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7 May 2004  
by Federal Express



Hon. Vernon Williams  
Secretary  
Surface Transportation Board  
1925 K Street, NW  
Washington, D.C. 20423-0001

Re: AB 290 (Sub-no. 168X)  
Norfolk and Western -- Exemption --  
between Kokomo and Rochester in  
Howard, et al. Counties, IN

ENTERED  
Office of Proceedings

MAY 11 2004

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Reply to Petitions for Reconsideration

Dear Mr. Williams:

Enclosed please find an original and ten copies of a Reply on behalf of Indiana Trails Fund, Inc. (ITF), opposing the pending petitions for reconsideration filed by Friend, et al., and the late-filed petition for reconsideration filed by Hoover. As indicated in Exhibit E to the Reply, and in the Reply itself, Nickel Plate Trail, Inc. and the Mayors of Rochester and Peru have joined in opposing the pending petitions for reconsideration.

By my signature below, I certify service on 8 May 2004 of the enclosed petition by express delivery (for delivery May 10) upon Nels Ackerson, Sommer Barnard Ackerson, 1666 K Street, N.W., Suite 1010, Washington, D.C. 20006-1217 (counsel for Friend, et al.) and Donald J. Tribbett, Starr Austen et al, 201 South Third Street, Logansport, IN 46947, and by U.S. Mail, postage pre-paid first class upon James R. Paschall, Law Department, Norfolk Southern Corporation, Three Commercial Place, Norfolk, Virginia, 23510-9241 (fax of Reply and certain exhibits has already been sent to the latter).

Thank you for your assistance in this matter.

Very truly,

  
Charles H. Montange  
for Indiana Trails Fund, Inc.

Encls.

cc. Counsel as indicated above (w/encl.)  
Richard Vonnegut, pres. ITF (w/encl.)  
Michael Kuepper, pres. Nickel Plate Trail (w/encl.)

BEFORE THE SURFACE TRANSPORTATION BOARD

Norfolk and Western Railway Co. -- )  
Abandonment Exemption -- ) AB 290 (Sub-no. 168X)  
between Kokomo and Rochester )  
in Howard, et al. Counties, IN )

Reply  
on behalf of  
Indiana Trails Fund, Inc.  
to

Friend, et al. "Petition for Reconsideration" (3/30/04)  
and "Supplemented Petition for Reconsideration" (4/19/04);  
and  
Hoover Petition for Reconsideration (4/26/04)

This is a Reply by Indiana Trails Fund, Inc. ("ITF") to two "petitions for reconsideration" filed on 3/30/04 and 4/19/04 by William C. Friend, Steven Furnival and Linda Schanlaub (hereinafter petitioners are referred to collectively as "FFS"), purportedly relating to a decision served March 10, 2004 issuing a Notice of Interim Trail Use (NITU) for MP 75.5 (near Peru) to MP 95.6 (near Rochester) on the line involved in this docket in Indiana.<sup>1</sup> On April 19, petitioner Hoover tendered a late-filed petition for reconsideration which basically simply

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<sup>1</sup> The relevant NITU in this proceeding for a petition for reconsideration was served March 10, 2004. This Board's rules (e.g., 49 C.F.R. § 1115.3(e)) afford twenty days for timely petitions for reconsideration. Petitions for reconsideration were due on March 30, 2004. On that date, three parties ("FFS") filed a petition for reconsideration and also sought twenty additional days to file supplemental information. This Board granted that request by order served April 6. FFS's filing on April 19, 2004, contained mainly repetitive or irrelevant information, but it did purport to expand the proceeding by seeking to reopen the May 14, 1996 NITU issued in this proceeding. At least that portion of the FFS petition must be evaluated under the more rigorous standards (49 C.F.R. § 1115.4) applicable to petitions to reopen administratively final orders.

adopted the filings of FFS.<sup>2</sup> As FFS appears to admit (see 4/19/04 petition at Exhibits 1, 2 and 3), ITF is the owner, pursuant to deeds invoking 16 U.S.C. § 1247(d), of MP 75.5 to MP 95.6, dated January 21, 1999.

The petitions for reconsideration are based on misassumptions, mistakes, or arguments without sound basis in fact. For these and the reasons set forth more fully below, this Board should deny the petitions for reconsideration. ITF is authorized to state that Nickel Plate Trail, Inc. and the Mayors of Rochester and Peru (endpoints of the northern segment of the railbanked line) join ITF in opposing the pending petitions. See Kuepper Verified Statement ¶4 (Exhibit E), and Kuepper Exhibit H (letters by the two Mayors).

#### Summary of Facts

FFS's two petitions in combination present a jumble of arguments relating to different parts of a rail corridor which runs from MP 57.2 (near Kokomo) to MP 95.6 (near Rochester) in Indiana. Although the 3/30/04 petition was limited to this Board's March 10, 2004 order dealing only with MP 75.5 (Peru) to MP 95.6 (Rochester) ("northern segment"), the 4/19/04 petition

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<sup>2</sup> The Hoover petition was evidently received at STB on April 19, but no fee was paid, so it was not filed until April 26. Whether counted as filed on April 19 or April 26, the result is the same: Hoover missed the twenty day window for petitions for reconsideration, and thus his petition it is tantamount to a petition to reopen under § 1115.4. However, because the Hoover petition merely adopts the arguments FFS, the entire point seems moot, for his substantive arguments rise or fall with those of the other petitioners. The fact that he is late may have a bearing only in connection with standards applicable on judicial review.

constitutes an effort to reopen the original May 14, 1996 NITU itself in respect to the line between Peru and Kokomo ("southern segment"). After first summarizing the salient facts, we will sort through the arguments presented in the two petitions, and then address them. The two petitions are purportedly supported by a number of affidavits. These documents contain many misassumptions and mistakes. ITF will identify some of these in this Reply and in supportive documents, but because much of what the petitioners have placed in their affidavits is not relevant, and because the time the Board has allotted for our Reply is so brief, we will focus on the more egregious of the petitioners' failings. Failure to address any particular assertion by them should not be deemed an admission of any of their claims, unless we expressly so indicate, and the only claims of theirs which we admit do not in any way entitle them to any relief.

1, May 14, 1996 NITU. Norfolk & Western (hereinafter referred to as Norfolk Southern or "NS") originally proposed abandonment of this entire line from MP 57.2 to MP 95.6. However, at the request of ITF and another party, NS all along consented to railbanking (application of 16 U.S.C. § 1247(d)). In an order served in this proceeding on May 14, 1996, this Board entered a "Notice of Interim Trail Use" ("NITU") for the portion of line from MP 57.2 to MP 74.2. This Board deferred issuance of a NITU for the portion from MP 74.2 to end of line at MP 95.6 because Indiana Hi Rail held trackage rights over

that portion of the line.<sup>3</sup> Indiana Hi Rail was in bankruptcy, and abandonment authorization for its trackage rights was in the jurisdiction of the bankruptcy court, not this Board. In its May 14, 1996 order, this Board carefully retained jurisdiction to authorize trail use of the segment from MP 74.2 to MP 95.6 after the Indiana Hi Rail trackage rights were discontinued. In particular, this Board required NS to inform ITF when the trackage rights were discontinued. STB authorized NS to consummate abandonment if ITF (or some other parties) did not indicate trail use interest within ten days of notice. Moreover, this Board specifically "reserve[d] jurisdiction to impose a trail use condition if an appropriate request is made." May 14, 1996 order at p. 4.

At all points germane to this proceeding, ITF made clear to NS that ITF desired to acquire the line in question for trail use. Verified Statement of Richard Vonnegut at ¶ 2 (Exhibit A). At all points germane to this proceeding (e.g., both at the time of the May 14, 1996 order and all the way through to the time of the March 10, 2004 order), NS consented to a trail use condition, and at no point did NS purport or intend to "consummate" abandonment so as to deprive this Board of jurisdiction to impose a trail use condition.

2. August 31, 1998 railbanking agreement. The May 14,

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<sup>3</sup> There were also complications arising from an offer of financial assistance. We will focus, however, on what actually happened when the May 14, 1996 order became effective so as to permit railbanking.

1996 NITU negotiation period as to the southern line was extended by various orders through September 1998. NS and ITF entered into a written railbanking/trail use agreement on August 31 for the transfer of MP 58.5 to 72.7 and 75.5 to 95.6 pursuant to 16 U.S.C. § 1247(d) on August 31, 1998. Verified Statement of Richard Vonnegut at ¶ 2 (Exhibit A). As provided in the contract, NS supplied deeds for the two portions of rail corridor dated January 21, 1999. The three deeds (for the three different counties) were issued for that purpose in January 1999 (these are set forth in exhibits 1 to 3 of the FFS 4/19/04 petition).<sup>4</sup> Contrary to the affidavit claims of petitioners, salvage did not occur before the railbanking agreement was entered. NS's salvage contract is dated January 22, 1999 (excerpts in Exhibit B). "The evidence of track removal in the record occurred after the line was conveyed to [trail manager] for interim trail use ...." and is thus does not, standing alone, constitute a consummation of abandonment depriving the Board of jurisdiction. See Georgia Great Southern Division -- Exemption -- between Albany and Sasser (GA), AB 389 (Sub-no. 1X), served April 16, 1999 (STB website version slip op. p. 4).

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<sup>4</sup> Although a parenthetical in the deeds used the word "abandoned" to describe the railroad right of way, the corridor had clearly been railbanked under the August 31, 1998 contract, and the deeds themselves conveyed the property pursuant to 16 U.S.C. § 1247(d). The word "abandoned" as used in the deeds clearly was not used to mean STB lacked jurisdiction because of full abandonment consummation, but instead to mean that common carrier rail services were not being provided over the line because it was railbanked.

3. Southern segment: MP I-57.2 to I-58.5. Although authorized to include MP I-57.2 to I-58.5 in a railbank or to abandon that segment, NS elected not to do either due to a potential shipper (Chrysler) for whom the track might be employed in Kokomo. Although ITF now understands that NS evidently gave some consideration to reclassifying the segment as an "industrial lead," NS instead decided (prior to consummation of abandonment or the expiration of the railbanking negotiation period) to lease the track to CERA (Central Railroad of Indianapolis) along with other trackage. See letter dated May 15, 1998, attached as Exhibit C (¶1 specifically provides that "NS-owned subsegment between mileposts I-57.1 and I 58.5 ... shall be included in the Lease").<sup>5</sup> Significantly, Exhibit C explains that although NS obtained abandonment authority for the relevant "sub-segment," NS "will not presently abandon the sub-segment; instead "CERA will operate this sub-segment to provide rail service to a potential shipper."

As indicated in Exhibit C-1 (Letter, July 8, 1996), the attorney for CERA (Mr. McFarland) confirmed that the segment "will not be abandoned." See also fax of 5/31/96 in Exhibit C-1 and memo of May 29, 1996, in which CERA states that "abandonment" will "commence at Milepost 58.5 and extend

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<sup>5</sup> Exhibit C is a redacted copy of the letter, which constitutes a letter agreement amending a lease, furnished ITF by NS. ITF understands the redacted material is business confidential and not relevant to the issues before this Board in this proceeding.

northward."<sup>6</sup>

In sum, both NS and CERA confirm with documents in the relevant time frame that abandonment authority for MP 57.2 to 58.5 was never exercised. At no point did NS consummate abandonment authority for the segment.

Shortly after CERA was acquired by RailAmerica, NS sold MP 57.1 to 58.5 to CERA as part of a larger line. See deed attached as Exhibit D conveying, among other things, MP I-51.8 to I-58.5. Although the NS deed clearly conveys the trackage all the way to MP 58.5, CERA evidently mistakenly used MP I-57.2 rather than I-58.5 in its "notice of exemption" for acquisition of the track. See Central Railroad of Indianapolis-- Acquisition and Operation Exemption -- Norfolk Southern, STB F.D. 34221, served July 12, 2002. Based on the documents in ITF's possession from NS, and on NS's representations to ITF, NS never consummated any abandonment authority for that track, but instead conveyed it to CERA for rail operation. The "exemption" granted CERA as served on July 12, 2002 therefore should have encompassed MP I-57.2 to I-58.5 as well as I-51.8 to I-58.5.

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<sup>6</sup> For the sake of petitioners, whose pens start scribbling whenever the word "abandonment" is used, we note that the term has many meanings in the rail context, most of which meanings are unhelpful to petitioners. Abandonment can mean a federal authorization, mere cessation of operation, actual consummation of a federal authorization, and/or different matters relating to abandonment at state law. In the CERA memo (the memo was by an attorney for CERA, not NS), "abandonment" is defined by a parenthetical to mean merely "removal of tracks." Track removal is fully consistent with railbanking, in that it does not preclude either a trail or rail reactivation. See also Georgia Great Southern Division, supra. It does not suggest any intent contrary to railbanking for MP 58.5 north.

CERA has not abandoned the trackage, and has not received authority to abandon I-57.2 to I-58.5. The track remains in place for possible use by the potential shipper. Vonnegut V.S. ¶2; see also Kuepper V.S. ¶4(b). In all events, it must be deemed active common carrier track, for common carrier obligations apply to purchasers of common carrier track in situations like this even though they have not formally sought approval for such transfer.<sup>7</sup>

In light of the above, it would be appropriate to modify the notice of exemption in F.D. 34221 to encompass MP I-57.2 to I-58.5. Counsel for NS (Mr. Paschall) has informed counsel for ITF that NS agrees that the notice of exemption in F.D. 34221 "made a mistake" in failing to include that segment.

4. Southern segment: at MP 72.7. NS contracted to convey, and conveyed, to ITF the southern segment only to MP 72.7. This milepost conforms to 7th Street in Peru. After 7th Street, the old Nickel Plate line at issue in this proceeding parallels or was part of the Wabash main line through Peru. The 7th Street railbanking terminus is just shy of the old Wabash Railroad mainline in Peru, because the trail will use 7th Street

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<sup>7</sup> E.g., Conrail Abandonment in Jeannette, PA, 366 ICC 384, 387 (1982); Onondaga County Industrial Development Agency - Acquisition and Operation Exemption -- Lines of Consolidated Rail Corporation, F.D. 32287, served July 7, 1994; Southern Pacific Transportation Company -- Abandonment Exemption -- Los Angeles County, CA, AB 12 (Sub-no. 139X), 8 ICC2d 495 (1992), quoting with approval the result in City of Austin, TX -- Acquisition -- Southern Pacific Transportation Company, F.D. 30861(A), served Nov. 4, 1986 (acquiring party, even if government agency, acquires common carrier obligation).

order was contingent upon (a) discontinuance of third party trackage rights and (b) non-consummation of full abandonment by NS. NS never consummated full abandonment on the northern segment. To the contrary, NS entered into a railbanking agreement on August 31, 1998 for the northern segment [see contract attached as Appendix I to Vonnegut V.S. (Exhibit A)]. Petitioners assert that NS had torn out track before the railbanking agreement was reached. To the contrary, the salvage contract (Exhibit B) entered into by NS postdates the January 1999 deed conveying the northern segment to ITF for railbanking, much less the railbanking agreement. Once ITF and NS were made aware of the need to apply for a NITU for the northern segment, they promptly made appropriate filings. This Board issued a NITU for the northern segment by order served March 10, 2004.

6. Northern segment: connection at 95.6. The petitioners assert that the northern segment does not connect to active track at the Rochester terminus of the trail (MP I-95.6). This is false. Fulton County LLC (d/b/a Fulton County Railroad) acquired the line all the way to railbanking terminus at I-95.6. See also Vonnegut V.S. ¶3 (Exhibit A); Kuepper V.S. ¶4(a) (Exhibit E).

#### Summary of Claims in FFS Petitions

To the extent petitioners have filed a timely petition for reconsideration (i.e., as to the March 10 NITU), this Board's rules provide that the petition may be granted only if one or

more of the following is shown: (1) that the prior action will be affected materially because of new evidence or changed circumstances, or (2) that the prior action involves material error. 49 C.F.R. § 1115.3(b).

The FFS 3/30/04 petition purported to claim that railbanking was inappropriate for the line in question in this proceeding from MP 75.5 in Peru to MP 95.6 in Rochester on the ground that the Board lacked jurisdiction. The 3/30/04 petition asserted two reasons for lack of jurisdiction. First, the 3/30/04 petition seems to claim that Norfolk Southern and/or ITF failed to apply to STB for railbanking within 10 days of a bankruptcy court's authorizing an abandonment of trackage rights by Indiana Hi-Rail over the portion of Norfolk Southern line in question. Second, the 3/30/04 petition claimed that MP 75.5 to MP 95.6 was severed from connection to the interstate rail network at both Peru and at Rochester.

FFS requested additional time to present more evidence. By order served April 6, this Board granted FFS additional time through April 19 to present more evidence on its petition. This Board also required that replies be filed by May 10.

On April 19, FFS filed what it terms a "Supplemented Petition for Reconsideration." The 4/19/04 petition does not include any relevant "new evidence" in support of the original 3/30/04 filing; instead, it reiterates FFS's two arguments against the March 10 order relating to the "northern segment" [i.e., MP 75.5 (Peru) to MP 95.6 (Rochester)] and adds a few

In support of reopening the 1996 NITU on the southern segment, FFS makes a new severance argument. FFS contends that it is an undisputed fact that MP 72.7 to MP 75.5 has been abandoned, and that Norfolk Southern classified MP 57.2 to 58.5 as "industrial track." FFS implies that the line between Kokomo and Peru has thus been severed from any connection to the interstate rail network at both ends. 4/19/04 petition at p. 5 and pp. 11-12. Contrary to the claim of petitioners, their assertion that NS classified MP 57.2 to 58.5 as "industrial track" is very much disputed; the claim in fact is wrong. FFS base the claim upon a letter previously filed by an NS attorney in this proceeding noting, on the basis of his research to date, that there was a document in NS files with a handwritten undated notation to that effect. But as indicated in the factual summary already provided, other NS documents (e.g., Exhibits C & D) indicate that any consideration to so reclassify the trackage in question was terminated, and the trackage was retained and leased as common carrier railroad, and ultimately conveyed to CERA as same. CERA documents (Exhibit C-1) also corroborate that abandonment of 57.2 to 58.5 was not consummated. Moreover, the alleged "severance" at Peru is belied by the availability of a rail connection. E.g., Vonnegut V.S. ¶ 2 (Exhibit A); Kuepper V. S. at ¶ 4(c) (Exhibit E).

FFS also argues that the three deeds (two of which convey property to ITF within the corridor covered by the 1996 NITU) are not dated until after the "negotiation" period on the NITU

expired in September of 1998. FFS views this as a fatal flaw. 4/19/04 petition at pp. 10-11. FFS failed to inquire whether there was a timely contract. As already noted, ITF and NS entered into a railbanking agreement on August 31, 1998.

#### ARGUMENT

Petitioners fail to present any "new evidence" or changed circumstance that affects the March 10 NITU, nor do they show a material error in its issuance. A similar conclusion applies in respect to the May 14, 1996 NITU, put at issue in the 4/19/04 FFS filing.

#### I. MP 75.5 to MP 95.6 (Peru to Rochester)

ITF will start with what this proceeding was supposed to be about under FFS's 3/30/04 petition: namely, MP 75.5 to MP 95.6 or the "northern segment".

1 Severance claims. Contrary to the conjectures of FFS, there is no severance of the "northern segment" at 95.6. If FFS had taken a minute to research this issue at the STB website, FFS would have found that Fulton County, LLC obtained acquisition and operation authority for MP 95.6 to 108.6 (plus some incidental trackage rights) from Norfolk & Western Railway Company in Fulton County LLC -- Acquisition and Operation Exemption -- Norfolk and Western Railway Company, F.D. 33477, served Oct. 31, 1997. There is no decision from STB authorizing abandonment of any of the line so acquired by Fulton County LLC. Indeed, Fulton County LLC apparently does business as Fulton County Railroad, serving Wilson Grain. According to the

President of Wilson Grain, Fulton County Railroad has not abandoned any of its line, and has no plans to do so because it is serving Wilson Grain. V.S. of Richard Vonnegut at ¶ 3. In short, MP 95.6 to 108.6 is and remains under the jurisdiction of this Board as an active line of regulated freight railroad.

It is well established that a rail line cannot be abandoned or deemed abandoned until this Board authorizes abandonment [e.g., Phillips Co. v. DRG, 97 F.3d 1375, 1377 (10th Cir. 1996)], and that authorization may only be granted prospectively. Id. at 1378 (no authority to authorize retroactively the abandonment of a rail line). Since this Board has not authorized MP 95.6 to 108.6 for abandonment, no portion of the line may be deemed abandoned, even if (as contended by FFS) some track and tie may be missing at MP 95.6, or even if (as contended by FFS) Fulton County Railroad is employing the end of the line at 95.6 only for storage.

FFS's assertions that track has been removed north of 95.6 is thus irrelevant. But in any event, it is not correct. ITF inspected what it understands to be the trackage at MP 95.6 on May 1, 2004. Based on valuation section maps, that point is at or near a road. There are tracks to the north, and ITF's railbanked trail to the south. There are no tracks crossing the road, but it is customary to remove tracks or to pave them over at unused road crossings. In all events, the railbanked right of way and the tracked right of way are co-terminus. V. S. of Richard Vonnegut at ¶ 3.

It follows that FFS's reliance (4/19/04 petition at p. 11) on RLTD v. STB, 166 F.3d 808, 813 (6th Cir. 1999), is totally misplaced. The northern segment has simply not been severed from the interstate network by an intervening abandonment. To the contrary, the line to the north is active rail regulated by STB, and indeed is active rail in place and apparently under use for a shipper.

Petitioners fail to produce any relevant evidence, changed circumstance, or material error as to severance on the northern segment.

2. Alleged loss of jurisdiction. Relying upon the May 14, 1996 order issued in this proceeding, FFS suggest that NS and/or ITF were too late in requesting a NITU for the northern segment. ITF had timely requested railbanking for the entire railroad corridor prior to issuance of the May 14, 1996 order and NS had timely indicated willingness to negotiate trail use for the entire corridor. May 14, 1996 order at p. 4. In an ordinary situation, STB would have issued a NITU authorizing NS to abandon or to railbank the entire corridor. However, this proceeding had numerous wrinkles. In particular, Indiana Hi-Rail had trackage rights over a portion of the corridor, and Indiana Hi-Rail was in bankruptcy and thus its rights were regulated by bankruptcy court. In response, STB in its May 14, 1996 order decided to authorized NS to cease service on all of MP 57.2 to MP 95.6, but dealt with the Indiana Hi-Rail trackage rights as to MP 74.2 to MP 95.6 by providing for a NITU only for

57.2 to 74.2. The 1996 order specifically provided that the "abandonment process" as to 74.2 to 95.6 "may not be completed" until the Indiana Hi-Rail trackage rights were discontinued. 1996 Order at p. 5, ordering ¶2. The May 14, 1996 order further specifically provided that STB retained jurisdiction to issue a NITU covering the northern segment once Indiana Hi-Rail's trackage rights were discontinued. 1996 Order at p. 4. The 1996 order required NS to inform ITF when Indiana Hi-Rail's trackage rights were discontinued. It provided that NS "may" abandon the northern segment completely if ITF did not seek railbanking under 16 U.S.C. 1247(d) within ten days of notice. 1996 Order at p. 4.

However, nothing in the order required NS to consummate abandonment within ten days of such notice, and nothing in the order required NS or ITF to re-approach STB for a NITU for the northern segment within any specified time period. NS at no time consummated abandonment to the northern segment from MP 95.6 to MP 75.5; to the contrary, NS at all points intended to convey same to ITF pursuant to 16 U.S.C. 1247(d). Indeed, the parties entered into a railbanking agreement covering the northern segment on August 31, 1998, well before a salvage contract was entered into by NS with respect to the property. In short, at all points relevant herein, ITF and NS sought to railbank the property in question.

It is indisputable that STB may grant an abandonment authorization or exemption from rail regulation but by condition

retain jurisdiction to authorize railbanking at some future time. E.g., BG & CM Railroad -- Exemption -- Camas Prairie Railnet, F.D. 34399, served Oct. 17, 2003 (exemption from regulation, including abandonment regulation, but retention of authority to issue a NITU); Camas Prairie Railnet -- Abandonment -- in Lewis, et al. Counties, ID, AB 564, served May 3, 2004 (same). FFS do not argue (and in light of the above decisions cannot argue) that STB committed material error in retaining jurisdiction to railbank the northern segment in the May 14, 1996 STB order. It therefore follows that since (i) STB's 1996 order specifically retained jurisdiction to impose a railbanking order, (ii) NS intended at all points to railbank rather than fully abandon, and (iii) NS entered into a railbanking agreement as to the northern segment and acted in full accordance with that agreement, STB at all points had jurisdiction to railbank the northern segment.

Becker v. STB, 132 F.3d 60 (D.C.Cir. 1997), on which FFS rely, is simply not applicable. In the Becker case, this Board's predecessor issued a NITU as opposed to retaining authority to issue a NITU in the future upon request after certain future events. In Becker, no railbanking agreement was reached in the NITU negotiation period, the railroad refused to extend the NITU negotiation period which then lapsed, and the railroad took out the track and ties and cancelled its tariffs. In contrast, in this case the Board not only retained authority but the parties at all points intended railbanking and indeed

entered into a railbanking agreement, to which they adhered. In any event, NS never consummated the abandonment. Instead, it agreed to and did railbank in 1998. Even without STB's order retaining jurisdiction, this would have been sufficient to retain jurisdiction on the part of STB to issue a railbanking order. Accord, Smith v. Palmetto Conservation Foundation, U.S. D.C. for So. Car. No. 8:03-1587-20, filed March 29, 2004, slip op. at 6-7 (if railroad does not consummate abandonment, STB retains authority to railbank) (copy attached as Exhibit F).

Petitioners basically seem to present a "material error" argument on the jurisdictional issue (i.e., that the Board erred in asserting jurisdiction, because jurisdiction had allegedly lapsed). But as indicated, there was no "material error," in that the Board specifically retained jurisdiction and NS did not abandon the line, but at all points sought to railbank it. The petition must be denied.

Whether or not this Board clearly retained jurisdiction to issue a railbanking order, it is clear that NS and ITF all along intended to railbank the northern segment, and did so prior to any consummation of abandonment. Although ITF's position is that this Board had jurisdiction to issue, and properly issued, the March 10 NITU, in the event the Board determines it did not have jurisdiction, it does not follow that the corridor cannot be railbanked. To the contrary, the second sentence of 16 U.S.C. § 1247(d) providing for preservation of rail corridors in the event of interim trail use is not conditioned upon this

Board's actions under the third sentence of § 1247(d). Courts have construed this to mean that the parties could agree to a railbanking without an order from this Board should the Board have lost jurisdiction to issue such an order but the abandonment not yet have been consummated. E.g., Buffalo Township v. Jones, 813 A.2d 659 (Pa. Supreme Court 2002), cert. denied, 124 S.Ct. 134 (2003) (Exhibit H). Thus, even if the Board were to construe its jurisdiction to have somehow lapsed, that conclusion would not mean railbanking is not permissible as to the northern segment, since all other criteria for railbanking are met.

3. Trail manager contentions. FFS claims that ITF is "not a valid trail sponsor" (4/19/04 Petition at 13), and that the March 10, 2004 NITU therefore should not have been issued. This contention, which appears directed only at the March 10, 2004 NITU and thus the northern segment, appears wholly contrived. FFS begins by asserting that ITF "flatly refuses to perform the responsibilities required of a trail sponsor by the Rails to Trails Act, 16 U.S.C. 1247(d)." 4/19/04 at p. 13. That is false. See Richard Vonnegut V.S. at ¶ 5. See also Kuepper V.S. at ¶4 and esp. 4(d) (summarizes with exhibits various management and development activities).

FFS does not appear to understand, or perhaps does not wish to acknowledge, the requirements which the Trails Act places on the trail manager. The express requirements of the Trails Act as applied to trail users/railbankers are very straightforward:

trail users/railbankers must assume responsibility for management, for torts, and for taxes (if any). The purpose of this requirement is to ensure that the railroad is no longer responsible for these things, but the trail manager is, so as to lift the burden of keeping the line available for future interstate commerce from current interstate commerce. ITF has fulfilled the requirements and met the purpose. ITF is managing the corridor, carries property insurance, and pays the land taxes. V.S. of Richard Vonnegut at ¶ 5 (Exhibit A).

An implied duty of the trail manager/railbanker is to attempt to keep the corridor intact in a fashion compatible with trail use and possible future rail reactivation. Ironically, ITF believes that our discharge of this duty is what has precipitated the FFS petition for reconsideration. It is noteworthy that the only authority which FFS cites for the proposition that ITF is not discharging its 16 U.S.C. 1247(d) responsibilities is an affidavit by one Donald Tribbett at ¶5. The Tribbett affidavit is attached to the FFS 4/19/04 petition. Mr. Tribbett is an attorney who represents Samuel Hoover. Mr. Hoover is the defendant in a suit brought by ITF against him in state court in Indiana (the suit is identified in ¶2 of the Tribbett affidavit). ITF brought suit against Mr. Hoover because he obstructed the corridor inter alia by fencing it and farming across it (see Complaint and discovery responses attached to Hoover Petition of 4/26/04). Mr. Hoover's actions prevent (and are intended to prevent) ITF's management of the

corridor, lack of which FFS purport to complain. To claim that ITF is not managing the corridor on the basis of evidence from persons wrongfully attempting to prevent ITF from managing the corridor is rampant bootstrapping at best, and especially so since ITF is using appropriate legal proceedings to confirm its ability to manage the corridor. Further rebuttal and response to Tribbett's "learnings" is provided in V.S. of Richard Vonnegut at ¶ 5 (Exhibit A). See also Kuepper V.S. at ¶¶ 2, 3 & 4(d) and exhibits thereto.<sup>8</sup> A cursory review of the Kuepper exhibits will more than indicate that ITF and affiliates are actively managing the corridor and that Mr. Tribbett's "learnings" are wrong and misleading.

Tribbett purports to base his claims on what he "learned" allegedly "in a deposition taken September 30, 2003" in ITF's trespass action against Tribbett's clients. The deposition is apparently a deposition which was started and never completed of Mr. Vonnegut, who is ITF's current president. Due to an illness in Mr. Tribbett's family, the deposition was suspended and has not yet been rescheduled. ITF has not been furnished with any transcript (counsel for ITF doubts one exists) of the partial deposition for Mr. Vonnegut to correct errors, and as noted the deposition has never been completed. ITF denies that what Mr.

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<sup>8</sup> Adjacent landowners obstructing railbanked trails may be enjoined from such trespass and penalized in the event they violate the injunction. E.g., King County v. Beres, Superior Court of Washington for King County, No. 97-2-18410-0 SEA, orders of 6 April 2001 and 3 October 2001 (contained in Exhibit J).

Tribbett claims he "learned" in fact correspond to the facts, or to reasonable conclusions concerning the facts, insofar as germane to this proceeding. Mr. Vonnegut's response is set forth in more detail in Vonnegut V.S. at ¶5 (Exhibit A). See also Kuepper V.S. (Exhibit E). Further, Mr. Tribbett's remarks are clearly hearsay, and certainly not best evidence. Mr. Tribbett does not purport to be an actual witness of anything, but instead seems to be presenting what amounts to argument as evidence, by setting it out in affidavit form as a "learning." This approach may seem cunning if it were not so transparent. A lawyer's argument at a trial to the finder of fact is not evidence, it is advocacy. This Board in general is supposed to follow federal evidentiary procedures. Mr. Tribbett's affidavit therefore should be as inadmissible at STB as it would be in a federal court for the purposes FFS intend. Under 49 C.F.R. § 1114.1, Tribbett is neither probative nor reliable, nor admissible under the Federal Rules of Evidence.

In the litigation against the Hoovers, Mr. Tribbett as their counsel contends that ITF must comply with the provisions of Indiana Code Title 8, Article 4.5 (transportation corridor planning) with respect to the trail on the rail corridor involved in this proceeding. Vonnegut V.S. ¶ 6 (Exhibit A). But IC 8-4.5 is only applicable in the event ITF seeks funding from the state grant-making process set up in IC 8-4.5 for certain kinds of trails. ITF (and Mr. Vonnegut) do deny any need to comply with IC 8-4.5 at this time. Vonnegut V.S. ¶ 6.

ITF is not spending money or volunteer time and volunteer money on maintenance issues.

ITF is a § 501(c)(3) non-profit dedicated to fostering the preservation of rights of way for trail and other compatible public uses, including possible future rail reactivation, wildlife habitat, and so on. ITF is attempting to develop this facility in a cost-effective manner for the public and to otherwise serve laudable public purposes using resources not connected the IC 8-4.5 program. ITF has assisted interested local trail supporters in the formation of Nickel Plate Trail, Inc., an Indiana non-profit corporation, also qualified under § 501(c)(3). Nickel Plate Trail, Inc. in conjunction with City of Peru has applied for at least two major grants for trail development, both of which Nickel Plate expects to receive. In the interim, the volunteers associated with Nickel Plate Trail, Inc. (including an Eagle Scout working on a project), in coordination with ITF, have placed trail gates and signs on the corridor, have fixed bridges, have cleared brush, and have undertaken other standard trail development tasks. One of the benefits of a rail corridor for trail purposes is that many such corridors are suitable for hiking and horseback riding with minimal development and require only minor maintenance. See Vonnegut V.S. at ¶¶ 5 & 6 (Exhibit A); Mike Kuepper V.S. ¶4(d) and exhibits thereto (Exhibit E).<sup>9</sup>

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<sup>9</sup> Mr. Kuepper's exhibits pictorially demonstrate trail maintenance and development, including gates and obstacles to prevent trespass, and signage (which directs parties with

4. Alleged unauthorized taking. FFS contend that the March 10 NITU is an unauthorized taking because it is "retroactive." 4/19/04 petition at 12. In this Board's 1996 order, this Board retained jurisdiction to take exactly the kind of action this Board took on March 10 if (a) the Indiana Hi Rail trackage rights were discontinued, and (b) NS did not consummate full abandonment but instead agreed to trail use. All that happened was this Board exercised its retained jurisdiction because the conditions for exercise were met and ITF and NS duly applied for a NITU.

If there is a taking by application of 16 U.S.C. 1247(d) on March 10, it is a so-called regulatory taking, for which compensation (if due) may be obtained after the taking has occurred by filing a claim under the Tucker Act. See Preseault v. ICC, 494 U.S. 1 (1990), cited by FFS at 4/19/04 petition p. 4. In essence, all regulatory takings are "retroactive" in that they occur before any compensation is paid. In such cases, parties claiming that a taking occurred have a compensation remedy under the Tucker Act, if they can establish that a taking in fact occurred. Under Preseault, 16 U.S.C. 1247(d) may be applied even if it results in a taking, because just compensation, if due, is available, even if paid after the fact.

FFS lost its takings argument when the Supreme Court decided Preseault in 1990.

II. MP 57.2 to MP 74.2 (Kokomo to Peru)

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questions to an ITF telephone number).

ITF now turns to claims which are totally new in FFS's 4/19/04 petition, and which bear on MP 57.2 to MP 74.2 (the "southern segment"). As already indicated (e.g., note 1), as to the southern segment, the FFS petition seeks to reopen an STB order which is long since final. FFS must therefore meet the stringent requirements of 49 C.F.R. § 1115.5 by showing "in detail" new evidence, changed circumstances, or material error sufficient to justify reopening. FFS utterly fail to do so.

1. Severance. FFS argues severance of the southern segment (MP 57.2 to MP 74.2) on two basic grounds: first, because the parties ostensibly railbanked only MP 58.5 to MP 72.7 as manifest in the deeds attached to FFS's 4/19/04 petition; and second because NS (as represented by Mr. Paschall in his letter of Feb. 17, 2004 at p. 4, filed already in this docket) has a document with an undated notation stating that 57.2 to 58.5 is being "reclassif[ed] to industrial track" and 72.7 to 75.5 was being "fully abandoned."

There is no severance of the southern segment from the interstate rail network. As already explained, although NS evidently considered reclassifying 57.2 to 58.5, NS instead leased the property to CERA, and later sold it to CERA, as operating railroad track. See Exhibits C & D. Indeed, NS in leasing the property to CERA specifically indicated it was not exercising abandonment authority for the segment. Exhibit C. Similarly, CERA documents corroborate non-abandonment. Exhibit C-1. CERA has not received abandonment authority for the

segment. It simply cannot be deemed abandoned.

Even if NS had reclassified the track to industrial lead, track remains in place (Vonnegut V.S. ¶2; Kuepper V.S. ¶ 4(b)) and the segment was conveyed to CERA as an operating rail line in order to serve a potential shipper (Exhibits C & D). The salvage contract (Exhibit B) did not include it. The segment is not "abandoned" at state law but remains available to serve that shipper. This Board has recognized that a line is not severed from the interstate network if alternative rights of way (such as public property like highways, or even private property such as other railroad rights of way) are available to interconnect it to the network. Compare Union Pacific RR Co. -- Exemption-- in McPherson, et al. Counties, AB 33 (Sub-no. 158X), served March 29, 2002 (raising severance question), with "Supplement to Explanation" received at STB on April 17, 2002 in AB 33 (Sub-no. 158X) (City of McPherson indicates alternative right of way on other road and railroad rights of way), with id. served Aug. 28, 2003 (approving railbanking and resolving severance question) (see Exhibit I). At the very least, CERA's trackage meets that criterion.

In any event, the terminus of the northern end of the southern segment of the railbanked trail in Peru is just shy of the old Wabash Railroad mainline.<sup>10</sup> The distance appears to be perhaps 100 yards, defined as roughly MP 72.7 to MP 72.8 at

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<sup>10</sup> An idea of the proximity can be obtained by a glance at exhibit C to the Kuepper Verified Statement, which in turn is Exhibit E.

point of intersection with the mainline. ITF understands that NS transferred or intended to transfer property at MP 72.7 to the City for park and trail use (compatible with rail restoration); however, we have not had time to ascertain whether this encompassed all of MP 72.7 to MP 72.8. We believe that everything else is basically adjacent to the mainline. To the extent not still owned by NS (in which case it remains available for restoration), ITF understands that the property is owned either by the City of Peru, or by Mr. Bean as successor to Lear Corporation, or by some combination of thereof. If owned by Peru or Bean, Mr. Kuepper (a Peru businessman and president of Nickel Plate Trail, Inc.) states that both entities will cooperate in making the connection available in the event of rail reactivation. Kuepper V.S. ¶ 4(c) (Exhibit E and esp. Ex. H thereto). Again, under precedent such as the McPherson proceeding noted above, there is no severance.

As to severance, the FFS petitioners have thus presented no new evidence, changed circumstances, or material error which justifies reopening the May 14, 1996 NITU to terminate railbanking of MP 58.5 to 72.7 as sought by FFS.

2. Jurisdiction. FFS contend that the 1996 NITU had expired before NS and ITF reached a railbanking agreement. FFS bases this contention upon the fact that the last extension of the 1996 NITU negotiation period "expired" on September 27, 1998, and upon the fact that the three deeds manifesting a

transfer for trail use were dated January 21, 1999.<sup>11</sup>

A NITU does not "expire" if an agreement for railbanking and trail use is reached during the period which is provided for negotiations. So long as the interim trail user and the railroad reach a trail use agreement during the specified negotiation period (as extended), there is no requirement that consideration be paid, or the deeds be issued as a condition for the NITU to extend indefinitely. For example, in Wisconsin Central -- Abandonment Exemption -- in Brown County, WI, AB 303 (sub-no. 13X), decided Feb. 7, 2000, STB held that a railbanking agreement met all requirements even though closing was outside the negotiation period and even though the agreement was contingent upon the trail user's raising funds and actually paying consideration after the negotiation period lapsed. This position was upheld in Madison County Mass Transit v. Hanfelder, U.S.D.C. S.D. Illinois No. 00-CV-0179, filed June 28, 2001, slip op. at pp. 5-6 (attached as Exhibit G). In short, so long as there is a railbanking agreement within the negotiation period, the deeds and other performance required by the agreement may come afterward.

A railbanking agreement was entered into as to both the northern and southern segments of this rail corridor on August 31, 1998, well within what petitioners admit was the NITU negotiation period.

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<sup>11</sup> FFS does not contend that the deeds are inadequate as a railbanking agreement, nor could FFS under Smith v. Palmetto Conservation Foundation, supra, slip op. at 4-6.

In sum, on this line of argument, the FFS petitioners obviously have no new evidence, changed circumstance, or material error to justify reopening the May 14, 1996 NITU to terminate railbanking of MP 58.5 to 72.7.

Hoover Petition

Sam Hoover late-filed a "petition for reconsideration" in this proceeding on April 26, 2004. This Board's rules require timely filing. 49 C.F.R. § 1104.6. Hoover's late-filed petition must therefore also be treated as a petition to reopen falling under § 11145.5, for it was not filed in the 20 day window for petitions for reconsideration, and unlike the FFS petitioners, Hoover did not seek or receive additional time. Accordingly, Hoover's arguments ordinarily should be entertained only if Hoover shows "in detail" material error, new evidence, or substantially changed circumstances. He has not, but the issue is largely moot, since Hoover's substantive argument merely adopts the arguments in the FFS petitions.

The only additional argument Hoover makes is that he was entitled to notice of the proceeding, without which he claims that he is denied due process. Leaving aside the point that Hoover got all the notice the public generally receives of an STB proceeding, the fact of the matter is that Hoover's due process issue is either totally irrelevant, moot, or both. Because (a) Hoover has adopted the arguments of the FFS petitioners, and (b) his own attorney quite obviously cooperated with the FFS petitioners in their filing (Tribbett supplied an

affidavit to the FFS petitioners for their 4/19/04 supplement, and otherwise neither offers nor seeks to offer evidence), this Board therefore will necessarily be considering all of Hoover's substantive points, as well as all the evidence Hoover's attorney has seen fit to present, in connection with the FFS petitions. Under the circumstances, no process due Hoover could possibly have been or could be denied. All Hoover's arguments and evidence will be considered by the Board, so he could not possibly be prejudiced in any way from the proceeding, regardless of notice. His petition should be denied for all the reasons set forth herein.

Lack of Standing on MP 58.5 to 72.7

Petitioner Furnivall at ¶3 of his affidavit filed in connection with the 3/30/04 petition states that he owns adjacent property in the "northern segment" of the trail. Petitioner Schanlaub at ¶3 of her affidavit filed in connection with the 4/19/04 petition indicates that she owns adjacent property in the "northern segment" of the trail. On information and belief, petitioner Friend (who filed no affidavit and with respect to whom petitioners made no claims) owns no property on the southern segment of the trail, but may own property on the northern segment. In short, all petitioners lack standing to contest the southern segment (i.e., the portion for which the May 14, 1996 NITU is directly applicable). Thus, none of the FFS petitioners has standing to seek to reopen the May 14, 1996 NITU as to MP 58.5 to 72.7.

Petitioner Hoover filed an out-of-time petition on 4/26/04. According to Hoover's attorney (Tribbett, in his affidavit filed 4/19/04 at ¶4), Hoover owns property adjacent to the northern segment. Hoover thus lacks standing to contest the southern segment (i.e., reopen the May 14, 1996 NITU as to MP 58.5 to 72.7) as well.

No petitioner in this proceeding has standing to seek reopening as to the southern segment.<sup>12</sup> It follows that this Board should deny the 4/19/04 petition insofar as it contests the southern segment on standing grounds.

#### Conclusion

FFS have not demonstrated any basis or entitlement to reconsideration of the March 10, 2004 NITU as to the northern segment, or reopening of the May 14, 1996 NITU as to the southern segment. Both FFS petitions should be denied. A similar result applies to the Hoover petition, which merely incorporates the FFS petition. Because the portion of the FFS petition of 4/19/04 dealing with the southern segment and the May 14, 1996 NITU is tantamount to a petition to reopen an administratively final order, in the event this Board denies it, his Board should make clear it is refusing to reopen the May 14, 1996 decision so that the parties may draw the benefit of Brotherhood of Locomotive Engineers. Similarly, since the

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<sup>12</sup> One of 4/19/04 affidavits purports to be from an individual residing on the southern segment, but this individual is not a petitioner, and FFS is not an association or organization such that the referenced individual can give FFS representational standing for the southern segment.

Hoover petition was outside the twenty day reconsideration window, it amounts to a petition to reopen, the reviewability of denial of which is governed by BLE. Finally, no petitioner owns property abutting the southern segment, so the 4/19/04 petition insofar as it attacks the May 14, 1996 NITU relating to the southern segment should be denied on that ground as well.

Opposition by Nickel Plate Trail, Inc. and others

As indicated in ¶3 of Exhibit E, Nickel Plate Trail, Inc. joins in opposing the petitions for reconsideration. Letters joining in opposing the petitions by the Mayors of Rochester and Peru are set forth in Kuepper Exhibit H (annexed to the Kuepper Verified Statement).

Respectfully submitted,



Charles H. Montange  
426 NW 162d St.  
Seattle, WA 98177  
(206) 546-1936  
for Indiana Trails Fund, Inc.

- Exhibit A -- Richard Vonnegut Verified Statement
- Exhibit B -- excerpts from salvage contract
- Exhibit C -- May 15, 1998 letter agreement NS/CERA (redacted)
- Exhibit C-1 -- CERA letter of July 8, 1996, and related memo and fax cover
- Exhibit D -- NS Deed to CERA in 2002
- Exhibit E -- Mike Kuepper Verified Statement
- Exhibit F -- Smith slip opinion
- Exhibit G -- Madison Transit slip opinion
- Exhibit H -- Buffalo Township slip opinion
- Exhibit I -- relevant excerpts from AB 33 (Sub-no. 158X) docket
- Exhibit J -- penalties for trespass in King County v. Beres

Exhibit A

BEFORE THE SURFACE TRANSPORTATION BOARD

Norfolk and Western Railway Co. -- )  
Abandonment Exemption -- ) AB 290 (Sub-no. 168X)  
between Kokomo and Rochester )  
in Howard, et al. Counties, IN )

Verified Statement  
of  
Richard Vonnegut

I, Richard Vonnegut, make this Verified Statement for use in the above-captioned proceeding.

1. My name is Richard Vonnegut. I am the president and a member of the board of directors of the Indiana Trails Fund, Inc. ("ITF"). ITF is an Indiana non-profit corporation qualified under § 501(c)(3) of the Internal Revenue Code. ITF works with conservation, recreation and transportation organizations to preserve existing transportation corridors and to acquire new transportation corridors with a focus on recreational and commuting trails in the State of Indiana. I am not an attorney. I have personal knowledge of the facts stated herein.

2. Although I was also involved, Mr. Howard Cohen, then a member of the ITF board and an attorney, was principally responsible for negotiation of a railbanking agreement with respect to the Norfolk Southern (NS) line at issue in this proceeding. We refer to the railbanked portion of the line as the Nickel Plate Trail. A copy of the August 31, 1998 railbanking agreement which Mr. Cohen signed on behalf of ITF is attached as Appendix 1. Both Mr. Cohen and I repeatedly and consistently made NS aware of ITF's desire to railbank under 16 U.S.C. § 1247(d). As the contract indicates, NS agreed to railbank MP I-58.5 (near Kokomo) to MP I-72.7 (Peru), and MP I-75.5 (near Peru) to MP I-95.6 (near Rochester). NS has clarified to ITF that NS intended to retain MP I-57.2 to I-58.5 as active track to serve a possible shipper and in fact leased same to CERA for that purpose, later selling it to CERA for that purpose. Thus, ITF did not believe that the southern end of the Nickel Plate Trail as railbanked would be separated from the interstate rail system, and such was not the intent of the parties to the best of my knowledge. I recently confirmed that track remains in place on MP I-57.2 to MP I-58.5 (I visually inspected the connection on April 28, 2004), and ITF can find no order authorizing its abandonment, other than the order upon which NS informed us it did not act at any point. As to the northern end of the line (I-72.7 at Peru), the distance between the railbanked trail and the active mainline is de minimis. It is my understanding that a connection can be made.

3. Upon reviewing the March 30 and April 19 petitions filed by Friend, et al., I noted that Friend, et al., alleged that there was a gap between the interstate rail network and MP 75.5 and 95.6. There is no gap. The railbanked corridor from MP 75.5 to MP 95.6 directly interconnects with Fulton County Railroad at MP 95.6. I spoke with the President of Wilson Grain, which ships on the Fulton County Railroad, and which I understand may own or be affiliated with Fulton County Railroad. He assured me that the Railroad was not abandoned. Indeed, he asked me why anyone would think it abandoned since it is in use for rail shipments. My review of valuation section maps indicates that MP 95.6 is roughly at a road intersection. MP 95.6 to MP 75.5 is south of the road, and visually the Fulton County Railroad trackage is in place north of the road. The claim that MP 75.5 to 95.6 is somehow "severed" from the interstate rail network has no basis.

4. ITF had applied to railbank the entire rail corridor prior to STB's May 14, 1996 order, and Norfolk Southern had consented to negotiate railbanking prior to STB's May 14, 1996 order. That order included a railbanking trail use authorization (NITU) for MP 57.2 to 74.2, but I now know it provided that the parties should re-apply for a NITU for MP 74.2 to 95.6 once trackage rights had been discontinued and notice of such was supplied to ITF. To the best of my knowledge, it was purely a housekeeping oversight that Norfolk Southern and ITF did not re-apply for a NITU once the trackage rights were discontinued. However, our consistent intent to railbank is manifest by our written contract entered into on August 31, 1998, and the deeds dated January 21, 1999 invoking 16 U.S.C. § 1247(d).

5. In my review of the April 19, 2004 petition, I observed that Friend, et al. claim that ITF is not complying with the requirements of 16 U.S.C. § 1247(d) with respect to MP 75.5 to MP 95.6. ITF has paid and is paying all property taxes due and owing on MP 75.5 to MP 95.6 (as well as MP 58.5 to MP 72.7) and is not in arrears. ITF maintains liability insurance to cover any claims for legal liability for accidents on the railbanked railroad corridor. ITF also has all management responsibility for the railroad corridor, and is managing the railroad corridor. I note that Friend, et al. rely on an affidavit by attorney Tribbett and that in paragraph 5 of his affidavit, he makes various claims about what he allegedly "learned" in a deposition of me which he did not complete, and which I have neither seen nor had an opportunity to correct. I wish to respond as follows, on an item by item basis to the subparts of his paragraph 5:

- a) ITF was formed to promote trails, and the purpose stated by Tribbett is one of the ways to promote trails.
- b) Correct.

c) The board of directors is self-nominating, as is the case in many non-profits for reasons of efficiency and economy. The articles of incorporation, by-laws, Indiana statutes, and the board determine who decides what for ITF.

d) ITF entered into a contract with NS and subsequently received three quitclaim deeds bearing on the Nickel Plate Trail.

e) Wrong. ITF acknowledges responsibility to address drainage issues, but to my knowledge has done nothing that alters drainage and has otherwise sought to maintain proper drainage.

f) Wrong. ITF has maintained security consistent with the security maintained in similar situations, including by the shortline railroad industry generally, to the best of my knowledge and belief. Tribbett is correct that we have put up signs. We have also installed some gates.

g) ITF denies that it is responsible for crossings when the crossings are the responsibility of another, as is so often the case on a railroad corridor. Private parties who desire crossings are not eleemosynary organizations, and ITF as a 501(c)(3) organization and an Indiana non-profit is legally prohibited from donating goods and services to private parties without consideration when the donations do not further our purpose. If neither NS nor ITF had responsibility for a crossing, then for ITF to assume the responsibility would be an improper and unlawful donation of our assets. Having said all this, we have in general honored private crossings, and we do not charge people seeking crossing rights. We reserve the right to insist that all crossings be constructed compatible with standards set by ITF or assigns for the Nickel Plate Trail.

h) Tribbett is wrong if he intends to represent that ITF denies that it is responsible for reasonable weed control. Tribbett is right if he means that ITF denies being aware of any unaddressed weed control problems. It is often the case on rail corridors that a weed problem arises primarily from the adjacent property owner, not the railroad.

i) Irrelevant. ITF relies on volunteers, and is being assisted by other organizations (e.g., Nickel Plate Trail, Inc. and Friends of Nickel Plate Trail). There is no requirement for a budget to my knowledge and ITF has viewed a budget of the sort Mr. Tribbett conjures as unnecessary overhead.

j) Because ITF relies on volunteers, ITF has not had to spend money on weed control or trash pick-up. This is hardly unusual, nor does it mean that ITF is ignoring those issues.

k) Wrong. ITF has placed gates and continues to place gates to minimize or to eliminate motorized access. We have also closed some sections of the trail temporarily to address alleged trespass problems. I have to confess that I am currently unable to corroborate any trespass by pedestrians or bicyclists on adjoining properties. We also have placed "no trespass" signs.

l) It is true that I thought we already had a NITU for

the whole line, rather than a NITU for the southern part and an STB order retaining jurisdiction to order a NITU for the remainder. I certainly believed and continue to believe that whatever federal jurisdiction is required is present. I certainly would not wish to be understood to say that our claim against Mr. Hoover for trespass lacks merit absent a NITU because that would be a legal opinion, and I am not a lawyer or otherwise qualified to offer up such an opinion. The lawyers affiliated with Rails to Trails Conservancy and the lawyer preparing our Reply to the pending Petitions point out case law that what they call "private railbanking" has been accepted where ICC or STB lacks jurisdiction and the line has not yet been abandoned.

6. As I recall attorney Tribbett's questions at the deposition, he asked whether ITF intended to comply with alleged requirements of Indiana Code 8-4.5. ITF (like all other Indiana trail groups to my knowledge) construes IC 8-4.5 requirements only to be applicable to a state agency when and if the agency applies for funding under a special state trail funding program set up in IC 8-4.5. There are extensive requirements for cost estimates and so forth in the event one seeks such funding. ITF in any event has not sought such funding, and does not plan to do so at this time, because the state deficit has resulted in no funds currently being available. Thus providing the various cost estimates would be useless. Moreover, ITF relies largely on volunteers, and our costs are therefore quite low. Indeed, we helped start Nickel Plate Trail, Inc., another Indiana non-profit corporation, to serve as a local organization for trail supporters and community organizations wishing to assist in managing the trail, and ultimately to acquire the trail from ITF as railbanker/manager. Nickel Plate Trail, Inc. and City of Peru have submitted grant applications for major trail construction in Peru and south of Peru. To my knowledge, no government has complained to ITF about the trail, that we have had only one complaint concerning our management of the trail (a weed control issue, which we dealt with). We are seeking to develop the property which we acquired from Norfolk Southern for trail purposes.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on 6 May 2004  


Appendix 1: August 31, 1998 railbanking agreement  
from files of Mr. Cohen

Appendix 1

**CONTRACT OF PURCHASE AND SALE**

This Contract of Purchase and Sale (hereinafter "Agreement"), dated the 31<sup>st</sup> day of August, 1998, between NORFOLK AND WESTERN RAILWAY COMPANY, a Virginia corporation, hereinafter called "Seller"; and

INDIANA TRAILS FUND, INC., an Indiana nonprofit corporation, hereinafter called "Purchaser";

**WITNESSETH:**

1. Seller agrees to sell to Purchaser and Purchaser agrees to purchase from Seller, subject to the terms and conditions hereinafter set forth, the land and improvements of Seller in Howard, Miami and Fulton Counties, Indiana, consisting of approximately 34.3 miles of abandoned right of way, more or less, from Milepost I-58.5 at or near Kokomo to Milepost I-72.7 at or near Peru and from Milepost I-75.5 at or near Peru to Milepost I-95.6 at or near Rochester, being the same property as will be railbanked by Seller in STB proceeding AB-290 (Sub-No. 168X), together with (i) all servitudes, easements, appurtenances and hereditaments appertaining thereto, and (ii) all improvements, structures, landscaping, and appurtenances situated thereon (hereinafter collectively referred to as "Premises"). At closing, the Seller shall also deliver to Purchaser the original valuation maps, charts, drawings and available surveys pertaining to the Premises.
2. The purchase price for said Premises is FORTY-FIVE THOUSAND AND NO/100 DOLLARS (\$45,000.00).
3. The earnest money to bind this Agreement, receipt of which is hereby acknowledged, is FOUR THOUSAND FIVE HUNDRED AND NO/100 DOLLARS (\$4,500.00), which amount shall be credited toward the total price at closing. The earnest money may be retained by Seller if Purchaser, through no fault of Seller, shall fail to close in accordance with the terms of this Agreement. The parties acknowledge that it is impossible to estimate more precisely the damages which might be suffered by Seller upon Purchaser's default. Seller's retention of said earnest money together with all interest thereon is not intended as a penalty, but as full liquidated damages. It is expressly understood and agreed that this Agreement is predicated upon Seller's receipt of a Certificate of Abandonment or similar authorization from the Surface Transportation Board that permits Seller to discontinue rail services on the Premises, and in the event such authorization is not obtained, this Agreement will be terminated and the earnest money promptly refunded to Purchaser. Seller will promptly advise Purchaser of all developments with respect to such authorization.
4. At closing, the Seller shall convey the Premises to Purchaser by quitclaim deed, under Section 8(d) of the National Trails Acts, 16 U.S.C. § 1247(d), reserving an easement for rail and cross tie removal, subject to the following:

- (a) General real estate taxes for the year of closing and subsequent years not yet due and payable;
- (b) Applicable zoning laws and regulations; and
- (c) All easements, conditions, reservations, leases, licenses and restrictions as may appear of record or be apparent by an inspection of the Premises.

5. (a) The Purchaser shall have thirty (30) days after the date of this Agreement to examine title to the Premises and to furnish Seller with a written statement of objections affecting the marketability of said title. Seller shall have thirty (30) days after receipt of such objections to satisfy them. If Seller does not satisfy such objections within the prescribed time, then, at Purchaser's option evidenced by written notice to Seller, Purchaser may either (i) terminate this Agreement, or (ii) waive any or all objections not cured by Seller and proceed to close hereunder without diminution in price. In the event this Agreement is terminated, Purchaser shall be entitled to a refund of the earnest money, without interest, and neither party shall be liable to the other for damages on account of the termination. Marketable title as used herein shall mean title which a title insurance company licensed to do business in the State of Indiana will insure at its regular rates subject only to standard exceptions and those stated in paragraph 4 of this Agreement.

(b) Seller expressly covenants that before closing it will secure whatever releases are required to free the Premises from all mortgages. If for any reason Seller is unable to secure said releases, this Agreement shall terminate and Seller shall return the earnest money to Purchaser without interest, and neither party shall be liable to the other for damages.

6. The closing shall be held at a mutually agreed upon location and time within one hundred-twenty (120) days of the date of this Agreement. At closing:

- (a) Seller shall deliver to Purchaser the duly executed and acknowledged deed conveying the Premises to Purchaser as provided in paragraph 4 hereof and a deed or deeds of release to release the lien of any mortgage or trust that may apply to the Premises.
- (b) Purchaser shall pay to Seller the purchase price specified in paragraph 2 herein for the purchase of said Premises, said payment to be made at closing in cash or by certified or cashier's check or by wire transfer.
- (c) General real estate taxes for the then current year relating to said Premises and rents, if any, shall be prorated as of the closing date and shall be so adjusted at closing. If the closing shall occur before the tax rate is fixed for the then current year, the apportionment of taxes shall be upon the basis of the tax rate for the next preceding year applied to the latest

assessed valuations. All special taxes or assessments due subsequent to the closing date shall be paid by Purchaser.

- (d) Possession shall be delivered at closing.
- (e) Seller shall pay for the deed preparation, transfer taxes and Seller's attorney's fees.
- (f) Purchaser shall pay for all other closing costs, taxes, filing fees and Purchaser's attorney's fees.
- (g) Purchaser and Seller will execute all documents required by Indiana law, including a Sales Disclosure Form.

7. (a) Purchaser and its employees and agents shall, until the sale contemplated herein has been completed or this Agreement has been terminated or has expired by limitation, have the right and permission, after the date of this Agreement, to enter upon said Premises or on any part thereof at all reasonable times for the purpose of inspecting, examining, surveying, making soil tests, borings, percolation tests and other necessary tests for engineering and planning for development and determination of surface, sub-surface and topographic conditions; PROVIDED, HOWEVER, and notwithstanding any other provision of this Agreement, Purchaser agrees to indemnify and hold Seller (which word, for the purposes of this paragraph 7.(a), shall be deemed to include any corporation controlling, controlled by or under common control with Seller, together with the officers, employees, agents and servants of any of them) harmless from and against any claims or liability for injuries to (including death of) persons or damage to or loss of property, real or personal, or expense in any manner connected with said undertakings hereunder and at Seller's option to defend any lawsuit brought against said Seller on account of any such claims and to pay any judgment against Seller resulting from any suit, whether or not any such claim, demand or suit purports to arise from the negligence of Seller or otherwise, and Purchaser shall also indemnify and hold harmless Seller from and against loss or damage occasioned by such entry, including, without limitation, any mechanic's liens or claims that may be filed or asserted against said property of Seller by contractors, sub-contractors or materialmen performing such work for the Purchaser.

(b) If, as a result of Purchaser's inspection as provided above or any other determination or analysis of the Premises by Purchaser, Purchaser discovers any geotechnical conditions concerning the Premises which render it unsuitable for Purchaser's purposes or reveal the existence of toxic/hazardous chemicals and waste substances, or the presence of asbestos, in such quantities as to give rise to possible liability under federal, state or local environmental laws and regulations, Purchaser shall have ninety (90) days after the date of this Agreement to furnish Seller with a written statement of said geotechnical conditions affecting the suitability of the Premises for Purchaser's purposes or which give rise to possible liability under federal, state or local environmental laws and regulations. Seller shall have thirty (30) days, after receipt of such

notice, to remedy such conditions, but shall be under no obligation so to do, and if Seller fails to remedy such conditions within the prescribed time, then, at Purchaser's option evidenced by written notice to Seller, Purchaser may either (i) terminate this Agreement, or (ii) waive any or all objections not cured by Seller and proceed to close hereunder without diminution in price. In the event this Agreement is terminated, Purchaser shall be entitled to a refund of the earnest money, without interest, and neither party shall be liable to the other for damages on account of the termination.

8. Purchaser and Seller each represent that no real estate commissions are due and owing to any party with respect to this transaction. Both parties hereby agree to indemnify and save harmless the other from and against any and all claims or liability for real estate commissions arising out of this transaction attributable to the indemnifying party.

9. In the event the conveyance contemplated hereunder shall constitute a subdivision, and if as a prerequisite to the recording of such conveyance it shall become necessary to comply with applicable subdivision ordinances and regulations, Purchaser agrees that it will, with reasonable diligence, arrange and pay for the filing of any necessary plat with the appropriate authorities. Purchaser will assume the entire cost of whatever streets, sewers, and utilities are required in connection with such subdivision, and will do all other acts and file such other papers as may be necessary to obtain any and all required approvals thereof. Seller agrees to execute such documents and plats as are reasonably necessary to accomplish such subdivision. All costs, expenses and attorney's fees incurred in complying with any such subdivision ordinances and regulations, including, without limitation, dedication and installation of streets, sewers, and utilities, shall be borne solely by Purchaser and Purchaser agrees that Purchaser will indemnify and save Seller harmless from any and all claims, demands, suits, costs or expenses arising or in any way growing out of any failure by Purchaser to fully comply with such subdivision ordinances and regulations.

10. This Agreement may not be assigned by Purchaser to any other party without the written consent of Seller, which consent may be withheld for any reason, except in the case of an assignment to an entity of which Purchaser has a controlling interest or is the general partner, or a governmental unit or an assignee that a governmental unit has asked Purchaser to assign this Agreement to, subject to the requirements of the National Trails Acts, such consent shall not be unreasonably withheld. Seller expressly reserves the right to assign or delegate all or any part of Seller's rights and duties hereunder with respect to all or any portion of the Premises to one or more third parties, including a qualified intermediary as defined by Treasury Regulation Section 1.1031 (K)-1(g) (4).

11. (a) Purchaser agrees to purchase the Premises "as is" and acknowledges that Seller has not made any express or implied representation or warranty with respect to the condition or suitability of the Premises, including, but not limited to, the condition of the soil, the presence of hazardous materials, substances, wastes or other environmentally regulated substances, or other contaminants in the soil or improvements -- whether known or unknown

(referred to herein as "contamination of the Premises") and other physical characteristics. Purchaser shall perform at its own expense and rely solely upon its own independent investigation concerning the physical condition of the Premises (including, but not limited to, an environmental assessment) and compliance of the Premises with any applicable law and regulations.

(b) Seller has not and does not hereby make any express or implied representation or warranty or give any indemnification of any kind to Purchaser concerning the Premises, its condition or suitability or its compliance with any statute, ordinance or regulation, including, but not limited to, those relating to the environment. Purchaser acknowledges that neither Seller nor any of its agents or representatives have made, and Seller is not liable for, or bound in any manner by, any express or implied warranties, guarantees, promises, statements, inducements, representations or information pertaining to the Premises or any part thereof, the physical condition, size, zoning, income potential, expenses or operation thereof, the uses that can be made of the same or in any manner or thing with respect thereof, including, without limitation, any existing or prospective leasing or occupancy of all or any part thereof.

(c) Purchaser hereby agrees that, following its purchase of the Premises, Purchaser will protect, indemnify and hold harmless Seller from and against any and all damages, penalties, fines, claims, demands, causes of action, liens, suits, liabilities, costs (including, without limitation, cleanup and remedial action costs), judgments, and expenses (including, without limitation, attorney's and experts' fees and expenses) of every kind and nature suffered by, incurred by (whether voluntarily or by court or administrative order or direction) or asserted against Seller or Purchaser as a direct or indirect result of any hazardous materials, substances, wastes or other environmentally regulated substances located on, in or under the Premises and introduced after the closing.

12. If, at any time prior to the closing hereunder, any action or proceeding is filed under which the Premises, or a substantial portion thereof, may be taken pursuant to any law, ordinance or regulation or by condemnation or the right of eminent domain, then, at the option of either Seller or Purchaser, (a) this Agreement shall be terminated and the earnest money, without interest, shall be returned to Purchaser or (b) this Agreement shall remain in full force and effect and Seller, at the time of closing hereunder, shall transfer and assign to Purchaser all of Seller's right, title and interest in any proceeds received or which may be received by the taking, or a sale in lieu thereof, said option to be exercisable by either party by delivering to the other written notice of such exercise on or before the thirtieth day following the day on which the respective party receives notice that such suit has been filed.

13. Before closing, Purchaser will not place any advertising or promotional signs on said Premises or on any of Seller's other property without the written consent of Seller.

14. This Agreement embodies the entire agreement between the parties and cannot be varied except by the written agreement of the parties. No representation, promise, or inducement

not included in this Agreement shall be binding upon the parties hereto.

15. Time is of the essence of this Agreement.

16. Any notice required or permitted to be delivered hereunder shall be deemed to be delivered, whether or not actually received, when deposited in the United States Postal Service, postage prepaid, registered or certified mail, return receipt requested, addressed to Seller or Purchaser, as the case may be, at the address set forth below.

Seller:

Mr. C. V. Baker, Director  
Real Estate and Contract Services  
Norfolk Southern Corporation  
One Georgia Center, Suite 1702  
600 West Peachtree Street, NW  
Atlanta, GA 30308-3603

Purchaser:

Indiana Trails Fund, Inc.  
47 South Pennsylvania Street  
P. O. Box 402  
Indianapolis, IN 46206-0402

With copy to:

Kimber M. Culpepper, Esq.  
Real Estate Counsel  
Real Estate and Contract Services  
Norfolk Southern Corporation  
One Georgia Center, Suite 1702  
600 West Peachtree Street, NW  
Atlanta, GA 30308-3603

With copy to:

Howard R. Cohen, Esq.  
Locke Reynolds Boyd & Weisell  
1000 Capital Center South  
201 North Illinois Street  
Indianapolis, IN 46204

17. All the terms and conditions of this Agreement are hereby made binding on the successors and permitted assigns of both parties hereto.

18. This Agreement shall be governed by and construed in accordance with the laws of the State of Indiana.

19. This Agreement shall not be effective or binding until fully executed by the parties hereto.

20. This Agreement will survive closing.

21. If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions of this Agreement shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

22. Words of any gender used in this Agreement shall be held and construed to include any other gender, and words in the singular number shall be held to include the plural, and vice versa, unless the context requires otherwise.

EXECUTED in duplicate, each part being an original, as of the day and year set forth above.

NORFOLK AND WESTERN RAILWAY COMPANY

By

*SG Rodwell*

Real Estate Manager

INDIANA TRAILS FUND, INC.

By

*Howard R Cole*

Director

KMC:swm  
1006321.cps/3-24-98  
Revised 8-11-98  
NSSALEK2.w61

Exhibit B

Sales Order Number: S0147899  
Contract Number: TR0187  
File Number: WLK-Retirements-IN-802

## SALVAGE CONTRACT

THIS CONTRACT made and entered into as of January 22, 1999, by and between Norfolk Southern Corporation ("Railway") and Azcon Corporation ("Purchaser");

### WITNESSETH:

For and in consideration of the mutual promises, undertakings and covenants hereinafter set forth, the parties hereto, intending to be legally bound, hereby agree as follows:

1. Sale and Removal of Salvage Materials

Purchaser agrees to purchase from Railway and Railway agrees to sell Purchaser, AS IS, WHERE IS, IN PLACE AND WITHOUT WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, OF FITNESS OR MERCHANTABILITY OR OTHERWISE, all of Railway's right, title and interest in and to certain used materials (the "Salvage Materials"). This Agreement has five exhibits, Exhibits "A", "B", "C", "D" and "E", the terms of all of which are a part of this Agreement and which are incorporated into this Agreement by reference. The overall project which is the subject of this Agreement is set forth by "Exhibit A", the Specifications to the project. The nature and extent of the Salvage Materials is described in Exhibit "B". The materials which are to be kept by Railway and not sold to Purchaser are set forth in Exhibit "C". Exhibit "D" sets forth the payment schedule; and Exhibit "E" set forth the insurance requirements for the Purchaser.

2. Purchase Price and Payment

As consideration for the sale of the Salvage Materials, Purchaser shall remove the Salvage Materials as hereinafter provided and shall perform all other work and obligations specified herein. As additional consideration for the sale of the Salvage Materials, Purchaser shall pay to Railway the sum of \$510,000.00 less \$40,000.00 for the repurchase of specified track material payable by Railway to contractor for a net amount of \$470,000.00 in accordance with the payment schedule set forth on Exhibit D hereto (the "Purchase Price").

3. Title, Security Interest and Risk of Loss

Each piece of Salvage Material shall become the property of Purchaser upon the completion of the following three events:

- (i) The execution of the Contract by Railway.

Sales Order Number: S0147899  
Contract Number: TR0187  
File Number: WLK-Retirements-IN-802

- (ii) Final designation of Salvage Materials as described in Section 4(c) below.
- (iii) Receipt by Railway of payment set forth in Exhibit "D", provided, however, that passage of title shall not in any manner extinguish, alter, or affect any lien, possessory interest or other rights of Railway as seller in possession and the parties agree that Railway shall have a security interest in the Salvage Materials to secure performance and payment of Purchaser's remaining obligations hereunder and, provided further, however, that the title to each piece of Salvage Material not removed in accordance herewith shall revert to Railway automatically upon the completion, termination or abandonment of Purchaser's operations hereunder or upon breach of any condition or covenant hereof by Purchaser, and no part of the Purchase Price shall be refunded to Purchaser on account thereof. All risk of loss as to the Salvage Materials shall pass to Purchaser upon the execution hereof by Railway and Railway shall not be responsible for any loss of or damage to Salvage Materials thereafter. Purchaser shall pay regular tariff charges for any Salvage Materials transported over Railway's lines for Purchaser's account.

4. Location and Scope of Work

(a) The work to be performed by Purchaser will consist generally of the removal of all Salvage Materials comprising that portion of retired and abandoned Railway line consisting of approximately 30.1 track miles of 90 lb jointed rail and OTM; 4.0 track miles of 100 lb jointed rail and OTM; 2.0 track miles of 110 lb jointed rail and OTM; 0.3 track miles 112 lb jointed and welded rail and OTM; 0.1 track miles of 132 lb jointed rail and OTM in the main line; and 1.9 track miles of light rail and OTM in side tracks from Kokomo to Peru and Peru to Rochester, IN as outlined in Exhibit A. All work to be performed is more fully described and shall be subject to the specifications, drawings, terms and conditions in Exhibit "A" & "B".

(b) Promptly after the execution of this Contract by both parties and the furnishing of insurance policies or certificates as provided herein, and not later than thirty (30) days from the date of this Contract, Purchaser shall begin to dismantle and remove, at Purchaser's sole cost and expense, all of the Salvage Materials. All work shall be performed strictly in accordance with the specifications and conditions set forth in Exhibit "A" & "B".

Sales Order Number: S0147899  
Contract Number: TR0187  
File Number: WLK-Retirements-IN-802

IN WITNESS WHEREOF the parties hereto have made and executed this Contract as of the date first above written.

NORFOLK SOUTHERN RAILWAY COMPANY

By R. C. Stuck, Jr.

ASSISTANT VICE PRESIDENT  
MATERIAL MANAGEMENT

AZCON CORPORATION

By Edward B. Doughty

(Title) Vice President - Azcon

(PRINTED NAME) Edward B Doughty

Specifications - Revised November 6, 1998

Exhibit A

## **Kokomo to Peru & Peru to Rochester, Indiana**

### **MP I-58.5 to MP I-73.5 and MP I-74.1 to MP I-95.6**

The project consists of the "where-is, as-is" sale of approximately 30.1 track miles of jointed 90-lb. rail and OTM; 4.0 track miles of jointed 100-lb. rail and OTM; 2.0 track miles of jointed 110-lb. rail and OTM; 0.3 track miles of jointed and welded 112-lb. rail and OTM; and 0.1 track miles of jointed 132-lb. rail and OTM in the main line; and 1.9 track miles of light rail and OTM in side tracks. These inventory quantities are derived from accounting records and are subject to on site verification by the Contractor. Portions of the line may be missing or partially dismantled.

#### **Project Limits**

The south end of the project is the point of curvature in a 1 degree curve to the right near Kokomo (Cassville) at *MP I-58.5*. This point is roughly 0.5 miles north of County Route 450W. The excluded portion at Peru begins at the point 500 track feet southeast of the derail located southeast of the switch in the active Ft. Wayne, IN to Decatur, IL line and near mileposts D-203 on the active track and I-73.5 on the abandoned line. The excluded portion continues on the opposite side of the active line to the point one rail length south of the Elwood Road (Ninth St.) road crossing near milepost I-74.1. The track through Elwood Street is to be removed and the pavement is to be restored. The north end of the project is the point one full rail length north of the north edge of County Route 290, North Wabash Street. The Contractor will construct an earth mound capable of stopping a railroad car at both the north and south ends and the two ends at Peru.

#### **Track Material**

All material is being sold "as-is, where-is". The Contractor is to remove and retain all rail, OTM, crossties and possibly remaining bridge material within the limits of the track segment while performing certain work and returning certain material back to the Railroad as part of the repurchase agreement. There is a chance the bridges will remain in place for a recreational trail. The Contractor is responsible for removal of all stockpiled or loose crossties on the Railroad property. No type of creosoted material will be buried on Railroad property. Included in this removal, are any ties still in the roadbed without rail or OTM at the old IMC yard site in Peru. Milepost signs are to remain in place as future reference points. Ballast is to remain and be smoothed out to a level surface and no ballast is to be removed from the roadbed.

\*\* TOTAL PAGE.05 \*\*

\*\* TOTAL PAGE.24 \*\*

Exhibit C



Norfolk Southern Corporation  
Strategic Planning  
Three Commercial Place  
Norfolk, Virginia 23510-2191  
757 629-2887

John T. Moon, II  
Manager  
Strategic Planning Dept

Writer's Direct Dial Number

(757) 629-2667  
FAX: (757) 533-4894

May 15, 1998

Via Facsimile 210-841-7693  
Mr. Greg B. Petersen  
Vice President - Corporate Development  
RailTex, Inc.  
4040 Broadway, Suite 200  
San Antonio, Texas 78209

Dear Greg:

This Letter Agreement confirms the understandings which were reached (at our meeting of April 29, 1998) between Norfolk Southern Railway Company and its subsidiaries including, but not limited to, Norfolk and Western Railway Company ("NW") (collectively, "NS") and RailTex, Inc. ("RailTex") pertaining to the planned acquisition (the "Transaction") by RailTex of the stock of Central Properties, Inc. ("CPI") which owns the Central Railroad of Indiana ("CIND") and operates the Central Railroad of Indianapolis ("CERA") over certain lines-of-railroad owned by NW and leased to CERA.

In accordance with the July 5, 1989, Lease and Option to Purchase Agreement which was supplemented on October 31, 1990, on January 3, 1992, and on August 28, 1992, between NW and CERA (the "Lease"), CERA currently leases two lines of railroad from NW, between mileposts I-41.0 (at/near Tipton, Indiana) and I-57.1 (at/near Kokomo, Indiana) and between mileposts TS-152.22 (at/near Marion, Indiana) and TS-206.44 (at/near Frankfort, Indiana). In accordance with the provisions of this Letter Agreement, NW agrees to the further assignment of the Lease to Rail-Text as the new operator of the CERA.

Effective on the date that the Surface Transportation Board ("STB") permits the Transaction between RailTex and CPI to become effective ("Effective Date"), CERA and NW agree to further supplement the Lease as follows:

- 1) The NW-owned sub-segment between mileposts I-57.1 and I-58.5 (at/near Kokomo, Indiana) shall be included in the Lease. (Although NW has received abandonment authority pertaining to its line between mileposts I-57.2 and

GT

Mr. Greg B. Petersen  
Vice President - Corporate Development  
RailTex, Inc.  
May 15, 1998  
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I-95.6, NW will not presently abandon the sub-segment between mileposts I-57.2 and I-58.5, and CERA will operate this sub-segment to provide rail service to a potential shipper.)

- 2) The NW-owned sub-segment between mileposts I-41.0 (at/near Tipton, Indiana) and I-51.8 (at/near Kokomo, Indiana) and the NW-owned sub-segment between mileposts TS-183.7 (at/near Kokomo, Indiana) and TS-206.44 (at/near Frankfort, Indiana) shall be excluded from the Lease. Prior to Effective Date, CERA shall have filed the appropriate documentation with, and received regulatory authority from, the STB to permit the discontinuance of CERA's lease and operation of the two sub-segments described in this Item 2 and to provide for the change in control anticipated to occur as part of the Transaction. (To the extent deemed necessary by NW, NW will file documents with the STB supporting CERA's discontinuance[s] anticipated in this Item 2.) The option to purchase provision of the Lease will not apply to the sub-segments removed from the Lease in accordance with this Item 2.
- 3) The rental contained in the Lease will be reduced on a pro-rata basis to reflect the mileage removed from the Lease in Item 2. Any lease payments owed to NW by CERA (due to a shortfall in the total cars handled in the account of NS) for calendar year 1998 will be waived by NS.

Also prior to Effective Date, the following arrangements will be in place:

- 4) NW and CERA will enter into an agreement providing for the interchange of cars on CERA-leased tracks at/near Kokomo, Indiana ("NW/CERA Interchange").
- 5) NS and CERA will enter into a "handling-line" agreement providing for CERA's movement of NS shipments moving to/from customers located on CERA.
- 6) The July 6, 1989, Interchange Agreement between NW and CERA, as amended, governing interchange between NW and CERA at Tipton and Frankfort, Indiana, will be terminated.

GP

Mr. Greg B. Petersen  
Vice President - Corporate Development  
RailTex, Inc.  
May 15, 1998  
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- 7) The July 7, 1989, Trackage Rights Agreement between NW and CERA providing CERA with access to the interchange tracks at Tipton, Indiana, will be terminated. Prior to Closing Date, CERA shall have filed the appropriate documentation with, and received regulatory authority from, the STB to permit the discontinuance of CERA's trackage rights described in this Item 7.

8)

Mr. Greg B. Petersen  
Vice President - Corporate Development  
RailTex, Inc.  
May 15, 1998  
Page 4

GP

Mr. Greg B. Petersen  
Vice President - Corporate Development  
RailTex, Inc.  
May 15, 1998  
Page 5

After the Effective Date or if the transaction anticipated in  
STB Docket 33388 is concluded, the following will apply:

- 9) NW, at its sole option, can relocate the NW/CERA  
Interchange from Kokomo, Indiana, to Marion, Indiana,  
upon giving thirty (30) days written notice to CERA. In  
this event, all arrangements provided for in this Letter

GP

Mr. Greg B. Petersen  
Vice President - Corporate Development  
RailTex, Inc.  
May 15, 1998  
Page 6

Agreement shall remain in effect except that the handling line charges for KGC shipments from Kokomo and Amboy, Indiana, respectively, will be reversed (if applicable) and that the Interchange Agreement pertaining to the NW/CERA Interchange will be supplemented to reflect the change.

- 10) NW, at its sole option, can remove the sub-segment between mileposts TS-152.22 and TS-157.4 (including the trackage rights between mileposts TS-153.1 and TS-153.4 and NW's interest in the Marion Semi Belt) from the Lease by giving CERA thirty (30) days written notice. Within thirty (30) days of CERA's receipt of such notice, CERA will file all required documents with the STB to effect the discontinuance of this sub-segment. If the sub-segment described in this Item 10 is so removed from the Lease, NW will grant CERA trackage rights (at no charge to CERA) to reach any customer located on this sub-segment that is served by CERA as of the date of this Letter Agreement.
- 11) In the event that NW receives STB authority to abandon and salvage any of the lines included in the Lease, NW may apply any net salvage proceeds to any track changes at Marion, Indiana, which are deemed necessary by NW to improve the relocated NW/CERA Interchange. Unless agreed otherwise by NW and CERA, NW will bear the cost of any such track changes at Marion.
- 12) If, in accordance with Item 10 above, NW notifies CERA of the changes to the Lease which are anticipated to occur after Closing Date, CERA's option to purchase that is contained in the Lease will be changed to reflect a purchase price of \$1.00 provided that CERA agrees to a liquidated damages provision (10-year declining balance based on the net liquidated value of the sub-segments that continue to be included in the Lease) which will apply if Rail-Tex abandons, discontinues, sells, leases, or otherwise relinquishes control of CERA. Prior to CERA's exercise of the option to purchase as revised by this Item 12, NW and CERA will jointly determine if any of the sub-segments then still included in the Lease should be abandoned; in the event that NW receives STB authority to abandon and salvage any such sub-segments, NW will retain all net salvage proceeds.

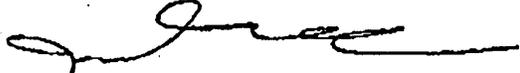
GP

Mr. Greg B. Petersen  
Vice President - Corporate Development  
RailTex, Inc.  
May 15, 1998  
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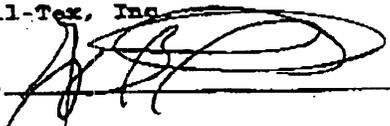
- 13) The proportional relationship of the handling line charges to be provided for in Item 5 above to the NS rates for shipments moving to or from the CERA Stations shall remain constant even if Rail-Tex abandons, discontinues, sells, leases, or otherwise relinquishes control of CERA.
- 14) In the event that the transaction envisioned in STB Docket No. 33388 is completed, Item 4 of the October 20, 1997, agreement between NS and CPI grants CERA first right of negotiation for the Marion - Red Key line-of-railroad providing that NS decides to divest the same. On the same terms, NS will also give CERA first right of negotiation if NS decides, at its sole option and subject to specific approval of on-line or affected shippers, to divest the Kokomo - Frankfort line-of-railroad or the industrial/terminal trackage adjacent to, and including, Goodman Yard at Marion, Indiana. The provisions of this Item 14 shall not apply if NW disposes of any portion of the Kokomo - Frankfort line south/west of milepost TS-205.0.

Please indicate your concurrence with the above items by executing in the space provided below, keeping the signed version for your files and transmitting a facsimile of the fully executed Letter Agreement to me at the above-listed receiver number for further handling.

Sincerely,

  
John T. Moon, II

AGREED AND ACCEPTED:  
Rail-Tex, Inc.

By: 

Title: VICE PRESIDENT

Date: 5/15/97

GP

Exhibit C-1

LAW OFFICES  
**McFARLAND & HERMAN**  
20 NORTH WACKER DRIVE-SUITE 1330  
CHICAGO, ILLINOIS 60606-2902  
TELEPHONE (312) 236-0204  
FAX (312) 201-9695

THOMAS F. MCFARLAND, JR.

STEPHEN C. HERMAN

July 8, 1996

By UPS Overnight

Richard R. Wilson, Esq.  
Vuono, Lavelle & Gray  
2310 Grant Building  
Pittsburgh, PA 15219

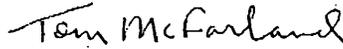
Re: Docket No. AB-289 (Sub-3X), *Central Railroad Company of Indianapolis – Discontinuance of Service Exemption – between Kokomo and Argos in Howard, Miami, Fulton and Marshall Counties, IN*  
and  
Docket No. AB-290 (Sub-No. 168X), *Norfolk and Western Railway Company – Abandonment Exemption – between Kokomo and Rochester in Howard, Miami and Fulton Counties, IN*

Dear Richard:

Reference is made to the STB's decision served July 3 accepting for filing Wilson Fertilizer's OFA for the rail line involved in the above matter.

This also confirms our prior telephone conversation in which I advised that the line segment between Milepost Nos. 58.5 and 57.2 (1.3 miles) near Kokomo will not be abandoned notwithstanding being encompassed within the abandonment exemption issued in the STB's decision served June 7. That exemption will not be implemented in order to preserve the opportunity to provide rail service to a shipper located between those designated milepost numbers. In view of that situation, you indicated that Wilson Fertilizer would not be likely to seek acquisition of that 1.3-mile segment. Consequently, you are urged to exclude that 1.3-mile segment in the event that you agree with N&W on a purchase or if you request the STB to fix terms and conditions for a purchase.

Very truly yours,



Thomas F. McFarland, Jr.  
Attorney for Central Railroad  
Company of Indianapolis

TMcF:kl:423

cc: Bob Cooney, by UPS overnight  
Chris Burger, by first-class mail

*Disick Wilson (412) 471-1800*

OMAS F. McFARLAND, JR.

STEPHEN C. HERMAN

FAX TRANSMITTAL

DATE: 5-31-96 TIME: \_\_\_\_\_

Pages (Including this Cover Page)

TO: Bob Cooney

ATTENTION: \_\_\_\_\_

FAX NO: 804 533 4872

FROM: Tom McFarland

FAX NO: (312) 201-9695 TELEPHONE NO: (312) 236-0204

REMARKS:

Re the enclosed from Chris Burger of Central. I encourage you to furnish an NLV to Wilson for a certain time as soon as possible, pointing out that abandonment will not be consummated south of P 58.5, so that ~~that~~ there will be no sale from that point south. I will send Wilson a letter stating that Central's rights need not be purchased -- operating rights with the time acquisition under the OFA.

File # 423

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosure under applicable law.

If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, and return the original message to us at the above address via the U.S. Postal Service.

**CENTRAL RAILROADS**  
P.O. BOX 554, KOKOMO, INDIANA 46903  
TELEPHONE (317) 450-3104 FAX (317) 457-4107

**CHRIS BURGER**  
**PRESIDENT & CEO**

MEMO TO FILE

DATE: May 29, 1986

SUBJECT: Kokomo To Rochester Abandonment

**RECORDED**  
MAY 31 1986

BELVA R.  
McFARLAND CLERK

On Tuesday, May 28, Steve Eisenach and I discussed the pending abandonment and retention of track to serve Chrysler.

We agreed upon abandoning the track north of Milepost 58.5. This will retain sufficient track to serve Chrysler should they in the future decide that they need rail service. I explained the need to retain this amount of track based upon Chrysler's plan to design a track which would access the plant from the north thereby requiring additional headroom.

Steve will suggest to NS's marketing people that they work with Norfolk Southern to see what traffic opportunities there may be.

On Wednesday, May 29, I conveyed the above information to Tom McFarland. He will work with NS and notify Wilson, the Fulton County Railroad and presumably the Surface Transportation Board that the actual abandonment (removal of tracks) will commence at Milepost 58.5 and extend northward. It was agreed that this would not prejudice our ability to negotiate with Chrysler for an agreement concerning ownership, maintenance, etc., of the track from highway 31 north.



cc: J. Johnson  
R. Morgan  
S. Eisenach  
T. McFarland ✓



Exhibit D



Norfolk Southern Corporation  
Strategic Planning  
Three Commercial Place  
Norfolk, Virginia 23510-2191  
757 626-2887

John T. Moon, II  
Manager  
Strategic Planning  
(757) 629-2667  
(757) 533-4884 FAX

June 21, 2002

VIA COURIER

Mr. Todd Cecil  
Vice President - Real Estate  
RailAmerica, Inc.  
4040 Broadway, Suite 200  
San Antonio, TX 78209

Dear Mr. Cecil:

Enclosed, please find original of Quitclaim Deed from Norfolk Southern Railway Company to Central Railroad Company of Indianapolis pertaining to the two lines-of-railroad (Howard and Grant Counties, Indiana) between Mileposts TS-157.44 and TS-183.64 and between Mileposts I-51.5 and I-58.5 which are being conveyed effective 11:59pm today.

Under separate cover, you will receive valuation maps, original title documents and NSR's original counterparts of the various leases and agreements which are being assigned.

If you have any questions, I can be reached at the above-listed direct-dial telephone.

Sincerely,

A handwritten signature in black ink, appearing to read "John T. Moon, II".

Enclosure

cc: Ms. Sandy Franger

Operating Subsidiary: Norfolk Southern Railway Company

185650

bc: ✓ B.L. Mason:

For your transmission to Archives, and completion of NSR's records (AFE #20001891), I have enclosed a copy of the deed and two originals each of four assignment agreements.

M.A. Mullady:

This deed and the aforementioned Assignment agreements complete the transaction which was discussed in my May 22 letter transmitting the May 21 Trackage Rights Agreement.

← Please send a copy of the deed & 4 original assignments for your records  
Ben

Howard  
County 185650  
Grant County 185651



Corres. 7940

SYSTEMS ENGINEER-REAL ESTATE  
DOCUMENT COPY ATTACHED  
FOR POSTING  
ASST. CORPORATE SECRETARY  
DATE 7-9-02 HANDLED BY KOK

QUITCLAIM DEED

THIS INDENTURE WITNESSETH, that the Grantor, NORFOLK SOUTHERN RAILWAY COMPANY, a corporation organized and existing under the laws of the State of Virginia, having its principal office in Norfolk, Virginia, for and in consideration of the sum of ONE AND NO/100 DOLLARS (\$1.00) and other valuable considerations, in hand paid, and pursuant to authority given by the Board of Directors of said corporation, and to the extent that Grantor's right, title, and interest permits and subject to the following terms and conditions, QUITCLAIMS unto the CENTRAL RAILROAD COMPANY OF INDIANAPOLIS, an Indiana corporation whose tax mailing address is 497 Circle Freeway Drive, Cincinnati, Ohio 45246, its successors and assigns, Grantee, all of its interest in the following described Real Estate situated in the County of Howard and in the County of Grant, State of Indiana, to-wit:

See Exhibit A, which exhibit is attached hereto and incorporated herein by this reference.

TOGETHER with, in "As is, Where is" condition and without warranty of any kind (express or implied), including but not limited to that of merchantability, habitability, and fitness for any particular purpose, all of Grantor's right, title, and interest in and to the road bed, ballast, main track, sidings, connecting and industrial tracks, depots, yards, storage and parking areas, culverts, bridges, tunnels, buildings, structures, communication and signal facilities, fixtures and all other railway appurtenances located upon or being appurtenant to and extending from the subject property.

RESERVING unto Grantor, its successors and assigns, a permanent and exclusive easement for the installation, maintenance and utilization of fiber optic, signal and other communications lines, as well as any facilities incident thereto, over, under, across and through

the subject property.

FURTHER RESERVING unto Grantor, its successors and assigns, a permanent and exclusive easement for the installation, construction, maintenance, utilization and replacement (including, but not limited to ingress and egress) of signboards over, under, across and through the subject property.

SUBJECT, however, to any conditions, restrictions, leases, reservations, licenses or easements, whether or not of record.

BY ACCEPTANCE OF THIS DEED, Grantee agrees to accept the subject property "AS IS," "WHERE IS," and without warranty (express or implied) of any kind, including, but not limited to fitness for a particular purpose, habitability and merchantability. Grantee further acknowledges that Grantor has not made any representation or warranty of any kind with respect to the condition or suitability of the property, including, but not limited to the environmental condition of the property.

IN WITNESS WHEREOF, Norfolk Southern Railway Company has caused its corporate name to be hereunto subscribed and its corporate seal to be hereunto affixed this 12<sup>th</sup> day of June March, 2002.

ATTEST:

  
Assistant Secretary

NORFOLK SOUTHERN RAILWAY  
COMPANY

  
By \_\_\_\_\_  
Real Estate Manager

STATE OF GEORGIA )  
 ) SS:  
COUNTY OF FULTON )

Before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named S. G. Portnell and Mary Ann Mullady, known to me to be the Real Estate Manager and Assistant Secretary, respectively, of Norfolk Southern Railway Company, a corporation, and acknowledged the execution of the foregoing deed for and in the name of and on behalf of said corporation as their free and voluntary act and deed and as the voluntary act and deed of said corporation.

WITNESS my hand and seal, this 12<sup>th</sup> day of June March, 2002.

My commission expires Notary Public, Fayette County, Georgia  
My Commission Expires May 21, 2002.

Sharon W. Mull  
Notary Public

This instrument prepared by:  
B. L. Mason, Esq.  
Norfolk Southern Corporation  
Suite 1702, One Georgia Center  
600 West Peachtree Street, NW  
Atlanta, Georgia 30308-3603

## Howard County, Indiana

All right, title or interest of the grantor in that line of railroad being a portion of the right of way for the main track of Norfolk Southern Railway Company, as it runs between Peru and Tipton, Indiana and being more particularly described as follows:

Beginning at a point on the track centerline at the southeasterly boundary of U.S. 31 Bypass, said point being located at railroad valuation station 2718+50, more or less (Milepost 51.5); thence, in a northwesterly and northwardly direction with a strip of land of varying width, through

Section 7 and the West  $\frac{1}{2}$  of Section 6, Township 23-North, Range 4-East; the Northeast  $\frac{1}{4}$  of Section 1, Township 23-North, Range 3-East; the East  $\frac{1}{2}$  of Section 36, the East  $\frac{1}{2}$  of Section 25, the East  $\frac{1}{2}$  of Section 24, and the Southeast  $\frac{1}{4}$  of Section 13, Township 24-North, Range 3-East; the West  $\frac{1}{2}$  of Section 18, and the West  $\frac{1}{2}$  of Section 7, Township 24-North, Range 4-East

a distance of 37,030 feet to a point on the track centerline at the southerly boundary of that property conveyed to Indiana Trails Fund in a deed dated January 21, 1999, located at railroad valuation station 3088+80 (Milepost 58.5).

Said portion of railroad being substantially as shown on railway valuation maps V14-Ind/23 through V14-Ind/S25-b and V15-Ind/2 through V15-Ind/4 inclusive, hereto attached and made a part hereof.

Grant County, Indiana

All right, title or interest of the grantor in that line of railroad being a portion of the right of way for the main track of Norfolk Southern Railway Company, as it runs between Marion and Frankfort, Indiana and being more particularly described as follows:

Beginning at a point on the track centerline near Michael, Indiana, located at railroad valuation station 8313+00, (Milepost 157.44), more or less; thence, in a westerly direction with a strip of land of varying width, through the

South  $\frac{1}{2}$  of Section 14, the Southeast  $\frac{1}{4}$  of Section 15, the North  $\frac{1}{2}$  of Section 22, the North  $\frac{1}{2}$  of Section 21, the North  $\frac{1}{2}$  of Section 20, the East  $\frac{1}{2}$  and Southwest  $\frac{1}{4}$  of Section 19, Township 24-North, Range 7-East; the South  $\frac{1}{2}$  of Section 24, the South  $\frac{1}{2}$  of Section 23, the Northwest  $\frac{1}{4}$  of Section 26, the North  $\frac{1}{2}$  of Section 27, and the North  $\frac{1}{2}$  of Section 28, Township 24-North, Range 6-East

to a point on the track centerline at the common line between Howard County and Grant County, Indiana located at railroad valuation station 8774+16 (Milepost 166.18), more or less, as shown on railway valuation maps V19-Ind/S 7-8 and V19-Ind/8.

Together with that portion of the west leg of the Wye Track property at Michael, Indiana lying westwardly of the east line of the Southwest  $\frac{1}{4}$  of Section 14, said east line crossing said main track at railway valuation station 8319+84, more or less;

Less and except that portion of said Wye Track property lying northeastwardly of a line 15.00 feet southwestwardly of, as measured normal from the centerline of the east leg of the Wye Track.

Said portion of railroad being substantially as shown on railway valuation maps V19-Ind/3 through V19-Ind/8 inclusive, hereto attached and made a part hereof.

Howard County, Indiana

All right, title or interest of the grantor in that line of railroad being a portion of the right of way for the main track of Norfolk Southern Railway Company, as it runs between Marion and Frankfort, Indiana and being more particularly described as follows:

Beginning at a point on the track centerline at the common line between Howard County and Grant County, Indiana located at railroad valuation station 8774+16 (Milepost 166.18), more or less, as shown on railway valuation maps V19-Ind/S 7-8 and V19-Ind/8; thence, in a westerly direction with a strip of land of varying width, through the

East  $\frac{1}{2}$  and Southwest  $\frac{1}{4}$  of Section 29, and the South  $\frac{1}{2}$  of Section 30, Township 24-North, Range 6-East; the South  $\frac{1}{2}$  of Section 25, the Northwest  $\frac{1}{4}$  of Section 36, the North  $\frac{1}{2}$  of Section 35, the East  $\frac{1}{2}$  and Southwest  $\frac{1}{4}$  of Section 34, the South  $\frac{1}{2}$  of Section 33, the East  $\frac{1}{2}$  and Northwest  $\frac{1}{4}$  of Section 32, the Northeast  $\frac{1}{4}$  of Section 31, and the South  $\frac{1}{2}$  of Section 30, Township 24-North, Range 5-East; Section 25, Section 26, Section 27, the South  $\frac{1}{2}$  of Section 28, the South  $\frac{1}{2}$  of Section 29, and the South  $\frac{1}{2}$  of Section 30, Township 24-North, Range 4-East; the South  $\frac{1}{2}$  of Section 25, the Northwest  $\frac{1}{4}$  of Section 36, and Section 35 of Township 24-North, Range 3-East; the Northwest  $\frac{1}{4}$  of Section 2 and the Northeast  $\frac{1}{4}$  of Section 3, Township 23-North, Range 3-East

to a point on the track centerline at the southerly boundary of West Defenbaugh Street located at railroad valuation station 9696+00 (Milepost 183.64), more or less.

Said portion of railroad being substantially as shown on railway valuation maps V19-Ind/8 through V19-Ind/S-16-C inclusive, hereto attached and made a part hereof.

Exhibit E

BEFORE THE SURFACE TRANSPORTATION BOARD

Norfolk and Western Railway Co.— )  
Abandonment Exemption— ) AB 290 (Sub-no. 168X)  
Between Kokomo and Rochester )  
In Howard, et. al. Counties, IN )

Verified Statement of  
Michael Kuepper

I, Michael Kuepper, make this Verified Statement for use in the above-captioned proceeding.

1. My name is Michael Kuepper. I am the president and a member of the board of directors of Nickel Plate Trail, Inc., address 154 West 6<sup>th</sup> St., Peru, Indiana. I am also a resident of Peru, Indiana, where I own and manage a small manufacturing plant. I make this Verified Statement on the basis of my personal knowledge.
2. Nickel Plate Trail, Inc. is a 501 (c) (3) Indiana non-profit corporation whose purpose is to acquire from Indiana Trail Fund the railbanked rail corridor at issue in this docket, plus some additional rights of way, for purposes of construction and operation of a recreational and commuting trail from Kokomo to Rochester, in cooperation with Miami, Fulton and Howard Counties, the City of Peru, and other affected local jurisdictions and conservation and recreational organizations.
3. Nickel Plate Trail by itself or in cooperation with the City of Peru has applied for more than \$1 million in grants (chiefly, from ISTEAs) and expects this summer to pave portions of the Nickel Plate Trail, and connectors in the City of Peru. Development of the rail corridor from Kokomo through Peru to Rochester enjoys widespread local support. I attach hereto as Exhibit A some of the many support letters accompanying our pending grant applications. I also attach hereto as Exhibit B a copy of one of our brochures. The scale of the brochure is insufficient to show connectors in Peru and from Cassville to Kokomo and also at the Rochester end.
4. On behalf of Nickel Plate Trail, Inc., I express our opposition to the pending petitions for reconsideration. The pending petitions do not accurately reflect the facts, and the verified statements/affidavits on which the petitions are based are not accurate or reliable, and in fact misrepresent key facts.
  - a) First, the so-called "northern segment" of this trail connects with Fulton County Railroad serving Wilson Grain in Rochester. There is no "severance" or gap.
  - b) Second, the so-called "southern segment" of this trail interconnects with Central Railroad of Indianapolis at MP 58.5 in Kokomo. There is no "severance" or gap.
  - c) Third, the former Norfolk Southern railroad right of way at issue here basically paralleled the old Wabash Railroad (now Norfolk Southern) mainline in Peru from MP 72.7 to approximately 74.2. Rather than "abandoning" land in the mainline corridor, we understand that Norfolk Southern basically incorporated that land into the mainline. The termination of the southern segment of the railbanking right of way acquired by Indiana Trail Fund is depicted on the map attached hereto as Exhibit C. From the termination point (7<sup>th</sup> Street) to the mainline (where the old right of way enters at an acute angle) is perhaps 100 yards. It appears that the segment in issue is owned by one or more entities, Norfolk Southern Railroad, City of Peru and/or Bill Bean (Lear Property).

Nickel Plate Trail, Inc. is in the process of acquiring quitclaim deeds from the above mentioned property owners to ensure that the railbanked trail can be reconnected to the mainline in Peru in the event necessary for rail reactivation. I have received a letter, (Exhibit H) from the Mayor of Peru advising their intention to proceed with the quitclaim deed process. Also Mr. Bill Bean has been cooperating with our request for a quitclaim deed. Thus it follows that there is no reasonable question but that the railbanked line, if reactivated can be connected to the main railroad line in Peru.

We intend to employ city streets rather than the operating mainline for our trail through the City of Peru. (There will also be a connector along the Wabash River to the old C&O Railroad yard, which is currently under "brownfield" redevelopment.) Nickel Plate Trail also plans to purchase right of way eventually to connect Peru north to the beginning of the northern segment (at MP 75.S).

- d) Fourth, Indiana Trail Fund has been providing management services for the trail. Indeed, ITF assisted in the organization of Nickel Plate Trail to provide a local management team not only to care for the corridor but also eventually to take over the entire facility. Nickel Plate Trail and I personally have been involved in posting signs (example in Exhibit D), arranging for volunteer projects to prepare bridges for trail use (examples in Exhibit E), and in many other activities (gates, clearing, and so fourth, examples in Exhibit F), that are development in nature. Although there has been a problem with a local landowner attempting to fence across the trail and to farm it, it is simply not true that the facility is not being managed for trail purposes. The pictures I attach show the very active trail management going on. No one has complained of lack of management to me. The few opponents have instead opposed any trail management.
- e) When Nickel Plate Trail receives the grants for which it has applied, we expect to file our own "statements of willingness" with this Board, and, if granted permission, we aspire to acquire the trail from ITF. This acquisition may be in stages.
5. I attach hereto as Exhibit G letters from the Mayor of Peru and Rochester joining in opposition to the pending petitions for reconsideration and underscoring the public support for and community interest in conserving this old rail corridor as a railbanked trail.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 5, 2004.

  
Michael Kuepper  
President  
Nickel Plate Trail, Inc.

Kuepper Exhibit A

**RICHARD G. LUGAR**  
INDIANA

306 HART SENATE OFFICE BUILDING  
WASHINGTON, DC 20510  
202-224-4814

senator\_lugar@lugar.senate.gov

COMMITTEES:  
FOREIGN RELATIONS, CHAIRMAN  
AGRICULTURE, NUTRITION, AND FORESTRY

## United States Senate

WASHINGTON, DC 20510-1401

January 13, 2004

Mr. J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 N. Senate Avenue, Room N755  
Indianapolis, Indiana 46204-2249

Dear Commissioner Nicol:

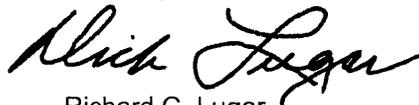
I am writing to indicate my support and encouragement in connection with an application for transportation enhancement funds submitted to the Indiana Department of Transportation (INDOT) by the Nickle Plate Trail, Inc. of Peru, Indiana.

The Nickle Plate Trail, Inc. proposes to use transportation enhancement funding to complete improvements to a trail greenway system that connects portions of Howard, Fulton and Miami counties. The trail will sustain a wide variety of non-motorized activities including: running, walking, roller-blading, cross-country skiing and bicycling.

I believe that the Nickle Plate Trail proposal is clearly demonstrative of the type of project that the Congress intended when the transportation enhancements program was created in 1991. I am pleased to support this worthwhile effort to provide this important community improvement.

You may direct any response to Mr. Lane A. Ralph in my Indianapolis Office at 1180 Market Tower, 10 West Market Street, Indianapolis, Indiana 46204-2964, or via telephone at (317) 226-5555. Thank you.

Sincerely,



Richard G. Lugar  
United States Senator

RGL/lar  
cc: Miles H. Straly, Treasurer, Nickle Plate Trail, Inc.

**BURTON**  
DISTRICT, INDIANA

COMMITTEES:

GOVERNMENT REFORM  
FORMER CHAIRMAN (1997-2002)

SUBCOMMITTEES:

HUMAN RIGHTS AND WELLNESS  
CHAIRMAN

INTERNATIONAL SECURITY, EMERGING THREATS AND  
INTERNATIONAL RELATIONS

INTERNATIONAL RELATIONS

SUBCOMMITTEES:

EUROPE

ASIA AND THE PACIFIC



Congress of the United States  
House of Representatives  
Washington, DC 20515-1405

WASHINGTON OFFICE:  
2185 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-1405  
TELEPHONE: (202) 225-2276

DISTRICT OFFICES:  
8900 KEYSTONE AT THE CROSSING  
INDIANAPOLIS, IN 46240  
TELEPHONE: (317) 848-0201  
TOLL-FREE: (800) 362-6020

209 SOUTH WASHINGTON STREET  
MARION, IN 46952  
TELEPHONE: (765) 662-6770  
TOLL-FREE: (877) 846-2936

WORLDWIDE WEB PAGE:  
<http://www.house.gov/burton/>

January 13, 2004

Mr. J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 N. Senate Avenue  
Indianapolis, IN 46204

Dear Commissioner Nicol:

I am writing in support of the Nickel Plate Trail, Incorporated's application for a TEA Grant. I hope you will give this grant application every appropriate consideration.

As you know, the TEA grant would fund much of the construction necessary to complete the 38-mile Nickel Plate Trail. By receiving the grant, residents, local business owners and tourists will benefit from the development of the paved trail connecting Peru to Rochester and many other cities in between. With years of research and planning, Nickel Plate Trail, Inc. has sought to insure that receipt of such funding will go to excellent use.

Again, I hope your office will give thorough consideration to this request. If there is any way my office can be of assistance to you, please do not hesitate to contact Jaclyn Dowd who serves as my Grant Coordinator. She can be reached at 317/848-0201. Thank you for your efforts and consideration on behalf of this request.

Sincerely,

Dan Burton  
Member of Congress



**Carmine A. Gentile**  
**Superintendent**  
**James E. Emrich**  
**Assistant Superintendent for Instruction**  
**Phil Smitley**  
**Director of Operations**

## **Maconaquah School Corporation**

January 15, 2004

J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 N Senate Avenue  
Indianapolis IN 46204

Dear Mr. Nicol:

I would like to express my support for the Nickel Plate Trail project. As superintendent I support this effort and the positive implications it can have for our community as well as the school community.

The existence of this trail will allow Maconaquah High School, Middle School, and Elementary schools access to a number of opportunities:

- A walking trail for students
- A nature trail for science and elementary students
- A project opportunity for our high school agricultural and landscaping programs
- Additional extracurricular opportunities for athletic teams and exercise programs

In addition to the above mentioned possibilities our students and staff will be able to explore other options that will enhance the learning process for students.

We support this project and hope that you will give serious consideration to this request.

Sincerely,

Carmine Gentile  
Superintendent

CG/lf

***IN PURSUIT OF EXCELLENCE***

**932 South Strawtown Pike, Bunker Hill, IN 46914-9667 Telephone (765) 689-9131 Fax (765) 689-0995**



## Peru Community Schools

Administrative Center  
35 W. Third St.  
Peru, Indiana 46970  
(765) 473-3081  
Fax (765) 472-5129

January 13, 2004

J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 N. Senate Avenue  
Indianapolis, IN 46204

Dear Mr. Nicol:

As superintendent of the Peru Community School Corporation and a resident of Miami County, I wish to state my support for the completion of the Nickel Plate Trail through Miami County. I believe the benefits of the trail to the populace are many.

First, as superintendent of schools, completion of this trail would be of value to the students of Miami County. Currently, the legislature is considering legislation to address a growing problem in Indiana, obesity among our youth. The general lack of safe, pleasant areas for physical activity is one reason for the lack of youth participation in physical activity. This lack is most apparent in rural and small towns throughout the state. During our summer physical education class our instructors use bicycling, skating, and hiking as activities for life-long physical fitness. One obstacle to the instruction is a safe area for engaging in the activity with a group of students. The Nickel Plate Trail would provide an excellent place for bicycling without the concern of constantly riding in traffic or on narrow, hilly county roads. Eliminating the vehicular traffic from intermingling with our bicycling would address a major safety concern.

In addition, our cross county teams are forced to practice either on the high school track or use city sidewalks or streets and county roads. The Nickel Plate Trail would again provide a good alternative to the current practice areas.

Page 2  
Nickel Plate Trail

As a resident of the county, I can see the benefit of the trail to more than just school children. The quality of life of Miami County would be enhanced by the Nickel Plate Trail. The community currently lacks sufficient locations for outdoor exercise. The trail would provide a safe and enjoyable area for popular healthful recreation activities such as biking and jogging for adults. Again, larger metropolitan regions have such amenities available, but small cities often do not. The enhanced quality of life would be an asset to the citizens and the future growth of the community.

Other communities which have developed a rails-to-trails program have noted a rise in tourism due to use of the trails by those outside the community. Again, at certain times of the year, Miami County draws tourists for the annual Circus City Festival and Heritage Days. These festivals may realize improved attendance by the trail's attraction of an audience that currently is not attracted by a solitary festival activity.

On the whole, I support the Nickel Plate Trail for a variety of reasons that would benefit our citizens and our community in general. Your consideration of Nickel Plate Trail Incorporated's grant application is appreciated.

Sincerely,



Dr. Thomas E. McKaig  
Superintendent of Schools

TEM/mm



ROADWAY EXPRESS, INC.  
2530 S. Tibbs Avenue • Indianapolis, IN 46241  
T: 317.486.9000 • Fax 317.486.4781 • www.roadway.com

ISO 9002 Certified

January 14, 2004

J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 N. Senate Avenue  
Indianapolis, IN 46204

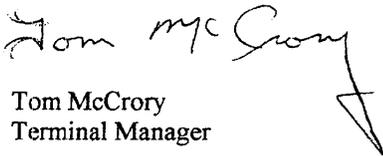
Dear Commissioner:

We at Roadway Express in Kokomo/Peru, Indiana support the Nickel Plate Trail. This government grant will allow the city of Peru to make significant headway in completing the trail. It would be a major plus for our county.

The transportation enhancements program has done more to inspire community revitalization, create safe places to walk and bicycle, restore historic transportation infrastructure, and spark hometown pride than any other transportation program. These projects have made American communities better places to live.

I trust that you will make the right choice in supporting the Nickel Plate Trail.

Sincerely,

A handwritten signature in cursive script that reads "Tom McCrory". The signature is written in black ink and is positioned above the printed name and title.

Tom McCrory  
Terminal Manager



## Peru/Miami County Chamber of Commerce

13 East Main Street, Peru, Indiana 46970

(765) 472-1923 (765) 472-7099 Fax

[www.miamicochamber.com](http://www.miamicochamber.com)

January 16, 2004

J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 N. Senate Ave.  
Indianapolis, IN 46204

Dear Mr. Nicol,

I am writing this letter in support of the Nickel Plate Trail Project. As the Executive Director of the Peru/Miami County Chamber of Commerce, I support projects such as the Nickel Plate Trail that improve the quality of life for our citizens and that will have a major economic impact on our community.

The Nickel Plate Trail will be a recreational area for our residents and will be used for such activities as running, walking, rollerblading, and bicycling which will improve the quality of life for the people of Miami County. The economic impact of this project will be a great asset to our community as well. It will bring revenue into the county in the form of tourism which will increase business for hotels, restaurants and bike shops to name a few. Studies have shown the property values of adjacent properties will also increase.

I have talked to other chamber directors in other communities that have a trail in their community and they all feel it has had a positive impact in their communities.

If you should have any questions, please feel free to contact me at 765-472-1923. I appreciate all the hard work this committee has done on a project that will be very beneficial to our community.

Sincerely,

Keith Chandler  
Executive Director

### MISSION STATEMENT

The Peru/Miami County Chamber of Commerce promotes a strong business and industrial climate for its members through a partnership between business and the community of Miami County.



THE HONEYWELL FOUNDATION, INC. 275 W. Market St. / Wabash, IN 46992-3057  
260-563-1102 / 800-626-6345 / FAX 260-563-0873

January 21, 2004

Mr. J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 North Senate Avenue  
Indianapolis, IN 46204

Dear Mr. Nicol:

We at the Honeywell Center in Wabash support the Nickel Plate Trail in Peru, Indiana, applying for a grant from the Transportation Enhancement (TEA) Program. The million-dollar government grant would allow them to make significant headway in completing the trail and will certainly be a major plus for the community.

The Honeywell Center, in downtown Wabash, offers meeting rooms, a world-class food service, an art gallery, a large outdoor activity plaza with a stage, and the 1,500-seat state-of-the-art Ford Theater. We are very much in favor of this project that will promote tourism and generate future interest and revenue in the Peru and Wabash areas.

Best Regards,

Tod C. Minnich  
Executive Director

TCM:bdm

**Town of Denver**  
**Office of Clerk-Treasurer**  
**P.O. Box 192**  
**Denver, IN 46926**

1/09/2004

**J. Bryan Nicol, Commissioner**  
**Indiana Department of Transportation**  
**100 North Senate Avenue**  
**Indianapolis, IN 46204**

Dear Mr. Nicol:

This letter is written to pledge the full support of the elected officials, the Denver Town Board and Clerk-Treasurer to the Nickel Plate Trail. It is felt that this project is a very worthwhile endeavor and will be a great asset to the Town of Denver, and Miami County.

We would hope that you give much consideration to this project in the grant application process.

Thank you for your time and consideration in this matter.

Respectfully,

Mary Titus  
Clerk-Treasurer



**DANIEL C. BANINA**  
JUDGE

## **Miami Superior Court**

51<sup>ST</sup> JUDICIAL CIRCUIT OF INDIANA  
PERU, INDIANA 46970

**LISA DILLON**  
COURT REPORTER

**BARBARA HIERS**  
COURT ADMINISTRATOR  
TEL: 765-472-3901 EXT. 232  
FAX: 765-472-8590

January 13, 2004

J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 N. Senate Avenue  
Indianapolis, IN 46204

Re: TEA Grant

Dear Commissioner Nicol,

It is my understanding that our local Nickel Plate Trail is applying for a TEA grant for help in finishing the trail in Miami County.

I personally am in support of the Nickel Plate Trail 100%. In fact, my son, Sam, recently completed his Boy Scout Eagle project by refurbishing an old railroad bridge to make pedestrian traffic safe on the trail. My wife, Helene, and I would never had allowed our son to work on this project unless we fully supported the cause and efforts of the Nickel Plate Trail.

The trail is off to a good start but like any grassroots effort needs funds to make it's dream come true. This trail will be a huge benefit to our otherwise depressed community recreationally and financially. Therefore, I would greatly appreciate your careful consideration of the grant request. Please feel free to contact me with any questions or comments.

Sincerely,

Daniel C. Banina  
Judge



## Peru Fire Fighters Association

Local No. 383  
Peru, Indiana



January 12, 2004

J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 N. Senate Avenue  
Indianapolis, IN 46204

To Whom It May Concern:

This letter is in reference to the Nickel Plate Trail, Inc. in Miami county. As President of IAFF Local 383 in Peru, my brother firefighters and I would like to show our support for the Nickel Plate Trail. We feel that this trail will encourage people to make a choice to improve their physical well-being. It also creates opportunities for Peru and Miami county to reap the benefits of possible revenues brought into the area in the form of tourism. We as a Union feel the positives from the construction of the Nickel Plate Trail far outweigh any negatives. Many good things can come from the trail, we only hope this county has the opportunity to achieve those things.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jim Murphy'.

Jim Murphy  
President/IAFF Local 383

Joy Holloway  
City Council Precinct Four  
City of Rochester, Indiana  
1217 Rochester Blvd.  
Rochester, IN 46975

January 13, 2004

J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 N. Senate Avenue  
Indianapolis, IN 46204

Dear J. Bryan Nicol, Commissioner:

The Nickel Plate Trail in north central Indiana will be a wonderful asset to our communities when completed. The 38+ miles of paved trail running from Kokomo to Rochester will connect our communities with a trail that can be used for all non motorized activities. It is my opinion that it will increase tourism, which will bring much needed revenue to motels, restaurants, and businesses in our communities. I, as a RE/MAX Country Realtor, can see a possible increase in property values of adjacent properties.

It has come to my attention as a member of the Rochester City Council that the Nickel Plate Trail, Inc. is about to apply for a grant from the Transportation Enhancement Program. I would like to personally voice my support for the Nickel Plate Trail and would hope that it will be selected as a TEA grant recipient.

Sincerely,



Joy Holloway  
cc: Nickel Plate Trail, Inc.



January 12, 2004

J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 N. Senate Avenue  
Indianapolis, IN 46204

Dear Mr. Nicol

The Fulton County Tourism Committee supports the efforts to complete the trail between Kokomo and Rochester. This trail will improve the quality of life for our community as well as the other communities involved in this project. It will provide a variety of outdoor activities, including running, walking, roller blading, cross country skiing, and bicycling. There will also be opportunity for equestrian use. It will also bring tourism to our area in the form of increased business for motels, restaurants and retail stores.

Please give due consideration to this grant recipient, as it is a worthy cause and can enhance thousands of lives.

Sincerely,

Fulton County Tourism Commission



# CITY OF ROCHESTER

320 Main Street • P.O. Box 110 • Rochester, Indiana 46975

Philip E. Thompson, *Mayor*  
219-223-4555

www.rochester.in.us  
Fax: 219-223-6509

Carla J. Zartman, *Clerk-Treasurer*  
219-223-2510

Mr. J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 North Senate Avenue  
Indianapolis, In. 46204

January 14, 2004

Greetings from the City of Rochester;

This letter is written on behalf of the City Council and elected officials of the City of Rochester in support of the proposed Nickel Plate Trail. The proposed 38-mile trail would connect Rochester with Peru, Kokomo and other communities South of Rochester.

The turning point taking this proposed project from plans on paper to a trail citizens of Indiana can use and enjoy will be obtaining a "TEA" grant from the Indiana Department of Transportation.

There are times being a small rural community can be a disadvantage but this is one time we see it as an advantage and a "win - win" situation. It would allow citizens from the larger communities to get out into the rural area to enjoy the beauty of Indiana. The smaller communities would benefit from additional revenue it could bring to the community. The "quality of life" factor would benefit the three counties and allow us to have a feature other communities do not have.

We trust the Department of Transportation will give favorable consideration to the grant request of Nickel Plate Trail, Inc.

Sincerely,

David Ewick  
Rochester City Council Pres.

Carla Smith  
Clerk-Treasurer

Philip Thompson  
Mayor



HISTORIC  
LANDMARKS  
FOUNDATION OF  
INDIANA

North Central Field Office  
104 West Market Street  
Wabash, IN 46992  
260 563 4534 Fax: 260 563 7957  
northcentral@historiclandmarks.org  
www.historiclandmarks.org

January 9, 2004

Mr. J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 North Senate Avenue  
Indianapolis, IN 46204

Dear Mr. Nicol,

It is my pleasure to send this letter of support for Nickel Plate Trail, Inc. in their efforts to secure Transportation Enhancement monies. The Nickel Plate Trail will improve the quality of life for the people of many communities, as it will connect Cassville to Rochester providing a route for fitness and recreation.

Historic Landmarks Foundation of Indiana is the largest statewide non-profit organization in the nation with the mission to protect historic structures. Trails such as the Nickel Plate Trail give many opportunities and benefits to the surrounding communities, and as the Field Representative for the North Central Field Office of Historic Landmarks, I feel that these trails also have elements of preservation. First of all, the Nickel Plate Trail includes a historic Through Truss bridge. As you may know, Historic Landmarks is constantly fighting to preserve these bridges, giving future generations the chance to enjoy and learn from these engineering symbols of the late 19<sup>th</sup> and early 20<sup>th</sup> century. Trails such as these also preserve the historic routes that were used by trains. Finally, these routes bring in tourists as well as businesses that are needed to support the trail, which could potentially help revitalize historic downtowns.

Because this trail would be approximately thirty-eight miles, it has the potential of bringing these benefits to several towns and communities, making it an important project for north central Indiana.

Please do not hesitate to call me if you have any questions.

Sincerely,

*Catherine R. Compton*

Catherine R. Compton  
North Central Field Representative



**Robert A. Spahr**

**Attorney at Law**

P.O. Box 145  
55 South Broadway  
Peru, Indiana 46970  
Atty. # 429-52

Telephone:  
(765) 473-4690

FAX:  
(765) 473-4693

**January 5, 2004**

**J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 N. Senate Ave.  
Indianapolis, IN 46204**

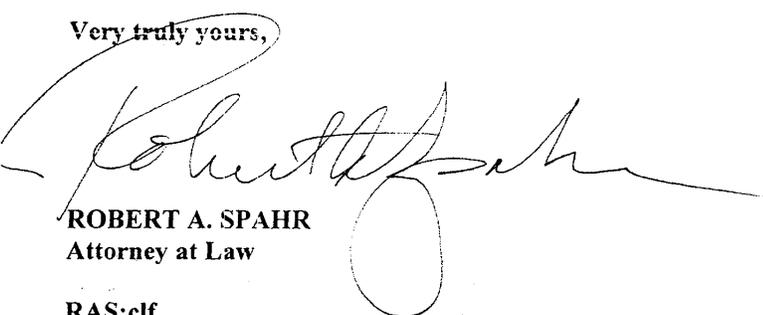
**Re: Transportation Enhancement (TEA) Program  
Nickel Plate Trail, Inc.'s Grant Application**

**Dear Commissioner Nicol:**

As a 25-year resident of Miami County, Indiana, I have rarely experienced as much community solidarity for completion of the Nickel Plate Trail from Rochester to Cassville, extending through Miami County. I have offered my personal services and labor to those persons seeking to upgrade the former right-of-way and recognize the value to the community from this worthy project. The award of a TEA grant for use in connection with this project will deliver a significant signal to the community that the project will be completed in a timely fashion for all to use and enjoy. I strongly urge that the grant application process be expedited for this project.

Should you have any questions concerning my unqualified support of this grant application, please feel free to contact me at your earliest convenience.

Very truly yours,



**ROBERT A. SPAHR**  
Attorney at Law

RAS:clf



*Miami County Medical Society*

*Peru, Indiana 46970*

January 7, 2004

J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 N. Senate Avenue  
Indianapolis, IN 46204

Dear Mr. Nicol,

At a recent meeting of the Miami County Medical Society, a resolution was passed supporting the creation of the Nickel Plate Rail Trail. The vote was unanimous with all physicians present supporting the motion. The rail trail will give the people of Miami County an incredible recreational asset which may be used for the pursuit of many non-motorized, healthy activities such as walking, running, and biking.

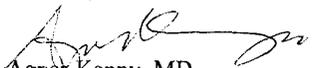
The rails-to-trails movement is very strong in this country. Hundreds of rail trails have been developed covering thousands of miles. The movement is strong because the trails add quality of life to communities. They give people an opportunity to get outside, exercise, enjoy nature, and breathe fresh air without having to worry about being killed by a speeding motorist.

Rail trails also improve the economic vitality of a community. Companies looking to expand or relocate will look upon the trail as an important recreational opportunity and quality of life asset for its employees. The trails have also been shown to boost tourism in the communities which border them.

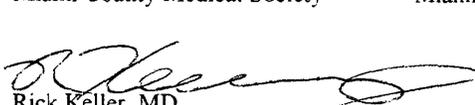
A strong local volunteer group, the 'Friends of the Nickel Plate', has been formed to support the creation of this trail. This group has already improved several areas of the trail.

We, the physicians of the Miami County Medical Society, strongly support the creation of the Nickel Plate Trail. We feel that it will improve the life and the health of our patients.

Sincerely,

  
Agnes Kenny, MD  
President  
Miami County Medical Society

Catherine Reese, MD  
Vice President  
Miami County Medical Society

  
Rick Keller, MD  
Secretary Treasurer  
Miami County Medical Society





Agnes Kenny, MD  
John B. Savage, MD  
Ana Nantes-Onglao, MD  
Arturo Onglao, MD  
Vickie Deeds, MSN, RN, FNP

January 6, 2004

J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 N. Senate Avenue  
Indianapolis, IN 46204

Dear Mr. Nicol,

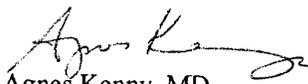
The Nickel Plate Rail Trail will bring a much needed enhancement to the quality of life in Miami County. Rail trails are being utilized nationwide for many healthy non-motorized recreational activities such as walking, running, bicycling, cross country skiing, and horse back riding. Miami County currently has very few safe, off-road places to pursue such activities. This will help the residents of this county pursue a healthy lifestyle.

The trail will also bring tourism to the county. This will be one of the longest rail trails in the state of Indiana and will undoubtedly attract trail users who will utilize nearby restaurants, hotels, and shops.

Communities with pedestrian trails are viewed as progressive by businesses searching for a new location. As a quality of life enhancer, the trail will help to attract new businesses to the area.

Please support Nickel Plate Trail, Inc as it makes application for various grants which will be needed to make this dream a reality.

Sincerely,

  
Agnes Kenny, MD  
Chief of Medical Staff  
Dukes Memorial Hospital

1000 North Broadway  
Peru, Indiana 46970  
765/472-5335

**Bruce C. Embrey Law Office**

23 West 3<sup>rd</sup> Street, P.O. Box 1296  
Peru, IN 46970

Phone: 765-473-3973  
FAX: 765-473-4325

January 5, 2004

J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 N. Senate Avenue  
Indianapolis, IN 46204

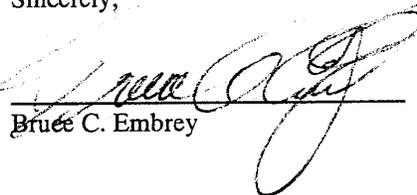
Dear Mr. Nicol:

I write to endorse the grant requested by the Nickel Plate Trail group. It is my opinion that it will greatly enhance the attractiveness of Peru and Miami County for economic development and will provide a very healthy recreational activity for the citizens of our county.

I live approximately two blocks from the river front walkway that now exists in Peru, which runs a distance of .9 miles. My family and I have used it extensively for walking, bicycling with our grandchildren, and even roller-blading from time to time. The walkway gets extensive use and I believe the Nickel Plate Trail will also be used extensively. Everyone with whom my wife and I associate have expressed favorable comments about the extension of the Nickel Plate Trail through Miami County. As city attorney, a job I only recently acquired, the trail strikes me as a very good selling point for Miami County when we begin talking to economic development prospects about the quality of life in our community. It will also bring significant tourism dollars into the community and serve to increase the property values of adjacent property.

All in all, this is a great project. It is receiving marvelous support throughout the county, with very few exceptions. The organization that has requested the grant has proven to me that they are dedicated to seeing this development completed. I would appreciate any consideration you could give their grant application.

Sincerely,

  
Bruce C. Embrey

*Miami County YMCA*

*34 E. 6th Street  
Peru, Indiana 46970  
765-472-1979*

January 6, 2004

Mr. J. Bryan Nicol  
Commissioner  
Indiana Department of Transportation  
100 N. Senate Avenue  
Indianapolis, IN 46024

Dear Mr. Nicol:

This is my letter of support for the Nickel Plate Trail in Miami County, Indiana. As an avid biker and walker, I am anxious to use the trail and I know many people who are just as excited. I have lived in and visited several communities where paved trails have proven to be big assets to the communities and were actively supported by families, individuals and the many entities needed.

As the executive director of the Miami County YMCA, I talk with many members who are also looking forward to the day when a trail is available in our community. Many of these people are avid runners, bikers, and rollerbladers who regularly search for new and safer places to exercise. I also know many families who enjoy doing things together and the trail is the perfect place for an outing with one or several families.

I am sure that the positives regarding a trail in Miami County will greatly outweigh any negatives and the trail will be a major asset to Peru and Miami County. Many adults, youths and families are looking forward to the Grand Opening of the Nickel Plate Trail in Miami County, Indiana.

Sincerely,



Richard L. Fullmer  
Executive Director



*A United Way Agency*

*YMCA Mission:  
To put Christian principles  
into practice through  
programs that build healthy  
body, mind and spirit for all.*

*City of Peru Mayor's Office*



*Jim Walker, Mayor*

*35 South Broadway, Peru, Indiana 46970*

1/9/04

J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 N. Senate Ave.  
Indianapolis, IN 46204

Dear Commissioner Nicol,

I am writing in support of the Nickel Plate Trail Project in the Peru/Miami County area.

Many residents have volunteered their time, energy and resources to see their dream of a completed trail through Miami County become a reality. They do this because they believe this project will benefit a large portion of our population. It will also have a positive impact on our economy and improve our quality of life.

I am impressed with the dedication they have shown to this project. I feel very strongly that this project is worthy of a Transportation Enhancement (TEA) Grant. I hope that you feel the same and lend your support to our efforts.

Thank you,

James R. Walker, Mayor  
City of Peru



## **Breakaway Bike & Fitness Shop**

154 N Grant Peru, In 46970 765-473-3848

January 9, 2004

J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 N. Senate Avenue  
Indianapolis, IN 46204

Dear Commissioner Nicol,

This letter is to support the development of the Nickel Plate Trail in Miami County. As the Owners of the only Bicycle shop in the County, we come in contact daily with supporters of this trail. Many of these supporters are now forced to travel outside of Miami County and the State of Indiana to find Recreational trails for enjoyment. Miami County as well as the State of Indiana are losing revenues daily from these recreationalists. Once these dollars are lost to other Counties and States we can never get them back. Let's start providing the citizens of Miami County opportunities in the there own community.

This 38 mile trail will connect many small communities that have that old town Indiana atmosphere. This is an ideal vacation attraction for individuals and families. Many people that live in large metropolitan cities have never been exposed to simple rural towns. These trials can give them opportunities to sight see while touring the trail.

I also must mention the health benefits. Exercise is such an important part of a healthy lifestyle. What greater way to visit these places than seated on a bicycle, your favorite equestrian mount, roller-blading, cross country skiing, or just walking. Even Retiree's will enjoy strolling with there Grandchildren talking about how life was when they were just a child.

It is our belief that the Nickel Plate Trail will improve the quality of life in Miami County, and attract Tourist from other areas of the State, Region, and Country. It will enhance Business and bring increased revenue at a time when it is most needed. We must pursue the opportunities available with enthusiasm and hope for the continued prosperity of our county. Other communities have found these trials to be positive additions to their communities. We ask that you support the trail project in Miami County.

Sincerely,

Chris & Janet Betzner

# MIAMI COUNTY SHERIFF'S DEPARTMENT

KENNETH F. ROLAND, SHERIFF

35 COURT STREET • PERU, INDIANA 46970  
911 EMERGENCY      ADMINISTRATION/JAIL 765-472-1322  
CENTRAL DISPATCH 765-473-5474 • FAX: 765-472-7520

January 9, 2004

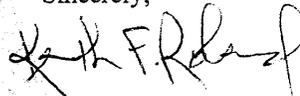
J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 N Senate Avenue  
Indianapolis, IN 46204

Dear Mr. Nicol:

I have recently learned that the Nickel Plate Trail will be applying for a grant from the Transportation Enhancement (TEA) Program. I would like to show my support to the Nickel Plate Trail in obtaining any monies through TEA to help complete the trail in our community.

Thank you in advance for any consideration you can lend in this matter.

Sincerely,



Kenneth F. Roland  
Sheriff

KFR:klb

Donald G. Musselman D.D.S.  
P. O. Box 125-Chandler Street  
Denver, Indiana 46926

J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 N. Senate Avenue  
Indianapolis, Indiana 46204

Dear Mr. Nicol,

I want to voice my support for the Nickel Plate Trail. There are many reasons for my very positive attitude regarding the Trail. One of the unique qualities of the Trail is the diversity of terrain along the 38 mile length of the Trail. The Trail spans the entire length of Miami County from the Howard County line at Cassville, to the Fulton County line just south of Rochester. The major geologic and topographic features of Miami County run in an east-west direction. The north-south orientation of the Trail provides a topographic cross section of the entire county. The Trail crosses two major rivers and numerous streams along the 38 mile route. The area around Birmingham contains the only virgin prairie area remaining in Miami County.

My wife and I have a particular fondness for the prairie area. Two years ago The Indiana Trails Fund received a \$9,000.00 grant from Ipalco to protect this unique prairie resource in Miami County. We have fenced in the most sensitive areas and constructed a path, foot bridges and a parking area large enough for several school busses. The Trail passes north-south thru this area between Deedsville and Macy.

There are many other areas like the Birmingham Prairie along the Trail's 38 mile route that can serve as outdoor education areas as well as provide recreational opportunities (and economic opportunities) for the entire county.

The Nickel Plate Trail will provide many benefits for not just Miami County, but the surrounding counties as well. It deserves enthusiastic support at the State and Federal levels.

Sincerely,



Dr. Donald G. Musselman

Cc: Nickel Plate Trail, Inc



Mr. J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 N. Senate Avenue  
Indianapolis, IN 46204

Re: Nickel Plate Trail – Miami County, IN

Dear Mr. Commissioner Nicol:

This letter is to serve as an endorsement by the International Circus Hall of Fame for the purpose of enhancing the Nickel Plate Trail throughout Miami County and connecting cities. We understand that this is one of the many steps in acquiring funding for such a large and needed project.

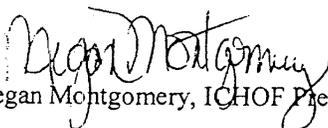
Miami County would only flourish with a pleasant recreation trail such as this. The trail would bring direct tourism into the quaint small town of Peru and its heritage. We are one of the only places in the country with such unique circus history through our professional show, circus museum and grounds, and amateur show.

The Nickel Plate would bring tourism to the county, enhancing revenue, and improving the quality of life for many whom would use it. The trail would connect cities and countryside through sidewalks and grasslands. This would be not only a way of exercising and socialization, but nature education as well.

We feel this trail is an asset of the future. Please accept our endorsement for the Nickel Plate Trail development.

Thank you for your consideration,

On behalf of all of us,

  
Megan Montgomery, ICHOF President

P.O. Box 700  
Peru, In. 46970

Phone: (765) 472-7553  
Fax: (765) 473-8751

E-Mail: [circus@cqc.com](mailto:circus@cqc.com)  
Website: [www.circushalloffame.com](http://www.circushalloffame.com)

Miami County Historical Society  
57 N. Broadway  
Peru, Indiana, 46970  
1-13-04

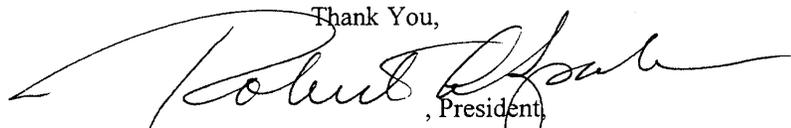
J. Bryan Nicol, Commissioner  
Department of Transportation  
100 N. Senate  
Indianapolis, Indiana 46204

Dear Mr. Nicol,

The Miami County Historical Society feels that the Nickel Plate Trail, Inc. is preserving an important part of the history of Miami County while at the same time providing economic and recreational opportunities for our citizens and those of the surrounding counties. The proposed Hike/Bike trail will connect Howard County on the south with Fulton County on the north. It will preserve a historic iron bridge over the Wabash River that was built in 1908. It will also preserve a valuable corridor for future transportation needs. We would like to add our voice to the choir of supporters of the Nickel Plate Trail.

Please help Miami County bring more recreational and tourist dollars into our county.  
Please support the Nickel Plate Trail.

Thank You,

  
Robert D. Spahr, President  
Miami County Historical Society

**Circus City Cyclists Bicycle Club  
154 N. Grant  
Peru, IN 46970**

January 2, 2004

J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 N. Senate Avenue  
Indianapolis, IN 46204

Dear Commissioner Nicol,

The Circus City Cyclists Bicycle Club is a group of dedicated bicyclists in Miami County who strongly believe in the benefits of bicycling for transportation, recreation, and exercise. There are about fifty of us and we unanimously support the creation of the Nickel Plate Rail Trail through Miami County.

As cyclists we are continuously looking for safe and scenic places to ride our bicycles and find there are not that many good choices in our area. The state highways are far too busy and the county roads, though scenic, are narrow with no shoulders at all for safety. We have had many close calls with motorists crowding us and sometimes even throwing things at us as they pass on the county roads.

We have taken excursions to ride on the Cardinal Trail and on some of the rail trails in surrounding states and are truly impressed with what they have to offer. We need something like that in this part of the state. We need a safe place to ride for both our children and ourselves.

We offer our full support to the efforts to create the Nickel Plate Trail.

*Miles H. Straly*  
Miles H. Straly, President  
Circus City Cyclists



**Carmine A. Gentile**  
**Superintendent**  
**James E. Emrich**  
**Assistant Superintendent for Instruction**  
**Phil Smitley**  
**Director of Operations**

## **Maconaquah School Corporation**

January 15, 2004

J. Bryan Nicol, Commissioner  
Indiana Department of Transportation  
100 N Senate Avenue  
Indianapolis IN 46204

Dear Mr. Nicol:

I would like to express my support for the Nickel Plate Trail project. As superintendent I support this effort and the positive implications it can have for our community as well as the school community.

The existence of this trail will allow Maconaquah High School, Middle School, and Elementary schools access to a number of opportunities:

- A walking trail for students
- A nature trail for science and elementary students
- A project opportunity for our high school agricultural and landscaping programs
- Additional extracurricular opportunities for athletic teams and exercise programs

In addition to the above mentioned possibilities our students and staff will be able to explore other options that will enhance the learning process for students.

We support this project and hope that you will give serious consideration to this request.

Sincerely,

Carmine Gentile  
Superintendent

CG/lf

***IN PURSUIT OF EXCELLENCE***

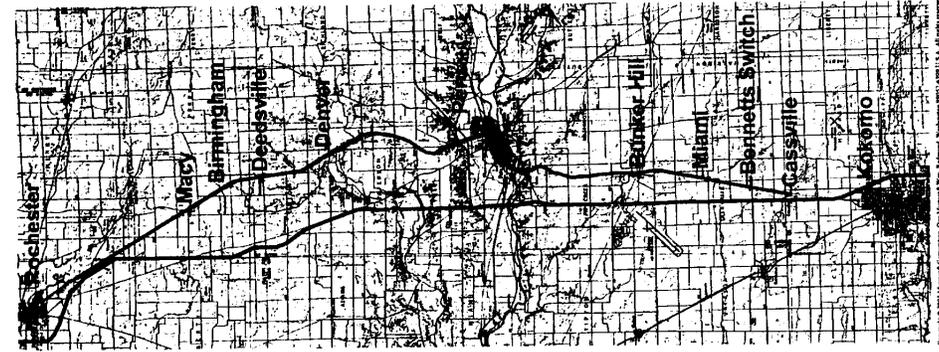
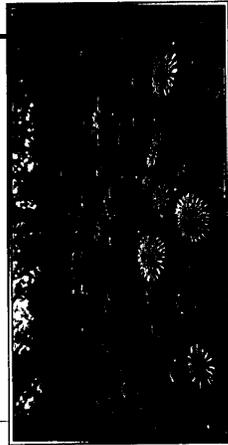
**7932 South Strawtown Pike, Bunker Hill, IN 46914-9667 Telephone (765) 689-9131 Fax (765) 689-0995**

Kuepper Exhibit B

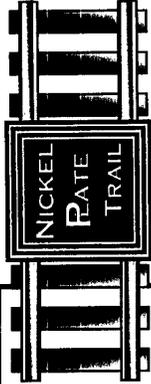


### Dream A Little

Can you imagine hiking 38 miles of peaceful, tree lined "linear park" from county to county? Jogging auto-free greenways edged with wildflowers? Bicycling and horseback riding over historic pathways connecting quaint little settlements? All this and more can become a reality with your help.



[www.nickelplatetrail.org](http://www.nickelplatetrail.org)

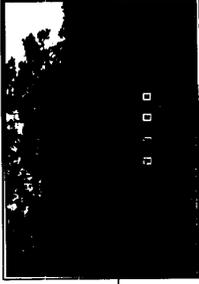


## Experience It For Yourself!



### What Are The Benefits Of A Linear Park?

- An economical boost to the area due to the trail-related business.
- A wonderful resource for community events.
- A traffic-free, level path for family recreation that is close to home.
- A non-motorized link between Howard, Miami, and Fulton counties.
- An unparalleled route for walking, jogging, and biking.
- An ideal place for horseback riding.
- A pleasant corridor for cross-country skiing.
- A habitat for wildflowers, birds, and wildlife.
- An opportunity to preserve a historic railway route.



### What Is The Proposed Nickel Plate Trail?

The Nickel Plate Trail is a potential 38 mile "linear park" on what used to be the Norfolk Southern right-of-way. The Nickel Plate begins at Cassville in Howard county and runs north through Miami county to Wabash Road in Fulton county.



**[J-24-2002]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**WESTERN DISTRICT**

BUFFALO TOWNSHIP,	:	No. 86 WAP 2001
	:	
Appellee	:	
	:	Appeal from the Order of the
	:	Commonwealth Court entered June 14,
v.	:	2001, at No. 1875CD2000, affirming the
	:	Order of the Court of Common Pleas of
	:	Butler County, Civil Division, entered on
CARL E. JONES, KATHRYN L. JONES,	:	July 31, 2000, at No. 00-50009.
LARRY W. TREDWAY, KASSIE	:	
TREDWAY, DAVID C. JONES, SYLVIA J.	:	
JONES, JERRY PURCELL AND MARGIE	:	
PURCELL,	:	
	:	ARGUED: March 6, 2002
Appellants	:	

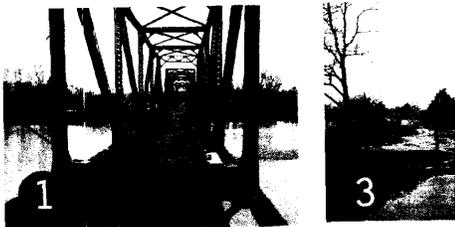
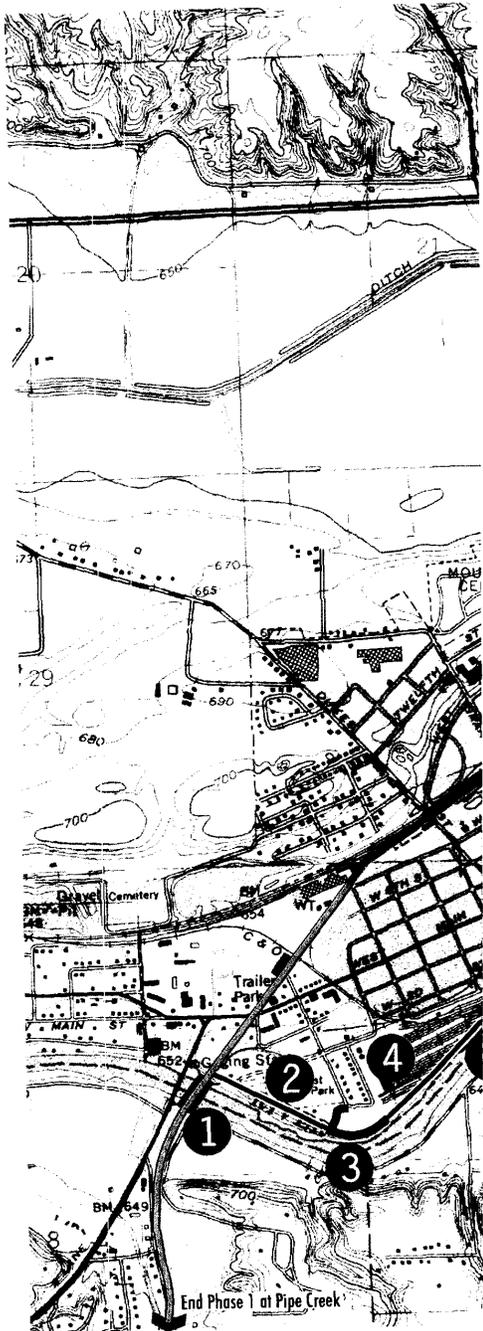
**DISSENTING OPINION**

**MR. JUSTICE SAYLOR**

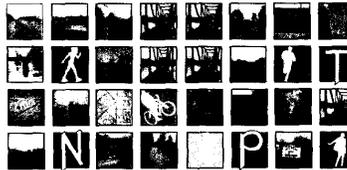
**DECIDED: DECEMBER 31, 2002**

In rejecting Appellants' contention that their right to a jury trial was implicated, the majority indicates that Appellants overlook that a request for preliminary or permanent injunction is addressed to a court's equitable jurisdiction, and there simply is no right to a jury trial in an equity action. See Majority Opinion, slip op. at 16-17. Appellants, however, do address this point, in effect, with the contention that it was improper for the common pleas court to invoke its equitable jurisdiction to resolve what is effectively a land title controversy.

I find merit in this argument. See Williams v. Bridy, 391 Pa. 1, 7, 136 A.2d 832, 836 (1957); see also Teacher v. Kijurina, 365 Pa. 480, 484-85, 76 A.2d 197, 200 (1950) ("title to real estate is ordinarily not properly raised by an action in equity unless it be by

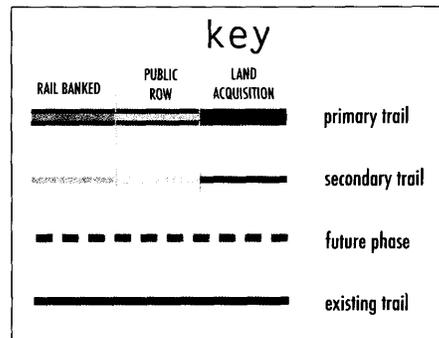


# NICKEL PLATE TRAIL



## PHASE 1 PLAN PERU, IN

January 2004

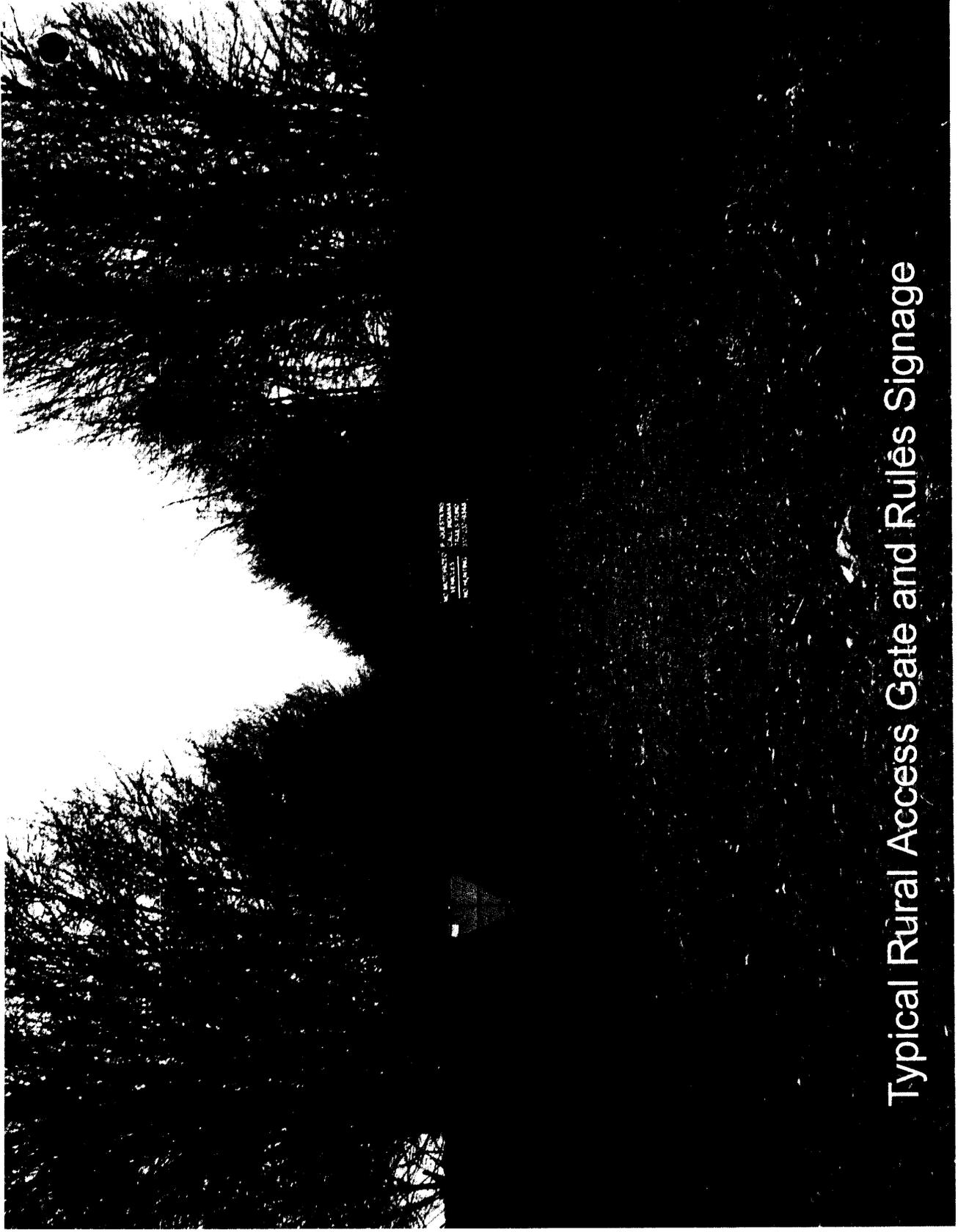


NORTH

SCALE:



Kuepper Exhibit D



Typical Rural Access Gate and Rules Signage

bill in partition, for the sound reason that in ejectment proceedings (the classic method of determining title to real estate), the parties are entitled to have disputed facts settled by a jury"); accord Dairy Queen, Inc. v. Wood, 369 U.S. 470, 471-73, 82 S. Ct. 894, 896-97 (1962). Indeed, in the present case, the common pleas court recognized the salient restrictions on its equitable jurisdiction, but merely circumvented them by indicating that the facts were clear and there was no room for doubt. See Buffalo Twp. v. Jones, EQ. No. 00-50009, slip op. at 6 (C.P. Butler Jul. 31, 2000). However, the question whether title reverted to Appellants by virtue of an abandonment of Conrail's right-of-way appears to have been keenly disputed, is treated as a fact-laden issue by the majority, and is itself within the range of issues in a land title controversy that must be determined by a jury. See generally Quarry Office Park Assoc. v. Philadelphia Elec. Co., 394 Pa. Super. 426, 436, 576 A.2d 358, 363 (1990).

In my view, the common pleas court's order could potentially be validly sustained (putting aside other questions of appropriate procedure) if the record established that Appellee maintained actual possession of the disputed tracts as of the time of the filing of its complaint. Cf. Siskos v. Britz, 567 Pa. 689, 701-02, 790 A.2d 1000, 1008 (2002) (establishing actual possession as the litmus in determining whether a right to a jury trial pertains in a land controversy). However, the common pleas court made no specific finding in this respect, and, although the record is somewhat vague on the point, there appears to be evidence that one or more of Appellants may have held actual possession for a substantial time period, including in the relevant time frame. See, e.g., N.T., May 24, 2000, at 21, 26, 64, 68; N.T., July 5, 2000, at 131, 154, 171-72; N.T., Jul. 24, 2000, at 11, 15, 24, 29. Accordingly, I am unable to join the majority in approving the grant of a permanent injunction on the record presented.

Mr. Justice Nigro joins this dissenting opinion.



Exhibit I

**Case**

**Docket No.**  
AB 33 158 X

**Title**

UNION PACIFIC RAILROAD COMPANY--ABANDONMENT EXEMPTION--IN MCPHERSON, ELLSWORTH AND RICE COUNTIES, KS

**Decision Summary**

(1) GRANTED LINSBORG'S REQUEST TO EXTEND THE INTERIM TRAIL USE NEGOTIATING PERIOD UNDER THE NITU UNTIL JULY 4, 2002; (2) DENIED MARQUETTE'S REQUEST TO EXTEND THE INTERIM TRAIL USE NEGOTIATING PERIOD UNDER THE NITU; AND (3) ADVISED UP AND MARQUETTE THAT WITHIN 10 DAYS FROM THE SERVICE DATE OF THIS DECISION, THEY MAY SUBMIT EVIDENCE EXPLAINING WHY THE SEGMENT OF LINE BETWEEN MILEPOST 504.5 AND MILEPOST 506.5 CONTINUES TO QUALIFY FOR A NITU.

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**Full Text of Decision**

32621

SERVICE DATE - MARCH 29, 2002

DO

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-33 (Sub-No. 158X)-(1)

UNION PACIFIC RAILROAD COMPANY-ABANDONMENT EXEMPTION-  
IN MCPHERSON, ELLSWORTH AND RICE COUNTIES, KS

Decided: March 28, 2002

On October 24, 2000, Union Pacific Railroad Company (UP) and Central Kansas Railway Limited Liability Company (CKR) jointly filed a petition seeking an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to permit UP to abandon, and CKR to discontinue service over, a 28.02-mile line of railroad: (1) between milepost 523.02, near Geneseo, and milepost 495.80, near Lindsborg (Hoisington Subdivision); and (2) between milepost 531.40 and milepost 530.60, near Lindsborg (McPherson Subdivision), in McPherson, Ellsworth, and Rice Counties, KS. By decision and notice of interim trail use or abandonment (NITU)<sup>(2)</sup> served February 9, 2001, the exemption was granted subject to trail use, public use, environmental conditions, and standard employee protective conditions.

In the February 9 decision, the Board authorized a 180-day period for the City of Lindsborg, KS (Lindsborg), to negotiate an interim trail use/rail banking agreement with UP for that portion of the right-of-way of the Hoisington Subdivision between milepost 495.8 and milepost 497.4, and for the entire right-of-way of the McPherson Subdivision. Also, a 180-day public use condition was imposed under 49 U.S.C. 10905.<sup>(3)</sup>

On February 13, 2001, the City of Marquette, KS (Marquette) filed a request for a NITU and for a public use condition. By decision and notice served March 7, 2001, the Board: (1) modified the February 9 NITU and authorized a 180-day period, until September 3, 2001, for Marquette to negotiate an interim trail use/rail banking agreement with UP for a 2-mile segment of the right-of-way of the Hoisington Subdivision between milepost 504.5 and milepost 506.5; and (2) denied Marquette's request for imposition of an additional public use condition.

By decision served September 4, 2001, the negotiating period was extended to

December 6, 2001, for Lindsborg and to January 2, 2002, for Marquette. Most recently, in a decision served on December 31, 2001, the negotiating period was extended to March 6, 2002, for Lindsborg and to April 2, 2002, for Marquette.

By letters filed on March 5, 2002, Marquette and Lindsborg request extensions of their negotiating periods in order to finalize the terms of their negotiated agreements. Both parties seek extensions of time for an additional 120 days. UP has indicated that it is agreeable to the extension requests.

By letter filed on March 18, 2002, UP notified the Board that, on January 8, 2002, it consummated the abandonment of the following segments of line: from milepost 523.02 to milepost 506.5 and from milepost 504.5 to milepost 497.4.

As to the request filed by Lindsborg, an extension of the trail use negotiating period may be granted as long as the Board retains jurisdiction over the involved right-of-way and the carrier is willing to continue negotiations. Inasmuch as UP has not consummated the abandonment and has indicated a willingness to continue to negotiate, the extension request can be granted. See Birt v. STB, 90 F.3d 580 (D.C. Cir. 1996); Rail Abandonments-Supplemental Trails Act Procedures, 4 I.C.C.2d 152, 157-58 (1987); and SSW Ry. Co.-Aban.-In Smith and Cherokee Counties, TX, 9 I.C.C.2d 406 (1992). Accordingly, Lindsborg's extension request will be granted.

As to Marquette's request, the predicate for interim trail use of rail lines is that the right-of-way be available-"rail banked"-for future active rail use. Such future use cannot be assured if the connections between the rail banked lines and the national rail system are withdrawn from the Board's jurisdiction. Because the railroad has now consummated the abandonment of the two segments of line surrounding the segment between mileposts 504.5 and 506.5, it appears that this segment may no longer qualify for a NITU, as it has been severed from the national rail system and active rail service evidently could not be restored. Accordingly, on this record, the extension sought by Marquette will be denied. UP and Marquette may, however, within 10 days of the service date of this decision, submit evidence explaining why the segment still qualifies for a NITU. Should the parties establish that the segment is in fact eligible for a NITU, a subsequent decision granting the requested extension will be issued.

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

It is ordered:

1. Lindsborg's request to extend the interim trail use negotiating period under the NITU is granted. The negotiating period is extended for a period of 120 days from March 6, 2002, until July 4, 2002.
2. Marquette's request to extend the interim trail use negotiating period under the NITU is denied.
3. UP and Marquette may, within 10 days from the service date of this decision, submit evidence

explaining why the segment of line between milepost 504.5 and milepost 506.5 continues to qualify for a NITU.

4. This decision is effective 20 days after its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams

Secretary

1. This proceeding formerly embraced STB Docket No. AB-406 (Sub-No. 12X), Central Kansas Railway Limited Liability Company-Discontinuance of Service Exemption-In McPherson, Ellsworth and Rice Counties, KS. By letter filed April 10, 2001, CKR's representative notified the Board that the discontinuance of service was consummated on

April 5, 2001.

2. See 16 U.S.C. 1247(d) and 49 CFR 1152.29.

3. The 180-day public use condition expired on September 7, 2001.

AB\_33\_158\_X

ORIGINAL

LAW OFFICE  
THOMAS F. MCFARLAND, P.C.  
208 SOUTH LASALLE STREET - SUITE 1890  
CHICAGO, ILLINOIS 60604-1194  
TELEPHONE (312) 236-0204  
FAX (312) 201-9695  
mcfarland@aol.com

205195

THOMAS F. MCFARLAND

April 16, 2002



By UPS overnight

Vernon A. Williams, Secretary  
Surface Transportation Board  
Case Control Unit, Suite 713  
1925 K Street, N.W.  
Washington, DC 20423-0001

Re: STB Docket No. AB-33 (Sub-No. 158X), *Union Pacific Railroad Company --  
Abandonment Exemption -- in McPherson, Ellsworth and Rice Counties, KS*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Supplement To Explanation Why Line Segment Qualifies For A Notice Of Interim Trail Use, Including Motion For Leave To File Supplement Out-Of-Time, for filing with the Board in the above referenced matter.

Kindly acknowledge receipt by date stamping the enclosed duplicate copy of this letter and return in the self-addressed stamped envelope.

Very truly yours,

Handwritten signature of Tom McFarland in cursive.

Thomas F. McFarland

TMcf:kl:enc:c:\wp8.0\875\lstrsb1

ENTERED  
Office of the Secretary

APR 17 2002

Part of  
Public Record

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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UNION PACIFIC RAILROAD )  
COMPANY -- ABANDONMENT ) DOCKET NO. AB-33  
EXEMPTION -- IN MCPHERSON, ) (SUB-NO. 158X)  
ELLSWORTH AND RICE COUNTIES, )  
KS )

---



**SUPPLEMENT TO EXPLANATION WHY LINE  
SEGMENT QUALIFIES FOR A NOTICE OF  
INTERIM TRAIL USE, INCLUDING MOTION  
FOR LEAVE TO FILE SUPPLEMENT OUT-OF-TIME**

---

CITY OF MARQUETTE, KANSAS  
FREDERICK L. PETERSON, City Clerk  
113 North Washington Street  
P.O. Box 401  
Marquette, KS 67464

*Trail Use Applicant*

THOMAS F. McFARLAND  
THOMAS F. McFARLAND, P.C.  
208 South LaSalle Street, Suite 1890  
Chicago, IL 60604-1194  
(312) 236-0204

*Attorney for Trail Use Applicant*

DATE FILED: April 17, 2002

BEFORE THE  
SURFACE TRANSPORTATION BOARD



UNION PACIFIC RAILROAD )  
COMPANY -- ABANDONMENT ) DOCKET NO. AB-33  
EXEMPTION -- IN MCPHERSON, ) (SUB-NO. 158X)  
ELLSWORTH AND RICE COUNTIES, )  
KS )

**SUPPLEMENT TO EXPLANATION WHY LINE  
SEGMENT QUALIFIES FOR A NOTICE OF  
INTERIM TRAIL USE, INCLUDING MOTION  
FOR LEAVE TO FILE SUPPLEMENT OUT-OF-TIME**

Pursuant to 49 C.F.R. § 1117.1, the CITY OF MARQUETTE, KANSAS (City) hereby files this Supplement to its explanation of why a two-mile line segment in the City of Marquette qualifies for a Notice of Interim Trail Use (NITU). This filing includes a motion for leave to file this Supplement out-of-time.

**BACKGROUND**

The two-mile segment in Marquette is part of a 28.02-mile rail line between Geneseo and Lindsborg, KS (Geneseo-Lindsborg line) for which an exemption for abandonment was issued in a Board decision served February 9, 2001. An NITU for the two-mile segment was issued in that decision.

The negotiation period for that NITU was extended on two occasions. On March 5, 2002, the City filed a request for another extension of the negotiating period.

In a letter filed on March 18, 2002, Union Pacific Railroad Company (UP), the owner of the Geneseo-Lindsborg line, notified the Board that on January 8, 2002 it consummated

abandonment of segments of that line on both ends of the two-mile segment.

In a decision served March 29, 2002, the Board denied the extension of NITU negotiating period sought by the City on the ground that a predicate for interim trail use of a railbanked line is that the line be available for future reactivation of rail service, and that it appeared that UP's consummation of abandonment on both ends of the two-mile segment may have severed that segment from the national rail system preventing future restoration of rail service. However, the Board provided that UP or the City could submit evidence explaining why the segment still qualifies for an NITU. The Board stated that if the parties were to establish that the segment is eligible for a NITU, a subsequent decision would be issued granting the requested extension.

**MOTION FOR LEAVE TO FILE SUPPLEMENT**

The Board provided that evidence explaining why the segment qualifies for an NITU is to be filed within 10 days from the date of service of the March 29, 2002 decision, i.e., by April 8, 2002. The City made a timely filing in response to that provision, but it was made without representation by counsel. Primarily on the advice of the State of Kansas, Department of Transportation (KDOT), which supports railbanking and interim trail use of the two-mile segment, the City retained counsel experienced in trail use and rail abandonment matters. However, counsel was not retained in time to comply with the 10-day filing requirement.

This constitutes a supplemental filing in behalf of the City after consultation with counsel. Good cause exists for granting leave to file this Supplement out-of-time. The City is not well-versed in trail use and rail abandonment matters. Until advised by KDOT, the City was not aware of the benefit of advice of experienced counsel in the circumstances. Upon being retained, counsel prepared and filed this Supplement with all due haste. The delay between this

filing and the due date for filing has not been excessive. Acceptance of this Supplement for filing will not prejudice any interest. There has been no filing which has opposed a determination that the two-mile segment is eligible for an NITU.

#### SUPPLEMENT

The two-mile segment continues to be eligible for an NITU because in the event of a future demand for rail service to or from the segment, such rail service can be reactivated in either of two ways.

First, such rail service can be reactivated to connect with UP's active rail line at McPherson, Kansas by utilizing public rights-of-way and a railbanked right-of-way. The public rights-of-way are Kansas Highway 175 from Marquette north to connection with Kansas Highway 4, thence east on Highway 4 to Lindsborg, Kansas. At Lindsborg, Highway 4 intersects the Meadowlark Trail, which extends south to point of connection with UP's active rail line at McPherson, Kansas.<sup>1/</sup> The proposed route for reactivation of rail service is illustrated on the attached Exhibit 1. The State of Kansas has agreed to cooperate with the City and UP to utilize public rights-of-way in conjunction with the named highways in the event of future reactivation of rail service. The right to reactivate rail service over the right-of-way of the Meadowlark Trail is provided by law. No private land would have to be acquired for reactivation of rail service under this scenario.

Secondly, such rail service can be reactivated to connect with UP at McPherson by means of UP utilizing its eminent domain authority to acquire railroad right-of-way between the

---

<sup>1/</sup> The trail sought to be acquired by the City of Lindsborg, KS in the instant proceeding would connect with the Meadowlark Trail.

Meadowlark Trail at or near Lindsborg and the two-mile segment at Marquette. The Meadowlark Trail would be used to reactivate rail service between Lindsborg and McPherson. The City would cooperate with UP financially in acquiring right-of-way for reactivation of rail service. UP possesses the requisite condemnation authority by virtue of Kans. Rev. Stats. §§ 66-501, *et seq.*

The Board should find that the foregoing alternate means of reconnecting the two-mile segment to the national rail system at McPherson satisfy the predicate of the National Trails System Act that a railbanked line be subject to reactivation for rail service in the event of future demand. Consistent with the expressed intent of that Act that the Board act to further railbanking and interim trial use wherever possible, the Board should find that the two-mile segment continues to be eligible for an NITU. On further review, therefore, the Board should extend the NITU negotiating period for that segment, as requested.

Respectfully submitted,

CITY OF MARQUETTE, KANSAS  
FREDERICK L. PETERSON, City Clerk  
113 North Washington Street  
P.O. Box 401  
Marquette, KS 67464

Trail Use Applicant

*Thomas F. McFarland*

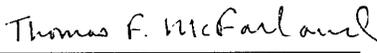
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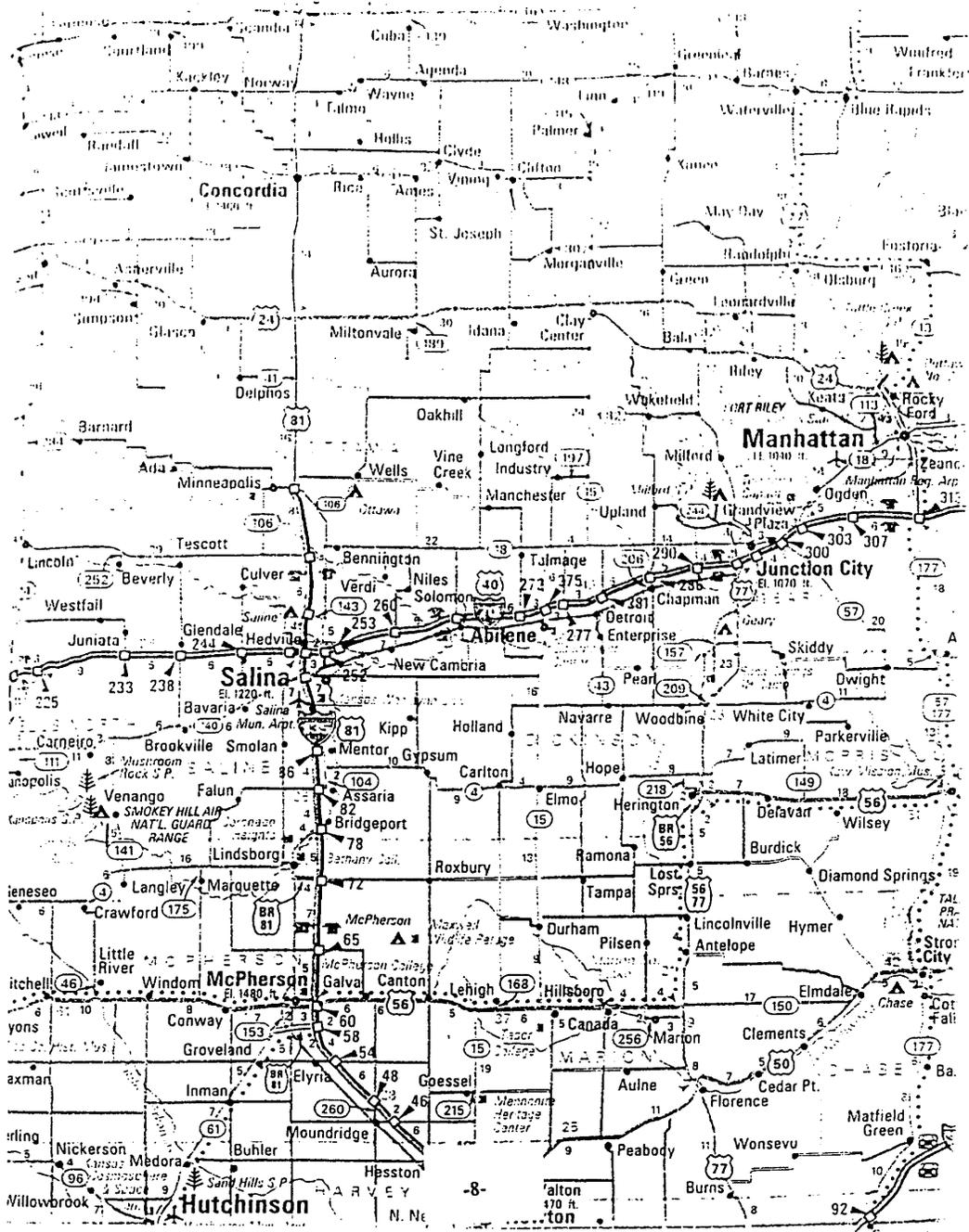
Attorney for Trail Use Applicant

DATE FILED: April 17, 2002

**CERTIFICATE OF SERVICE**

I hereby certify that on April 16, 2002, I served the foregoing document, Supplement to Explanation Why Line Segment Qualifies For A Notice Of Interim Trail Use, Including Motion For Leave To File Supplement Out-Of-Time, on Mack H. Shumate, Jr., Union Pacific Railroad Company, 101 North Wacker Drive, Suite 1920, Chicago, IL 60606, and John Jay Rosacker, Kansas Department of Transportation, Bureau of Transportation Planning, Thacher Building, 217 SE Fourth Street, 2<sup>nd</sup> fl., Topeka, KS 66603-3504, by UPS overnight mail.

  
\_\_\_\_\_  
Thomas F. McFarland



**Case**

**Docket No.**  
AB 33 158 X

**Title**

UNION PACIFIC RAILROAD COMPANY--ABANDONMENT EXEMPTION--IN MCPHERSON, ELLSWORTH AND RICE COUNTIES, KS

**Decision Summary**

GRANTED THE CITY OF MARQUETTE, KS'S REQUEST TO EXTEND THE INTERIM TRAIL USE NEGOTIATING PERIOD UNDER THE NITU FOR THE PORTION OF THE LINE BETWEEN MILEPOST 504.5 AND 506.5 UNTIL FEBRUARY 24, 2004.

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**Full Text of Decision**

33903  
DO

SERVICE DATE - AUGUST 28, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-33 (Sub-No. 158X)

UNION PACIFIC RAILROAD COMPANY--ABANDONMENT EXEMPTION--  
IN MCPHERSON, ELLSWORTH AND RICE COUNTIES, KS

Decided: August 27, 2003

On October 24, 2000, Union Pacific Railroad Company (UP) and Central Kansas Railway Limited Liability Company (CKR) jointly filed a petition seeking an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to permit UP to abandon, and CKR to discontinue service over, a 28.02-mile line of railroad: (1) between milepost 523.02, near Geneseo, and milepost 495.80, near Lindsborg (Hoisington Subdivision); and (2) between milepost 531.40 and milepost 530.60, near Lindsborg (McPherson Subdivision), in McPherson, Ellsworth, and Rice Counties, KS. By decision and notice of interim trail use or abandonment (NITU) served on February 9, 2001, the exemption was granted subject to trail use, public use, environmental conditions, and

standard employee protective conditions.

As pertinent here, on February 13, 2001, the City of Marquette, KS (Marquette), filed a request for a NITU. By decision and notice served March 7, 2001, the Board, *inter alia*, modified the February 9 NITU and authorized a 180-day period, until September 3, 2001, for Marquette to negotiate an interim trail use/rail banking agreement with UP for a 2-mile segment of the right-of-way of the Hoisington Subdivision between milepost 504.5 and milepost 506.5. By decisions served September 4, 2001, and December 31, 2001, the negotiating period was extended to January 2, 2002, and April 2, 2002, respectively.

By letter filed on March 5, 2002, Marquette again sought an extension of the negotiating period. In a decision served on March 29, 2002, the request was denied based on concerns about whether the 2-mile segment at issue was still eligible for a NITU. The decision added, however, that UP and Marquette could submit additional evidence explaining why the segment continued to qualify for a NITU, thus warranting the sought extension.

Marquette responded by letter on April 8, 2002, and filed supplemental evidence on April 17, 2002. On August 12, 2003, Marquette filed a letter indicating that UP has agreed to donate property in furtherance of its trail plans. Marquette requests another extension of 180 days to finalize terms of interim trail use.

Review of the record, as now supplemented, leads to the conclusion that the segment remains eligible for a NITU. Moreover, UP has indicated that it is agreeable to the extension request. Where, as here, the carrier has not consummated abandonment of the segment of the right-of-way at issue and is willing to continue trail use negotiations, the negotiating period may be extended. ¶ The parties have shown that the additional time is necessary to complete negotiations. An extension of time will promote the establishment of trails and rail banking consistent with the National Trails System Act, 16 U.S.C. 1247(d). Accordingly, the NITU negotiating period will be extended until February 24, 2004.

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

It is ordered:

1. Marquette's request to extend the interim trail use negotiating period under the NITU for the portion of the line between milepost 504.5 and 506.5 is granted. The negotiating period is extended until February 24, 2004.

2. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams  
Secretary



AB\_33\_158\_X

Exhibit J

COPY RECEIVED  
39th FLOOR KEY TOWER

APR 10 2001

NORM MALENG  
PROSECUTOR  
CIVIL DIVISION

The Honorable Robert Alsdorf

Hearing Date: March 20, 2001

Without Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

KING COUNTY, a municipal corporation and a political subdivision of the State of Washington,

Plaintiff,

vs.

WARREN and VICKI BERES, husband and wife,

Defendants.

No. 97-2-18410-0 SEA

~~PROPOSED~~ ORDER OF CONTEMPT OF COURT

THIS MATTER having come on for hearing without oral argument on March 20, 2001 before the undersigned court on plaintiff King County's Motion for Contempt of Court, and the court having considered the pleadings, and records and files herein, including the Declarations of Joe Wilson and Howard Schneiderman, and the attachments thereto, <sup>the opposition and the reply.</sup> rules as follows:

FINDINGS OF FACT

- The defendants failed to completely remove their fences and fence posts from the East Lake Sammamish rail right-of-way (the "subject property"), <sup>such removal was required by the terms of the Stipulation and Order of Judgment to which they agreed, in writing, and which was then entered as a final order of this Court.</sup>
- The defendants have also obstructed the subject property with a boat, potted plants, toys, and a barbecue, <sup>since the time of the Stipulation and Order of Judgment.</sup>

ORDER OF CONTEMPT OF COURT - 1

Norm Maleng, Prosecuting Attorney  
CIVIL DIVISION  
900 King County Administration Building  
500 Fourth Avenue  
Seattle, Washington 98104  
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COPY

1 3. King County has incurred expenses, including attorney fees and costs, ~~not in excess of~~  
2 ~~one thousand dollars (\$1,000.00)~~ in seeking enforcement of the Judgment and bringing forward this  
3 motion.

4 Now, therefore, the court rules as follows:

5 CONCLUSIONS OF LAW

- 6 1. The defendants have violated the Judgment signed by this court on July 19, 1999, *which*  
7 *judgment the Court signed based upon defendants' stipulation transcripts.* (initials)  
8 2. The defendants are in contempt of court pursuant to RCW 7.21.010(1)(b).

9 Now, therefore, the court orders as follows:

10 ORDER

11 1. The defendants shall completely remove their fences, fence posts, boat, toys, barbecue,  
12 potted plants, or any other obstructions from the subject property no later than ~~March 31, 2001~~, and  
13 *April 27, 2001* (initials), and shall refrain from further violating the Judgment.

14 2. Should the defendants fail to fully comply with this order, or if they further violate the  
15 Judgment, they shall pay ~~King County one hundred dollars (\$100.00) per day, RCW 7.21.030.~~  
16 *such sums as the Court may hereafter order for each day* (initials)  
17 *of contempt.* (initials)

18 3. The defendants shall immediately pay one thousand dollars (\$1,000.00) to King County  
19 *3. The Court will reserve ruling on costs and fees and sanctions* (initials)  
20 *to partially reimburse the County its reasonable costs and attorney fees pursuant to RCW*  
21 *until subsequent motion, based upon whether there is any further or* (initials)  
22 *7.21.030(2)(d) continuing contempt by defendants.* (initials)

23 4. This Order shall be self-executing.

24 DONE in open court this 6<sup>th</sup> April day of March, 2001.

25   
26 HON. ROBERT ALSDORF

27 Norm Maleng, Prosecuting Attorney  
28 CIVIL DIVISION  
29 900 King County Administration Building  
30 500 Fourth Avenue  
31 Seattle, Washington 98104  
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Presented by:  
NORM MALENG  
King County Prosecuting Attorney

By: *Howard P. Schneiderman*  
Howard P. Schneiderman, WSBA #19252  
Senior Deputy Prosecuting Attorney

*Scott D. Johnson*  
Scott D. Johnson, WSBA #22956  
Deputy Prosecuting Attorney  
Attorneys for King County

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SUPERIOR COURT

NORM MALENG  
PROSECUTING ATTORNEY  
CIVIL DIVISION

The Honorable Robert Alsdorf  
Hearing Date: October 2, 2001  
Without Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

KING COUNTY, a municipal corporation and a  
political subdivision of the State of Washington,  
  
Plaintiff,  
  
vs.  
  
WARREN and VICKI BERES, husband and wife,  
  
Defendants.

No. 97-2-18410-0 SEA

~~PROPOSED~~ SECOND ORDER OF  
CONTEMPT OF COURT

THIS MATTER having come on for hearing without oral argument on October 2,  
2001 before the undersigned court on plaintiff King County's Motion for Contempt of Court,  
and the court having considered the pleadings, and records and files herein, including the  
Declarations of Shelley Marelli, Joe Wilson and Howard Schneiderman, and the attachments  
and exhibits thereto, rules as follows:

*and defendants having not asked for hearing or oral argument, but having simply submitted written opposition and declarations.*

FINDINGS OF FACT

1. The defendants have intentionally obstructed <sup>access across</sup> the subject property since at least  
September 14, 2001, by installing ropes, approximately 3' - 4' from the ground, across the

SECOND ORDER OF CONTEMPT OF  
COURT - 1

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ORIGINAL

1 subject property. The defendants also attached two signs to the ropes reading "PRIVATE  
2 PROPERTY. KEEP OUT".

3 2. Since at least September 14, 2001, the defendants have further and  
4 intentionally obstructed the subject property with a barbecue, childrens' toys, and a garden  
5 hose.

6 3. King County has incurred expenses, including attorney fees and costs, in  
7 excess of three thousand seven hundred and fifty dollars (\$3,750.00) in seeking enforcement  
8 of the stipulated judgment, this court's April 6, 2001 order of contempt of court, and bringing  
9 forward two contempt of court motions.

10 4. Sanctions are necessary and warranted to coerce the defendants to comply  
11 with the judgment and previous order of contempt of court. *Neither the stipulated judgment  
12 originally entered herein, nor this  
13 court's prior Order of Contempt, was  
limited in scope to the private or personal benefit of King County employees. Each was designed to  
allow public access. No reasonable person could believe otherwise. The yellow ropes and the "Private  
access and King County access. No reasonable person could believe otherwise. Defendants' argument  
of "health" reasons for their actions is similarly frivolous; no competent health-related evidence has  
been offered by defendants.*

CONCLUSIONS OF LAW

14 1. The defendants have intentionally violated the Judgment signed by this court  
15 on July 19, 1999.

16 2. The defendants have intentionally violated the court's April 6, 2001 contempt  
17 of court order.

18 3. The defendants are again in contempt of court pursuant to RCW  
19 7.21.010(1)(b).

20 Now, therefore, the court orders as follows:

ORDER

21 1. The defendants shall completely remove their ropes, signs, toys, barbecue and  
22

SECOND ORDER OF CONTEMPT OF  
COURT - 2

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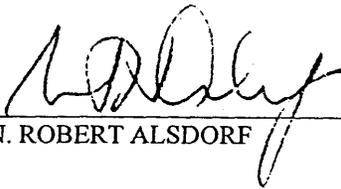
1 hose and any other obstructions from the subject property no later than October 8, 2001, and  
2 shall refrain from further violating the Judgment.

3 2. The defendants shall <sup>by October 15, 2001</sup> immediately pay three thousand seven hundred and fifty  
4 dollars (\$3,750.00) to King County to partially reimburse the County for its reasonable costs  
5 and attorney fees pursuant to RCW 7.21.030(2)(d).

6 3. The defendants shall <sup>by October 15, 2001</sup> immediately pay \$2,000 <sup>to be held by the Clerk of the King County</sup>  
7 ~~in sanctions for violating the~~ <sup>Superior Court, to be available to King County to pay legal and other costs of future</sup>  
8 ~~judgment and the court's April 6, 2001 order of contempt of court.~~ <sup>enforcement of this original</sup>  
9 ~~Stipulated Judgment and this Court's prior Order of Contempt; this is a coercive contempt~~  
10 ~~remedy, that is appropriate because of defendant's willful and frivolous violations to date.~~  
11 This Order shall be self-executing. (Pall)

12 5. Should the defendants fail to fully comply with this order, or with the  
13 judgment, they shall be subject to additional fees, costs and sanctions. RCW 7.21.030.

14 DONE in open court this 3<sup>rd</sup> day of October, 2001.

15   
16 HON. ROBERT ALSDORF

17 Presented by:  
18 NORM MALENG  
19 King County Prosecuting Attorney

20 By: \_\_\_\_\_  
21 Howard P. Schneiderman, WSBA #19252  
22 Senior Deputy Prosecuting Attorney

\_\_\_\_\_  
Scott D. Johnson, WSBA #22956  
Deputy Prosecuting Attorney  
Attorneys for King County

} submitted with  
} master papers

SECOND ORDER OF CONTEMPT OF  
COURT - 3

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