

CHARLES H. MONTANGE

ATTORNEY AT LAW

426 NW 162ND STREET

SEATTLE, WASHINGTON 98177

(206) 546-1936

FAX: (206) 546-3739



JAN 10 2006

RECEIVED

9 January 2006  
by express

Hon. Vernon Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20036

2 15523

Re: Nebkota Railway, Inc. --  
Abandonment Exemption --  
in Sheridan and Cherry  
Counties, NE, AB 988X

filing of Reply

Dear Mr. Secretary:

Enclosed for filing please find the original and ten copies of a Request for Public Use Condition and Reply, due on 10 January in the above-referenced proceeding. This filing is tendered on behalf of both Nebraska Game and Parks Commission (NGPC) and Rails to Trails Conservancy (RTC).

Thank you for your assistance in this matter.

Very truly,

Charles H. Montange  
for NGPC and RTC

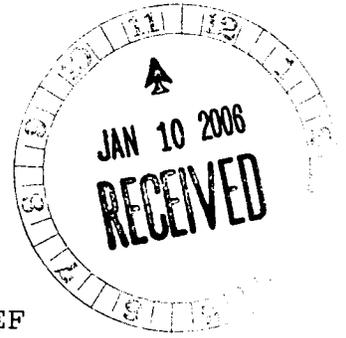
Encls.

cc. Mr. Kahn  
NGPC  
RTC (all w/encl.)

BEFORE THE SURFACE TRANSPORTATION BOARD

NEBKOTA RAILWAY, INC. -- )  
ABANDONMENT EXEMPTION -- ) AB 988X  
IN SHERIDAN AND CHERRY )  
COUNTIES, NE )

215523



ENTERED  
Office of Proceedings

JAN 10 2006

Part of  
Public Record

REQUEST FOR PUBLIC USE CONDITIONS  
AND NOTICE OF POSSIBLE NEED FOR ADDITIONAL RELIEF

REPLY to NEBKOTA PETITION

This Request and Notice, and Reply, is made on behalf of Rails to Trails Conservancy (RTC) and Nebraska Game and Parks Commission (NGPC or "Nebraska"). For the reasons set forth below, this Board should carefully retain jurisdiction over the line in question until a contractual dispute is resolved.

I. Background

NEBKOTA Railroad acquired all interest in land and rail for the premises at issue in this proceeding from Chicago & Northwestern Transportation Company (CNW) pursuant to a "Master Agreement" between CNW, NEBKOTA and Rails to Trails Conservancy entered into by the three parties on 7 January 1994. The Agreement settled a prolonged dispute between CNW and the State of Nebraska over abandonment of CNW's "Cowboy Line" extending from MP 83.3 (Norfolk) to MP 404.5 (Chadron). RTC provided all the consideration (in excess of \$6 million) to be paid to CNW under the Agreement. The plain language and intent of the Master Agreement was to allow rail use on a portion of the Cowboy Line for which operational costs might be recovered (MP 331 to MP 404.5), but to preserve forever all portions of the line that were then (MP 83.3 to MP 331) or in the future subject

to an abandonment proceeding (MP 331 to MP 404.5). In the words of the purpose clauses of the Master Agreement,

"RTC seeks to purchase all of C&NW's right, title and interest in the portion of the Line from M.P. 83.3 to M.P. 331 for trail and railbanking use ... and to obtain consistent rights with respect to the portion of the Line from M.P. 331 to M.P. 404.5...."

The relevant Interstate Commerce Commission docket, which outlines the history of the dispute, is AB-1 (Sub-no. 230). The relevant decision embodying the Master Agreement is set forth in CNW -- Abandonment Exemption, ICC dkt. AB 1 (Sub-no. 249X), served June 2, 1994.

As noted in that decision, the parties intended the NEBKOTA and RTC portions of the line to form the "Cowboy Trail" which, with anticipated extension to Crawford, "will be linked to other major trails in the region including the White River Trail from Crawford to Crandall, WY." Id., 1994 ICC Lexis 91 at \*4. In short, all were clear the objective was a railbanked line across the entire State, as such became available due to abandonments, inclusive of NEBKOTA.

Under the Master Agreement, CNW agreed to convey MP 83.3 (Norfolk) to MP 331 (Merriman) to Rails to Trails Conservancy (or its nominee, the Nebraska Game and Parks Commission) pursuant to section 8(d) of the Trails Act, 16 U.S.C. 1247(d) (railbanking) for preservation for the State of Nebraska. The Agreement provided for CNW to convey MP 331 (Merriman) to MP

404.5 (Chadron) to NEBKOTA, subject to two important provisos.

First, under Section 4(c) of the Master Agreement, RTC or its nominee obtained a continuous easement for trail purposes along and inside the entire NEBKOTA segment during rail use.

Second, under the same Section 4(c), the Agreement provided that should NEBKOTA ever seek to abandon its segment, or any portion thereof, NEBKOTA must consent to railbanking (application of 16 U.S.C. § 1247(d)) upon request, and must further convey the land interests upon request subject to certain conditions not pertinent here.

The Master Agreement with appendices is quite lengthy. RTC and Nebraska attach hereto as Exhibit A the body of the Agreement itself.

Nebraska has recently filed a "statement of willingness" under section 8(d) of the Trails Act and this Board's regulations with regard to the segment of NEBKOTA at issue in this proceeding [MP 331 (Merriman) to MP 374 (Rushville)].

Nebraska has advised NEBKOTA of NEBKOTA's contractual obligation to consent to railbank the premises so it may be preserved for the benefit of the State of Nebraska. By letter dated 4 January 2006, counsel for NEBKOTA took the position, contrary to the Master Agreement, that all rights by RTC or the State of Nebraska, to require NEBKOTA to railbank the premises, or to convey the premises to Nebraska for railbanking, have expired. NEBKOTA bases this claim on section 4(b) of the Master

Agreement. . That provision contains language providing that if NEBKOTA sought abandonment authority during the first 10 years, it would have to pay compensation for the rail. NEBKOTA confuses its obligation set forth in section 4(b) with respect to rail with its obligation set forth in section 4(c) in respect to the land. NEBKOTA's claim is contrary to the intent of the parties as expressed in the third Whereas clause of the Master Agreement; it is contrary to the plain language of section 4(c); and it is contrary to the recollection and contemporaneous documents exchanged by the negotiating parties.

By letter dated 9 January 2006, RTC and Nebraska have requested NEBKOTA to reconsider its 4 January position. Nebraska and RTC have further indicated that failure of NEBKOTA to consent to railbanking, and failure to convey per the Master Agreement would amount to a breach of contract, rendering NEBKOTA liable for relief, including specific performance and damages.

Nebraska and RTC are hopeful that this dispute can be resolved quickly and without litigation because the intent and language of the Master Agreement seem extremely clear on their face and NEBKOTA presumably does not wish to face a large claim for damages and other relief. However, this Board's notice of proceeding indicates that requests for certain relief are due on 10 January, which necessitates the foregoing explanation, and the request, notice and reply set forth below.

A verification of this Section is attached on p. 11.

## II. Summary of Position

STB does not view itself as a forum for resolving contractual disputes between parties. Instead, this Board has indicated that contract disputes must be directed to state courts. E.g., D&I Railroad Co. -- Trackage Rights Exemption-- State of South Dakota, F.D. 34646-1, served Jan. 19, 2005 ("contractual dispute respecting the scope of the rights retained by or granted to the State and/or BNSF under the 1986 Operating Agreement must be resolved in a court of competent jurisdiction"). Pending resolution of a contractual dispute, this Board endeavors to issue orders which do not prejudice either party to the dispute. In this case, in order to avoid potentially irreparable prejudice to Nebraska and RTC, this Board must refrain from entering an order authorizing an abandonment without railbanking until the contractual dispute is finally resolved.

The Board's standard remedy for states and other entities interested in abandoned railroad real estate is a public use condition under 49 U.S.C. § 10905. Although Nebraska and RTC request such a remedy below, it is not adequate to preserve Nebraska and RTC against prejudice given the contractual dispute. For that purpose, the Board must either deny abandonment, grant it but stay the effective date pending the outcome of litigation and further action of the Board, or grant a discontinuance but not an abandonment.

## III. Request for Public Use Condition

Pursuant to 49 C.F.R. § 1152.29, RTC and Nebraska Game and Parks Commission state as follows:

1. Condition sought. A bar on any disposition of any interest in real estate, bridges, culverts, roadbed and similar structures other than to RTC or Nebraska Game and Parks Commission.

2. Public importance. The Cowboy Line is a major rail corridor extending across the State of Nebraska. The State wishes to preserve it for possible future rail reactivation in the public interest. In the interim, the State is developing the corridor as a trail. The State desires to preserve the corridor all the way across the State both for possible future rail use, and for interim trail use. This facility is one of the longest continuously preserved rail corridors in the country and it would be a tragedy for a 43 mile segment in the center to be lost. Loss of the segment would also be contrary to the Master Agreement which settled the dispute between CNW and Nebraska in AB-1 (Sub-no. 249). Breach of that Master Agreement is contrary to the public interest.

3. Period. Maximum allowable under STB regulations and precedent (no less than 180 days from any effective abandonment order).

4. Justification for period. As of the date of filing of this request, NEBKOTA is disputing its contractual responsibilities. Resolution of contract disputes through final appeals generally takes at least three years.

#### IV. Need for Additional Relief and Reply to NEBKOTA Petition

The plain, unambiguous language of the Master Agreement requires NEBKOTA to agree to continued trail use on the entire NEBKOTA segment during and after cessation of rail use. The plain language reflects the intent of all parties at the time that the land underlying the entire Cowboy Line corridor, including the portion on which NEBKOTA intended to operate a railroad, would be preserved for future rail reactivation and interim trail use when and if a railroad sought to abandon it. RTC would never have entered into an agreement that afforded NEBKOTA what amounted to free use of the land and rail without obtaining a right to railbank the portion of the Cowboy Line to be operated by NEBKOTA. That is the only reasonable construction of the relevant whereas clause; it is embodied in Section 4(c) of the Master Agreement; and it is corroborated by contemporaneous documents.

In light of the rights of RTC and Nebraska under Section 4(c) of the Master Agreement, this Board should enter no order which is inconsistent with preserving this corridor under section 8(d) of the Trails Act. If NEBKOTA fails timely to consent to railbanking, or withdraws consent before conveying the property to Nebraska, then this Board may lose jurisdiction to issue a railbanking order. If this were to happen, adjacent landowners might claim automatic easement extinguishments or base fee reversions, such that Nebraska and RTC would be denied a meaningful specific performance remedy under the Master

Agreement. This Board should not allow its jurisdiction to lapse before the contract dispute is resolved. To do so would violate the settlement embodied in a decision of this Board's predecessor and possibly result in irreparable severance of the Cowboy Line, contrary to the expectations of the parties.

Nebraska and RTC believe the following options exist consistent with preserving this corridor should it be necessary for a court to adjudicate the contractual dispute: (a) This Board can dismiss this proceeding on the ground that use of exemption procedures is too controversial where a State is contesting the railroad's obligations under a contract or postpone a decision to afford the parties more opportunity to brief the issue,<sup>1</sup> (b) this Board could issue an abandonment authorization but condition its effectiveness upon further action by this Board after final resolution<sup>2</sup> of any litigation on the contract commenced by RTC or Nebraska within 180 days of any abandonment authorization, or (c) this Board could deny

---

<sup>1</sup> In a recent case where a neighboring state objected to use of an exemption process in a rail matter involving a contract dispute, this Board indicated that delays were appropriate for the Board "to compile a record that will allow us to resolve the issues raised." BNSF -- Acquisition and Operation Exemption -- State of South Dakota, F.D. 34645, served Jan. 14, 2005, slip op at 3.

Counsel for RTC and Nebraska was unaware that NEBKOTA intended to take the position it had no obligation to RTC and Nebraska until Mr. Kahn's January 4 letter arrived after close of business on Friday, January 6. Although the Master Agreement is clear, the brief time available to send a pleading to STB for a January 10 filing deadline in this proceeding is plainly not adequate to mount all the arguments showing the error in NEBKOTA's position.

<sup>2</sup> Including appeals.

abandonment authority but grant discontinuance authority.<sup>3</sup>

Should this Board authorize discontinuance but not abandonment, RTC and Nebraska Game and Parks Commission do not object to a special condition allowing NEBKOTA to salvage the track materials (but not bridges, culverts, roadbed and similar structures) so that the railroad may use the proceeds or materials to foster its remaining rail activities, provided nothing in such a condition results in loss of this Board's jurisdiction over the corridor.

Conversely, should this Board enter an order merely retaining jurisdiction so as to prevent any easement extinctions or reversions pending the final outcome of litigation, then this Board should also enter an order barring sales of land, or removals or sales of bridges, culverts, roadbed and other structures required by the Master Agreement to be conveyed to RTC (or Nebraska Game and Parks Commission) in order to maintain the status quo.

In short, unless NEBKOTA alters its position to be consistent with railbanking the premises and conveying same pursuant to Section 4(c) of the Master Agreement to RTC or its nominee, the State, this Board should enter no relief which

---

<sup>3</sup> In CNW--Abandonment--between Norfolk and Chadron, NE, AB-1 (Sub-no. 230), ICC served April 17, 1992, ICC authorized discontinuance of the entire Cowboy Line, including the portion here, but not abandonment, to permit continued negotiations for acquisition of the line by Nebraska. That action resulted in the Master Agreement, and ICC's decision in AB-1 (Sub-no. 249X) embodying it. Similar relief here is necessary so Nebraska is assured the benefit of its bargain in 1994.

permits NEBKOTA to destroy the settlement embodied the Master Agreement. That Agreement resolved the dispute in ICC docket AB 1 (Sub-no. 230) and established a policy and format to preserve the entire Cowboy Line across the State of Nebraska for future rail reactivation and interim trail use. Failure to preserve the right under the Master Agreement for RTC or Nebraska to railbank and to acquire the real property and non-rail fixtures at issue here is inconsistent with any finding that the public convenience and necessity permit an abandonment. It would violate a settlement accepted by this Board's predecessor.

Respectfully submitted,



Charles H. Montange  
Counsel for Rails to Trails  
Conservancy and Nebraska Game and  
Parks Commission

426 N.W. 162d St.  
Seattle, Washington 98177  
(206) 546-1936  
(206) 546-3739

Of counsel for Rails to Trails  
Conservancy:

Andrea Ferster, Esq.  
General Counsel  
Rails to Trails Conservancy  
1100--17th St., N.W., 10th Floor  
Washington, D.C. 20036

cc. Rex Amack,  
Director, NGPC  
2200 N. 33d St.  
Lincoln, NE 68503-0370

Verification

Pursuant to 28 U.S.C. § 1746, I, Charles H. Montange, hereby declare and verify under penalty of perjury under the laws of the United States of America that a true and correct copy of the Master Agreement, omitting exhibits, referenced in the above Request and Reply is attached hereto, that I was personally involved in negotiation of the Master Agreement on behalf of, among others, Rails to Trails Conservancy (a party to the agreement), and that the facts stated in the "Background" section are true and correct to the best of my knowledge and belief.

Charles H. Montange 9 Jan 06

Certificate of Service

The undersigned hereby certifies service of the foregoing by express service, next business day delivery, this 9th day of January 2006 upon Fritz R. Kahn, Esq., 1920 N Street, N.W., Washington, D.C. 20036-1601

Charles H. Montange

Exhibit A

MASTER AGREEMENT

This Agreement ("Agreement") made and entered this 7th day of January, 1994 by and between the Chicago and North Western Transportation Company ("C&NW"), Rails To Trails Conservancy ("RTC") and NEBKOTA Railway, Inc. ("NEBKOTA").

WITNESSETH

WHEREAS, the C&NW has lawfully discontinued its common carrier obligations over its line of railroad between Norfolk, Nebraska at M.P. 83.3 and Chadron, Nebraska, M.P. 404.5 (the "Line") pursuant to Interstate Commerce Commission ("ICC") authority issued in Finance Docket AB-1 (Sub.No. 230); and

WHEREAS, the C&NW intends to petition the ICC for permission to abandon and remove the Line in Finance Docket AB-1 (Sub No. 249); and

WHEREAS, RTC seeks to purchase all C&NW's right, title, and interest in the portion of the Line from M.P. 83.3 to M.P. 331 for trail and railbanking use pursuant to Section 8(d) of the National Trails System Act, 16 U.S.C. § 1247(d), and to obtain consistent rights with respect to the portion of the Line from M.P. 331 to M.P. 404.5, and NEBKOTA seeks to purchase all of C&NW's right, title and interest in the

portion of the Line between Merriman at M.P. 331 and Chadron at M.P. 404.5, for rail operating purposes, and to accommodate a trail alongside; and

WHEREAS, C&NW is willing to grant overhead trackage rights to NEBKOTA between M.P. 404.5 near Chadron, Nebraska to the end of C&NW's line at Crawford, Nebraska, a distance of 27.8 miles, in order to facilitate the operations between Merriman and Chadron and to allow NEBKOTA to interchange rail traffic with the Burlington Northern Railroad at Crawford, Nebraska; and

WHEREAS, the State of Nebraska (the "State") has agreed to support the transactions contemplated by this Agreement.

NOW THEREFORE, the parties hereto agree as follows:

Section 1). Petition to Abandon

In light of the letter from the Honorable E. Benjamin Nelson to Messrs. Robert Schmiede, et al, dated December 28, 1993 supporting the transactions contemplated by this Agreement, C&NW shall promptly file its petition or application to abandon and request the Commission for a Notice or Certificate of Trail Use, as the case may be. The parties hereto agree to use their best efforts to accomplish the purposes of this Agreement. If authority for abandonment or certificate of Interim Trail Use is not issued by March 31, 1994, or if conditions unacceptable to C&NW are imposed in connection with any such authority or

certificate, C&NW shall have the right to withdraw its petition and terminate this Agreement.

Section 2). RTC - The Cowboy Trail

Upon issuance of a Notice or Certificate of Interim Trail Use by the ICC (NITU/CITU), the C&NW shall convey to RTC or its designee on an as-is where-is basis, without warranty or representation of title, interest, merchantability or fitness for use, in accordance with 16 U.S.C. Sec. 1241, for Ten Dollars (\$10.00) and other valuable considerations its interest in the right-of-way between M.P. 83.3 near Norfolk, Nebraska and M.P. 331 Merriman, Nebraska, including bridges, culverts and drainage pipes (collectively, the "right of way"), but excluding tracks, (rail, rail fastenings, spikes, ties and signals (the "Track")), extra width right-of-way and crossing materials. Conveyance shall be by quit claim deed substantially in the form attached hereto as Exhibit A. C&NW makes no representations or warranties as to the condition of the property or its compliance with environmental laws; provided, however, that neither RTC nor its designee shall be responsible for any environmental claims or conditions arising prior to its ownership of the right-of-way. RTC or its designees shall be responsible for the recording, transfer or other fees or compliance with local subdivision rules, ordinances or regulations relative to recordation of the deed. C&NW shall by separate instrument assign its interest to RTC or its designee in leases and licenses relating to the Line except master licenses, and RTC or its designee shall assume

C&NW's obligations and rights thereunder. There will be no license fee or lease rental proration. It is understood that RTC may transfer its right to acquire the described right-of-way to the Nebraska Games and Parks Commission pursuant to Nebraska legislative Bill LB 739 or other qualified entity designated by RTC.

Section 3). Rails-to-Trails Conservancy (RTC)

(a) Upon issuance of a CITU/NITU, C&NW shall convey the Track to RTC, or its designee in an as-is condition with appropriate disclaimers of warranty, fitness, merchantability or use, by bill of sale, substantially in the form attached hereto as Exhibit B. The purchase price for the Track is \$6,262,000. RTC shall pay C&NW ten percent of the purchase price upon execution of this Agreement. Upon the ICC's issuance of a CITU/NITU in AB-1 (Sub-No. 249), C&NW shall notify RTC in writing of such issuance and RTC shall within 20 days of the receipt of such notice pay C&NW eighty (80%) percent of the purchase price. Upon receipt of such payment C&NW shall issue to RTC a right of entry to begin salvage of the Line. If RTC fails to make such payment, C&NW, at its sole option, may terminate this Agreement with respect to RTC or in its entirety. The remaining 10 percent shall be paid at closing which shall occur not later than 120 days following the issuance of a CITU/NITU and at which time the bill of sale will be delivered. RTC shall be solely responsible for the removal and disposition of the Track and associated rail materials, including ties, and shall comply with all applicable

laws, statutes and regulations, including but not limited to, environmental requirements in connection with said removal and disposal. Nothing herein shall prevent RTC from entering into an agreement with the Nebraska Parks and Game Commission relative to restoration or grading of the right-of-way after RTC's payment of ninety percent (90%) of the purchase price.

(b) C&NW shall grant an option to RTC to enter into a rate contract with C&NW for a minimum 350 cars providing for rates for transporting the track and other rail material, excluding ties, to Chicago Heights, Illinois via CNW/BOCT/CHT&T at \$16.00 per ton; and a system rate of 2 cents per ton mile, minimum \$500, to any location or interchange point on the C&NW System, with C&NW not absorbing switching charges. Said option shall expire unless exercised in writing in the manner provided in Section 6 hereof within thirty (30) days of receipt of the bill of sale specified in paragraph 3(a). RTC shall take such steps and actions as are necessary in its arrangements with connecting carriers at Chicago Heights or elsewhere to assure prompt return to C&NW of the empty gondolas used in this service for placement at Norfolk, Nebraska. Said rate contract shall be substantially in the form and substance of that set forth in Exhibit C hereto. Nothing herein shall prevent C&NW and RTC from negotiating different contract rates.

(c) The parties acknowledge that gondolas are in short supply. However, upon RTC's exercise of the option in accordance with paragraph (b), CNW, without liability for its failure to do

so, shall use its reasonable efforts to create a pool of 50 gondolas with an 80-100 ton capacity, or 60-65 plain friction bearing gondolas with a 70 ton capacity, having C&NW reporting marks for a period of nine months, commencing on March 15, 1994, or such date as the parties may agree, in writing, for the purpose of transporting the removed or recovered materials as RTC may tender to C&NW.

Section 4). NEBKOTA Railway Inc.

(a) Upon issuance of a CITU/NITU, C&NW shall convey to NEBKOTA for the purpose of railroad operations on an as-is where-is basis and without warranty of title or fitness or use, for Ten Dollars (\$10.00) and other valuable consideration, (i) the right-of-way (the "Land") and (ii) the track, rail, ties, signals, track fastenings, and crossings (the "Track Material") between M.P. 331 at Merriman and M.P. 404.5 at Chadron. Conveyance of the Track Material shall be made by a bill of sale and conveyance of the Land shall be made by quit claim deed substantially in the form of the bill of sale and quit claim deed attached hereto as Exhibits D and E. C&NW makes no representations or warranties as to the condition of the property or its compliance with environmental laws; provided, however, that neither NEBKOTA, its designee, successors or assigns shall be responsible for any environmental claims or conditions arising prior to its ownership of the Land. NEBKOTA shall be responsible for the recording, transfer or other fees or compliance with local subdivision rules, ordinances or regulations relative to recordation of the

deed. C&NW shall by separate instrument assign its interest to NEBKOTA or its designee in leases and licenses relating to the Line except master licenses, and NEBKOTA or its designee shall assume C&NW's obligations and rights thereunder. There will be no license fee or lease rental proration.

(b) In the event NEBKOTA or any successor or assign fails to begin rail operations within ninety (90) days of the date of the deed of conveyance, or within the ten year period commencing on such date of the deed shall cease commercial rail operations over all or part of the Line, whether such cessation is authorized or unauthorized, or otherwise discontinue rail operations, upon notice to and demand by C&NW delivered to NEBKOTA in accordance with Section 6 hereof, at any time within two years following such cessation of rail operations, title to the Track Material shall automatically reinvest in C&NW, to the same force and extent as if no conveyance had been made hereunder. In such event, NEBKOTA, its successors and assigns, shall issue a confirmation bill of sale to C&NW, its successors or assigns, for the then existing Track Material from the Line or part thereof, including any improvements and betterments thereto, with full warranty of title, and confirming that such Track Material is free from any and all liens and encumbrances. Failure to perform commercial rail operations for a period of ninety (90) days shall be deemed *prima facie* evidence of cessation of service. To secure NEBKOTA's obligation hereunder, C&NW's bill of sale to NEBKOTA shall retain a security interest in recordable form in and to the Track Material and NEBKOTA shall

execute such other agreements or documents as may be necessary or appropriate to perfect or acknowledge such security interest. NEBKOTA further agrees during such ten year period to maintain the Track Material in the condition when conveyed, in no event less than FRA Track 1 standards, and to provide, at C&NW's request, periodic reports on the condition of the Track Material and additions and betterments thereto.

(c) Upon receipt of the quit claim deed described in paragraph 4(a) NEBKOTA shall grant a continuous easement except for interruptions at the outer-most switch points at the east and west sides of towns (at which points NEBKOTA shall provide reasonable assistance for alternative routes through or around the towns) to RTC or its designee over the right-of-way between M.P. 331 and M.P. 404.5 at Chadron provided that said easement (unless NEBKOTA and RTC or its designee otherwise mutually agree in writing), shall extend from a line twenty feet from the centerline of the railroad tracks to the boundary of the rail corridor on the side of the corridor closest to the Niobrara River (unless the parties otherwise mutually agree in writing), and provided further that RTC or its designee shall be responsible for construction and maintenance of any such trail, and for any requirements to permit safe use of a trail parallel to the railroad when both railroad and trail are operating. Provided, further, that in the event NEBKOTA or its successor applies for abandonment or discontinuance authority, including exemption authority, for all or a portion of the property conveyed herein, NEBKOTA or its successor, upon request, shall agree to interim trail use and railbanking of the property to be

abandoned or discontinued, facilitate any regulatory proceeding involved to that end, and, upon timely request, shall convey all real estate, bridges, culverts, roadbed and similar structures to RTC (or its assignee) by quit claim deed under Section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d), or equivalent authority, for \$10.00, excluding only those parcels which RTC (or its assignee) requests in writing be excluded. Failure of NEBKOTA to grant such easement or to comply with the terms thereof shall not obligate C&NW, and RTC's only recourse for any such failure shall be against NEBKOTA.

(d) C&NW shall also grant NEBKOTA overhead trackage rights between M.P. 404.5 at Chadron to the end of C&NW's line at Crawford at M.P. 432.3 for the purpose of permitting NEBKOTA to interchange traffic originating and terminating on the Line between Merriman and Chadron with the Burlington Northern. Rental for said track shall be at a train mile rate of \$13.50 per mile per grain train, including engines, consisting of up to 54 cars, provided that for each car in excess of 54 cars NEBKOTA shall pay C&NW 25 cents per car mile for rental. For other than grain trains, the rate shall be 25 cents per car mile with an engine counting as two cars. Further provided that notwithstanding obtaining ICC authority, NEBKOTA shall not commence operations over C&NW track between M.P. 404.5 and Crawford at M.P. 432.3 until it provides C&NW with evidence of insurance satisfactory to C&NW's Treasurer in the amount of \$5,000,000, providing for liability or damage coverage to C&NW, its property or employees or to third parties in connection with

NEBKOTA's operations over C&NW track. Said policy shall name C&NW as an additional insured. NEBKOTA shall take such actions and keep effective said insurance so long as it operates over C&NW tracks and shall annually provide C&NW proof thereof satisfactory to C&NW's Treasurer each January 1. Failure to provide said insurance shall result in termination of the trackage rights. The trackage rights agreement embodying the terms of this paragraph shall be substantially in the same form and substance as set forth in Exhibit F attached hereto.

(e) Pending the issuance of the CITU or NITU, CNW shall grant NEBKOTA a temporary easement from M.P. 331 to M.P. 404.5 in the form as set forth in Exhibit G attached hereto. The easement shall be issued for the sole purpose of permitting rail operations until issuance of the CITU or NITU, following which a quit claim deed and bill of sale for the Line will be issued in accordance with paragraph (a) of this Section 4. The easement shall only be effective upon NEBKOTA obtaining insurance called for in paragraph (d) hereof which shall also cover its operations under the easement. The easement shall provide that the property subject to the easement will be used on an as-is basis with no warranty of title, fitness, use or merchantability.

Section 5). Proration of Taxes and Other Payments

(a) Centrally assessed (i.e., on assessed values determined by state, rather than county or other local, assessors) ad valorem property taxes on the real property to be

conveyed to either RTC or NEBKOTA, including any taxes upon personal property if the taxing jurisdiction taxes such personal property along with real property (collectively "Property Taxes") payable for the calendar tax year 1993 and prior years shall be paid by the C&NW. Property taxes payable for the year of Closing (the "Current Tax Year") shall be paid in accordance with paragraph 5(b) hereof. C&NW represents that the tax information set forth in Exhibit H is a true and correct summary of the most recent information available to the C&NW concerning Property Taxes payable on the properties.

(b) The C&NW shall pay the Property Taxes payable during the Current Tax Year, but NEBKOTA shall be responsible for that portion of such Property Taxes applicable to the property it is acquiring for the period of that year commencing on the date of the easement to NEBKOTA (the "Easement Date"), as provided in Section 4(e) hereof. NEBKOTA shall be obligated to pay to C&NW when installments for 1994 taxes are due an amount equal to the daily proration for its share of such Property Taxes, based on the 1993 assessment for such property and based upon the time remaining to December 31 of the Current Tax Year, and commencing on the Easement Date, to be applied to the Property Taxes payable during the Current Tax Year. The Property Taxes are to be paid by C&NW when due to avoid the incurring of any penalties or interest for delinquent payment. Centrally assessed Nebraska Property Taxes payable for 1993 (and to be paid in 1993 and 1994) shall also be paid by C&NW prior to delinquency. Subject to

RTC's compliance with paragraph 5(f) hereof, there will be no proration of Property Taxes with RTC.

(c) Where the property is only a portion of the C&NW property within a county, the Property Taxes will be a proration of C&NW ad valorem taxes within that county based upon the proration that the track miles of the property bear to the total C&NW rail track miles having situs in said county.

(d) Special assessments and maintenance charges, and installment payments thereon, on the property due and payable prior to the Closing Date shall be paid by C&NW. RTC and NEBKOTA shall each be responsible for maintenance charges and special assessment installment payments, which are or become due and payable after the respective Closing Date for each party, except that the amount of such special assessments and special assessment installment payments not attributable to specific services performed for the benefit of the properties (i.e., removal of brush and grass, crossing maintenance, etc.) shall be paid by the party in ownership of the property as of the time the services are performed and the parties shall make appropriate adjustments for any such items billed after the respective Closing for such party. C&NW represents that the known locally assessed taxes, special assessments, maintenance charges, and installment payments have been set forth in Exhibit I hereto.

(e) C&NW shall promptly forward to RTC or NEBKOTA any tax, special assessment or maintenance charge bill received by

C&NW, the payment of which is either RTC's or NEBKOTA's responsibility, and any notice received of assessments for improvements levied after the Closing Date.

(f) The obligation to make adjustments for said proration of Property Taxes, to pay for said special assessments and maintenance charges and installments thereof to pay Property Taxes and other amounts referenced herein, and to forward said bills and assessment notices shall survive the respective Closing for each party. C&NW, RTC and NEBKOTA shall cooperate to obtain any divisions necessary so that ad valorem taxes for the year following the Current Tax Year will be separately assessed to either RTC or NEBKOTA with respect to the properties. Both RTC and NEBKOTA agree to take such actions as may be appropriate to obtain any tax exemptions, relief, abatements, rebates or credits that may be applicable to the properties. To the extent that Property Taxes for 1993 are reduced below the 1992 assessment, C&NW shall refund such difference to RTC and/or NEBKOTA, as appropriate.

Section 6). Notices

All notices given pursuant to this Agreement shall be deemed delivered if delivered by hand or sent by same day or overnight courier or by United States certified or registered mail, postage prepaid, addressed as follows:

To C&NW:

Chicago and North Western Transportation Company  
165 N. Canal Street

Chicago, IL 60606  
Attn: Senior Vice President, General Counsel  
and Secretary

To RTC:

Rails to Trails Conservancy  
1400 16th Street, N.W.  
Washington, D.C. 20036  
Attn: Mr. David Burwell, President  
Copy to: Ms. Andrea Ferster, General Counsel

To NEBKOTA:

NEBKOTA Railway, Inc.  
112 East Orin Street  
Gordon, NE 69343  
Attn: Mr. Glenn Price, President

Section 7). Closing

Closing for each of the transactions provided for herein shall take place at the offices of C&NW or at such other location as the parties may mutually select. The date of Closing shall be set by C&NW by notice to RTC and/or NEBKOTA at least ten (10) days prior thereto.

Section 8). Time of Essence

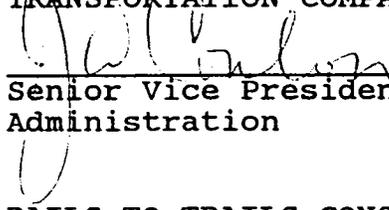
Time is of the essence of this Agreement.

Section 9). Counterparts

This Agreement may be executed in any number of counterparts, all of which together shall constitute a single instrument. It shall not be necessary that any counterpart be signed by all the parties so long as each party hereto shall sign at least one counterpart hereof which shall be effective upon delivery thereof to Mr. Thomas E. Greenland, Associate General Counsel, Chicago and North Western Transportation Company, 165 North Canal Street, Chicago, Illinois 60606.

CHICAGO AND NORTH WESTERN  
TRANSPORTATION COMPANY

By

  
\_\_\_\_\_  
Senior Vice President -  
Administration

RAILS TO TRAILS CONSERVANCY

By

\_\_\_\_\_

NEBKOTA RAILWAY, INC.

By

\_\_\_\_\_

Section 8). Time of Essence

Time is of the essence of this Agreement.

Section 9). Counterparts

This Agreement may be executed in any number of counterparts, all of which together shall constitute a single instrument. It shall not be necessary that any counterpart be signed by all the parties so long as each party hereto shall sign at least one counterpart hereof which shall be effective upon delivery thereof to Mr. Thomas E. Greenland, Associate General Counsel, Chicago and North Western Transportation Company, 165 North Canal Street, Chicago, Illinois 60606.

CHICAGO AND NORTH WESTERN  
TRANSPORTATION COMPANY

By \_\_\_\_\_

RAILS TO TRAILS CONSERVANCY

By \_\_\_\_\_

*Thomas E. Greenland*  
President

NEBKOTA RAILWAY, INC.

By \_\_\_\_\_

Section 8). Time of Essence

Time is of the essence of this Agreement.

Section 9). Counterparts

This Agreement may be executed in any number of counterparts, all of which together shall constitute a single instrument. It shall not be necessary that any counterpart be signed by all the parties so long as each party hereto shall sign at least one counterpart hereof which shall be effective upon delivery thereof to Mr. Thomas E. Greenland, Associate General Counsel, Chicago and North Western Transportation Company, 165 North Canal Street, Chicago, Illinois 60606.

CHICAGO AND NORTH WESTERN  
TRANSPORTATION COMPANY

By \_\_\_\_\_

RAILS TO TRAILS CONSERVANCY

By \_\_\_\_\_

NEBKOTA RAILWAY, INC.

By

Thomas F. McFarland Jr.  
THOMAS F. MCFARLAND JR.  
ATTORNEY-IN-FACT