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226465

17 February 2010

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SUBMIT  
TRANSPORTATION BOARD

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, D.C. 20423

Re: Central Illinois Railway Co. - Discontinuance  
Exemption - Line in Peoria County, IL,  
AB -1066 (Sub-no. 1X)

**FILED**  
FEB 18 2010  
SUBMIT  
TRANSPORTATION BOARD

- Comments by City of Peoria and Village of Peoria Heights;
- Submission of "Statement of Willingness" on behalf of Peoria Park District
- Check enclosed for filing fee, but fee waiver requested.

Dear Ms. Brown:

Enclosed for filing on behalf of City of Peoria and Village of Peoria Heights please find the original and ten copies of "Comments of Owners of Line and Request for Additional Relief." To the extent a motion for leave is required, one is set forth in the Comments.

A "statement of willingness" on behalf of The Pleasure Driveway and Park District of Peoria, Illinois ("Peoria Park District") seeking issuance of a Notice of Interim Trail Use for M.P. 2.78 to M.P. 8.50 of the Kellar Branch (the segment at issue in the AB 1066 (Sub-no. 1X) is attached as Exhibit A to the Comments. The owners of the line (City of Peoria and Village of Peoria Heights) consent to issuance of the NITU as confirmed by my signature on their behalf below, and as further set forth in the Comments. Central Illinois Railroad Company also consents

per Exhibit B to the Comments.

Under this Board's fee schedule, a filing fee of \$250 is required for a "statement of willingness." I enclose herewith my check in the requisite amount. However, under 49 C.F.R. 1002.2(e)(1) provides for waiver of filing fees for state or local agencies. The Peoria Park District is a unit of local government, as described in the letter attached hereto. On behalf of the Peoria Park District, I therefore request waiver of the filing fee (and thus return of the enclosed check).

Thank you for your assistance in this matter.

Respectfully submitted,

  
Charles H. Montange  
for City of Peoria and Village  
of Peoria Heights

attachment (Park District)  
encls. (Comments)

cc. Counsel for CIRY and PIRY  
per cert. of service (w/encl.)

**VONACHEN, LAWLESS, TRAGER & SLEVIN**

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February 15, 2010

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VIA FEDERAL EXPRESS OVERNIGHT

Mr. Charles H. Montange  
Attorney at Law  
426 NW 162<sup>nd</sup> Street  
Seattle, WA 98177

Re: STB Docket No. AB-1066 (Sub-no. 1X)  
Statement of Willingness to Assume Financial Responsibility

Dear Mr. Montange:

Enclosed are the two signed originals of the Statement of Willingness to Assume Financial Responsibility on behalf of The Pleasure Driveway and Park District of Peoria, Illinois for inclusion with the other documents you are preparing and will file on behalf of the City of Peoria and Village of Peoria Heights in the above matter. Also enclosed is the map to attach to the statement.

The Pleasure Driveway and Park District of Peoria, Illinois is a unit of local government operating under the Park District Code of the State of Illinois (70 ILCS 1205/1-1 through 13-9e). According to 70 ILCS 1205/1-3, the term "Pleasure Driveway and Park District" means any park district organized under "An Act to provide for the creation of Pleasure Driveway and Park Districts," approved June 19, 1893, as amended, or any park district organized under the provisions of the Park District Code as a Pleasure Driveway and Park District. The Pleasure Driveway and Park District of Peoria, Illinois (commonly known locally as the "Peoria Park District") was organized under the 1893 act referred to above and is the oldest park district in the State of Illinois.

Now that I have likely provided you with way more detail than you need, please don't hesitate to give me a call if you need some information I did not provide or if you have any questions.

Thank you.

Very truly yours,

VONACHEN, LAWLESS, TRAGER & SLEVIN

By: \_\_\_\_\_

James E. Konsky

JEK/hd

Enclosure

cc: Bonnie Noble

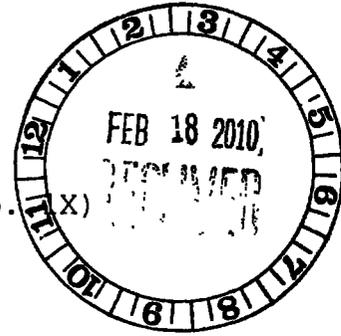
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BEFORE THE SURFACE TRANSPORTATION BOARD

Central Illinois Railroad )  
Company - Discontinuance of ) Dkt. No. AB-1066 (Sub-no. 1X)  
Service Exemption - Line )  
in Peoria County, IL )

226465



Comments of Owners of Line  
and Request for Additional Relief  
(Statement of Willingness per 49 C.F.R. 1152.29 Attached)

These comments and requests for additional relief are filed on behalf of City of Peoria and Village of Peoria Heights (hereinafter jointly referred to as "Cities"). Cities are the owners of the line (a portion of the "Kellar Branch" between M.P. 2.78 and M.P. 8.50) over which Central Illinois Railroad Company ("CIRY") seeks discontinuance of service authority in this proceeding.<sup>1</sup>

The specific additional relief that Cities request in this proceeding is that the Board issue a Notice of Interim Trail Use ("NITU") for the portion of the Kellar Branch (namely MP 2.78 to M.P. 8.50) over which CIRY seeks discontinuance authority. To this end, The Pleasure Driveway and Park District of Peoria Illinois (herein referred to as "Peoria Park District" or

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<sup>1</sup> Pioneer Industrial Railway Company ("PIRY") also seeks discontinuance of service authority over the line at issue in this proceeding, plus certain additional trackage. See Pioneer Industrial Railway Co. - Discontinuance of Service Exemption - Line in Peoria County, IL, AB-1056X. In its Decision served January 15, 2010 in AB 1066 (Sub-no. 1X) and in AB 1056X, the Board did not indicate that the two proceedings were consolidated. Since the relief requested by City is applicable only to the trackage at issue in the CIRY proceeding, City is only seeking specific relief in the CIRY proceeding. However, to the extent that language in the Board's decision on January 15, 2010 (namely in slip op 1 note 1) is incorrect, that language may appropriately be modified in both proceedings for consistency purposes.

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"District"<sup>2</sup>) is filing herewith (Exhibit A) a "Statement of Willingness" pursuant to 49 C.F.R. 1152.29 and Cities specifically agree to negotiate a railbanking agreement with the District. To the extent CIRY's consent is necessary, CIRY also consents (copy of forwarded email confirmation from Mr. Ascher, counsel for CIRY, attached as Exhibit B).

The relief requested by Cities is appropriate under, consistent with, and required by Chillicothe-Brunswick Rail Maintenance Authority - Discontinuance Exemption - in Livingston, Linn and Chariton Counties, MO, AB-1001X, served Jan. 15, 2008 ("Chillicothe"), and State of Vermont and Vermont Railway, Inc. - Discontinuance of Service Exemption- in Chittenden County, VT, AB 265 (Sub-no. 1X), ICC served Feb. 7, 1986) ("Vermont") and Vermont & Vt. Ry - Discontinuance - Chittenden Co., VT, 3 I.C.C.2d 903 (1987), aff'd, Preseault v. ICC, 853 F.2d 145 (2d Cir. 1988), aff'd, 494 U.S. 1 (1990) ("Preseault").

#### Background

The line in question in this proceeding was fully abandoned when the Cities acquired it. See Central Illinois Railroad

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<sup>2</sup> The Peoria Park District is a unit of local government operating under the Park District Code of the State of Illinois (70 ILCS 1205/1-1 through 13-9e). According to 70 ILCS 1205/1-3, the term "Pleasure Driveway and Park District" means any park district organized under "An Act to provide for the creation of Pleasure Driveway and Park Districts," approved June 19, 1893, as amended, or any park district organized under the provisions of the Park District Code as a Pleasure Driveway and Park District. The Pleasure Driveway and Park District of Peoria, Illinois (commonly known locally as the "Peoria Park District") was organized under the referenced 1893 act, and is the oldest park district in the State of Illinois.

Company-Discontinuance of Service Exemption - in Peoria County, IL, AB-166X, served Nov. 21, 2005, citing Chicago, R.I.&P.R. Co. Abandonment, 363 ICC 150 (1984). This Board has already determined that Cities never held themselves out as a common carrier, that further abandonment authority would only be required if Cities held themselves out as common carriers, and that the only authority now needed for the Board to remove its jurisdiction is through a discontinuance proceeding. City of Peoria and the Village of Peoria Heights, IL - Adverse Discontinuance - Pioneer Industrial Railway Co., AB 878, served August 10, 2005, slip op at 6.

The Kellar Branch has a rich history of litigation before this Board over the past decade. It seems unnecessary to recount that history here. Suffice it to say that the interested parties, through the involvement of a third party, have devised a compromise whereby the two ends of the Kellar Branch will be devoted to continued rail use, but the central section, which traverses a number of highway crossings, will be developed as a trail by the Peoria Park District. Cities support that result.

On December 29, 2009, CIRY as part of a joint petition for exemption (PIRY also participated in the petition for a more lengthy section of the Kellar Branch) sought discontinuance authority for the portion of the Kellar Branch involved in this proceeding. The participants in the joint petition also sought expeditious treatment.

In its decision served January 15, 2010, in response to the

CIRY/PIRY petition for exemption, this Board indicated that it would issue a decision by April 16, 2010, and called for comments by Feb. 4.

At the time the petition for exemption was filed, the Cities had not yet completed their due diligence (including third party title reviews) germane to whether "railbanking" under 16 U.S.C. 1247(d) of the portion of the Kellar Branch at issue would be necessary or prudent as part of the discontinuance proceeding in order to ensure that the line remains intact for trail and other compatible public uses. The Cities have recently completed their due diligence and have concluded that railbanking in fact is prudent.

While Cities appreciate CIRY's (and PIRY's) interest in expedition for this proceeding, Cities note that they did not have a meaningful opportunity to comment on the petition prior to its filing and before completion of due diligence. Because of the time required for due diligence, Cities were unable to fashion their comments until now. Cities accordingly move for an extension of the Feb. 4 due date for comments, to the extent necessary for this filing to be fully accepted. As further grounds for an extension, Cities note that the relief they seek is a trail use/railbanking order, and in exemption cases, requests for such relief are ordinarily not due until the Board authorizes abandonment/discontinuance relief, which of course has not yet been done in this proceeding. In that sense, the Cities' comments and request for relief are clearly in advance of any

normal due date. Under the circumstances, acceptance of these comments is appropriate and prejudices no one. Moreover, consideration of these comments and granting the relief sought (which is not opposed by CIRY) should not delay the proceeding.

Comments and Relief Sought

At p. 11 of the pertinent petition for exempt discontinuance authority, CIRY (and PIRY) sought an exemption from OFA, public use, and "related" regulations, and in footnote 5 on that page, quoted a Board decision in an unrelated case to the effect that railbanking is not appropriate in discontinuance proceedings.

This Board in its Decision in this proceeding served January 15, 2010, essentially adopted the statement in footnote 5 of the Petition, stating that "because this is a discontinuance proceeding and not an abandonment, trail use/railbanking and public use conditions are not appropriate." Decision served Jan. 15, 2010 at p. 1 n.1.

While Cities support the exemption from OFA and public use conditioning sought by CIRY (and PIRY), Cities disagree with the Petition at p. 11, as well as this Board's Decision served Jan. 15, insofar as either suggest that trail use/railbanking conditions are not appropriate, or that an exemption should be granted from trail use/railbanking, in this proceeding.

In almost all instances involving discontinuance of service obligations, trail use/railbanking conditions are not appropriate. However, this Board and its predecessor have recognized almost from the inception of 16 U.S.C. 1247(d) a

category of discontinuance cases in which trail use/railbanking conditions are appropriate; namely, those situations where discontinuance authority is the only authority necessary to abandon a line. See Chillicothe, supra, slip at 2-3, discussing Vermont, supra, and Preseault, supra.

Since this Board has already determined that only a discontinuance proceeding, and not an abandonment proceeding, is necessary for purposes of removing this Board's jurisdiction over the portion of the Kellar Branch relevant here (see City of Peoria and the Village of Peoria Heights, IL, supra, AB 878, served August 10, 2005, slip op at 6), it follows under Chillicothe, Vermont and Preseault that trail use/railbanking orders are appropriate here if sought.

The Peoria Park District has filed herewith a "statement of willingness" seeking trail use/railbanking. Cities consent to negotiate an arrangement with the District.<sup>3</sup> Applying this

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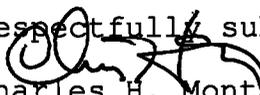
<sup>3</sup> Ordinarily the owner of the railroad line (which is abandoning the line) consents to railbanking and holds the "residual common carrier obligation" as to the line. Although the Cities do not hold themselves out as common carriers and thus do not require abandonment authority, the Cities here should be viewed as controlling any residual obligation. When CIRY or PIRY first sought common carrier authority from this Board over the Kellar Branch, their only basis for doing so was a contract with the Cities. Without such a contract, neither CIRY nor PIRY could appropriately seek STB authority. By similar token, Cities should be deemed to hold the right to enter into future contracts for the provision of rail service over the portion of the Kellar Branch that is railbanked in the circumstances presented here. The situation is similar to cases involving modified certificates of public convenience and necessity (modified PCN's) converted into NITU's. The public authority that owns the right of way is permitted to keep the corridor intact through railbanking the line for possible future use by parties in contract with itself in the future.

Board's longstanding policy that its function in such circumstances is ministerial and not discretionary,<sup>4</sup> a railbanking order therefore must be entered.

Conclusion

When the Board issues its Decision in the CIRY proceeding, the Board should issue a Notice of Interim Trail Use ("NITU") for the portion of the Kellar Branch from M.P. 2.78 to M.P. 8.50, and such other relief as is just and appropriate, consistent with expeditious authorization of not simply discontinuance but also railbanking for that portion of the Kellar Branch.

Respectfully submitted,

  
Charles H. Montange  
426 NW 162d St.  
Seattle, WA 98177  
206-546-1936  
fax: -3739

Attorney for City of Peoria and  
Village of Peoria Heights

Att: (A) Peoria Park District  
Statement of Willingness;  
(B) Email from Mr. Ascher

Certificate of Service

By my signature below, I certify service of the foregoing and attachment by deposit in the U.S. Mail, postage pre-paid, first class, this 17th day of February, 2010, upon William A. Mullins, Esq., 2401 Pennsylvania Ave., N.W., Suite 300, Washington, DC 20037, and Michael R. Ascher, 2500 S. Highland Ave., Suite 360, Lombard, IL 60148



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<sup>4</sup> Policy Statement on Rails to Trails Conversions, Ex Parte NO. 274 (Sub-no. 13B), Jan. 29, 1990, at numbered paragraph 3 and note 12 (agency has no discretion except to grant railbanking where relevant parties agree).

Exhibit A

Before the Surface Transportation Board

Central Illinois Railroad Company -        )  
Discontinuance of Service Exemption -    )        AB 1066 (sub no. 1X)  
Line in Peoria County, Illinois            )

Statement of Willingness  
to Assume Financial Responsibility

In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 C.F.R. 1152.29, The Pleasure Driveway and Park District of Peoria, Illinois is willing to assume full responsibility for management of, for any legal liability arising out of the transfer or use of (unless user is immune from liability in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against the right-of-way owned by the City of Peoria and Village of Peoria Heights, and operated by Central Illinois Railroad Company. The property, part of the "Kellar Branch," extends from railroad milepost 2.78 to railroad milepost 8.50, a distance of 5.72 miles, in Peoria County, IL. The right-of-way is part of a line of railroad proposed for service discontinuance in docket no. AB-1006 (Sub-no. 1X).

A map of the property depicting the right-of-way is attached.

The Pleasure Driveway and Park District of Peoria, Illinois acknowledges that use of the right-of-way is subject to the user's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. A copy of this statement is being served on owner City of Peoria and Village of Peoria Heights on the same date it is being served on the Board.

Respectfully submitted,

The Pleasure Driveway and Park  
District of Peoria, Illinois

By: Bonnie W. Noble  
Bonnie W. Noble

Title: Executive Director

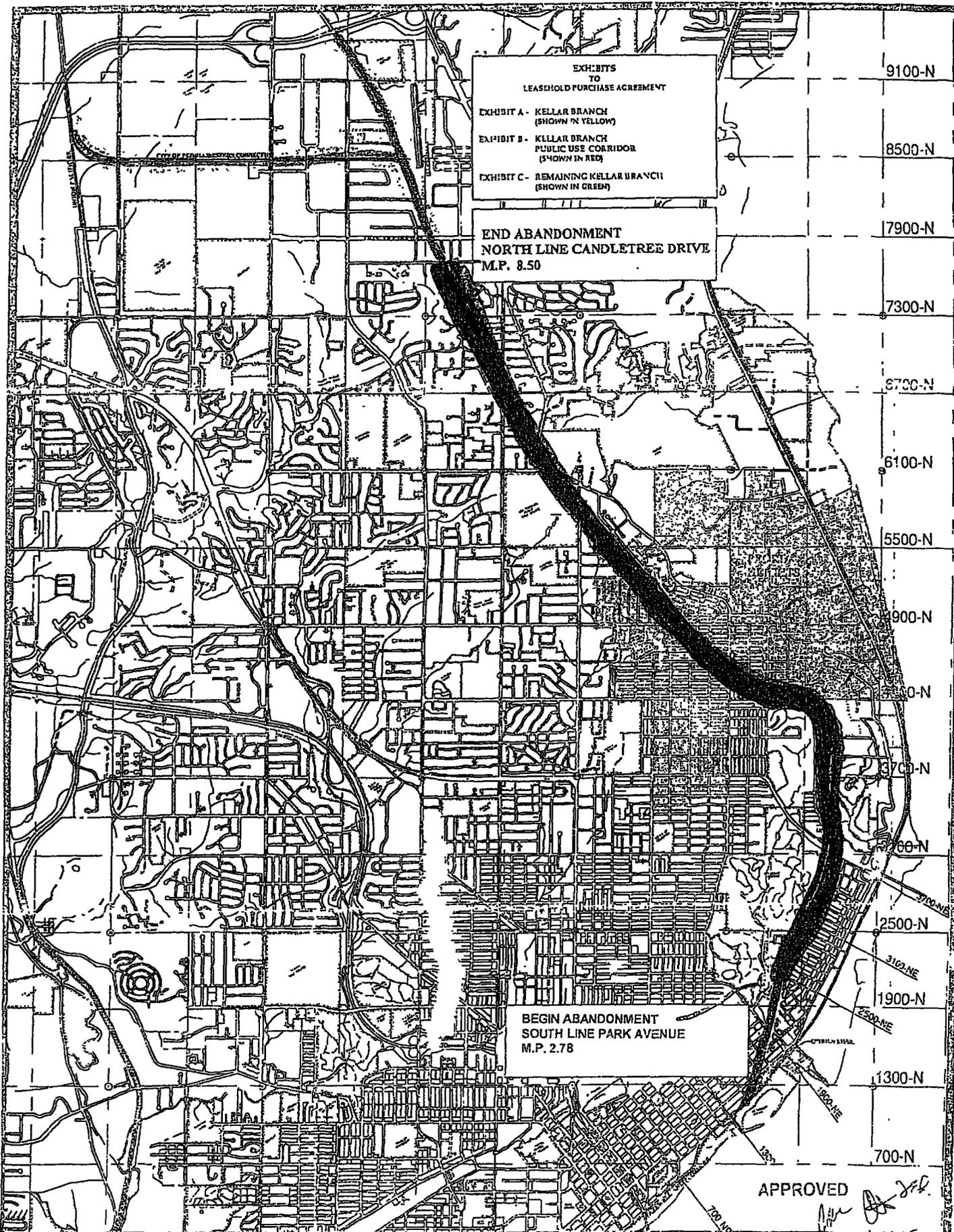


Exhibit B



**From:** Mike Ascher [mailto:MAscher@tousscarl.com]  
**Sent:** Monday, February 15, 2010 4:19 PM  
**To:** Tom Leiter  
**Cc:** 'Dave Malay'  
**Subject:** RE: Central Illinois Railroad Holdings: RE: Kellar Branch

Tom - CIRY also hereby consents to the City of Peoria representing CIRY's consent to the STB.

Thanks - Mike

Michael R. Ascher  
(630) 928-0040 (o)  
(630) 928-0045 (f)  
mascher@tousscarl.com

**From:** Mike Ascher  
**Sent:** Monday, February 15, 2010 4:17 PM  
**To:** 'Tom Leiter'  
**Cc:** 'Dave Malay'  
**Subject:** Central Illinois Railroad Holdings: RE: Kellar Branch

Tom - CIRY hereby consents to your filing of a Notice of Interim Trail Use over the portion of the Kellar Branch over which CIRY is seeking discontinuance, i.e. the portion of the line from Mile Post 2.78 to Mile Post 8.50.

Please call me if you have questions - thanks -Mike

Michael R. Ascher  
(630) 928-0040 (o)  
(630) 928-0045 (f)  
mascher@tousscarl.com