

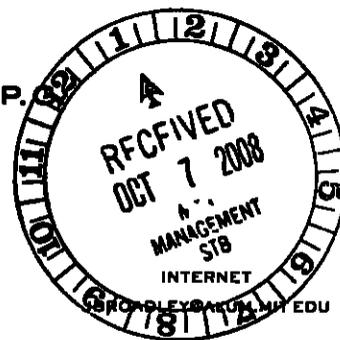
LAW OFFICES

JOHN H. BROADLEY & ASSOCIATES, P.C.

CANAL SQUARE
1054 THIRTY-FIRST STREET, N.W.
WASHINGTON, D.C.
20007

223736

(202) 333 6025
(202) 333-5685 FAX



October 6, 2008

JOHN H BROADLEY

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

Re F.D. 35181, The Indiana Rail Road Company -- Petition for Declaratory Order

Dear Ms. Quinlan

Enclosed for filing please find

- 1 The original and ten copies of the Petition of the Indiana Rail Road Company for a Declaratory Order,
- 2 The original and ten copies of the Verified Statement of John Rickoff in support of the Petition,
- 3 A check in the amount of \$1400 payable to the Surface Transportation Board,
- 4 A disc with a copy of the petition and verified statement in both Word and PDF format, and
- 5 An extra copy of the petition and verified statement which I request you date stamp and return with our messenger

Should you have any questions concerning this matter, please don't hesitate to call me at the above number

FEE RECEIVED

OCT 07 2008

**SURFACE
TRANSPORTATION BOARD**

Enclosures

Yours very truly,

John Broadley

FILED

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Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.



The Indiana Rail Road Company -- Petition for
A Declaratory Order

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) Finance Docket No 35181
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PETITION OF THE INDIANA RAIL ROAD COMPANY
FOR A DECLARATORY ORDER

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TRANSPORTATION BOARD

John Broadley
John H Broadley & Associates, P C
1054 31st Street NW, Suite 200
Washington, D C 20007
Tel. 202-333-6025
Fax 301-942-8280
E-mail Jbroadley@alum.mit.edu

Dated October 6, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

The Indiana Rail Road Company -- Petition for
A Declaratory Order

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Finance Docket No 35181

**PETITION OF THE INDIANA RAIL ROAD COMPANY
FOR A DECLARATORY ORDER**

The Indiana Rail Road Company ("INRD"), by its undersigned attorneys, hereby petitions the Board to institute a declaratory order proceeding and to issue a declaratory order that a track INRD proposes to construct from its east-west main line at Dugger, IN to a new Peabody coal operation in the coal bearing area south of the INRD east-west main line will be a spur track exempt from Board approval under 49 U S C 10906, and not the construction of a line of railroad requiring Board approval under 49 U S C 10901 In support of this Petition, the Board is respectfully referred to the argument below and the attached Verified Statement of John Rickoff ("Rickoff V S ")

The Board has jurisdiction under 5 U S C 554(e) and 49 U S C 721(a) to institute a declaratory order proceeding and issue an order to terminate a controversy or remove uncertainty The Board has instituted declaratory order proceedings in the past to resolve questions similar to that presented here -- whether a proposed new track would be an exempt spur under 49 U.S.C. 10906, or would be a line of railroad requiring Board approval under 49 U S C 10901 See e g *New York City Economic Development Corporation -- Petition for Declaratory Order*, STB Finance Docket No 34429 (STB served July 15, 2004), 2004 WL 1585810 (S T B) (*NYCEDC Declaratory Order*)

BACKGROUND

1. The Indiana Rail Road Company

INRD is a Class II carrier with two main lines INRD's east-west main line runs from Indianapolis, IN southwest to Bloomington, IN where it turns west and continues through Linton, IN into Sullivan County to Sullivan, IN and ultimately to Newton, IL where it connects with Canadian National ("CN"), formerly Illinois Central ("IC") INRD acquired its east-west main line from IC in 1986 (Indianapolis to Sullivan, IN) and 1991 (Sullivan, IN to Newton, IL) INRD's north-south main line begins in Chicago, IL and runs south over trackage rights to Terre Haute, IN and then southeast over owned track to Bedford, IN and then southeast to Louisville, KY over trackage rights INRD acquired its north-south main line from Canadian Pacific's ("CP") Soo Line subsidiary in 2006 INRD's two main lines cross at Linton, IN (Rickoff V S ¶ 2) A map of the INRD system is attached as Exhibit 1 to the Rickoff V S which accompanies this Petition

Between Linton, IN and Sullivan, IN there are extensive coal deposits on both sides of the INRD east-west main line Mines in these coal bearing areas historically have been served by spurs and private tracks from the INRD east-west main line (Rickoff V S ¶ 9) When an economically mineable deposit is exhausted the spur track or private track serving it is removed and the mine area is reclaimed In some cases the track is left in place to handle future business (Rickoff V S ¶¶ 9-12)

Indiana coal from mines served from INRD's tracks typically finds a market in Indiana INRD itself serves four coal-fired electric generating plants and connects with Indiana Southern Railroad that serves other electric generating stations in Indiana (Rickoff V.S. ¶ 3)

2 The Bear Run Pit Project

Peabody Energy is the largest private sector coal company in the world Through its Black Beauty Coal Company subsidiary, Peabody is the largest producer of coal in the Illinois Basin, producing over 22 million tons per year See www.peabodyenergy.com (site visited 10/1/08)¹ One of Peabody's mines in Indiana, the Farmersburg mine, is running out of minable reserves at its current operation The current Farmersburg mine operation is located on INRD's north-south line south of Terre Haute, IN and moves coal onto INRD through the coal loadout at Blackhawk, IN. To replace this capacity Peabody is planning to develop a new operation in the coal bearing area south of INRD's east-west main line The new operation will be named "Farmersburg Mine, Bear Run Pit " (Rickoff V S ¶ 4)

Peabody has asked INRD to build a spur track ("Bear Run spur track") to connect the coal loadout and loop track Peabody will build to serve the Bear Run Pit to the INRD east-west main line east of Dugger, IN (Rickoff V S ¶ 5) The planned location of the Bear Run Pit coal loadout and loop track is marked on the aerial photograph attached as Exhibit 2 to the Rickoff V S as is the location of the proposed Bear Run spur track The map attached as Exhibit 3 to the Rickoff V S shows the location of the proposed facilities with respect to each other, with respect to the rail lines in the area, and with respect to the old Dugger Mine in the same coal bearing area, including the spur track from the INRD east-west main line and the private track serving it

3 The Bear Run Spur Track

INRD has an agreement in principle with Peabody to build the spur track connection that Peabody has requested (Rickoff V S ¶ 5) The proposed Bear Run spur track would leave INRD's east-west main line east of Dugger, IN by a Wye to permit trains loaded with Bear Run

¹ In this Petition we will use "Peabody" as a short-hand term for Peabody Energy or its Black Beauty Coal Company subsidiary

Pit coal to go either east towards Indianapolis and the connection with Indiana Southern Railroad ("ISRR"), or west to Hoosier Energy's generating station at Merom, IN and Ameren's Newton Generating Station at Newton, IL. Coal could also move via INRD's Midland Sub-Division onto INRD's north-south line where INRD serves the Duke Energy Corporation's Wabash River Generating Station at Terre Haute, IN. This larger picture can be seen on Exhibit 1 to the Rickoff V S

The Bear Run spur track will run west from INRD's east-west main line for approximately one mile using approximately ½ mile of the right-of-way of an earlier Peabody-owned private track that served the now abandoned and reclaimed "Dugger Mine" from the east. After approximately a mile the new spur track will turn south and run almost directly to the Bear Run Pit loadout and loop track. The total length of the Bear Run spur track will be approximately 5 miles (27,174 track feet including both branches of the Wye connection to the main line) (Rickoff V.S. ¶ 7)

The Bear Run spur track will be used to move loaded coal trains from the Bear Run loadout and loop track to the INRD main line where the trains will then be routed to one of the power plants on INRD's lines or to a connection with ISRR where they will move to power plants on ISRR's lines or to connections with other railroads. The only inbound movements to the mine will be of empty coal trains.

The Bear Run spur track will be built to accommodate the heavily loaded coal trains that Peabody and its electric utility customers want to use to move coal from Bear Run Pit to electric power plants efficiently. Both the Peabody loop track and the Bear Run spur track will be built to accommodate this heavy loading use, likely with 132 lb or heavier rail. The only trains that will use the Bear Run spur track will be coal trains and empties serving the Bear Run Pit. No

other mines or other industry will be served from the track. The track will not be signaled and safe operations will be assured by track warrant control. (Rickoff V S ¶¶7, 13)

It is anticipated that most of the 5 mile Bear Run spur track will be built on right-of-way owned or controlled by Peabody. At present, Peabody owns or controls 3.26 miles of the proposed right-of-way, and INRD expects that Peabody will acquire an additional mile of right-of-way. Thus, Peabody will provide approximately 4.2 miles of the right-of-way out of a total length of the Bear Run spur track of approximately 5 miles. INRD's estimate of the cost of construction of the Bear Run spur track is \$9 - \$12 million. (Rickoff V S ¶ 7) INRD anticipates that either Peabody or Peabody's customers will enter into rail transportation contracts that will make it possible to finance the project. The details of these arrangements are not yet final. (Rickoff V.S ¶ 5)

In the event the Bear Run spur track is not built, or is delayed beyond the July 1, 2009 planned start-up date of the Bear Run Pit operation, Peabody will move the coal by truck to the present Farmersburg Mine preparation plant and rail loadout. The distance of this truck haul is approximately 34 miles and would go through several Indiana communities, including Dugger, Sullivan, Shelburn and Farmersburg. The need to truck the coal this distance would have a substantial impact on the financial viability of the Bear Run Pit operation, and also have adverse environmental consequences. (Rickoff V S ¶ 6)

SPUR TRACK VERSUS LINE EXTENSION (The Law)

The Interstate Commerce Act does not define the terms "spur, industrial, team, switching or side tracks" as used in 49 U.S.C. 10906. These terms and the exemption now found in 49 U.S.C. 10906 were first enacted by Section 402 of the Transportation Act of 1920, 41 Stat. 477, and formed part of former 49 U.S.C. 1(18). The 1920 legislation also did not define the terms

The courts and the Interstate Commerce Commission ("ICC"), and more recently this Board have given meaning to the terms through a number of decisions addressing specific factual situations. In the last analysis, however, the courts and administrative agencies have all recognized that these cases must be decided on a case by case basis. There is no bright line rule that provides an answer in all cases. While there are some bright line rules, they cover only a limited number of situations. The following discussion outlines the general framework for decision making as expounded by the Supreme Court, the courts of appeals and the administrative agencies.

The Supreme Court

In *Texas & Pacific Ry Co v Gulf, Colorado & Santa Fe Ry Co*, 270 U S 266 (1926) ("*Texas & Pacific*"), the Supreme Court held that the term "spur, industrial team, switching and side tracks" must be interpreted in light of the Congressional policy established in the Transportation Act of 1920. According to the Court, the underlying objective of Congress was to preserve the earning power and protect the financial resources of rail carriers by regulating the construction of unnecessary lines and lines that would inflict competitive injury on other rail carriers. *Texas & Pacific* 270 U S at 277. In light of that policy, the Supreme Court held that the construction of new track was of national concern under two circumstances (*Id* at 278)

[W]here the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern.

Under the Court's formulation, the invasion of territory already served by another carrier would be considered a line extension and subject to Commission approval, as would the construction of new trackage which had the purpose and effect of a "substantial extension of a line into new territory." *Id* at 278. There was no question that the industrial zone into which

Santa Fe wanted to build a track was already served by another carrier (Texas & Pacific) and that construction of the track would divert substantial revenues from Texas & Pacific. The Court had no difficulty under those circumstances in concluding that the Santa Fe line was a line extension and required ICC approval under 49 U.S.C. 1(18). The Court did not address the issue of whether the Santa Fe's project would have required ICC approval if the industrial zone had not already been served by another railroad. It thus left unexamined the question of what type of project is a "significant extension" and what comprises "new territory" when there is no invasion of the territory of another carrier.

Ten years after the *Texas & Pacific* decision, the Supreme Court again considered the question of what was an exempt spur and what was a line extension, this time in *United States v. State of Idaho*, 298 U.S. 105 (1936) (*State of Idaho*). The issue concerned whether the abandonment of a nine mile track between Oregon Short Line's main line and a coal mine was within the ICC's jurisdiction (as the abandonment of a line of railroad) or was within the jurisdiction of the state of Idaho as an intrastate "spur" track not subject to the ICC's jurisdiction. The ICC held that the track was a line of railroad and that abandonment jurisdiction was in the Commission. On review, a three judge district court reversed the ICC and held that the track was a spur track. *State of Idaho v. United States*, 10 F. Supp. 712 (D. Utah 1935). On appeal, the Supreme Court upheld the district court's decision stating (*State of Idaho*, 298 U.S. 105 at 109)

The District Court concluded that the Talbot branch was constructed and maintained for the purpose of serving a single industry, that practically no other industry is served, that this trackage does not invade new territory, that its continued operation or abandonment is of local and not of national concern, that it is therefore a "spur", and hence, that the order of the Interstate Commerce Commission was in excess of its jurisdiction. The court annulled the order and enjoined its enforcement. 10 F. Supp. 712

The decree should be affirmed, because on findings amply supported by the evidence the trackage is a spur

Reference to the district court's discussion of the case shows that the facts that convinced the Supreme Court that the line was a spur and not a line extension were as follows (10 F Supp 712, 713-14)

This line was built by the United States Railroad Administration in 1918-20 to serve the coal mines at Talbot, while the railroad was under federal control, pursuant to a contract with the owners of the mines. It runs through a mountainous, sparsely settled district in Eastern Idaho. The grade of the last two miles is over 2 per cent, and the topography forbids any further extension. The total cost was \$300,000, of which the coal company agreed to pay a part and also to furnish the right of way on the understanding that the railroad company could tear up the tracks in the event the coal company failed to supply a minimum specified tonnage. The terms of the contract resulting in the construction indicate that the line was built exclusively to serve only the mines in question.

It further appears that at no time has there been a train schedule or regular service of any kind over this line. The railroad company maintains no buildings, loading platforms, or agents at any point on this line, and has no telegraph line, express, passenger or mail service.

The two decisions, *Texas & Pacific* and *State of Idaho*, were both written by Justice Brandeis, thus it is a reasonable conclusion that the construction of a stub ended line of 9 miles length to serve a single coal mine in a rural area adjacent to the main line of a railroad does not constitute a "significant extension" into "new territory" as the Court used that term in *Texas & Pacific*.

The Courts of Appeals

In *Chicago, Milwaukee, St Paul & Pacific R Co v Chicago & Eastern Illinois R Co*, 198 F.2d 8 (7th Cir 1952) (*Chicago Milwaukee*), the court of appeals dealt with C&EI's construction of a new track to serve the new Public Service of Indiana generating plant at Vigo, IN. The district court held that the 3 ½ mile track was a spur and did not invade the territory of

the Milwaukee or constitute a significant extension into new territory In the course of its decision, the Seventh Circuit quoted approvingly the Kentucky Supreme Court decision in *Jefferson County v. Louisville & N R Co*, 245 S W 2d 611(1951) In that case the court had held that the construction of a 5 ½ mile track from a yard to a new General Electric plant was a spur (*Chicago, Milwaukee*, 198 F.2d at 615)².

'We think the cases of *State of Idaho v United States*, D C 10 F Supp 712, 715, and *Missouri, K T R Co v Texas & N O R Co* 5Cir, 172 F 2d 768, are more nearly in point with this case In the Idaho case it was held that a railroad track nine miles in length, built to serve a single industry, was a 'spur' or 'industrial' track within the meaning of the Federal statute In that case the Court said 'Each case, of course, turns upon its particular facts '

'In the Missouri, K T R Co case it was held that a proposed line of track 5000 feet in length across a two square mile area near a city, to serve three or four industries and to be built in accordance with promises inducing industries to locate in that area, was not an 'extension' of the railroad's line, but was a 'spur' or 'industrial' track

'Under the circumstances of this case, we are of the opinion the proposed new track is a 'spur' or 'industrial' track within the meaning of the Federal Transportation Act, and that it is not necessary that the Company obtain a certificate of public convenience and necessity before constructing the line ' (245 S W 2d 615)

Hughes v Consol-Pennsylvania Coal Company, 945 F 2d 594 (3d Cir 1991), is one of the most recent court of appeals decisions addressing the construction of a track into a territory not served by another carrier This was a complex case involving allegations of fraud and RICO violations by persons acquiring railroad right of way Right of way had been acquired and a track built over 14.5 miles to serve a coal mine Representations had been made to private property owners in connection with the right of way acquisition that Monongahela (a rail carrier)

² The quotation is from *Jefferson County* but is taken from the Seventh Circuit's decision in *Chicago, Milwaukee*

had power to condemn private property. The plaintiff property owners alleged that this was not the case because, *inter alia*, Monongahela did not have ICC approval to construct the new track in question, and because the track was outside Monongahela's chartered territory. The court of appeals disagreed with the plaintiffs' contention that ICC approval was required. The court concluded that (945 F 2d at 612)

If, however, the track is "designed and used for loading, unloading, switching, and other purposes connected with, and incidental to, but not actually and directly used for [transporting goods between two different points of shipment]," that track is a spur and lies outside ICC jurisdiction. *Nicholson*, 711 F 2d at 367-368. Among other factors to be considered in determining whether it is a spur are the length of the addition, whether the proposed addition will serve only a single customer, and whether the carrier had been requested by the customer to provide service. See *Pennsylvania RR Co v Reading Co*, 132 F Supp. 616, 621-22 (E.D. Pa. 1955).

The district court correctly found that the proposed track was a spur. Though a track's designation itself does not determine its character (extension or spur), the track in question is sufficiently local to preclude ICC jurisdiction. *Nicholson*, 711 F 2d at 368, n 12. The track runs from the Bailey Mine in Grand Enon, Pennsylvania, to Waynesburg. It runs only 14.5 miles (n 1). It is located wholly intra-state. It functions as a route to unload and transfer shipments from the Waynesburg line. Only Monongahela uses it. And it serves only Consol. In short, none of its features evokes "national concern." *Texas & Pacific*, 270 U.S. at 277, 46 S.Ct. at 266. The district court was correct, ICC approval was unnecessary.

n 1 The landowners cite *Central of Georgia Railway*, 336 I.C.C. 623 (1970) for the proposition that a 14.5 mile track could not be a spur. In *Central of Georgia Railway*, the ICC concluded that a 14.45 mile track costing more than \$3 million was an extension. The decision was based on the length of the track and the cost alone. We refuse to adopt this reasoning since a track's designation depends on its use, not the length and cost alone.

The Administrative Agencies

Since the passage of the Interstate Commerce Commission Termination Act in 1994, disputes over the status of a track as an exempt "spur" or a regulated "line of railroad" have migrated to the Board. The courts no longer have jurisdiction to hear a suit by a private party to address the question except through review of Board orders.

In *NYCEDC Declaratory Order*, the Board considered the character of a 1 mile track NYCEDC proposed to build from the end of the existing Staten Island Railroad (SIRR) into the New York City land fill at Fresh Kills on Staten Island. The Board adopted the analysis previously adopted by the courts and added flesh to the bones.

Specifically, the Board stated (*NYCEDC Declaratory Order* at 5) (emphasis added)

In Texas & Pacific Ry v Gulf, Colo & S F Ry, 270 U S 266, 278 (1926) . . . the United States Supreme Court found that track should be considered to be a line of railroad "where the proposed trackage extends into territory not theretofore served by the carrier, particularly where it extends into territory already served by another carrier." Here, the construction of track to Fresh Kills will not extend the territory of the newly reactivated SIRR. Staten Island is a geographically distinct area--a small island historically served by only one freight railroad (the SIRR)--and so our focus is properly on the area as a whole, rather than on the Fresh Kills site.

The fact that the City-owned DSNY facility at Fresh Kills happens to be located slightly more than a mile from the end of the line--and not ancillary to a point in the middle of the line--does not, by itself, make this project a line extension. Rather, it is well settled that the agency must consider a variety of relevant factors in determining the spur vs line of railroad issue. The agency and the courts look primarily at the use of the track ("the "use test"), and at a track's physical characteristics in making the determination of whether it should be categorized as a line of railroad or a spur or switching track.

The Board also looks at the use of the track and at its physical characteristics, recognizing that no single criterion is dispositive. Characteristics the Board has looked at include (*NYCEDC Declaratory Order* at 6)

the length of the track, how many shippers will be served, whether it is stub-ended, whether it was built to invade another railroad's territory, whether the shipper is located at the end of the track (indicating that the sole purpose of the track is to reach that shipper's facility rather than a broader market), whether there is regularly scheduled service or not, who owns and maintains the track, etc

**THE PROPOSED BEAR RUN SPUR TRACK WILL
BE AN EXEMPT SPUR LINE NOT A LINE OF RAILROAD**

The proposed Bear Run spur track closely resembles the Talbot Branch of the Oregon Short Line Railroad that the Supreme Court found to be an exempt spur in *State of Idaho*, 298 U S 105 (1936) From the Rickoff Verified Statement we see

- Like the Talbot Branch, the Bear Run spur track will be built pursuant to an agreement with the shipper (Rickoff V S ¶ 5)
- Either Peabody or its customers will enter into contracts for transportation that will make financing possible The shipper provided some of the financing in the case of the Talbot Branch (Rickoff V S ¶ 5)
- Like the Talbot Branch, the shipper to be served by the Bear Run spur track will provide a large part of the right-of-way needed for the track -- 4 2 miles out of approximately 5 miles total length of the spur track (Rickoff V S ¶ 7)
- Like the Talbot Branch, the Bear Run spur track will be stub ended, terminating at the Peabody loop track and coal loadout at the Bear Run Pit (Rickoff V S ¶ 7)
- Like the Talbot Branch, the Bear Run spur track will serve only one shipper, Peabody (Rickoff V S. ¶ 7)

- The Bear Run spur track will be approximately 5 miles from its connection with INRD's line to the Peabody Bear Run loadout compared to 9 miles in the case of the Talbot Branch (Rickoff V S ¶ 7)

The only significant factor differentiating the proposed Bear Run spur track from the Talbot Branch is the cost. The 1918 cost of the Talbot Branch was \$300,000. The estimated 2009 cost of the Bear Run spur track will be between \$9 and \$12 million in current dollars. A substantial portion of the difference can be accounted for by general price inflation which between 1918 and 2008 has been approximately 1400% as measured by the consumer price index and 4260% as measured by the change in the dollar price of gold.³ Adjusting the \$300,000 for inflation using the consumer price index the cost of the Talbot Branch in current dollars was \$4,200,000. Adjusting the \$300,000 by the change in the value of the dollar in terms of gold the cost of the Talbot Branch in terms of current dollars was \$12.8 million, or slightly more than INRD's current high estimate of the cost of the Bear Run spur track.

In considering today's costs with those of the early 20th century, in addition to price inflation one also needs to take into account the radically improved engineering and quality standards and standards of environmental protection of modern rail construction when compared to prevailing standards of that earlier time. This likely explains the higher cost per track-mile incurred today, even after adjusting the 1918 cost of the Talbot Branch to today's dollars. To the

³ INRD is not aware of any index of railroad construction costs that extends back to 1918. The consumer price index change between 1918 and 2008 can be determined by using a historic consumer price index going to 1997 and a more recent consumer price index for the last ten years. See, e.g. <http://www.lib.umich.edu/govdocs/historiccpi.html> and <http://data.bls.gov/cgi-bin/survcymost>. The gold price index is more easily computed. In 1918 the value of the dollar was fixed by statute at \$20.67/troy ounce and was fully convertible at that price. Today it takes \$880.70 to buy a troy ounce of gold (Wall Street Journal, October 2, 2008, p. C4), a price increase of 42.6 times. Because the CPI is based on a constantly changing basket of consumer goods, it may not reflect the change in the cost of railroad construction costs as well as the gold price index.

extent that the absolute dollar cost of the project is relevant, the Bear Run spur track is directly comparable to the Talbot Branch once inflation is taken into account

The Bear Run spur track also meets the market tests established by the Supreme Court in *Texas & Pacific*. Specifically, the Bear Run track will not invade the territory of any other railroad. The closest line of another carrier is the CSXT C&EI main line approximately 6 ½ miles to the west. CSXT serves no shippers from its main line that are located in the vicinity of the proposed Bear Run Pit. (Rickoff V S ¶ 8)

The Bear Run spur track will not constitute a significant extension of INRD's line into new territory. INRD and its predecessors on both its east-west line and its north-south line have a long history of serving the coal mines located in the coal bearing area adjacent to those lines, including the area south of INRD's east-west main line where the Bear Run Pit will be located (Rickoff V S ¶ 9). Exhibit 3 to the Rickoff Verified Statement shows the location of the old Dugger Mine and the IC spur track that served it from the INRD east-west main line to the north. The Dugger Mine was closed in the 1980's and the track was removed from the spur line (Rickoff V S ¶ 10). The Dugger Mine was also served from the east by a private Peabody-owned track. (Rickoff V S ¶ 10). The proposed Bear Run track would use approximately 1/2 mile of right-of-way formerly used by that Peabody-owned private track. (Rickoff V S ¶ 7)

INRD's research into the history of the coal bearing territory south of its east-west main line between Linton and Sullivan, IN has disclosed that the old Dugger Mine was not the only mine in the area served by tracks built from an INRD main line. In light of this history, this coal bearing territory south of INRD's east-west main line is clearly tributary to that INRD line and the construction of a track to serve a new mine in that territory on the same basis INRD's

predecessors served other mines in the area does not constitute a substantial extension into new territory (Rickoff v S ¶ 9)

This analysis is also consistent with the Board's analysis in *NYCEDC Declaratory Order* where the Board looked at the geographically distinct area historically served by SIRR--Staten Island. In our case, the geographically distinct coal bearing area south of INRD's east-west main line bears the same relationship to INRD as Staten Island did to the SIRR--it has historically been served by INRD's predecessors and is not served by the line of any other carrier. Accordingly, INRD's construction of a track to serve another coal operation in that area does not constitute an extension into new territory.

CONCLUSION

The Bear Run spur track complies with the broad market tests for spur track established by the Supreme Court in *Texas & Pacific First*, it will not invade territory served by another railroad as there are no other railroads serving the territory in which the Bear Run Pit will be located. Second, the Bear Run spur track will not constitute a significant extension of INRD's line into new territory as the territory in which the Bear Run Pit will be located historically has been served by spur tracks running off the present INRD main lines.

Almost all of the factors the courts and the Board have used to evaluate the status of tracks weigh on the side of the Bear Run spur track being an exempt spur and not a line of railroad. It will be built pursuant to an agreement with Peabody to serve only Peabody. It will be built with Peabody financial support, either directly or indirectly through transportation contracts with Peabody's customers. It will be built on right-of-way approximately 4/5 of which is owned or controlled by Peabody. The track will be stub ended and will have no railroad buildings, stations loading or other facilities located on it. Moreover, the track will be used only

for moving trains from INRD's main line to and from the Peabody loadout and loop track. The track will not be signaled.

The factual circumstances of the 5 mile Bear Run spur track are on all fours with the factual circumstances of the 9 mile Talbot Branch found by the Supreme Court to be a spur in *State of Idaho*. The conclusion that the Bear Run spur track is an exempt spur is also consistent with the Board's analysis of similar circumstances in more recent cases such as *NYCEDC Declaratory Order* in which the Board has found track construction proposals to be exempt spur tracks. For the foregoing reasons, the Board should issue a declaratory order that the proposed Bear Run spur track will be a spur track subject to 49 U.S.C. 10906, and not a line extension subject to 49 U.S.C. 10901.

Respectfully submitted,

THE INDIANA RAIL ROAD COMPANY

By John Broadley
One of its attorneys

John Broadley
John H. Broadley & Associates, P.C.
1054 31st Street NW, Suite 200
Washington, D.C. 20007
Tel 202-333-6025
Fax 301-942-0676
E-mail Jbroadley@alum.mit.edu

Dated October 6, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

The Indiana Rail Road Company -- Petition for
Declaratory Order

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Finance Docket No 35181

VERIFIED STATEMENT OF JOHN RICKOFF

1 I am Executive Vice President and Chief Commercial Officer of The Indiana Rail Road Company (INRD) In this capacity I have overall responsibility for the development of INRD's business, including its coal business INRD currently hauls more than 13,000,000 tons of coal and has been actively working on transportation for several new coal mining operations in Sullivan County, Indiana Sullivan County has a long history of coal mining in the State of Indiana and is expected to continue for many more years

2 INRD has two main lines The first is the east-west main line running from Indianapolis, IN southwest to Bloomington IN, and then west to Linton, IN, Sullivan, IN and Newton, IL INRD acquired the east-west main line from Illinois Central in 1986 (Indianapolis to Sullivan) and 1991 (Sullivan to Newton). INRD's second main line begins in Chicago and runs over trackage rights to Terre Haute, IN and then southeast over a combination of owned trackage and trackage rights to Louisville, KY INRD acquired the north-south main line in 2006 The north-south and the east-west lines cross at Linton, IN I have attached as Exhibit No 1 a map showing the location of INRD's lines.

3 INRD serves four coal-fired electric power plants on its lines and four coal load-outs These facilities are located at

Power Plants

- Indianapolis, IN Indianapolis Power & Light Company's
Harding Street Station
- Merom, IN Hoosier Energy's
Merom Generating Station
- Terre Haute, IN Duke Energy Corporation's
Wabash River Generating Station
- Newton, IL Ameren Corporation's
Newton Generating Station

Coal Loadouts

- Blackhawk, IN Black Beauty Coal Company's
Farmersburg Mine
- Coalmont, IN Little Sandy Coal Company's
Lewis Dock Loadout
- Switz City, IN James River Coal Company's
Triad Mining Loadout
- Odon, IN Little Sandy Coal Company's
DAVCO Dock Loadout

4 Peabody Energy, through its Black Beauty Coal Company subsidiary ("Peabody"), operates a coal mine near Farmersburg, IN which is served by INRD. The current Farmersburg mine operation is nearing the end of its mineable reserves which will be exhausted by 2011. Peabody has secured a large coal deposit south of INRD's east-west main line to replace the current Farmersburg mine operation. Peabody calls this new deposit and the proposed operation, the "Farmersburg Mine Bear Run Pit." I will refer to it as the "Bear Run Pit."

5. Peabody has asked INRD to build a spur track from INRD's main line near Dugger, IN to its new Bear Run Pit coal operation. Peabody and INRD have an agreement in principle covering the project under which INRD will build, operate over and maintain the track connecting Peabody's coal loadout to the INRD main line, Peabody will make available right of way which it controls, and INRD will recover its costs through shipments from the Bear Run Pit. I have attached as Exhibit No. 2 an aerial photograph which has marked on it the location of the proposed Bear Run spur track and the location of the Bear Run Pit operation and rail loadout that would be served by the spur track. It also has marked on it the locations a previous mine operation (the "Dugger Mine") in the coal bearing area south of INRD's east-west main line that was served by a spur track from the INRD east-west main line which was then owned by Illinois Central, and by a private Peabody-owned line from the east. I have attached as Exhibit No. 3 a map of the area where the Bear Run spur track will be built. The map also shows the location of the Dugger Mine and the location of the former spur track that served that mine from the INRD east-west main line and the private track that served it from the east.

6. In the event that the Bear Run spur track is not built, or in the event it is delayed beyond the anticipated July 1, 2009 opening of the Bear Run Pit operation, Peabody will move the coal by truck to the current Farmersburg Mine preparation plant and rail loadout. The distance of this truck haul is approximately 34 miles and would travel through the communities of Dugger, Sullivan, Shelburn and Farmersburg. If trucking of the Bear Run Pit coal were to occur it would have a substantial financial impact on the Bear Run Pit project, and would have significant adverse environmental consequences.

7. The proposed Bear Run spur track would have the following characteristics

- The spur track would leave INRD's main line via a Wye approximately 1 mile southeast of Dugger, IN. It would follow the right-of-way of the former Peabody private track serving the Dugger Mine for approximately 1/2 mile.
- It would run west then south to the location of the Bear Run Pit operation.
- The spur track would be approximately 5 miles in length (27,174 track feet, including both legs of the Wye connection at the INRD main line)
- Approximately 3.26 miles of the required right-of-way is already controlled by Peabody. We expect that Peabody will acquire approximately one additional mile of right-of-way for a total of approximately 4.2 miles. Thus, 4.2 miles of the 5 mile spur track would be built on Peabody controlled right-of-way
- The spur track would serve only the Bear Run Pit operation and would terminate at the rail loadout Peabody will build there
- Because the spur track will carry heavily loaded coal trains it will be built with 132 lb. or heavier rail, the same weight or heavier than that which will be used by Peabody at its rail loadout
- The total cost of the spur track will be approximately \$9-12 million

8. No other railroad serves the area where the Bear Run Pit operation will be located. The closest railroad is located approximately 6.2 miles due west which is a CSXT mainline track. CSXT does not serve any industries on the east side of their main line between Sullivan, IN and Carlisle, IN except the new Sunrise coal loadout at Carlisle which is shown on the map at Exhibit 3.

9. Historically, INRD's predecessors owning the east-west main line at Dugger and the north-south main line just to the east of Dugger, served coal mines in the coal-bearing area

from Terre Haute, IN to Odon, IN. As shown on Exhibit 3, the "Dugger Mine" was located northwest of where Peabody is planning to build the Bear Run Pit, the Hawthorn Mine was located to the southeast of that location, and the Kindill III Mine (formerly known and shown on the Exhibit 3 map as the Minnehaha Mine) was located just to the north of the INRD main line, though surface mining operations of the Minnehaha mine extended south of the INRD main line as reserves north of the line were mined out. These are the most recently operated mines within a short distance of the proposed Bear Run Pit operation. Earlier in the 20th century there were other mines operated in the same area.

10. The old Dugger Mine was served by a spur track that ran from the Illinois Central main line south to the mine. Later the mine was also served by a private track to the east owned by Peabody that hauled raw coal to another Peabody processing plant. The location of the former Dugger Mine spur that connected it to the IC main line to the north is shown on the map at Exhibit No. 3 as is the location of the Peabody track that served it from the east. The Dugger Mine was closed in the early 1980's and the spur track was removed. The land where the old Dugger Mine was located has been reclaimed and is controlled by the Indiana Department of Natural Resources.

11. The Hawthorn Mine was served by a branch line owned by Conrail which was subsequently acquired by Indiana Southern Railroad ("ISRR"). INRD's predecessor on its north-south main line (Canadian Pacific) acquired trackage rights from Conrail to serve the Hawthorn Mine. CP hauled most of the coal taken from the Hawthorn mine between 1985 and the closure of that mine. The Hawthorn Mine closed in the mid-1990's and has undergone final reclamation.

12 The Kindill III Mine (Minnehaha Mine) was served by a branch line coming from INRD's north-south main line at Jasonville, IN which is still in existence. The Kindill III (Minnehaha) mine operations extended into the coal bearing area south of INRD's east-west main line. Coal from those operations was trucked to the mine loadout north of the INRD line. The Kindill III mine closed in the late 1990's and has not yet completed final reclamation. Peabody still controls thousands of acres of land that comprised the Hawthorn and Kindill III mines.

13 INRD will move the loaded coal trains from the Bear Run Pit operation over the new Bear Run spur track to its main line where the Wye connection will make it possible for them to go to power plants located east, west and north on its lines, including plants at Indianapolis, IN (Indianapolis Power & Light's Harding Street Station), Merom, IN (Hoosier Energy's Merom Generating Station) and Terre Haute, IN (Duke Energy's Wabash River Generating Station). INRD also expects to interchange some of the coal with Indiana Southern at Beehunter, IN. It is anticipated that Indiana Southern will move the coal to power plants on its line at Petersburg, IN (IPL's Petersburg Generating Station) and Martinsville, IN (IPL's Eagle Valley Generating Station).

**DECLARATION PURSUANT TO
28 U.S.C. 1746**

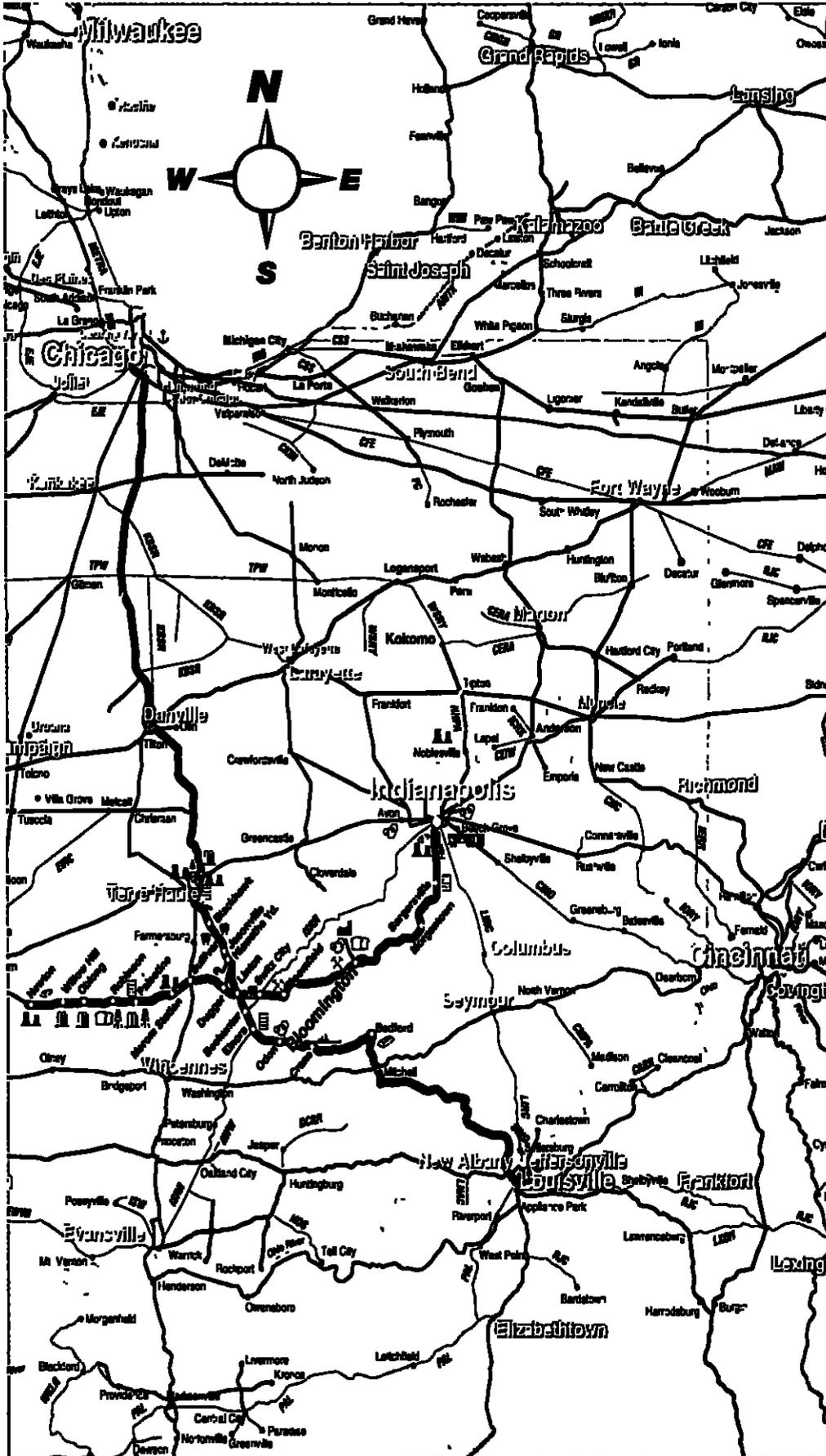
I John Rickoff, declare that the foregoing is true and correct. Further I certify that I am qualified and authorized to file this Verified Statement in support of a Pctition for a Declaratory Order

Executed on October 3rd, 2008



John Rickoff

EXHIBIT 1



America's New Regional Railroad.

Legend

INRD 1-4-2m Rail Road (not coverage area)

Class I Railroads

- BNSF** Burlington Northern Santa Fe
- CN** Canadian National
- CP** Canadian Pacific
- CSXT** CSX Transportation
- KCS** Kansas City Southern
- NS** Norfolk Southern
- UP** Union Pacific

Regional and Shortline Railroads

(All carriers)

- AWW** Algona Wapak & Western
- BRC** Belt Railway of Chicago
- CB&Q** Central Railroad Company of Indiana
- CERA** Central Railroad Company of Indiana
- CPE** Chicago Fort Wayne & Eastern
- CKM** Chesapeake & Indiana
- CM&A** Central Midland Railway
- CMR** Chicago South Shore & South Bend Railroad
- ES&E** Eastern Illinois Railroad
- EJ&E** Elgin Joliet & Eastern
- EWR** Evansville Western Railway
- IO&O** Indiana & Ohio Railroad
- IO&O** Indiana & Ohio Railway
- IS&M** Illinois & Midland Railroad
- IS&M** Indiana Southern Railroad
- IS&M** Iowa Indiana Railroad
- IS&M** Iowa Chicago & Eastern
- IS&M** Indiana Harbor Belt
- IS&M** Indiana Northwestern
- IS&M** Kentucky Somerset & Southern Railroad
- IS&M** Louisville & Indiana Railway
- IS&M** Louisville New Albany & Corydon
- IS&M** Ohio Central Railroad
- IS&M** Paducah & Louisville Railway
- IS&M** R.J. Carman Railroad Group
- IS&M** Southern Indiana Railroad
- IS&M** Toledo Peoria & Western
- IS&M** Wheeling & Lake Erie
- IS&M** Wisconsin & Southern
- IS&M** Winamac Southern Railway

Connections by Carrier

- Belt Railway of Chicago
- BNSF
- Canadian National
- Canadian Pacific
- Central Railroad Company of Indiana
- CSX Transportation
- Chicago Ft. Wayne & Eastern
- Chicago South Shore & South Bend
- Elgin Joliet & Eastern
- Evansville Western Belt
- Indiana Southern Railroad
- Iowa Chicago & Eastern
- Iowa Indiana
- Louisville & Indiana Railway
- Paducah & Louisville Railway
- Union Pacific
- Wisconsin & Southern
- Chicago
- Chicago Newton II
- Chicago
- Indianapolis (via CSXT switch)
- Chicago Indianapolis
- Turne Haste Ind. Sullivan Ind.
- Chicago
- Chicago
- Chicago
- Chicago
- Stutz City Ind
- Chicago
- Chicago
- Indianapolis Louisville
- Chicago, Indianapolis, Louisville
- Louisville
- Chicago

Connections by City

- Chicago
- Indianapolis
- Louisville
- Newton, II
- Stutz City Ind.
- Turne Haste Ind.
- BRC BNSF CPE CN CP CSX, CSXT EJE, IAS ICE, I&M NS, UP
- CH&Q CSXT LIRC NS
- CMR CSXT LIRC NS, PAL
- CN
- ES&E
- IS&M (Cham only)
- CSXT

Industries Served by The Indiana Rail Road Company

- Coal Mines
- Petroleum and Ethanol
- Grain Elevators
- Sand and Stone Quarries
- Plastics Distribution
- Food Products
- Maritime Ports
- Power Plants
- Fertilizer and Chemicals
- Manufacturing
- Lumber and Forest Products
- Metals
- U.S. Navy
- Transload Facilities

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Exhibit 2



Former Rail Line
To Digger Mine

Proposed Spur

Exhibit 3

Location of Proposed Spur
Farmersburg Mine Bear Run Pit

