

JH



202-245-0458

5 March 2007

Memo to Secretary, STB (for filing)

Re: F.D. ~~34924~~ *34924*

From: Charles Montange
426 NW 162d St.
Seattle, WA 98188
for Black Hills Transportation

I apologize for so long a fax filing, but this pleading is due today, and although I have properly addressed the Federal Express delivery ticket (see next page), Federal Express cannot seem to find your new location, after two tries.

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Office of Proceedings

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Public Record

Encl.

FedEx | Track

Page 1 of 1

Track Shipments
Detailed Results

Quick Help

Tracking number	858533776897	Service type	FedEx 2Day Pak
Ship date	Mar 1, 2007	Weight	7.0 lbs.
Estimated delivery	Mar 6, 2007 by 4:30 PM		
Status	Delivery exception		

Date/Time	Activity	Location	Details
Mar 5, 2007	2:59 PM Delivery exception	WASHINGTON, DC	Customer not available or business closed
	2:14 PM On FedEx vehicle for delivery	WASHINGTON, DC	
	11:39 AM At local FedEx facility	WASHINGTON, DC	
	7:27 AM Delivery exception	WASHINGTON, DC	Incorrect address
	7:08 AM At local FedEx facility	WASHINGTON, DC	
Mar 2, 2007	6:29 PM At dest sort facility	DULLES, VA	
	4:07 PM Departed FedEx location	MEMPHIS, TN	
	3:42 PM In transit	MEMPHIS, TN	
	11:14 AM Arrived at FedEx location	MEMPHIS, TN	
Mar 1, 2007	6:23 PM Left origin	SEATTLE, WA	
	4:26 PM Picked up	SEATTLE, WA	

edEx. US Airbill
Express

8585 3377 6897

Sender's Copy

TOEN Please print and press hard

Date March 07 Sender's FedEx Account Number 1387-6516-6

Sender's Name MONTANGE, CHARLES, ATTORNEY Phone (206) 546-1936

Company MONTANGE, CHARLES, ATTORNEY

Address 426 NW 16TH ST

City SHORELINE State WA ZIP 98177-3730

Internal Billing Reference OPTIONAL

Recipient's Name Secretary (Confidential) Phone

Recipient's Address Surface Transportation Board

395 E Street SW

City Washington State DC ZIP 20423-0001

0346719596

4a Express Package Service

FedEx Priority Overnight
 FedEx Standard Overnight
 FedEx First Overnight

FedEx 2Day
 FedEx Express Saver

4b Express Freight Service

FedEx 1Day Freight
 FedEx 2Day Freight
 FedEx 3Day Freight

5 Packaging

FedEx Envelope
 FedEx Pak
 FedEx Box
 FedEx Tube
 Other

6 Special Handling

SATURDAY Delivery
 HOLD at FedEx Location
 HOLD Saturday at FedEx Location

7 Payment

Sender
 Recipient
 Third Party
 Credit Card
 Cash/Check

Total Packages 1 Total Weight 7.0 Total Declared Value \$ 00

8 NEW Residential Delivery Signature Options

No Signature Direct Signature Indirect Signature

CHARLES H. MONTANGE

ATTORNEY AT LAW

426 NW 162ND STREET

SEATTLE, WASHINGTON 98177

(206) 546-1936

FAX: (206) 546-3739

1 March 2007

Express (for delivery 5 March)

Memorandum to Secretary (for filing)
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: Black Hills Transportation, Inc.
d/b/a Deadwood, Black Hills & Western
Railroad -- exemption -- modified
certificate of public convenience
and necessity, F.D. 34924

Reply to Petition to Revoke

From: Charles H. Montange 
Counsel for Black Hills Transportation, Inc.

I enclose the original and ten copies of a Reply on behalf of Black Hills Transportation d/b/a DBHWR to the petition to revoke filed in this proceeding on February 9, 2007. DBHWR understands that it has 20 days from filing of the petition to reply. Because 20 days from February 9 falls on March 1, because the Board is closed on March 1-4, and because filing deadlines are tolled during the closure, we are filing the enclosed Reply with the Board on March 5, 2007.

As indicated on the certificate of service, we served counsel for the petitioners on March 1.

Encl. (orig and 10)

cc. Counsel (w/encl.)

BEFORE THE SURFACE TRANSPORTATION BOARD

Black Hills Transportation, Inc.)
 d/b/a Deadwood, Black Hills & Western)
 Railroad -- exemption -- modified) F.D. 34924
 certificate of public convenience)
 and necessity)

Reply on behalf of
 Deadwood, Black Hills & Western Railroad
 to
 "Petition ... to Revoke"

Black Hills Transportation, Inc., d/b/a Deadwood, Black Hills & Western Railroad (DBHWR) opposes the "Petition under 49 U.S.C. § 10502(d) to Revoke" the modified certificate of public convenience and necessity ("modified PCN") issued in this proceeding on September 29, 2006.¹ The Petition, filed by Mr. Charles Brown, et al (hereinafter "Brown Petition") has no merit.²

Summary of Argument

The modified PCN was a final order as of the date of issuance. No one filed for a timely administrative reconsideration or

¹ The "Petition" alleges the modified PCN was dated September 21, 2006. The modified PCN was decided on September 21, 2006. It was published at the Board's website and in the Federal Register (71 Fed. Reg. 57600-01) on September 29, 2006.

² With the exception of Mr. Brown (whose standing is arguably justified by a statement of Mr. Justen in Mr. Brown's Exhibit A, but see note 5 infra), petitioners do not indicate any interest sufficient for standing by any of the ostensible petitioners in this proceeding. The continued participation of all petitioners other than Brown is thus objectionable, and the petition should be dismissed for lack of standing, except possibly for Brown. In all events, DBHWR will refer to all petitioners herein as "Mr. Brown" unless the context clearly indicates another meaning.

judicial review of the modified PCN. Focussing on administrative reconsideration, under the Board's rules, a timely petition for reconsideration or administrative appeal was due within twenty days of September 29. Mr. Brown, however, waited over four months to file a petition contesting the modified PCN. The tardy petition therefore amounts to a petition to reopen. Petitions to reopen may only be granted if the petitioner shows new evidence, changed circumstances, or material error. Mr. Brown shows no new evidence (certainly none they could not have adduced within the twenty day reconsideration/appeal period), does not argue changed circumstances, and indicates no material error.

In any event, Mr. Brown provides no justification for revocation. Mr. Brown contends that DBHWR's notice contained false or misleading information. It contained nothing of the sort. The information set forth in the notice was responsive to the Board's applicable regulations, to the point, and accurate.

Argument

I. The Brown Petition Does Not Meet Reopening Requirements

A. Background

The Brown petition is untimely. The world had notice of the granting of the modified PCN by way of publication in the Federal Register (71 Fed. Reg. 57600-01) on September 29, 2006 (copy attached hereto). This is legally sufficient notice for all potentially interested parties.

"Publication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance. See 44 U.S.C. § 1507; Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85 (1947); Government of Guam v. United States, 744 F.2d 699, 701 (9th Cir. 1984); Bennett v. Director, Office of Workers' Compensation Programs, 717 F.2d 1167, 1169 (7th Cir. 1983); North Alabama Express, Inc. v. United States, 585 F.2d 783, 787 n.2 (5th Cir. 1978)...."

Friends of Sierra Railroad v. ICC, 881 F.2d 663, 667-68 (9th Cir. 1989). Mr. Brown makes no claim that the contents of the notice in the Federal Register were insufficient to apprise the reader of the nature of the proceeding.

Under this Board's rules, an interested party has 20 days from this kind of "Board action" to file a timely appeal (termed a "petition for reconsideration"). 49 C.F.R. § 1115.3(e). See also 49 C.F.R. § 1104.13(a) (20 days to file replies to pleadings). The modified PCN was a final order when issued, at which point the 20 day review period commenced (as well as the 60 day period for seeking judicial review under the Hobbs Act, 28 U.S.C. §§ 2341, et seq.). The twenty day period for timely administrative review ended no later than October 19, 2006.

Of course a person may file for administrative review outside the 20 day limit, but that kind of "petition" is automatically a "petition to reopen" an administratively final action. As such, it must

"state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed

circumstances and must include a request that the Board make such a determination."

49 C.F.R. § 1115.4. In any event, the general rule is that where, as here, an exemption has become effective, "a revocation request is treated as a petition to reopen and revoke," which "must state in detail whether revocation is supported by material error, new evidence or substantially changed circumstances." E.g., Mountain Laurel Railroad Company -- Acquisition and Operation Exemption -- Consolidated Rail Corp., F.D. 31974, served May 15, 1998, slip op. at 9.

In addition, "the burden of proof is on the petitioner which must articulate reasonable, specific concerns under the revocation criteria." Id. at 8.

Mr. Brown fails to meet the stated standards and requirements. To the extent he presents evidence, the evidence is not "new," and he provides no rationale for why he was unable to present it during the 20 day administrative appeal period. He does not purport to argue substantially changed circumstances. And the argument he presents is either irrelevant, unsupported by any evidence (i.e., it is mere supposition and speculation), or insufficient to show any material error. In other words, he does not meet his burden of proof.

B. No New Evidence or Changed Circumstances

To constitute "new evidence," the evidence must not have been

available during the administrative review period. Friends of Sierra Railroad, supra, 881 F.2d at 667 (evidence available at the time of the initial proceeding is not "new" evidence). A cursory review of the "evidence" cited by the Mr. Brown³ indicates that it was all available to him before September 29, 2006 (when the Federal Register notice appeared), much less before October 19, 2006, by which date the administrative review period had run. Mr. Brown cannot claim lack of sufficient notice; as Friends of Sierra Railroad indicates, Mr. Brown had adequate notice "regardless of actual knowledge or hardship resulting from ignorance." Mr. Brown in short gives no legally relevant reason for his tardiness.

Mr. Brown cites no changed circumstances.

C. No Material Error

1. Sole Grounds Offered by Brown

This means that the only basis left for Mr. Brown to assert as a grounds for revocation is material error. The sole grounds he purports to offer for a finding of material error is that the DBHWR

³ The only evidence petitioners attach to support the merits of their petition is their Exhibit A (an affidavit by Ralph Justen, dated February 8, 2005); and their Exhibit B (an internet version of a newspaper article dated October 14, 2005). Their Exhibit C is a legal filing dated December 29, 2006, but that is cited by them only to suggest that Northern Hills Regional Railroad Authority (the government entity that owns this rail line) intends to assert preemption of any claim that the line has been abandoned for purposes of 43 U.S.C. § 912 (dealing with federally granted railroad rights of way). In any event, none of this "evidence," which presumably is submitted to support the "material error" arguments of Mr. Brown, is relevant to the merits, and thus not new evidence justifying reopening anyway.

set forth "false and/or misleading representations regarding the nature and status of the purported ownership and control of the Whitewood-to-Deadwood Right-of-Way..." Petition at 1. This is simply not the case.

DBHWR stated that the line was owned by Northern Hills Regional Rail Authority (NHRRA). See Notice at p. 1. NHRRA certainly claims ownership. We attach hereto an affidavit by Thomas Brady ("Brady Affidavit"). Mr. Brady, legal counsel for NHRRA, is a member of the bar of the State of South Dakota. He indicates that NHRRA claims title, provides a basis, notes that judicial decisions to date are all favorable to NHRRA. See Brady Affidavit ¶¶ 4-7.

Mr. Brown at p. 2 of his petition complains that DBHWR failed to disclose that there are two lawsuits pending against NHRRA. The relevant regulations do not require disclosure of pending lawsuits. Since there is no requirement to disclose lawsuits, non-disclosure is not false or misleading. Moreover, there is no result in litigation that is contrary to any representation by DBHWR. Brady Affidavit ¶¶ 6-7. The plain fact of the matter is that no court of competent jurisdiction has declared any part of the "Whitewood to Deadwood Right-of-Way" (petitioners' term) "abandoned." See Brady Affidavit ¶ 6. The only judicial determination to date (in the Charles Brown case referenced by Mr. Brown at p. 2 of his petition) is that the railroad interest is not abandoned and (for all

purposes relevant here) is owned by NHRRA. That determination was made on December 12, 2005, and is certainly fully consistent with NHRRA's claim of ownership. See Brady Affidavit ¶ 7 (attaching opinion). In short, to the extent there is litigation, NHRRA has won to date and its legal position is consistent with established decisions. This is fully consistent with DBHWR's representations. Mr. Brown at page 2 of his petition apparently wishes to relitigate title issues he has so far lost, but, with respect, the appropriate forum for that is state court. In all events, there is nothing about the underlying situation which renders DBHWR's statements false or misleading.

The above discussion of p. 2 of the Brown petition disposes of what we understand to be the thrust of Mr. Brown's argument. However, we would go on to note that the "Argument" portion of the petition contains a number of statements by or on behalf of Mr. Brown that are false or misleading. We will discuss some of these that have not already been addressed in the section below.

2. Other Claims by Mr. Brown

-- Mr. Brown says that "applicant" stated that the right of way had not been abandoned. Pet. at p. 3, point 6. Mr. Brown is evidently referring to NHRRA's position in state court proceedings. While DBHWR agrees with NHRRA's position in this regard in state court, what is relevant is what was said before STB. DBHWR represented to this Board that the line had been authorized for

abandonment. Notice at p.2, para. 2. No one contests this fact. The relevant regulation governing modified PCN's applies to lines that are abandoned or authorized for abandonment. In short, what DBHWR said was manifestly correct. Nothing DBHWR said on this point is or could be false or misleading.

-- Mr. Brown says (without citation to any authority) that a "right-of-way is an easement and once the easement has been terminated, the ROW is extinguished, therefore no right can be transferred." Pet. at p. 3, point 7. This of course is wrong. The term "right of way" in the context of a railroad can mean either a right to construct and to operate, which might be an easement, "or the land so used." Black's Law Dictionary 1326 (West 7th ed. 1999).⁴ A railroad "right of way" can be comprised of parcels held in fee simple absolute, base fee, easement, or federally granted interests. Mr. Brown's parcel happens to be traversed by a federally-granted railroad interest. See Brady Affidavit ¶ 5. That interest continues until there is a judicial determination of abandonment. See, e.g., Phillips v. Denver & R.G. W.R., 97 F.3d 1375 (10th Cir. 1996). At that point, a government entity still has one year to acquire the federal interest for public highway purposes per 43 U.S.C. § 912. There has been no judicial determination of abandonment here. See Brady Affidavit ¶ 6. Instead, the South Dakota courts so far have declined to make such

⁴ See also State v. Tolke, 586 P.2d 791 (Ore. 1978).

a determination as indicated in the Brown decision involving Mr. Brown attached to Mr. Brady's Affidavit.

-- Mr. Brown claims it is misleading to fail to disclose to STB that he disputes the court rulings to date. Pet. at 3, point 8. With respect, the fact that someone disagrees with a court ruling does not make a filing consistent with the ruling misleading, nor does it require some sort of exegesis.

-- Mr. Brown, citing a 2005 newspaper story, claims that the project is solely for passenger purposes. Pet. at 3, point 9. DBHWR forthrightly acknowledged in its notice for this modified PCN that it intended to offer passenger as well as freight rail service. Notice at pp. 1 & 3. But the fact that a newspaper reporter in an article in 2005 emphasized passenger train use does not contradict DBHWR's interest and intent to provide freight service. Peter Lien & Sons owns rock deposits just outside Deadwood which could be developed if served by the line. Mr. Lien has expressed interest in use of the line in order to facilitate the quarry, and is a "major shareholder" (Mr. Brown's term in his Petition at p. 3, point 10) in the project. DBHWR is thus well motivated, and wishes, to provide freight service. See Verified Statement of Ralph Justen (president, DBHWR) at ¶ 2. Since freight use is anticipated, a modified PCN is appropriate.

-- Mr. Brown says that NHRRA has never referenced any proposed freight use. Petition at p.3, point 10. Even assuming

this so arguendo, Mr. Brown's point would be irrelevant. NHRRA's statute states that the purpose of NHRRA is to foster "passenger and other rail service in the Northern Black Hills area." SDCL 49-17A. NHRRA's authority is thus manifestly consistent with both freight and passenger rail service. Even if NHRRA initially focussed on passenger, as Mr. Brown claims, it did not exclude freight. Brady Affidavit ¶ 8. The key question is what does NHRRA's rail operator intend. DBHWR has a shipper on its board who wishes to use the line for freight, and DBHWR indicates it is committed to provide such service. Justen V.S. ¶ 2. NHRRA sees freight as facilitating its plans as well. Brady Affidavit ¶ 8.

Mr. Brown seems to admit that DBHWR has legitimate freight rail intent by complaining that a major shareholder of DBHWR wishes to ship freight on DBHWR (see Notice, Appendix F, Letter from Mr. Lien). As DBHWR's filing indicated (Notice, Appendix B), Mr. Lien is even on DBHWR's board. However, neither the fact that Mr. Lien is a shareholder or that he is a board member renders "false or misleading" anything that was said by DBHWR to this Board. It would rather seem to make sense that if DBHWR has a major shareholder and/or board member interested in freight use that DBHWR would be sincerely endeavoring to offer freight rail service. Certainly DBHWR's articles of incorporation (Notice App. A, Articles Art. III) encompass any rail service.

-- Mr. Brown says that he "believe[s]" that DBHWR is seeking

a modified PCN to assert federal preemption. Pet. at p. 3, point 11. DBHWR seeks to provide freight service and is in the process of seeking funding assistance from state and federal sources for same. See Justen V.S. ¶ 2. To both these related ends, DBHWR needs authorization to provide freight service. DBHWR has nowhere asserted federal preemption. The fact that DBHWR's modified PCN may assist NHRRA in resisting claims by Mr. Brown that the federally granted railroad right of way interest is extinguished on Mr. Brown's property is an entirely appropriate side effect.⁵

-- Mr. Brown on his concluding p. 4 claims that NHRRA and DBHWR have "done their best to create a false impression and manipulate the STB" in order to "take land from the rightful owners." With respect, this is simply rhetoric by parties or their lawyers who have thus far lost in state court. Counsel for NHRRA has reviewed DBHWR's filing and found nothing misleading. Brady Affidavit ¶9. Similarly, DBHWR believes the filing accurate. Justen Affidavit preamble. DBHWR and NHRRA have no wish to be litigated to death. They wish to get on with rail service. To this end, they have complied with, and shown good faith compliance with, all the requirements set forth in the relevant regulation.

⁵ DBHWR also notes that under 16 U.S.C. § 1248(c), it appears that Mr. Brown does not have any underlying property interest, because that statute modifies the allocation of the unvested federal interest in 43 U.S.C. § 912 by repealing any reversion to owners of the legal subdivision traversed by the federally granted right of way. That being the case, Mr. Brown also lacks standing.

Neither has said anything false or misleading to this Board.

3. National Transportation Policy

Mr. Brown filed his petition under 49 U.S.C. § 10502(d). That statute states that the Board may revoke an exemption only where it finds that application of the ICCTA "is necessary to carry out the transportation policy of section 10101 of this title." Although Mr. Brown bears the burden of proof,⁶ and thus certainly the burden of going forward, he does not even mention national transportation policy (NTP) set forth in 49 U.S.C. § 10101, much less show that revocation is necessary to accomplish it. The Brown petition thus utterly fails to justify revocation under 49 U.S.C. § 10502(d).

Continued application of the modified PCN exemption is consistent with NTP. It serves, among other things, to reduce regulatory barriers [§10101(2)&(7)], to foster sound economic conditions [§10101(5)], to encourage energy conservation [§10101(14)], and to ensure development and continuation of a sound rail transportation system [§10101(4)].

Moreover, DBHWR and NHRRA are already acting in reliance on the modified PCN. Mr. Brown argued in his Petition that NHRRA is evidently already properly relying upon the modified PCN. DBHWR is also relying on the modified PCN for purposes of funding and business planning. *Justen V.S.* at ¶ 2. This presents issues of finality, repose, and detrimental reliance, which of course are the

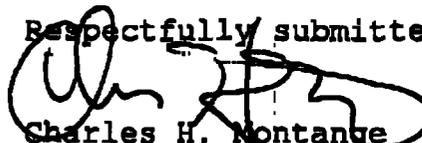
⁶ See Mountain Laurel RR Co., *supra*, at p. 8.

reason that petitions to reopen administratively final actions, like the one here, are disfavored. See S.R. Investors, Ltd. d/b/a Sierra Railroad Company -- Abandonment -- Tuolumne County, CA, ICC dkt. AB 239X, served Jan. 26, 1988, slip op. at 9.

III. Conclusion

Mr. Brown does not show any material error. He does not identify any statement made by DBHWR that was false or misleading. His petition does not meet the standards to reopen, or to revoke. This Board should decline to reopen, much less to reopen to revoke. DBHWR and NHRRA are moving forward with their project. The Brown petitioners had notice, now act well outside the period for timely reconsideration, and offer nothing to merit further proceedings in any event.

Respectfully submitted,



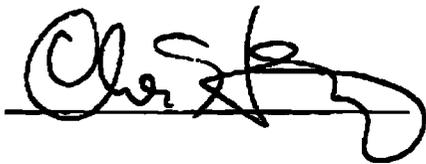
Charles H. Montange
for Black Hills Transportation,
Inc., d/b/a Deadwood, Black Hills &
Western Railroad

Attachments:
Federal Register Notice
Justen Verified Statement
Brady Affidavit (and attachments)

Certificate of Service

I hereby certify service by U.S. Mail, postage pre-paid, first class, this 1st day of March 2007 upon the following counsel for petitioners:

Kenneth Dewell, Esq.
John Eisland Law Offices
4020 Jackson Blvd.
Rapid City, South Dakota 57709-6900

A handwritten signature in black ink, appearing to read "Charles Montange", is written over a horizontal line.

57600

Federal Register / Vol. 71, No. 189 / Friday, September 28, 2006 / Notices

carriers. Accordingly, the Board may not impose labor protective conditions here, because all of the carriers involved are Class III carriers.

If the verified notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34929, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423-0001. In addition, one copy of each pleading must be served on Fritz R. Kahn, Fritz R. Kahn, PC, 1920 N St., NW., Eighth Floor, Washington, DC 20036-1501.

Board decisions and notices are available on our Web site at WWW.STB.DOT.GOV.

Decided: September 22, 2006.

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

Vernon A. Williams,

Secretary.

[FR Doc. E6-16037 Filed 9-28-06; 8:45 am]

BILLING CODE 4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

Release of Waybill Data

The Surface Transportation Board has received a request from Baker & Miller, on behalf of the University of Denver's Intermodal Transportation Institute (WB981-7/28/06), for permission to use certain data from the Board's 1987-2005 Carload Waybill Samples. A copy of this request may be obtained from the Office of Economics, Environmental Analysis, and Administration.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to these requests, they should file their objections with the Director of the Board's Office of Economics, Environmental Analysis, and Administration within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

Contact: Mac Frampton, (202) 565-1541.

Vernon A. Williams,

Secretary.

[FR Doc. E6-16038 Filed 9-28-06; 8:45 am]

BILLING CODE 4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

Release of Waybill Data

The Surface Transportation Board has received a request from Mayer, Brown, Rowe & Maw on behalf of The BNSF Railway Company (BNSF) (WB481-13-8/31/2006) for permission to use certain data from the Board's Carload Waybill Samples. A copy of this request may be obtained from the Office of Economics, Environmental Analysis, and Administration.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to these requests, they should file their objections with the Director of the Board's Office of Economics, Environmental Analysis, and Administration within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

Contact: Mac Frampton, (202) 565-1541.

Vernon A. Williams,

Secretary.

[FR Doc. E6-16039 Filed 9-28-06; 8:45 am]

BILLING CODE 4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

Release of Waybill Data

The Surface Transportation Board has received a request from Michael Behe representing FRN, LLC (WB604-4-7/8/06) for permission to use certain data from the Board's 2005 Carload Waybill Sample. A copy of this request may be obtained from the Office of Economics, Environmental Analysis, and Administration.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to these requests, they should file their objections with the Director of the Board's Office of Economics, Environmental Analysis, and Administration within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

Contact: Mac Frampton, (202) 565-1541.

Vernon A. Williams,

Secretary.

[FR Doc. E6-16041 Filed 9-28-06; 8:45 am]

BILLING CODE 4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

Release of Waybill Data

The Surface Transportation Board has received a request from Schmeltzer, Aptaker & Shepard, P.C. on behalf of Trinity Industries, Inc. (WB605-2-7/28/2006) for permission to use certain data from the Board's 2005 Carload Waybill Sample. A copy of the requests may be obtained from the Office of Economics, Environmental Analysis, and Administration.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to these requests, they should file their objections with the Director of the Board's Office of Economics, Environmental Analysis, and Administration within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

Contact: Mac Frampton, (202) 565-1541.

Vernon A. Williams,

Secretary.

[FR Doc. E6-16042 Filed 9-28-06; 8:45 am]

BILLING CODE 4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

(STB Finance Docket No. 34924)

Black Hills Transportation, Inc., d/b/a Deadwood, Black Hills & Western Railroad—Modified Rail Certificate

On August 30, 2006, Black Hills Transportation, Inc., d/b/a Deadwood, Black Hills & Western Railroad (DBHWR), filed a notice for a modified certificate of public convenience and necessity under 49 CFR 1150, Subpart C, *Modified Certificate of Public Convenience and Necessity*, to operate approximately 9.01 miles of rail line extending from milepost 0.0, at Whitewood, to milepost 9.01, at Deadwood, in Lawrence County, SD.

The line was formerly a portion of the Chicago & North Western Railway Company and was authorized for abandonment by the Interstate Commerce Commission in *Chicago & North Western Railway Co.—Abandonment—Lawrence County, SD*, Finance Docket No. 28079 (ICC served May 20, 1970). Although authorized for abandonment, the line was subsequently acquired by the State of South Dakota and ownership was

ultimately passed to the Northern Hills Regional Railroad Authority (NHRA).

As operator of the line, DBHWR will provide both passenger and freight services pursuant to an operating agreement with NHRA. Under the agreement, DBHWR expects to interchange with Dakota, Minnesota & Eastern Railroad at milepost 0.0, at Whitewood. DBHWR states that the period for operation is currently indefinite and that the agreement with NHRA will be amended or supplanted prior to actual commencement of operations.

The rail segment qualifies for a modified certificate of public convenience and necessity. See *Common Carrier Status of States, State Agencies and Instrumentalities and Political Subdivisions*, Finance Docket No. 28990F (ICC served July 18, 1981).

DBHWR states that the line will require reconstruction for operational purposes and the imposition of certain preconditions to ensure that construction and operation costs are recoverable. DBHWR indicates that commencement of rehabilitation or operations will be contingent upon shippers meeting the following preconditions: (a) Entry into binding written commitments to provide funding for restoration purposes equal to a sum no less than \$13,000,000;¹ and (b) entry into binding written commitments sufficient to assure car loadings (or payments in lieu thereof) in an amount no less than 1,000 carloads per year (an amount judged adequate to cover all costs associated with maintenance, operation and capitalization of the line).

DBHWR indicates that no subsidy is involved. DBHWR also indicates that it

¹ This sum may be increased in the event a third party engineering study identifies needs requiring a greater amount of rehabilitation necessary to improve the facilities in order to achieve 25 mph operation in accordance with applicable standards.

has obtained liability insurance coverage, and will obtain additional insurance when it commences rehabilitation or actual operation.

This notice will be served on the Association of American Railroads (Car Service Division) as agent for all railroads subscribing to the car-service and car-hire agreement; Association of American Railroads, 50 F Street, NW., Washington, DC 20001; and on the American Short Line and Regional Railroad Association: American Short Line and Regional Railroad Association, 50 F Street, NW., Suite 7020, Washington, DC 20001.

Board decisions and notices are available on our Web site at WWW.STB.DOT.GOV.

Decided: September 21, 2006.

By the Board, David M. Konschnik,
Director, Office of Proceedings,
Vernon A. Williams,
Secretary.

[FR Doc. E6-15955 Filed 9-28-06; 8:45 am]
BILLING CODE 4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34928]

SMS Rail Lines of New York, LLC— Acquisition and Operation Exemption—Northeastern Industrial Park, Inc.

SMS Rail Lines of New York, LLC (SMSNY), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to acquire by lease from Northeastern Industrial Park, Inc., and to operate approximately 15 miles of rail line in the Northeastern Industrial Park, Guilderland Center 12085, Albany County, NY.¹

¹ The rail lines extend from connections with the Canadian Pacific Railway at milepost 11.4 on the railroad's Voorheesville Running Track. There is a

This transaction is related to STB Finance Docket No. 34929, *Jeffrey L. Sutch—Continuance in Control Exemption—SMS Rail Lines of New York, LLC*, wherein Jeffrey L. Sutch has concurrently filed a verified notice of exemption to continue in control of SMSNY, upon its becoming a Class III rail carrier.²

SMSNY certifies that the projected annual revenues as a result of this transaction will not result in the creation of a Class II or Class I rail carrier, and further certifies that its projected annual revenues will not exceed \$8 million. The transaction was scheduled to be consummated on or after September 8, 2006.

If the notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34928, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423-0001. In addition, one copy of each pleading must be served on Fritz R. Kahn, Fritz R. Kahn, PC, 1920 N St., NW., Eighth Floor, Washington, DC 20036-1601.

Board decisions and notices are available on our Web site at WWW.STB.DOT.GOV.

Decided: September 22, 2006.

By the Board, David M. Konschnik,
Director, Office of Proceedings,
Vernon A. Williams,
Secretary.

[FR Doc. E6-16038 Filed 9-28-06; 8:45 am]
BILLING CODE 4915-01-P

separate connection with a rail line of CSX Transportation, Inc.

² Mr. Sutch also controls SMS Rail Service, Inc., a Class III rail carrier.

BEFORE THE SURFACE TRANSPORTATION BOARD

**Black Hills & Western RR – Exemption – Modified Certificate
F.D. 34924**

Verified Statement of Ralph Justen

I, Ralph Justen, am the President and an employee of Black Hills Transportation, Inc. d/b/a Deadwood, Black Hills & Western RR. I am authorized to make this Verified Statement on behalf of Black Hills Transportation, Inc. I have read the Petition to Revoke filed by petitioners Brown, et al in this proceeding. I have also read the notice for a Modified Certificate filed by Black Hills Transportation. Petitioners Brown, et al, are incorrect in asserting that anything in the notice is "false" or "misleading." The notice we filed is true and correct to the best of my knowledge and belief. For the benefit of the record, I will add the following points:

1. The Northern Hills Regional Railroad Authority is a political subdivision of the State of South Dakota formed pursuant to South Dakota Codified Laws 49-17A et seq. Black Hills Transportation Inc. is under contract with the Northern Hills Regional Railroad Authority to carry forward the purpose and intent of the Northern Hills Regional Railroad Authority to "reestablish passenger and other rail service to the Northern Black Hills Area including, but not limited to service between Whitewood and Deadwood, South Dakota."
2. On August 30, 2006, Black Hills Transportation filed a "notice" for, and on September 29, 2006, was granted a Modified Certificate of Public Convenience and Necessity. While we took no action on the Modified Certificate until it was final, since then we have taken action based upon it. For example, Black Hill Transportation is relying on that Certificate for purposes of making arrangements to provide freight railroad service to, among others, Peter Lien and Sons, which is a major aggregates company with rock deposits near to Deadwood. We understand they will invest in a new quarry and transload facility if we are able to provide freight rail service on our Whitewood to Deadwood corridor. We also are working on a trackage rights agreement with the DM&E Railroad, which also is predicated on us having a Modified Certificate. Moreover, we are relying on the Modified Certificate for purposes of securing State and Federal funding for rehabilitation expenses and to attract additional capital investment from potential shippers and others. While Black Hills Transportation is certainly interested in providing passenger services, it is definitely committed to freight, and indeed, a major shipper is a member of our board and wishes to use the line covered by the Modified Certificate for freight rail transportation. The Brown Petition is simply wrong in claiming or suggesting that Black Hills Transportation or Northern Hills Regional Railroad Authority are only interested in passenger service, or only intend passenger service.
3. State law encourages railroad service, and in particular provides "for the acquisition, operation, maintenance and improvement of public rail lines..." pursuant to SDCL 1-44-20, SDCL 1-44-18, SDCL 1-44-27, SDCL 49-16C1, SDCL 49-16C-3 and SDCL 49-17A et seq. The Modified Certificate is consistent with state law, and with implementing the purposes of state law by Northern Hills Regional Railroad Authority through the actions of Black Hills Transportation.

Per 49 C.F.R. 1104.5, I, Ralph Justen, declare under penalty of perjury that the foregoing is true and correct. Further I certify that I am qualified and authorized to file this Verified Statement.

Signature: _____

Ralph Justen

Executed on: _____

2/28/07

BEFORE THE SURFACE TRANSPORTATION BOARD

Black Hills Transportation, Inc.)
d/b/a Deadwood, Black Hills & Western)
Railroad - exemption - modified)
Certificate of public convenience)
and necessity)

F. D. 34924

Brady Affidavit

State of South Dakota)
) ss.
County of Lawrence)

Thomas E. Brady, being first duly sworn upon his oath, deposes and states as follows:

1. The undersigned, Thomas E. Brady, is duly licensed to practice law, inter alia, in all Courts of the State of South Dakota and the Federal District Court of the State of South Dakota. This Affidavit is submitted based on the undersigned's personal knowledge and information.

2. The undersigned has been legal counsel for the Northern Hills Regional Railroad Authority (NHRRA) since September 2000.

3. NHRRA is a regional railroad established in 1994 pursuant to South Dakota Codified Laws, Chapter 49-17A. Pursuant to the "Regional Railroad Authorities Act" (SDCL 49-17A-40), the purpose of NHRRA is to reestablish rail service along the historical rail line (ROW) known as the Whitewood, Lawrence County, South Dakota to Deadwood, Lawrence County, South Dakota, line consisting of approximately 9.1 miles established in the 1890s by the Fremont, Elkhorn & Missouri Valley Railroad. A portion of the ROW passes through, upon and across the Charles Brown (Brown) property. NHRRA has, pursuant to SDCL 49-17A-16, proceeded with the planning for the acquisition and operation of a railroad and facilities, together with acquisition of property and, has, pursuant to SDCL 49-17A-36, entered into Agency and Operating Agreements with Black Hills Transportation, Inc., d/b/a Deadwood, Black Hills & Western Railroad (DBHWR).

4. NHRRA claims ownership of the ROW. Documents evidencing ownership include the following:

- (1) Deed for the ROW from the South Dakota Department of Transportation dated March 25, 2004 (South Dakota received title by deed from the Chicago & North Western, successor in interest of the Fremont, Elkhorn & Missouri Valley), a copy of which is attached hereto as Exhibit 1.
- (2) Deed for the ROW from Union Pacific dated June 16, 2006, (Chicago & North Western merged into the Union Pacific, thus the successor in interest of any interest that Chicago & North Western possessed in the ROW), a copy of which is attached hereto as Exhibit 2.
- (3) Deed for the ROW from Dakota, Minnesota & Eastern Railroad dated October 17, 2006 (possible successor in interest from the Union Pacific by virtue of the DM&E acquiring rail lines in western South Dakota from the Union Pacific, which may include the ROW), a copy of which is attached hereto as Exhibit 3.
- (4) Easement in regard to part of the ROW dated May 23, 2003, from the South Dakota Game, Fish & Parks (which received title to a portion of the ROW from the South Dakota Department of Transportation), a copy of which is attached hereto as Exhibit 4.

5. The ROW was established in part by the Fremont, Elkhorn & Missouri Valley by acquiring deeds from property owners who had received patents to certain portions of the property prior to the railroad and was established in part (including the portion through, upon or across the Brown property) by the General Railroad Right of Way Act of 1875, 43 U.S.C. 934-39 et seq., preceding the issuance of patents.

6. There is no Court in the State of South Dakota, which Courts consist of the Circuit Court and the Supreme Court, that has declared the ROW abandoned. No South Dakota Federal District Court has declared the ROW abandoned. Upon exhaustive research and information, no federal court anywhere in the United States has declared the ROW abandoned. Upon research and information, there is no Act of Congress declaring the ROW abandoned.

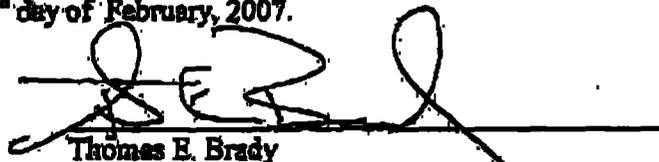
7. Brown commenced litigation in South Dakota Circuit Court, Lawrence County, captioned "Charles W. Brown, Plaintiff vs. Northern Hills Regional Railroad Authority, et al.", Civil Action #04-254. On December 12, 2005, Presiding Circuit Court Judge Warren G. Johnson entered "Order Granting NHRRA, SDDOT and GF&P Motions For Judgment Summary (sic) and Order Denying Brown and Eisenbacher Cross Motions for Summary Judgment", a copy of which Order is attached hereto as Exhibit 5, concluding there was no question of fact and that as a matter of law, NHRRA has title to the ROW that passes through, upon and across the Brown and Eisenbacher properties. Brown has appealed this Judgment (adverse to him) to the South

Dakota Supreme Court (Bischofberger did not appeal). Although the matter is now pending before the South Dakota Supreme Court, no application, bond or proceeding to stay the Circuit Court Judgment has been made or entered. As the State of South Dakota Department of Transportation, the South Dakota Game, Fish & Parks and NHRRA presented in their briefing to the South Dakota Supreme Court, under that Court's decision in *Barnay v. Burlington Northern Railroad Company*, 490 N.W.2d 726 (SD 1992), a copy of which is attached hereto as Exhibit 6, the Court has specifically addressed the issues Brown is attempting to litigate and thus, the appeal has no merit.

8. NHRRA's initial focus to reestablish rail service on the historic Whitewood to Deadwood ROW was to facilitate passenger service, but not to the exclusion of freight rail service. The ROW can serve important freight rail purposes as represented to be a need by a significant company, the President of which sits on the Board of Directors of DBHWR. DBHWR plans to provide freight service for customers so requesting. Additionally, there are significant other economic development projects occurring in the region that may provide additional demand for freight service on the ROW, all of which shall contribute to the economic development interests for the region and for the State of South Dakota as a whole. Thereby, DBHWR's application for the modified Certificate is currently an integral part of its business plan and in turn facilitates NHRRA's plan to reestablish service on the ROW and to accomplish the preservation and use of this historic line.

9. Brown and his counsel from time to time have accused NHRRA and persons affiliated with NHRRA, including the undersigned, with making "false or misleading" statements, and make similar accusations as to DBHWR. Upon review of the DBHWR Notice for a Modified Certificate, upon information and belief, there is nothing contained therein to be false or misleading, either as to or by NHRRA or DBHWR.

Respectfully submitted this 27th day of February, 2007.


Thomas E. Brady

Subscribed and sworn to before me this 27th day of February, 2007.

(SEAL)

My Commission Expires: 11/6/2012


Notary Public



Doc# 2004-01838
 Recording Fee: \$ 12
 Date: 02/22/2004 Time: 10:41
 Lawrence County
 Register of Deeds

Shelly Brown
 Deputy

EXEMPT FROM TRANSFER FEE

Prepared By:
 BRADY PLUMER P.C.
 155 Colorado Blvd.
 Spearfish, SD. 57783
 Telephone: (605) 722-9000

AND

SOUTH DAKOTA DEPARTMENT OF TRANSPORTATION
 700 E. Broadway
 Pierre, SD 57501
 Telephone: (605) 773-4396

QUIT CLAIM DEED

STATE OF SOUTH DAKOTA, DEPARTMENT OF TRANSPORTATION, *Grantor*, of 700 E. Broadway, Pierre, SD 57501, pursuant to SDCL 31-19-63 and for and in consideration of Good and Valuable Consideration, **CONVEYS AND QUIT CLAIMS TO** NORTHERN HILLS REGIONAL RAILROAD AUTHORITY, *Grantee*, of P. O. Box 503, Deadwood, SD 57732, all highway right of way through the following described real estate in the County of Lawrence in the State of South Dakota, to-wit:

That portion of the right of way line within the former Chicago and North Western Railway Company described as follows, to-wit:

NE $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 5, Township 5 North, Range 4 East of the B.F.M., Lawrence County, South Dakota;

NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 6, Township 5 North, Range 4 East of the B.F.M., Lawrence County, South Dakota;

NE $\frac{1}{2}$ SE $\frac{1}{4}$, SE $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{2}$ SE $\frac{1}{4}$, SE $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 28; NE $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 33; SE $\frac{1}{2}$ NE $\frac{1}{4}$, NE $\frac{1}{2}$ SE $\frac{1}{4}$, NW $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{2}$ SE $\frac{1}{4}$, SE $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 32, in Township 6 North, Range 4 East, of the B.F.M., Lawrence County, South Dakota;

SE $\frac{1}{2}$ NE $\frac{1}{4}$, SW $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 5, Township 5 North, Range 4 East of the B.F.M., Lawrence County, South Dakota;

Lot H1 of Lot 2, Lot H1 of Lot 3 and Lot H1 of Lot 4 in Placer Claim Lot No. 166;
 Lot H3 of Lot 2, Lot H3 of Lot 3 and Lot H3 of Lot 4 in Placer Claim Lot No. 166;
 Lot H5 in Placer Claim Lot 587;
 Lots H3 and H4 in Placer Claim Lot 888;
 Lot H2 in Placer Claim Lot 343; and
 Mining Claims 383, 687, 888 and 166.

AS IS PART OF:

All of the right of way of the Chicago and North Western Railway Company in Section 1, Township 5 North, Range 3 East, and in Sections 5 and 6, Township 5 North, Range 4 East, and in Sections 32 and 33, and South Half of Section 28, in Township 6 North, Range 4 East, B.F.M.

QUIT CLAIM DEED

Page 2 of 3

State of South Dakota, Department of Transportation/
Northern Hills Regional Railroad Authority

ALSO:

All of the right of way of the Chicago and North Western Railway Company through Falls Mining District and Whitewood Mining District, lying Northeastly of the Northeastly Corporate Limits of Deadwood. EXCEPTING THEREFROM that part of Cattaraugus Placer (M.L. No. 952) lying Westerly of said right of way and Westerly of the following described tract of land: Beginning at Corner No. 16 of the official survey of Placer M.L. No. 952; thence with Course No. 16 of said survey North 00 degrees, 45 minutes West a distance of 170 feet to Corner No. 17; thence North 47 degrees East a distance of 170 feet to Corner No. 18; thence North 23 degrees East a distance of 100 feet to Corner No. 1 of said survey which is also Corner No. 12 of the official survey of Red Placer, M.L. No. 921; thence on Course No. 11 of said last mentioned survey, North 35 degrees West a distance of 563 feet to a point; thence South 34 degrees, 04 minutes West a distance of 571.5 feet; thence Southeastly a distance of 606 feet, more or less, to the point of beginning.

ALSO:

All of the right of way of the former Chicago and North Western Railway Company through that part of the Whitewood Mining District including part of Mineral Claim 216, and Block 12, City of Deadwood, bounded and described as follows: Beginning at the most Westerly corner of Lot "T" Spring Creek Conduit Easement, being a point on the Southeastly line of Lot H-1, M.S. 216; thence Southwestly along said Southeastly line of Lot H-1, Lot H-4 and Lot H-5, Block 12, to a point on the Northwestly line of said "T" Easement to Chicago, Burlington & Quincy Railroad, and in turn deeded to City of Deadwood (by CB&Q) November, 1940; thence Northeastly along the Northwestly line of said deeded lands to a point on the Southwestly line of said Mineral Claim No. 216; thence Southeastly along said Southwestly line of Mineral Claim No. 216 to a point on the Northwestly right of way line of the Grand Island and Wyoming Central Railroad, also known as the Deadwood Central Railroad Company, as described in that certain Warranty Deed dated May 14, 1890, between Levi E. Field and Peda Damouth, and the Fremont, Elkhorn and Missouri Valley Railroad Company, filed for record in the Register of Deeds Office for Lawrence County on September 29, 1899, in Book 89, on Page 626; thence Northeastly along said last described right of way line to the most Southerly corner of said Lot "T"; thence Northwestly along the Southwestly line of said Lot "T" to the point of beginning. EXCEPTING THEREFROM Lots 34, 36, 38, 40, 42 and 44 of Block 12, Southeastly side of Main Street, City of Deadwood,

except and subject to such interest as may have been previously conveyed pursuant to that certain Quit Claim Deed wherein State of South Dakota, Department of Transportation, appears as Grantor, and South Dakota Department of Game, Fish and Parks appears as Grantee, filed for record as Document No. 85-1371 in the Office of the Lawrence County Register of Deeds, Deadwood, South Dakota, and further except and subject to such interest as may have been previously abandoned, conveyed, encumbered or otherwise transferred as a result of South Dakota Transportation Commission Resolutions No. 14217, 14218, and 14219, attached hereto as Exhibit 1, and South Dakota Transportation Commission Resolution No. 15796, filed for record as Document No. 95-1083 in the Office of the Lawrence County Register of Deeds, Deadwood, South Dakota.

QUIT CLAIM DEED

Page 3 of 3

State of South Dakota, Department of Transportation/
Northern Hills Regional Railroad Authority

Any property interests conveyed or transferred through this Deed shall be held by Grantee, its successors and assigns, for public highway purposes only. In the event Grantee or its successors or assigns do not hold said property interests for public highway purposes, then any interest conveyed or transferred pursuant to this Deed shall revert to Grantor.

It is further understood that this Deed does not carry with it any implied covenants whatsoever.

***Exempt from transfer fee pursuant to SDCL 43-4-22(2).

Dated this 25TH day of March, 2004.

STATE OF SOUTH DAKOTA,
DEPARTMENT OF TRANSPORTATION

By: [Signature]
Its: Sec.

State of South Dakota }
County of Hughes } SS.

On this 25TH day of March, 2004, before me, the undersigned officer, personally appeared Dennis Lundquist, known to me or satisfactorily proven to be the Secretary of the State of South Dakota, Department of Transportation, and that he/she as such officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained in such capacity.

IN WITNESS WHEREOF, I have set my hand and official seal.



[Signature]
Notary Public

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September 27, 1984

Notice was made by Mustard, seconded by Rothstein, to appoint Attorney Dana Ferguson, Jr. Moore, as the hearing examiner for the potential debarment of the contractors listed above. All voted Yes. Motion carried.

* * * * *

Secretary Myers presented three resolutions to the Commission for their approval. These resolutions dealt with the disposal of the Whitewood as Seaside Rail line and transfer of so Game, Fish & Parks.

More Doyle, Staff Counsel, stated that one resolution declared that the State had no need for and was abandoning the property as which the State does not have title. The second resolution allowed the Department of Transportation to sell the pieces of property that the DOT did have for title to, subject to the final approval of the Commission. The third resolution transferred title of the property from Seaside to the Section Line, to Game, Fish & Parks.

Notice was made by Rothstein, seconded by Appelwick, to approve the above three described resolutions, Nos. 14217 through 14219, respectively. All voted Yes. Motion carried. (Resolutions scratched)

* * * * *

THE FOLLOWING IS A TRANSCRIPT FROM THE 11:00 A.M. HEARING:

JAMES HARRIS: Legal Counsel. This is the time you set for a hearing on speed zones in Pennington County which is Rapid City and in Meade County in Sturgis. George Wherrill will be speaking on those and give you the background. And then on the Off Right of Way signing which has been proposed for a hearing you will be Chair Kuhl to talk on that. Also we have another thing that will come up after that hearing and that is on our Emergency Rules for some permits we will need, hopefully, on the trucking industry part in the western part of the State. And then after that's concluded, we'll have to propose a hearing if you adopt the Emergency Rules for a final rule hearing on that same area in addition to some other matters I would like to have proposed to you. The first thing is the speed zones and the Off Right of Way. And the record show that notice has been given as required by law in the newspaper to all persons interested and we can proceed with the hearing.

CHIEF WHEELER: Operations Support. On the resolution for Rapid City there has been a change. I think what you are looking at probably reads "to the property line of Oakland Street" which is south city limits, 35 MPH. That has been extended further south so that that last line should read "the intersection of Cathedral Drive at 35 MPH." Oakland Street was the old city limits and now the new city limits is the Cathedral Drive so that would be approximately a 3 or 4 block extension to the south.

SECRETARY MYERS: And it is on the second page, bottom of the first large paragraph.

GEORGE WHEELER: The reason that we had this proposal in the first place was that on Oak Street, between Center and Main, was the City of Rapid City's responsibility. That has now been taken over by the Department of Transportation so there is about a 1 block length in there on the north end which we are adding to the resolution. Restyling also reads the same in the actual part of it.

The other one was in Sturgis. It had to do with a service road to which there was no previous speed limit established. There was a resolution come in to the Highway Department from the people who live on that section of roadway. They were asking for a 15 to 25 MPH speed limit. Our resolution reads 30 MPH. We decided that even the 25 MPH was too slow. Our traffic engineer met with the man who had initiated the petition, Elmer Snybery, and they agreed that 30 MPH would be realistic for that 1/2 mile section.

SECRETARY MYERS: This is the one that I authorized the 30 MPH sign. Mr. Chairman, in that instance though however looking at the public point that was being made, in spite of the fact that it didn't give us enforcement ability, after reviewing the thing I authorized that the signs be installed pending the Commission action so that we would respond immediately to what was a valid public input. We did disagree with them however by 5 MPH on the speed. And since I took that action I suppose I should go ahead and move it.

Notice was made by Myers, seconded by Appelwick, to adopt the speed limit rules No. 70-01-02-02(24), Pennington County, and 70-01-02-48(12), Meade County. All voted Yes. Motion carried.

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September 27, 1934

Herby authorize and request the Attorney General of the State of South Dakota to institute proceedings for condemnation of said above described land for highway purposes, and if necessary, file a Declaration of Taking in accordance with the provisions of SDCL 31-19 and amendments thereto.

IT IS FURTHER DECLARED NECESSARY, to obtain said temporary easement by condemnation, which said temporary easement shall be a temporary construction easement. The Transportation Commission of the State of South Dakota does hereby authorize and request the Attorney General of the State of South Dakota to institute proceedings for condemnation of said above described land for temporary easement for highway purposes, and if necessary, file a Declaration of Taking in accordance with the provisions of SDCL 31-19 and amendments thereto.

RESOLUTION NO. 14217
LAWRENCE COUNTY

BE IT RESOLVED BY THE SOUTH DAKOTA TRANSPORTATION COMMISSION

WHEREAS, the South Dakota Department of Transportation, has acquired fee title to the property described as follows:

Former Chicago & North Western Railroad right-of-way in the NE1/4 of Section 25-13N-24E and NE1/4 of Section 26-13N-24E as shown on map no. SDakV3A/1 as parcels 8 and 9 containing 6.38 acres, more or less, and as is shown on the attached map.

WHEREAS, it has been determined by the Transportation Commission that the property described above is no longer needed or necessary for highway purposes;

NOW, THEREFORE, BE IT RESOLVED, by the State of South Dakota, acting by and through the Transportation Commission, that the property described above located in Lawrence County, South Dakota, is not now or in the future needed or deemed necessary for use in the construction and maintenance of highways or for highway right-of-way purposes; and

FURTHER, the Department of Transportation is hereby authorized to dispose of the property pending final Transportation Commission approval of any sale.

RESOLUTION NO. 14218
LAWRENCE COUNTY

BE IT RESOLVED BY THE SOUTH DAKOTA TRANSPORTATION COMMISSION

WHEREAS, the South Dakota Department of Transportation, has acquired fee title to the right-of-way in Lawrence County, described as follows:

All that former Chicago & North Western railroad right-of-way as shown on valuation series map SDakV3A/1 as the following parcels:

- 1 - Section 218-13N-24E
- 2 - Section 222-13N-24E
- 3 - Section 228-13N-24E
- 4 - Section 234-13N-24E
- 5 - Section 240-13N-24E
- 6 - Section 246-13N-24E
- 7 - Section 252-13N-24E & Section 258-13N-24E
- 10 - Section 264-13N-24E

and as shown on valuation series map SDakV3A/2 as the following parcels:

- 1 - Section 25-13N-24E
- 2 - Section 26-13N-24E
- 3 - Section 27-13N-24E
- 4 - Section 28-13N-24E

September 27, 1984

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AND WHEREAS, it has been determined by the Transportation Commission that said property described above is no longer needed or necessary for highway purposes.

NOW, THEREFORE, BE IT RESOLVED, by the State of South Dakota, acting by and through the Transportation Commission, that the property described above located in Lawrence County, South Dakota, is not now or in the future needed or deemed necessary for use in the construction and maintenance of highways or for highway right-of-way purposes, and the same is hereby abandoned and any rights therein hereby revert to the former owner, his heirs or assigns.

RESOLUTION NO. 14319
LAWRENCE COUNTY

BE IT RESOLVED BY THE SOUTH DAKOTA TRANSPORTATION COMMISSION

WHEREAS, 131-13-03 of the South Dakota Compiled Laws authorizes the Department of Transportation to convey any highway right-of-way to a political subdivision without requiring payment therefor; and

WHEREAS, the Department of Transportation has determined that it is in the public interest to convey its interest in the following described property to the Department of Game, Fish & Parks:

AAJ341

- Map SDakV3A/2 (5) - Thruway Parcel
- Map SDakV3A/2 (6) - Placer claims 2, 3, 4, & portions of 1 & 5 Falls Placer Mining District
- Map SDakV3A/2 (7) - Hill Claims of E. Ruppert on northwesterly side of Whitewood Creek opposite Placer Claims 47 & 48 in Falls Placer Mining District
- Map SDakV3A/2 (8) - Placer Claims 49 & 50 in Falls Placer Mining District
- Map SDakV3A/2 (11) - Placer Claims 51, 52 & 53 Falls Placer Mining District
- Map SDakV3A/2 (12) - Placer Claims 51, 52 & 53 Falls Placer Mining District
- Map SDakV3A/2 (13) - Placer Claims 54, 55, 56 & 57 Falls Placer Mining District
- Map SDakV3A/2 (14) - Placer Claims 54, 55, 56 & 57 Falls Placer Mining District
- Map SDakV3A/2 (15) - Placer Claims 54, 55, 56 & 57 Falls Placer Mining District
- Map SDakV3A/2 (15) - Placer Claims 58, 51, 62, 63 & 64 Falls Placer Mining District
- Map SDakV3A/2 (17) - Placer Claims 59 & 60 Falls Placer Mining District
- Map SDakV3A/2 (18) - Placer Claims 54, 61, 62, 63 & 64 Falls Placer Mining District
- Map SDakV3A/2 (19) - Placer Claims 65, 66, 67, 68, 69, 70, 71, 72 & 73 Falls Placer Mining District
- Map SDakV3A/2 (20) - Placer Claims 74, 75 & 76 & fractional claim lying between 76 & 77 Falls Placer Mining District
- Map SDakV3A/2 (21) - Placer Mining Claims 77 & 78 Falls Placer Mining District

September 27, 1984

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Map SDakVIA/2 (22) - Placer Claims 79, 80, 81 & 82 Falls Placer Mining District

Map SDakV3A/2 (29) - Placer Claims 83 & 84 Falls Placer Mining District

All of which is shown on the map attached hereto and made a part hereof, and

WHEREAS, the Department of Game, Fish & Parks is willing to take title to the property.

NOW, THEREFORE, BE IT RESOLVED, by the South Dakota Transportation Commission that the Department of Transportation is authorized to transfer the above described property to the Department of Game, Fish & Parks.

RESOLUTION NO. 14200 FOR AMENDING, ADOPTING AND REPEALING CH. RULES

WHEREAS, the South Dakota Transportation Commission of the South Dakota Department of Transportation has met at a regular meeting of said Commission on the 27th day of September, 1984; and

WHEREAS, pursuant to notice duly given, as required by law in such case made and provided, a hearing was duly held at the hour of 11:00 A.M., 8'clock (CST) on September 27, 1984, in the board room located in the Transportation Building, Pierre, South Dakota, for the purpose of considering and taking information, testimony and oral and written arguments concerning the adopting, amending and repealing of rules 70:01:02:02(22); 70:01:02:49(12); 70:01:06:03(02); 70:01:06:03(14); 70:01:06:03(15); 70:01:06:03(16) and 70:01:06:03(18); and

WHEREAS, all persons were afforded an opportunity prior to and at the time of the hearing to present oral or written arguments for or against the proposed rules as will be more particularly shown by the minutes of the South Dakota Transportation Commission; and

WHEREAS, the Commission has given the matter of the above referred to rules, as are hereto attached, due and deliberate consideration and is satisfied that the adoption, amending and repealing of said rules would be in the best interest of all parties concerned.

THEREFORE, BE IT RESOLVED as follows, to-wit:

That the rules reflected in the minutes of the South Dakota Transportation Commission are hereby adopted, amended or repealed. The adopted rules contain changes recommended by the Code Council.

RESOLUTION NO. 14221 FOR ADOPTION OF EMERGENCY RULES

WHEREAS, the South Dakota Transportation Commission of the Department of Transportation, has met on the 27th day of September, 1984; and

WHEREAS, Notice of the intent of the South Dakota Transportation Commission to adopt emergency rules were duly given; and

WHEREAS, the South Dakota Transportation Commission has given the matter of the above referred to emergency rules, as are hereto attached, due and deliberate consideration and is satisfied that the adopting of said emergency rules would be in the best interest of all parties concerned;

THEREFORE, BE IT RESOLVED as follows, to-wit: That rules number 170:01:04:79 and 170:01:04:80 being hereto attached and the same are hereby adopted on the 27th day of September, 1984, and shall remain in effect for the statutory period or until permanent rules become effective whichever comes first.



Doc# 2006-04149
Recording Fee: \$ 25
Date: 07/10/2006 Time: 15:03
Lawrence County
Register of Deeds

Recording Requested by
and when recorded mail to:

Prepared By:
Union Pacific Railroad Co.
1400 Douglas Street
Omaha, NE 68179
Tel: 402-544-8943
Mail Tax Statements to:

*Sheryl J. Brown
Deputy*

TRANSFER FEE PAID \$ 5.00
R# 1004-4512

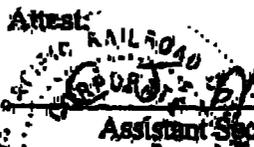
Folder # 2391-42

QUITCLAIM DEED

UNION PACIFIC RAILROAD COMPANY, a Delaware corporation (successor in interest to Chicago and North Western Railway Company, a Wisconsin corporation) ("Grantor") in consideration of the sum of Ten Dollars (\$10.00), and other valuable consideration to it duly paid, the receipt whereof is hereby acknowledged, does hereby REMISE, RELEASE and forever QUITCLAIM unto **NORTHERN HILLS REGIONAL RAILROAD AUTHORITY** ("Grantee") whose address is 510 1/2 National Street, Belle Fourche, South Dakota 57117, and unto its successors and assigns forever all of Grantor's right, title, interest, estate, claim and demand, both at law and in equity, of, in, and to the real estate (hereinafter the "Property") situated in Lawrence County, State of South Dakota, as more particularly described in Exhibit A, hereto attached and hereby made a part hereof.

EXCEPTING from this deed and RESERVING unto Grantor, its successors and assigns, all coal, oil, gas, and the minerals and mineral rights of whatever nature or description, kind or character, like or unlike, known or unknown, and whether occurring in solid, liquid, vaporous or other and different forms in, on or under the Property, provided, however, that no operation of investigating, exploring, prospecting or mining for or storing or transporting said minerals or any of them, shall be conducted or placed upon the Property.

IN WITNESS WHEREOF, the Grantor has caused this deed to be duly executed as of the 16th day of June, 2006.

Attest:

Sheryl J. Brown
Assistant Secretary

UNION PACIFIC RAILROAD COMPANY
By *Tracy K. Love*
Title: Assistant Vice President

GRANTOR ACKNOWLEDGEMENT

STATE OF NEBRASKA)
)
COUNTY OF DOUGLAS)

On this 21st day of June, 2006, before me, a Notary Public in and for said County and State, personally appeared Tina K. Love and C. J. Meuser who are the Assistant Vice President - Real Estate and the Assistant Secretary, respectively, of Union Pacific Railroad Company, a Delaware corporation, and who are personally known to me (or proved to me on the basis of satisfactory evidence) to be the persons whose names are subscribed to in the within instrument, and acknowledged to me that they executed the same in their authorized capacities, and that by their signatures on the instrument the persons, or the entity upon behalf of which the persons acted, executed the instrument.

WITNESS my hand and official seal.

Greg A. Larsen
Notary Public

(Seal)



EXHIBIT A**Legal Description**

All of the right of way of the former Chicago and North Western Railway Company in Section 1, Township 5 North, Range 3 East; and in Sections 5 and 6, Township 5 North, Range 4 East; and in Sections 22 and 23, and South Half of Section 28, in Township 6 North, Range 4 East, B.H.M.;

ALSO:

All of the right of way of the former Chicago and North Western Railway Company through Falls Mining District and Whitewood Mining District, lying Northeastly of the Northeastly Corporate Limits of Deadwood. EXCEPTING THEREFROM that part of Catechisms Place (M.L. No. 952) lying Westerly of said right of way and Westerly of the following described tract of land: Beginning at Corner No. 16 of the official survey of Placer M.L. No. 952; thence with Course No. 16 of said survey North 00 degrees, 45 minutes West a distance of 170 feet to Corner No. 17; thence North 47 degrees East a distance of 170 feet to Corner No. 18; thence North 23 degrees East a distance of 100 feet to Corner No. 1 of said survey which is also Corner No. 12 of the official survey of Red Placer, M.L. No. 921; thence on Course No. 11 of said last mentioned survey, North 35 degrees West a distance of 563 feet to a point; thence South 34 degrees, 04 minutes West a distance of 571.5 feet; thence Southeastly a distance of 606 feet, more or less, to the point of beginning.

ALSO:

All of the right of way of the former Chicago and North Western Railway Company through that part of the Whitewood Mining District including part of Mineral Claim 216, and Block 12, City of Deadwood, bounded and described as follows: Beginning at the most Westerly corner of Lot "T", Spring Creek Condit Easement, being a point on the Southeastly line of Lot H-1, M.S. 216; thence Southwestly along said Southeastly line of Lot H-1, Lot H-4 and Lot H-5, Block 12, to a point on the Northwestly line of land "Conceded to Chicago, Burlington & Quincy Railroad, and in turn deeded to City of Deadwood (by CB&Q) November, 1940"; thence Northeastly along the Northwestly line of said conceded lands to a point on the Southwestly line of said Mineral Claim No. 216; thence Southeastly along said Southwestly line of Mineral Claim No. 216 to a point on the Northwestly right of way line of the Grand Island and Wyoming Central Railroad, also known as the Deadwood Central Railroad Company, as described in that certain Warranty Deed dated May 14, 1890, between Levi

CAPOCCME-1head@LOCALS-TT@W@N@t@n@t@-D@P@2@2@1@2

R. Field and Paul Denton, and the Fremont, Elkhorn and Missouri Valley Railroad Company, filed for record in the Register of Deeds Office for Lawrence County on September 29, 1890, in Book 69, on Page 626; thence Northeasterly along said last described right of way line to the most Southerly corner of said Lot "T"; thence Northeasterly along the Southwesterly line of said Lot "T" to the point of beginning. EXCEPTING THEREFROM Lots 34, 36, 38, 40, 42 and 44 of Block 12, Southeastern side of Main Street, City of Deadwood;

ALSO:

All of that portion of the NW1/4 NW1/4 of Section 5, Township 5 North, Range 4 East, R.H.M. lying South of the right of way of the railroad beginning at a point on the South line of said right of way due south of a point on the center line of said Railroad which is Seventy Seven (77) feet easterly from the place at the farm road crossing where there is a cattle guard (being Station 186+25 of the survey of said railroad) measured on said center line; thence due south to the South line of said first mentioned tract of land, thence east on said line 586 feet, thence North to the said South line of said right of way, thence Westerly 586 feet more or less along said right of way line, to the place of beginning, all as described in this certain deed recorded November 20, 1897 in Book 121 at Page 167 of the records of the Lawrence County, South Dakota Register of Deeds.



Doc#: 2006-06199
 Recording Fee: \$ 16
 Date: 10/18/2006 Time: 25:58
 Lawrence County
 Registrar of Deeds

Charles Montange
Opdy

Prepared By:
 BRADY PLUMER P.C.
 135 E. Colorado Blvd.
 Spearfish, SD 57783
 Telephone: (605) 722-9000

EXEMPT FROM TRANSFER FEE

QUIT CLAIM DEED

DAKOTA, MINNESOTA & EASTERN RAILROAD, CORPORATION,
Grantor, of 140 North Phillips, Sioux Falls, South Dakota 57104, for and in consideration
 of One Dollar and Other Good and Valuable Consideration, **CONVEY AND QUIT**
CLAIM TO NORTHERN HILLS REGIONAL RAILROAD AUTHORITY, Grantee,
 of 510 1/2 National Street, Belle Fourche, South Dakota 57717, all interest now owned or
 hereafter acquired in and to the following described real estate in the County of Lawrence
 in the State of South Dakota, to-wit:

All of the right of way of the former Chicago and North Western
 Railway Company in Section 1, Township 5 North, Range 3 East,
 and in Sections 5 and 6, Township 5 North, Range 4 East, and in
 Sections 32 and 33, and South Half of Section 28, in Township 6
 North, Range 4 East, B.H.M.;

ALSO:

All of the right of way of the former Chicago and North Western
 Railway Company through Falls Mining District and Whitewood
 Mining District, lying Northeastly of the Northeastly Corporate
 Limits of Deadwood. EXCEPTING THEREFROM that part of
 Cattaraugus Placer (M.L. No. 952) lying Westerly of said right of
 way and Westerly of the following described tract of land:
 Beginning at Corner No. 16 of the official survey of Placer M.L.
 No. 952; thence with Course No. 16 of said survey North 00
 degrees, 45 minutes West a distance of 170 feet to Corner No. 17;
 thence North 47 degrees East a distance of 170 feet to Corner No.

Quit Claim Deed
 Page 1
 DMCE/Northern Hills Regional Railroad Authority

18; thence North 23 degrees East a distance of 100 feet to Corner No. 1 of said survey which is also Corner No. 12 of the official survey of Red Placer, M.L. No. 921; thence on Course No. 11 of said last mentioned survey, North 35 degrees West a distance of 563 feet to a point; thence South 34 degrees, 04 minutes West a distance of 571.5 feet; thence Southeasterly a distance of 606 feet, more or less, to the point of beginning.

ALSO:

All of the right of way of the former Chicago and North Western Railway Company through that part of the Whitewood Mining District including part of Mineral Claim 216, and Block 12, City of Deadwood, bounded and described as follows: Beginning at the most Westerly corner of Lot "T", Spring Creek Conduit Easement, being a point on the Southeasterly line of Lot H-1, M.S. 216; thence Southwesterly along said Southeasterly line of Lot H-1, Lot H-4 and Lot H-5, Block 12, to a point on the Northwesterly line of land "Conceded to Chicago, Burlington & Quincy Railroad, and in turn deeded to City of Deadwood (by CB&Q) November, 1940"; thence Northeasterly along the Northwesterly line of said conceded lands to a point on the Southwesterly line of said Mineral Claim No. 216; thence Southeasterly along said Southwesterly line of Mineral Claim No. 216 to a point on the Northwesterly right of way line of the Grand Island and Wyoming Central Railroad, also known as the Deadwood Central Railroad Company, as described in that certain Warranty Deed dated May 14, 1890, between Levi F. Field and Paula Demouth, and the Fremont, Ellsbom and Missouri Valley Railroad Company, filed for record in the Register of Deeds Office for Lawrence County on September 29, 1890, in Book 69, on Page 626; thence Northeasterly along said last described right of way line to the most Southerly corner of said Lot "T"; thence Northwesterly along the Southwesterly line of said Lot "T" to the point of beginning. EXCEPTING THEREFROM Lots 34, 36, 38, 40, 42 and 44 of Block 12, Southeasterly side of Main Street, City of Deadwood;

ALSO:

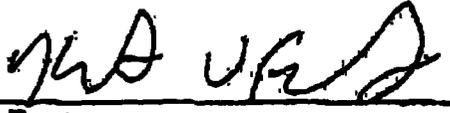
All of that portion of the N1/2 NW1/4 of Section 5, Township 5 North, Range 4 East, B.H.M. lying South of the right of way of the railroad beginning at a point on the South line of said right of way due south of a point on the center line of said Railroad which is Seventy Seven (77) feet easterly from the fence at the farm road crossing where there is a cattle guard (being Station 186+25 of the

survey of said railroad) measured on said center line; thence due south to the South line of said first mentioned tract of land, thence east on said line 586 feet, thence North to the said South line of said right of way, thence Westerly 586 feet more or less along said right of way line, to the place of beginning, all as described in that certain deed recorded November 28, 1897 in Book 121 at Page 167 of the records of the Lawrence County, South Dakota Register of Deeds.

ALSO EXCEPTING THEREFROM, as clarification, any and all operating railroad line including but not limited to the right of way, tracks and appurtenances of Grantor in the City of Whitewood or in Lawrence County as part of Grantor's Colony Line acquired from the Union Pacific Railroad (and more particularly the former Rapid City Branch of Union Pacific Railroad, as successor by merger with the Chicago & North Western Transportation Company and its predecessor the Chicago & North Western Railway Company) extending in a northerly and northwesterly direction from the Nebraska/South Dakota State line at Mile Post 13.13, Engineering Station 8169 + 14, to the South Dakota/Wyoming state line at Mile Post 168.10, Engineering Station 610 + 40, in, over and across the legal subdivisions of the City of Whitewood and Lawrence County.

***Exempt from transfer fee pursuant to SDCL 43-4-22(2).

Dated this 17th day of October, 2006.


Kurt V. Feaster

Its: _____

Sr. VP Finance

State of South Dakota)
) ss.
County of Minnehaha)

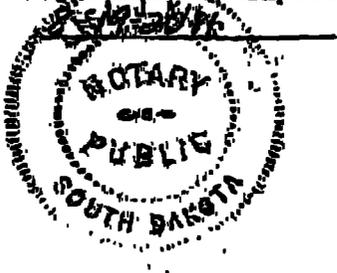
On this 17th day of October, 2006, before me, the undersigned officer, personally appeared Kurt V. Feaster as Senior Vice President Finance of Dakota, Minnesota & Eastern Railroad, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged that he executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I have set my hand and official seal.

(SEAL)

[Handwritten Signature]
Notary Public - South Dakota

My Commission Expires:



NORTHERN HILLS RAILROAD AUTHORITY EASEMENT

This Agreement, made this 23 day of May, 2009, by and between the South Dakota Department of Game, Fish and Parks, 523 East Capitol, Pierre, South Dakota 57501 (GRANTOR); and Northern Hills Regional Railroad Authority, P.O. Box 503, Deadwood, South Dakota 57732 (GRANTEE):

WHEREAS, GRANTOR has previously claimed an interest in certain real property and any fixtures or other property, real or personal, attached thereto or located thereon (referred to hereafter as "the PROPERTY") consisting of the right of way of the Chicago and North Western Railway Company located in Sections 1, 12, 13, 23 and 24, Township 5 North, Range 3 East, B.H.M., Lawrence County, South Dakota, and Sections 5 and 6, Township 5 North, Range 4 East, B.H.M., Lawrence County, South Dakota, including but not limited to the following:

All of the right of way of the Chicago and North Western Railway Company in Section 1, Township 5 North, Range 3 East, and in Sections 5 and 6, Township 5 North, Range 4 East, and in Sections 32 and 33, and South Half of Section 28, in Township 6 North, Range 4 East, B.H.M.;

ALSO:

All of the right of way of the Chicago and North Western Railway Company through Falls Mining District and Whitewood Mining District, lying Northeasterly of the Northeasterly Corporate Limits of Deadwood, EXCEPTING THEREFROM that part of Cateraugus Placer (M.L. No. 952) lying Westerly of said right of way and Westerly of the following described tract of land: Beginning at Corner No. 16 of the official survey of Placer M.L. No. 952; thence with Course No. 16 of said survey North 00 degrees, 45 minutes West a distance of 170 feet to Corner No. 17; thence North 47 degrees East a distance of 170 feet to Corner No. 18; thence North 23 degrees East a distance of 100 feet to Corner No. 1 of said survey which is also Corner No. 12 of the official survey of Red Placer, M.L. No. 921; thence on Course No. 11 of said last mentioned survey, North 35 degrees West a distance of 563 feet to a point; thence South 34 degrees, 04 minutes West a distance of 571.5 feet; thence Southeasterly a distance of 606 feet, more or less, to the point of beginning.

ALSO:

PREPARED BY:
NAME Bridget Plummer PC
ADDRESS 13 SE Colorado Blvd
Spokane SD 57703

That part of the Whitewood Mining District including part of Mineral Claim 215, and Block 12, City of Deadwood, bounded and described as follows: Beginning at the most Westerly corner of Lot "T", Spring Creek Conduit Basement, being a point on the Southeastly line of Lot H-1, M.S. 216; thence Southwesterly along said Southeastly line of Lot H-1, Lot H-4 and Lot H-5, Block 12, to a point on the Northwesterly line of land "Conceded to Chicago, Burlington & Quincy Railroad, and in turn deeded to City of Deadwood (by CB&Q) November, 1949"; thence Northeastly along the Northwesterly line of said conceded lands to a point on the Southwesterly line of said Mineral Claim No. 216; thence Southeastly along said Southwesterly line of Mineral Claim No. 216 to a point on the Northwesterly right of way line of the Grand Island and Wyoming Central Railroad, also known as the Deadwood Central Railroad Company, as described in that certain Warranty Deed dated May 14, 1890, between Levi F. Field and Perla Demouth, and the Fremont, Elkhorn and Missouri Valley Railroad Company, filed for record in the Register of Deeds Office for Lawrence County on September 29, 1890, in Book 69, on Page 626; thence Northeastly along said last described right of way line to the most Southerly corner of said Lot "T"; thence Northwesterly along the Southwesterly line of said Lot "T" to the point of beginning. EXCEPTING THEREFROM Lots 34, 36, 38, 40, 42 and 44 of Block 12, Southeastly side of Main Street, City of Deadwood.

WHEREAS, GRANTEE is a railroad authority formed under the laws of the State of South Dakota and is planning on constructing a railroad along the old Chicago and North Western Railway Company right of way, to be located in part upon the above-described PROPERTY, and desires to obtain an easement and right-of-way for such railroad.

NOW, THEREFORE, in consideration of the terms and conditions of this Easement, GRANTOR hereby conveys to GRANTEE, its successors and assigns, the following:

An Easement and right of way to utilize the PROPERTY for the sole purpose of constructing, operating and maintaining a railroad and activities incidental thereto.

Neither GRANTEE nor GRANTOR, or their successors in interest, has any obligation to maintain, repair or expend any sums of money on the PROPERTY, including the bridges located thereon (although GRANTEE shall have the right and privilege to do so), or assure anyone that the PROPERTY is adequate and safe for purposes of providing, facilitating or assisting access and passage, vehicular or otherwise, on the PROPERTY, or for any other purpose whatsoever.

GRANTEE agrees that GRANTEE shall not otherwise utilize the PROPERTY to obstruct, hinder or adversely affect the management or use of the PROPERTY by GRANTOR or GRANTOR'S successors in interest, the public, permitted users of the PROPERTY, or any other persons or entities who may have an interest in or right to use the PROPERTY. GRANTEE agrees that upon construction of the railroad, that GRANTEE shall install and construct a single lane wheeled vehicle railroad crossing at an appropriate location that is approximately at the existing trail that crosses the right of way grade.

GRANTEE'S limited interest in PROPERTY may not be encumbered by any lien or encumbrance that would adversely affect GRANTOR'S interest in the PROPERTY.

GRANTOR makes no warranty or representations, express or implied, as to the marketability of its title to the PROPERTY or of the fitness of the PROPERTY for the intended or permitted use by GRANTEE.

GRANTOR and GRANTEE agree to execute any other documents as may be necessary to carry out the purpose of this agreement. This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, assigns, heirs and personal representatives.

Dated this 1st day of May, 2003.

SOUTH DAKOTA DEPARTMENT OF GAME,
FISH AND PARKS

By: Douglas R. Hansen
Its: Director - Div. of Wildlife



U.S. No. 2003-3226
Recording Fee: \$ 25
Date: 05/23/2003 Time: 09:00
Lawrence County
Register of Deeds

Dated this 23rd day of May, 2003.

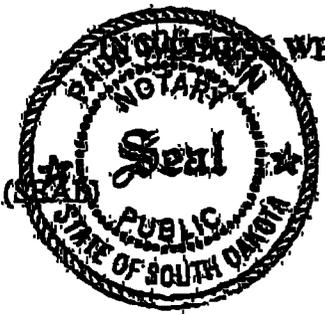
Sheree K. Stein, Deputy

NORTHERN HILLS RAILROAD AUTHORITY

By *Loren O. Binn*
Its: *Chairman*

STATE OF SOUTH DAKOTA)
)SS.
COUNTY OF *Hughes*)

On this *1st* day of *May*, 2003 before me, the undersigned officer, personally appeared *Charles R. Hanson* known to me or satisfactorily proven to be the *Deputy Director* of SOUTH DAKOTA DEPARTMENT OF GAME, FISH AND PARKS and that he/she as such officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained.

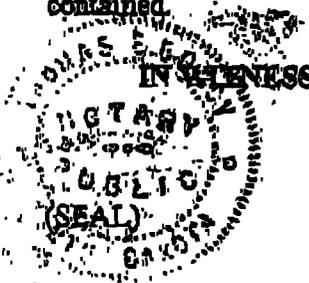


WHEREOF, I hereunto set hand and official seal.

Charles Montange
Notary Public
My Commission expires: *August 24, 2007*

STATE OF SOUTH DAKOTA)
)SS.
COUNTY OF LAWRENCE)

On this *23rd* day of *May*, 2003 before me, the undersigned officer, personally appeared *Loren Binn* known to me or satisfactorily proven to be the *Chairman* of the NORTHERN HILLS RAILROAD AUTHORITY and that he/she as such officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained.



IN WITNESS WHEREOF, I hereunto set hand and official seal.

Charles Montange
Notary Public
My Commission expires: *August 24, 2007*

STATE OF SOUTH DAKOTA)
)SS.
COUNTY OF LAWRENCE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

CIV. #04-254

CHARLES W. BROWN,

Plaintiff,

vs.

NORTHERN HILLS REGIONAL
RAILROAD AUTHORITY; STATE
OF SOUTH DAKOTA; KARL E.
EISENBACHER; DOUGLAS R.
HAYES; KRISTI JO HAYES; JOHN
R. MILLER; JEAN MILLER;
STRAWBERRY HILL MINING
COMPANY; MAURICE HOFFMAN;
LAWRENCE COUNTY, a political
subdivision of the State of South
Dakota; and all persons unknown who
have or claim to have any interest or
estate in or encumbrance upon the
premises described in the Complaint,
or any part thereof,

Defendants.

ORDER GRANTING NHERRA, SDDOT
AND GF&P MOTIONS FOR
JUDGMENT SUMMARY
AND
ORDER DENYING BROWN AND
EISENBACHER CROSS MOTIONS
FOR SUMMARY JUDGMENT

This matter came on regularly for hearing before the Court on the 29th day of November, 2005 on the Motions of Defendants Northern Hills Regional Railroad Authority (NHERRA), State of South Dakota Department of Game, Fish and Parks (G,F&P) and State of South Dakota Department of Transportation (DOT) for Summary Judgment and Plaintiff's Cross Motion for Summary Judgment, which Cross Motion was joined in by Defendant and Cross-Defendant Karl E. Eisenbacher.

Upon motion of NHERRA, G,F&P and DOT, and by Order dated and entered the _____ day of November, 2005, G,F&P and DOT were substituted as parties for the named Defendant State of South Dakota.

FILED

DEC 12 2005

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

The record herein reflects that service of all pleadings, briefs and affidavits has been completed upon all the named parties. Service of the Crossclaims of NHRRA, GF&P and DOT has not been completed by publication upon unknown persons, however, by Order dated and entered on the _____ day of November, 2005, the Court ordered that service of said Crossclaims may be made upon such persons by publication.

Upon motion of NHRRA, GF&P and DOT and by Order dated and entered the _____ day of November, 2005, the Court takes judicial notice of the documents and federal law as identified as "Exhibits A through KK", inclusive, of NHRRA's Amended Index of Documents, dated October 17, 2005.

By a Stipulation for Entry of Judgment on file herein, Cross-Defendants John B. Miller and Jean Miller have stipulated to entry of judgment against them and in favor of Crossclaimants NHRRA, GF&P and DOT. By order dated and entered the _____ day of November, 2005, the Court entered judgment against the Millers and in favor of the NHRRA, GF&P and DOT upon their Crossclaims.

No parties or persons, either named or unnamed, except Plaintiff, NHRRA, State of South Dakota, GF&P, DOT, Eisenbacher and the Millers have answered the Complaint, answered or replied to the Counterclaims or the Crossclaims of NHRRA, GF&P and DOT, responded to the cross motions for summary judgment, or otherwise appeared in the action.

NHRRA, GF&P, DOT, Plaintiff and Karl B. Eisenbacher appeared at the hearing on the cross motions for summary judgment through their respective counsel of record.

The Court, having read and considered the briefs, relevant affidavits and other submissions filed herein by the parties in connection with the motions for summary judgment, having reviewed the record herein, having heard the argument of counsel for the parties appearing, and being fully advised in the premises and that there are no genuine issues of material fact and that NHRRA, DOT and GF&P are entitled to judgment as a matter of law, now makes the following Order.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The Court has jurisdiction over the subject matter of this action and over all parties except unknown persons affected by the Crossclaims of NHRRA, GF&P and DOT.

2. The Fremont, Elkhorn and Missouri Valley Railroad Company ("FEMV") acquired the railroad right-of-way (the "ROW") that is the subject matter of this litigation pursuant to the General Right-of-Way Act of 1875 (43 USC § 934).

3. Title to the real property described in the Complaint was public land of the United States until it was patented to John Bohnsack and William P. Stowers subject to the ROW easement of the FEMV. (Exhibit "D"; 42 USC 934 and 937; *Svendig v. Washington Water Power Co.* 265 U.S. 322; 44 S. Ct. 496; 68 L. Ed. 1036 (1924)).

4. The ROW was transferred and conveyed by FEMV to the Chicago and Northwestern Railroad Company ("C&NW") on February 28, 1903. (Exhibit "H").

5. The abandonment of service by C&NW over its Whitewood to Deadwood line, including the part of the line at issue here, pursuant to Interstate Commerce Commission ("ICC") authorization on or about December 31, 1970 (Exhibits "I" and "J"), did not constitute an abandonment of the ROW, since there has been no declaration of abandonment of the ROW by an Act of Congress or by a court of competent jurisdiction. (43 USC 912; *Barney v. Burlington Northern Railroad Company*, 490 N.W. 2d 729 (S.D. 1992); *Neuz v. East Bay Regional Park District*, 906 F. 2d 1330 (C.A. 9th Cir. 1990); *State of Idaho v. Oregon Short Line Railroad Co.*, 617 P. Supp. 207 (DC Idaho 1985) ("*Idaho F.*").

6. The portion of the ROW at issue here is now owned by G,F&P, which has granted an easement and right-of-way over the ROW to NHRA. (Exhibits "K", "L", "M", and "N"). The right-of-way of NHRA is subject to the interests of G,F&P set forth in Exhibit "N" and to the reversionary interest of DOT set forth in Exhibits "O" and "P". There is no evidence that the State of South Dakota, DOT, G,F&P or NHRA have otherwise transferred or conveyed or abandoned the ROW. (43 USC 912; *Atland v. County of Yankton*, 280 N.W. 2d 666 (S.D. 1979)).

7. Since it was established on June 28, 1890, the ROW has been continuously owned and possessed by the FEMV, C&NW, State of South Dakota, DOT, G,F&P and NHRA and could not, therefore, be adversely possessed by any person, including the current adjoining landowners or their predecessors in interest. Since June 28, 1890, FEMV, C&NW, the State of South Dakota, DOT, G,F&P and NHRA, as the sole owners and possessors of the ROW, have held the right of the exclusive use and possession of the ROW and of the land underlying the ROW. (SDCL Sections 43-30-13 and 43-30-14; *Taylor v. Pennington County*, 87 S.D. 172, 204

N.W. 2d 395 (1973); *Northern Pacific Railway Co. v. Townsend*, 190 U.S. 267, 23 S.Ct. 671, 47 L. Ed. 1044 (1903).

8. The Affidavits of Possession executed and recorded by Plaintiff, the Hayes and the Millers; the Private Easements and Rights of Way executed and recorded by Plaintiff, the Hayes, the Millers; the Affidavit of Use, Possession and Enjoyment of Easement executed and recorded by Strawberry Hill Mining Company; and, the Private Easement and Right of Way executed and recorded by Eisenbacher are void, ab initio, and are of no force or effect to the extent that any such document purports to affect the rights and interests, including the right of the exclusive use and possession of the ROW, by the State of South Dakota, DOT, G,F&P, NHRRA, or their successors and assigns, or purports to grant any easement or other right or interest whatsoever in the ROW. (SDCL Sections 42-30-13 and 40-30-14; *Taylor v. Pennington County* (supra); *Northern Pacific Railway Co. v. Townsend* (supra)).

9. By his Affidavit on file herein, Plaintiff has admitted activities which constitute trespass upon the ROW property of the State of South Dakota, DOT, G,F&P and NHRRA. It is therefore ordered:

- (a) that Plaintiff shall, within thirty (30) days of the entry of judgment herein, remove all fences, signs, gates, barriers and other obstructions that Plaintiff has erected or constructed, or caused to be erected or constructed, at any place upon the ROW and to restore the ROW to its condition prior to such acts of trespass by Plaintiff, excepting only that the roadways that Plaintiff has constructed upon the ROW shall not be removed, altered or destroyed;
- (b) that in the event Plaintiff shall fail to complete the restoration and repair of the ROW described above within said thirty (30) day period, upon motion of G,F&P and/or NHRRA, the Court will schedule a date for trial to determine the amount of damages suffered by G,F&P and NHRRA as a result of Plaintiff's trespass; and
- (c) that Plaintiff be, and he hereby is, permanently enjoined, with the sole exception of entry upon the ROW for the exclusive purposes of performing the above-described restoration and repair, from any further trespass, use, entry and other activities upon the ROW without the prior express written consent of the G,F&P and NHRRA. (SDCL Sections 21-8-1 and 21-8-14;

Demko v. Mamola, 437 N.W. 2d 205 (S.D. 1989); *Sunflow Railroad, Inc. v. Paulson*, 2003 S.D. 122; 676 N.W. 2d 518).

10. The rights and interests of DOT, G,F&P and NHRRA in the ROW are exempt from any real estate taxes or special assessments assessed by Lawrence County, South Dakota (SDCL Sections 10-4-3, 41-2-21 and 49-17A-20).

11. Plaintiff and Defendants and Cross-Defendants Karl E. Eisenbacher, Douglas R. Hayes, Kristi Jo Hayes, John R. Miller, Jean Miller, Strawberry Hill Mining Company and Maurice Hoffman, deceased, and his heirs, personal representatives, successors and assigns, own no interest or claim, whatsoever, in, and have no right, title or interest, whatsoever, in and to the ROW on, over, across and through the real property described in the Complaint.

12. Plaintiff is the owner in fee simple of the real property described in the Complaint as being owned by him and title thereto is quieted in him, subject, however to:

(a) the ROW as established under the ROW grant by the United States to FEMV on June 28, 1890 on, over, across and through said real property, which ROW is now owned and held by G,F&P and NHRRA for their exclusive use and possession and subject also to the reversionary rights of DOT reserved as set forth in Exhibits "O" and "P";

(b) to restrictions and easements of record, and to the easements and rights of way granted by Plaintiff to Defendants Eisenbacher, Hayes and Miller only to the extent said easements and rights of way do not encroach upon or in any manner affect the ROW of G,F&P and NHRRA and their rights and interests therein.

13. The Crossclaims of NHRRA, G,F&P and DOT against all unknown persons who have or claim to have any interest or estate in or encumbrance upon the premises described in the Complaint or any part thereof are hereby reserved for further proceedings.

14. Motions for Summary Judgment by Northern Hills Railroad Authority, South Dakota Department of Transportation and South Dakota Game, Fish & Parks are hereby granted.

15. Cross Motion for Summary Judgment by Charles W. Brown and to which joined by Karl E. Eisenbacher is hereby denied.

16. G,F&P, DOT and NHRRA are entitled to recover their costs, expenses and disbursements incurred in this action against Plaintiff and Cross-Defendant Eisenbacher in such amounts as shall hereinafter be determined by the Court.

LET JUDGMENT ENTER ACCORDINGLY.

12:00 ~~11:00~~ *December*
Dated this 28th day of November, 2005.

BY THE COURT

Walter G. Johnson
Walter G. Johnson
Circuit Court Judge

Alice Bruce
Alice Bruce
Clerk

By: _____
Deputy

(SEAL)

STATE OF SOUTH DAKOTA
Fourth Judicial Circuit Court
I hereby certify that the foregoing instrument
is a true and correct copy of the original as the
same appears on file in my office on this date:

DEC 13 2005

Alice Bruce
Lawrence County Clerk of Court
By: *Alice Bruce*

FILED

DEC 12 2005

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By: _____

corridor, vest, forfeiture, cease, Way Act, entitled to compensation, public transportation, automatically, disqualified, certificate

LexisNexis(R) Headnotes ← **Hide Headnotes**

Transportation Law > Rail Transportation > Railroad Lands & Rights of Way

HN12: 23 U.S.C.S. § 912 provides that whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment, be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted. **More Like This Headnote** | **Shepardize: Restrict By Headnote**

Transportation Law > Rail Transportation > Railroad Lands & Rights of Way

HN12: 23 U.S.C.S. § 316 reads: For the purposes of this title the consent of the United States is given to any railroad or canal company to convey to the state highway department of any state, or its nominee, any part of its right-of-way or other property in that state acquired by grant from the United States. **More Like This Headnote** | **Shepardize: Restrict By Headnote**

Governments > Legislation > Interpretation

HN12: In interpreting statutory language, conveyances by the government are to be construed to carry out the intent of the grantor. To ascertain Congressional intent courts must look to the condition of the country when the acts were passed and the purpose as declared on the face of the act and read all parts together. **More Like This Headnote** | **Shepardize: Restrict By Headnote**

Governments > Public Improvements > Public Improvements Generally

HN12: State law determines what constitutes a public highway legally established for purposes of federal land grant statutes, including 42 U.S.C.S. § 912. **More Like This Headnote** | **Shepardize: Restrict By Headnote**

Governments > Public Improvements > Public Improvements Generally

HN12: A public highway is defined as a passage or road which every citizen has a right to use. South Dakota law defines "highway" as every way or place of whatever nature open to the public, as a matter of right, for purposes of vehicular travel. S.D. Codified Laws § 31-1-1. Vehicles may include snowmobiles and bicycles. S.D. Codified Laws § 32-14-1. Federal law specifically recognizes and authorizes the conversion of railroad rights-of-way to recreational trails in the Trails Act 16 U.S.C.S. §§ 1241, et seq. **More Like This Headnote** | **Shepardize: Restrict By Headnote**

Real & Personal Property Law > Estates, Rights & Titles > Easements & Rights of Way

HN12: It has long been held that the holder of an easement is not limited to the particular method of use in vogue when the easement was acquired, and that other methods of use in aid of the general purpose of which the easement was acquired are permissible. **More Like This Headnote** | **Shepardize: Restrict By Headnote**

The Landowners claim that rights-of-way granted by the United States to the railroads under the 1875 Act are common law easements which automatically extinguish and revert to the underlying landowner when they cease to be used for railroad purposes and that the rights-of-way are not subject to the reversion provisions of § 912. ⁿ³ Section 912 provides:

Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands [**6] for such purposes has ceased or shall hereafter cease, . . . by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all [**7] right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted . . .

The historical background of § 912 begins with the role of Congress in railroad development. Beginning in 1850 Congress, for the first time, enacted a bill that explicitly granted public lands to aid construction of a cross-country railroad, Act of Sept. 20, 1850, 9 Stat. 466. First, lines were built connecting the southern states with Illinois. Then, spurred by the California gold rush and the Civil War, Congress wanted the railroads to expand to provide passage to the western United States. Congress gave generous land grants from the public domain to the [**7] railroads to subsidize the costs of the western expansion. The Union Pacific Act of 1862 created the impetus to begin laying track from the 100th meridian, a point in the Platte River Valley near Kearney and North Platte, Nebraska, to California. Act of July 1, 1862, 12 Stat. 489; see, Leo Sheep Co., 440 U.S. 668, 59 L.Ed. 2d 677, 99 S.Ct. 1403 (1979). n3

----- Footnotes -----

n3 Chief Justice Rehnquist writing for the Court unfolds a colorful history and background of this period.

----- End Footnotes -----

In 1872, Congressional policy changed; the House of Representatives enacted a resolution condemning its policy of outright land grant subsidies to railroads. Leo Sheep Co., *supra*. Congress, instead, reserved the land for homesteads and educational purposes. Great Northern R. Co. v. United States, 315 U.S. 262, 273-4, 86 L.Ed. 885, 62 S.Ct. 579 (1942). Nevertheless, Congress continued to encourage development of the west and enacted [**8] the General Railroad Right-of-Way Act in 1875 (1875 Act) which gave easements to railroads across public lands. 43 U.S.C. § 934. The right-of-way at issue in this case was granted by the 1875 Act.

Subsequently, the United States transferred much of the underlying lands to homesteaders and others subject to the railroad rights-of-way. In the early 1920's, Congress passed statutes designating procedures for distribution of the rights-of-way when the railroads abandoned their lines. 43 U.S.C. § 913 (1920), 43 U.S.C. § 912 (1922), 23 U.S.C. § 316 (1921). n4

----- Footnotes -----

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n4 See generally, Note, Reversion of Railroad Right of Way In South Dakota After Haack v. Burlington Northern, Inc., 28 S.D. Law Rev. 196 (Winter 1982).

----- End Footnotes -----

The Landowners contend that § 912 applies only to reversionary rights held by the United States and that the 1875 Act left no retained interest with the United States. n5 The nature of the property interest held by the United States Government, the Landowners or the Railroad is defined and controlled [**9] by federal legislation and is, therefore, a federal question. Northern P. R. Co. v. Townsend, 190 U.S. 287, 47 L.Ed. 1044, 23 S.Ct. 671 (1903). The U.S. Supreme Court defined the right-of-way interest conveyed to the railroads as a "limited fee, made on an implied condition of reverter." Id. 190 U.S. at 271, 47 L.Ed. at 1047, 23 S.Ct. at 672; Rio Grande Western R. Co. v. Stringham, 239 U.S. 44, 50 L.Ed. 138, 36 S.Ct. 5 (1915).

----- Footnotes -----

n5 Landowners rely upon City of Aberdeen v. Chicago & North Transp., 602 F.Supp. 589 (D.C.S.D. 1984) in which Judge Porter held that § 912 did not apply to railroad easements granted under the 1875 Act. We do not adopt the reasoning of the Aberdeen case.

----- End Footnotes -----

The U.S. Supreme Court in 1942 in Great Northern, supra, further defined the nature of the property right given to the railroads by the 1875 Act. The [**10] Court determined that Congress conveyed an easement, not a fee simple in the right-of-way. The U.S. Supreme Court discussed the nature of the property interest conveyed by the 1875 Act in Great Northern but did not address the applicability of the reversion procedures in §§ 912 or 913. The main question before the Court in Great Northern was whether the United States conveyed a fee title to the railroads by the [**730] 1875 Act. Great Northern stands only for the proposition that the underlying landowner--the U.S. Government--owned the mineral rights beneath the right-of-way. See also, United States v. Union P. R. Co., 353 U.S. 112, 1 L.Ed.2d 683, 77 S.Ct. 685 (1957). Reversionary interests in the right-of-way of a third party adjoining landowner or even the United States Government were not at issue in Great Northern.

A recent federal case which addressed the issue of reversionary interests in abandoned railroad rights-of-way is Vieux v. East Bay Regional Park Dist., 906 F.2d 1330 (1990), cert. denied 498 U.S. 111 S.Ct. 430, 112 L.Ed. 2d 414 (1990). The Vieux court determined [**11] that § 912 applied to 1875 grants:

In 1922, Congress passed 48 U.S.C. § 912 (Disposition of Abandoned Railroad Grants) as part of the Public Lands Act to ensure that railroad rights of way would continue to be used for public transportation purposes. Although the U.S. Supreme Court has not addressed whether the change in 1871 in the nature of the grants, from "limited fee with right of reverter" to "exclusive easement," affects the application of § 912, we agree with the district court's Memorandum and Order of March 2, 1987, in that the statute applies to grants both before and after 1871. [Citation omitted].

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Id., 906 F.2d at 1335.

The easement granted by Congress is an easement subject to the intentions and specifications of Congress; it is not a common law easement.

Congress could preempt or override common-law rules regarding easements, reversions, or other traditional real property interests. In other words, even if the 1875 Act granted only an easement, it does not necessarily follow that Congress would or did not intend to retain an interest in that easement.

...

The precise nature of that retained interest need not be shoe-horned into any **[**12]** specific category cognizable under the rules of real property law.

State of Idaho v. Oregon Short Line R. Co., 617 F.Supp. 207, 217 (D.C. Idaho 1985) (Idaho I). It is clear from the legislative history that Congress assumed some type of reversionary or other interest in the railroad rights-of-ways. H.R. Rep. No. 217, 67th Cong., 1st Sess. 1 (1921); H.R. Rep. No. 843, 66th Cong., 2d Sess. 2 (1920) cited in Idaho I, 617 F.Supp. at 211.

Under the broad power over interstate commerce, Congress has authority to grant railroad easements subject to its own terms and conditions. Congress wanted to preserve a corridor of public transportation, especially the railroad transportation, for further development of the western United States. Congress kept an interest in the railroad easements in order to influence future development and eventual disposition. Idaho I, supra, n6 The Nation's railway system reached its peak of 272,000 miles in 1920 and has steadily declined. n7 Fewer than half of these miles are in use today. As travel shifted from railways to highways, Congress turned its attention to preserving public highways. **[**13]** The Congressional Record which accompanied the enactment of § 912 shows Congress's intent to preserve railroad corridors for "public highway" use.

The attention of the committee was called to the fact that in some cases highways have been established on abandoned rights-of-way and it might be desirable to establish highways on such as may be abandoned in the future. Recognizing the public interest in establishment of roads, your committee safeguarded such rights by suggesting the amendments above referred to protecting not only roads now established, but giving the public authorities one year's time **[**14]** after a decree of forfeiture or abandonment to establish a public highway upon any part of such right-of-way.

S. Rep. No. 338, 67th Cong., 2nd Sess. 1 (1922). Congress also encouraged the development of highways by the language of 49 U.S.C. § 216 enacted in 1958 which reads:

For the purposes of this title the consent of the United States is given to any railroad or canal company to convey to the State highway department of any State, or its nominee, any part of its right-of-way or other property in that State acquired by grant from the United States.

----- Footnotes -----

n6 "An examination of the congressional debate on the 1875 Act reveals that there was extensive discussion of Congress' continuing commerce power over railroad rights-of-way Cong.Rec., 43rd Cong. 2d Sess., vol. 3, pp. 404-06." Idaho I, 617 F.Supp. at 212 n.4.

[**14]

n7 See authorities cited in Comment, *Rails to Trails: Converting America's Abandoned Railroads Into Nature Trails*, 22 Akron L.Rev. 645, 645 (1985).

-----End Footnotes-----

In interpreting statutory language, conveyances by the government are to be construed to carry out the intent of the grantor. To ascertain Congressional intent we must look to the condition of the country when the acts were passed and the purpose as declared on the face of the act and read all parts together. *Leo Sheep Co.*, supra. To say that § 912 does not apply to the easements granted under the 1875 Act would, in effect, nullify the intent of Congress.

These statutes [43 U.S.C. §§ 912, 913 and 23 U.S.C. 316] would be rendered null if this Court were to find them inapplicable to 1875 Act rights-of-way, for they were specifically enacted to dispose of the United States' retained interest in 1875 Act rights-of-way. [See H.R.Rep. No. 217, 57th Cong., 1st Sess. 1 (1921); H.R.Rep. No. 843, 55th Cong., 2d Sess. 2 (1920).]

Idaho I, 617 F.Supp. at 212. We conclude [**15] that the United States Government retained a reversionary interest in railroad rights-of-way, including those granted post 1871 and that § 912 applies to the right-of-way granted to the Railroad.

II. ABANDONMENT AND REVERSION UNDER § 912

A. Decree by Court or Act of Congress

Having determined that § 912 applies to the abandonment and reversion of the right-of-way, this court must then determine if the statutory requisites were met. We adopt the test used in *Vieux*: "In order for reversionary rights to vest under § 912, the railroad must 1) cease 'use and occupancy' of the rights of way and 2) abandonment must be 'declared or decreed' by a court of competent jurisdiction or a Congressional act." *Vieux*, 906 F.2d at 1337.

There is no dispute that the railroad has ceased to use or occupy the right-of-way as required by the statute. The issue lies with the second part of the test. The Landowners contend that Congress has delegated its authority to supervise and regulate railroad abandonments to the I.C.C. and that the I.C.C.'s authorization of abandonment falls within § 912 as an "Act of Congress." n8 Legislative history makes it clear that Congress [**16] intended that any reversion or forfeiture of the rights-of-ways must be decided by a court or special act of Congress. During House debate, Representative Christopherson of South Dakota, a manager for the bill, explained the amendment which required abandonment to be "declared or decreed by a court of competent jurisdiction or by act of Congress." The text of the Congressional Record reads as follows:

MR. GARD. The objection which was in my mind was that without any process by anybody, except the proof of the matter of abandonment, the title to this land vested in some subdivision which was outside a municipality, and simply because a man might own a piece of ground contiguous to this abandoned [**732] land, by virtue of the ownership and no other action he became entitled to this abandoned land. It seems to me there ought to be some approval by some one who has charge of the land rather than have the automatic

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addition to the man's own land.

MR. CHRISTOPHERSON. This does not do that automatically. The bill was originally drawn so that it would automatically do it, but by the suggestion of the department there was a committee amendment which has been submitted by the committee and which [**17] I will read--whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by act of Congress.

With that amendment the parties would either have to go into court and get a decree declaring the land forfeited in a competent court or by a special act of Congress. We should also bear in mind that this does not operate upon any railroad lands, excepting those that have been granted by the Government for railroad purposes alone. . . .

Cong. R. House 8046 (May 31, 1920) (emphasis added). The legislative history indicates that Congress did not intend to delegate its abandonment authority to the I.C.C.

----- Footnotes -----

n8 Landowners cite Harris v. Ski Park Farms, Inc., 814 P.2d 684 (Wash. App. 1991) as authority. The issue in Harris was construction of a deed which conveyed adjacent property excepting the railroad right-of-way which had been abandoned prior to the transfer. The Harris court concluded that the I.C.C. authorization of abandonment was sufficient to meet the statutory requirements of § 912. The Harris decision is limited to interpreting the language of a deed and the intention of the conveying party. There was no attempt by the state, or anyone else to establish a public highway along the right-of-way. We find that Harris is distinguishable.

----- End Footnotes ----- [**18] .:

We adopt the reasoning of the Ninth Circuit U.S. Court of Appeals in Vieux:

The I.C.C. approval of abandonment, even in formal abandonment proceedings, is only a determination that under its Congressional mandate, cessation of service would not hinder I.C.C.'s purposes. It is not a determination that the railroad has abandoned its lines. Lastly, the only remedy for an "illegal" abandonment, that is one that is not approved by the I.C.C., is an injunction brought by the I.C.C., the U.S. or a state government. Thus, a railroad could abandon without any involvement from the I.C.C., if there is no injunctive action brought and if a court decrees that the railroad has abandoned the line. The I.C.C. regulations and process determine what effects an abandonment will have and what the railroad must do to counteract those effects before it abandons, but they do not determine that an abandonment has actually occurred. (citations omitted)

Vieux, 906 F.2d at 1339. See, State by Wash. Wildlife Preservation v. State, 329 N.W.2d 543 (Minn. 1983), cert. denied, 463 U.S. 1209, 77 L.Ed.2d 1390, 103 S.Ct. 3540 (1983). [**19] We agree with the trial court that the right-of-way in the present case was not legally abandoned until the trial court so decreed.

B. Establishment of a Highway Within One Year of Abandonment

The Landowners contend that a recreational trail as proposed by the State is not a public highway within the meaning of § 912. ^{HN4} State law determines what constitutes a "public highway legally established" for purposes of federal land grant statutes, including § 912; Standage Ventures, Inc. v. Arizona, 499 F.2d 248 (9th Cir. 1974) cited in Vieux, 906 F.2d at 1341.

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~~490 N.W.2d 726~~ A public highway is defined as "a passage or road which every citizen has a right to use." Lawrence v. Swert, 21 S.D. 580, 583, 114 N.W. 709, 710 (S.D. 1908). South Dakota law defines "highway" as "every way or place of whatever nature open to the public, as a matter of right, for purposes of vehicular travel." SDCL 31-1-1; Dave Gustafson & Co. v. State, 84 S.D. 238, 242, 168 N.W.2d 722, 724-725 (S.D. 1989). Vehicles may include snowmobiles and bicycles. SDCL 32-14-1. Federal law specifically recognizes and authorizes the conversion of [**20] railroad rights-of-way to recreational trails in the Trails Act, 16 U.S.C. 66 1241 et seq. n9 The recreational trail proposed by the State is open to the public for snowmobiling and bicycling and, therefore, falls within the definition of highway under state law. The State established the trail within the one year statutory period.

----- Footnotes -----

n9 See Comment, supra note 7.

----- End Footnotes -----

III. COMPENSATION

The railroad right-of-way is preserved as a public transportation corridor in accordance [**20] with 43 U.S.C. 56 912 and 913, 23 U.S.C. 5 316 and South Dakota statutory law, SDCL 49-16A-115. The landowners contend that the State has taken their reversionary interest for use as a public recreational trail and that under the South Dakota Constitution art. VI, § 13, the State should pay compensation for the taking. Section 13 reads in part: "Private property shall not be taken for public use, or damaged, without just compensation."

The U.S. Supreme Court in Preseault v. I.C.C., 494 U.S. 1, 108 L.Ed.2d 1, 110 S.Ct. 914 (1990) [**21] in addressing the constitutionality of a federal "rails-to-trails" statute determined that whether or not a taking had occurred depended upon the legal status of the reversionary interest. *Id.* The South Dakota Legislature requires a railroad to settle reversionary interest title claims to right-of-way easements within one year after abandonment pursuant to federal requirements of § 912.

A railroad which abandons service over, salvages and removes its rail, ties and other track material from any right-of-way in which it claims any right, title or interest in public lands, as prescribed by the act of Congress approved March 3, 1875, as amended, or in Indian lands as prescribed by the act of Congress approved March 2, 1889, as amended, or § 49-16A-55, shall settle title claims with adjoining landowners and municipalities within one year after salvage of the abandoned road is complete or title to the abandoned railroad right-of-way easement reverts and vests, by operation of law, pursuant to 42 Stat. 424 (March 8, 1922) [§ 912].

SDCL 49-16A-115. The state statute explicitly defers to § 912 to determine when reversionary interests vest.

Under the provisions of § 912, the Railroad [**22] has transferred the right-of-way to the State for use as a public highway. Hikers, bikers, skiers, and snowmobilers will use the right-of-way, and, as such, the right-of-way will continue to be used as a public highway compatible and consistent with its prior use as a public railway. No greater burden has been placed upon the servient estate. ~~490 N.W.2d 726~~ It has long been held that the holder of an easement

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is not limited to the particular method of use in vogue when the easement was acquired, and that other methods of use in aid of the general purpose of which the easement was acquired are permissible." Wash. Wildlife, 329 N.W.2d at 546. The Landowners acquired the property subject to the right-of-way traversing the land. Their interest has not been diminished by converting the right-of-way to a public recreational trail. The Landowners' reversionary rights will not mature until the right-of-way ceases to be used as a public highway. Therefore, there has been no taking and the Landowners are not entitled to compensation from the State.

We affirm the decision of the circuit court on all issues.

MILLER, Chief Justice, and WUEST, Justice, and McKEEVER, Circuit Judge, and STEELE, [**23] Circuit Judge, concur.

McKEEVER, Circuit Judge, for HENDERSON, Justice, disqualified.

STEELE, Circuit Judge, for SABERS, Justice, disqualified.

MEIERHENRY, Circuit Judge, for ANUNDSON, Justice, disqualified.

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