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October 29, 2008

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BY THE NATIONAL BOARD OF TRIAL ADVOCACY

VIA UPS NEXT DAY AIR

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



re: Black Hills Transportation, Inc.
STB Finance Docket No. FD 34924

Dear Ms Hardy

Enclosed for the STB's consideration is the original and ten (10) copies of the MOTION FOR CLARIFICATION IN REFERENCE TO THE SUBMISSIONS UNDER THE PETITION UNDER 49 U.S.C §10502(d) TO REVOKE MODIFIED RAIL CERTIFICATE AND EXEMPTION UNDER 49 C.F.R. 1150.21 and 49 C.F.R. 1180.2(d)(3) GRANTED TO BLACK HILLS TRANSPORTATION, INC.

I believe this Motion For Clarification is self-explanatory, but should you or the STB staff have any questions or require anything further of our clients, Brown, et al, please feel free to contact my office. In advance, we would like to thank you and your staff for your prompt and professional attention to this matter

Sincerely yours,

Kenneth R. Dewell

KRD: dab
Enc.
cc Charles W. Brown
Attorney Roger Tellinghuisen and Eric Strawn
Attorney Thomas E. Brady
Attorney Charles Montangue

ENTERED
Office of Proceedings
OCT 31 2008
Part of
Public Record

BEFORE SURFACE TRANSPORTATION BOARD
STB Finance Docket No 34924



**MOTION FOR CLARIFICATION IN REFERENCE TO THE SUBMISSIONS UNDER
THE PETITION UNDER 49 U.S.C. §10502(d) TO REVOKE MODIFIED RAIL
CERTIFICATE AND EXEMPTION UNDER 49 C.F.R. 1150.21 and 49 C.F.R.
1180.2(d)(3) GRANTED TO BLACK HILLS TRANSPORTATION, INC**

**Charles Brown; James A Swaby; Fred K. Ening Jr; William W. Miller and Laurel D
Miller Co-Trustees Under the William W. Miller Revocable Trust 50% interest And
Laurel D. Miller and William W. Miller Co-Trustees of the Laurel D. Miller Revocable
Trust 50% interest, Barbara J. Spector as Trustee of the Spector Living Trust and
Muriel A. Hanna as Trustee under Declaration of Trust; Crook Mt Angus Ranch, Inc ;
Albert R. and Lori A. Tetreault; Brian and Heidi Janz; John and Patricia Dvorak; Bobby
A and Cindy L Lander; Randy G and Lori A. Fryer; William R. and Teresa Fox; David
J Fandrck; Desperado Investments, LLC; Tracy L and Kelly J McDaniels; and Gerald
and Edith Miles, ("Petitioners") hereby respectfully move the Board for clarification of
the breadth of the jurisdiction and authority of the Board to rule upon real estate issues
associated with the Modified Rail Certificate and Exemption under 49 C.F.R. 1150.21
and 49 C.F.R. 1180.2(d)(3) granted to Black Hills Transportation, Inc., dated September
21, 2006**

**This motion is based upon all of the previous filings of the Petitioners, Brown, et
al, in the above captioned proceedings and in particular and including the following:**

- 1. The Petition Under 49 U.S.C. §10502(d) to Revoke Modified Rail
Certificate and Exemption under 49 C F R. 1150 21 and 49 C.F.R.
1180.2(d)(3) granted to Black Hills Transportation, Inc., (hereinafter**

**ENTERED
Office of Proceedings**

OCT 31 2008

**Part of
Public Record**

"Petition to Revoke") is dated February 5, 2007, on file with the Board and incorporated herein by reference

- 2. Charles Brown v. Northern Hills Regional Railroad Authority, et al., 2007 SD 49, 732 N.W.2d 732, a copy of which was previously provided to the Board as part of these proceedings and incorporated herein by reference**
- 3. The Order Reserving Ruling On Appellees' Motion to Supplement Record dated February 1, 2007, by David Gilbertson, Chief Justice of the South Dakota Supreme Court in the appeal of Charles Brown v Northern Hills Regional Railroad Authority, et al. (which Order relates to Appellees' Motion For Leave to Supplement the Record dated December 29, 2006, which was previously provided to the Board as Exhibit C attached to the Petition to Revoke), a copy of which Order Reserving Ruling On Appellees' Motion to Supplement Record is attached as Exhibit A and incorporated herein by reference.**
- 4. The Memorandum Opinion of Judge Randall L. Macy, Circuit Court Judge, Fourth Judicial Circuit, of the Circuit Court of the State of South Dakota, dated June 25, 2007, in that South Dakota litigation captioned James W. Swaby, et al , vs. Northern Hills Regional Railroad Authority, et al, on file with the Board and incorporated herein by reference.**
- 5. The Court's Default Judgment and Court's Judgment on Stipulated Facts entered by Judge Randall L. Macy, Circuit Court Judge, Fourth Judicial Circuit, of the Circuit Court of the State of South Dakota, dated June 25, 2007, in that South Dakota litigation captioned James W Swaby, et al.**

vs. Northern Hills Regional Railroad Authority, et al, on file with the Board and incorporated herein by reference.

- 6 The Appellants' Brief dated April 21, 2008, to the South Dakota Supreme Court in that South Dakota litigation captioned James W. Swaby, et al, vs. Northern Hills Regional Railroad Authority, et al, and in particular Section III - the 1875 Act Right-of-Way, Issue 7(2): State court action affecting the 1875 Act right-of-way has been pre-empted, at page 33, a copy of which brief is attached hereto as Exhibit A (including the Appendix Table of Contents, but without the attachments [which have been previously provided to the Board or are copies of federal and South Dakota law otherwise readily accessible to the Board]), a copy of which Appellants' Brief is attached as Exhibit B and incorporated herein by reference.

This Motion for Clarification is necessary and appropriate in that the Northern Hills Regional Railroad Authority, both before the Circuit Court in the remand of *Brown v. Northern Hills Regional Railroad Authority, et al*, and before the South Dakota Supreme Court in *Swaby, et al*, is asserting an argument and legal position that the Board has the exclusive and pre-emptive jurisdiction to determine issues relating to the title and ownership of real estate within the State of South Dakota and which real estate parcels are the subject matter of these two (2) South Dakota state court proceedings:

This Motion for Clarification is separate and apart from the issue of whether or not the Modified Rail Certificate and Exemption issued to Black Hills Transportation, Inc., is valid or should be revoked. The parties, and in particular *Brown, et al*, are

entitled to a clarification by and from the Board as to the issues presented by this
Motion for Clarification.

Dated: October 29, 2008.

Respectfully Submitted,

By: 

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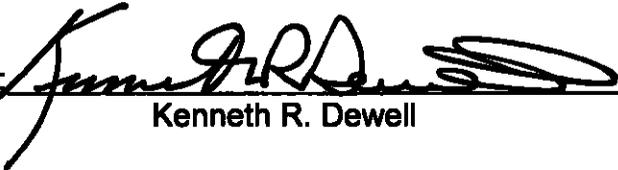
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CERTIFICATE OF SERVICE

The undersigned affirms and certifies that a copy of the foregoing was sent to the following counsel of record via first class mail this 29th day of October, 2008.

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By: 
Kenneth R. Dewell

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

CHARLES W. BROWN,)
Plaintiff and Appellant,)
vs.)

ORDER RESERVING RULING ON
APPELLEES' MOTION
TO SUPPLEMENT RECORD

#23989

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 person unknown who)
have or claim to have any)
interest or estate in or)
encumbrance upon the premise)
described in the Compliant)
or any part thereof,)
Defendants and Appellees.)

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

FEB 01 2007

Shirley A. Johnson Long
Clerk

Appellees having served and filed a motion for an order to supplement the record in the above-entitled matter, and appellant having served and filed objections thereto, and the Court having considered the motion and response and being fully advised in the premises, now, therefore, it is

ORDERED that the Court hereby reserves ruling on said motion.

DATED at Pierre, South Dakota this 1st day of February, 2007.

ATTEST:

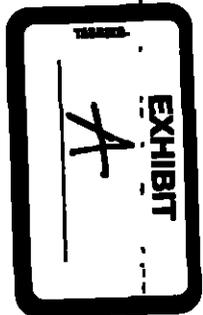
[Signature]

Clerk of the Supreme Court
(SEAL)

BY THE COURT:

[Signature]

David Gilbertson, Chief Justice



PARTICIPATING: Chief Justice David Gilbertson, Justices Richard W. Sabers, John K. Konenkamp, Steven L. Zinter and Judith K. Meierhenry.

CHRISTIANA GRALAPP, husband and wife;
LYMAN D. PETTIT and HANNA M. PETTIT,
husband and wife; THOMAS S. NEWMAN;
ANDREW NORNE/GOTTFRIED BURGER;
RICHARD GRENFELL and GRACE GRENFELL,
and JOHN LEWIS and MARGARET LEWIS,
husband and wife; and ALL PERSONS
UNKNOWN WHO HAVE OR CLAIM TO
HAVE ANY INTEREST OR ESTATE IN OR
EVEN ENCUMBRANCE UPON THE
PREMISES DESCRIBED IN THE
AMENDED COMPLAINT.

Defendants/Appellants

Appeal from the Circuit Court
Fourth Judicial Circuit
Lawrence County, South Dakota

THE HONORABLE RANDALL L. MACY

APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to SDCL §15-26A-3(1). Appellants Northern Hills Regional Railroad Authority, South Dakota Department of Transportation and South Dakota Department of Game, Fish & Parks seek review of the “Court’s Default Judgment and Court’s Judgment on Stipulated Facts” dated, entered and filed January 15, 2008 (Rec. at p. 1105). Amended Notice of Court’s Default Judgment and Court’s Judgment on Stipulated Facts was served on February 7, 2008 (Rec p 1116). The Court’s Default Judgment and Court’s Judgment on Stipulated Facts constituted final Judgment in favor of the Plaintiffs/Appellees. Appellants’ Notice of Appeal was filed with the Circuit Court on February 19, 2008 (Rec. at 1118). No other Defendants have appealed.

STATEMENT OF LEGAL ISSUES

1. WAS PLAINTIFFS’ ACTION ON THE FEE LANDS BARRED BY THE STATUTE OF LIMITATIONS?

The Circuit Court failed to address or specifically rule on this preemptive issue in its Memorandum Decision or Judgment, but rather quieted title to the Fee Lands in the Plaintiffs.

Cowell v. Springs Co., 100 US 55; 25 L.Ed. 547 (1897)

Gorman Mining Co. v. Alexander, 2 SD 557; 51 N.W. 346 (1892)

Estate of Lamb v. Morrow, 117 N.W. 1118 (IA 1908)

SDCL §15-3-3

2. WERE THE FEE LANDS ABANDONED? –

The Circuit Court erroneously ruled that the Fee Lands had been abandoned.

Barney v. Burlington Northern R.R. Company, Inc , 490 N.W.2d 726 (SD 1992)

(cert den. 507 U.S. 914)

Helvering v. Jones, 120 F 2d 828 (8th Circ. 1941)

Aasland v. County of Yankton, 280 N.W.2d 666 (SD 1979)

Shaw v. Circuit Court of Hamlin County, 27 S.D. 49; 129 N.W. 907 (1911)

SDCL §43-25-8

SDCL §5-2-11

SDCL §31-19-42

3. DID THE KROLL AND CLARK DEEDS CONVEY FEE SIMPLE TITLE?

The Circuit Court erroneously ruled that the Kroll and Clark deeds conveyed an easement.

Brown v. Washington, 924 P.2d 908 (Wash. 1996)

4. HAVE THE FEE LANDS BEEN ADVERSELY POSSESSED BY NHRRA?

The Circuit Court failed to address or specifically rule on this issue in its Memorandum Decision or Judgment, but quieted title to the Fee Lands in the Plaintiffs

Schultz v Dew, 1997 SD 72; 564 N.W 2d 320

Schilling v. Backer, 2004 SD 45; 678 N.W 2d 802

SDCL §15-3-10

SDCL §15-3-7

SDCL §15-3-11

5. DOES NHRRA HOLD CLEAR TITLE UNDER SDCL CHAPTER 43-30?

The Circuit Court failed to address or specifically rule on this issue in its Memorandum Decision or Judgment, but quieted title in the Plaintiffs.

SDCL §43-30-12

SDCL §43-30-3

SDCL §43-30-7

6. DID THE CIRCUIT COURT ERR IN GRANTING CERTAIN PLAINTIFFS SUMMARY JUDGMENT AS TO THE EXCLUDED PROPERTY?

The Circuit Court failed to address or specifically rule on this issue in its Memorandum Decision or Judgment, but quieted title in the Plaintiffs.

Crowley v. Trezona, 408 N.W.2d 332 (SD 1997)

Rowbotham v Jackson, 68 SD 566; 5 N.W.2d 36 (1942)

State Dep't of Revenue v. Thiewes, 448 N.W 2d 1 (SD 1989)

SDCL §43-4-3

SDCL §21-41-11

SDCL §15-6-56(c)

7. HAS THE 1875 ACT RIGHT-OF-WAY BEEN ABANDONED?

The Circuit Court erroneously ruled that the 1875 Act right-of-way had been abandoned.

Idaho v. Oregon Short Line Railroad Co., 617 F. Supp. 207

Barney v. Burlington Northern R.R. Company, Inc., 490 N.W.2d 726 (SD 1992)
(cert. den 507 U S 914)

United States v. Washington Improvement and Development Co., 189 F. 674
(C.C E.D. Wash 1911)

Central Transportation Co. v. Pullman's Palace Car Co , 139 U.S. 24; 11 Sup. Ct.

478, 35 Law. Ed. 55 (1891)

16 U.S.C. §1248(c)

43 U.S.C. §912

43 U.S.C. §940

43 U.S.C. §937

43 U.S.C. §913

43 U.S.C. §939

SDCL §15-6-12(h)

STATEMENT OF THE CASE

Judgment was entered January 15, 2008 by the Circuit Court, Fourth Judicial Circuit, Lawrence County, South Dakota, the Honorable Randall L. Macy presiding.

Plaintiffs brought this action pursuant to SDCL Ch. 21-41 to quiet title to real property to which the predecessors in interest of certain Plaintiffs had conveyed fee simple title to the Fremont, Elkhorn and Missouri Valley Railway Company ("FEMV") in 1890 and certain other lands over which right-of-way had been granted to FEMV by the United States pursuant to 43 U.S.C. §§934-939. (Second Amended Complaint, Rec. p. 617) Defendants Northern Hills Regional Railroad Authority ("NHRRA"), South Dakota Department of Transportation ("DOT") and South Dakota Department of Game, Fish & Parks ("GFP"), successors in interest to FEMV, generally denied Plaintiffs' claims and counterclaimed against Plaintiffs requesting that title to the Fec Lands and to the right-of-way granted by the United States be quieted in NHRRA. (Answers of NHRRA, DOT and GFP to Second Amended Complaint, Rec. pp. 861, 859 and 841).

NHRRA, DOT and GFP also asserted a counterclaim against Plaintiff Swaby for damages for trespass on a certain part of the Fee Lands and for an order permanently enjoining Swaby and others under him from further trespass. NHRRA, DOT and GFP also cross-claimed against certain of the other Defendants requesting title to the lands and right-of-way be quieted in their favor and against those Defendants. (Rec. pp. 754, 741 and 423). By Stipulation, Lawrence County and Dakota, Minnesota and Eastern Railroad Corporation were dismissed from the action. (Rec. pp. 872 and 863) No other Defendants answered or appeared.

NHRRA, DOT and GFP filed a Motion for Summary Judgment (Rec. p. 270) as did Plaintiffs (Rec. p. 435). The Motions for Summary Judgment were submitted to the Circuit Court upon Stipulated Facts (Rec. p. 889). The Court entered Default Judgment for the Plaintiffs and against the Defendants who did not appear or answer and Judgment on Stipulated Facts for Plaintiffs quieting title to the lands and right-of-way in Plaintiffs as against the Defendants. (Rec. p. 1105).

STATEMENT OF THE FACTS

The facts of this case and those relevant to this appeal are set forth in Stipulation of Facts (Rec. p. 889), a copy of which is included in the Appendix to this Brief at Appendix pp. C-44 – C-54.

STANDARD OF REVIEW

In Dahl v. Combined Insurance Company, 2001 S.D. 12, P5; 621 N.W.2d 163, 165-166, this Court described the standard for review of summary judgment:

In reviewing a grant or a denial of summary judgment under SDCL 15-6-56(c), we must determine whether the moving party demonstrated the absence of any genuine

issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper. (citations omitted)

This action was submitted to the Circuit Court on cross-motions for summary judgment.

On review of motions for summary judgment submitted on stipulated facts this Court only determines whether the circuit court correctly applied the law. Knight v. Madison, 2001 S D. 120, P3; 634 N.W.2d 540, 542.

ARGUMENT INTRODUCTION

As relevant to this appeal, the following three categories of property interests are involved:

1. The "Fee Lands" are that to which fee simple title was granted during the year 1890 to FEMV by nine grantors (the "1890 Grantors") identified in Paragraphs 4(A) – (F), 4A(A) and Paragraphs 9 and 10 of the Stipulation of Facts ("SF") (Record, p. 889; Appendix pp. C-45, C-46; C-47 – C-48).
2. The "Excluded Property" is that which is owned by certain Plaintiffs where the deeds conveying those lands to them specifically excluded either the Fee Lands (described in SF 12(b) and 12(h)), or the 1875 Act right-of-way (described in SF 12(a) and 12(n)) (App. pp. C-48, C-50 and C-51; Exhs. 13, 14, 23, 33).

3. The “1875 Act right-of-way” that was granted to FEMV by the United States pursuant to the 1875 Act prior to the issuance of patents by the United States to the parcels of land traversed by the 1875 Act right-of-way. (Court’s Exhibit 1 (attached to Memo. Dec.); Rec., p. 987; App. p. B-20).

Appellants’ will address the issues as to each of these categories of property interests in sections I, II, and III, below.

All real property involved in this action is situated in Range 4 East, Black Hills Meridian, Lawrence County, South Dakota. The following abbreviations are used in the brief:

“CNW” - Chicago and Northwestern Railway Company

“DME” - Dakota, Minnesota and Eastern Railroad Corporation

“DOT” - South Dakota Department of Game, Fish & Parks

“FEMV” – Fremont, Elkhorn and Missouri Valley Railway Company

“GFP” - South Dakota Department of Game, Fish & Parks

“ICC” - Interstate Commerce Commission (now known as Surface Transportation Board)

“Judgment” - Court’s Default Judgment and Court’s Judgment on Stipulated Facts

“Memo. Dec.” - Memorandum Decision of the Circuit Court

“NHRRA” - Northern Hills Regional Railroad Authority

“SF” - Stipulation of Facts

“State” – State of South Dakota

“Transportation Commission” - South Dakota Transportation Commission

“UPR” - Union Pacific Railroad Company

“1875 Act” - The General Railroad Right-of-Way Act of March 3, 1875, codified at 43 USC §§934-939

The exhibits admitted into evidence by the Circuit Court were separately indexed and transmitted to this Court by the Clerk of Courts in a separate binder. References in this Brief to the exhibits are by the letter and number designations in the Clerk’s “Exhibit List”.

I. THE FEE LANDS.

A. INTRODUCTION

Fee simple title to the strips of land described in the 1890 deeds was conveyed by the 1890 Grantors to FEMV. (SF 4). The current owners of the properties adjoining the lands conveyed in fee to FEMV (the “Fee Lands”), who are the successors in interest of the 1890 Grantors, are identified in paragraph 5 of the Judgment. (App. p. A-3) Title to the Fee Lands was conveyed from FEMV to CNW, then to the State, and finally to NHRRA (SF 14, 17, 19, 20; App. pp. C-52 – C-53) UPR and DME also conveyed all of their right, title and interest in and to the Fee Lands to NHRRA. (SF 21, 22, App. p. C-53). NHRRA continues to hold fee title. (SF 23; App p. C-54; Exhs. 41 and P.).

Each of the 1890 deeds contained a clause in substantially the following language

Provided that if said Railroad [FEMV] shall not be located and graded within ten years [two years in the Burger, Grenfell and Newman deeds] from the date hereof or if at any time after said railroad shall have been constructed, the said party of the second part [FEMV] its successors or assigns shall abandon said road or the route thereof shall be changed so as not to be continued over said premises the land hereby conveyed in and to the same shall revert to the said party of the first part [the Grantors] their heirs and assigns.

(SF 5; App. p. C-46).

As established by the Stipulation of Facts, the 1890 deeds granted *fee simple title* to the land described in the deeds to FEMV (SF 4; Rec. p. 987; App. p. C-45), not mere right-of-way, as the Circuit Court erroneously stated in its Memorandum Decision (App. p. B-16). FEMV's fee simple title was subject only to the *conditions subsequent* stated in the deed clause quoted above. Conditions subsequent are defined by SDCL §43-3-1 and §43-3-2 as follows:

§43-3-1. The time when the enjoyment of property is to begin or end may be determined by computation, or be made to depend on events. In the latter case, the enjoyment is said to be upon condition.

§43-3-2 Conditions are precedent or subsequent. The former fix the beginning, the latter the ending of the right.

Creation of an estate in fee simple subject to a condition subsequent is described in Restatement of the Law, Property, Section 45 (1936) as:

An estate in fee simple subject to a condition subsequent is created by any limitation which, in an otherwise effective conveyance of land,

- a. Creates an estate in fee simple; and
- b. Provides that upon the occurrence of a stated event the conveyer or his successor in interest *shall have the power to terminate* the estate so created. (emphasis provided).

Comment a. to Section 45 describes the exercise of the "power to terminate" the estate conveyed, stating, in relevant part.

When a transferor, having an estate in fee simple absolute transfers an estate in fee simple subject to a condition subsequent, the transferee is regarded as having received the entire estate of the transferor, who, by virtue of his reserved power of termination has the power to regain his former estate, if and when there is a breach of the condition subsequent

In Comment j to Section 45, the creation of an estate in fee simple subject to a condition subsequent is described in the following language:

Except when the attempted condition is illegal an estate in fee simple subject to a condition subsequent is created by an otherwise effective conveyance which contains:

1. some one of the following phrases, namely, "upon express condition that," or "upon condition that," or "*provided that*," or a phrase of like import, and also
2. a provision that if the stated event occurs, the conveyer "may enter and terminate the estate hereby conveyed," or a phrase of like import. (emphasis added).

Here, the clauses containing the conditions begin with the words "Provided That" creating, as explained in Comment j., a condition subsequent. In Hooper v. Cummings, 45 ME 359 (1858) the deed in question conveyed a parcel of land with the condition "providing the said committee and proprietors fence the said land and keep the same in repair." (emphasis added). The court in that case held that the provision created a condition subsequent, stating:

We may assume that the *proviso* in the deed created a condition subsequent, and, in this, we are sustained by most, if not all, the authorities, ancient and modern; notwithstanding it is to be construed strictly and most strongly against the grantor to prevent, if possible, a forfeiture of the estate (emphasis in original).

The conditions subsequent in the 1890 deeds are. (1) that the railroad be located and graded within the period stated in the deeds; (2) that FEMV, its successors or assigns not abandon the "road"; and, (3) that the route not be changed so as not to continue over the premises conveyed by the deeds. The timeliness of the location and of the grading of the railroad and the continuation of the route over the premises conveyed by the 1890 deeds are not disputed in this action. (SF 6; App. p C-46). The first condition subsequent can now never occur. The only condition subsequent at issue is the second regarding

abandonment of the road. (See Issue 2, *infra*, at p. 14) A breach of the third condition ?
could still occur, but has not and is not at issue

B. ISSUE 1. WAS PLAINTIFFS' ACTION ON THE FEE LANDS BARRED BY THE STATUTE OF LIMITATIONS?

Statute of limitations was raised as an affirmative defense by NHRRA, DOT and GFP in their Answers to Plaintiffs' Second Amended Complaint. (NHRRA: Rec. pp. 861 and 754 (p. 6, para. 19); DOT: pp. 859 and 741, (p. 6, para. 19); GFP: pp. 841 and 423 (p. 6, para. 19)). This issue was briefed and argued to the Circuit Court, but the Court did not address or specifically rule on the issue in its Memorandum Decision or Judgment, although, this issue is adversely dispositive to Plaintiffs' claims.

The occurrence of the event described in the second condition in the 1890 deeds to FEMV, abandonment of the "road", would have given the Plaintiffs or their predecessors in interest the right to claim reversion of the Fee Lands, although, if such an event did occur, title would not have reverted unless a reentry action was first successfully concluded. The cause of action upon a breach of a condition subsequent is one for reentry or ejectment. See Cowell v. Springs Co., 100 US 55, 58; 25 L.Ed. 547 (1897), holding that where there is a condition subsequent and a breach thereof, the original grantor has "a right to treat the estate as having reverted to it, and bring ejectment for the premises." See also Gorman Mining Co. v. Alexander, 2 SD 557, 565; 51 N.W. 346, 348 (1892) where the Court stated:

In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. *If it be a private grant, that right must be asserted by entry, or its equivalent.* (emphasis added)

As the language of the cases cited above holds, even if a breach of a condition subsequent does occur, title to the subject property does not revert unless an action to retake the title is successfully completed. As stated in Estate of Lamb v. Morrow, 117 N.W. 1118, 1122 (IA 1908)

If the conveyance was originally upon condition subsequent, it nevertheless passed title, with all rights annexed thereto subject, of course, to be (sic) defeated for breach of the condition. *But some affirmative act on the part of the grantor was necessary to defeat the title conveyed.* (emphasis added)

SDCL §15-3-3 provides.

No entry upon real estate shall be deemed sufficient or valid as a claim unless an action be commenced thereupon within one year after the making of such entry, or within twenty years from the time when the right to make such entry descended or accrued.

The Circuit Court Judgment ruled that the Fee Lands have been abandoned.

Assume for the moment that the Court was correct. The Circuit Court failed to then address the statute of limitations issue before concluding, on that basis, title of the Fee Lands was quieted in the adjoining Plaintiff landowners. (Judgment, ¶ 5, Rec., p 1105; App. p. A-3).¹ In its Memorandum Decision, the Circuit Court referred to two events in support of the conclusion that the right-of-way had been abandoned. One event was a 1970 ICC "Certificate and Order" authorizing an abandonment of rail *service* by CNW over the Whitewood to Deadwood line and CNW's December 31, 1970 cessation of that *service* and its removal of its tracks and certain other physical facilities (SF 15, App. p. C-52; Exh. E (at p. 21), 37, 38). The other event was the approval of Resolution No.

¹ The fee lands adjoin all of the property described in ¶¶ 5 and 6 of the Judgment except Elwyn J Cole, SE1/4NE1/4, Gerald and Edith Miles, a portion of SW1/4NE1/4, Desperado Investments, LLC, a portion of SW1/4NE1/4, all in S 6, T5 and Crook Mountain Angus Ranch, Inc., SE1/4SE1/4 S 28 T6. These properties adjoin 1875 Act Right-of-Way

14218 by the Transportation Commission on September 27, 1984. The Resolution purported to abandon certain portions of the former CNW right-of-way that the State acquired by deed from CNW in 1972. (SF 18; App. p. C-53). It stated that any rights in the interests described in the Resolution would revert to the “former owner, his heirs or assigns”. (Exh. H)

If the 1890 Grantors or their successors and assigns had a claim that an abandonment of the “road” had breached or triggered the second condition subsequent in the deeds (which claim Appellants deny, see section C, *infra*, at p.14), that claim accrued no later than December 31, 1970 (as to CNW’s cessation of rail *service*), or no later than September 27, 1984 (as to Resolution 14218). There is no allegation and no evidence that Plaintiffs or their predecessors in interest made an entry upon the Fee Lands and commenced a reentry action within the one year period required by SDCL §15-3-3 after CNW’s December 31, 1970 cessation of rail service, or within one year after Resolution 14218 was approved on September 27, 1984. There is also no allegation and no evidence that they commenced an action for reentry within 20 years of those dates, or at any other time prior to this action that was commenced on May 5, 2005. (Notice and Admission of Service, Rec. p. 81; SDCL §15-2-30, App. p. E-67). The title to the Fee Lands granted to FEMV by the 1890 deeds, has never passed, by reverter or otherwise, from FEMV or its successors and assigns to Plaintiffs or to their predecessors in interest. That title was never divested, even if a breach of the second condition subsequent occurred, because no “entry” action (Gorman, *supra*) was commenced until after such an action had been barred by SDCL § 15-3-3. Neither Plaintiffs, nor their predecessors in interest, timely

undertook the affirmative act “necessary to defeat the fee title conveyed” to FEMV.

Estate of Lamb, supra.

Upon the passing of the 20-year limitation of SDCL §15-3-3 (January 1, 1991 as to the cessation of rail service and September 28, 2004 as to Resolution 14218), Plaintiffs’ claims of reverter and any right to bring an action for reentry based upon those events was forever barred by SDCL §15-3-3. By the expiration of the SDCL §15-3-3 statute of limitations, Plaintiffs’ claims and argument that the Fee Lands were abandoned became moot. The fee title now vested in NHRRA, the successor in interest of FEMV, is free of the second condition subsequent, if in fact such events as relied upon by the Circuit Court did occur. The Circuit Court erred in failing to dismiss Plaintiffs’ claims to the Fee Lands as being barred by the statute of limitations and in failing to enter judgment quieting fee title to the Fee Lands in NHRRA for such reason.

C. ISSUE 2. WERE THE FEE LANDS ABANDONED?

As described in the preceding section, the Plaintiffs’ action claiming reversion of the Fee Lands is barred, therefore, the Circuit Court should not have reached the issue of abandonment of the Fee Lands. Appellants respectfully submit that this case should be remanded to the Circuit Court with instructions to dismiss those claims with prejudice, which action would render consideration of the abandonment issue by this Court unnecessary. Should this Court consider the abandonment of the Fee Lands question on this appeal, the Circuit Court also erred in its determination that the those lands have been abandoned. As stated above, abandonment of “road” is the only condition subsequent at issue in this action. In the following discussion, the reasons why CNW’s

cessation of rail *service* and the approval of Resolution 14218 did not constitute an abandonment of the road arc addressed.

I. Cessation of Rail Service. Barney v Burlington Northern R.R. Company, Inc., 490 N.W.2d 726 (SD 1992) (cert. den. 507 U.S. 914) is controlling on the question of whether the CNW application to the ICC and the ICC's authorization of the cessation of *service* constituted an abandonment of the Fee Lands by CNW. Barney specifically held:

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 ICC's purposes. It is not a determination that the railroad has abandoned its lines. * * * 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.* (Id. at 732) (emphasis added)

(At 732, citing Vieux v. East Bay Regional Park District, 906 F.2d 1330, at 1339 (9th Cir. 1990) (cert. den. 498 US 967)). As stated in Barney, the ICC regulations and process are only an exercise of the limited authority of the ICC to regulate railroad *services* and operations, including the cessation of such *services*. The ICC Certificate and Order did not constitute a determination regarding real property interests. CNW's application to the ICC for authority to cease *service* over the Whitewood to Deadwood line was not an abandonment of the road or of CNW's title to the Fee Lands. The ICC's authorization of abandonment of *service* and CNW's exercise of that authority was only that, an abandonment of *service*. See Barney, *id.*

In December 1970 CNW agreed, pursuant to contract, to convey its Whitewood to Deadwood property interests, including its right, title, and interest in and to the Fee Lands, to the State. (SF 16, Exh. 43). As stated in Hickman v Link, 22 S W. 472, 473

(Mo 1893), "To constitute an abandonment, there must be a concurrence of the intention to abandon and the actual relinquishment of the property, so that it may be appropriated by the next comer." The rule of law established in Hickman regarding the elements of abandonment and the requirement that those elements must conjoin and operate together or there is no abandonment was followed in Helvering v. Jones, 120 F 2d 828, at 830 (8th Cir. 1941). The quitclaim deed from CNW conveyed all right, title, and interest of CNW in and to the Fee Lands to the State. (SDCL §43-25-8 (App. p. E-82). See also Anderson v Aesoph, 2005 SD 56, P22; 697 N.W.2d 25, 32. CNW's contract to convey and then conveyance of the Fee Lands to the State is wholly inconsistent with relinquishment of the property so that it could be appropriated by Plaintiffs or any of their predecessors in interest. "Conveyance of property and abandonment of property are not consistent actions." Vieux, supra at 1341. Conveyance is the exercise of an act (if not the final act) of ownership.

CNW's intention as to the Fee Lands is specifically and clearly declared in the May 21, 1968 Resolution of its Board of Directors where the Board directed and authorized CNW officers and employees, among other duties, to sell "*the land*" and the right-of-way for the "best price obtainable". (Exh. E, at p. 27). Had abandonment to Plaintiffs or their predecessors in interest been the intent of CNW, the property would not have been deeded to the State, and certainly the State would not have paid, nor would have CNW expected to receive, monetary consideration for the conveyance. The fact that the agreement to sell the Fee Lands was entered into before the cessation of *service* and before CNW's conveyance of its property pursuant to that agreement on May 30, 1972

(SF 17; App. p. C-53) belie, as a matter of law, any intent or act of CNW to abandon the road and no abandonment in fact occurred.

2. Resolution No. 14218.

(a) DOT did not have authority to convey title to the Fee Lands. Before the Circuit Court could consider whether Resolution 14218 is evidence of abandonment by the State of its Fee Lands, the Court was required to first determine whether the DOT could transfer and convey real property owned by the State. The Circuit Court incorrectly concluded that SDCL §5-2-11 which governs that question, did not apply, stating that the issue before it was whether right-of-way was abandoned. (Memo. Dec., p.9; App. p. B-16). As to the Fee Lands, the issue was whether lands owned in fee, not easements, were abandoned. (SF 4; App. p C-45). Resolution No. 14218 could not have resulted in the conveyance of the title to the Fee Lands because of the language of SDCL §31-19-42 then in effect (App. p. E-75). In 1972 when CNW conveyed the Fee Lands to the State, and until amended by SL 1986, Ch. 238, §1, that statute provided, in relevant part, that DOT was permitted to obtain a fee ownership in real estate "other than right-of-way". In 1986, SDCL §31-19-42 was amended to provide, in relevant part, that DOT was permitted to obtain a fee ownership in real estate "including right-of-way". (App. p. E-76)

The 1972 conveyance by CNW was, as it had to be, to the State, not to DOT, since in 1972 DOT could not hold fee title to right-of-way lands pursuant to the then version of SDCL §31-19-42. If the State, the owner of the Fee Lands, determined in

September 1984 that it would convey title to those lands to anyone², that conveyance could only have been accomplished by compliance with SDCL §5-2-11, which sets forth the specific requirements for a conveyance of title to real property owned by the State (App. p. E-66). A transfer and conveyance of Fee Lands from State ownership could only be accomplished by a deed from the State following the procedures of SDCL §5-2-11 because that is the only “lawful method” by which the State could transfer and convey title to real property. The “lawful method” rule is stated in Aasland v. County of Yankton, 280 N.W.2d 666, at 668 (SD 1979), where it was held:

Once the right-of-way was deeded to the public for its use as a roadway, the overriding public interest in a road mandated an express action or ‘lawful method’ employed by the public before such a right-of-way could be divested.
* * * Since there is no indication that defendant pursued any ‘lawful method’ of abandonment, as specifically provided for by statute, the trial court was correct in refuting plaintiff’s contention and in finding no abandonment of the right-of-way by defendant.

The “lawful method” rule stated in Aasland applies even if a right-of-way held as public highway has never been used or improved. See Thormodsgard v. Wayne Township Board of Supervisors, 310 N.W.2d 157, 158 (SD 1981). When Resolution 14218 was approved in 1984, DOT did not have the authority to abandon the Fee Lands by any “lawful method”. DOT was, therefore, also without authority to undertake any act that could be held to be a declaration of intent by the State to abandon its fee interest in that property. “A county or other governmental agency cannot be bound for acts of its officers and agents in excess of its powers or in violation of positive law.” Mellette County v. Arnold,

² Since 1971, the DOT has had authority to make transfers of highway right-of-way to political subdivisions of the State, such as the transfers it made of the Fee Lands to GFP and NHRRA pursuant to SDCL §31-19-63. (App p E-77) However, the State’s title to right-of-way so transferred would not thereby be conveyed out of the State’s ownership

76 S.D. 210, 214; 75 N.W.2d 641, 643 (1956). The Transportation Commission, being a creature of statute, had no power except that conferred on it by statute and could not act unless it was authorized to do so. If Resolution 14218 was intended to convey title to the State's Fee Lands, then that act exceeded the Transportation Commission's lawful powers, was not the act of, or one binding upon, the Transportation Commission or the State, and was null and void. See Treadway v. Schnauber, 1 Dakota 236; 46 N.W. 464, 466 (1875); Shaw v. Circuit Court of Hamlin County, 27 S.D. 49, 60; 129 N.W. 907, 912 (1911) (quoting Mitchell v. Lasseter, 40 S.E. 287, 290 (Ga. 1901)). Resolution 14218 was therefore not a valid conveyance of the Fee Lands by the State to any of the Plaintiffs or their predecessors in interest.

Because, under SDCL § 31-19-42, title to the Fee Lands was held by the State, not by DOT, in September, 1984, Resolution No. 14218 was necessarily limited in its effect and application to that interest which DOT controlled, that is, as stated in the Resolution, the use of the property "in the construction and maintenance of highways or for highway right-of-way purposes". (Exh. H). The Resolution only reflected the Transportation Commission's decision not to use the Fee Lands for a highway. The Resolution cannot be read as an abandonment of the State's fee ownership in the Fee Lands purchased from CNW and it is not, indeed could not be under SDCL §5-2-11, a conveyance of title to the Fee Lands by the State. What was expressed in Resolution No. 14218 was the intention of the Transportation Commission not to build a highway over the property, not an intent to abandon the road. Abandonment of fee title by the State must be by deed. In 1984, the State did not undertake the acts SDCL §5-2-11 required to

convey title to the Fee Lands. Therefore, Plaintiffs and their predecessors in interest took nothing by Resolution No. 14218.

(b) CNW was the “former owner”. Resolution No. 14218, if effective for any purpose, did not result in the reversion of title to the Fee Lands to the Plaintiffs or their predecessors in interest. Resolution No. 14218 stated that the interests abandoned revert to the “former owner, his heirs, and assigns”. The Circuit Court reached the erroneous conclusion that the interests described reverted to the Plaintiffs or their predecessors in interest under the Resolution as the assigns of the 1890 Grantors. Plaintiffs are not the “former owner” and are not the “heirs or assigns” of the “former owner”. Plaintiffs have never owned the Fee Lands. None of Plaintiffs’ predecessors in interest have owned any fee interest in the Fee Lands since they conveyed fee title to those lands to FEMV. The State obtained title to the Fee Lands by deed from CNW. CNW was the fee owner of the Fee Lands on December 31, 1970 when it ceased *service* over the line and on May 30, 1972 when it conveyed that fee interest to the State. Therefore, at the time Resolution 14218 was approved, CNW was the “former owner” of the interests described in the Resolution. See Westmed Rehab Inc. v. Dep’t of Social Services, 2004 S.D. 104, P. 8,9; 687 N.W.2d 516, 518, holding that words and phrases in regulatory language are given their plain meaning and effect. If the Fee Lands did revert under the Resolution to the former owner, CNW, then through CNW’s merger with UPR, UPR’s conveyance to DME, and the UPR and DME deeds to NHRRA, all interests of the “former owner” are now owned by NHRRA. (Exhs. 41, P, 44, 45)

Upon the undisputed facts and transactions, as a matter of law in South Dakota, the road has not been abandoned and NHRRA is now the owner of the road.

D. ISSUE 3. DID THE KROLL AND CLARK DEEDS CONVEY FEE SIMPLE TITLE?

The Circuit Court Judgment included the S½ of Government Lot 1 (S½NE¼ NE¼NE¼) S. 6, T5N among the lands ruled to be abandoned. But, the lands in that quarter section that had been conveyed to FEMV, and which CNW later conveyed to the State, were designated as “available for sale” in Transportation Commission Resolution No. 14217 and were further identified therein as “Parcel 9” (Exhibit V). Parcel 9 refers to the identity of tracts on CNW’s valuation series map SDakB3A/1, a partial copy of which is included in the Record as Exhibit U. Those lands are not listed in Resolution 14218. (Exh. H).

In its Memorandum Decision, the Court stated that the 1890 Kroll and Clark deeds of the N½NE¼ (Government Lot 1) to FEMV conveyed an easement, not fee title, citing Neider v. Shaw 65 P.3d 525 (Idaho 2003). (SF 9, 10; Memo. Dec., App. p. C-47; B-14; Court’s Exhs. 4, 5). The holding in Neider is limited by the Idaho Court’s interpretation of the particular language in that conveyance to the railroad as granting an easement. The Neider holding is inapplicable to the Kroll and Clark deeds because the language of these deeds clearly granted fee simple title from Kroll and Clark to FEMV, not a mere easement. As explained in Brown v. Washington, 924 P.2d 908, at 914 (Wash. 1996):

The words ‘right of way’ can have two purposes: (1) to qualify or limit the interest granted in a deed to the right to pass over a tract of land (an easement), or (2) to describe the strip of land being conveyed to a railroad for the purpose of constructing a railway.

Where right-of-way appears in the legal description, as it does in the Kroll and Clark deeds, it “merely describes a strip of land acquired for rail lines.” (Id.) In the Kroll

and Clark deeds, the legal description of the property conveyed to FEMV is “The Right of Way”, followed by a specific metes and bounds description for the property and concluding with the words, “as said line of Railroad is located *over said tract of land.*” (emphasis added) The words “The Right of Way” in these deeds describes the land conveyed to FEMV, that is, “said tract of land”. Those words do not describe “a right-of-way” easement, a mere right to pass over the land Use of the words “through, over and across” in these deeds is in connection with the metes and bounds description of the land conveyed and simply assist in locating the land. (Id.)

The Circuit Court erred in determining that the Kroll and Clark deeds granted mere easements. There is no reversion language in those deeds, therefore, the title conveyed to FEMV was fee simple absolute. Through the chain of title described above from FEMV through to NHRRA, NHRRA now holds fee simple absolute title to the S½ of Government Lot 1, S. 6, T5N. Title to the property should have been quieted in NHRRA.

E. ISSUE 4. HAVE THE FEE LANDS BEEN ADVERSELY POSSESSED BY NHRRA?

The Circuit Court did not specifically rule on the NHRRA’s claim that it has adversely possessed the Fee Lands, in which case even if Plaintiffs were otherwise correct, NHRRA is the current owner.

On June 14, 1972, CNW’s deed to the State was filed with the Lawrence County Register of Deeds. (SF 20; App. p. C-53). Even if the Fee Lands did revert to Plaintiffs or their predecessors in interest by CNW’s cessation of *service* over the line (which Appellants deny, see section C 1, supra), the Fee Lands have been adversely possessed by

the State and by NHRRA, its successor and assign,³ under the provisions of SDCL §15-3-10 (App. p E-70). Title to the Fee Lands is now in NIIRRA by adverse possession pursuant to SDCL § 15-3-10 through the possession of those lands by the State from May 30, 1972 (the date of CNW's deed to the State) and by NHRRA from March 25, 2004 (the date of the DOT deed to NHRRA) to the present. Thus, the 20-year time requirement of SDCL §15-3-10 for acquisition of property by adverse possession was satisfied by NHRRA and its predecessor, the State, on June 15th, 1992, being 20 years and one day after CNW's deed of the Fee Lands to the State was recorded. (SF 17; App. p C-53)

Under the deeds from CNW to the State and from the State to NHRRA, possession of the Fee Lands is presumed to have been in each of those entities. (SDCL §15-3-7 (App. p E-69) See also Schultz v. Dew, 1997 SD 72, P11; 564 N.W.2d 320, 322-323. Pursuant to SDCL §15-3-7, any occupancy if such would be claimed, of the Fee Lands by Plaintiffs or their predecessors in interest after CNW's conveyance to the State is "deemed to have been under and in subordination to the legal title" of the State and NHRRA. The requirements of SDCL §15-3-11 (App. p.E-71) have also been met. CNW used the Fee Lands it owned as a part of the right-of-way upon which it operated its Whitewood to Deadwood railroad line. That fee land right-of-way was conveyed to the State for right-of-way purposes, that is, as a transportation corridor, which is "the ordinary use of the occupant". (SF 16, App. p. C-52; SDCL §15-3-11(3)) The State and NHRRA continued to possess the Fee Lands for that ordinary use during the time necessary to establish adverse possession.

³ " . . . tacking allows a party to add its own claim to that of previous adverse possessors in interest, and under whom the party claims a right of possession " *Titus v Chapman*, 2004 S.D 106, P27; 687 N W 2nd 918, 926-927

In this case, the adverse possession by the State and NHRRA for the 20-year statutory period can be established even without regard to the provisions of SDCL §15-3-11. Any occupancy of the Fee Lands by Plaintiffs or their predecessors in interest could only have been subordinate to the record legal title of those entities because the exception to that presumption stated in §15-3-7, in this case adverse possession by the Plaintiffs or their predecessors in interest, could never apply. *Property of railroads or of the State cannot be adversely possessed.* See SDCL §43-30-13, SDCL §43-30-14 (App. pp. E-86, E-87); and, Schilling v. Backer, 2004 SD 45, P4; 678 N.W.2d 802, 803. The presumption of possession of the Fee Lands by the State and NHRRA arising under SDCL §15-3-7 cannot be rebutted. The Fee Lands have been adversely possessed by NHRRA.

F. ISSUE 5. DOES NHRRA HOLD CLEAR TITLE UNDER SDCL CH. 43-30?

According to SDCL §43-30-12 (App. p. E-85), the “Marketable Title Act”, SDCL Ch. 40-30, does not apply to bar conditions subsequent in a deed, therefore, the period between the 1890 deeds and the cessation of rail *service* by CNW on December 31, 1970 (the period during which the second condition subsequent applied) would not be counted in calculating the 23 years required under SDCL Ch. 43-30 for the establishment of marketable title. However, even if CNW’s cessation of *service* was an abandonment of the road (which, again, is legally and factually incorrect), the breach of that condition subsequent occurred on December 31, 1970. The 23-year period during which Plaintiffs or their predecessors in interest were required by SDCL §43-30-3 and §43-30-7 (App. pp. E-83, E-84) to file their notice of a claim of possession of the Fee Lands for the alleged breach of the condition subsequent began to run on January 1, 1971. There is no

evidence of the filing for record of any such notice as to any of the Fee Lands by any Plaintiff or by any of Plaintiffs' predecessors in interest

Under the State's March 24, 2004 deed to NHRRA, title to the Fee Lands was taken by NHRRA free and clear of all interests, claims and charges of Plaintiffs. Plaintiffs' claims to the Fee Lands adverse to NHRRA are thus barred by SDCL §40-30-3.

II. THE EXCLUDED PROPERTY

ISSUE 6: DID THE CIRCUIT COURT ERR IN GRANTING CERTAIN PLAINTIFFS SUMMARY JUDGMENT AS TO THE EXCLUDED PROPERTY?

The deeds conveying certain parcels to the Plaintiffs named below specifically exclude the Fee Lands from the property that was conveyed to them.

The warranty deed to William W. Miller and Laurel D. Miller, Co-trustees, describes the property conveyed, in relevant part, as follows:

That portion of the Southeast Quarter of the Southwest Quarter of Section 28, lying North of the Railroad right of way and that portion of the Southwest Quarter of the Southeast Quarter of Section 28, lying North of the Railroad right of way and that portion of the Northeast Quarter of the Northwest Quarter of Section 33 lying North of the Railroad right of way, all lying in Township 6 North, Range 4 East, Black Hills Meridian, Lawrence County, South Dakota; (Exh.14) (emphasis added).

The quitclaim deed to Crook Mountain Angus Ranch, Inc. describes the property conveyed, in relevant part, as follows:

Southeast Quarter of the Southeast Quarter, less right of way (Exh. 13) (emphasis added).

The warranty deed to Ening describes the property conveyed, in relevant part, as follows.

.. that portion of the Southeast Quarter of the Northeast Quarter of Section 32, lying North of the Railroad Right of Way (Exh. 21) (emphasis added).

(SF 12(a), 12(b), 12(h)).

These Plaintiffs have no “protectible interest” in the Fee Lands (the railroad fee property) adjoining these properties. Crowley v. Trezona, 408 N.W.2d 332, 334 (SD 1997) Should a breach of the conditions subsequent under the 1890 deeds occur, the right of reentry would vest in whoever last owned these properties before the right-of-way was excluded from the property conveyed, not in these Plaintiffs. These Plaintiffs as to these properties do not hold any rights under those reverter clauses since the properties conveyed to them did not include the right-of-way. A right of reentry can only be held by the owner of the affected property. See SDCL §43-4-3, (App. p. E-81) and Rowbotham v. Jackson, 68 SD 566, 571-572; 5 N.W.2d 36, 38 (1942). The undisputed facts in this case establish that as to these properties these Plaintiffs are not in the chains of title that held the possibility of a reverter under the 1890 deeds.

It is required by SDCL §21-41-11 (App. p. E-74) that a plaintiff in a quiet title action state in his complaint that he has or claims title in fee to the property. These Plaintiffs, as to these properties, have failed to provide any evidence supporting that element of their quiet title claims and have entirely failed to carry their burden to show that there are no genuine issues of material fact upon which they are entitled to judgment as a matter of law on those claims. SDCL §15-6-56(c), (App. p. E-73); State Dep't of Revenue v. Thewes, 448 N.W.2d 1, 2 (SD 1989). The facts do not show that these Plaintiffs have any claim to the Fee Lands adjoining these properties superior to the claims of NHRRA. And, there are genuine issues of material fact as to who retained

ownership of the reverter rights under the 1890 deeds. The Circuit Court erred in granting summary judgment in favor of these Plaintiffs as to those properties

III THE 1875 ACT RIGHT-OF-WAY

ISSUE 7: HAS THE 1875 ACT RIGHT-OF-WAY BEEN ABANDONED?

The 1875 Act right-of-way involved in this action traverses only the property identified in Paragraph 6 of the Judgment (App. p. A-5) now owned by Elwyn J. Cole (formerly by Spector/Hanna, see footnote 1, supra at p. 12) Miles, Desperado Investments, LLC and Crook Mountain Angus Ranch, Inc. Citing and attempting to follow Brown v. Northern Hills Regional Railroad Authority, 2007 S.D. 49, 723 N.W.2d 732, and discussing CNW's 1970 ICC authorized abandonment of rail *service* and Resolution 14218, the Circuit Court erroneously determined the 1875 Act right-of-way had been abandoned and thus erroneously quieted title of that land free of the right-of-way in the Plaintiffs named above.

The scope and duration of 1875 Act right-of-way is determined by "the relevant statutory provisions."⁴ (Whipps Land and Cattle Co. v. Level III Communications, LLC, 265 Neb. 472, 658 N.W.2d 258, 264 (2003)). Determining property interests arising under the 1875 Act is an issue of federal law. Idaho v. Oregon Short Line Railroad Co., 617 F. Supp. 207, at 212; Barney v. Burlington Northern Railroad Co., 490 N.W.2d 726, 729 (S.D. 1992) cert. den., 507 U.S. 914 (1993); Beres v. United States, 64 Fed. Cl. 403, at 410 (2005)

1. **The 1875 Act right-of-way could not be abandoned or conveyed.**

⁴ §§ 935, 936 and 938 of the Act are not relevant to this action

In Brown this Court ruled that 43 U S C §912 (“§912”) (App. p D-57) governing the disposition of railroad right-of-way granted by the United States, including 1875 Act right-of-way, did not apply to the 1875 Act right-of-way traversing property owned by Brown because the U S. patents to his predecessors in interest were issued *before* the enactment of §912 in 1922 (Id, at P22) The Brown Court overruled its holding in Barney to the extent that Barney conflicted with the Brown Court holding that by “the declaration of the patents, the federal government reserved no interest in the right-of-way to which §912 could apply.” (Brown, supra at P20). As in Brown, the patents issued to the property here that is traversed by the 1875 Act right-of-way were also issued *before* Congress’s enactment of §912 (in 1892 and 1917, see Exh. B). Under the Brown decision, §912 does not apply to the 1875 Act right-of-way involved in this case. There is no Congressional authorization in the 1875 Act for abandonment of right-of-way granted under that Act, or authorization for conveyance of right-of-way by a railroad to a state. Thus, following Brown, the 1875 Act right-of-way involved in this action could not be either abandoned or sold by CNW or its successors in interest unless a specific Act of Congress would authorize such an action. That rule of federal law is succinctly stated in United States v. Washington Improvement and Development Co., 189 F. 674 at 682 (C.C.E.D. Wash. 1911) as “ . . a grant made by [Congress] must remain in full force and effect until Congress ordains otherwise.” The Washington case involved railroad right-of-way granted by an 1898 Act of Congress. Section 5 of that Act specifically provided terms under which the right-of-way could be forfeited. After the rail company and its assigns failed to construct a railroad on the right-of-way, the United States filed an action requesting the right-of-way be declared forfeited. The railroad company demurred

claiming that the complaint was filed without any lawful authority to do so. The issue in that action was whether the United States could maintain an action to forfeit the right-of-way granted in the absence of a declaration of forfeiture by Congress and express authorization by Congress for the institution of such an action (Id. at 674, 675). The Washington Court held that there was no such right because such grants “can only be forfeited for breach of conditions subsequent by direct legislative act and by judicial proceedings expressly authorized by law.” (Id. at 676, 680) The federal rule of law stated in Washington has also been stated and applied in cases such as Spokane and British Columbia Railway Co. v. Washington and Great Northern Railway Co., 219 U.S., 166, at 174; 31 S.Ct. 182; 55 L.Ed. 159 (1911) and Schulenberg v. Harriman, 88 U.S. 44, at 63, 64; 22 L.Ed. 551 (1875). Congress itself acknowledged this rule of law in the enactment of 43 U.S.C. §940.⁵ Section 4 of the 1875 Act (codified at 43 U.S.C. §937, App. p. D-62) established as a condition subsequent of grants of right-of-way under the Act that the right-of-way be forfeited if any section of the road were not completed within five years after location. Congress’s enactment of 43 U.S.C. §940 in 1906/1909 was an acknowledgment that such a Congressional Act was required to authorize enforcement of the forfeiture provisions of the 1875 Act. Before the enactment of 43 U.S.C. §940, a separate Act of Congress would have been required to enforce a forfeiture of each section of 1875 Act right-of-way that had not been built upon within five years.⁶

⁵ 43 U.S.C. §940 (App. p. D-65), enacted by Congress in 1906 and amended in 1909, provided for disposition of 1875 Act right-of-way forfeited if the road had not been constructed, or was not under construction, within five years of the location of the right-of-way

⁶ Later cases, for example, Union Land and Stock Co. v. United States, 257 F. 635, at 637-639 (9th Cir 1919) have held that where forfeiture is specifically authorized, as it was by 43 U.S.C. §§937 and 940, an Act of Congress is not required to authorize the United States Attorney General to bring a judicial action to

There are no provisions in the original 1875 Act to allow for abandonment of right-of-way granted under the Act, or to allow the conveyance of right-of-way to a state. Authorization of such actions cannot be implied into the 1875 Act under the federal rule of law stated in the cases discussed above because such actions must be asserted by legislative act. The application of that rule of law to the 1875 Act is unmistakably established by the fact that in 1920 and 1922 Congress enacted 43 U.S.C. §913 ("§913") and §912 amending the 1875 Act to authorize declarations of abandonment of 1875 Act right-of-way or its conveyance to a state. If the rule of federal law stated in the cases cited above did not apply to the 1875 Act, or if abandonment or conveyance to a state of the right-of-way granted under the Act could have been implied into the Act, enactment of §§912 and 913 would not have been necessary.

Absent the application of §§ 912 and 913, (as this Court concluded in Brown that such sections did not apply) there is no Congressional authorization to abandon this 1875 Act right-of-way, or for CNW to enter into an agreement to convey, or to thereafter convey, the right-of-way to the state. See Central Transportation Co. v. Pullman's Palace Car Co., 139 U.S. 24, at 48-49; 11 S.Ct. 478; 35 L.Ed. 55 (1891) as follows:

One of the most important powers with which a corporation can be invested is the right to sell out its whole property . . . In the case of a railroad company, these privileges, next to the right to build and operate its railroad, would be the most important which could be given it, and this idea would impress itself upon the legislature. Naturally we would look for the authority to do these things in some express provision of law. We would suppose that if the legislature saw fit to confer such rights, it would do so in terms which could not be misunderstood.

enforce a forfeiture statute, But, the requirement clearly remains that a forfeiture condition be authorized by an Act of Congress before such action can be undertaken

And, quoting Oregon Railway v. Oregonian Railway Co., 130 U.S. 1, at 30, 9 S.Ct. 409; 32 L.Ed. 837 (1889), as follows

A corporation cannot, without the assent of the legislature, transfer its franchise to another corporation, or abnegate the performance of the duties to the public, imposed upon its charter as the consideration for the grant of its franchise.

If §§912 and 913 do not apply to 1875 Act right-of-way (again, as this Court concluded in Brown), CNW's agreement to convey and its conveyance of the right-of-way to the State, without specific Congressional authorization to do so, were beyond the scope of CNW's powers and thus unlawful and void. Central, supra at 48. See Boise Cascade Corp. v. Union Pacific Railroad Co., 454 F. Supp. 531, 533 (D. Utah 1978) (cert. den. 450 U.S. 995) where it is stated that the Congressional intent of 43 U.S.C §934 is that ". . . railroads are legally incapable of alienating the subject property in any way, directly or indirectly." See also Energy Transportation Systems, Inc. v. Union Pacific Railroad Co., 606 F.2d 934, 938 (10th Cir 1979), as follows: "We believe the true holding in Townsend is that the railroad cannot alienate any interest in the right-of way which was granted it by the United States for the express purpose of building a railroad." (Referencing Northern Pacific Railway v. Townsend, 190 U.S. 267; 23 S.Ct. 671; 47 L.Ed. 1044 (1903)).

Since, under Brown, §912 does not apply to 1875 Act right-of-way in South Dakota, unless Congress passes an act specifically authorizing the abandonment of the 1875 Act right-of-way easement involved in this case, or authorizing its conveyance to the State (which Congress has not done), title to that right-of-way easement remained vested in CNW and, pursuant to deeds received from UPR and DME (Exhs. 44, 45), title

to that right-of-way easement is now vested in NHRRA as the successor in interest of FEMV, CNW, UPR, and DMF. See Schulenberg, supra at 64, where it is stated:

Where an action affecting right-of-way granted by the United States is ineffective because not authorized by an Act of Congress, the title in that property interest remains in the grantee . . . as completely as it existed on the day when the title by location of the route of the railroad acquired precision and became attached to the adjoining . . . sections

Because §912 does not apply here (per Brown), the Plaintiff owners of the lands adjoining this 1875 Act right-of-way have no interest, claim or standing to maintain any action affecting that right-of-way because an action upon an abandonment claim (if one existed, although one does not) could only be enforced by the United States, the grantor of the property interest to FEMV and its successors and assigns. (Schulenberg, supra at 63).⁷ Furthermore, since no judicial action to declare this 1875 Act right-of-way has been authorized by Congress, the Circuit Court lacked subject matter jurisdiction over an action by Plaintiffs to declare this 1875 Act right-of-way abandoned. The Circuit Court's Judgment declaring this 1875 Act right-of-way abandoned must be reversed. This case should be remanded with instructions to dismiss Plaintiffs' claims as to the 1875 Act right-of-way and to quiet title to that right-of-way in NHRRA. SDCL §15-6-12(h) (App.

⁷ It must be noted that the deed to Desperado Investments, LLC of the SW¼NE¼, S. 6, T5N specifically excepts the railroad right-of-way from the property conveyed. (Exh 33) Therefore, in addition to the reasons discussed above, Desperado Investments, LLC has no "protectible interest" in the land the 1875 Act right-of-way traverses and, therefore, no right to maintain an action claiming the right-of-way has been abandoned (Crowley, supra) The discussion of Issue 6 (supra, pp 25-26) regarding the failure of the Plaintiffs to meet their burden under SDCL §15-6-56(c) also applies to Desperado Investments, LLC since the right-of-way in the SW¼NE¼ of S. 6 is also excluded property.

p E-72), Clark v Solem, 336 N W.2d 381, 382 (S D. 1983), City of Sioux Falls v. Missouri Basin Municipal Power Agency, 2004 S D 14, P9; 65 N W.2d 739, 742)

2. State court action affecting the 1875 Act right-of-way has been pre-empted.

The Surface Transportation Board of the United States has granted Black Hills Transportation, Inc. d/b/a Deadwood, Black Hills and Western Railroad, the agent of NHRRA, a Modified Rail Certificate effective on September 21, 2006 (Exh. 46). The Certificate authorizes Black Hills Transportation, Inc. to operate a railroad on the 9.01 miles of the rail line between Whitewood and Deadwood, part of which, including the Fee Lands, the Excluded Properties, and the 1875 Act right-of-way, is the subject matter of this litigation. The Certificate was issued prior to entry of the Circuit Court's Judgment declaring the Fee Lands and the 1875 Act right-of-way abandoned. To the extent the South Dakota state courts possessed any jurisdiction to declare any portion of the Fee Lands or the 1875 Act right-of-way abandoned, that jurisdiction was pre-empted by the United States, by and through the Surface Transportation Board, on the effective date of the Modified Rail Certificate. See Preseault v. United States, 100 F.3d 1525, 1537 (Fed. Cir. 1996), as follows:

There can be no denying that that Federal Government, beginning as early as 1920, has occupied the field of regulation of interstate railroad operations pre-empting any pattern of conflicting state regulation.

The subject matter jurisdiction of the Circuit Court having ended on September 21, 2006, this action must be dismissed. SDCL §15-6-12(h)(3) (App. p. E-72).

3. Application of 43 U.S.C. § 939.

In the Brown decision, this Court did not consider 43 USC §939 (Section 6 of the 1875 Act) which provides:

Congress reserves the right at any time to alter, amend or repeal §§934-939 of this title, or any part thereof.

These Plaintiffs and their predecessors in interest are chargeable with knowledge of that provision and that these lands were subject to the 1875 Act right-of-way Jones v. United States, 121 F.3d 1327, 1330; 43 U.S.C. §937. Congress, under the power it specifically reserved to do so, amended the 1875 Act by enacting 43 U.S.C. §§912, 913 and 23 U.S.C. 316⁸ and 16 U.S.C. §1248(c) (App. p. D-55) to ensure that 1875 Act right-of-way would continue to be used for public transportation purposes. See Vieux, supra at 1335; Idaho, supra at 212; Home on the Range v. AT&T Corp., 386 F.2d 999, 1006 (S.D. Ind. 2005). These Plaintiffs and their predecessors in interest were also chargeable with knowledge of those statutes.

§912 created for the first time a “possibility of reverter” in the patentees and their successors in interest to the 1875 Act right-of-way. See Vieux, supra at 1337. Under §912 that possibility of reverter would not vest into an enforceable right unless the right-of-way was declared abandoned by a court of competent jurisdiction or an Act of Congress. There has been no court decree purporting to declare this right-of-way abandoned until this Circuit Court Judgment. No Act of Congress has declared it abandoned. Where Congress disposed of its reversionary interest in the 1875 Act right-of-way, as it did in §912, until that reversionary interest vested, Congress was free to

⁸ 23 U.S.C. §316 (App. p. D-56) applies to 1875 Act Rights-of-Way Idaho v. Oregon Short Line RR Co., 617 F. Supp. 207, 213 (D. Idaho 1985). 23 U.S.C. §316 also takes precedence over and repeals that part of §913 which required railroads to retain at least fifty feet (50') on each side of the center line of the main track (Id. at 211).

amend, alter or repeal §912, as it did by the enactment of 16 U.S.C. §1248(c). See Independent School District v. Smith, 181 N W 1, 2 (Iowa 1921), as follows

As to the parties who might ultimately become entitled to a reversion under the provisions of the statute then existing, no right then vested. The legislature could thereafter have repealed the provision for reversion without violating the rights of anyone. It could have again enacted different provisions pertaining to reversion, without violating the rights of anyone. In other words, no one then had a vested right in the future operation of the statute.

See also Commonwealth Transportation Commissioner v. Windsor Industries, 630 S.E 2d 514, 521 (Va. 2006), as follows:

Thus, we are of the opinion that until the possibility of having an estate in the property vested into an enforceable right, the contingencies upon which it depended and the procedures for exercising the right accrued remain subject to modification by future amendment.

Should this Court now overrule its decision in Brown and now conclude that §912 does apply to 1875 Act right-of-way in South Dakota, under §912 there would be Congressional authority for a judicial action to determine if 1875 Act right-of-way has been abandoned. In this action, to the extent that the Circuit Court Judgment in quieting title to the property which the 1875 Act right-of-way traverses discharged the right-of-way easement granted to FEMV by the United States, the Judgment is in error. If 1875 Act right-of-way is abandoned and is not embraced with any public highway within one year after the determination of abandonment, the right, title and interest in the right-of-way⁹ is not discharged but reverts to the United States under 16 U.S.C. §1248(c). This right-of-way is the type described in §912¹⁰ and is subject to 16 U.S.C. §1248(c) as

⁹ "Right-of-way" meaning as to 1875 Act right-of-way, the right to pass over the land. Brown v. Washington, supra at 914

¹⁰ Public lands of the United States granted to a railroad company for use as a railroad right-of-way

provided in the plain language of that statute. See Vitek v Bon Homme County Comm'rs, 2002 S.D P8, 650 N.W.2d 513, 516. Under 16 U.S.C §1248(c) the property of these Plaintiffs is not relieved of the right-of-way granted to FEMV by a decree of abandonment, rather, that right-of-way interest reverts to the United States. See Hash v. United States, 403 F.3d 1308, at 1311: "It is no longer subject to question that the United States may by legislative act prevent reversion of discontinued railway rights-of-way" (Citing Preseault v. Interstate Commerce Commission, 494 U.S. 1108 L.Ed.2d 1110 S.Ct. 1914 (1990)).

Because these properties have been subject to the 1875 Act right-of-way since the right-of-way was granted to FEMV, these Plaintiffs and their predecessors in interest have never owned their property free of that right-of-way. If §912 does apply, they held only a "possibility of reverter" and, by 16 U.S.C. §1248(c), Congress has transferred that possibility of reverter back to the United States. Plaintiffs have no interest upon which they are entitled to maintain an action claiming this right-of-way has reverted to them, even if it is abandoned. Title to these properties, free of the 1875 Act right-of-way, could not have been quieted in these Plaintiffs by the Circuit Court.

CONCLUSION

For the foregoing reasons and upon the statutes and authority cited above, Appellants request this Court grant the following relief:

1. To remand this case to the Circuit Court with instructions to dismiss Plaintiffs' action to quiet title in the Plaintiffs to the Fee Lands, including the lands conveyed by the Kroll and Clark deeds, as being barred by the statute of limitations (Issues 1 and 3); but if this Court declines to do so, then

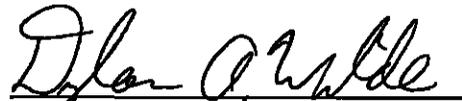
2. To reverse the Judgment of the Circuit Court stating that the Fee Lands have been abandoned and directing entry of judgment declaring that the Fee Lands have not been abandoned. (Issue 2)
3. To reverse the Judgment of the Circuit Court that the 1875 Act right-of-way has been abandoned (Issue 7).
4. To remand this case to the Circuit Court with instructions to quiet title to the Fee Lands and to the 1875 Act right-of-way in NHRRA. (Issues 1-7).
5. To remand this case to the Circuit Court for further proceedings upon the Appellant's Counterclaim against Plaintiff Swaby and upon Appellants' Cross-Claims against the Cross Defendants.

REQUEST FOR ORAL ARGUMENT

Appellants believe that oral argument would be of assistance to the Court in disposition of this Appeal and therefore request the privilege of appearing before the Court.

Respectfully submitted, this 21st day of April, 2008.

BRADY PLUIMER, P.C.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served two true and correct copies of the Appellants' Brief in the above entitled matter upon the Appellees by mailing, by U.S. Mail, with all first class postage thereupon prepaid, to Appellees' attorney of record on the 21st day of April, 2008, to-wit.

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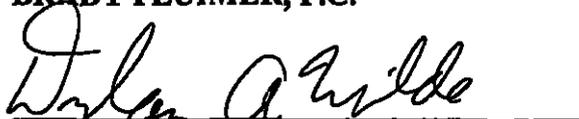


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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with SDCL 15-26A-66. This brief is 37 pages in length, exclusive of certificate of service, is typeset in Times New Roman 12 and, exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement and Statement of Legal Issues, contains no more than 10,000 words or 50,000 characters.

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CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that pursuant to SDCL §15-26A-79, he served the original and fifteen (15) copies of the foregoing Appellants' Brief on the Clerk of the Supreme Court by depositing the same this date in the United States Mail, postage prepaid, at Spearfish, South Dakota as follows.

Ms. Shirley Jameson-Fergel
SD Supreme Court Clerk
500 E. Capitol
Pierre, SD 57501-5070

DATED this 21st day of April, 2008.



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APPENDIX

A. Court’s Default Judgment and Court’s Judgment on Stipulated Facts A1 – A7

B. Memorandum Decision B8 – B43

C. Stipulation of Facts C44 – C54

D.

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