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March 30, 2007

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

(Via Electronic Filing)

RE: YILA – Abandonment Exemption
Yakima County, WA, AB 600 (Sub-no 1X) 218929

YILA – Adverse Abandonment
Yakima County, WA AB 600 218927

For filing: Response To Status Report On Rail Banking
In AB 600 (Sub-no. 1x) and
Reply to Reply to Kershaw Petition To Reopen
Abandonment in AB 600

Declaration of Rob Conrad
AB 600
AB 600 (Sub-no. 1x)

Dear Mr. Williams:

Enclosed please find Kershaw's Response To Status Report On Rail Banking in AB 600 (Sub-no. 1x) and Reply to Reply to Kershaw Petition To Reopen Abandonment in AB 600 and Declaration of Rob Conrad in AB 600 and AB 600 (Sub-no. 1x).

Very truly yours,

VELIKANJE, MOORE & SHORE, P.S.



Kevan T. Montoya

KTM:dg

cc: Charles H. Montange, Esq.
Paul Edmondson, Esq.
Raymond L. Paoella, Esq.
Lawrence E. Martin, Esq.
Terry Austin, Esq.
Eric Light, Esq.
(w/enclosures)

BEFORE THE SURFACE TRANSPORTATION BOARD

Yakima Interurban Lines Association,) AB 600
-- Abandonment Exemption – in) AB 600 (sub-no 1-X)
-- Yakima County, WA)

**RESPONSE TO STATUS REPORT ON RAIL BANKING
IN AB 600 (SUB-NO. 1X)
AND
REPLY TO REPLY TO KERSHAW PETITION TO
REOPEN ABANDONMENT IN AB 600**

I. FACTS

Yakima County, the City of Yakima, Town of Naches, and Yakima Interurban Lines Association (YILA) filed a Reply to Kershaw Petition to Reopen Abandonment and Status Report on Rail Banking (Reply) on March 14, 2007. (AB 600) (218798). They filed “Status Report on Rail Banking” (Status Report) on March 21, 2007. (AB 600 218840 and AB 600 (Sub-No. 1x)), (218838). The Status Report had attached to it a copy of a document entitled “Purchase and Sale Agreement.” (Agreement). (218840, Exhibit A). The document does not sell any property or establish any agreement to operate a trail. (218840, Exhibit A). It states that YILA “desires to transfer ownership of the Naches Branch to Yakima County” (Exhibit A, p.2). It then lists four contingencies that must occur prior to closing. (Exhibit A, p.3). The Agreement establishes a closing date of September 4, 2007, to close the transaction if the contingencies are met. (Exhibit A, p.8).

II. ARGUMENT

A. No agreement to establish or operate a trail exists.

No agreement to establish or operate a trail exists that would allow the Board to approve the rail banking. 49 C.F.R. 1152.29(d)(1) permits a railroad to “fully abandon [a] line if no agreement is reached within 180 days after [an NITU] is issued [.]” The trails act

requires that a trail sponsor assume full responsibility for managing the right-of-way and for any legal liability arising out of the right-of-way. 49 C.F.R. § 1152.29(a)(2); *Illig v. United States*, 58 Fed. Cl. 619, 631 (2003). Accordingly, the “trails act and its implementing regulations require that a trail sponsor must have the same control over the entire right-of-way corridor that would be held by a railroad in order that the trail sponsor can insure that any and all uses made of the right-of-way are consistent with the restoration of rail service.” *Illig*, 58 Fed. Cl. at 631. The implementing statute allows rail banking if a “political subdivision . . . is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use” 16 U.S.C. § 1247(d).

Yakima County has not shown it is prepared to assume the requisite responsibility for the rail line to allow the Board to approve rail banking. Instead, Yakima County stacks numerous contingencies together to create the illusion that it has an agreement. Kershaw Sunnyside Ranches, Inc. (Kershaw) understands that the Board’s function in rail banking is ministerial; nevertheless, Kershaw submits that the Board has the responsibility to insure that the necessary agreements to assume responsibility and establish a trail are met before it grants any request to rail bank.

Yakima County’s illusory agreement provides none of the certainty that the Trails Act requires before the Board approves rail banking. If the Board approves the current rail banking request, it runs the risk of the county failing to meet its conditions and allowing a deteriorating, abandoned rail line with noxious weeds growing throughout it, to burden adjacent property owners. (See Declaration of Rob Conrad filed with this response). The adjacent property owners will then be forced to control the weeds to prevent fire hazards and a nuisance to agriculture.

Yakima County states that Exhibit A “constitutes an agreement for purposes of the NITU [.]” (Docket No. 218838 p.2). No regulation explains what constitutes an agreement for purposes of the NITU. The Board’s Overview: Abandonments & Alternatives to Abandonments, p. 30 (April 1997) indicates that if a rail carrier agrees to use its line as a trail that the NITU period of 180 days exists for the “parties to negotiate an agreement”. It

further discusses the parties negotiating a “trail use agreement.” *Supra*. The agreement the county filed shows no proof of any trail use agreement.

At a minimum, the Board should only approve the rail banking subject to Yakima County acquiring the property and filing proof of a trail use agreement. It should also require that the county fulfill the terms of YILA’s agreement that would require that it maintain the right-of-way along the rail line during the time period that it continues to negotiate with Yakima Interurban Lines Association to reach an agreement.

B. The line is defacto severed from the interstate transportation system.

The large gaps in the track and for years effectively eliminate the Naches Line from the interstate transportation system. The Board has jurisdiction “over transportation by rail carrier that is – (A) only by railroad[.]” 49 U.S.C. § 10501(a)(1)(A). Jurisdiction of the Board under paragraph (1) applies only to “transportation in the United States between a place in (A) state and a place in the same or another state as part of the interstate rail network [.]” *Id*. The STB’s power extends “even to approval of abandonment of purely local lines operated by regulated carriers when, in the commission’s judgment, ‘the over-riding interests of interstate commerce requir[e] it.’” *Kalo Brick & Tile*, 450 US 311, 320 (1981). (quoting *Palmer v. Massachusetts*, 308 US 79, 85 (1939)). If a rail operator is not an interstate carrier, the STB must have an over riding interest in order to assume abandonment jurisdiction. *RLTD Railway Corporation v. Surface Transportation Board*, 166 F.3d 808, 813 (1999). The Rails to Trails Act does not broaden the Board’s jurisdiction. *Id*.

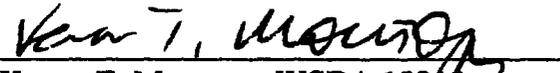
A defacto abandonment will remove a rail line from the jurisdiction of the Board. *See id.* at 813. In *RLTD Railway Corporation*, the STB ruled that a defacto abandonment occurred when a rail line had been salvaged and an end of the track had been paved over, preventing connection to interstate rail service. *See id.* at 812.

The Declaration of Rob Conrad filed with this Response shows that a defacto severance has occurred of the Naches Branch Line from the interstate commerce system. The Board previously ruled that the line is “in fact, still connected to the interstate rail

system” (AB-600 (sub. no. 1X) 37428 EB p.3). Kershaw submits the exhibits to Mr. Conrad’s declaration show that the line has been severed.

Dated this 30th day of March, 2007.

VELIKANJE, MOORE & SHORE, P.S.
Attorneys for Kershaw Sunnyside Ranches


Kevan T. Montoya, WSBA 19212

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CERTIFICATE OF SERVICE

By my signature below, I certify service on March 30, 2007, by U.S. Mail, postage pre-paid first class, of the foregoing upon the following counsel of record:

Charles Montange, Esq.
Attorney at Law
426 NW 162nd Street
Seattle, WA 98177

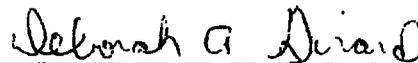
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Deborah A. Girard

BEFORE THE SURFACE TRANSPORTATION BOARD

Yakima Interurban Lines Association,) AB 600
-- Abandonment Exemption -- in) AB 600 (sub-no 1-X)
-- Yakima County, WA)

DECLARATION OF ROB CONRAD

1 I am the President of Kershaw Sunnyside Ranches, Inc. (Kershaw). I make this declaration based upon knowledge of facts to which I am competent to testify and would testify at trial. I have lived in Yakima for 39 years. I am familiar with the rail line known in this case as the Naches Line. I have reviewed the Notice of Exemption filed under Surface Transportation Board (Board) number 215462.

2. I have taken pictures of the area at the beginning of the Naches Branch on March 28, 2007, to show that the line is not connected to the Burlington Northern and Santa Fe leased line that leads to the Burlington Northern main line (See STB Finance Docket No. 34640 (STB served Jan. 21, 2005)). Attached as Exhibit 1 is picture of the area in which the Naches line should be located, near milepost 2.97 by Fruitvale Blvd. and 40th Avenue in Yakima, Washington facing east. I am taking the picture from where the track should be located. The area in the middle of the picture is the area where the track should be located. Exhibit 2 is a picture of the area where the railroad should be, facing west. The truck tire marks show the area where the track should be. Exhibit 3 is a picture of the area where the railroad should be, also facing west. In this picture I am showing an area farther west of the area in exhibit 2. Exhibit 4 is a picture of the rails that have been removed and stacked south of the rail bed, near the location of the picture in exhibits 1-3. Exhibit 5 is a picture of a sign showing that the tracks are out of service. All of the attached photographs are of the location of where the Yakima Interurban Lines Association (YILA) rail line is supposed to connect to the Burlington Northern Rail Line that ends near 40th Avenue.

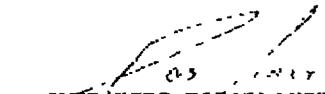
3 The photographs show that there is a missing section of rail and nonexistent rail bed between the Burlington Northern Line and the beginning of the YILA line. They also show that the beginning of the YILA line is severed at 40th Avenue on ramp. The on ramp is located just to the

west of the yellow "Sherri's" sign in exhibit 1 that is difficult to read. Fruitvale Blvd is to the south of the area I am standing when I took the pictures. In exhibit 5, I am facing south, the 40th Avenue on ramp is to my left, or to the east.

4. I have driven near the intersection shown in exhibit 5 for years. The condition of the track in the attached pictures has been the same for years. During that time it has always been severed from the line that connects to the Burlington Northern line. I am also responsible for making sure that we spray the weeds that are on the track near our property which about half way to Naches. The weeds shown in these photographs are the kind of weeds that have grown on the rail line for years because of the complete neglect of any maintenance on the line by YILA. If we did not spend money every year to spray the area of the rail line, it would look like the area in exhibit 3 near our property. It would not be acceptable to allow this kind of weed growth because we have an on-going orchard operation next to the line.

I hereby certify under the penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Dated this 24th day of March, 2007 at Yakima, Washington.


Rob Conrad

CERTIFICATE OF SERVICE

By my signature below, I certify service on March 30, 2007, by U.S. Mail, postage pre-paid first class, of the foregoing upon the following counsel of record:

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Chief Civil Deputy Pros. Atty
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Deborah A. Grand

EXHIBIT I



EXHIBIT 2



EXHIBIT 3

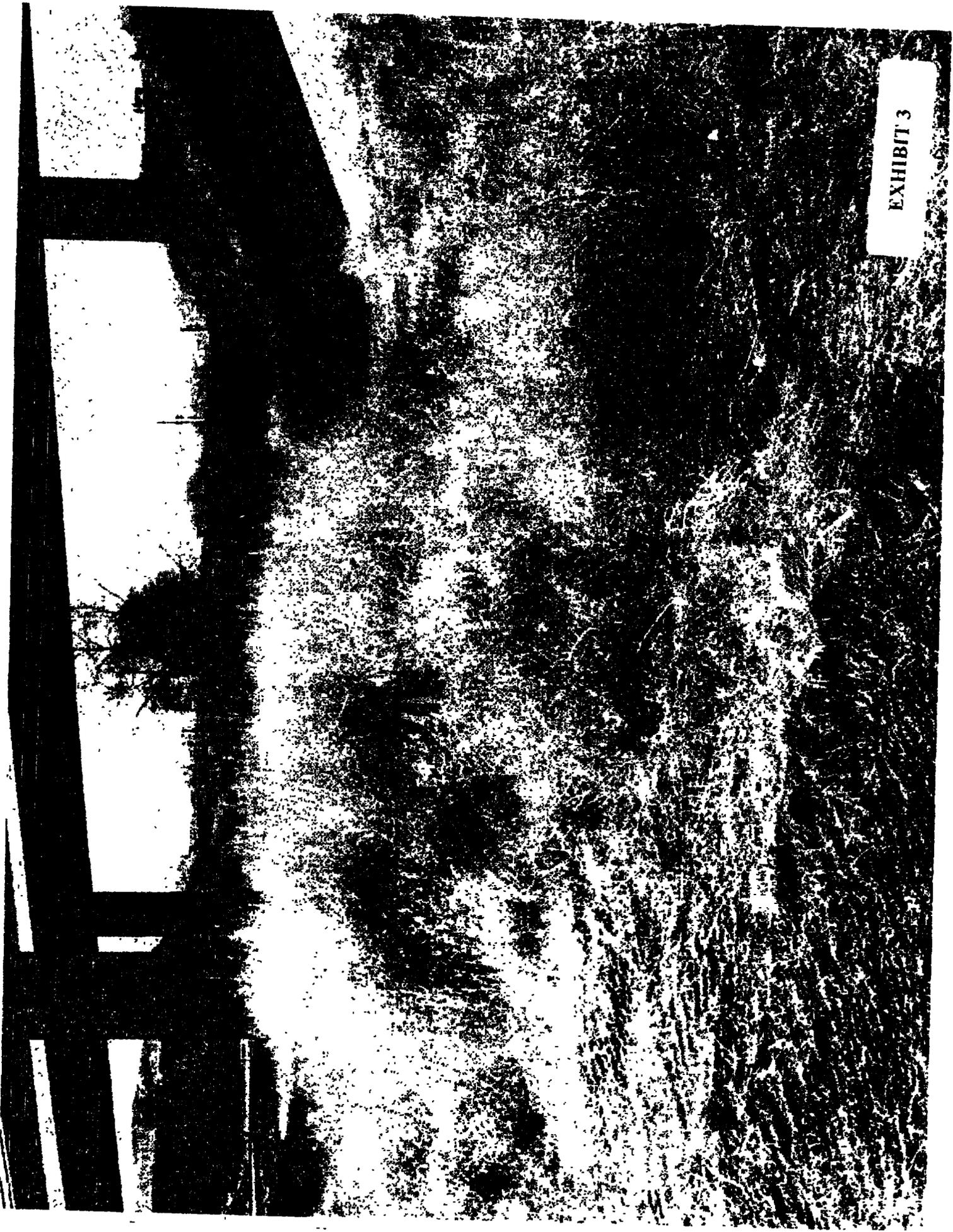


EXHIBIT 4

