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Office of Proceedings

June 19, 2020

Part of

Public Record

Via Electronic Filing

June 18, 2020

Ms. Cynthia T. Brown  
Chief Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E. Street SW  
Washington, DC 20433

Re: Board of Trustees of JDD 6 & 56 – Petition For Declaratory Order  
FD 36412

Dear Ms. Brown:

This letter hereby submits a Petition For Declaratory Order by the Board as Trustees of Joint Drainage District Nos. 6 & 56 (JDD #6 & 56) concerning the Preemption Issue under the provisions of 49 U. S. C. § 10501(b) with Iowa Northern Railway Company (INRC).

My office paid the \$1,400.00 filing fee on June 18, 2020, Pay.gov Tracking ID: 26P701GK, Agency Tracking ID: 76008965626.

Pursuant to 49 C. F. R. § 10022(e)(1), I am hereby requesting that the fee for filing this Application For Declaratory Ruling be waived. My clients are the Cerro Gordo County, Iowa Board of Supervisors and the Floyd County, Iowa Board of Supervisors, as Trustees of the Joint Drainage District Nos. 6 & 56, which covers lands in both Cerro Gordo County, Iowa and Floyd County, Iowa.

Please return file-stamped copies of this letter and Petition For Declaratory Order.

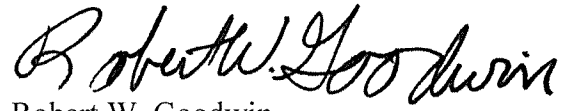
A copy of this letter and Petition For Declaratory Order, with Exhibits attached, has been served via email on Kimberly P. Knoshaug, attorney for INRC.

FEE RECEIVED  
June 19, 2020  
SURFACE  
TRANSPORTATION BOARD

FILED  
June 19, 2020  
SURFACE  
TRANSPORTATION BOARD

Thank you for your assistance.

GOODWIN LAW OFFICE, P.C.

A handwritten signature in black ink, reading "Robert W. Goodwin". The signature is written in a cursive style with a large, stylized "R" and "G".

Robert W. Goodwin  
Attorney at Law

RWG:jcr

Enclosures

cc: Kimberly P. Knoshaug (via email)



Before the  
SURFACE TRANSPORTATION BOARD

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**PETITION OF THE BOARD AS TRUSTEES  
OF JOINT DRAINAGE DISTRICT NOS. 6 AND 56 FOR  
DECLARATORY ORDER – INSTALLATION OF CULVERT  
IN THE EMBANKMENT OF IOWA NORTHERN RAILWAY COMPANY (INRC)  
PURSUANT TO IOWA CODE SECTIONS 468.109 – 468.113.  
FD 36412**

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Filed on Behalf of Boards as Trustees of  
JDD #6 & 56

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**ATTORNEY FOR PETITIONER  
BOARD AS TRUSTEES OF  
JDD #6 & 56**

Before the  
SURFACE TRANSPORTATION BOARD

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**PETITION OF THE BOARD AS TRUSTEES  
OF JOINT DRAINAGE DISTRICT NOS. 6 AND 56 FOR  
DECLARATORY ORDER – INSTALLATION OF CULVERT  
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FD 36412**

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I. INTRODUCTION

The Floyd County, Iowa Board of Supervisors and the Cerro Gordo County, Iowa Board of Supervisors, acting as Trustees of Joint Drainage District Nos. 6 and 56 (JDD# 6 & 56) (“Board”), files this Petition For Declaratory Order with the Surface Transportation Board (“STB”) seeking a determination of whether JDD# 6 & 56’s engineer’s plans to install a culvert in the natural waterway through the embankment of Iowa Norther Railway Company (INRC) pursuant to Sections 468.109 – 468.113, Code of Iowa, using the jack and bore method is preempted pursuant to the provisions of 49 U.S.C. § 10501(b).

INRC’s line goes through JDD# 6 & 56 and crosses a natural waterway. In 1918-1920, the Chicago, Rock Island and Pacific Railroad, which is the predecessor of INRC, constructed a 4-feet by 6-feet box culvert in its railroad embankment at the natural waterway. There also was a main tile line constructed under and through the railroad embankment west of the box culvert, near the railroad bridge over West Drive, a road within the city limits of Nora Springs, Iowa.

The tile line and box culvert are no longer adequate to provide the needed drainage for the lands in JDD# 6 & 56. An Engineer’s Report dated February 25, 2014 recommended an

improvement project of new open ditches upstream and downstream of the railroad embankment to replace the old inadequate main tile line, and with a new larger culvert at the natural waterway through the railroad embankment pursuant to Section 468.109 – 468.113, Code of Iowa.

INRC has failed and refused to put in the new culvert as required under Section 468.110, Code of Iowa. JDD# 6 & 56, therefore, intends to put in the new culvert pursuant to Section 468.112, Code of Iowa. INRC now asserts that the installation of the new culvert is pre-empted by 49 U.S.C. 10501(b).

The Petitioner (Board), therefore, respectfully requests that the STB issue an Order that the installation of the new culvert in INRC's embankment is not pre-empted under the provisions of 49 U.S.C. 10501(b).

The Petitioner (Board) believes this matter is governed by the principles stated in Maumee & Western Railroad Corporation and RMW Ventures, L.L.C. – Petition For Declaratory Order, STB Finance Docket No. 34354, slip op. at 2 (STB served Mar. 3, 2004 (Maumee & Western), and Eastern Alabama Railway LLC – Petition For Declaratory Order, FD 35583 (March 8, 2012).

## II. BACKGROUND

On June 24, 2014, the Board approved the proposed improvement project of replacing the old main tile line with an open ditch and with a new larger culvert through the INRC embankment. The existing main tile line was having blowouts because it is too small and too shallow. The road, West Drive, under the railroad overpass on the west side of the natural

waterway and the 4-feet by 6-feet box culvert would flood because the box culvert is too small and too high, nearly 3 feet above the waterway.

On August 23, 2016, the Board approved the installation of a 5.5-foot diameter steel culvert using the jack and bore method to avoid any interference with the operation of the rail line. The original culvert plan was to excavate and construct a new larger box culvert. The revised plan that was approved August 23, 2016 to install a new 5.5-foot diameter smooth steel culvert using the jack and bore method which includes leaving the existing 4-feet by 6-feet box culvert in place for possible overflow of surface water. The INRC engineers did not have any objection to the jack and bore method of installing the 5.5-foot diameter smooth steel culvert in 2016.

The bottom of the new 5.5-foot diameter smooth steel culvert will be 3.3 feet lower than the bottom on the existing 4-feet by 6-feet box culvert. The new 5.5-foot diameter smooth steel culvert will be 15 to 16 feet below the rail line, which is at a depth that the jack and bore installation of the new culvert is not expected to have any effect on the operation of the rail line.

The installation of the new 5.5-foot diameter smooth steel culvert will be monitored by a laser survey. If the rail line moves more than  $\frac{1}{4}$  inch, the installation operation will be stopped, to ensure there is no interference with the operation of the rail line. The jack and bore activities will be suspended while trains pass through the project area. INRC's own specifications for installing culverts using the jack and bore method will be used. The contractor is required to have \$5 million insurance to cover any damages that may occur from the project.

### III STATE COURT LITIGATION

On September 27, 2016, INRC filed suit in Floyd County, Iowa District Court Case No. EQCV030873 challenging the installation of the new 5.5-foot diameter smooth steel culvert, with the following counts:

- Count I: Injunction to stop the installation of the new culvert because repairs should be made instead of the improvements approved by the Board.
- Count II: The 1918 Contract with Rock Island Railroad provided for JDD 6 & 56 to repair the main tile.
- Count III: Declaratory Judgment that the Board's decision to approve the improvement project with a new culvert was incorrect because a new culvert is not necessary.
- Count IV: Breach of Contract for failing to make repairs under the 1918 Contract.
- Count V: Mandamus to compel the Board to follow the 1918 Contract.
- Count VI: Certiorari that the Board's decision to approve the improvement project was not supported by substantial evidence.

The Iowa District Court in Case No. EQCV030873 entered a Ruling on Defendants' Motion For Summary Judgment on August 15, 2017 in favor of the Board, a copy of which is marked Exhibit A and is attached hereto.

Section 468.109, Code of Iowa, provides that when a ditch, drain, or water course in a drainage district crosses the right-of-way of any railroad company, the railroad company is to

build and construct, or rebuild and reconstruct, the necessary culvert or bridge in accordance with the plans and specifications of the engineer appointed by the Board.

Sections 468.110 and 468.111, Code of Iowa, provide that it is the duty of the railroad company to build and construct or rebuild or reconstruct the necessary culvert or bridge at its own expense.

Section 468.112, Code of Iowa, provides that if the railroad company fails to build, construct, rebuild, or reconstruct the necessary culvert or bridge, the Board shall provide for the construction of the improvement. Pages IV-1122 and IV-1123 of the Code of Iowa with Sections 468.109 through 468.113 marked Exhibit B are attached hereto.

INRC has failed and refused to install the new 5.5-foot diameter smooth steel culvert. Therefore, the Board, under Section 468.112, Code of Iowa, intends to proceed with the installation of the new 5.5-foot diameter smooth steel culvert.

The Iowa Supreme Court has held and the Court of Appeals has reaffirmed that the railroad companies' responsibility for allowing the natural flow of water to cross its embankment is not a static one, but that the railroad companies bear an ongoing responsibility to provide drainage with changed conditions and for increased use demands. Mason City & Ft. Dodge Co. v. Bd. Of Sup'rs, 121 N.W.39 39-40 (1909), Chicago Cent. & Pac. R.R. Co. v. Calhoun Cnty. Bd. Of Supervisors, (Iowa App., 2010) pp. 14-15.

On May 21, 2019, INRC filed its Petition For Mandamus and Application For Temporary Injunction in Floyd County, Iowa District Court in Case No. EQCV031386, a copy of which is marked Exhibit C and is attached hereto.

On November 25, 2019, the Defendants filed a Motion For Summary Judgment, a copy of which is marked Exhibit D and is attached hereto. The Motion For Summary Judgment contains Affidavits of the drainage engineer, Kent Rode, the subcontractor to install the new 5.5-foot diameter smooth steel culvert, Tracy Holly, and an independent contractor who installs culverts using the jack and bore method, Scott Dullard, that all state that the jack and bore method of installing culverts is a standard method that will not interfere with nor interrupt the railroad's use of its rail line. Tracy Holly with Precision Tunneling stated that it used the jack and bore method of installing a culvert in INRC's embankment in Hancock County, Iowa, without any objection nor any problem. The only difference is that the city paid for the culvert in Hancock County, and INRC is to pay the cost of installing the culvert in the JDD 6 & 56 project.

INRC, in its Resistance To The Board's Motion For Summary Judgment and Cross Motion For Summary Judgment, submitted an Affidavit of its General Council, T. Scott Bannister, which states that INRC will not allow its trains or any other trains to use its railroad line if the culvert is installed. An engineer, Peter J. Schierloh, in his Affidavit, states there are possible risks in the installation of the new culvert. A copy of INRC's Resistance with said Affidavits is marked Exhibit E and is attached hereto.

INRC states in paragraph 1 of Plaintiff's Resistance that STB has the exclusive jurisdiction over the question of whether JDD 6 & 56's installation of the 5.5-foot diameter smooth steel culvert with the jack and bore method is pre-empted by 49 U.S.C. § 10501(b). The below signed attorney for the Board understands that State Courts, Federal Court, and STB all

have concurrent jurisdiction to decide whether there is pre-emption under 49 U.S.C. § 10501(b), as stated in Adrian & Blissfield Rail Road Company – Petition For Declaratory Order, FD 36148 (January 30, 2018) p. 4, Elem. V. Kan. City S. Ry., 635 F.3d 796, 811 (5th Cir. 2011), and City of Gerard v. Youngstown Belt Ry. Co., 979 N.W.2d 1273, 1280 (Ohio 2012), and 14500 Limited LLC – Petition For Declaratory Order, FD 35788 (June 4, 2014), p. 2.

The Iowa District Court in Case No. EQCV031386 apparently agrees with the Plaintiff INRC that the STB has exclusive jurisdiction over the pre-emption issue.

A copy of the Board's, Defendant's, Response To Plaintiff's Resistance To Defendant's Motion For Summary Judgment and Resistance To Plaintiff's Cross Motion For Summary Judgment is marked Exhibit F and is attached hereto. The Supplemental Affidavit of JDD 6 & 56's Engineer, Kent Rode, therein was provided to further explain the need of the new 5.5-foot diameter smooth steel culvert; that the depth of the boring at 15 to 16 feet below the rail line will not interfere with the operation of the rail line; that the boring will be some 50 feet away where timber piles that are speculated to potentially exist; and that is common to encounter obstructions during the boring process such as timber that are easy to cut and be removed. Affidavits of the Mayor of Nora Springs and its City Council are also attached that state that the new culvert is needed because there is flooding of West Drive with the existing 4-feet by 6-feet box culvert.

The Iowa District Court in Case No. EQCV031386, on January 3, 2020, entered an Order granting Summary Judgment in favor of Plaintiff. A copy of which is marked Exhibit G and is attached hereto. The Order, on page 3, states it relies on the position of INRC that it will cease said operation on its rail line if the culvert is installed.



The Board filed Defendants' Motion To Reconsider on January 10, 2020, a copy of which is marked Exhibit H and is attached hereto.

The Board's Motion To Reconsider states the concern that INRC takes the position that railroads can avoid their statutory duty under Sections 468.109 through 468.113, Code of Iowa, by voluntarily choosing to shut down the operation of the rail line if a culvert is to be installed when there is no evidence that the installation of the culvert will interfere with the operation of the rail line.

The installation of a culvert using the jack and bore method of installation is a routine, non-conflicting operation which would be stopped if, in the rare, unexpected event that the rail lines would move more than ¼ of an inch from the installation activity.

INRC filed Plaintiff's Rule 1.904 Motion, a copy of which is marked Exhibit I and is attached hereto. The Board filed Defendant's Resistance To Plaintiff's Rule 1.904 Motion, a copy of which is marked Exhibit J and is attached hereto. The Board argued that (a) Mandamus should not issue if there is no established, clear, and specific duty, (b) there is no pre-emption because the jack and bore installation of the 5.5-foot diameter smooth steel culvert will not interfere with the operation of INRC's rail line, and (c) there is no mandatory duty for the Board to present the matter of pre-emption to the STB.

In INRC's Plaintiff's Reply To The Defendant's Resistance To Its Rule 1.904 Motion Re: Mandamus in paragraph 2 thereof, it again states the STB has exclusive jurisdiction to consider the pre-emption issue. A copy of said Reply is attached and marked Exhibit K.

On April 3, 2020, the Iowa District Court issued a Ruling and a Writ of Mandamus for the Board to present the issue of pre-emption to the STB, and to not proceed with the installation of the 5.5-foot diameter smooth steel culvert unless and until it has obtained authority or a directive from the STB to proceed. A copy of said Ruling and Writ of Mandamus are marked Exhibits L and M and are attached hereto.

#### IV ARGUMENT AND REQUEST FOR DECLARATORY ORDER

As shown in the Affidavits of Kent Rode (2 Affidavits), Tracy Holly, and Scott Dullard contained in the Board's attached pleadings in the Iowa District Court, the jack and bore installation of the 5.5-foot diameter smooth steel culvert in INRC's embankment, which will be 15 to 16 feet below the rail line, is a routine, non-conflicting process that will not interfere with the use and operation of INRC's rail line. There will be a laser survey during the jack and bore installation of the culvert. If the rail line moves more than ¼ inch the jack and bore installation will be stopped. As trains pass through the area, the jack and bore installation will temporarily be suspended while the trains pass through. The jack and bore installation will be done pursuant to INRC's own jack and bore installation specifications. There will be \$5 million insurance coverage.

It is respectfully submitted that pursuant to Maumee & Western Railroad Corporation & RMV Ventures, LLC – Petition For Declaratory Order, STB Finance Docket No. 34354 slip op. at 2 STB served Mar. 3, 2004 (Maumee & Western); Eastern Alabama Railway LLC – Petition For Declaratory Order, FD 35583 (March 8, 2012); Adrian & Blissfield Railroad Company – Petition For Declaratory Order FD 36148 (January 31, 2018); Adrian & Blissfield R. Co. v.

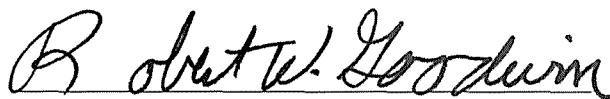
Village of Blissfield, 550 F.3d 533, 541 (6<sup>th</sup> Cir. 2008); and New York Susquehanna v. Jackson, 550 F.3d 238, 254 (3<sup>rd</sup> Cir. 2007), since the installation of the 5.5-foot diameter smooth steel culvert in INRC's embankment will not prevent nor interrupt INRC from the use of its rail line nor from carrying out its business in a reasonable fashion, the culvert installation in this case is not pre-empted pursuant to the provisions of 49 U.S.C. § 10501(b).

Therefore, the Petitioner, (the Board of JDD 6 & 56) requests consideration of this Petition For Declaratory Order to allow it to proceed with the installation of the 5.5-foot diameter smooth steel culvert in the embankment of INRC in JDD 6 & 56.

#### V RELIEF SOUGHT

WHEREFORE, Petitioners request that the STB issue a Declaratory Order determining that JDD 6 & 56's installation of the 5.5-foot diameter smooth steel culvert in the embankment of INRC in JDD 6 & 56 pursuant to Sections 468.109 through 468.113, Code of Iowa, is not pre-empted by the provisions of 49 U.S.C. § 10501(b).

Respectfully submitted,  
GOODWIN LAW OFFICE, P.C.



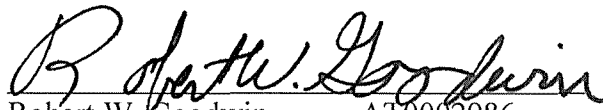
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**ATTORNEY FOR PETITIONER BOARD**  
**AS TRUSTEES OF JDD #6 & 56**

**Certificate of Service**

I, Robert W. Goodwin, hereby certify on this 18 day of June 2020, that I did serve a true and correct copy with attached Exhibits A through M of the foregoing Petition For Declaratory Order – Installation Of A Culvert In Embankment Of INRC Pursuant to Iowa Code Sections 468.109 through 468.113, Code of Iowa, upon the following by email and regular mail as set forth below:

Kimberly P. Knoshaug  
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**ATTORNEY FOR PETITIONER BOARD  
AS TRUSTEES OF JDD #6 & 56**

IN THE IOWA DISTRICT COURT FOR FLOYD COUNTY

|                                       |   |                       |
|---------------------------------------|---|-----------------------|
| IOWA NORTHERN RAILWAY                 | ) |                       |
| COMPANY,                              | ) |                       |
|                                       | ) |                       |
| Plaintiff/Petitioner,                 | ) | Case No. EQCV030873   |
|                                       | ) |                       |
| vs.                                   | ) | RULING ON DEFENDANTS' |
|                                       | ) | MOTION FOR SUMMARY    |
| FLOYD COUNTY BOARD OF                 | ) | JUDGMENT              |
| SUPERVISORS, AND CERRO GORDO          | ) |                       |
| COUNTY BOARD OF SUPERVISORS,          | ) |                       |
| Acting as Trustees for JOINT DRAINAGE | ) |                       |
| DISTRICT NO. 6 AND 56,                | ) |                       |
|                                       | ) |                       |
| Defendants/Respondents.               | ) |                       |

On the 20<sup>th</sup> day of June, 2017, the above-captioned matter came before the Court for hearing on a Motion for Summary Judgment filed on behalf of the defendants. The parties were represented by counsel of record.

**CASE SYNOPSIS**

Iowa Northern Railway Company ("Iowa Northern") operates a rail line that passes through Floyd and Cerro Gordo Counties. The defendants are the trustees of Joint Drainage District No. 6 and 56 ("Drainage District"). The rail line passes through the Drainage District.

One of the Drainage District's tile lines, Main No. 1, runs through the railroad's right-of-way. In 2011, after receiving a request from a landowner within the Drainage District, the trustees ordered an engineer's report on repairing the tile line versus creating an open ditch. The engineer's report was accepted on February 25, 2014. It contained

three options, two of which involve making repairs to the existing tile while the third (Option 2) was an improvement of constructing an open ditch.

A public hearing was held on April 8, 2014, regarding the engineer's report. The hearing was continued to June 24, 2014. At the hearing the trustees of the Drainage District voted unanimously to proceed with Option 2 of the engineer's report. Changes to the plan were approved on August 23, 2016.

The railroad objects to the Drainage District's plan. It filed this lawsuit which contains six separate counts. Specifically, Iowa Northern asks for injunctive relief (temporary and permanent); declaratory judgment (contract construction); declaratory judgment (railroad's obligation for new culvert); breach of contract; mandamus; and certiorari. The Drainage District seeks summary judgment, alleging that mandamus is the exclusive remedy against a drainage district and that there are no material fact issues related to that claim.

### **SUMMARY JUDGMENT STANDARDS**

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. A fact issue is "material" only if the dispute is over facts that might affect the outcome of the suit. The burden is on the party moving for summary judgment to prove the facts are undisputed. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717 (Iowa 2001).

In ruling on a summary judgment motion, the Court must look at the facts in a light most favorable to the party resisting the motion. The Court must also consider on behalf of the nonmoving party every legitimate inference that can be reasonably deduced

from the record. An inference is legitimate if it is rational, reasonable, and otherwise permissible under the governing substantive law. On the other hand, an inference is not legitimate if it is based on speculation or conjecture. If reasonable minds may differ on the resolution of an issue, a genuine issue of material fact exists. *Id.* at 717-18.

The purpose behind summary judgment is to avoid the expense and delay of trial in appropriate circumstances. *Bates v. Allied Mutual Insurance Co.*, 467 N.W.2d 255, 258 (Iowa 1991). It is not the Court's role at the summary judgment stage to weigh evidence against the countervailing evidence in the record. *Kern v. Palmer College of Chiropractic*, 757 N.W.2d 651, 661 (Iowa 2008). Even if the facts are undisputed, summary judgment may not be appropriate if reasonable minds may draw different inferences from them. *Shaw v. Soo Line Co.*, 463 N.W.2d 51, 53 (Iowa 1990).

### ANALYSIS

The types of claims that may be brought against a drainage district are extremely limited. The first course of action for an aggrieved party is to appeal a final action of the Board of Trustees of a drainage district to the district court. *Iowa Code § 468.83(1)*. In the present case Iowa Northern did not appeal the Drainage District's final action.

Drainage districts cannot be sued for money damages. *Board of Water Works Trustees of the City of Des Moines v. Sac County Board of Supervisors*, 890 N.W.2d 50, 57 (Iowa 2017). However, a second course of action for an aggrieved party is to file a mandamus action to compel action by the drainage district. *Id.* The *Water Works* case makes it clear that the remedy of mandamus is exclusive. The Court held:

In sum, a century's worth of precedent, including a case our court decided unanimously just four years ago, precludes any remedy against drainage districts other than mandamus. *Id.* at 59.

Given Iowa Northern did not appeal the Board's final action its sole recourse is to seek a writ of mandamus. Accordingly, Counts II, III, IV, and VI are not allowable as stand-alone causes of action and must be dismissed. As discussed below, it is the Court's opinion that temporary injunctive relief is available in a mandamus action.

### **Temporary Injunction**

The Drainage District contends that the Court should dissolve the temporary injunction because the district is immune from suit except for a mandamus action. The Court does not agree that it is precluded from issuing a temporary injunction in a case such as this. The Court agrees that a permanent injunction cannot be ordered because mandamus provides essentially the same type of remedy. However, the statute allows the Court to enter temporary orders ". . . for preventing damage or injury to the plaintiff until the action is decided." *Iowa Code § 661.16*. If temporary injunctions were not available, drainage districts could proceed with impunity regardless of the legality of its actions. Such a result would render the availability of mandamus meaningless. It is the Court's opinion that temporary injunctive relief is available and appropriate in this case. Accordingly, the defendants' motion with respect to this issue will be denied.

### **Mandamus**

Iowa Northern seeks a writ of mandamus compelling the Drainage District to follow the terms of a 1918 contract between the District and Chicago, Rock Island &



Pacific Railroad (the “Rock Island”). Iowa Northern also seeks to compel the District to follow the provisions of Iowa Code § 468.126 which relates to keeping improvements in repair, alleging that the Drainage District has failed to maintain, repair, and keep Main Drain No. 1 in good and working condition and continues to refuse to do so.

The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation, or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station. *Iowa Code § 661.1*. If such duty, the performance of which is sought to be compelled, is not one resulting from an office, trust, or station, it must be one for the breach of which a legal right to damages is already complete at the commencement of the action, and must also be a duty of which a court of equity would enforce the performance. *Iowa Code § 661.6*. Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but cannot control such discretion. *Iowa Code § 661.2*. Mandamus is a drastic remedy to be applied only in exceptional circumstances. It is not to be used to establish rights but to enforce rights that have already been established. *Hewitt v. Ryan*, 356 N.W.2d 230, 233 (Iowa 1984).

**The 1918 Contract.** In 1918 the then trustees of the Drainage District entered into a contract with the Rock Island regarding the construction of Main No. 1. The contract was deemed necessary by the Drainage District because the Rock Island did not receive proper notice and the Drainage District desired to proceed without delay. It was agreed that the Drainage District would construct and repair the tile line as necessary without cost to the Rock Island. In exchange, the Rock Island waived any claim for

damages and any claims regarding the lack of proper notice. The contract contains no termination date.

The law in Iowa is not well developed regarding the duration of contracts where the parties failed to specify a duration. It is apparent that when a contract contains no termination date it remains in force only for a reasonable time and is subject to termination upon reasonable notice. *Keppy v. Lilienthal*, 524 N.W.2d 436, 439 (Iowa App. 1994); *Hess v. Iowa Light, Heat & Power Co.*, 221 N.W. 194, 196-197 (Iowa 1928); *Shelby County Cookers, L.L.C. v. Utility Consultants Int'l, Inc.*, 857 N.W.2d 186, 191 (Iowa 2015); *17B CJS Contracts* § 583 (2017).

Additionally, it is well settled that one legislature cannot bind future legislatures on policy matters. The same rule applies to boards or other groups properly delegated legislative authority. *Board of Ed. Delaware County v. Bremen School Dist.*, 148 N.W.2d 419, 424 (Iowa 1967).

It is the Court's conclusion that there is no material issue of fact regarding the 1918 contract. The contract is nearly 100 years old and cannot reasonably be read to preclude the Drainage District from making improvements rather than repairs after such a long period of time. In addition the Drainage District, by its actions, has given reasonable notice to Iowa Northern that it considers the contract terminated. The Court also agrees that the trustees in 1918 had no authority to bind future trustees with respect to policy decisions such as choosing to make particular repairs or improvements. Therefore, the Court concludes that as a matter of law the contract is no longer binding.

In the Court's opinion there is another reason for concluding that the 1918 contract is unenforceable. The document contains no language regarding the Rock Island's successors in interest. The contract was executed because of lack of notice to the Rock Island. No successor in interest, including Iowa Northern, was adversely affected by the lack of notice. Given the purpose of the contract and the lack of language protecting successors in interest, it is the Court's opinion that the contract was not assignable and was enforceable only by the Rock Island. Therefore, there is no basis for the Court to issue a writ of mandamus based on the 1918 contract.

**The Failure to Maintain/Repair.** The railroad also argues that the Drainage District should be required to repair Main No. 1 rather than proceeding with the planned improvement. This claim is based on Iowa Code § 468.126 which requires drainage districts to keep improvements in repair. The railroad contends that the current condition of Main No. 1 is attributable to a lack of maintenance since 1976, and perhaps before that.

Iowa statutory law vests drainage district trustees with the discretion and authority to make "improvements" in a drainage district in which any ditch, tile drain, or other facility has previously been constructed if it is intended to expand, enlarge, or otherwise increase capacity. *Iowa Code § 468.126(4)*. An "improvement" is authorized when the Board determines it is "necessary or desirable." *Iowa Code § 468.126(4)(a)*.

As stated above, mandamus is not available to control discretionary decisions of drainage district trustees. In the present case the trustees determined that the proposed improvement is preferable to the alternative of repairs. The decision falls within the

discretionary powers given to the trustees under Chapter 468 of the Iowa Code. The Court cannot substitute its judgment for that of the trustees. Therefore, mandamus is not available as a means of requiring the drainage district to pursue repairs rather than the proposed improvement.

### **Lack of Notice**

Iowa Northern contends the Drainage District's decision to proceed with an improvement is void due to lack of proper notice to the railroad. Lack of notice can be a basis for determining that a drainage district's actions are void. *Voogd v. Joint Drainage District No. 3-11*, 188 N.W.2d 397 (1971). The Drainage District contends that Iowa Northern had actual knowledge of all material events which negates any deficiencies with respect to statutory notice requirements.

The undisputed facts relevant to this issue are as follows:

- The engineer's report for proposed repairs or improvement of Main No. 1 was accepted by the trustees on February 25, 2014.
- The landowners in the drainage district were given notice of a public hearing on the proposal with the meeting being scheduled on April 8, 2014. The public hearing was continued to June 24, 2014.
- At the June 24, 2014 hearing the Board of Trustees voted to proceed with the proposed improvement (Option 2 of the engineer's report).
- Iowa Northern's property was not part of the drainage district until January 19, 2015.
- Kent Rode is the drainage district's engineer. He had continuous contact with representatives of Iowa Northern from March 21, 2014, through October 5, 2016. Iowa Northern's engineer was present and participated in the June 24, 2014 hearing.

- Following the June 24, 2014 meeting Rode had discussions with Iowa Northern representatives regarding alternatives to the proposed improvement. On July 19, 2016, Rode notified Iowa Northern that he was willing to proceed with a “Smooth Steel Pipe Culvert” as an alternative to the railroad clearing and repairing the existing box culvert. Rode informed the railroad that if he did not hear from them regarding a preference he would proceed with the smooth steel pipe culvert plan. The railroad did not respond.
- On August 23, 2016, Rode changed the plan to proceed with the smooth pipe culvert. The Board of Trustees approved the final plans with the change on the same date.

With respect to repairs or improvements to an existing drainage district, the Iowa Supreme Court has held that “substantial compliance” with respect to notice requirements is sufficient. *Hicks v. Franklin County Auditor*, 514 N.W.2d 431, 436 (Iowa 1994). “Substantial compliance” means compliance to the extent necessary to assure that the reasonable objectives of the statute are met. *Id.* The notice provisions are intended to safeguard the individual taxpayer and property owner’s rights to be informed and to object. *Id.* Liberal construction is possible only where there has been sufficient effort towards compliance. *Id.* Actual notice, without any compliance, with a statute is inadequate. *Id.*

When a drainage district’s Board of Trustees determines that a substantial improvement is necessary or desirable a public hearing on the proposal is required. *Iowa Code § 468.126(4)(a)*. Notice of the hearing must be given “. . . to the owner of each tract of land or lot within the proposed levy or drainage district . . . including railway companies having right-of-way in their proposed district . . .” *Iowa Code § 468.14*. The record reflects that notice of the meeting was published pursuant to *Iowa Code § 468.15*.

Iowa Northern was not named in the published notice nor was service made on its agent pursuant to Iowa Code § 468.16.

As the Court interprets the record, Iowa Northern's railway was not part of the joint drainage district until January 2015. That being the case, the drainage district was not obligated to give the railroad statutory notice of a meeting that took place in 2014. The railroad contends that the district was required to hold a public hearing to approve the final plan changes that were adopted in August of 2016. The fact that the trustees ordered a change is immaterial. Iowa Code § 468.126(4)(a) provides that the engineer's "*... report may be amended before final action.*" A public hearing was held regarding the changes. There does not appear to be any legal requirement that new notice be given. The Court agrees with the defendants' position that such a requirement would be impractical. Therefore, it is the Court's opinion that Iowa Northern was not deprived of any required statutory notice.

Even if Iowa Northern was deprived of statutorily required notice it clearly had actual notice of all relevant proceedings relating to the proposed improvement. The railroad actively participated in the process even prior to the hearing in June 2014. Its own engineer attended the meeting. Its representatives engaged in dialogue with the drainage district's engineer and other personnel regarding possible alternatives prior to the final change being adopted in 2016. The drainage district provided notice to property owners in 2014 so there was at least some, if not total, statutory compliance. The objectives of the statute were met. Iowa Northern was aware of what was going on and cannot legitimately claim to have been prejudiced due to lack of notice. It is the Court's

opinion that there has been substantial compliance with the notice requirements of Iowa Code Chapter 468.

### **Remonstrance**

The plaintiff also contends that summary judgment is not appropriate because there is an issue as to whether there were sufficient complaints from landowners to constitute a remonstrance. The argument is based on minutes from the June 2014 meeting which reflect that objection letters were received from seven property owners. A remonstrance requires a majority of the landowners owning in the aggregate more than 70 percent of the total land in the district to object. *Iowa Code § 468.126(4)(c)*. The bare assertion that the minutes “may demonstrate that the landowners’ objections constituted a remonstrance” is not sufficient to generate a fact issue.

### **ORDER**

**IT IS THEREFORE ORDERED** that the defendants’ Motion for Summary Judgment is sustained for the reasons stated above and those urged by the defendants. The plaintiff’s petition is dismissed.

**IT IS FURTHER ORDERED** that the temporary injunction shall remain in effect for 30 days following the filing of this ruling unless terminated or extended by further order of the Court.

Court costs are taxed against the plaintiff.



State of Iowa Courts

**Type:** OTHER ORDER

| <b>Case Number</b> | <b>Case Title</b>                                       |
|--------------------|---------------------------------------------------------|
| EQCV030873         | (JMD)IOWA NORTHERN RAILWAY CO VS FLOYD CO BOARD OF SUPE |

So Ordered

A handwritten signature in black ink, appearing to read "James M. Drew", is written over a horizontal line.

James M. Drew, District Court Judge,  
Second Judicial District of Iowa



and constructed within the limits of any public highway, it shall be so built as not materially to interfere with the public travel thereon.

[S13, §1989-a20; C24, 27, 31, 35, 39, §7537; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §455.116]

89 Acts, ch 126, §2

CS89, §468.106

#### 468.107 Establishment of highways.

The board shall have power to establish public highways along and upon any levee or embankment along any such ditch or drain, but when so established the same shall be worked and maintained as other highways and so as not to obstruct or impair the levee, ditch, or drain.

[S13, §1989-a20; C24, 27, 31, 35, 39, §7538; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §455.117]

89 Acts, ch 126, §2

CS89, §468.107

#### 468.108 Bridges.

When a levee, ditch, drain, or change of any natural watercourse crosses a public highway, necessitating moving or building or rebuilding any secondary road bridge upon, or ditch or drain crossing the road, the board of supervisors shall move, build, or rebuild it, paying the costs and expenses, including construction, maintenance, repair and improvement costs, from county funds.

If the bridge or crossing be upon or across a primary or interstate road, the work aforesaid shall be done by the state department of transportation and paid for out of the primary road fund.

[S13, §1989-a19; C24, 27, 31, 35, 39, §7539; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §455.118]

83 Acts, ch 123, §184, 209; 89 Acts, ch 126, §2

CS89, §468.108

Referred to in §331.429

#### 468.109 Construction across railroad.

Whenever the board of supervisors shall have established any levee, or drainage district, or change of any natural watercourse and the levee, ditch, drain, or watercourse as surveyed and located crosses the right-of-way of any railroad company, the county auditor shall immediately cause to be served upon such railroad company, in the manner provided for the service of original notices, a notice in writing stating the nature of the improvement to be constructed, the place where it will cross the right-of-way of such company, and the full requirements for its complete construction across such right-of-way as shown by the plans, specifications, plat, and profile of the engineer appointed by the board, and directing such company to construct such improvement according to said plans and specifications at the place designated, across its right-of-way, and to build and construct or rebuild and reconstruct the necessary culvert or bridge where any ditch, drain, or watercourse crosses its right-of-way, so as not to obstruct, impede, or interfere with the free flow of the water therein, within thirty days from the time of the service of such notice upon it.

[S13, §1989-a18; C24, 27, 31, 35, 39, §7540; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §455.119]

89 Acts, ch 126, §2

CS89, §468.109

Referred to in §468.110, 468.112

Manner of service, R.C.P. 1.302 - 1.315

#### 468.110 Duty to construct.

Upon receiving the notice provided in section 468.109, such railroad company shall construct the improvement across its right-of-way according to the plans and specifications

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[S13, §198  
§455.120]

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CS89, §46

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[S13, §198  
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89 Acts, cl

CS89, §46

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[S13, §1989-a18; C24, 27, 31, 35, 39, §7541; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §455.120]

89 Acts, ch 126, §2

CS89, §468.110

#### 468.111 Bridges at natural waterway — costs.

The cost of building, rebuilding, constructing, reconstructing, changing, or repairing, as the case may be, any culvert or bridge, when such improvement is located at the place of the natural waterway or place provided by the railroad company for the flow of the water, shall be borne by such railroad company without reimbursement therefor.

[S13, §1989-a18; C24, 27, 31, 35, 39, §7542; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §455.121]

89 Acts, ch 126, §2

CS89, §468.111

#### 468.112 Construction when company refuses.

If a railroad company does not comply with a notice provided in section 468.109, the board shall provide for the construction of the improvement under the supervision of the engineer in charge of the improvement. The railroad company shall be liable for the cost of the construction which shall be collected by the county on behalf of the district in any court having jurisdiction. The court may award a prevailing county reasonable attorney fees incurred by the county, to be paid by the railroad company and taxed as part of the costs of the action.

[S13, §1989-a18; C24, 27, 31, 35, 39, §7543; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §455.122]

89 Acts, ch 126, §2

CS89, §468.112

99 Acts, ch 184, §1

#### 468.113 Cost of construction across railway.

The cost of constructing the improvement across the right-of-way of such company, not including the cost of building or rebuilding and constructing or reconstructing any necessary culvert or bridge, when such improvement is located at the place of the natural waterway or place provided by the railroad company for the flow of the water, shall be considered as an element of such company's damages by the appraiser to appraise damages.

[S13, §1989-a18; C24, 27, 31, 35, 39, §7544; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §455.123]

89 Acts, ch 126, §2

CS89, §468.113

#### 468.114 Passing drainage equipment across railway.

It shall be the duty of any steam or electric railway company to furnish the contractor unrestricted passage across its right-of-way, telegraph, telephone, and signal lines for the contractor's machines and equipment, whenever recommended by the engineer and approved by the board of supervisors, and the cost thereof shall be considered as an element of such company's damages by the appraisers thereof; provided that if such company shall fail to do so within thirty days after written notice from the auditor, the engineer shall cause the same to be done under the engineer's direction and the company shall be liable for the cost thereof to be collected by the county in any court having jurisdiction. Provided, further, that the railway company shall have the right to designate the day and hours thereof within said period of thirty days above mentioned when such crossing shall be made.

[C24, 27, 31, 35, 39, §7545; C46, 50, 54, 58, 62, 66, 71, 73, 75, 77, 79, 81, §455.124]

89 Acts, ch 126, §2

CS89, §468.114

IN THE IOWA DISTRICT COURT FOR FLOYD COUNTY

IOWA NORTHERN RAILWAY COMPANY, )

Plaintiff/Petitioner, )

vs. )

FLOYD COUNTY BOARD OF SUPERVISORS, )  
AND CERRO GORDO COUNTY BOARD OF )  
SUPERVISORS, Acting as Trustees for JOINT )  
DRAINAGE DISTRICT NO. 6 AND 56, )

Defendants/Respondents. )

Case No. EDCV031386

PETITION FOR MANDAMUS  
AND APPLICATION FOR  
TEMPORARY INJUNCTION

The Plaintiff/Petitioner, Iowa Northern Railway Company, by and through counsel, for its actions against the Defendants/Respondents, the Floyd County Board of Supervisors and the Cerro Gordo County Board of Supervisors Acting as Trustees for Joint Drainage District No. 6 and 56, states as follows:

**I. VERIFIED FACTUAL ALLEGATIONS.**

**A. THE IOWA NORTHERN AND THE NORA SPRINGS TRACKS.**

1. Iowa Northern Railway Company ("Iowa Northern" or the "Railroad") is an Iowa corporation. It is a railroad common carrier operating in interstate commerce, subject to the jurisdiction of the Surface Transportation Board, 49 U.S.C. §10501, *et. seq.*
2. Iowa Northern is a Class III railroad. It owns 253 miles of track in northeast Iowa.
3. Iowa Northern's tracks were originally constructed by the Burlington, Cedar Rapids & Northern Railway ("Burlington Northern") in 1871. The Burlington, Northern was consolidated into the Chicago, Rock Island & Pacific Railroad ("Rock Island"), which entered

bankruptcy in 1980. The railroad tracks were inactive for several years after the bankruptcy. Commencing in 1984, Iowa Northern progressively re-opened the tracks between Cedar Rapids and Manly, Iowa.

4. The Burlington Northern and the Rock Island are Iowa Northern's predecessors-in-interest.

5. A portion of Iowa Northern's rail line and associated right-of-way is located in Floyd and Cerro Gordo Counties, Iowa. The specific location of Iowa Northern's rail line and right-of-way involved in this case is physically situated at the west outskirts of or in the city of Nora Springs, Floyd County, Iowa ("**Nora Springs Tracks**").

6. The Nora Spring Tracks are located on an embankment.

7. Part of the railroad tracks at this location cross over a railroad bridge. This overpass bridge is known as Iowa Northern Bridge 210.8.

8. Iowa Northern Bridge 210.8 was constructed in 1922, replacing an existing trestle bridge. According to the 1922 plan, the timber trestle extended at least 15 feet beyond each end of the current concrete bridge. The timber piles were left in place after removing the timber bridge from service and buried with new fill.

9. Underneath Iowa Northern Bridge 210.8 is a road called West Drive. The primary purpose of Bridge 210.8 is to allow traffic on West Drive to drive underneath the railroad. There has been a road in that same general location since at least 1895 and it was formerly known as Primary Road 19.

10. In addition to constructing the railroad, in approximately 1871 or 1872 the Burlington Northern built Culvert 210.7 to pass water through the railroad embankment at or near the location of the existing natural watercourse. Culvert 210.7 was designed to create an

opening through the Iowa Northern's embankment in order to allow the free passage of the natural watercourse.

11. Culvert 210.7 is a single barrel, stone box culvert that consists of two laid stone foundation walls and stone slab roof. Sometime before 1944, Culvert 210.7 was lengthened with cast-in-place concrete. Based on photographic evidence, this occurred prior to 1944.

12. Culvert 210.7 has been inspected by properly certified engineers twice in 2013 and once in 2016. Culvert 210.7 functions properly, there is no indication that it will cease to function as designed for next three years, it meets all current safety regulations, and it is not in danger of collapsing.

13. There are four to six trains per day that cross the Nora Springs Tracks.

14. In addition to Iowa Northern trains, the Canadian Pacific Railway utilizes the tracks between Nora Springs and Plymouth, Iowa to bypass Mason City and reduce the number of trains traveling through Mason City.

B. THE BOARDS OF SUPERVISORS AND THE JOINT DRAINAGE DISTRICT.

15. The Floyd County Board of Supervisors ("**Floyd Board of Supervisors**") is a governmental entity authorized to determine the local affairs and government of Floyd County, Iowa as provided in Iowa Code Chapter 331.

16. The Cerro Gordo County Board of Supervisors ("**Cerro Gordo Board of Supervisors**") is a governmental entity authorized to determine the local affairs and government of Cerro Gordo County, Iowa as provided in Iowa Code Chapter 331.

17. Joint Drainage District No. 6 and 56 is an entity organized by the Floyd Board of Supervisors and Cerro Gordo Board of Supervisors pursuant to the provisions of Iowa Code Chapter 468 and specifically, Iowa Code Sections 468.270 - .283 (the "**JDD**"), established

circa 1918.

18. The Railroad Property is located within the JDD.

19. The District constructed certain drainage lines designated as Main No. 1 under Iowa Northern's railroad right-of-way pursuant to a Contract entered into on October 16, 1918 by the District and Iowa Northern's predecessor in interest, the Rock Island. Drainage tile line construction was completed in approximately 1920.

C. THE PROPOSED PROJECT.

20. Upon information and belief, in 2011 a private landowner made a request to either the Floyd Board of Supervisors or Cerro Gordo Board of Supervisors or the JDD or all of them for drainage issue analysis.

21. The JDD retained I & S Group, Inc., Algona, Iowa ("I & S") to study drainage issues related, in part, to Main No. 1.

22. I & S submitted an Engineer's Report dated February 25, 2014 to the District for: "PROPOSED REPAIRS OR IMPROVEMENT- MAIN NO. 1 - Joint Drainage District, No. 6 and 56, Floyd and Cerro Gordo Counties, Iowa". The report contemplated Open Ditch Improvements, denominated as Option 2, which involved the construction of an open ditch and installation of a culvert through and upon Iowa Northern's right-of-way and through the embankment over which the trains run upon its rail lines.

23. Option No. 2 is a groundwater drainage improvement project. The plans remove certain existing drainage tile used to drain lands -- lands not owned by Iowa Northern -- by artificially channeling both the flow of groundwater and surface water, via an open ditch through Culvert 210.7.

24. The proposed open drainage ditch under Option # 2 is at least four feet lower than the existing natural waterway. The reason for the low streambed elevation of the proposed option ditch is to provide adequate artificial groundwater drainage.

25. Absent this intentional open ditch design that forces groundwater drainage through the right of way, the railroad does not obstruct the natural flow of the waterway since Culvert 210.7 functions to channel surface water through the railroad embankment.

26. Option No. 2 is not necessary to maintain the otherwise natural flow of water through Iowa Northern's embankment.

27. The railroad does not obstruct the natural flow of the waterway since Culvert 210.7 functions to channel surface water through the railroad embankment and would continue to do so unless the intentional open ditch design is constructed, which forces groundwater drainage through the right of way.

28. Option No. 2 is not necessary to maintain the otherwise natural flow of water through Iowa Northern's embankment.

29. Option No. 2 would remove approximately 830 feet of the existing 18" drain tile from its existing outlet downstream of Iowa Northern Railway embankment, up under Iowa Northern Bridge 210.8, to a point on the upstream side of Iowa Northern Bridge 210.8.

30. The culvert's proposed location per Option No. 2 is within Iowa Northern's right of way, approximately ten (10) feet from Culvert 210.7.

31. The new culvert's proposed location is also in close proximity to the West Drive underpass and will be installed between West Drive and Culvert 210.7.

32. The proposed depth level of the new culvert is four (4) feet below the current level of the abutting open ditch and Culvert 210.7.

D. INSTALLATION OF THE CULVERT THROUGH THE RAILROAD'S PROPERTY.

33. On June 22, 2016, the JDD notified Iowa Northern that it was being required to construct a new 96" (8' x 8') culvert at the location selected by the JDD through Iowa Northern property at Iowa Northern's cost.

34. The District demanded installation of the new 8' x 8' culvert on or before July 27, 2016.

35. Iowa Northern presented a written Reply to the District dated July 6, 2016 in which Iowa Northern stated, among other matters, that the 1918 Contract applies to the issue and that it could not comply with the plans provided to it as they were incomplete.

36. The JDD then forwarded to Iowa Northern correspondence dated August 30, 2016 notifying Iowa Northern that the District had instead decided to construct, at Iowa Northern's sole expense, a 66" culvert utilizing a jack and bore method through the embankment.

37. No new statutory notice or revised plans were served upon Iowa Northern pursuant to Iowa Code Chapter 468 reflecting this, or any other changes in the JDD's construction plans or project costs.

38. Installation of the proposed new pipe could cause physical and financial damage to the Railroad due to the presence of timber from the trestle bridge that was covered with fill in 1922 and the District's intention to install the pipe using a jack and bore method and regulates railroad transportation.

39. If the jack and bore method is unsuccessful, the pipe would have to be installed by cutting through the rails and embankment, disrupting the Iowa Northern's railroad operation, causing physical and financial damage and regulates.



40. Regardless of the method actually used to install the culvert, Iowa Northern will cease railroad operations at or near the Nora Springs Track if the JDD constructs a culvert through its embankment due to the dangers inherent to its railroad operations, suffer financial harm, and the JDD's actions interfere with and regulate rail transportation.

41. The JDD's actions in seeking costs from Iowa Northern regulates rail transportation.

E. IOWA NORTHERN I.

42. On or about September 7, 2016 Iowa Northern filed suit in Floyd County, Case No. ("Iowa Northern I") challenging the JDD's attempt to force it to construct and pay for a new culvert on its property and through the embankment at Iowa Northern's costs.

43. The JDD filed a counterclaim citing Iowa Code Sections 468.109 - .112, and stating, "WHEREFORE, the defendants, Floyd County Board of Supervisors, and Cerro Gordo County Supervisors, acting as Trustees for Joint Drainage District 6 and 56, pray for judgment against the plaintiff, Iowa Northern Railroad Company, for reasonable attorney fees it has in this matter and that it will occur [sic:] in this matter and in this case to be taxed as costs of this action."

44. Iowa Northern's suit was dismissed on summary judgment leaving only the JDD's counterclaim for adjudication.

45. Iowa Northern filed for summary judgment asserting that express federal preemption under the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501(b) ("ICCTA"), warranted dismissal of the Counterclaim and precluded the relief sought by the JDD, specifically that the Railroad was statutorily required to construct the culvert and to pay for the culvert construction.

46. The issue of federal express preemption was fully briefed and a hearing on the Motion was held.

47. The JDD then dismissed its Counterclaim.

48. The Counterclaim dismissal concluded Iowa Northern I and the Court never ruled on whether the ICCTA preempted Iowa Code Sections 468.109 - .112.

F. THE JDD'S CURRENT ACTIONS.

49. Upon the conclusion of Iowa Northern I, Iowa Northern informed the JDD, through its attorney, that it was not to enter upon the Railroad's property without express written permission. (Letter from T. Scott Bannister to Robert Goodwin dated March 27, 2019, Exhibit A).

50. The JDD responded by letter dated May 9, 2019. (Letter from Robert Goodwin to T. Scott Bannister dated May 9, 2019, Exhibit B).

51. On information and belief based upon Exhibit B, the JDD intends it has the legal ability to willingly and intentionally ignore Iowa Northern's directive not to trespass upon its real property and forcibly construct a culvert through the Railroad's embankment using a jack and bore method.

52. The JDD could have obtained an adjudication of express federal preemption in Iowa Northern I, instead of resorting to intentional acts of unlawful trespass in violation of state and federal law.

53. The parties are at an impasse. (Letter from Kimberly P. Knoshaug to Robert Goodwin dated May 16, 2019, Exhibit C).

COUNT I

(Temporary Injunctive Relief)

54. Iowa Northern re-alleges and incorporates by reference its allegations contained in paragraphs one (1) through fifty-three (53).

55. Iowa Northern seeks a temporary injunction pursuant to Iowa R. Civ. Pro. 1.1501, *et. seq.*, either as an independent or an auxiliary remedy in this action.

56. Iowa Northern *is* entitled to temporary injunctive relief and should be afforded temporary injunctive relief to suspend the District's actions and demands and for such other related injunctive relief that is necessary to maintain and protect its legal rights and the status quo.

57. Iowa Northern has no other adequate legal remedy.

58. There is a sufficient legal and factual basis for Iowa Northern to succeed on the merits of this action.

59. A balancing of the relative harms weighs in Iowa Northern's favor as the Railroad is or shortly will be subject to irreparable injury.

60. No petition by Iowa Northern seeking temporary injunctive relief has been previously presented to and refused by any court concerning the subject matter of this Application.

61. Iowa R. Civ. Pro. 1.1501 expressly authorizes injunctive relief in conjunction with the other action asserted in this Petition.

62. Iowa Northern's request for temporary injunctive relief is supported by the affidavit of T. Scott Bannister, Esq., and is incorporated into the Petition and this Count I, verifying the facts of paragraphs one (1) through sixty-two (62), attached as "Exhibit D".

WHEREFORE, Iowa Northern Railway Company respectfully requests that this Court enter a temporary injunction enjoining the District from entering onto Iowa Northern property,

attempting to construct a New Culvert or any related improvements to Main Drain No. 1 at the Railroad's cost, impairment of its legal rights, operation as an interstate Railroad, or to its detriment in such other ways that is necessary, and for such further temporary or permanent injunctive relief that is appropriate under the facts and circumstances of this case.

**COUNT II**

(Mandamus)

63. Iowa Northern re-alleges and incorporates by reference its allegations contained in paragraphs one (1) through fifty-three (53).

64. The mandamus action seeks to compel the JDD to cease and desist in its actions which are preempted by the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501(b) ("ICCTA") and are in violation of federal law.

65. The mandamus action also seeks to compel the JDD to comply with Iowa Code §§ 468.110 and 468.111 (2019) because the Railroad can only be assessed for the cost of the culvert improvement located at the natural course of the waterway or at the place provided by the railroad for the natural flow of water. Iowa Northern Culvert 210.7 already properly functions to channel surface water through the Railroad's embankment and the presence of the railroad structures do not impede the natural flow of water.

66. The allegations raised by Iowa Northern are properly addressed through a mandamus action.

67. Iowa Code §661.1 authorizes the use of mandamus "to obtain an order commanding a board to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station". In order to obtain mandamus relief, a petitioner must show that the defendant: (1) failed to perform an official duty clearly imposed by law; (2) that,

as a result, the petitioner suffered a public wrong specifically injurious to the petitioner; and (3) that there is no other adequate legal remedy." *Northern States Power Co.*, 684 N.W.2d at 491 (citations omitted).

68. The JDD has failed to perform a duty specifically prohibited by federal law or a duty clearly imposed by law.

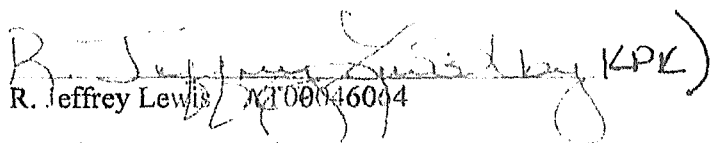
69. The JDD has failed to perform a duty specifically prohibited by federal law or a duty clearly imposed by law.

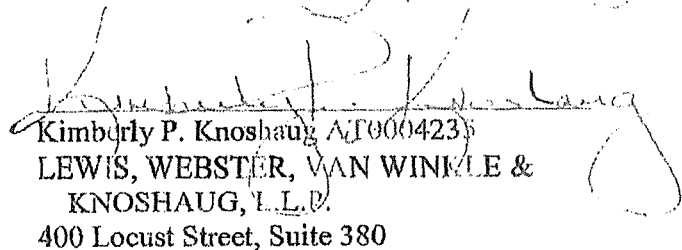
70. The JDD seeks to perform a duty that imposes an undue and unconstitutional burden upon interstate commerce.

71. The JDD's actions will result in the closure of Iowa Northern's main railroad line which is also utilized by the Canadian Pacific Railroad that will not only burden but will cause a complete stoppage of the free flow of interstate commerce.

WHEREFORE, Iowa Northern Railway Company respectfully requests that this Court enter mandamus against the JDD to enforce its statutory and constitutional obligations and for such further relief that is appropriate under the facts and circumstances of this case.

Respectfully submitted,

  
R. Jeffrey Lewis AT00046004

  
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ATTORNEYS FOR IOWA NORTHERN  
RAILWAY



**IOWA NORTHERN RAILWAY COMPANY**

201 Tower Park Drive  
Suite 300  
Waterloo, Iowa 50701  
319.297.6000

March 27, 2019

Mr. Robert W. Goodwin, Esq.  
Goodwin Law Office, PC  
311 W. Lincoln Way, Suite 1  
Ames, Iowa 50010-3317

*VIA EMAIL - GOODWINLAWOFFICE@FBX.COM*

Re: Joint Drainage District No. 6 and 56 ("JDD") - Iowa Northern Railway

Dear Bob:

I write to follow up and confirm your prior conversations with our attorney, Kim Knoshaug, regarding any future entry onto Iowa Northern's property. As you are aware, a district court ruling could have been obtained concerning the issue as to whether the JDD is prohibited from entry upon Iowa Northern's land and construction of its proposed drainage culvert on or through Iowa Northern's railway as a result of federal law preemption (including the Interstate Commerce Commission Termination Act). Instead, the JDD chose to dismiss its Counterclaim without prejudice in December, 2018, which put off a judicial determination on the merits.

Please take notice that until then the JDD, anyone acting on its behalf, or anyone attempting or seeking to further any drainage or culvert project upon Iowa Northern's real property located in or near Nora Springs has no legal right or authority to enter Iowa Northern's property at any time, without prior, written permission from Iowa Northern. This includes any contractors or subcontractors retained to perform such work. Any and all such individuals are prohibited and expressly directed not to trespass and enter upon Iowa Northern's property.

We are not aware of any viable legal argument which would support any sort of "implied" easement or right of entry upon Iowa Northern's real property. As a result, any acts in contravention of this notice will be treated as violations of both Iowa and federal law.

PLEASE ACT AND GOVERN YOURSELVES ACCORDINGLY.

Sincerely yours,



T. Scott Bannister

Vice President, Secretary and General Counsel

Copy to: Kim Knoshaug, Esq.



**GOODWIN LAW OFFICE, P.C.**

ATTORNEY AT LAW  
311 W. LINCOLN WAY, SUITE 1  
AMES, IOWA 50010-3317

ROBERT W. GOODWIN

TELEPHONE  
515-232-7390

FAX  
515-232-7396

Email: [goodwinlawoffice@fbx.com](mailto:goodwinlawoffice@fbx.com)

May 9, 2019

Mr. T. Scott Bannister  
Vice President, Secretary and General Counsel  
Iowa Northern Railway Company  
201 Tower Park Drive, Suite 300  
Waterloo, Iowa 50701

Re: Floyd & Cerro Gordo Counties JDD Nos. 6 & 56

Dear Scott:

I am responding to your letter dated March 27, 2019. In your letter you assert that JDD 6 & 56 does not have authority to enter Iowa Northern's real property to install the culvert in or near Nora Springs.

JDD 6 & 56 does have authority to enter Iowa Northern's property to install the culvert for each of the following bases.

First, what is now Section 468.27, Code of Iowa, provides as follows:

"Following its establishment, the drainage district is deemed to have acquired by permanent easement all right-of-way for drainage ditches, tiles lines, settling basins and other improvements..." i.e. the improvement of the culvert in question.

Second, Section 468.112, Code of Iowa, authorizes the drainage district to go onto railroad real estate and "provide for the construction of the improvement" across the railroad's property if the railroad fails to construct the culvert itself.

"Should the railroad fail to construct the culvert or bridge within thirty days, the board may construct the intersection itself and collect the costs, including necessary attorney fees, from the railroad. Id. Sections 468.109, .112." Hardin Cnty. Drainage Dist. 55, Div. 3. Lateral 10 v Union Pacific R.R. Co 826 N.W.2d 507, 511 (Iowa 2013).

"If the railroad refuses to fulfill its duty, the board may, under Iowa Code Section 468.112, cause the work to be done, and then seek to recover the costs of the improvement, including the culvert or bridge, from the railroad in an action in Iowa District Court." CNW v Webster County Bd of Sup & #39: rs, 880 F. Supp. 1290, 1296 (N.D. Iowa 1995).

"Should the railroad fail to construct the culvert or bridge within thirty days, the board may construct the intersection itself and collect the costs,

EXHIBIT

B

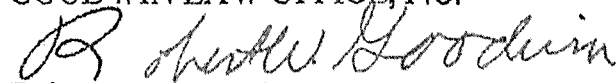


including any necessary attorney fees, from the railroad in the appropriate district court. Id. Section 468.112." Chi Cent & Pac R.R. Co v Calhoun Cnty. Bd. of Supervisors, 816 N.W.2d 367, 372 (Iowa 2012).

Furthermore, we have checked with local contractors that have experience in boring culverts through railroad's right-of-way. It is routinely performed without interfering with or disturbing the railroad's uninterrupted use of its line(s). However, as a precautionary measure and as is commonly done, the contractor working for the District will be required to monitor the rail lines at all times during the boring to insure there is no deviation of more than 1/4" in elevation.

Sincerely,

GOODWIN LAW OFFICE, P.C.



Robert W. Goodwin  
Attorney at Law

RWG:nla

cc: Kim Knoshaug (via email)  
Joint Board of JDD 6 & 56  
Sandy Shonka (via email)  
Gloria Carr (via email)  
Kent Rode (via email)  
James Hudson (via email)

Law Firm

**LEWIS, WEBSTER, VAN WINKLE & KNOSHAUG, L.L.P.**

R. Jeffrey Lewis  
Kimberly P. Knoshaug

400 Locust Street  
Suite 380  
Des Moines, Iowa 50309

Telephone: (515) 243-1000  
Facsimile: (515) 288-7000  
E-mail: [RJL@lewislaw-ia.com](mailto:RJL@lewislaw-ia.com)  
(R. Jeffrey Lewis)  
E-mail: [KPK@lewislaw-ia.com](mailto:KPK@lewislaw-ia.com)  
(Kimberly P. Knoshaug)

May 16, 2019

Robert W. Goodwin  
Goodwin Law Office, P.c.  
311 W. Lincoln Way, Suite 1  
Ames, Iowa 50010-3317

**VIA EMAIL [GOODWINLAWOFFICE@FBX.COM](mailto:GOODWINLAWOFFICE@FBX.COM) ONLY**

Re: Floyd and Cerro Gordo Drainage Districts No. 6 and 56/  
Iowa Northern Railway Company

Dear Mr. Goodwin:

This letter will respond to your letter of May 5, 2019 addressed to T. Scott Bannister, Vice-President and General Counsel of the Iowa Northern Railway Company and as follow up to Mr. Bannister's letter to you dated March 27, 2019.

As you no doubt are already aware, the Iowa Northern does not agree that your legal arguments which purportedly provide your clients with any authority to enter on the property of the railroad without express permission. The parties appear to be at an impasse and it is unlikely that repetitive recitation of selected legal arguments will influence our position otherwise. Any suggestions that there has been an agreement at some point for open access would be misguided and would run counter to pre-emption pursuant to federal law, specifically that the Interstate Commerce Commission Termination Act. The parties had an opportunity to obtain a ruling from Judge Drew on this specific legal point, but your clients elected to voluntarily dismiss their counterclaim.

As you know, the Iowa Northern has had long standing concerns about the boring project itself and the experience, training and certification of contractors and other third parties your clients would expect to be involved in the boring operation. The disclosure from your letter that the drainage districts have consulted with local contractors and seemed to have relied upon them is disturbing. Your clients should be aware of the need by the railroad in assessing risks directly to a right of way to being subject of routinely carrying train traffic, for complete information affecting the proposed project.



Robert W. Goodwin  
May 16, 2019  
Page 2

The Iowa Northern reaffirms its position regarding persons, including the drainage districts and their contractors, attempting entry on Iowa Northern's property without permission, set forth in paragraph 2 of Mr. Bannister's letter of March 27, 2019.

Very truly yours,

/s/  
R. Jeffrey Lewis

  
Kimberly P. Knoshaug

RJL, KPK: jj

Copy to: T. Scott Bannister, Esq.

**EXHIBIT "D"**

**AFFIDAVIT OF T. SCOTT BANNISTER**

STATE OF IOWA                     )  
                                              ) ss:  
COUNTY OF POLK                 )

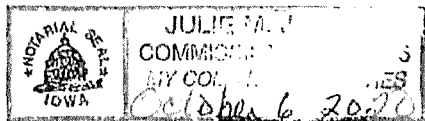
I, T. Scott Bannister, being first duly sworn on oath do depose and state as follows:

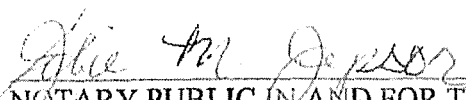
1. I am an attorney licensed to practice law in the State of Iowa.
2. I am General Counsel for Iowa Northern Railway and by virtue of my position and employment with Iowa Northern, I am aware of the facts contained in paragraphs one (1) through fifty-two (52) of the Petition .
3. The facts set forth on paragraphs one (1) through seventy-one (71) of the Petition are true and correct to the best of my knowledge.

Further, affiant sayeth naught.

Dated this 20<sup>th</sup> day of May, 2019.

  
\_\_\_\_\_  
T. Scott Bannister



  
\_\_\_\_\_  
NOTARY PUBLIC IN AND FOR THE  
STATE OF IOWA



IN THE IOWA DISTRICT COURT IN AND FOR FLOYD COUNTY

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|                                         |                             |
|-----------------------------------------|-----------------------------|
| IOWA NORTHERN RAILWAY COMPANY )         | CASE NO. EQCV031386         |
| Plaintiff/Petitioner, )                 |                             |
| vs. )                                   |                             |
| FLOYD COUNTY BOARD OF )                 | <b>DEFENDANTS' MOTION</b>   |
| SUPERVISORS, AND CERRO GORDO )          | <b>FOR SUMMARY JUDGMENT</b> |
| COUNTY BOARD OF SUPERVISORS, )          |                             |
| Acting as Trustees for JOINT DRAINAGE ) |                             |
| DISTRICT NOS. 6 AND 56, )               |                             |
| Defendants/Respondents. )               |                             |

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The Defendants, Floyd County Board of Supervisors, and Cerro Gordo County Board of Supervisors, Acting as Trustees for Joint Drainage District Nos. 6 and 56, move the Court for entry of Summary Judgment for the reasons set forth herein.

1. There is no genuine dispute of the following material facts:
  - A. The Plaintiff, Iowa Northern Railway Company (Railway Company) has a railroad line that runs through Floyd County and Cerro Gordo County Joint Drainage District Number 6 & 56 (JDD 6 & 56).
  - B. The railroad line crosses the natural flow of water in JDD 6 & 56.
  - C. At the place where the railroad line crosses the natural flow of water, a railroad embankment was constructed on the southeast side of West Drive for a railroad overpass bridge over West Drive.

- D. In or about 1871 the Railway Company's predecessor constructed a 4-feet x 6-feet block box culvert in the railroad embankment on the southeast side of West Drive in the approximate location of the natural flow of water.
- E. JDD 6 & 56 was organized in 1918.
- F. In 1918-1920 the Main No. 2 tile line of JDD 6 & 56 was constructed. It does not follow the natural course of the water to cross the railroad line. It goes next to the southeast side of West Drive where it crosses the railroad right-of-way under the overpass bridge.
- G. As of February 2014 there were several blowouts of the tile line. The tile line is inadequate because it is too shallow and the amount of water running through the tile exceeds the capacity of the tile causing the blowouts.
- H. An Engineer's Report dated February 25, 2014 was submitted to the Joint Board of JDD 6 & 56.
- I. On June 24, 2014, the Joint Board of JDD 6 & 56 approved an improvement project recommended by the Engineer's Report of replacing the inadequate tile with new open ditches which increase the drainage capacity needed and wanted by the landowners in JDD 6 & 56. It also provided for replacing the existing 4-feet x 6-feet box culvert with an 8-feet x 8-feet box culvert.
- J. The new open ditch is located in the natural flow of the water.

- K. Instead of removing the existing 4-feet x 6-feet box culvert and replacing it with an 8-feet x 8-feet box culvert, the engineer for JDD 6 & 56 changed the plans to install a 5.5-foot diameter smooth steel round culvert at the southeast side of the 4-feet x 6-feet box culvert which will be allowed to remain in place.
- L. The 5.5-foot diameter steel culvert will be installed using the jack and bore method, which will reduce the costs from \$330,000 to \$170,000, a savings of \$160,000
- M. The installation of an 8-feet x 8-feet box culvert would have required an excavation in the railroad line, which would have interrupted the Railway Company's use of its railroad line.
- N. The jack and bore method will not interrupt the Railway Company's use of its railroad line.
- O. The 5.5-foot diameter steel culvert will be bored 15-feet to 16-feet below the rail line. At that depth there is no reasonable expectation that there will be any interference with the Railway Company's railroad line.
- P. The jack and bore method for the installation of the 5.5-foot diameter culvert will be done in accordance with the Railway Company's own specifications for jacking and boring in its embankment.
- Q. Furthermore, during the jack and bore method there will be a laser survey being made. If the top of the rail line moves  $\frac{1}{4}$ -inch, the operation will be



stopped, thereby ensuring that the Railway Company's use of its railroad line will not be interrupted.

- R. The jack and bore method of installing culverts in railroad embankments is commonly used without any interference with the use of the railroad line.
- S. The contractor for JDD 6 & 56 is required to have liability insurance in the amount of \$5,000,000.00 for each occurrence for the protection of the Railway Company.

See the attached Affidavits of Kent L. Rode, Matt Holly and Scott Dullard.

- 2. Pursuant to Section 468.110, Code of Iowa, the Railway Company is obligated to construct the 5.5-foot diameter steel culvert.
- 3. The Railway Company has refused to construct the 5.5-foot diameter steel culvert.
- 4. Pursuant to Section 468.112, Code of Iowa, JDD 6 & 56 has contracted with Cole Excavating to do the work on their JDD 6 & 56 project, which has subcontracted with Precision Drilling, Inc. to install the 5.5-foot diameter steel culvert.
- 5. Pursuant to Section 468.112, Code of Iowa, Iowa Northern Railway Company will be liable for the costs of installing the 5.5-foot diameter steel culvert and attorney fees, which will be sought by JDD 6 & 56 once the installation of the 5.5-foot diameter steel culvert is completed and accepted.
- 6. As discussed in Defendants' Memorandum Of Authority, a railroad has an on-going responsibility to not interfere with the natural flow of water.



7. The Plaintiff's Petition in paragraphs 45 and 64 refer to pre-emption by Federal Law. However, the Plaintiff chose to file this action in District Court in Floyd County, Iowa. Furthermore, there is no federal pre-emption in this case as discussed in the Defendants' Memorandum Of Authorities because there will be no interference with the operation of the Railway Company's railroad line.
8. The Plaintiff's Petition in paragraph 51 refers to JDD 6 & 56 trespassing on the Railway Company's property. As will be discussed in the Defendants' Memorandum Of Authorities under Section 468.112, Code of Iowa, JDD 6 & 56 has the authority and duty to go onto and be on the railroad property to construct a culvert that the railroad refuses to construct.
9. Based upon such facts and law, the Defendants' are entitled to judgment as a matter of law.

GOODWIN LAW OFFICE, P.C.



Robert W. Goodwin, AT0002986

311 W. Lincoln Way, Suite 1

Ames, Iowa 50010-3317

(515) 232-7390

(515) 232-7396 (Fax)

E-mail: goodwinlawoffice@fbx.com

**ATTORNEY FOR  
DEFENDANTS/RESPONDENTS**

Original: E-filed.

E-copies to:

R. Jeffery Lewis

Kimberly P. Knoshaug

Lewis, Webster, Van Winkle & Knoshaug, L.L.P.

400 Locust Street, Suite 380

Des Moines, IA 50309

**Attorney for Plaintiff/Petitioner**

**CERTIFICATE OF FILING AND SERVICE**

The undersigned certifies that the foregoing instrument was electronically filed with the Clerk of Court, and electronically served on all attorneys of record, by using the electronic filing system on November 25, 2019.

Signature /s/Joni C. Rentschler

IN THE IOWA DISTRICT COURT IN AND FOR FLOYD COUNTY

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|                                       |   |                                  |
|---------------------------------------|---|----------------------------------|
| IOWA NORTHERN RAILWAY COMPANY         | ) | CASE NO. EQCV031386              |
|                                       | ) |                                  |
| Plaintiff/Petitioner,                 | ) |                                  |
|                                       | ) |                                  |
| vs.                                   | ) |                                  |
|                                       | ) |                                  |
| FLOYD COUNTY BOARD OF                 | ) | <b>AFFIDAVIT OF KENT L. RODE</b> |
| SUPERVISORS, AND CERRO GORDO          | ) |                                  |
| COUNTY BOARD OF SUPERVISORS,          | ) |                                  |
| Acting as Trustees for JOINT DRAINAGE | ) |                                  |
| DISTRICT NOS. 6 AND 56,               | ) |                                  |
|                                       | ) |                                  |
| Defendants/Respondents.               | ) |                                  |

---

STATE OF IOWA    )  
                              ) ss:  
CLAY COUNTY     )

I, Kent L. Rode, being first duly sworn upon my oath, do hereby depose and state as follows:

I am a licensed professional engineer (P.E.) in the state of Iowa. I am employed with Bolton & Menk, Inc. I have over twenty years' experience in drainage engineering. I am the drainage engineer for the Floyd county and Cerro Gordo County Boards of Supervisors who are the Trustees of Joint Drainage District Number 6 & 56 (JDD #6 & 56), which drains approximately 1,430 acres.

JDD #6 & 56 was organized in 1918. The railroad that is now owned by Iowa northern Railway Company has always gone through JDD #6 & 56 diagonally in a northwest/southeast direction as shown in the attached Defendants' Exhibit A. The railroad crosses the path of the natural watercourse. As can be seen in Exhibit A there is a railroad overpass bridge that goes

over West Drive. The overpass bridge and West Drive are within the city limits of Nora Springs, Iowa.

The Main No. 1 tile line was constructed in 1918-1920. It does not follow the natural course of water to cross the railroad line. It goes next to the southeast side of West Drive where it crosses the railroad right-of-way under the overpass bridge, as shown in the attached Defendants' Exhibit B. The Main No. 1 tile line was constructed with a 14-inch clay tile upstream of the railroad line, and a 16-inch clay tile downstream of the railroad line.

The typical life expectancy of a clay tile is 40 to 100 years, depending on numerous factors. In 1976 the 16-inch tile downstream of the railroad line was repaired by it being replaced with an 18-inch tile laid parallel to the old tile.

As of February 2014, there were several blowouts of the 18-inch and the 14-inch tile. This was 38 years after the 1976 repairs. It is not unexpected that after 38 years the 18-inch and the 14-inch tile would need to be repaired again. Also, after that length of time it is reasonably expected that there would be brush and trees growing over the tile. The tile is very shallow in many of the blowout locations. The blowouts show that the tile is inadequate, i.e. it is too shallow and the amount of water running through the tile exceeds the capacity of the tile.

Apparently, in approximately 1871, the railroad constructed a 4-feet x 6-feet block box culvert through the overpass embankment on the southeast side of West Drive in the area of the natural waterway. The 4-feet x 6-feet box culvert does not provide adequate drainage during heavy rains, which results in West Drive being flooded with water flowing around the overpass embankment on West Drive under the railroad overpass.

On September 13, 2011, the Joint Board of JDD #6 & 56 appointed an engineer to consider how best to provide drainage for JDD #6 & 56.

My Engineer's Report For: Proposed Repairs On Improvement Main No. 1 Joint Drainage District No. 6 and 56 Floyd and Cerro Gordo Counties, Iowa, dated February 25, 2014, recommends putting in an open ditch upstream from and downstream from the railroad line as shown in the attached Defendants' Exhibit B. The open ditch will provide the drainage capacity that is needed to meet current design capacity standards, which is requested and needed by the drainage district landowners.

On June 24, 2014, the Joint Board of JDD #6 & 56 approved an open ditch improvement with a new culvert through the railroad embankment southeast of West Drive for the railroad's overpass bridge over West Drive.

The proposed open ditch as shown in Exhibit B follows the natural waterway. A natural open ditch has formed east and downstream from the railroad line as shown in the attached Defendants' Exhibit A. Likewise, a natural ditch has formed southwest and upstream from the railroad line as shown on the attached Defendants' Exhibit C. Further, as shown in the attached Defendants' Exhibit D, the proposed open ditch, which is shown by the blue line, follows the natural waterway.

The original proposed plans provided for replacing the existing 4-feet x 6-feet black box culvert with an 8-feet x 8-feet box culvert. The 8-feet x 8-feet box culvert would be placed in a cut in the railroad line and bed which would interrupt the operation of the railroad line. From March 21, 2014 through October 5, 2016, I had continuous contact with Daniel Tegtmeier, the engineer for Iowa Northern Railway Company. On June 30, 2016 and July 6, 2016 I had conference calls with Daniel Tegtmeier, Peter Scheislog, the railroad's bridge engineer, and William Magee, the railroad's manager.



Messrs. Tegtmeier, Scheislog and Magee stated that the existing 4-feet x 6-feet box culvert is acceptable and would be able to remain in place subject to cleaning and repairs. I told them that I would be willing to accept an alternate construction to the open cut for an 8-feet x 8-feet box culvert. Instead, I would have a 107-feet x 66-inch (5.5 feet) diameter smooth steel culvert pipe be jacked and bored adjacent to and on the south side of the existing 4-feet x 6-feet box culvert in the railroad's overpass embankment on the southeast side of West Drive as shown on Exhibit B. The 5.5-feet diameter steel culvert is in the natural waterway as shown in Exhibit D.

Attached is Defendants' Exhibit E which is a copy of an aerial depiction of the proposed open ditch and 5.5-feet diameter pipe culvert from the Construction Plans.

The existing 4-feet x 6-feet box culvert would provide overflow in heavy storms. The 5.5-feet diameter jacked and bored steel culvert would reduce the costs from \$330,000 to \$170,000, a savings of \$160,000 and it would not interrupt the railroad's continued, uninterrupted use of the line.

On or about July 2016, the Iowa Northern Railway Company provided me with its "Iowa Northern Railway Company Standard Specification For Boring and Jacking and Casing Pipe" which specifies how jack and boring of a culvert pipe is to be done in its railroad bed.

The "Joint Drainage District No. 6 & 56 Floyd & Cerro Gordo County, Iowa Project Manual For: Open Ditch Improvements 2016" dated August 23, 2016 incorporates the Iowa Northern Railway Company's standards for jacking and boring the 5.5-feet diameter steel culvert in its railroad bed. The Project Manual requires the track to be monitored with a laser survey to make sure that the top of the rail does not deflect more than ¼-inch. If the top of the rail does deflect more than ¼-inch, all operations shall stop until the matter is resolved.

Further, the contractor is required to have liability insurance to protect Iowa Northern Railway Company in the amount of \$5,000,000.00 for each occurrence or claim.

It is significant that the jack and bore method of installing a culvert in a railroad embankment will not interfere with the operation of the railroad line because the jack and bore method of installation will be stopped if there is any chance of any interference with the use of the railroad line. If the top of the rail moves as much as 1/4-inch during the jack and bore method, the work will be stopped to ensure the use of the railroad line will not be interrupted.

The purpose of the jack and bore method of installation of the culvert is to avoid any interruption of the railroad's use of its line. I am aware that the jack and bore method is commonly used through railroad embankments to avoid any interruption of the railroad's use of the lines.

I personally was involved with the jack and bore method of installing a large culvert through the Union Pacific Railroad Company's embankment in Story County, Iowa, two or three years ago. The jack and bore installation of the culvert did not interrupt the railroad's continued use of its double track line.

The contract with the contractor concerning the installation of the culvert in the Iowa Northern's railroad embankment includes track monitoring to assure that there are no problems. The track elevations are surveyed during the boring process. If the track elevation would start to change, the boring would be stopped to ensure the continued uninterrupted use of the rail line.

Such monitoring was done for the Union Pacific Railroad project in Story County, Iowa, which I am confident has a much higher traffic count than Iowa Northern Railway Company's rail line.

The engineers for Iowa Northern Railway Company with whom I have dealt with since 2014 never brought up any issue to me that the jack and bore method of installing the culvert in the railroad embankment would interrupt the railroad's use of its line.

The jack and bore method to install the culvert in Iowa Northern Railway Company will not interrupt the railroad's continued use of its rail line, and it will in no way burden, affect, nor interfere with the Iowa Northern Railway Company's railroad transportation operations or activities.

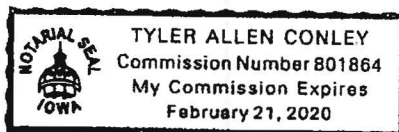
On August 23, 2016, the Joint Board of JDD #6 & 56 approved the plans to jack and bore the 5.5-foot diameter steel culvert in the Railway Company overpass bridge embankment on the southeast side of West Drive.

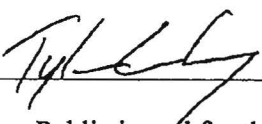
Iowa Northern Railway Company has failed and refused to install the 5.5-foot diameter steel culvert.

Dated this 8<sup>th</sup> day of November, 2019.

  
Kent L. Rode

Subscribed and sworn to me by Kent L. Rode on this 8<sup>th</sup> day of November, 2019.



  
Notary Public in and for the State of Iowa.

Attached to Defendants' Motion For Summary Judgment.



## Tree Farm

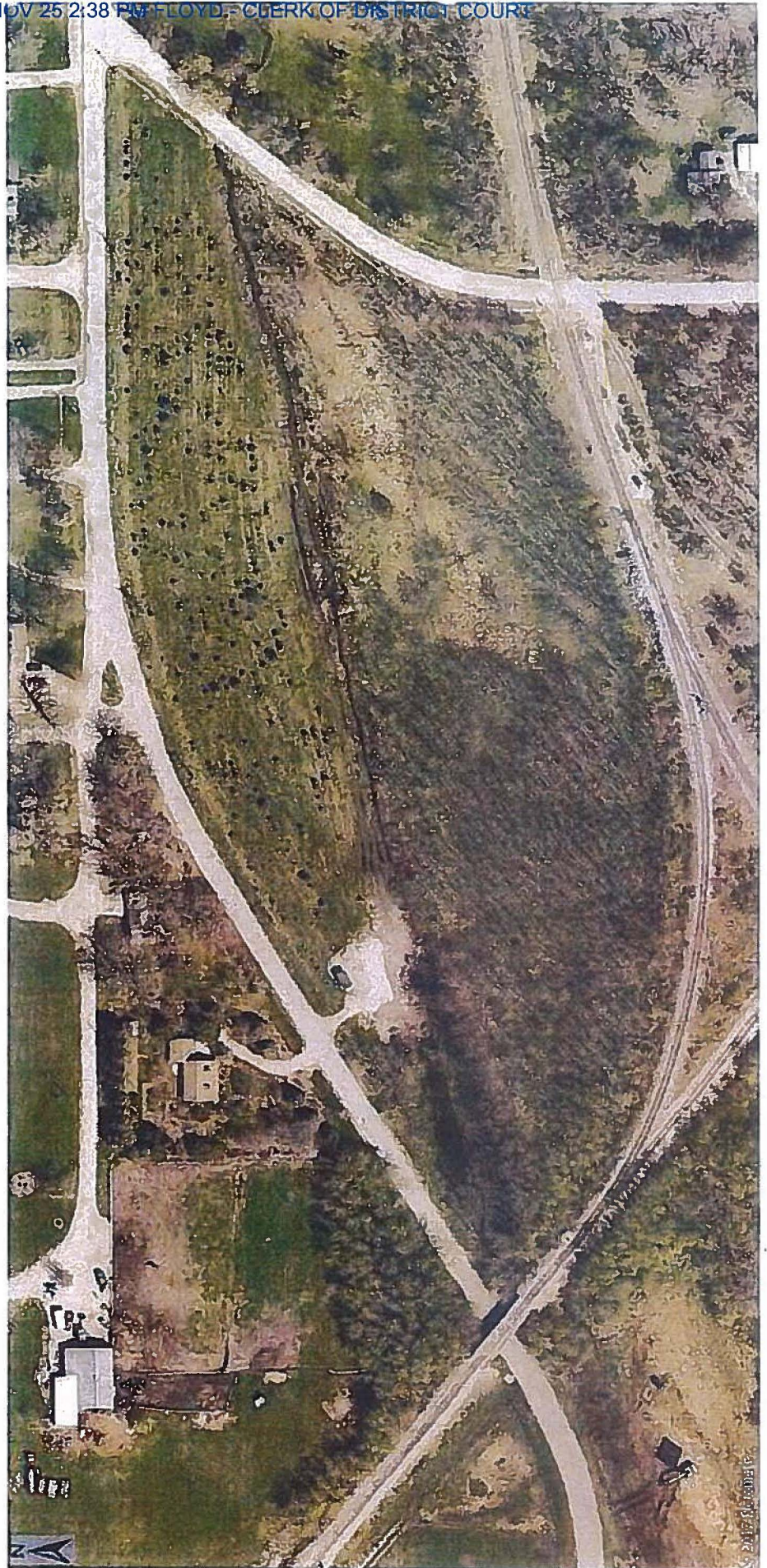


EXHIBIT A



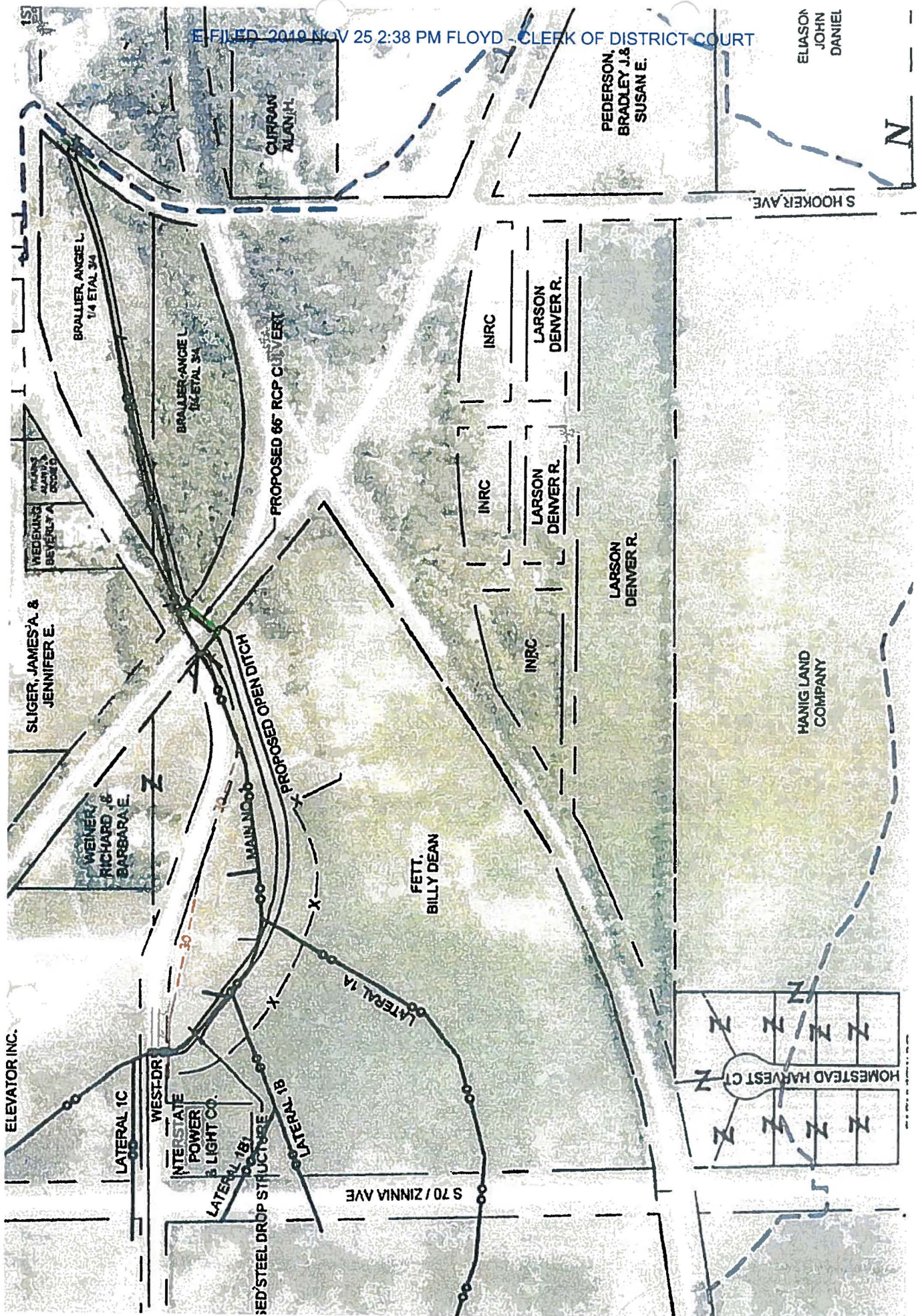


EXHIBIT B



Google Maps Nora Springs



Imagery ©2019 Maxar Technologies, Map data ©2019 100 ft



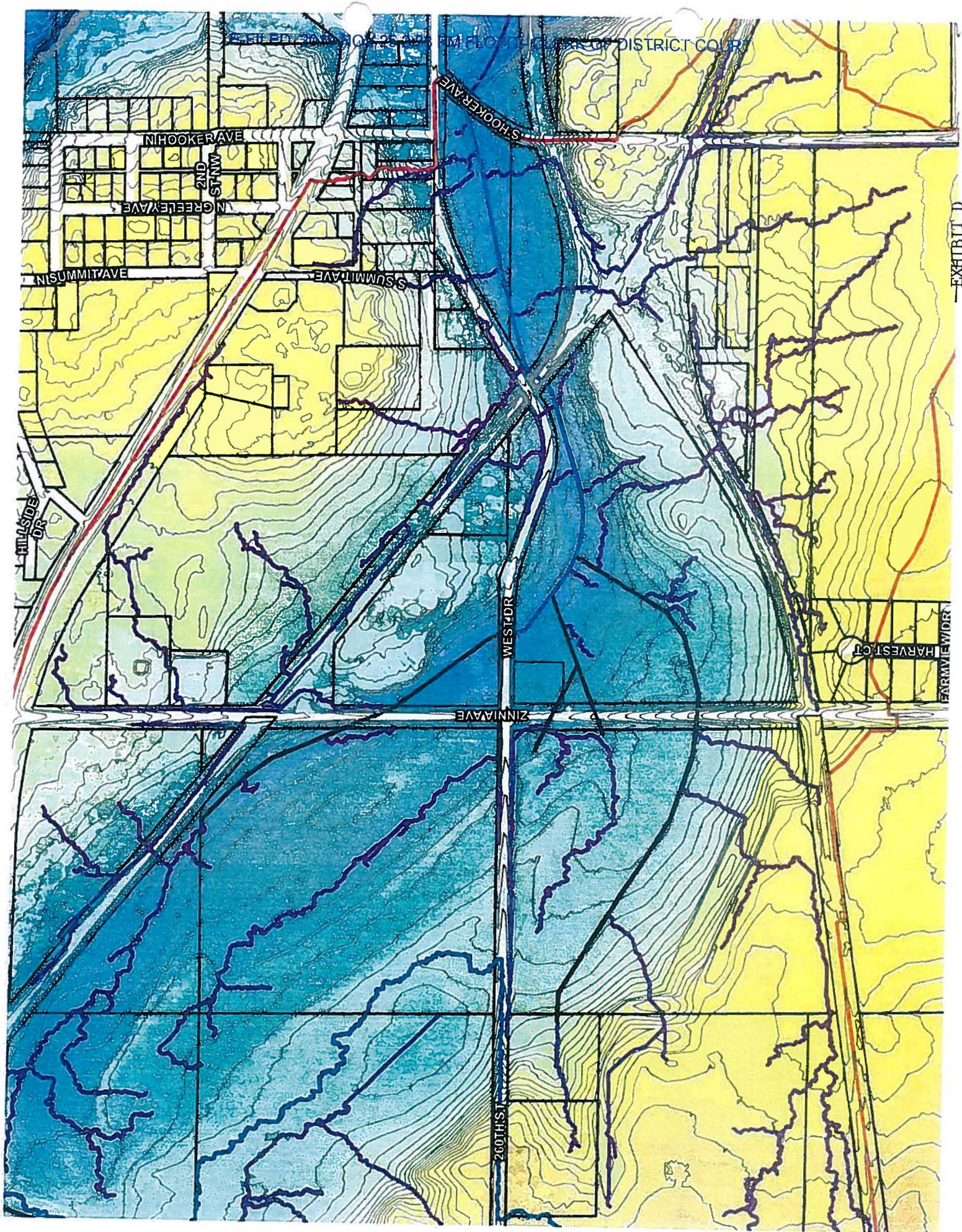


EXHIBIT D



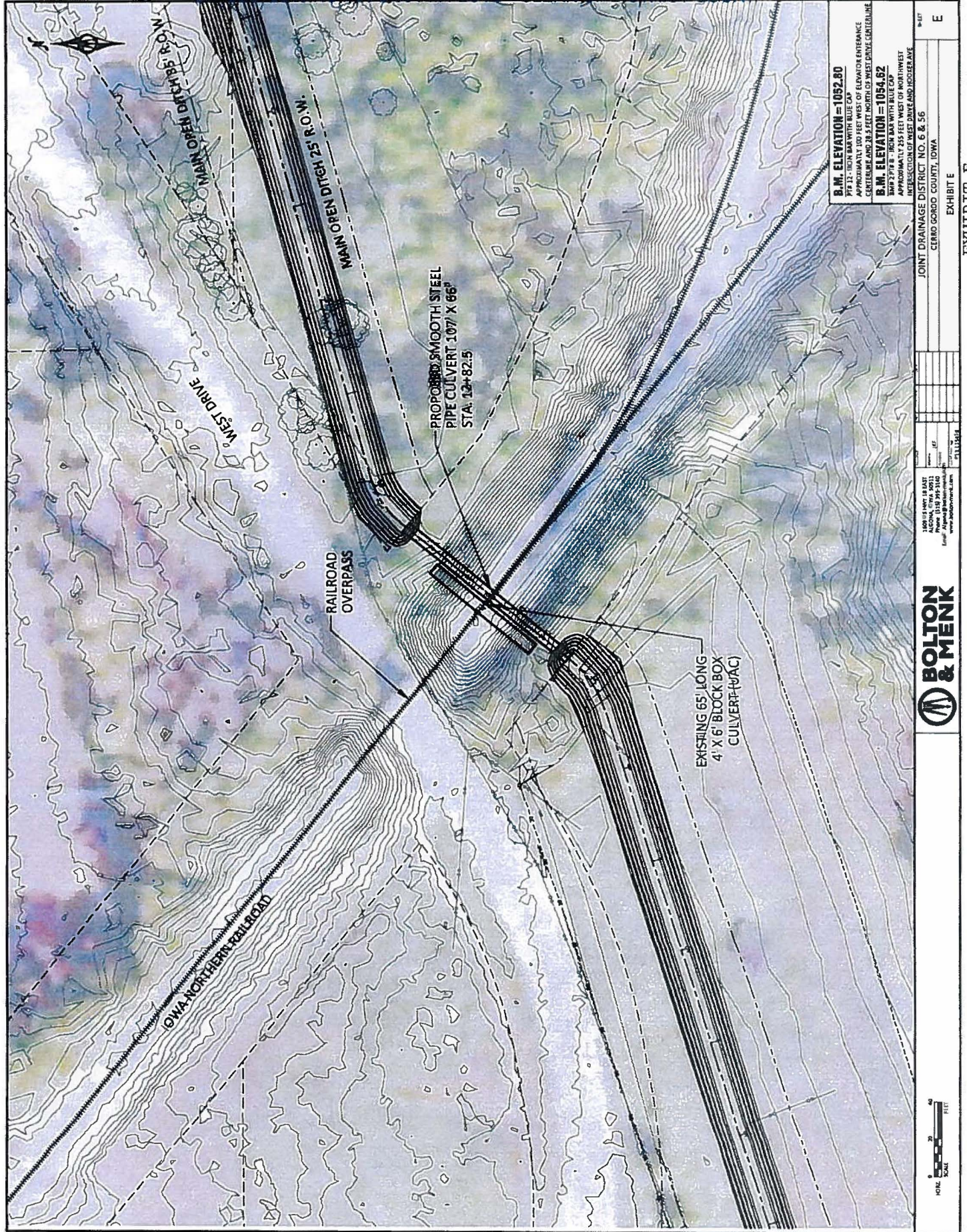


EXHIBIT E



IN THE IOWA DISTRICT COURT IN AND FOR FLOYD COUNTY

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|                                       |   |                      |
|---------------------------------------|---|----------------------|
| IOWA NORTHERN RAILWAY COMPANY         | ) | CASE NO. EQCV031386  |
|                                       | ) |                      |
| Plaintiff/Petitioner,                 | ) |                      |
|                                       | ) |                      |
| vs.                                   | ) |                      |
|                                       | ) |                      |
| FLOYD COUNTY BOARD OF                 | ) | <b>AFFIDAVIT OF</b>  |
| SUPERVISORS, AND CERRO GORDO          | ) | <b>SCOTT DULLARD</b> |
| COUNTY BOARD OF SUPERVISORS,          | ) |                      |
| Acting as Trustees for JOINT DRAINAGE | ) |                      |
| DISTRICT NOS. 6 AND 56,               | ) |                      |
|                                       | ) |                      |
| Defendants/Respondents.               | ) |                      |

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STATE OF IOWA     )  
                              ) ss:  
COUNTY OF POLK    )

I, Scott Dullard, being first duly sworn upon my oath, do hereby depose and state as follows:

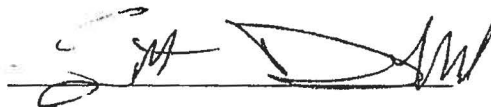
I am the General Manager and Estimator of The Driller, LLC with offices at 5125 East University Avenue, Pleasant Hill, Iowa 50327. I have been in the business of trenchless construction including auger boring and tunneling since 1995.

I have reviewed the plans to jack and bore a 5.5-foot diameter round steel culvert in the embankment of the Iowa Northern Railway Company on the JDD #6 & 56 project in Floyd County. The installation as shown in the plans is very typical of projects we construct using trenchless methods. The jack and bore method of installing the steel culvert in the railroad's right of way under its embankments and rail would also be a typical "means & method" of installation. An experienced trenchless professional, using best practices, would be expected to

perform the work without incident, and without any interference with the use of the railroad's line or interruption of its service.

Also, it is important to recognize that there will be a laser survey during the operation of the jack and bore method of installation. That means that all work could potentially be stopped before anything would occur that would affect and interfere with the operation of the railroad's line. If, during the jack and bore method of installing the culvert, the top of the rail line would move 1/4- inch the operation would be stopped, and the installation of the culvert would not resume unless and until it could be done without interference with the operation of the railroad's line.

Dated this 25<sup>th</sup> day of November, 2019.



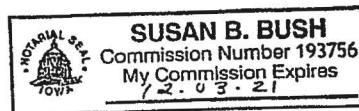
Scott Dullard

Subscribed and sworn to me by Scott Dullard on this 25<sup>th</sup> day of November, 2019.



Notary Public in and for the State of Iowa.

Attached to Defendants' Motion For Summary Judgment.



IN THE IOWA DISTRICT COURT IN AND FOR FLOYD COUNTY

IOWA NORTHERN RAILWAY COMPANY )

CASE NO. EQCV031386

Plaintiff/Petitioner, )

vs. )

FLOYD COUNTY BOARD OF )  
SUPERVISORS, AND CERRO GORDO )  
COUNTY BOARD OF SUPERVISORS, )  
Acting as Trustees for JOINT DRAINAGE )  
DISTRICT NOS. 6 AND 56, )

AFFIDAVIT OF TRACY HOLLY

Defendants/Respondents. )

STATE OF MINNESOTA )

) ss:

COUNTY OF HENNEPIN )

I, Tracy Holly, being first duly sworn upon my oath, do hereby depose and state as

follows:

My husband is Matt Holly. He has 30 years' experience in jack and boring through railroad embankments. Matt started his own business, U.S. Boring, Inc. in 1999. Precision Tunneling, Inc. was established in 2011. It is a WBE company. Matt is the Manager of Field Operations of Precision Tunneling, Inc. It specializes in bridge, tunnel and elevated highway construction, with our office being at 4047 White Bear Avenue North, Saint Paul, Minnesota 55110. Sixty percent (60%) of the work done by Precision Tunneling, Inc. is jack and bore work through railroad embankments. The jack and bore method is used so that there will not be any interference with the railroad's line.



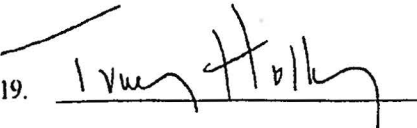
The boring on the JDD #6 & 56 project is 15-feet to 16-feet below the rail line. At that much depth, Matt and I are confident that the rail line will not be affected by the jack and bore method of installing the 5.5-foot diameter round steel culvert.

It is significant that the jack and bore operation will be done with a laser survey being operated at all times. Therefore, if the top of the rail would move more than 1/4-inch, the operation will be stopped so that the operation of the rail line will not be affected and there will not be any interference with the operation of the railroad line.

Any concern of Northern Iowa Railway Company that there might be some interference with its use of the railroad line is without merit.

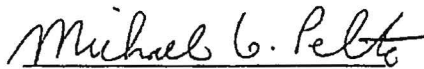
In the fall of 2018, Precision Tunneling, Inc. did a jack and bore method of installing a culvert in the Iowa Northern Railway Company in Hancock County, Iowa, with no problem and no objection to us using the jack and bore method of installing the culvert. The difference in this Hancock County project and this JDD #6 & 56 job is that the city paid for the work in Hancock County, but JDD #6 & 56 expects the railroad to pay for the work on the JDD #6 & 56.

Dated this 19 day of November, 2019.

  
Tracy Holly

Subscribed and sworn to me by Tracy Holly on this 19 day of November, 2019.





Notary Public in and for the State of Minnesota.

Attached to Defendants' Motion For Summary Judgment.

IN THE IOWA DISTRICT COURT IN AND FOR FLOYD COUNTY

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|                                         |                               |
|-----------------------------------------|-------------------------------|
| IOWA NORTHERN RAILWAY COMPANY )         | CASE NO. EQCV031386           |
| Plaintiff/Petitioner, )                 |                               |
| vs. )                                   |                               |
| FLOYD COUNTY BOARD OF )                 | <b>DEFENDANTS' STATEMENT</b>  |
| SUPERVISORS, AND CERRO GORDO )          | <b>OF UNDISPUTED MATERIAL</b> |
| COUNTY BOARD OF SUPERVISORS, )          | <b>FACTS</b>                  |
| Acting as Trustees for JOINT DRAINAGE ) |                               |
| DISTRICT NOS. 6 AND 56, )               |                               |
| Defendants/Respondents. )               |                               |

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The Defendants, Floyd County Board of Supervisors, and Cerro Gordo County Board of Supervisors, Acting as Trustees for Joint Drainage District Nos. 6 and 56, state that there is no genuine dispute as to the following material facts:

1. On September 13, 2011, the Joint Board of JDD #6 & 56 appointed an engineer to provide an Engineer's Report to consider how best to provide drainage for JDD #6 & 56. See Kent L. Rode Affidavit.
2. As of February 2014, there were several blowouts of the tile line. The tile line is inadequate because it is too shallow and the amount of water running through the tile exceeds the capacity of the tile causing the blowouts. See Kent L. Rode Affidavit.

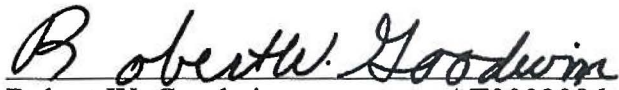
3. On February 25, 2014, the Engineer's Report For: Proposed Repairs Or Improvement Main No. 1 Joint Drainage District No. 6 and 56 was presented to the Board. See Kent L. Rode Affidavit.
4. On June 24, 2014, the Joint Board approved an open ditch improvement project, with a new culvert through the railroad embankment southeast of West Drive for the railroad's overpass bridge over West Drive. See Kent L. Rode Affidavit.
5. The original plan was to remove an existing 4-feet x 6-feet block box culvert and replace it with an 8-feet x 8-feet box culvert. This would require an open cut in the railroad embankment which would have interfered with the operation of the railroad line. See Kent L. Rode Affidavit.
6. On June 27, 2016, Iowa Northern Railway Company was given Notice of the improvement project, and that the Railway Company was responsible for constructing the 8-feet x 8-feet culvert. See Kent L. Rode Affidavit.
7. From March 21, 2014 through October, Kent L. Rode, the drainage engineer for JDD #6 & 56, had continuing contact and conversations with Dan Tegtmeier, the engineer for Iowa Northern Railway. See Kent L. Rode Affidavit.
8. On June 30, 2016, and July 6, 2016, Kent L. Rode had conference calls with Daniel Tegtmeier, Peter Scheislog, Iowa Northern Railway Company's bridge engineer and William Magee, Iowa Northern Railway Company's manager. See Kent L. Rode Affidavit.

9. In those conversations Messrs. Tegtmeier, Scheislog, and Magee said the existing 4-feet x 6-feet box culvert is acceptable and would be able to remain in place subject to cleaning and repairs. See Kent L. Rode Affidavit.
10. Kent L. Rode told Messrs. Tegtmeier, Scheislog, and Magee that he would accept an alternate construction to the open cut for an 8-feet x 8-feet box culvert. Instead, Kent L. Rode would have a 107-feet x 66 inch (5.5 feet) diameter smooth steel culvert pipe be jacked and bored adjacent to and on the south side of the existing 4-feet x 6-feet box culvert in the railroad's overpass embankment on the southeast side of West Drive. See Kent L. Rode Affidavit.
11. The existing 4-feet x 6-feet box culvert and the 5.5-feet diameter culvert are in the natural waterway. See Kent L. Rode Affidavit.
12. The jack and bore method of installing the 5.5-feet diameter culvert will reduce the costs from \$330,000 to \$170,000, a savings of \$160,000. See Kent L. Rode Affidavit.
13. The jack and bore method of installing a culvert in a railroad bed is a standard method that is used which does not interfere with the operation of the railroad line. See Kent L. Rode, Matt Holly and Scott Dullard Affidavits.
14. The Iowa Northern Railway Company has its own standards for the use of the jack and bore method of installing culverts in its railroad beds, which will be used on JDD #6 & 56's project. See Kent L. Rode Affidavit.

15. Laser surveys will also be used on JDD #6 & 56's project to ensure that there will be no interference with the railroad line, because if the top of the track would move 1/4-inch the jack and bore operation would be stopped. See Kent L. Rode, Tracy Holly and Scott Dullard Affidavits.
16. The jack and bore operation on the Iowa Northern Railway Company railroad will be at a depth of 15 to 16 feet. At that depth there is no expectation that there be any movement of the track, nor any interference with the use of the railroad line. See Kent L. Rode and Tracy Holly Affidavit.
17. Iowa Northern Railway Company has failed and refused to agree to, or to perform, the jack and bore method of installing the 5.5-foot diameter steel culvert. See Kent L. Rode Affidavit.
18. On August 23, 2016, the Joint Board of JDD #6 & 56 Resolved to proceed with the project, including the jack and bore method of installing the 5.5-foot diameter steel culvert. See Kent L. Rode Affidavit.

Attached to Defendants' Motion For Summary Judgment.

GOODWIN LAW OFFICE, P.C.

A handwritten signature in cursive script that reads "Robert W. Goodwin". The signature is written in black ink and is positioned above the printed contact information.

Robert W. Goodwin, AT0002986

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**ATTORNEY FOR  
DEFENDANTS/RESPONDENTS**



IN THE IOWA DISTRICT COURT IN AND FOR FLOYD COUNTY

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|                                         |                      |
|-----------------------------------------|----------------------|
| IOWA NORTHERN RAILWAY COMPANY )         | CASE NO. EQCV031386  |
| )                                       |                      |
| Plaintiff/Petitioner, )                 |                      |
| )                                       |                      |
| vs. )                                   |                      |
| )                                       |                      |
| FLOYD COUNTY BOARD OF )                 | <b>DEFENDANTS'</b>   |
| SUPERVISORS, AND CERRO GORDO )          | <b>MEMORANDUM OF</b> |
| COUNTY BOARD OF SUPERVISORS, )          | <b>AUTHORITIES</b>   |
| Acting as Trustees for JOINT DRAINAGE ) |                      |
| DISTRICT NOS. 6 AND 56, )               |                      |
| )                                       |                      |
| Defendants/Respondents. )               |                      |

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The Defendants, Floyd County Board of Supervisors, and Cerro Gordo County Board of Supervisors, Acting as Trustees for Join Drainage District Nos. 6 and 56, submit the following Authorities in support of their Motion For Summary Judgment.

**Summary Judgment**

Summary Judgment is appropriate when there are no genuine issues of material facts and the moving party is entitled to judgment as a matter of law. Ia. R. Civ. P. 1.981, Phillips v. Covenant Clinic, 625 N.W.3d 714, 717 (Iowa, 2001).

**Railroad's On-Going Responsibility**

When a railroad line crosses a drainage district, the railroad line has a duty to put in a bridge or culvert to not interfere with the natural flow of surface water. This

responsibility for allowing the natural flow of water is not a static one but an on-going responsibility with respect to changed conditions and increased demand.

“Our supreme court construed an early version of section 468.11 as obligating the railroad company to build a new culvert or bridge over a planned drainage ditch improvement at its own expense even when ‘at or near’ this place there was a wooden box four by five feet through the embankment for the purpose of letting the water through.” *Mason City & Ft. Dodge Ry. Co. v. Bd. of Sup’rs*, 144 Iowa 10, 12, 121 N.W. 39, 39-40 (1909). The *Mason City* case sets out the expectation that a railroad company’s responsibility for allowing the natural flow of water to cross its embankments is not a static one; it does not cease after an initial improvement is built. The railroad company bears an ongoing responsibility to respect the public interest in the water course as changed conditions and increase use demand.

The court reasoned: “The increased volume of water and the improvement to carry it away are but the results of better drainage of tillable lands on either side of the track which the company was bound to anticipate.” *Id.* at 13, 121 N.W.2d at 40. *Chicago Cent. & Pac. R.R. Co. v. Calhoun Cnty. Bd. of Supervisors* (Iowa App., 2010) pp 14-15.”

“When a drainage improvement crossing the railroad’s right-of-way needs to be rebuilt or reconstructed, the board is responsible for drawing up plans for the rebuilding or reconstruction of the improvement and serving those plans on the railroad. *Id.* § 468.109. The railroad then has a duty to ‘build or rebuild the necessary culvert or bridge.’ *Id.* § 468.110. If the railroad refuses, the board ‘shall provide for the construction of the improvement’ and may file suit against the railroad to collect the cost.” *Id.* § 468.112. *Chi. Cent. & Pac. R.R. Co. v. Calhoun County Bd. of Supervisors* 816 N.W.2d 367, 375 (Iowa, 2012).”

**Authority of JDD 6 & 56  
To Enter Railway Company Land**

JDD 6 & 56 has statutory authority to enter the Railway Company’s land to install the 5.5-foot diameter steel culvert.

Drainage District Boards will have an engineer prepare plans and specifications to construct or rebuild and reconstruct the necessary culvert or bridge where a drain, ditch or watercourse crosses the railroad company's right-of-way. The plans and specifications are to be served on the railroad company. Section 468.109, Code of Iowa.

The railroad company is to construct or rebuild and reconstruct the necessary culvert or bridge in accordance with the plans within thirty days. Section 468.109, Code of Iowa.

It is the duty of the railroad company to construct or rebuild and reconstruct the necessary culvert or bridge, at its own expense. Sections 468.110 and 468.111, Code of Iowa.

If the railroad company refuses to construct or rebuild or reconstruct the necessary culvert or bridge, the Board shall provide for the construction of the improvement. Section 468.112, Code of Iowa.

"If a railroad company does not comply with a notice provided in Section 468.109, the board shall provide for the construction of the improvement under the supervision of the engineer in charge of the improvement." (Emphasis added.) Section 468.112, Code of Iowa.

Section 468.112, Code of Iowa, necessarily authorizes the drainage district to go onto the railroad company's land to construct or rebuild and reconstruct the necessary culvert or bridge.

If the Board provides for the construction of the improvement, the railroad company shall be liable for the costs of the construction and reasonable attorney fees incurred by the Board. Section 468.112, Code of Iowa.

“Drainage district improvements must necessarily cross railroad rights-of-way. Sections 468.109 to 468.113 address how the cost of these intersections will be allocated between the district and the railroad. Iowa Code §§ 468.109-.113; *Chi. & Nw. Transp. Co. v. Webster Cnty. Bd. of Supervisors*, 880 F.Supp. 1290, 1295-96 (N.D.Iowa), *aff’d*, 71 F.3d 265 (8<sup>th</sup> Cir.1995). When a proposed improvement crosses a right-of-way, section 468.109 requires the board to serve notice on the railroad, indicating the nature and location of the improvement and the plans for how the improvement will cross the right-of-way. Iowa Code § 468.109; *Chi. & Nw. Transp. Co.*, 880 F.Supp. at 1295. The railroad company is then directed to construct such improvement according to said plans and specifications at the place designated, across its right of way, and to build an construct or rebuild and reconstruct the necessary culvert or bridge where any ditch, drain, or watercourse crosses its right of way, so as not to obstruct, impede, or interfere with the free flow of the water therein, within thirty days from the time of the service of such notice upon it.

Iowa Code § 468.109.

Should the railroad fail to construct the culvert or bridge within thirty days, the board may construct the intersection itself and collect the costs, including any necessary attorney’s fees, from the railroad in the appropriate district court. *Id.* § 468.112.” *Chi. Cent. & Pac. R.R. Co. v. Calhoun Cnty. Bd. of Supervisors*, 816 N.W.2d 367, 372 (Iowa, 2012).

“When a drainage improvement crossing the railroad’s right-of-way needs to be rebuilt or reconstructed, the board is responsible for drawing up the plans for the rebuilding or reconstruction of the improvement and serving those plans on the railroad. *Id.* § 468.109. The railroad then has a duty to ‘build or rebuild the necessary culvert or bridge.’ *Id.* § 468.110 . If the railroad refused, the board ‘shall provide for the construction of the improvement’ and may file suit against the railroad to collect the cost. *Id.* § 468.112.” (Emphasis added.) *Id.* at 816 N.W.2d 375.

The Iowa Supreme Court in the above highlighted portion of the quoted language necessarily recognizes that the drainage district has the implicit authority and duty to go onto the railroad company's land to provide for the construction of the improvement by the drainage district.

"The construction must be done 'according to the plans and specifications prepared by the engineer' of the drainage district and must be done within the time specified. *Id.* § 468.110. Should the railroad fail to construct the culvert or bridge within thirty days, the board may construct the intersection itself and collect the costs, including any necessary attorney's fees, from the railroad. *Id.* §§ 468.109, .112." Hardin Cnty. Drainage Dist. 55, Div. 3, Lateral 10 v. Union Pac. R.R. Co. 826 N.W.2d 507, 511 (Iowa, 2013).

Again, the Iowa Supreme Court in the above quoted language presumes the board has the implicit authority to go onto the railroad company's land to construct or rebuild and reconstruct the necessary culvert or bridge.

### **There Is No Pre-Emption**

The Plaintiff's Petition in paragraphs 45, 46 and 64 allude to the issue of there being Federal exemption of this matter under the Interstate Commerce Commission Termination Act, 49 U.S.C. § 105.01(b) (ICCTA). However, it is the Plaintiff who chose to file this action in Floyd County, Iowa District Court.

There is a presumption that there is no federal pre-emption.

"There is also a presumption that the 'historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' *Altria group*, 129 S.Ct. at 543 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). The presumption is relevant even when there is an express pre-emption



clause. That is because ‘when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily ‘accept the reading that disfavors pre-emption.’” *Id.* (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005)). Thus, the presumption operates both to prevent and to limit preemption.

This Court has explained that the presumption against preemption is applicable to ‘areas of law traditionally reserved to the states, like police powers and property law...’” (Emphasis added.) *Franks Inv. Co. LLC v. Union Pacific R. Co.* 593 F.2d 404, 407 (5<sup>th</sup> Cir., 2010).

“The Eleventh Circuit has held that ‘Congress narrowly tailored the ICCA pre-emption provision to displace only ‘regulation’, i.e., those state laws that may reasonably be said to have the effect of ‘manag[ing]’ or ‘govern[ing]’ rail transportation, ... while permitting the continued application of laws having a more remote or incidental effect on rail transportation.’ *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11<sup>th</sup> Cir. 2001). We find this interpretation of the ICCTA to be persuasive. The text of Section 10501(b), with its emphasis on the word regulation, establishes that only laws that have the effect of managing or governing rail transportation will be expressly preempted” *Id.* at 593 F.3d 410.

“As one Circuit Court of Appeals has observed, ‘the presumption against preemption is applicable to ‘areas of law traditionally reserved to the states, like police powers and property law[.]’” *Gordon v. New England Cent. R.R., Inc.* (D. Vt., 2017) p. 9.

Our present case involved property law and drainage law.

“Thus, according to the Board, state regulation is permissible if it passes a two-part test: (1) it is not reasonably burdensome, and (2) it does not discriminate against railroads. *See Maumee & W. Ry. Corp.*, 2004 WL 395835, at \*2 (S.T.B. 2004) (denying request for declaratory order). This is a fact-intensive inquiry. For example, the Board has ruled that a state may take easements over rail lines when the facts show that doing so will not significantly interfere with the railroad’s ability to conduct business.” *New York Susquehanna v. Jackson* 500 F.3d 238, 253 (3<sup>rd</sup> Cir., 2007).

“As for the unreasonably burdensome prong, the most obvious component is that the substance of the regulation must not be so draconian that it prevents the



railroad from carrying out its business in a sensible fashion. In addition, as the *Green mountain* Court held, regulations must be settled and definite enough to avoid openended delays. *See* 404 F.3d at 643. The animating idea is that, while states may set health, safety, and environmental ground rules, those rules must be clear enough that the rail carrier can follow them and that the state cannot easily use them as a pretext for interfering with or curtailing rail service.” (Emphasis added.) *Id.* at 500 F.3d 254.

“We therefore apply the as-applied-preemption analysis to the Michigan statutes at issue. ‘[T]he touchstone [of this analysis] is whether the state regulation imposes an unreasonable burden on railroading.’ *Jackson*, 500 F.3d at 253. As summarized by the Third Circuit, the STB has found that a state regulation is permissible as long as ‘(1) it is not unreasonable burdensome, and (2) it does not discriminate against railroads.’ *Id.*; *see also Green Mountain*, 404 F.3d at 643. Regarding the unreasonable-burden prong, ‘the substance of the regulation must not be so draconian that it prevents the railroad from carrying out its business in a sensible fashion and ‘the regulations must be settled and definite enough to avoid open-ended delays.’” *Jackson*, 500 F.3d at 254. To pass the non-discrimination prong, a state regulation ‘must address state concerns generally, without targeting the railroad industry.’ *Id.* States retain their police powers, allowing them to create health and safety measures, but ‘those rules must be clear enough that the rail carrier can follow them and ... the state cannot easily use them as a pretext for interfering with or curtailing rail service.’ *Id.*

Under this analysis, state actions are not preempted merely because they reduce the profits of a railroad: ‘We doubt whether increased operating costs are alone sufficient to establish ‘unreasonable’ interference with railroad operations.’” *Barrois*, 533 F.3d at 335; *see also Fla. E. Coast Ry.*, 266 F.3d at 1338 n. 11”. (Emphasis added.) *Adrian & Blissfield R. Co. v. Village of Blissfield* 550 F.3d 533, 541 (6<sup>th</sup> Cir., 2008).

The jack and bore method of installing the 5.5-foot diameter steel culvert will not interfere with the operation of the railroad line. It is a standard practice and does not interfere with the operation of the rail line. To ensure that the jack and bore operation will not interfere with the operation of the railroad line, a laser survey will be present to stop the operation if the top of the rail line moves more than ¼-inch.

Requiring railroads to maintain culvers and bridges so as to not interfere with the natural flow of water does not discriminate against railroads.

Section 468.621, Code of Iowa, provides that “owners of land may drain the land in the general course of natural drainage ...”

It is established Iowa Law that downstream/servient land owners are obligated to not interfere with the natural flow of water onto their property. DeWitt v. DeWitt 147 N.W.2d 32, 33 (Iowa, 1966); Moody v. Van Wechel 402 N.W.2d 752, 757 (Iowa 1987), and Sabotka v. Sabotka (Iowa App., 2013) p. 5.

Sections 468.148 and 468.618, Code of Iowa, allow treble damages if the natural flow of water is obstructed.

Road authorities under Section 314.7, Code of Iowa, are obligated to not interfere with the natural flow of water.

Section 468.109, Code of Iowa, likewise, provides that railroads are to construct culverts and bridges where a ditch, drain, or watercourse crosses the right-of-way “so as not to obstruct, impede, or interfere with the free flow of the water.”

All parties are treated equally. None should interfere with the natural flow of water.

### **Conclusion**

The Defendants, Floyd County Board of Supervisors, and Cerro Gordo County Board of Supervisors, Acting as Trustees for Join Drainage District Nos. 6 and 56, are

entitled to Summary Judgment dismissing the Plaintiff's Petition. The Iowa Northern Railway Company has a continuing obligation under Sections 468.109 - .112, Code of Iowa, to construct the 5.5-foot diameter steel culvert through its overpass bridge embankment on the southeast side of River Street. The Railway Company has failed and refused to construct the 5.5-foot diameter steel culvert.

The construction for the 5.5-foot diameter steel culvert will be done by the jack and bore method which will not interfere with the Railway Company's operation of its railroad line. Furthermore, a laser survey will be used during the jack and bore operation to stop the operation if the top of the rail line would move more than 1/4-inch, thereby ensuring that the operation of the railroad line will not be interrupted.

There is no federal pre-emption because the jack and bore method will not interfere with the operation of the railroad line, and the requirement of not blocking the natural flow of water does not discriminate against the railroad.

Attached to the Defendants' Motion For Summary Judgment.

GOODWIN LAW OFFICE, P.C.

A handwritten signature in black ink, reading "Robert W. Goodwin". The signature is written in a cursive style with a large, stylized "R" and "G".

Robert W. Goodwin, AT0002986

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**ATTORNEY FOR  
DEFENDANTS/RESPONDENTS**

IN THE IOWA DISTRICT COURT IN AND FOR FLOYD COUNTY

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|                                         |                             |
|-----------------------------------------|-----------------------------|
| IOWA NORTHERN RAILWAY COMPANY )         | CASE NO. EQCV031386         |
| )                                       |                             |
| Plaintiff/Petitioner, )                 |                             |
| )                                       |                             |
| vs. )                                   |                             |
| )                                       |                             |
| FLOYD COUNTY BOARD OF )                 | <b>DEFENDANTS' MOTION</b>   |
| SUPERVISORS, AND CERRO GORDO )          | <b>FOR SUMMARY JUDGMENT</b> |
| COUNTY BOARD OF SUPERVISORS, )          |                             |
| Acting as Trustees for JOINT DRAINAGE ) |                             |
| DISTRICT NOS. 6 AND 56, )               |                             |
| )                                       |                             |
| Defendants/Respondents. )               |                             |

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The Defendants, Floyd County Board of Supervisors, and Cerro Gordo County Board of Supervisors, Acting as Trustees for Join Drainage District Nos. 6 and 56, move the Court for entry of Summary Judgment for the reasons set forth herein.

1. There is no genuine dispute of the following material facts:
  - A. The Plaintiff, Iowa Northern Railway Company (Railway Company) has a railroad line that runs through Floyd County and Cerro Gordo County Joint Drainage District Number 6 & 56 (JDD 6 & 56).
  - B. The railroad line crosses the natural flow of water in JDD 6 & 56.
  - C. At the place where the railroad line crosses the natural flow of water, a railroad embankment was constructed on the southeast side of West Drive for a railroad overpass bridge over West Drive.

- D. In or about 1871 the Railway Company's predecessor constructed a 4-feet x 6-feet block box culvert in the railroad embankment on the southeast side of West Drive in the approximate location of the natural flow of water.
- E. JDD 6 & 56 was organized in 1918.
- F. In 1918-1920 the Main No. 2 tile line of JDD 6 & 56 was constructed. It does not follow the natural course of the water to cross the railroad line. It goes next to the southeast side of West Drive where it crosses the railroad right-of-way under the overpass bridge.
- G. As of February 2014 there were several blowouts of the tile line. The tile line is inadequate because it is too shallow and the amount of water running through the tile exceeds the capacity of the tile causing the blowouts.
- H. An Engineer's Report dated February 25, 2014 was submitted to the Joint Board of JDD 6 & 56.
- I. On June 24, 2014, the Joint Board of JDD 6 & 56 approved an improvement project recommended by the Engineer's Report of replacing the inadequate tile with new open ditches which increase the drainage capacity needed and wanted by the landowners in JDD 6 & 56. It also provided for replacing the existing 4-feet x 6-feet box culvert with an 8-feet x 8-feet box culvert.
- J. The new open ditch is located in the natural flow of the water.



- K. Instead of removing the existing 4-feet x 6-feet box culvert and replacing it with an 8-feet x 8-feet box culvert, the engineer for JDD 6 & 56 changed the plans to install a 5.5-foot diameter smooth steel round culvert at the southeast side of the 4-feet x 6-feet box culvert which will be allowed to remain in place.
- L. The 5.5-foot diameter steel culvert will be installed using the jack and bore method, which will reduce the costs from \$330,000 to \$170,000, a savings of \$160,000
- M. The installation of an 8-feet x 8-feet box culvert would have required an excavation in the railroad line, which would have interrupted the Railway Company's use of its railroad line.
- N. The jack and bore method will not interrupt the Railway Company's use of its railroad line.
- O. The 5.5-foot diameter steel culvert will be bored 15-feet to 16-feet below the rail line. At that depth there is no reasonable expectation that there will be any interference with the Railway Company's railroad line.
- P. The jack and bore method for the installation of the 5.5-foot diameter culvert will be done in accordance with the Railway Company's own specifications for jacking and boring in its embankment.
- Q. Furthermore, during the jack and bore method there will be a laser survey being made. If the top of the rail line moves  $\frac{1}{4}$ -inch, the operation will be

stopped, thereby ensuring that the Railway Company's use of its railroad line will not be interrupted.

R. The jack and bore method of installing culverts in railroad embankments is commonly used without any interference with the use of the railroad line.

S. The contractor for JDD 6 & 56 is required to have liability insurance in the amount of \$5,000,000.00 for each occurrence for the protection of the Railway Company.

See the attached Affidavits of Kent L. Rode, Matt Holly and Scott Dullard.

2. Pursuant to Section 468.110, Code of Iowa, the Railway Company is obligated to construct the 5.5-foot diameter steel culvert.
3. The Railway Company has refused to construct the 5.5-foot diameter steel culvert.
4. Pursuant to Section 468.112, Code of Iowa, JDD 6 & 56 has contracted with Cole Excavating to do the work on their JDD 6 & 56 project, which has subcontracted with Precision Drilling, Inc. to install the 5.5-foot diameter steel culvert.
5. Pursuant to Section 468.112, Code of Iowa, Iowa Northern Railway Company will be liable for the costs of installing the 5.5-foot diameter steel culvert and attorney fees, which will be sought by JDD 6 & 56 once the installation of the 5.5-foot diameter steel culvert is completed and accepted.
6. As discussed in Defendants' Memorandum Of Authority, a railroad has an on-going responsibility to not interfere with the natural flow of water.

7. The Plaintiff's Petition in paragraphs 45 and 64 refer to pre-emption by Federal Law. However, the Plaintiff chose to file this action in District Court in Floyd County, Iowa. Furthermore, there is no federal pre-emption in this case as discussed in the Defendants' Memorandum Of Authorities because there will be no interference with the operation of the Railway Company's railroad line.
8. The Plaintiff's Petition in paragraph 51 refers to JDD 6 & 56 trespassing on the Railway Company's property. As will be discussed in the Defendants' Memorandum Of Authorities under Section 468.112, Code of Iowa, JDD 6 & 56 has the authority and duty to go onto and be on the railroad property to construct a culvert that the railroad refuses to construct.
9. Based upon such facts and law, the Defendants' are entitled to judgment as a matter of law.

GOODWIN LAW OFFICE, P.C.



Robert W. Goodwin, AT0002986

311 W. Lincoln Way, Suite 1

Ames, Iowa 50010-3317

(515) 232-7390

(515) 232-7396 (Fax)

E-mail: [goodwinlawoffice@fbx.com](mailto:goodwinlawoffice@fbx.com)

**ATTORNEY FOR**

**DEFENDANTS/RESPONDENTS**

Original: E-filed.

E-copies to:

R. Jeffery Lewis

Kimberly P. Knoshaug

Lewis, Webster, Van Winkle & Knoshaug, L.L.P.

400 Locust Street, Suite 380

Des Moines, IA 50309

**Attorney for Plaintiff/Petitioner**

**CERTIFICATE OF FILING AND SERVICE**

The undersigned certifies that the foregoing instrument was electronically filed with the Clerk of Court, and electronically served on all attorneys of record, by using the electronic filing system on November 25, 2019.

Signature /s/Joni C. Rentschler

IN THE IOWA DISTRICT COURT IN AND FOR FLOYD COUNTY

---

IOWA NORTHERN RAILWAY COMPANY )

CASE NO. EQCV031386

Plaintiff/Petitioner, )

vs. )

FLOYD COUNTY BOARD OF )  
SUPERVISORS, AND CERRO GORDO )  
COUNTY BOARD OF SUPERVISORS, )  
Acting as Trustees for JOINT DRAINAGE )  
DISTRICT NOS. 6 AND 56, )

**AFFIDAVIT OF KENT L. RODE**

Defendants/Respondents. )

---

STATE OF IOWA )

) ss:

CLAY COUNTY )

I, Kent L. Rode, being first duly sworn upon my oath, do hereby depose and state as follows:

I am a licensed professional engineer (P.E.) in the state of Iowa. I am employed with Bolton & Menk, Inc. I have over twenty years' experience in drainage engineering. I am the drainage engineer for the Floyd county and Cerro Gordo County Boards of Supervisors who are the Trustees of Joint Drainage District Number 6 & 56 (JDD #6 & 56), which drains approximately 1,430 acres.

JDD #6 & 56 was organized in 1918. The railroad that is now owned by Iowa northern Railway Company has always gone through JDD #6 & 56 diagonally in a northwest/southeast direction as shown in the attached Defendants' Exhibit A. The railroad crosses the path of the natural watercourse. As can be seen in Exhibit A there is a railroad overpass bridge that goes

over West Drive. The overpass bridge and West Drive are within the city limits of Nora Springs, Iowa.

The Main No. 1 tile line was constructed in 1918-1920. It does not follow the natural course of water to cross the railroad line. It goes next to the southeast side of West Drive where it crosses the railroad right-of-way under the overpass bridge, as shown in the attached Defendants' Exhibit B. The Main No. 1 tile line was constructed with a 14-inch clay tile upstream of the railroad line, and a 16-inch clay tile downstream of the railroad line.

The typical life expectancy of a clay tile is 40 to 100 years, depending on numerous factors. In 1976 the 16-inch tile downstream of the railroad line was repaired by it being replaced with an 18-inch tile laid parallel to the old tile.

As of February 2014, there were several blowouts of the 18-inch and the 14-inch tile. This was 38 years after the 1976 repairs. It is not unexpected that after 38 years the 18-inch and the 14-inch tile would need to be repaired again. Also, after that length of time it is reasonably expected that there would be brush and trees growing over the tile. The tile is very shallow in many of the blowout locations. The blowouts show that the tile is inadequate, i.e. it is too shallow and the amount of water running through the tile exceeds the capacity of the tile.

Apparently, in approximately 1871, the railroad constructed a 4-feet x 6-feet block box culvert through the overpass embankment on the southeast side of West Drive in the area of the natural waterway. The 4-feet x 6-feet box culvert does not provide adequate drainage during heavy rains, which results in West Drive being flooded with water flowing around the overpass embankment on West Drive under the railroad overpass.

On September 13, 2011, the Joint Board of JDD #6 & 56 appointed an engineer to consider how best to provide drainage for JDD #6 & 56.



My Engineer's Report For: Proposed Repairs On Improvement Main No. 1 Joint Drainage District No. 6 and 56 Floyd and Cerro Gordo Counties, Iowa, dated February 25, 2014, recommends putting in an open ditch upstream from and downstream from the railroad line as shown in the attached Defendants' Exhibit B. The open ditch will provide the drainage capacity that is needed to meet current design capacity standards, which is requested and needed by the drainage district landowners.

On June 24, 2014, the Joint Board of JDD #6 & 56 approved an open ditch improvement with a new culvert through the railroad embankment southeast of West Drive for the railroad's overpass bridge over West Drive.

The proposed open ditch as shown in Exhibit B follows the natural waterway. A natural open ditch has formed east and downstream from the railroad line as shown in the attached Defendants' Exhibit A. Likewise, a natural ditch has formed southwest and upstream from the railroad line as shown on the attached Defendants' Exhibit C. Further, as shown in the attached Defendants' Exhibit D, the proposed open ditch, which is shown by the blue line, follows the natural waterway.

The original proposed plans provided for replacing the existing 4-feet x 6-feet black box culvert with an 8-feet x 8-feet box culvert. The 8-feet x 8-feet box culvert would be placed in a cut in the railroad line and bed which would interrupt the operation of the railroad line. From March 21, 2014 through October 5, 2016, I had continuous contact with Daniel Tegtmeier, the engineer for Iowa Northern Railway Company. On June 30, 2016 and July 6, 2016 I had conference calls with Daniel Tegtmeier, Peter Scheislog, the railroad's bridge engineer, and William Magee, the railroad's manager.

Messrs. Tegtmeier, Scheislog and Magee stated that the existing 4-feet x 6-feet box culvert is acceptable and would be able to remain in place subject to cleaning and repairs. I told them that I would be willing to accept an alternate construction to the open cut for an 8-feet x 8-feet box culvert. Instead, I would have a 107-feet x 66-inch (5.5 feet) diameter smooth steel culvert pipe be jacked and bored adjacent to and on the south side of the existing 4-feet x 6-feet box culvert in the railroad's overpass embankment on the southeast side of West Drive as shown on Exhibit B. The 5.5-foot diameter steel culvert is in the natural waterway as shown in Exhibit D.

Attached is Defendants' Exhibit E which is a copy of an aerial depiction of the proposed open ditch and 5.5-foot diameter pipe culvert from the Construction Plans.

The existing 4-feet x 6-feet box culvert would provide overflow in heavy storms. The 5.5-foot diameter jacked and bored steel culvert would reduce the costs from \$330,000 to \$170,000, a savings of \$160,000 and it would not interrupt the railroad's continued, uninterrupted use of the line.

On or about July 2016, the Iowa Northern Railway Company provided me with its "Iowa Northern Railway Company Standard Specification For Boring and Jacking and Casing Pipe" which specifies how jack and boring of a culvert pipe is to be done in its railroad bed.

The "Joint Drainage District No. 6 & 56 Floyd & Cerro Gordo County, Iowa Project Manual For: Open Ditch Improvements 2016" dated August 23, 2016 incorporates the Iowa Northern Railway Company's standards for jacking and boring the 5.5-foot diameter steel culvert in its railroad bed. The Project Manual requires the track to be monitored with a laser survey to make sure that the top of the rail does not deflect more than ¼-inch. If the top of the rail does deflect more than ¼-inch, all operations shall stop until the matter is resolved.

Further, the contractor is required to have liability insurance to protect Iowa Northern Railway Company in the amount of \$5,000,000.00 for each occurrence or claim.

It is significant that the jack and bore method of installing a culvert in a railroad embankment will not interfere with the operation of the railroad line because the jack and bore method of installation will be stopped if there is any chance of any interference with the use of the railroad line. If the top of the rail moves as much as ¼-inch during the jack and bore method, the work will be stopped to ensure the use of the railroad line will not be interrupted.

The purpose of the jack and bore method of installation of the culvert is to avoid any interruption of the railroad's use of its line. I am aware that the jack and bore method is commonly used through railroad embankments to avoid any interruption of the railroad's use of the lines.

I personally was involved with the jack and bore method of installing a large culvert through the Union Pacific Railroad Company's embankment in Story County, Iowa, two or three years ago. The jack and bore installation of the culvert did not interrupt the railroad's continued use of its double track line.

The contract with the contractor concerning the installation of the culvert in the Iowa Northern's railroad embankment includes track monitoring to assure that there are no problems. The track elevations are surveyed during the boring process. If the track elevation would start to change, the boring would be stopped to ensure the continued uninterrupted use of the rail line.

Such monitoring was done for the Union Pacific Railroad project in Story County, Iowa, which I am confident has a much higher traffic count than Iowa Northern Railway Company's rail line.

The engineers for Iowa Northern Railway Company with whom I have dealt with since 2014 never brought up any issue to me that the jack and bore method of installing the culvert in the railroad embankment would interrupt the railroad's use of its line.

The jack and bore method to install the culvert in Iowa Northern Railway Company will not interrupt the railroad's continued use of its rail line, and it will in no way burden, affect, nor interfere with the Iowa Northern Railway Company's railroad transportation operations or activities.

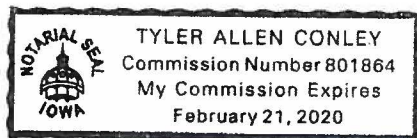
On August 23, 2016, the Joint Board of JDD #6 & 56 approved the plans to jack and bore the 5.5-foot diameter steel culvert in the Railway Company overpass bridge embankment on the southeast side of West Drive.

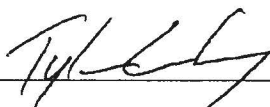
Iowa Northern Railway Company has failed and refused to install the 5.5-foot diameter steel culvert.

Dated this 8<sup>th</sup> day of November, 2019.

  
Kent L. Rode

Subscribed and sworn to me by Kent L. Rode on this 8<sup>th</sup> day of November, 2019.

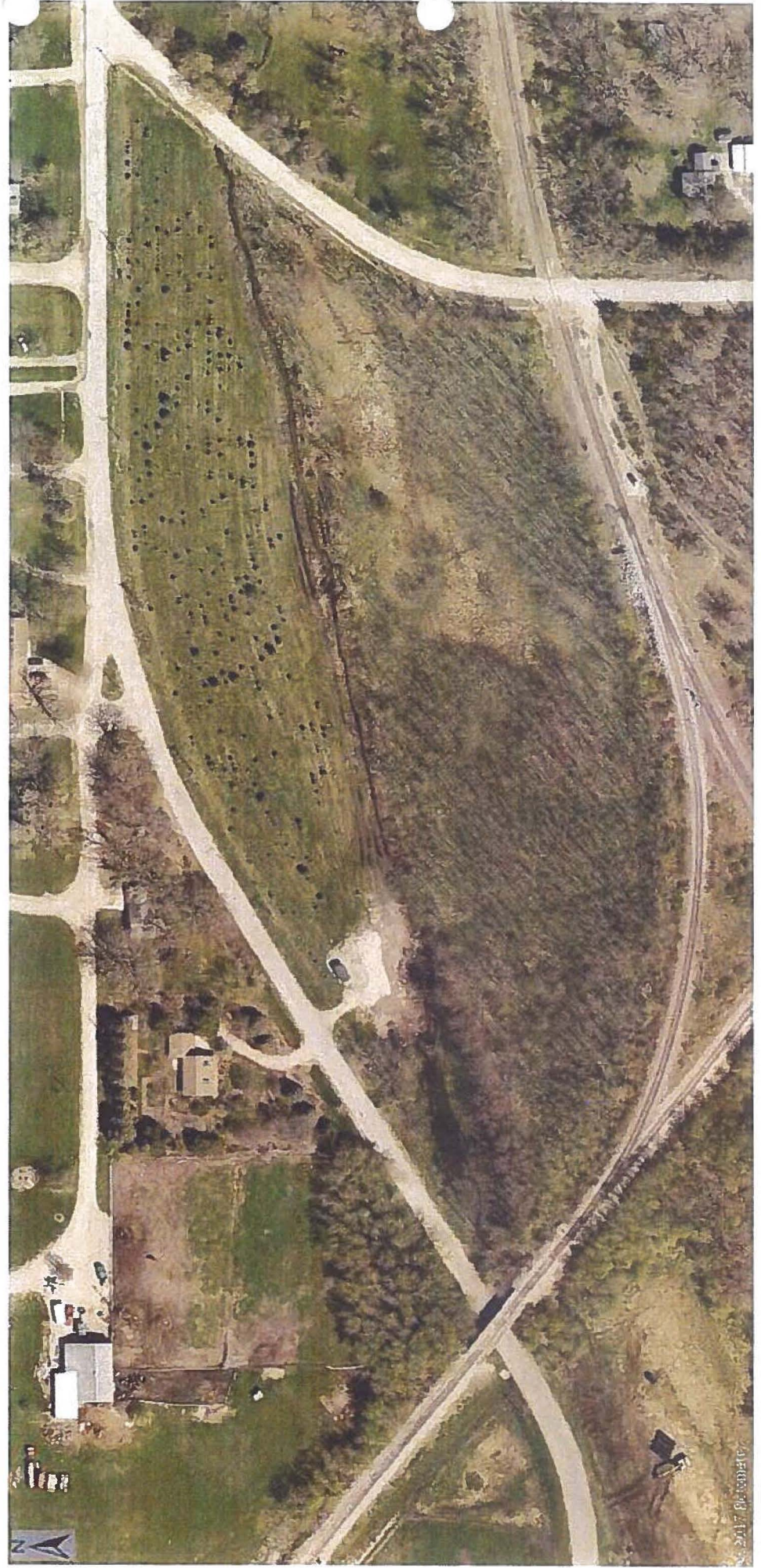


  
Notary Public in and for the State of Iowa.

Attached to Defendants' Motion For Summary Judgment.



# Tree Farm





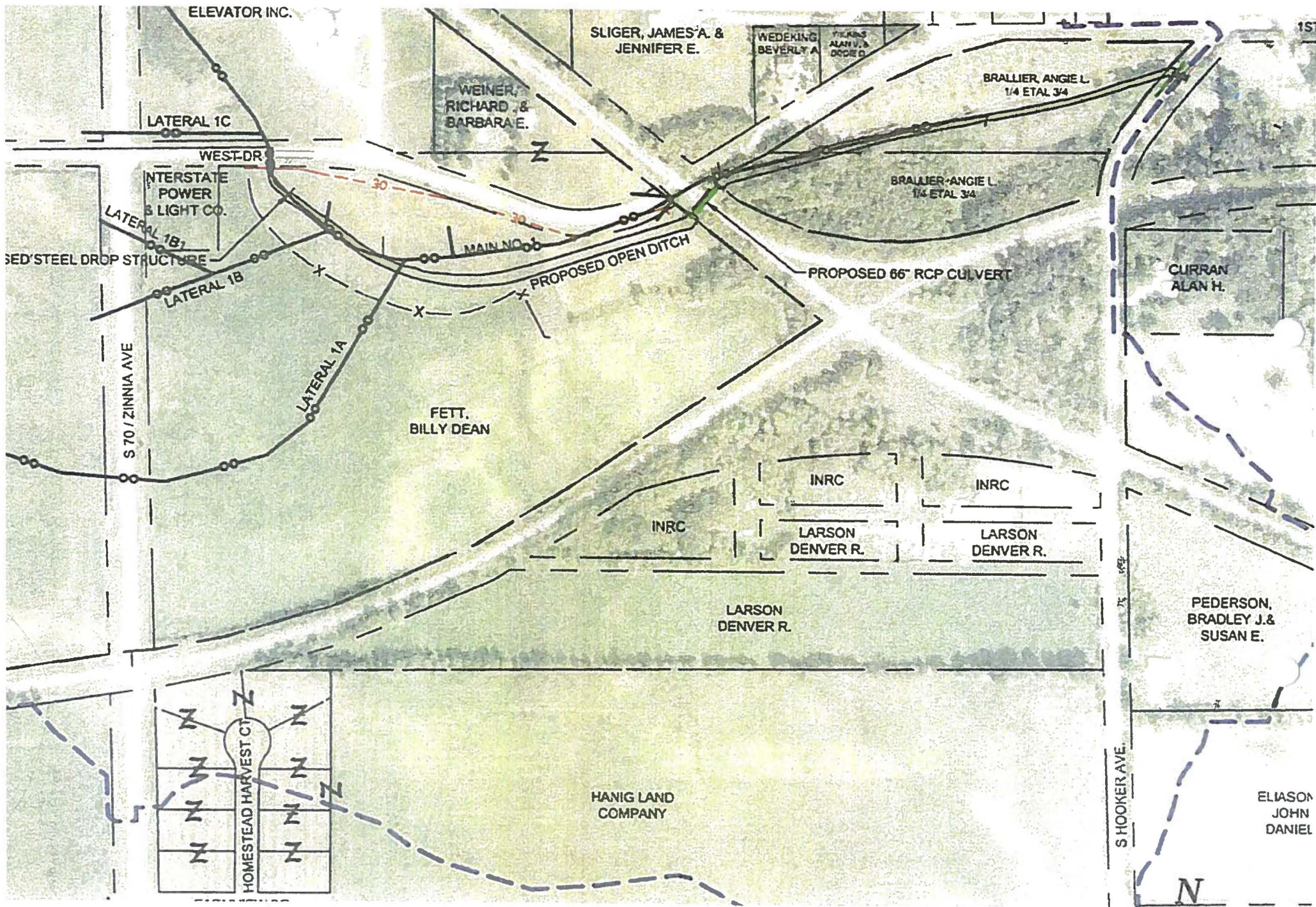


EXHIBIT B



Google Maps Nora Springs



Imagery ©2019 Maxar Technologies, Map data ©2019 100 ft



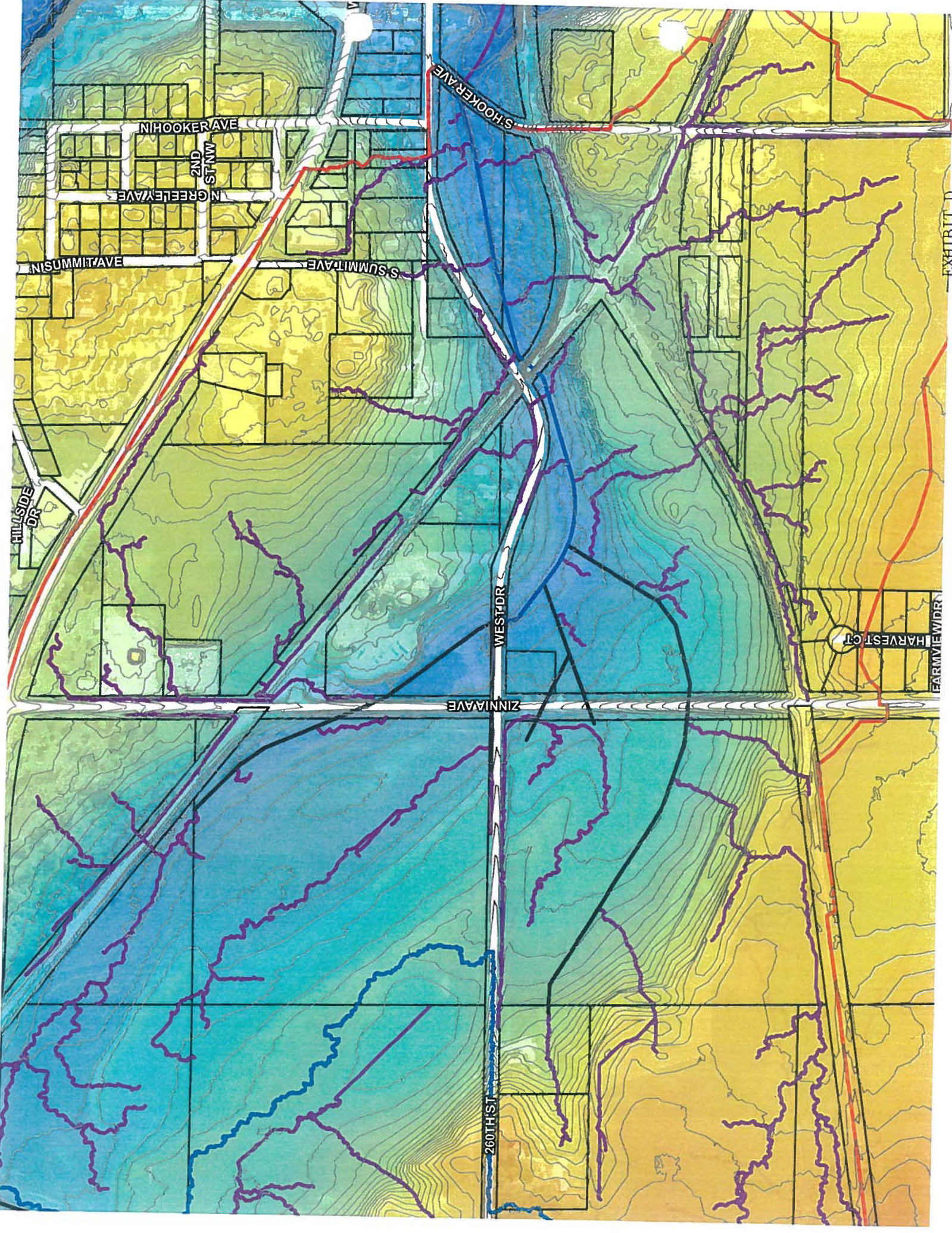


EXHIBIT D

FARMVIEW DR

HARVEST CT

WEST DR

ZINN AVE

260TH ST

S HOOKER AVE

S SUMMIT AVE

N HOOKER AVE

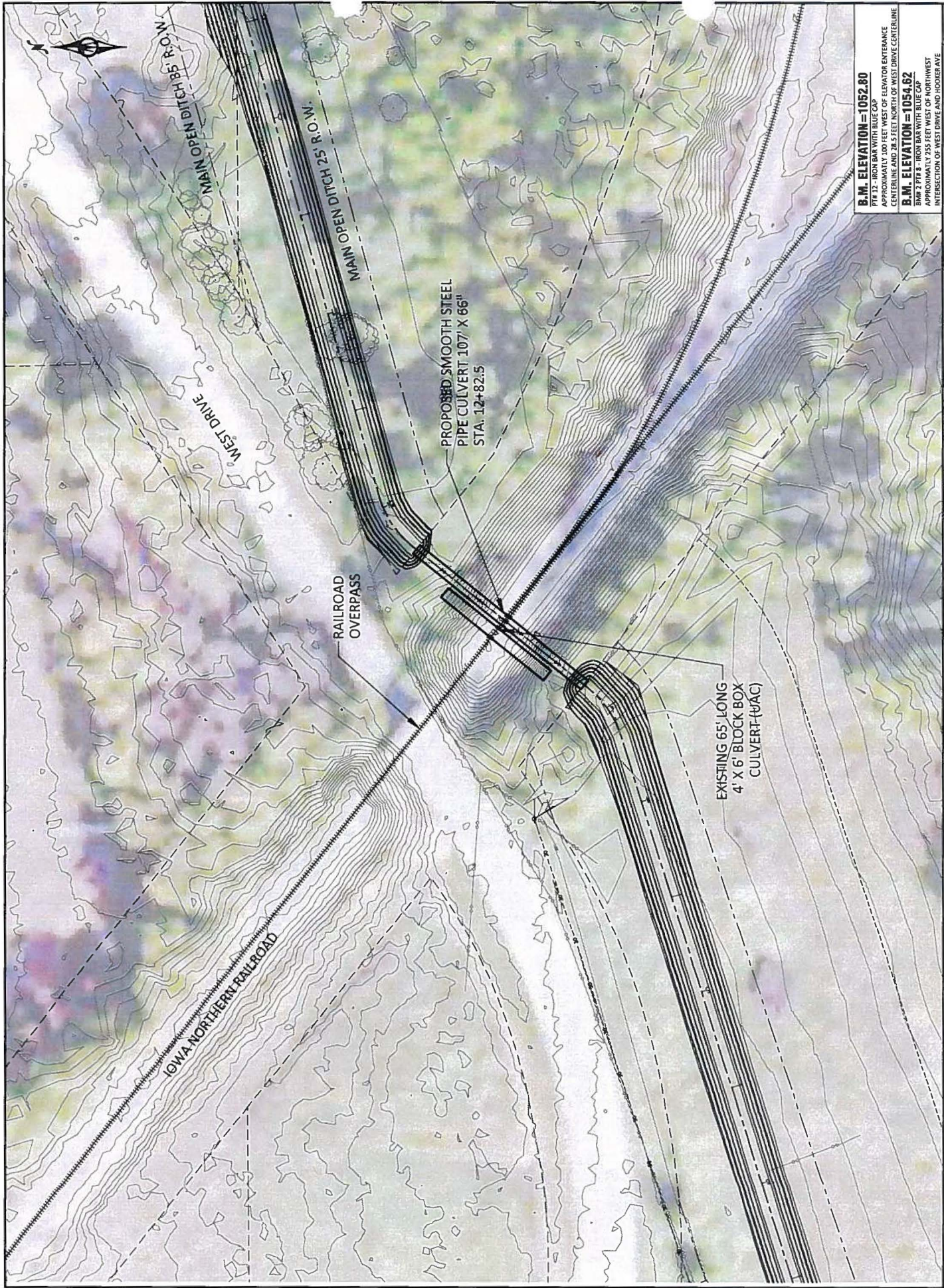
N GREELEY AVE

N SUMMIT AVE

HILLSIDE DR

2ND ST NW





**B.M. ELEVATION = 1052.80**  
 PTH 12 - IRON BAR WITH BLUE CAP  
 APPROXIMATELY 100 FEET WEST OF ELEVATOR ENTRANCE  
 CENTERLINE AND 25 FEET NORTH OF WEST DRIVE CENTERLINE

**B.M. ELEVATION = 1054.62**  
 B.M. 2 PTH 8 - IRON BAR WITH BLUE CAP  
 APPROXIMATELY 255 FEET WEST OF NORTHWEST  
 INTERSECTION OF WEST DRIVE AND HOOKER AVE

1500 US HWY 18 EAST  
 ALCONDA, IOWA 52008  
 Tel: 515.335.1830  
 Fax: 515.335.1830  
 www.bolton-menk.com

DATE: 10/25/2019  
 TIME: 10:13:27 AM

JOINT DRAINAGE DISTRICT NO. 6 & 56  
 CERRO GORDO COUNTY, IOWA

EXHIBIT E

SHEET E





IN THE IOWA DISTRICT COURT IN AND FOR FLOYD COUNTY

IOWA NORTHERN RAILWAY COMPANY )

CASE NO. EQCV031386

Plaintiff/Petitioner, )

vs. )

FLOYD COUNTY BOARD OF )  
SUPERVISORS, AND CERRO GORDO )  
COUNTY BOARD OF SUPERVISORS, )  
Acting as Trustees for JOINT DRAINAGE )  
DISTRICT NOS. 6 AND 56, )

**AFFIDAVIT OF TRACY HOLLY**

Defendants/Respondents. )

STATE OF MINNESOTA )

) ss:

COUNTY OF HENNEPIN )

I, Tracy Holly, being first duly sworn upon my oath, do hereby depose and state as follows:

My husband is Matt Holly. He has 30 years' experience in jack and boring through railroad embankments. Matt started his own business, U.S. Boring, Inc. in 1999. Precision Tunneling, Inc. was established in 2011. It is a WBE company. Matt is the Manager of Field Operations of Precision Tunneling, Inc. It specializes in bridge, tunnel and elevated highway construction, with our office being at 4047 White Bear Avenue North, Saint Paul, Minnesota 55110. Sixty percent (60%) of the work done by Precision Tunneling, Inc. is jack and bore work through railroad embankments. The jack and bore method is used so that there will not be any interference with the railroad's line.

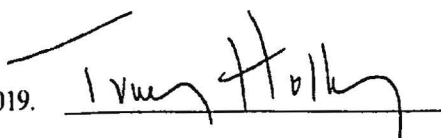
The boring on the JDD #6 & 56 project is 15-feet to 16-feet below the rail line. At that much depth, Matt and I are confident that the rail line will not be affected by the jack and bore method of installing the 5.5-foot diameter round steel culvert.

It is significant that the jack and bore operation will be done with a laser survey being operated at all times. Therefore, if the top of the rail would move more than 1/4-inch, the operation will be stopped so that the operation of the rail line will not be affected and there will not be any interference with the operation of the railroad line.

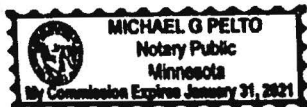
Any concern of Northern Iowa Railway Company that there might be some interference with its use of the railroad line is without merit.

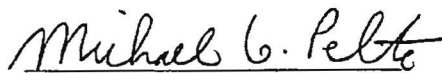
In the fall of 2018, Precision Tunneling, Inc. did a jack and bore method of installing a culvert in the Iowa Northern Railway Company in Hancock County, Iowa, with no problem and no objection to us using the jack and bore method of installing the culvert. The difference in this Hancock County project and this JDD #6 & 56 job is that the city paid for the work in Hancock County, but JDD #6 & 56 expects the railroad to pay for the work on the JDD #6 & 56.

Dated this 19 day of November, 2019.

  
Tracy Holly

Subscribed and sworn to me by Tracy Holly on this 19 day of November, 2019.





Notary Public in and for the State of Minnesota.

Attached to Defendants' Motion For Summary Judgment.



IN THE IOWA DISTRICT COURT IN AND FOR FLOYD COUNTY

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|                                                                                                                                               |   |                                   |
|-----------------------------------------------------------------------------------------------------------------------------------------------|---|-----------------------------------|
| IOWA NORTHERN RAILWAY COMPANY                                                                                                                 | ) | CASE NO. EQCV031386               |
|                                                                                                                                               | ) |                                   |
| Plaintiff/Petitioner,                                                                                                                         | ) |                                   |
|                                                                                                                                               | ) |                                   |
| vs.                                                                                                                                           | ) |                                   |
|                                                                                                                                               | ) |                                   |
| FLOYD COUNTY BOARD OF SUPERVISORS, AND CERRO GORDO COUNTY BOARD OF SUPERVISORS, Acting as Trustees for JOINT DRAINAGE DISTRICT NOS. 6 AND 56, | ) | <b>AFFIDAVIT OF SCOTT DULLARD</b> |
|                                                                                                                                               | ) |                                   |
| Defendants/Respondents.                                                                                                                       | ) |                                   |

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STATE OF IOWA    )  
                          ) ss:  
COUNTY OF POLK )

I, Scott Dullard, being first duly sworn upon my oath, do hereby depose and state as follows:

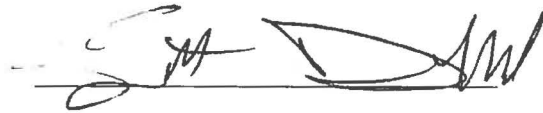
I am the General Manager and Estimator of The Driller, LLC with offices at 5125 East University Avenue, Pleasant Hill, Iowa 50327. I have been in the business of trenchless construction including auger boring and tunneling since 1995.

I have reviewed the plans to jack and bore a 5.5-foot diameter round steel culvert in the embankment of the Iowa Northern Railway Company on the JDD #6 & 56 project in Floyd County. The installation as shown in the plans is very typical of projects we construct using trenchless methods. The jack and bore method of installing the steel culvert in the railroad's right of way under its embankments and rail would also be a typical "means & method" of installation. An experienced trenchless professional, using best practices, would be expected to

perform the work without incident, and without any interference with the use of the railroad's line or interruption of its service.

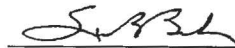
Also, it is important to recognize that there will be a laser survey during the operation of the jack and bore method of installation. That means that all work could potentially be stopped before anything would occur that would affect and interfere with the operation of the railroad's line. If, during the jack and bore method of installing the culvert, the top of the rail line would move 1/4- inch the operation would be stopped, and the installation of the culvert would not resume unless and until it could be done without interference with the operation of the railroad's line.

Dated this 25<sup>th</sup> day of November, 2019.



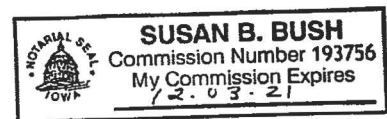
Scott Dullard

Subscribed and sworn to me by Scott Dullard on this 25<sup>th</sup> day of November, 2019.



Notary Public in and for the State of Iowa.

Attached to Defendants' Motion For Summary Judgment.



IN THE IOWA DISTRICT COURT IN AND FOR FLOYD COUNTY

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|                                       |   |                               |
|---------------------------------------|---|-------------------------------|
| IOWA NORTHERN RAILWAY COMPANY         | ) | CASE NO. EQCV031386           |
|                                       | ) |                               |
| Plaintiff/Petitioner,                 | ) |                               |
|                                       | ) |                               |
| vs.                                   | ) |                               |
|                                       | ) |                               |
| FLOYD COUNTY BOARD OF                 | ) | <b>DEFENDANTS' STATEMENT</b>  |
| SUPERVISORS, AND CERRO GORDO          | ) | <b>OF UNDISPUTED MATERIAL</b> |
| COUNTY BOARD OF SUPERVISORS,          | ) | <b>FACTS</b>                  |
| Acting as Trustees for JOINT DRAINAGE | ) |                               |
| DISTRICT NOS. 6 AND 56,               | ) |                               |
|                                       | ) |                               |
| Defendants/Respondents.               | ) |                               |

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The Defendants, Floyd County Board of Supervisors, and Cerro Gordo County Board of Supervisors, Acting as Trustees for Join Drainage District Nos. 6 and 56, state that there is no genuine dispute as to the following material facts:

1. On September 13, 2011, the Joint Board of JDD #6 & 56 appointed an engineer to provide an Engineer's Report to consider how best to provide drainage for JDD #6 & 56. See Kent L. Rode Affidavit.
2. As of February 2014, there were several blowouts of the tile line. The tile line is inadequate because it is too shallow and the amount of water running through the tile exceeds the capacity of the tile causing the blowouts. See Kent L. Rode Affidavit.

3. On February 25, 2014, the Engineer's Report For: Proposed Repairs Or Improvement Main No. 1 Joint Drainage District No. 6 and 56 was presented to the Board. See Kent L. Rode Affidavit.
4. On June 24, 2014, the Joint Board approved an open ditch improvement project, with a new culvert through the railroad embankment southeast of West Drive for the railroad's overpass bridge over West Drive. See Kent L. Rode Affidavit.
5. The original plan was to remove an existing 4-feet x 6-feet block box culvert and replace it with an 8-feet x 8-feet box culvert. This would require an open cut in the railroad embankment which would have interfered with the operation of the railroad line. See Kent L. Rode Affidavit.
6. On June 27, 2016, Iowa Northern Railway Company was given Notice of the improvement project, and that the Railway Company was responsible for constructing the 8-feet x 8-feet culvert. See Kent L. Rode Affidavit.
7. From March 21, 2014 through October, Kent L. Rode, the drainage engineer for JDD #6 & 56, had continuing contact and conversations with Dan Tegtmeier, the engineer for Iowa Northern Railway. See Kent L. Rode Affidavit.
8. On June 30, 2016, and July 6, 2016, Kent L. Rode had conference calls with Daniel Tegtmeier, Peter Scheislog, Iowa Northern Railway Company's bridge engineer and William Magee, Iowa Northern Railway Company's manager. See Kent L. Rode Affidavit.

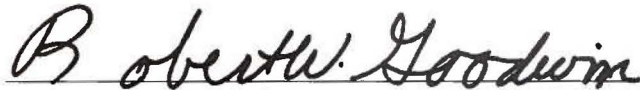


9. In those conversations Messrs. Tegtmeier, Scheislog, and Magee said the existing 4-feet x 6-feet box culvert is acceptable and would be able to remain in place subject to cleaning and repairs. See Kent L. Rode Affidavit.
10. Kent L. Rode told Messrs. Tegtmeier, Scheislog, and Magee that he would accept an alternate construction to the open cut for an 8-feet x 8-feet box culvert. Instead, Kent L. Rode would have a 107-feet x 66 inch (5.5 feet) diameter smooth steel culvert pipe be jacked and bored adjacent to and on the south side of the existing 4-feet x 6-feet box culvert in the railroad's overpass embankment on the southeast side of West Drive. See Kent L. Rode Affidavit.
11. The existing 4-feet x 6-feet box culvert and the 5.5-feet diameter culvert are in the natural waterway. See Kent L. Rode Affidavit.
12. The jack and bore method of installing the 5.5-feet diameter culvert will reduce the costs from \$330,000 to \$170,000, a savings of \$160,000. See Kent L. Rode Affidavit.
13. The jack and bore method of installing a culvert in a railroad bed is a standard method that is used which does not interfere with the operation of the railroad line. See Kent L. Rode, Matt Holly and Scott Dullard Affidavits.
14. The Iowa Northern Railway Company has its own standards for the use of the jack and bore method of installing culverts in its railroad beds, which will be used on JDD #6 & 56's project. See Kent L. Rode Affidavit.

15. Laser surveys will also be used on JDD #6 & 56's project to ensure that there will be no interference with the railroad line, because if the top of the track would move ¼-inch the jack and bore operation would be stopped. See Kent L. Rode, Tracy Holly and Scott Dullard Affidavits.
16. The jack and bore operation on the Iowa Northern Railway Company railroad will be at a depth of 15 to 16 feet. At that depth there is no expectation that there be any movement of the track, nor any interference with the use of the railroad line. See Kent L. Rode and Tracy Holly Affidavit.
17. Iowa Northern Railway Company has failed and refused to agree to, or to perform, the jack and bore method of installing the 5.5-foot diameter steel culvert. See Kent L. Rode Affidavit.
18. On August 23, 2016, the Joint Board of JDD #6 & 56 Resolved to proceed with the project, including the jack and bore method of installing the 5.5-foot diameter steel culvert. See Kent L. Rode Affidavit.

Attached to Defendants' Motion For Summary Judgment.

GOODWIN LAW OFFICE, P.C.

A handwritten signature in cursive script that reads "Robert W. Goodwin". The signature is written in dark ink and is positioned above the printed contact information.

Robert W. Goodwin, AT0002986

311 W. Lincoln Way, Suite 1

Ames, Iowa 50010-3317

(515) 232-7390

(515) 232-7396 (Fax)

E-mail: [goodwinlawoffice@fbx.com](mailto:goodwinlawoffice@fbx.com)

**ATTORNEY FOR**

**DEFENDANTS/RESPONDENTS**

IN THE IOWA DISTRICT COURT IN AND FOR FLOYD COUNTY

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|                                         |                      |
|-----------------------------------------|----------------------|
| IOWA NORTHERN RAILWAY COMPANY )         | CASE NO. EQCV031386  |
| )                                       |                      |
| Plaintiff/Petitioner, )                 |                      |
| )                                       |                      |
| vs. )                                   |                      |
| )                                       |                      |
| FLOYD COUNTY BOARD OF )                 | <b>DEFENDANTS'</b>   |
| SUPERVISORS, AND CERRO GORDO )          | <b>MEMORANDUM OF</b> |
| COUNTY BOARD OF SUPERVISORS, )          | <b>AUTHORITIES</b>   |
| Acting as Trustees for JOINT DRAINAGE ) |                      |
| DISTRICT NOS. 6 AND 56, )               |                      |
| )                                       |                      |
| Defendants/Respondents. )               |                      |

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The Defendants, Floyd County Board of Supervisors, and Cerro Gordo County Board of Supervisors, Acting as Trustees for Join Drainage District Nos. 6 and 56, submit the following Authorities in support of their Motion For Summary Judgment.

**Summary Judgment**

Summary Judgment is appropriate when there are no genuine issues of material facts and the moving party is entitled to judgment as a matter of law. Ia. R. Civ. P. 1.981, Phillips v. Covenant Clinic, 625 N.W.3d 714, 717 (Iowa, 2001).

**Railroad's On-Going Responsibility**

When a railroad line crosses a drainage district, the railroad line has a duty to put in a bridge or culvert to not interfere with the natural flow of surface water. This

responsibility for allowing the natural flow of water is not a static one but an on-going responsibility with respect to changed conditions and increased demand.

“Our supreme court construed an early version of section 468.11 as obligating the railroad company to build a new culvert or bridge over a planned drainage ditch improvement at its own expense even when ‘at or near’ this place there was a wooden box four by five feet through the embankment for the purpose of letting the water through.” *Mason City & Ft. Dodge Ry. Co. v. Bd. of Sup’rs*, 144 Iowa 10, 12, 121 N.W. 39, 39-40 (1909). The *Mason City* case sets out the expectation that a railroad company’s responsibility for allowing the natural flow of water to cross its embankments is not a static one; it does not cease after an initial improvement is built. The railroad company bears an ongoing responsibility to respect the public interest in the water course as changed conditions and increase use demand.

The court reasoned: “The increased volume of water and the improvement to carry it away are but the results of better drainage of tillable lands on either side of the track which the company was bound to anticipate.” *Id.* at 13, 121 N.W.2d at 40. *Chicago Cent. & Pac. R.R. Co. v. Calhoun Cnty. Bd. of Supervisors* (Iowa App., 2010) pp 14-15.”

“When a drainage improvement crossing the railroad’s right-of-way needs to be rebuilt or reconstructed, the board is responsible for drawing up plans for the rebuilding or reconstruction of the improvement and serving those plans on the railroad. *Id.* § 468.109. The railroad then has a duty to ‘build or rebuild the necessary culvert or bridge.’ *Id.* § 468.110. If the railroad refuses, the board ‘shall provide for the construction of the improvement’ and may file suit against the railroad to collect the cost.” *Id.* § 468.112. *Chi. Cent. & Pac. R.R. Co. v. Calhoun County Bd. of Supervisors* 816 N.W.2d 367, 375 (Iowa,2012).”

### **Authority of JDD 6 & 56 To Enter Railway Company Land**

JDD 6 & 56 has statutory authority to enter the Railway Company’s land to install the 5.5-feet diameter steel culvert.



Drainage District Boards will have an engineer prepare plans and specifications to construct or rebuild and reconstruct the necessary culvert or bridge where a drain, ditch or watercourse crosses the railroad company's right-of-way. The plans and specifications are to be served on the railroad company. Section 468.109, Code of Iowa.

The railroad company is to construct or rebuild and reconstruct the necessary culvert or bridge in accordance with the plans within thirty days. Section 468.109, Code of Iowa.

It is the duty of the railroad company to construct or rebuild and reconstruct the necessary culvert or bridge, at its own expense. Sections 468.110 and 468.111, Code of Iowa.

If the railroad company refuses to construct or rebuild or reconstruct the necessary culvert or bridge, the Board shall provide for the construction of the improvement. Section 468.112, Code of Iowa.

"If a railroad company does not comply with a notice provided in Section 468.109, the board shall provide for the construction of the improvement under the supervision of the engineer in charge of the improvement." (Emphasis added.) Section 468.112, Code of Iowa.

Section 468.112, Code of Iowa, necessarily authorizes the drainage district to go onto the railroad company's land to construct or rebuild and reconstruct the necessary culvert or bridge.

If the Board provides for the construction of the improvement, the railroad company shall be liable for the costs of the construction and reasonable attorney fees incurred by the Board. Section 468.112, Code of Iowa.

“Drainage district improvements must necessarily cross railroad rights-of-way. Sections 468.109 to 468.113 address how the cost of these intersections will be allocated between the district and the railroad. Iowa Code §§ 468.109-.113; *Chi. & Nw. Transp. Co. v. Webster Cnty. Bd. of Supervisors*, 880 F.Supp. 1290, 1295-96 (N.D.Iowa), *aff’d*, 71 F.3d 265 (8<sup>th</sup> Cir.1995). When a proposed improvement crosses a right-of-way, section 468.109 requires the board to serve notice on the railroad, indicating the nature and location of the improvement and the plans for how the improvement will cross the right-of-way. Iowa Code § 468.109; *Chi. & Nw. Transp. Co.*, 880 F.Supp. at 1295. The railroad company is then directed to construct such improvement according to said plans and specifications at the place designated, across its right of way, and to build an construct or rebuild and reconstruct the necessary culvert or bridge where any ditch, drain, or watercourse crosses its right of way, so as not to obstruct, impede, or interfere with the free flow of the water therein, within thirty days from the time of the service of such notice upon it.

Iowa Code § 468.109.

Should the railroad fail to construct the culvert or bridge within thirty days, the board may construct the intersection itself and collect the costs, including any necessary attorney’s fees, from the railroad in the appropriate district court. *Id.* § 468.112.” *Chi. Cent. & Pac. R.R. Co. v. Calhoun Cnty. Bd. of Supervisors*, 816 N.W.2d 367, 372 (Iowa, 2012).

“When a drainage improvement crossing the railroad’s right-of-way needs to be rebuilt or reconstructed, the board is responsible for drawing up the plans for the rebuilding or reconstruction of the improvement and serving those plans on the railroad. *Id.* § 468.109. The railroad then has a duty to ‘build or rebuild the necessary culvert or bridge.’ *Id.* § 468.110 . If the railroad refused, the board ‘shall provide for the construction of the improvement’ and may file suit against the railroad to collect the cost. *Id.* § 468.112.” (Emphasis added.) *Id.* at 816 N.W.2d 375.

The Iowa Supreme Court in the above highlighted portion of the quoted language necessarily recognizes that the drainage district has the implicit authority and duty to go onto the railroad company's land to provide for the construction of the improvement by the drainage district.

“The construction must be done ‘according to the plans and specifications prepared by the engineer’ of the drainage district and must be done within the time specified. *Id.* § 468.110. Should the railroad fail to construct the culvert or bridge within thirty days, the board may construct the intersection itself and collect the costs, including any necessary attorney’s fees, from the railroad. *Id.* §§ 468.109, .112.” Hardin Cnty. Drainage Dist. 55, Div. 3, Lateral 10 v. Union Pac. R.R. Co. 826 N.W.2d 507, 511 (Iowa, 2013).

Again, the Iowa Supreme Court in the above quoted language presumes the board has the implicit authority to go onto the railroad company's land to construct or rebuild and reconstruct the necessary culvert or bridge.

### **There Is No Pre-Emption**

The Plaintiff's Petition in paragraphs 45, 46 and 64 allude to the issue of there being Federal exemption of this matter under the Interstate Commerce Commission Termination Act, 49 U.S.C. § 105.01(b) (ICCTA). However, it is the Plaintiff who chose to file this action in Floyd County, Iowa District Court.

There is a presumption that there is no federal pre-emption.

“There is also a presumption that the ‘historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’ *Altria group*, 129 S.Ct. at 543 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). The presumption is relevant even when there is an express pre-emption



clause. That is because ‘when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily ‘accept the reading that disfavors pre-emption.’” *Id.* (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005)). Thus, the presumption operates both to prevent and to limit preemption.

This Court has explained that the presumption against preemption is applicable to ‘areas of law traditionally reserved to the states, like police powers and property law...’” (Emphasis added.) *Franks Inv. Co. LLC v. Union Pacific R. Co.* 593 F.2d 404, 407 (5<sup>th</sup> Cir., 2010).

“The Eleventh Circuit has held that ‘Congress narrowly tailored the ICCA pre-emption provision to displace only ‘regulation’, i.e., those state laws that may reasonably be said to have the effect of ‘manag[ing]’ or ‘govern[ing]’ rail transportation, ... while permitting the continued application of laws having a more remote or incidental effect on rail transportation.’ *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11<sup>th</sup> Cir. 2001). We find this interpretation of the ICCTA to be persuasive. The text of Section 10501(b), with its emphasis on the word regulation, establishes that only laws that have the effect of managing or governing rail transportation will be expressly preempted” *Id.* at 593 F.3d 410.

“As one Circuit Court of Appeals has observed, ‘the presumption against preemption is applicable to ‘areas of law traditionally reserved to the states, like police powers and property law[.]’” *Gordon v. new England Cent. R.R., Inc.* (D. Vt., 2017) p. 9.

Our present case involved property law and drainage law.

“Thus, according to the Board, state regulation is permissible if it passes a two-part test: (1) it is not reasonably burdensome, and (2) it does not discriminate against railroads. *See Maumee & W. ry. Corp.*, 2004 WL 395835, at \*2 (S.T.B. 2004) (denying request for declaratory order). This is a fact-intensive inquiry. For example, the Board has ruled that a state may take easements over rail lines when the facts show that doing so will not significantly interfere with the railroad’s ability to conduct business.” *New York Susquehanna v. Jackson* 500 F.3d 238, 253 (3<sup>rd</sup> Cir., 2007).

“As for the unreasonably burdensome prong, the most obvious component is that the substance of the regulation must not be so draconian that it prevents the

railroad from carrying out its business in a sensible fashion. In addition, as the *Green mountain* Court held, regulations must be settled and definite enough to avoid openended delays. *See* 404 F.3d at 643. The animating idea is that, while states may set health, safety, and environmental ground rules, those rules must be clear enough that the rail carrier can follow them and that the state cannot easily use them as a pretext for interfering with or curtailing rail service.” (Emphasis added.) *Id.* at 500 F.3d 254.

“We therefore apply the as-applied-preemption analysis to the Michigan statutes at issue. ‘[T]he touchstone [of this analysis] is whether the state regulation imposes an unreasonable burden on railroading.’ *Jackson*, 500 F.3d at 253. As summarized by the Third Circuit, the STB has found that a state regulation is permissible as long as ‘(1) it is not unreasonable burdensome, and (2) it does not discriminate against railroads.’ *Id.*; *see also Green Mountain*, 404 F.3d at 643. Regarding the unreasonable-burden prong, ‘the substance of the regulation must not be so draconian that it prevents the railroad from carrying out its business in a sensible fashion and ‘the regulations must be settled and definite enough to avoid open-ended delays.’” *Jackson*, 500 F.3d at 254. To pass the non-discrimination prong, a state regulation ‘must address state concerns generally, without targeting the railroad industry.’ *Id.* States retain their police powers, allowing them to create health and safety measures, but ‘those rules must be clear enough that the rail carrier can follow them and ... the state cannot easily use them as a pretext for interfering with or curtailing rail service.’ *Id.*

Under this analysis, state actions are not preempted merely because they reduce the profits of a railroad: ‘We doubt whether increased operating costs are alone sufficient to establish ‘unreasonable’ interference with railroad operations.’” *Barrois*, 533 F.3d at 335; *see also Fla. E. Coast Ry.*, 266 F.3d at 1338 n. 11”. (Emphasis added.) *Adrian & Blissfield R. Co. v. Village of Blissfield* 550 F.3d 533, 541 (6<sup>th</sup> Cir., 2008).

The jack and bore method of installing the 5.5-foot diameter steel culvert will not interfere with the operation of the railroad line. It is a standard practice and does not interfere with the operation of the rail line. To ensure that the jack and bore operation will not interfere with the operation of the railroad line, a laser survey will be present to stop the operation if the top of the rail line moves more than ¼-inch.



Requiring railroads to maintain culvers and bridges so as to not interfere with the natural flow of water does not discriminate against railroads.

Section 468.621, Code of Iowa, provides that “owners of land may drain the land in the general course of natural drainage ...”

It is established Iowa Law that downstream/servient land owners are obligated to not interfere with the natural flow of water onto their property. DeWitt v. DeWitt 147 N.W.2d 32, 33 (Iowa, 1966); Moody v. Van Wechel 402 N.W.2d 752, 757 (Iowa 1987), and Sabotka v. Sabotka (Iowa App., 2013) p. 5.

Sections 468.148 and 468.618, Code of Iowa, allow treble damages if the natural flow of water is obstructed.

Road authorities under Section 314.7, Code of Iowa, are obligated to not interfere with the natural flow of water.

Section 468.109, Code of Iowa, likewise, provides that railroads are to construct culverts and bridges where a ditch, drain, or watercourse crosses the right-of-way “so as not to obstruct, impede, or interfere with the free flow of the water.”

All parties are treated equally. None should interfere with the natural flow of water.

### **Conclusion**

The Defendants, Floyd County Board of Supervisors, and Cerro Gordo County Board of Supervisors, Acting as Trustees for Joint Drainage District Nos. 6 and 56, are

entitled to Summary Judgment dismissing the Plaintiff's Petition. The Iowa Northern Railway Company has a continuing obligation under Sections 468.109 - .112, Code of Iowa, to construct the 5.5-foot diameter steel culvert through its overpass bridge embankment on the southeast side of River Street. The Railway Company has failed and refused to construct the 5.5-foot diameter steel culvert.

The construction for the 5.5-foot diameter steel culvert will be done by the jack and bore method which will not interfere with the Railway Company's operation of its railroad line. Furthermore, a laser survey will be used during the jack and bore operation to stop the operation if the top of the rail line would move more than ¼-inch, thereby ensuring that the operation of the railroad line will not be interrupted.

There is no federal pre-emption because the jack and bore method will not interfere with the operation of the railroad line, and the requirement of not blocking the natural flow of water does not discriminate against the railroad.

Attached to the Defendants' Motion For Summary Judgment.

GOODWIN LAW OFFICE, P.C.

A handwritten signature in black ink, reading "Robert W. Goodwin". The signature is written in a cursive style with a large, stylized "R" and "G".

Robert W. Goodwin, AT0002986

311 W. Lincoln Way, Suite 1

Ames, Iowa 50010-3317

(515) 232-7390

(515) 232-7396 (Fax)

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**ATTORNEY FOR  
DEFENDANTS/RESPONDENTS**

IN THE IOWA DISTRICT COURT FOR FLOYD COUNTY

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|                                             |                               |
|---------------------------------------------|-------------------------------|
| IOWA NORTHERN RAILWAY COMPANY, )            |                               |
| Plaintiff/Petitioner, )                     | Case No. EQCV031386           |
| vs. )                                       |                               |
| FLOYD COUNTY BOARD OF SUPERVISORS, )        |                               |
| AND CERRO GORDO COUNTY BOARD OF )           | PLAINTIFF'S RESISTANCE TO THE |
| SUPERVISORS, Acting as Trustees for JOINT ) | DEFENDANTS' SUMMARY           |
| DRAINAGE DISTRICT NO. 6 AND 56, )           | JUDGMENT MOTION AND           |
| Defendants/Respondents. )                   | CROSS MOTION FOR SUMMARY      |
|                                             | JUDGMENT                      |

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The plaintiff, Iowa Northern Railway Company ("Iowa Northern"), resists the defendants' summary judgment motion and submits its own cross motion for summary judgment pursuant to Iowa R. Civ. Pro. 1.981. In support of Iowa Northern's right to relief as a matter of law, it states as follows:

1. Iowa Northern is entitled to summary judgment as the Federal Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10501(b), confers exclusive jurisdiction over this dispute in the Federal Surface Transportation Board. The ICCTA expressly preempts the defendants' attempts to forcibly install a culvert through Iowa Northern's property and rail facilities as well as payment of any costs of construction, attorneys' fees, or any other monetary compensation demanded from the railroad. The ICCTA also prohibits the defendants' claim for summary judgment under Iowa Code §§468.109 - 113.

2. In addition, a disputed fact exists as to whether Iowa Northern's railroad obstructs the natural flow of water. Even if so, summary judgment is precluded by a fact dispute as to whether the culvert acts to channel surface water or is being used as a design disguise in order to

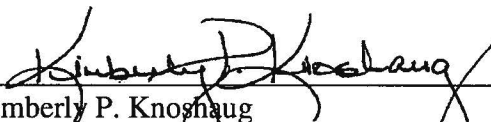
install a groundwater improvement project only for the benefit of surrounding land owners but at Iowa Northern's cost.

3. A Statement of Undisputed Facts is submitted concurrently with this Motion as required by Iowa R. Civ. Pro. 1.981 (8).

4. A supporting brief, as is also required by Iowa R. Civ. Pro. 1.981 (8) is also contemporaneously submitted.

WHEREFORE, the plaintiff, Iowa Northern Railway Company, respectfully requests that this Court deny the defendants' Motion for Summary Judgment, grant Iowa Northern's Cross Motion for Summary Judgment entering judgment in its, and for such other and further relief that is appropriate under the facts and circumstances of this case.

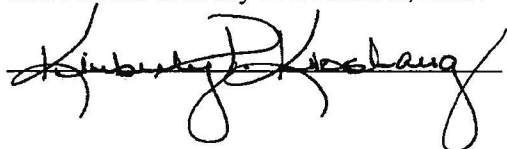
Respectfully submitted,

  
\_\_\_\_\_  
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KNOSHAUG, LLP  
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ATTORNEYS FOR THE PLAINTIFF

Proof of Service

The undersigned certifies that a copy of the foregoing instrument was served by EDMS on each of the attorneys of record listed below in the above entitled cause on the 13th day of December, 2019.





Robert W. Goodwin, Esq.  
311 W. Lincoln Way, Suite 1  
Ames, Iowa 50010-3317

ATTORNEY FOR THE DEFENDANTS

IN THE IOWA DISTRICT COURT FOR FLOYD COUNTY

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|                                           |   |                     |
|-------------------------------------------|---|---------------------|
| IOWA NORTHERN RAILWAY COMPANY,            | ) |                     |
|                                           | ) | Case No. EQCV030873 |
| Plaintiff/Petitioner,                     | ) |                     |
|                                           | ) |                     |
| vs.                                       | ) |                     |
|                                           | ) |                     |
| FLOYD COUNTY BOARD OF SUPERVISORS,        | ) | AFFIDAVIT OF        |
| AND CERRO GORDO COUNTY BOARD OF           | ) | T. SCOTT BANNISTER  |
| SUPERVISORS, Acting as Trustees for JOINT | ) |                     |
| DRAINAGE DISTRICT NO. 6 AND 56,           | ) |                     |
|                                           | ) |                     |
| Defendants/Respondents.                   | ) |                     |

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STATE OF IOWA     )  
                              )ss:  
COUNTY OF POLK    )

I, T. Scott Bannister, being first duly sworn on oath do depose and state as follows:

A.     **T. Scott Bannister Professional Background and Personal Knowledge of Statements in This Affidavit.**

1.     I am an attorney licensed to practice law in the State of Iowa.

2.     I am the secretary and general counsel for Iowa Northern Railway Company.

3.     I am the registered agent for Iowa Northern Railway Company.

4.     Due to my positions with the Iowa Northern, I have personal knowledge of the information in this Affidavit.

5.     Iowa Northern Railway Company is an Iowa corporation. It is a railroad common carrier operating in interstate commerce and is subject to the jurisdiction of the Surface Transportation Board, 49 U.S.C. §10501, *et. seq.* It is a Class III railroad.

6.     Iowa Northern operates approximately 225 miles of track from Manly, Iowa to Cedar Rapids, Iowa. Its track also includes a branch line running from Waterloo to Oelwein, Iowa and another branch line running from Forest City to Belmond, Iowa which is not directly connected to the

core Iowa Northern System but accessed by trackage rights over the Canadian Pacific ("CP") between Nora Springs and Garner, Iowa. The railroad transports a variety of commodities for its customers, including for example, ethanol, chemicals and other hazardous materials, wind turbine equipment, corn, oats, soybeans, intermodal containers, fertilizer, meat and tractors.

7. There are approximately four to five trains per day that cross Iowa Northern's track at Nora Springs, Iowa. In addition, the CP uses these tracks both for interchange of traffic with the Iowa Northern and as a Mason City By-Pass by moving CP traffic between Owatonna and Marquette over the Iowa Northern between Plymouth Junction and Nora Springs Junction. Between Iowa Northern and CP there may be up to seven to eight trains which operate over the tracks at Nora Springs each day.

8. The Iowa Northern objects to the installation of a culvert by the JDD as the proposed project usurps the sole authority of the Surface Transportation Board as well the railroad own internal workings and decision-making with respect to rail operations and safety procedures. It also attempts to regulate and dictate Iowa Northern's current construction, management, and operation of its own railroad as well as past construction, management, and operations.

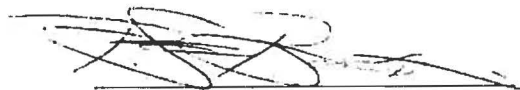
9. Requiring Iowa Northern to pay, as currently estimated, \$170,000.00 (but in all likelihood underestimated) for the culvert installation will have a negative economic impact on Iowa Northern. It would certainly divert funds already budgeted for operations and maintenance. Any additional attorneys', engineering, expert, interest, costs, or other monies the JDD seeks to collect from Iowa Northern could adversely impact its ability to continue to maintain its railroad operations or function.

10. In the event that the JDD's contractor attempts to construct a culvert using a jack

and bore method as intended and set forth in the JDD's engineering report, Iowa Northern cannot allow its trains or the trains of any other railroad to run over its Nora Spring tracks due to safety concerns and the dangers presented by such construction.

11. Such dangers could include collapse of the roadbed and/or surrounding embankment and material and adverse damage to the track and ties of the railway and nearby bridge structure No. 210.8 (especially considering that timber from the old trestle bridge is still embedded in the embankment). Such dangers could result in serious personal injury to Iowa Northern or CP employees, culvert construction workers, and any individuals within the vicinity. locomotives and freight cars and tank cars including the commodities contained in such cars could be damaged or destroyed. The rail lines could be disturbed, broken, or rendered unusable thereby preventing the free flow of interstate commerce. Property owned or occupied by nearby landowners could be damaged. A loss of train cargo could lead to environmental damages and claims. Lawsuits would likely be filed and Iowa Northern would almost surely be named as a defendant for failing to stop its train traffic.

12. The JDD has no right or authority to dictate that Iowa Northern continue to operate trains over its tracks its Nora Springs during construction of the proposed culvert. To do so may endanger the health and safety of the community of Nora Springs and of Iowa Northern, CP and project construction workers.



T. Scott Bannister

SUBSCRIBED and SWORN to before me this 13<sup>th</sup> day of December, 2019.



  
NOTARY PUBLIC IN AND FOR  
THE STATE OF IOWA





with Notice Pursuant to Section 468.109 dated June 22, 2016, marked Preliminary, Title Sheet Issue Date October 27, 2014, and the Joint Drainage District No. 6 & 56 Main No. 1 Open Ditch Improvements Project Plans, Title Sheet Issue Date August 22, 2016, Final Plans (marked as defendants' Exhibit D in support of their Motion for Summary Judgment).

5. My opinions are based upon my personal knowledge, my training, education, and experience as an engineer, and my work affiliation with the Iowa Northern Railway Company.

**B. The Construction of the Railroad in 1871.**

6. The Burlington, Cedar Rapids & Northern Railway constructed a railroad over the natural watercourse near Nora Springs in 1871. The railroad embankment runs in a northwesterly direction and crosses the natural watercourse 2,310 feet upstream from the outlet of the natural watercourse into the Shell Rock River.

**C. The Location of the Railroad and the Natural Waterway.**

7. The natural waterway passes through the Iowa Northern Railway in its natural position and has not been relocated by ditching, levees, or other manmade structures.

**D. The History of Iowa Northern's Railroad Ownership and its Current Operations.**

8. The BCR&N was consolidated into the Chicago, Rock Island & Pacific Railroad system, which operated the railroad until entering bankruptcy in 1980. The tracks were inactive for several years after bankruptcy until the Iowa Northern progressively re-opened the former BCR&N route between Cedar Rapids and Manly, Iowa starting in 1984.

9. Today, the Iowa Northern operates over 253 miles of track in northeast Iowa as a Class III railroad. Four to six trains use the Iowa Northern track in Nora Springs on a daily basis throughout the year. These four to six train movements include both Iowa Northern Railway trains, as well as Canadian Pacific Railway trains operating over the Iowa Northern Railway track

between Nora Springs and Plymouth, Iowa to reduce the number of trains operating through Mason City, Iowa.

E. **The Construction of Culvert 210.7 in Circa 1871.**

10. The BCR&N provided a structure to pass water through the railroad embankment at or near the location of the existing natural watercourse. No records exist indicating the exact year when Culvert 210.7 was constructed.

11. The main body of Culvert 210.7 is a single barrel stone box culvert that consists of two laid stone foundation walls and stone slab roof. Nearby stone structures constructed by the BCR&N have construction dates ranging from 1879 to 1889. Amongst structures that we have confirmed build dates on for BCRN line between Cedar Rapids and Manly, Iowa there are no new structures that were built of stone after 1900. At some point the culvert was lengthened with cast-in-place concrete. Based on photographic evidence, this occurred prior to 1944.

12. Mr. Rode's affidavit at p. 1, at an un-numbered paragraph, states that Culvert 210.7 was constructed in 1918 – 1920. Unless Mr. Rode can provide evidence otherwise, based on the construction practices of the predecessor railroad and photographs, it is my opinion that Culvert 210.7 was constructed in approximately 1871 or very shortly after the railroad opened. It was lengthened with cast-in-place before 1944.

F. **The Current Condition of Culvert 210.7.**

13. I first inspected Iowa Northern Railway Culvert 210.7 on November 11, 2013, and again on October 25, 2016. The culvert was also inspected by Mr. Mike Murdaugh, an inspector employed by SW Bridge Engineers, LLC, on July 8<sup>th</sup>, 2016. The purpose of these inspections was to determine whether Culvert 210.7 was functioning adequately by allowing the passage of the

natural watercourse through the Iowa Northern Railway embankment and maintaining the integrity of the railroad embankment.

14. The culvert is not in danger of collapse.

15. All three of these inspections determined that the Culvert 210.7 was functioning adequately as designed, which is to provide an opening through the Iowa Northern Railway embankment allow the free passage of the natural watercourse, and there is no indication that it will cease to function as designed for next three years. It meets all current safety regulations.

G. **The Railroad Bridge and West Drive.**

16. Iowa Northern Bridge 210.8 lies 30 feet to the northwest of Culvert 210.7. The primary purpose for Bridge 210.8 is to provide an opening for West Drive to pass underneath the railroad.

17. Bridge 210.8 was constructed in 1922 and replaced an existing timber trestle that previously carried the railroad over Primary Road 19, which was the name of West Drive at that time. Historic mapping of the Nora Springs area indicates that a roadway in the same general location as West Drive existed as early as 1895.

18. The current bridge is a single span bridge consisting of concrete encased steel beams resting on concrete abutments. The concrete abutments rest on spread footings without the use of foundation piles.

19. A timber trestle that the current bridge replaced is shown on the 1922 plans for the bridge. The 1922 plan shows that previous timber trestle extended at least 15 feet beyond each end of the current concrete bridge. Standard practice was and is to leave the timber piles in place after removing a timber bridge from service and burying it new fill.



**H. Flooding of West Drive – Lack of Information for Causation.**

20. The affidavits provide no examples of the flooding events on West Drive, nor do they indicate what constitutes a flood event on West Drive. There is no way to evaluate whether the flood events have a serious impact on the functionality of West Drive without a description of what is construed as a flood event. Without specific examples of flood events that substantially hindered the functionality of West Drive, it cannot be determined if the flood event was limited to the drainage of the natural watercourse, or if it was due to floodwaters backing up from the Shell Rock River. In the latter case the proposed drainage ditch will do nothing to reduce flooding on West Drive. Information defining what constitutes a flood event, how that event impacts the functionality of West Drive, and dates and descriptions of the flood events that have occurred are necessary to evaluate any claim of a flood event and any claim that the proposed project will affect flooding.

**I. The District Engineer's Report of February 25, 2014 (Exhibit B).**

21. In his 2014 report, the District's Engineer proposed three options to address the deterioration of Main No.1 tile due to the District's lack of maintenance. These three options are summarized as follows:

Option No. 1: This option would replace the section of Main No. 1 tile from West Drive to the existing outlet at South Hooker Avenue in-kind with an equivalent 18" pipe. This section of replacement would include the section of Main No. 1 tile that passes under Iowa Northern Bridge 210.8 and is subject to the provisions of the 1918 Agreement. This option also recommended cleaning silt from the open ditch at the downstream end of Main No. 1 tile and some cleaning of the natural waterway in addition to replacing the section of Main No. 1 tile. The Iowa Northern would not be responsible for the cost of this repair.

Option No. 2: This option would remove a section of Main No. 1 tile from West Drive to the existing outlet at South Hooker Avenue and replace it with an open ditch. This section of replacement would include the section of Main No. 1 tile that passes under Iowa Northern Bridge 210.8 and is subject to the provisions of the 1918 Agreement. This option



calls the installation of a large pipe or concrete box to carry water from the open ditch through the Iowa Northern Railway embankment. The District seeks to impose the cost of constructing a new pipe onto the Iowa Northern, as well as other additional fees and expenses.

Option 3: This option would replace the section of Main No. 1 tile from the West Drive to the downstream side of the Iowa Northern Railway embankment in-kind with an equivalent 18" pipe. This section of replacement would include the section of Main No. 1 tile that passes under Iowa Northern Bridge 210.8 and is subject to the provisions of the 1918 Agreement. From the downstream side of the Iowa Northern embankment to the existing outlet at South Hooker Avenue the existing Main No. 1 tile would be replaced with an open ditch. The Iowa Northern would not be responsible for the cost of this work.

**J. The District Engineer's Recommendation.**

22. In Section 6.0 of the District Engineers report, Mr. Rode recommended that the District approve and adopt Option No. 1. The report stated in part:

We believe the capacity of the Main No. 1 drainage system was adequate in its original state because of the natural surface relief of this watershed...The repair of the open ditch and tile as well as the cleanout of the surface drain will restore the efficiency and capacity of the district facilities with the least amount of regulatory complications and delays. The proposed repairs are considered to be of public benefit and are conducive to the public health, convenience or welfare.

**K. The District's Failure to Maintain No. No. 1.**

23. Historically, the District failed to maintain the original tile from 1918 through 1976 at which time the original tile was in such poor condition that it had to be replaced at the district's expense. In 1976 a section of Main No.1 tile was replaced, including the portion of Main No.1 tile under bridge 210.8. The existing 16" tile was replaced with an 18" tile. The reason for increasing the tile size to 18" was to avoid the cost of additional rock excavation. The 16" tile would have been at least 56 years old in 1976 and there is no evidence that at any time in that 56 year time period that the District performed any work to keep the tile in proper repair.

24. The District has not improved its track record for maintaining Main No.1 tile under Bridge 210.8 since 1976, allowing it to go without maintenance for over four decades. 25.

This lack of maintenance has allowed Main No.1 tile to deteriorate to the point that the

District's Engineer is once again calling for replacement of the drain tile under Bridge 210.8 under Option No. 1.

26. Section 2.1 of the Engineer's report describes the existing 18" tile as being blown out in multiple locations, blocked by silt, and overgrown with brush and trees. In the Section 2.2 of the same report the District's Engineer states that the capacity of Main No.1 tile appears to provide adequate drainage with good surface relief.

27. Main No.1 tile as constructed and properly maintained is capable of providing adequate drainage with surface relief. The District's Engineer states as much in his report, but the fact that Main No.1 tile has been in place for nearly a century without previous need for additional drainage relief also provides substantial evidence that Main No.1 tile is capable of providing adequate drainage. The only time that Main No.1 tile has not provided adequate drainage in the last 98 years is when the District's persistent failure to properly maintain Main No. 1 has resulted in blow outs, silt blockages, and excessive vegetation.

28. The failure of District to maintain Main No.1 tile is the reason Main No.1 tile is currently not capable of providing adequate drainage and requires replacement as proposed under Option No. 1.

L. **Option No. 2 is an Artificial Drainage Improvement Project and Is Not Necessary to Drain the Natural Flow of Water Through the Railroad's Right of Way.**

29. Option 2 No. 2 is a groundwater drainage improvement project. It functionally replaces the existing drainage tile used to drain certain non-railroad lands by artificially channeling the flow of this groundwater, as well as surface water, via an open ditch through a pipe installed through Iowa Northern's right of way.

30. The proposed open drainage ditch under Option No. 2 is at least four feet lower than the existing natural waterway. The reason for the low streambed elevation of the proposed option ditch is to provide adequate artificial groundwater drainage.

31. Absent this intentional open ditch design that forces groundwater drainage through the right of way, the railroad does not obstruct the natural flow of the waterway since the culvert functions to channel surface water through the railroad embankment.

32. In other words, Option No. 2 is not necessary to maintain the otherwise natural flow of water through Iowa Northern's embankment.

**M. Option No. 2 Destroys Portions of the Tile Subject to the 1918 Agreement.**

33. The conversion of the lower section of Main 1 to an open ditch drainage system in accordance to Option No. 2 will require the removal of approximately 830 feet of the existing 18" drain tile from its existing outlet downstream of Iowa Northern Railway embankment, up under Iowa Northern Bridge 210.8, to a point on the upstream side of Iowa Northern Bridge 210.8.

34. This section of 18" drain tile to be removed includes a portion of drain tile that is subject to the 1918 Agreement.

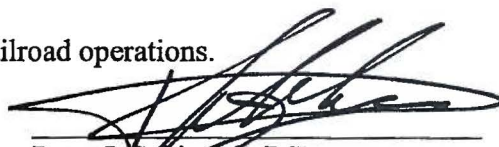
**N. Risks of Jacking and Boring the Pipe.**

35. The site conditions are challenging for the jack and bore method and installation by this method could result in damage to the railway due to the presence of timber and existing stone culvert, and such damage will delay or cease railway operations resulting in financial damage to the Iowa Northern Railway.

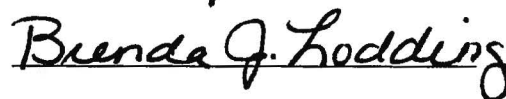
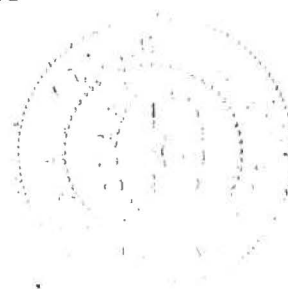
36. The 1922 plans for Iowa Northern Bridge 210.8 indicate that a timber trestle was in place within the embankment in close proximity to both Bridge 210.8 and Culvert 210.7.

37. Jack and bore equipment cannot cut through the large timbers that are used for timber trestle construction and the jack and bore operation cannot continue until the large timber is removed. If the boring auger cannot clear the timber, then the timber must be removed by having a laborer enter the partially installed pipe to cut away and remove the timber by hand, which is a dangerous and time consuming process. If the timber cannot be clear by hand, the partially installed pipe is abandoned in place and another attempt to jack and bore a new pipe is made adjacent to the first.

38. If no suitable location for jack and bore installation is found, the cut and cover method would be used. This would cause disruption of railroad operations.

  
Peter J. Schierloh, P.E.

SUBSCRIBED and SWORN to before me this 12<sup>th</sup> day of May, 2017.

  
NOTARY PUBLIC



IN THE IOWA DISTRICT COURT IN AND FOR FLOYD COUNTY

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|                                         |                             |
|-----------------------------------------|-----------------------------|
| IOWA NORTHERN RAILWAY COMPANY )         | CASE NO. EQCV031386         |
| Plaintiff/Petitioner, )                 |                             |
| vs. )                                   |                             |
| FLOYD COUNTY BOARD OF )                 | <b>DEFENDANTS' RESPONSE</b> |
| SUPERVISORS, AND CERRO GORDO )          | <b>TO PLAINTIFF'S</b>       |
| COUNTY BOARD OF SUPERVISORS, )          | <b>RESISTANCE TO</b>        |
| Acting as Trustees for JOINT DRAINAGE ) | <b>DEFENDANTS' MOTION</b>   |
| DISTRICT NOS. 6 AND 56, )               | <b>FOR SUMMARY JUDGMENT</b> |
| Defendants/Respondents. )               | <b>AND RESISTANCE TO</b>    |
|                                         | <b>PLAINTIFF'S CROSS</b>    |
|                                         | <b>MOTION FOR SUMMARY</b>   |
|                                         | <b>JUDGMENT</b>             |

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COME NOW, the Defendants/Respondents, Floyd County Board of Supervisors, and Cerro Gordo County Board of Supervisors, Acting as Trustees for Joint Drainage District Nos. 6 and 56, in Response to Iowa Northern Railway Company's (Railroad) Resistance To The Defendants' Motion For Summary Judgment, and in Resistance To The Plaintiff's Cross Motion For Summary Judgment, and state as follows:

Railroad's On-Going Responsibility

1. The Railroad has an on-going duty and responsibility to install a bridge or culvert to not interfere with the free flow of water. Chi. Cent. & Pac. R.R. Co. v. Calhoun County Bd. of Supervisors (Iowa App., 2010) p. 15.

The Plaintiff Railroad makes no recognition of its on-going duty to install a culvert to not interfere with the free flow of water.



The Railway's duty under Section 468.109, Code of Iowa, is in accordance with the plans, specifications, plat and profile prepared by the engineer appointed by the board "to build and construct or rebuild and reconstruct the necessary culvert or bridge where any ditch, drain, or watercourse crosses its right-of-way, so as not to obstruct, impede, or interfere with the free flow of water therein". (Emphasis added.)

The plans, specifications, plat and profile of JDD 6 & 56's engineer provides for the free flow of water through a 5.5-foot diameter smooth steel culvert to the open ditch improvement.

Peter J. Schierloh's Affidavit on page 8 incorrectly assumes the concern is with the natural flow of water. Instead, Section 468.109, Code of Iowa, places a duty on the Railway to install the culvert for the "free flow of water" in accordance with the plans and specifications of the drainage district's engineer.

The Railway has failed and refused to install the specified 5.5-foot diameter culvert. Therefore, pursuant to Section 468.112, Code of Iowa, JDD 6 & 56 "shall provide for the construction of the improvement".

"The construction must be done 'according to the plans and specifications prepared by the engineer' of the drainage district and must be done within the time specified. Id. § 468.110. Should the railroad fail to construct the culvert or bridge within thirty days, the board may construct the intersection itself and collect the costs, including necessary attorney fees, from the railroad. Id. § 468.109, .112" Hardin Cnty. Drainage Dist. 55, Div. 3, Lateral 10 v. Union Pac. R.R. Co. 826 N.W.2d 507, 511 (Iowa, 2013).

"The railroad company is then directed to construct such improvement according to said plans and specifications at the place designated, across its right-of-way, and

to build and construct or rebuild and reconstruct the necessary culvert or bridge where any ditch, drain or watercourse crosses its right-of-way, so as not to obstruct, impede, or interfere with the free flow of water therein, within thirty days from time of service of such notice upon it.” (Emphasis added.) Chi. Cent. & Pac. R.R. Co. v. Calhoun Cnty. Bd. of Supervisors, 816 N.W.2d 367, 372 (Iowa, 2012).

“Of course, a railroad company may not be required to widen or deepen a watercourse through its right-of-way at its own expense any more than this may be expected of a landowner, but the public has the undoubted authority to widen and deepen such a course, even though this shall render necessary the rebuilding of the bridge or culvert, and, when this is done the expense is a proper one for the railway company to bear ... ‘the railroad company is bound to make and keep its crossings and at its own expense in such condition as shall meet all the reasonable requirements of the public as changed conditions and increased use may demand’.” (Emphasis added.) Mason City & Ft. D. R. Co. v. Bd. of Sup’rs of Wright County 121 N.W. 39, 40 (Iowa, 1909).

#### Board’s Duty and Discretion To Determine Drainage Work

2. Section 468.126(1), Code of Iowa, places a mandatory duty on the board to keep the drainage district in repair.

“[T]he board has the duty to keep the improvement in repair.” Hickman v. Franklin County Auditor 514 N.W.2d 431, 435 (Iowa, 1994).

That duty is discretionary. Id. at 514 N.W.2d 441.

The Board may order a repair or an improvement.

“Instead of repairing an old improvement, the board may elect to construct a new improvement, so long as more rigorous procedural requirements are met.” Hardin Cnty. Drainage Dist. 55., Div. 3, Lateral 10 v. Union Pac. R.R. Co. 826 N.W.2d 507, 510 (Iowa, 2013).

An abuse of discretion can only exist if the Board’s action was illegal, fraudulent, or in excess of jurisdiction. Johnson v. Monona-Harrison Drainage Dist. 68 N.W.2d 517,

523 (Iowa, 1955), Allen v. Webster County Board of Supervisors No. 8-077/07-0876, Court of Appeals, Filed March 26, 2008, p.8.

3. In the first 8 pages of his Affidavit, Peter J. Schierloh questions the Board's decision to have an open ditch improvement project. His questions are immaterial in this case because he is challenging the discretion of the Board. The Plaintiff's Petition does not raise the issue of abuse of discretion by the Board, nor does the Plaintiff's Motion raise any issue of abuse of discretion by the Board.

Dispute of Material Facts

4. The Affidavit of T. Scott Bannister does not raise issues of fact. Instead, it only asserts speculation and conjecture without any facts to support the speculation and conjecture. Mr. Bannister's Affidavit states "dangers could include collapse of the roadbed ... could result in serious personal injury ... rail line could be disturbed, broken, rendered useless ... could lead to environmental damages and claims". (Emphasis added.) That is only speculation and conjecture.

Iowa Rule of Civil Procedure 1.981(5) provides that "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence ..." (Emphasis added.)

Testimony that is speculation and conjecture is not admissible as evidence. Speculation and conjecture is not sufficient to generate a material fact question.



“However, an inference based upon speculation or conjecture does not generate a material factual dispute to defeat summary adjudication.” Butler v. Hoover Nature Trail, Inc. 530 N.W.2d 85, 88 (Iowa App. 1994).

“Speculation is not sufficient to generate a material fact question.” E. Iowa Plastics, Inc. v. Hartford Cas. Ins. Co. 922 N.W.2d 106 (Table) p. 2 (Iowa App. 2018).

“Thus ‘speculation is not sufficient to generate a genuine issue of fact.’” Banwart v. 50th St. Sports 910 N.W.2d 540, 545 (Iowa, 2018).

Also, Peter J. Schierloh, on page 9 of his Affidavit, speculates that there may be timber in the railroad embankment that would need to be removed.

As Kent L. Rode states in his Supplemental Affidavit:

- The elevation of the bottom of the 4-feet x 6-feet box culvert built in 1871 is Elev. 1045
- The elevation of the bottom of the 5.5-foot diameter steel culvert will be 1041.7, 3.3 lower than the existing box culvert.
- It is highly unlikely that any timber were placed in the railroad embankment beside or below the box culvert when the trestle bridge was replaced in 1922.
- Even if timber is encountered, it will be bored through just as any rock will be bored through.
- There will be no interruption of the Railroad’s operation. When trains are to pass over the area where the jack and bore operation is to occur, flagmen will stop the jack and bore operation for the train to pass.
- The jack and bore method to be used is the Railroad’s own specification, which shows that the jack and bore method will not damage the Railroad’s property.

#### No Federal Pre-Emption

5. There is no Federal Pre-Emption in this case. If there were a Federal Pre-Emption, the Plaintiff would not have filed its Petition here in Floyd County, Iowa District Court.

Furthermore, the jack and bore method being used to install the 5.5-foot diameter smooth steel culvert will not interfere with the Railroad's continued, uninterrupted use of its line. Federal Pre-Emption only applies if the action is so draconian that it prevents the Railroad from carrying on its business. Also, an increase in operating costs is not an unreasonable interference with Railroad operations. Adrian and Blissfield R. Co. v. Village of Blissfield 550 F.3d 533, 541 (6th Cir., 2018), New York Susquehanna v. Jackson 500 F.3d 238, 253 (3rd Cir., 2007).

#### Attachments

6. Attached hereto are the Supplemental Affidavit of Kent L. Rode, the Affidavit of Mayor Randy Hassman, and the Affidavit of the Mayor and City Council of Nora Springs, Iowa.

Also attached are a Statement of Undisputed Material Facts and Memorandum of Authorities.

#### Conclusion

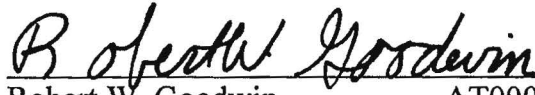
7. The Plaintiff's Affidavits of T. Scott Bannister and Peter J. Schierloh do not generate a genuine issue of fact because they are based on speculation and conjecture. The Railway has failed and refused to install the 5.5-foot diameter smooth steel culvert as required under Section 468.110, Code of Iowa. JDD 6 & 56, therefore, has authority to install the 5.5-foot diameter culvert pursuant to Section 468.112, Code of Iowa.



The jack and bore method of installation of the 5.5-foot diameter culvert will be used to ensure that there is no interference with the Railway's operation of its rail line.

WHEREFORE, the Defendants Renew their Motion For Summary Judgment and ask the Court to deny the Plaintiff's Motion For Summary Judgment.

GOODWIN LAW OFFICE, P.C.



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Ames, Iowa 50010-3317

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**ATTORNEY FOR**

**DEFENDANTS/RESPONDENTS**

Original: E-filed.

E-copies to:

R. Jeffery Lewis

Kimberly P. Knoshaug

Lewis, Webster, Van Winkle & Knoshaug, L.L.P.

400 Locust Street, Suite 380

Des Moines, IA 50309

**Attorney for Plaintiff/Petitioner**

**CERTIFICATE OF FILING AND SERVICE**

The undersigned certifies that the foregoing instrument was electronically filed with the Clerk of Court, and electronically served on all attorneys of record, by using the electronic filing system on December 20, 2019.

Signature /s/Joni C. Rentschler

IN THE IOWA DISTRICT COURT IN AND FOR FLOYD COUNTY

IOWA NORTHERN  
RAILWAY COMPANY

Plaintiff/Petitioner

**VS.**

FLOYD COUNTY BOARD OF  
SUPERVISORS, AND CERRO GORDO  
COUNTY BOARD OF SUPERVISORS,  
Acting as Trustees for JOINT DRAINAGE  
DISTRICT NOS. 6 AND 56,

## Defendants/Respondents

Case No. EQCV031386

**SUPPLEMENTAL  
AFFIDAVIT OF  
KENT L. RODE**

STATE OF IOWA        )  
                              ) ss:  
FLOYD COUNTY         )

I, Kent L. Rode, being first duly sworn upon my oath, do hereby depose and state as follows:

This Affidavit supplements my Affidavit dated November 8, 2019, which was filed November 25, 2019 with Defendant's Motion For Summary Judgment.

I have read the depositions of T. Scott Bannister and Peter J. Schierloh, filed with the Iowa Northern Railway Company's (Railway) Resistance To Defendants' Motion For Summary Judgment and its Cross Motion For Summary Judgment.

The jack and bore method of installing the 5.5-foot diameter smooth steel culvert pipe will be done in accordance with the Railway's own specifications for jack and bore operations on their property. Attached are copies of portions of the Project Manual for

Open Ditch Improvements which incorporates pertinent portions of the Measurement and Payment Specifications describing the required Track Monitoring, pertinent portions of the Contractor's Insurance Requirements, and pertinent portions of the Iowa Northern Railway Company Standard Specifications for Boring and Jacking and Casing Pipe, which are attached to the Defendants' Answer as Exhibit A.

The Railway's Standard Specifications For Boring and Jacking and Casing Pipe do not in any way indicate that any damage will be done to the Railway's property or to its operations if the work is done in accordance with its standard specification. The jack and bore work on the Railway's property in regard to JDD #6 & 56 Project will be done in accordance with the Railway's Standard Specification, and there will be no damage to the Railway's property nor any interference with the Railway's operation of its rail line, as stated in my previous Affidavit and the Affidavits of Scott Dullard and Tracy Holly.

A flagman may be present on the rail line during the jack and bore operation ensuring safety of the construction personnel and track. When a train approaches the work area, the flagman will have all work with the jack and bore operation stopped until the train passes through the area.

T. Scott Bannister, in his Affidavit, speculates that various things might happen. However, when the work is done in accordance with the Railway's own standard specifications, there will be no damage to the Railway's property nor any interference with the Railway's operation of its rail line. As previously stated and as is shown in the Track Monitoring Specification in Exhibit A, if the laser survey detects more than a ¼-inch movement in the rail line, the jack and bore operation will be stopped so that there is

no damage to the Railway's property, and no interference with the Railway's operation of its rail line. The jack and bore operation will be 15 to 16 feet below the rail line. It is highly unlikely that there will be any movement of the rail line from the jack and bore operation at that depth.

Peter J. Schierloh, on page 9 of his Affidavit, speculates that the jack and bore operation might encounter timber in the railroad embankment. The jack and bore method will bore through any timber just as it will bore through any other obstruction, such as rock, that might be encountered as described in the Railway's Specifications. It is very common to encounter obstructions during the boring process and large diameter casing pipes such as this allow easy access for the cutting and removal of the obstruction.

Furthermore, the jack and bore operation will be approximately 3.3 feet below the existing 4-feet x 6-feet block box culvert and on the south side of it which is on the opposite side from where the timber piles are speculated to potentially exist and some 50 feet away. It is highly unlikely that any timber from the removal of the timber trestle bridge in 1922 was put in the existing embankment below and past the existing box culvert that was constructed in 1871. Regardless, if any timber or rock is encountered, it will be bored through as a part of the jack and bore operation.

The Railway line crosses the path of the natural watercourse. The Joint Board of JDD #6 & 56, on September 3, 2011, appointed an engineer to consider how to best provide drainage for the landowners in JDD #6 & 56. On June 24, 2014, the Joint Board of JDD #6 & 56 approved an open ditch improvement with a culvert through the railroad



embankment southeast of the Railway's overpass bridge over West Drive to provide improved drainage as desired by the landowners of the district.

The existing tile is inadequate because it is too shallow and too small to handle the amount of water that drains from the upstream area. The elevation of the existing tile under the overpass bridge over West Drive is at approximate Flowline Elev. 1043, which is very shallow. The 4-feet x 6-feet box culvert built in 1871 is not adequate during heavy rains to provide drainage without flooding the adjacent road, West Drive, in Nora Springs, Iowa. The elevation of the bottom of the 4-feet x 6-feet box culvert is Elev. 1045. It is too small and too high to serve any other purpose than providing an overflow during times of heavy rains.

The improvement of an open ditch is necessary to provide adequate drainage for the landowners in JDD #6 & 56. A properly constructed open ditch needs sufficient depth to allow field tiles to discharge their waters through the banks of the open ditch and above the normal depth of flow of water in the open ditch.

As the engineer for JDD #6 & 56, I prepared the plans, specifications, plat, and profile for the improvement project approved by the Joint Board on June 24, 2014. The plans and specifications provide for the installation of a 5.5-foot diameter smooth steel culvert to have free flow of water through the railroad embankment. The elevation of the bottom of the open ditch at the location of the existing 4-feet x 6-feet box culvert is Elev. 1042.2. The elevation of the bottom of the 5.5-foot diameter smooth steel culvert is to be Elev. 1041.7, or 0.5-feet lower than the bottom of the new open ditch to ensure the free flow of water in the 5.5-foot diameter culvert and through the railroad embankment.

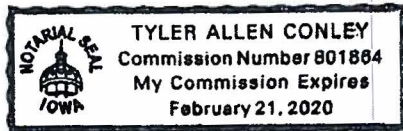


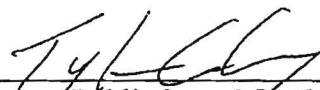
A picture of the inside of the existing 4-feet x 6-feet block box culvert is attached. It is undersized based on today's design standards. As can be seen on the attached General Culvert Design Sheet, the highlighted Inlet Control Headwater (I.C. HW) elevations for all storm events but the 2yr-48 hour even are higher than the West Drive roadway surface elevation of approximately 1048.0. As shown here and as documented by the City of Nora Springs, Iowa staff, water flows from the west side to the east side of the Iowa Northern Tracks overtop of the roadway surface of West Drive at the overpass bridge during all but the smallest of rain events. This is not acceptable or safe for the traveling public.

Dated this 19<sup>th</sup> day of December, 2019.

  
Kent L. Rode, P.E.

Subscribed and sworn to me by Kent L. Rode on this 19<sup>th</sup> day of December, 2019.



  
Notary Public in and for the State of Iowa.

Attached to Defendants' Response/Resistance.

# JOINT DRAINAGE DISTRICT NO. 6 & 56

## FLOYD & CERRO GORDO COUNTY, IOWA

Project Manual For: Open Ditch Improvements

2016

**Owner:**

Floyd County Board of Supervisors as Trustees  
101 S Main St. Suite #303  
Charles City, IA, 50616  
Project Number: 116480

**Owner:**

Cerro Gordo County Board of Supervisors as Trustees  
220 N Washington Ave.  
Mason City, IA, 50401  
Project Number: 116480

ISG

ARCHITECTURE

ENGINEERING

+

ENVIRONMENTAL

+

PLANNING

EXHIBIT A

**19. GEOTEXTILE FABRIC:**

- a. Measurement by square yard of specified material furnished and properly placed as shown on the drawings.
- b. Includes all labor, tools, material and equipment required for placement of geotextile fabric on all earth surfaces under the erosion stone as shown on the drawings.
- c. Payment: Unit price bid per square yard placed.

**20. CULVERT, CMP, 24" DIA.**

- a. Measure in lineal feet along centerline of newly furnished pipe. Fractions of feet disregarded.
- b. Includes all labor, tools, material and equipment required to installation new pipe, backfilling, shaping and miscellaneous associated work as required to complete the work.
- c. Includes necessary coupling bands and connections.
- d. Payment: Unit price per linear foot installed.

**22. CULVERT, SMOOTH WALL STEEL PIPE, 7/8" WALL, JACKED AND BORED, 66" DIA.**

- a. Refer to Appendix for Iowa Northern Railway Company Standard Specifications for Boring and Jacking and Casing Pipe.
- b. Measurement by lineal feet to the nearest foot along centerline of steel pipe installed under the Iowa Northern Railway.
- c. Includes all labor, tools, equipment and material required to complete the work in compliance with the plans and construction notes.
- d. Payment: Unit price bid per foot installed.

**23. RAILROAD PROTECTIVE LIABILITY INSURANCE**

- a. Refer to Appendix for Contractor's Insurance Requirements
- b. Measured per completed job.
- c. Includes all work required in obtaining Railroad Protective Liability Insurance for work within the Iowa Northern Railway Right-of-Way.
- d. No work is anticipated within 25 feet of the main track centerline, therefore the use of flaggers is not anticipated.
- e. Payment: Lump Sum

**23. TRACK MONITORING**

- a. Measured per completed job.
- b. Includes all labor, tools, equipment and material required to complete the track monitoring.
- c. The top of rail shall not permanently deflect more than ¼ inch vertical or horizontal.
- d. Targets shall be placed on the rails to monitor track deflection. Track monitoring shall not require track access other than to place the track monitoring targets. Monitoring targets shall be placed that monitoring is possible when a train is present. However, monitoring during the passing of a train is not required as the train will temporarily deflect the track.
- e. Adhesive backed reflective targets may be attached to the side of the rail temporarily. Targets should be removed once monitoring phase is complete.
- f. If the top of rail does deflect more than ¼ inch, all operations shall stop until the matter is resolved. Provide established contingency plan, in the event of ground loss and/or the rail deviates ¼ inch vertical or horizontal.
- g. Establish a bench mark in the vicinity of the construction. Establish locations for shooting elevations on the top of rail at each area of construction.
- h. Example locations for shooting rail elevations would be at:
  - At the centerline of an under track crossing.
  - At outside edges of the crossing.
  - At multiple locations from the crossing/excavation edge but no less than 10, 20, 30, 40, and 50 feet from the crossing.



- i. Shots shall be multiple times daily and recorded in a field log book dedicated for this purpose. Copies of these field log entries can be made available to all concerned parties upon request at any time during construction.
- j. Any excavation, holes or trenches on the Railroad property shall be covered, guarded and /or protected. Handrails, fence, or other barrier methods must meet OSHA and FRA requirements.
- k. Temporary lighting may also be required by the Railroad to identify tripping hazards to train crewmen and other Railroad personnel.
- l. Payment: Lump Sum.

**END OF SECTION**

## CONTRACTOR'S INSURANCE REQUIREMENTS

Iowa Northern Railway Company (IANR) is named as beneficiary on contractor provided insurance policies.

Contractor shall, at its sole cost and expense, procure and maintain during the life of this Agreement the following insurance coverage on behalf of Iowa Northern Railway Company and Contractor shall ensure that Iowa Northern Railway Company is named by each insurance carrier as a 'named insured' in each policy:

1. **Commercial General Liability Insurance.** This insurance shall contain broad form contractual liability with a single limit of at least **\$5,000,000 each occurrence or claim** and an **aggregate limit of at least \$10,000,000.** Coverage must be purchased on a post 1998 ISO or equivalent form, including but not limited to coverage for the following:

- Bodily injury including death and personal injury.
- Property damage.
- Fire legal liability (Not less than the replacement value of the portion of the premises occupied).
- Products and completed operations.

2. **Worker's Compensation and Employers Liability** insurance including but not limited to:

- Contractor's statutory liability under the worker's compensation laws of the State of Iowa.
- Employer's Liability (Part B) with limits of at least **\$2,000,000 each accident, \$1,000,000 disease limit, \$2,000,000 each employee.**



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If Contractor is self-insured, evidence of state approval must be provided along with evidence of excess worker's compensation coverage.

3. **Umbrella or Excess Policies.** In the event Contractor utilizes Umbrella or excess policies, these policies shall "follow form" and afford no less coverage than the primary policy.

4. **All Risk Property** insurance (including Flood and Quake) covering all betterments, and improvements on the premises and all appurtenances thereof in an amount not less than their replacement value.

5. **Other Requirements:**

a. Any punitive damage exclusion must be deleted which deletion shall be indicated on the certificate of insurance.

b. Contractor agrees to waive its right of recovery, and its insurers, through policy endorsement, agree to waive their right of subrogation against Iowa Northern Railway Company. Contractor further waives its right of recovery, and its insurers also waive their right of subrogation against Iowa Northern Railway Company for loss of its owned or leased property or property under its care, custody and control. Contractor's insurance shall be primary with respect to any insurance carried by Iowa Northern Railway Company. All waivers of subrogation shall be indicated on the certificate of insurance.

c. All policy(s) required above (excluding Workers Compensation) shall provide severability of interests and shall name Iowa Northern Railway Company as insured. **Severability of interest and naming Iowa Northern Railway Company as insured shall be indicated on the certificate of insurance.**

d. Prior to commencement of construction, Contractor shall furnish to Iowa Northern Railway Company original certificate(s) of insurance evidencing the required coverage, endorsements, and amendments. The certificate(s) shall contain a provision that obligates the insurance company(ies) to notify Iowa Northern Railway Company in writing of any cancellation or material alteration. **Upon request from Iowa Northern Railway Company a certified duplicate original of any required policy shall be furnished.**

e. Any insurance policy shall be written by a reputable insurance company acceptable to Iowa Northern Railway Company or with a current Best's Insurance Guide Rating of A- and Class VII or better, and authorized to do business in the State of Iowa.

f. Contractor **WARRANTS** that this Agreement has been thoroughly reviewed by Contractor's insurance agent(s)/broker, who have been instructed by Contractor to procure the insurance coverage, required by this Agreement and acknowledges that Contractor's insurance coverage will be primary.

g. The fact that insurance is obtained by Contractor shall **not** be deemed to release or diminish the liability of Contractor, including, without limitation, liability under the indemnity provisions of this Agreement. Damages recoverable by Iowa Northern Railway Company and Iowa Northern Railway Company shall **not** be limited by the amount of the required insurance coverage.

**IOWA NORTHERN RAILWAY COMPANY  
STANDARD SPECIFICATIONS FOR  
BORING AND JACKING AND CASING PIPE**

**PART 1 GENERAL**

**Description of Work**

- A. Boring and jacking installation of casing pipe – Work includes the excavation of boring and receiving pits, any required sheeting, shoring, and bracing, dewatering, and the boring and jacking of a casing pipe.
- B. Boring and jacking installation of carrier pipe – Work includes the excavation of boring and receiving pits, any required sheeting, shoring, and bracing, dewatering, and the boring and jacking of a carrier pipe.
- C. Prior to any Open cut installations, a written request shall be submitted to the Office of Engineering of the Iowa Northern Railway Company (IANR). Open cut installation of casing pipe – Work includes any required sheeting, shoring, and bracing, dewatering, and the excavation and trench installation of a casing pipe by open cut methods.
- D. All water mains, force mains, and any other pressurized carrier pipe with the exception of natural gas lines, shall use ductile iron pipe (DIP) as the carrier pipe within the IANR Right of Way. Revisions to this shall be a case by case review.
- E. On a case by case basis - Storm sewers may use the casing pipe as the carrier pipe. Plans shall be submitted to the Engineering Department of the IANR for approval.

**Submittals**

- A. Submit plan for boring and jacking operation to the IANR Engineering Office, including backfill methods within the casing pipe if required.
- B. Submit plan for dewatering operation to the IANR Engineering Office.
- C. Submit certificate of compliance indicating the materials incorporated into the Work comply with the Contract Documents.
- D. Submit Shop Drawings on carrier pipe support systems.
- F. Submit pipe and casing manufacturers' recommendation for casing spacer placement.

**Delivery, Storage and Handling**

- A. Store excavated material in locations which will minimize the interference with operations, minimize environmental damage, and protect adjacent areas from flooding, runoff and sediment disposition.

**Scheduling and Conflicts**

- A. Work shall be scheduled so as to not have disruption of IANR Train service.



**Special Requirements**

- A. Notify the Engineer immediately if contaminated soils, historical artifacts, or other similar such conditions are encountered.
- B. All Work and materials incorporated shall conform to all applicable local, state, and federal requirements.

**PART 2 PRODUCTS**

**Casing Pipe**

- A. The casing type and characteristics shall be the following unless otherwise noted in the Contract Documents.

1. Casing pipe: Welded steel pipe ASTM A-139, Grade B, with minimum 35,000 psi (241,325 kPa) yield strength.
2. The encasing pipe shall be clean and coated, on the outside, with two coats of coal tar paint, Kopper "Bitumastic Super Service Black", Mobile "High-Build Bituminous Coating 35-J-10", Tnemec "46-465 HB Tnemecol", or equivalent. 4-mil coat thickness.
3. Unless noted otherwise on the Plans, steel casing pipe shall have a minimum nominal diameter:
  - a. For carrier pipe sizes 12 inches and larger: 2 inches larger than the bell OD of the carrier pipe.
  - b. For carrier pipe sizes less than 12 inches: twice the carrier pipe nominal diameter.
  - c. Wall thicknesses shall conform to following table:

| Casing Diameter<br>(inches) | Minimum Casing Pipe<br>Wall Thickness (inches) |
|-----------------------------|------------------------------------------------|
| 8 - 12                      | 0.188                                          |
| 14 - 16                     | 0.250                                          |
| 18                          | 0.250                                          |
| 20 - 22                     | 0.3125                                         |
| 24 - 26                     | 0.375                                          |
| 28 - 30                     | 0.375                                          |
| 32 - 34                     | 0.4375                                         |
| 36 - 48                     | 0.5                                            |

- d. Larger casing pipe may be substituted at no additional cost to the Owner.
- B. If casing pipe installation is under a railroad, the casing shall be smooth steel pipe conforming with American Railway Engineering Association (AREA) and/or the railroad company's standards for jacked installations. The casing shall have a coal tar pitch varnish finish inside and out.

**Carrier Pipe**

- A. The carrier pipe shall be as set forth as written Part 1 Description of Work and in the Contract Documents.

### **Casing Spacers**

- A. Casing spacers shall be as manufactured by Cascade Waterworks Manufacturing Company, Powerseal Model 4810, or approved equal.
- B. Casing spacers for pipe up to 6 inches in diameter shall be PVC, HDPE, or stainless steel with HDPE, nylon, or PVC runners. Larger sizes shall be stainless steel with HDPE, nylon, or PVC runners.
- C. Use of wooden shims to support pipe shall not be permitted in any case.

### **Vents and Cathodic Protection**

- A. Vents and cathodic protection shall be as set forth in the Contract Documents.

### **End Seals**

- A. For single carrier pipe installations, provide watertight mechanical rubber end seals. For installations with multiple carrier pipes, end seals shall be hand-formed from concrete brick and mortar.

### **Backfill**

- A. Where the drawings require backfill within the casing pipe, backfill within the casing pipe shall be flowable mortar.

## **EXECUTION**

### **Boring and Jacking (Casing and Carrier Pipes)**

- A. The Contractor shall excavate the boring and receiving pits at the approved locations. Any required sheeting, shoring, or bracing which is required to provide for safe working conditions shall be provided by the Contractor.
- B. After the excavation is opened, the placing and jacking of the pipe shall follow immediately to avoid unnecessarily disturbing the stability of the embankment and roadbed.
- C. The Contractor shall dewater the excavation in a manner appropriate for the conditions.
- D. The leading section of the pipe shall be equipped with a jacking head securely anchored thereto to prevent any wobble or variation in alignment during the boring and jacking operation.
- E. The driving end of the pipe shall be properly protected against damage, and the intermediate joints shall be similarly protected by the use of sufficient bearing shims to properly distribute the jacking stresses. Any section of casing pipe showing signs of damage shall be removed and replaced, or repaired to the satisfaction of the Engineer.
- F. Excavation shall not be made in excess of the outer dimensions of the pipe being jacked unless approved by the Engineer. Every effort shall be made to avoid loss of earth outside the jacking head. Excavated material shall be removed from the conduit as excavation progresses, with no accumulation of such material within the conduit.



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- G. Once the jacking operation has commenced, it shall be continued until the casing pipe has been jacked between the specified limits. This requirement may be modified if the Contractor submits to the Engineer for prior approval, methods and details that shall prevent freezing of the casing pipe and ensure the head is stable at all times.
  - H. Should appreciable loss of soil occur during the boring and jacking operation, the voids shall be backfilled promptly to the extent practicable with soil-cement consisting of a slightly moistened mixture of 1 part cement to 2 parts sand mortar. This mixture shall be thoroughly mixed and rammed into place as soon as possible after the loss of soil occurs.
  - I. If the jacking of the pipe cannot progress as a result of encountering obstructions (such as rock), the Contractor shall be responsible to contact the Engineer for approval to remove the obstruction or relocate the installation. Upon approval of the Engineer, the Contractor shall backfill the abandoned casing pipe with flowable mortar and cap the end.
  - J. The Contractor is responsible to safely mark and protect the excavation until the operation is complete and the excavation is backfilled.
  - K. The excavation shall be backfilled following extension of the carrier pipe beyond the backfilling operation.

#### **Boring and Jacking Installation Of Casing Pipe**

- A. Casing spacers shall be used for water, sanitary, or storm sewer installation. Spacers shall be installed per pipe and spacer manufacturer's instructions.
- B. Unless shown elsewhere in the Contract Documents, the annular space between the casing and carrier pipes shall not be backfilled.
- C. The joints of a steel casing shall be welded with a continuous circumferential weld. It shall be the responsibility of the Contractor to provide stress transfer across the joints which is capable of resisting the jacking forces involved.
- D. Following the completion of the boring and jacking operation, the Contractor shall install the carrier pipe in accordance with the Contract Documents, backfill the space in the casing pipe outside the carrier pipe if specified, and seal the casing ends in accordance with the Contract Documents.

#### **Boring and Jacking Installation of Carrier Pipe**

- A. Upon completion of the boring and jacking operation, all voids around the outside face of the carrier pipe shall be filled by grouting.
- B. Water main shall not be installed by directional drilling or horizontal boring without a casing pipe, unless specified otherwise in the Contract Documents.

#### **Open Cut Installation of Casing Pipe**

- A. The trench excavation for a casing pipe shall be completed in accordance with Section 02200, including any required sheeting, shoring, and bracing and/or dewatering.
- B. The joints of a steel casing shall be welded with a continuous circumferential weld.
- C. Following the completion of the casing installation, the Contractor shall install the carrier pipe and seal the casing ends in accordance with the Contract Documents.

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- D. The excavation shall be backfilled in accordance with Section 02200 allowing extension of the conduit beyond the backfilling operation.
- E. The Contractor is responsible to safely mark and protect the excavation until the operation is complete and the excavation is backfilled.

**Other Requirements**

- A. Provide minimum of 72 hours notice to the IANR Engineering office prior to commencing Work, including boring-and-jacking operations within or immediately adjacent to IANR Right Of Way.
- B. During all Work within railroad right-of-way, including boring-and-jacking operations, the Contractor shall arrange with the IANR of railroad flaggers and on-track safety training.







| County | Project Number | Station |
|--------|----------------|---------|
| Floyd  | 116480         | 13+00   |

### GENERAL CULVERT DESIGN

| Allowable Headwater Elevation (ft) | Inlet Invert Elevation (ft) | Outlet Invert Elevation (ft) | Culvert Barrel Length (ft) |
|------------------------------------|-----------------------------|------------------------------|----------------------------|
| 1047.50                            | 1044.99                     | 1044.80                      | 65                         |

| Culvert Type                 | Inlet Type         | Manning n | Ke  |
|------------------------------|--------------------|-----------|-----|
| RCB: Reinforced Concrete Box | 0* wingwall flares | 0.013     | 0.7 |

### User Defined Size

| Barrels | Width (feet) | Height (feet) |
|---------|--------------|---------------|
| Single  | 4            | 6             |

| Return Period (Years) | Q (ft <sup>3</sup> /s) | TW Depth (ft) | HW Elev. (ft)       | HW H (ft) | Exit Vel. (ft/s) | I.C. HW Elev. (ft) | I.C. H (ft) | O.C. HW Elev. (ft) | O.C. H (ft) | Exit Vel. I.C. (ft/s) | Exit Vel. O.C. (ft/s) | Crit. Depth (ft) | Normal Depth (ft) | Hydraulic Slope |
|-----------------------|------------------------|---------------|---------------------|-----------|------------------|--------------------|-------------|--------------------|-------------|-----------------------|-----------------------|------------------|-------------------|-----------------|
| 5                     | 116.00                 | 0.00          | <del>1,050.05</del> | -0.94     | 9.77             | 1,050.05           | -0.94       | 1,049.99           | -1.00       | 7.44                  | 9.77                  | 2.97             | 3.90              | Mild            |
| 10                    | 163.00                 | 0.00          | <del>1,051.36</del> | 0.37      | 10.94            | 1,051.36           | 0.37        | 1,051.06           | 0.07        | 7.89                  | 10.94                 | 3.72             | 5.17              | Mild            |
| 25                    | 186.00                 | 0.00          | <del>1,051.96</del> | 0.97      | 11.44            | 1,051.96           | 0.97        | 1,051.65           | 0.66        | 8.05                  | 11.44                 | 4.07             | 5.78              | Mild            |
| 50                    | 232.00                 | 0.00          | <del>1,053.85</del> | 2.86      | 12.31            | 1,053.85           | 2.86        | 1,052.99           | 2.00        | 9.67                  | 12.31                 | 4.71             | Undefined(2)      | Undefined       |
| 100                   | 279.00                 | 0.00          | <del>1,055.62</del> | 4.63      | 13.09            | 1,055.62           | 4.63        | 1,054.56           | 3.57        | 11.63                 | 13.09                 | 5.33             | Undefined(2)      | Undefined       |
| 2yr-48hr              | 25.00                  | 0.00          | <del>1,048.37</del> | -2.62     | 5.86             | 1,046.78           | -4.21       | 1,048.37           | -2.62       | 5.13                  | 5.86                  | 1.07             | 1.22              | Mild            |

TW: Tailwater, HW Elev.: Headwater elevation at the inlet, HW H: Height of headwater above the inside top of culvert, at the inlet

I.C.: Inlet control, O.C.: Outlet control, Crit.: Critical, Vel.: Velocity

### Hydraulic Slope

Steep: Normal Depth < Critical Depth

Mild: Normal Depth > Critical Depth

Critical: Normal Depth = Critical Depth

Horizontal: Inlet Invert Elevation = Outlet Invert Elevation

Adverse: Inlet Invert Elevation < Outlet Invert Elevation

### Normal Depth

Undefined(1): Normal depth is not defined for horizontal or adverse slopes.

Undefined(2): Maximum Q for open channel flow is < Q.



IN THE IOWA DISTRICT COURT IN AND FOR FLOYD COUNTY

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|                                                                                                                                               |   |                                   |
|-----------------------------------------------------------------------------------------------------------------------------------------------|---|-----------------------------------|
| IOWA NORTHERN RAILWAY COMPANY                                                                                                                 | ) | CASE NO. EQCV031386               |
|                                                                                                                                               | ) |                                   |
| Plaintiff/Petitioner,                                                                                                                         | ) |                                   |
|                                                                                                                                               | ) |                                   |
| vs.                                                                                                                                           | ) |                                   |
|                                                                                                                                               | ) |                                   |
| FLOYD COUNTY BOARD OF SUPERVISORS, AND CERRO GORDO COUNTY BOARD OF SUPERVISORS, Acting as Trustees for JOINT DRAINAGE DISTRICT NOS. 6 AND 56, | ) | <b>AFFIDAVIT OF RANDY HASSMAN</b> |
|                                                                                                                                               | ) |                                   |
| Defendants/Respondents.                                                                                                                       | ) |                                   |

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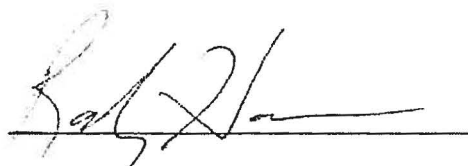
STATE OF IOWA    )  
                              ) ss:  
FLOYD COUNTY    )

I, Randy Hassman, being first duly sworn upon my oath, do hereby depose and state as follows:

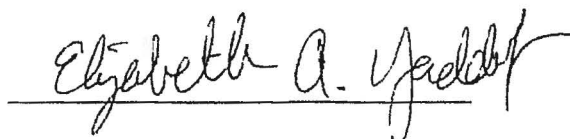
I am the Mayor of Nora Springs, Iowa. I am aware that Joint Drainage District Nos. 6 and 56, Floyd and Cerro Gordo Counties, have approved an improvement project that includes putting in a new culvert in the railroad embankment southeast of the railroad overpass bridge over West Drive.

The existing box culvert is not adequate during heavy rains to provide drainage without flooding the adjacent road, West Drive. The City Council and I, as Mayor, all want a larger culvert through the railroad embankment to avoid flooding West Drive, which is in the city limits of Nora Springs, Iowa.

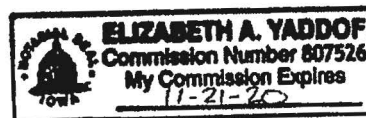
Dated this 20<sup>th</sup> day of December, 2019.

  
Randy Hassman

Subscribed and sworn to me by Randy Hassman on this 20<sup>th</sup> day of December, 2019.

  
Notary Public in and for the State of Iowa.

Attached to Defendants' Motion For Summary Judgment.



IN THE IOWA DISTRICT COURT IN AND FOR FLOYD COUNTY

IOWA NORTHERN RAILWAY COMPANY, )

Plaintiff/Petitioner, )

vs. )

FLOYD COUNTY BOARD OF )  
SUPERVISORS, AND CERRO GORDO )  
COUNTY BOARD OF SUPERVISORS, )  
Acting as Trustees for JOINT DRAINAGE )  
DISTRICT NO. 6 AND 56, )

Defendants/Respondents )

Case No. EQCV030873

**AFFIDAVIT IN SUPPORT  
OF DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT**

STATE OF IOWA )  
 )ss:  
COUNTY OF FLOYD )

We, the undersigned, being first duly sworn upon my oath, do hereby depose and state as follows:

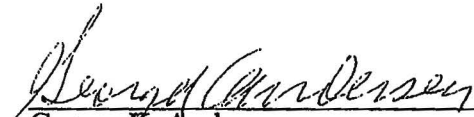
We are respectively the Mayor and Members of the City Council of Nora Springs, Iowa. We are aware that Joint Drainage District Nos. 6 & 56, Floyd and Cerro Gordo Counties, hereinafter referred to as JDD 6 & 56, had an Engineer's Report prepared concerning the repair or the improvement of JDD 6 & 56. There were public hearings on the Engineer's Report. The Joint Board of JDD 6 & 56 unanimously voted to improve JDD 6 & 56 with an open ditch which will increase the drainage capacity of JDD 6 & 56.

The railroad is in the path of the natural water course. There is presently a 4 feet x 6 feet box culvert that is not adequate during heavy rains to provide drainage without flooding

the adjacent road, West Drive, which goes under the railroad overpass. West Drive and the railroad overpass are within the City limits of Nora Springs, Iowa.

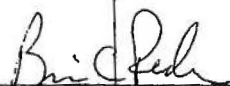
Each of us want the open ditch improvement which includes a larger culvert through the railroad to avoid flooding West Drive.

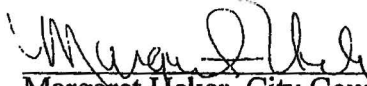
Dated this 4th day of April, 2017.

  
George K. Anderson  
Mayor of Nora Springs, Iowa

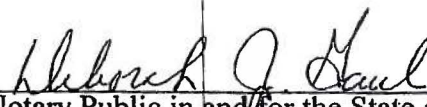
  
Steve Blickenderfer, City Council Member  
of Nora Springs, Iowa

  
Brian Hanft, City Council Member  
of Nora Springs, Iowa

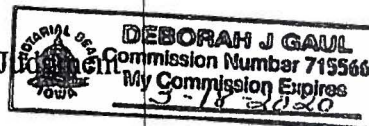
  
Brian Pederson, City Council Member  
of Nora Springs, Iowa

  
Margaret Ueker, City Council Member  
of Nora Springs, Iowa

Subscribed and sworn to me by George K. Anderson, Steve Blickenderfer, Brian Hanft, Brian Pederson, and Margaret Ueker on this 4th day of April, 2017.

  
Notary Public in and for the State of Iowa.

Attached to Defendants' Motion For Summary Judgment





IN THE IOWA DISTRICT COURT IN AND FOR FLOYD COUNTY

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|                                         |                               |
|-----------------------------------------|-------------------------------|
| IOWA NORTHERN RAILWAY COMPANY )         | CASE NO. EQCV031386           |
| Plaintiff/Petitioner, )                 |                               |
| vs. )                                   |                               |
| FLOYD COUNTY BOARD OF )                 | <b>DEFENDANTS' STATEMENT</b>  |
| SUPERVISORS, AND CERRO GORDO )          | <b>OF UNDISPUTED MATERIAL</b> |
| COUNTY BOARD OF SUPERVISORS, )          | <b>FACTS</b>                  |
| Acting as Trustees for JOINT DRAINAGE ) |                               |
| DISTRICT NOS. 6 AND 56, )               |                               |
| Defendants/Respondents. )               |                               |

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The Defendants, Floyd County Board of Supervisors, and Cerro Gordo County Board of Supervisors, Acting as Trustees for Join Drainage District Nos. 6 and 56, concerning no genuine dispute as to material facts state:

A. In regard to the Defendants' Statement of Undisputed Material Facts filed November 25, 2019, it is hereby supplemented with the following:

19. The jack and bore operation on the Iowa Northern Railway Company railroad will be done according to the Iowa Northern Railway Company Standard Specifications For Boring And Jacking And Casing Pipe. See Kent L. Rode Supplemental Affidavit.

20. The jack and bore operation on the Iowa Northern Railway Company railroad will have flagmen to stop the jack and bore operation while trains pass through the area. See Kent L. Rode Supplemental Affidavit.

21. The existing 4-feet x 6-feet box culvert is not adequate during heavy rains to provide drainage without flooding the adjacent road, West Drive, in Nora Springs, Iowa. See Kent L. Rode Supplemental Affidavit, Affidavit of Mayor Randy Hassman, and Affidavit of Mayor and Council Members of Nora Springs, Iowa.

22. If timber or rock are encountered they will be bored through as part of the jack and bore operation. See Supplemental Affidavit of Kent L. Rode.

B. In regard to Defendants' Statement of Undisputed Material Facts in reference to its Resistance to the Plaintiff's Cross Motion For Summary Judgment, the Defendants submit its Statement of Undisputed Facts filed November 25, 2019 as supplemented above.

Attached to Response/Resistance.

GOODWIN LAW OFFICE, P.C.



Robert W. Goodwin, AT0002986

311 W. Lincoln Way, Suite 1

Ames, Iowa 50010-3317

(515) 232-7390

(515) 232-7396 (Fax)

E-mail: goodwinlawoffice@fbx.com

**ATTORNEY FOR  
DEFENDANTS/RESPONDENTS**

IN THE IOWA DISTRICT COURT IN AND FOR FLOYD COUNTY

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|                                         |                      |
|-----------------------------------------|----------------------|
| IOWA NORTHERN RAILWAY COMPANY )         | CASE NO. EQCV031386  |
| )                                       |                      |
| Plaintiff/Petitioner, )                 |                      |
| )                                       |                      |
| vs. )                                   |                      |
| )                                       |                      |
| FLOYD COUNTY BOARD OF )                 | <b>DEFENDANTS'</b>   |
| SUPERVISORS, AND CERRO GORDO )          | <b>MEMORANDUM OF</b> |
| COUNTY BOARD OF SUPERVISORS, )          | <b>AUTHORITIES</b>   |
| Acting as Trustees for JOINT DRAINAGE ) |                      |
| DISTRICT NOS. 6 AND 56, )               |                      |
| )                                       |                      |
| Defendants/Respondents. )               |                      |

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The Defendants, Floyd County Board of Supervisors, and Cerro Gordo County Board of Supervisors, Acting as Trustees for Join Drainage District Nos. 6 and 56, submit its Memorandum of Authorities filed November 25, 2019, supplemented by the Authorities stated in its Response To Plaintiff's Resistant To Motion For Summary Judgment and Cross Motion as its Memorandum of Authorities in support of its Motion For Summary Judgment and in Resistance To The Plaintiff's Cross Motion For Summary Judgment.

Attached to the Response/Resistance.

GOODWIN LAW OFFICE, P.C.

A handwritten signature in black ink that reads "Robert W. Goodwin". The signature is written in a cursive style with a large, stylized "R" and "G".

Robert W. Goodwin, AT0002986

311 W. Lincoln Way, Suite 1

Ames, Iowa 50010-3317

(515) 232-7390

(515) 232-7396 (Fax)

E-mail: [goodwinlawoffice@fbx.com](mailto:goodwinlawoffice@fbx.com)

**ATTORNEY FOR**

**DEFENDANTS/RESPONDENTS**



IOWA DISTRICT COURT FOR FLOYD COUNTY

|                                  |   |                                 |
|----------------------------------|---|---------------------------------|
| IOWA NORTHERN RAILWAY            | ) |                                 |
| COMPANY,                         | ) | EQCV031386                      |
|                                  | ) |                                 |
| Plaintiff(s),                    | ) |                                 |
|                                  | ) | ORDER granting summary judgment |
| vs.                              | ) | in favor of Plaintiff           |
|                                  | ) |                                 |
| FLOYD COUNTY BOARD OF            | ) |                                 |
| SUPERVISORS and CERRO GORDO      | ) |                                 |
| COUNTY BOARD OF SUPERVISORS,     | ) |                                 |
| acting as Trustees for JOINT     | ) |                                 |
| DRAINAGE DISTRICT Nos. 6 and 56, | ) |                                 |
|                                  | ) |                                 |
| Defendant(s).                    | ) |                                 |

A railroad company and drainage districts find themselves at loggerheads about a proposed improvements to culvert passing through a railroad embankment. The defendant counties, acting as trustees for the drainage districts ("JDD") move for summary judgment. The plaintiff railroad company ("Iowa Northern") resists and cross-moves.

The court **finds** the following undisputed material **facts**:

Iowa Northern operates railroad track in Iowa. At the relevant location, Iowa Northern's track sits on an embankment near Nora Springs in Cerro Gordo or Floyd County, in Drainage District Numbers 6 and 56. Water passes through the embankment via a culvert originally constructed when the embankment and railway was built.

The Joint Board of Drainage Districts Nos. 6 and 56 are dissatisfied with the flow of water and seek to make changes and/or improvements through or at the embankment. The JDD relies on the recommendations of its engineer. In addition to other improvements to the land near the embankment, the JDD seeks to install an additional culvert using a "jack and bore" method and has entered into a contract for the work.

Iowa Northern objects to the installation of the culvert. It further advises that it will halt train operation on the tracks in the area if the construction takes place.

The court **concludes** as follows:

Summary judgment is proper when there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 1.981. "[It] is appropriate if the only conflict concerns the legal consequences of undisputed facts." *Farmers Nat. Bank of Winfield v. Winfield Implement Co., Ltd.*, 702 N.W.2d 465, 466 (Iowa 2005) (citation

omitted). In determining whether a genuine issue of material fact exists, the court must examine the existing record in the light most favorable to the party opposing summary judgment. If reasonable people can draw different conclusions from the facts, summary judgment should be denied. See *Knapp v. Simmons*, 345 N.W.2d 118 (Iowa 1984). "The burden is on the party moving for summary judgment to prove the facts are undisputed." *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717 (Iowa 2001) (citations omitted). But the court must also consider on behalf of the nonmoving party "every legitimate interference that can be reasonably deduced from the evidence." *Boelman v. Grinnell Mut. Reins. Co.*, 826 N.W.2d 494, 501 (Iowa 2013) (cleaned up).

The JDD is correct that Iowa Code §§ 468.109 et seq. allow authorizes the JDD to take the action it seeks if the embankment interferes with the free flow of water. Section 468.109 provides

Whenever the board of supervisors shall have established any levee, or drainage district, or change of any natural watercourse and the levee, ditch, drain, or watercourse as surveyed and located crosses the right-of-way of any railroad company, the county auditor shall immediately cause to be served upon such railroad company, in the manner provided for the service of original notices, a notice in writing stating the nature of the improvement to be constructed, the place where it will cross the right-of-way of such company, and the full requirements for its complete construction across such right-of-way as shown by the plans, specifications, plat, and profile of the engineer appointed by the board, and directing such company to construct such improvement according to said plans and specifications at the place designated, across its right-of-way, and to build and construct or rebuild and reconstruct the necessary culvert or bridge where any ditch, drain, or watercourse crosses its right-of-way, so as not to obstruct, impede, or interfere with the free flow of the water therein, within thirty days from the time of the service of such notice upon it.

The subsequent sections authorize the JDD to pursue the construction and assess the costs to a railroad company that refuses to do it. So, step one of the analysis favors the JDD.

Then comes step two, and Iowa Northern counters with two arguments. First, it denies that the embankment interferes with the free flow of water. Second, it asserts that this entire dispute is pre-empted by federal law and that the Federal Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10501(b) confers exclusive jurisdiction of the dispute in the Federal Surface Transportation Board. Section 10501(b) provides

The jurisdiction of the [Surface Transportation] Board<sup>1</sup> over--

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

Iowa case law on ICCTA preemption is limited. Iowa Northern relies on *Griffioen v. Cedar Rapids & Iowa City Railways Co.*, 914 N.W.2d 273, cert. denied, \_\_\_ U.S. \_\_\_, 139 S.Ct. 1320 (Mem) (2019). This court does not find *Griffioen* to be as persuasive as Iowa Northern argues, as the claims and posture of that case were decidedly different from these circumstances. Nevertheless, this court concludes that Iowa Northern is correct on the preemption issue, having reviewed a number of cases across several jurisdictions in addition to *Griffioen*.<sup>2</sup> Specifically convincing are the undisputed facts that Iowa Northern will cease rail operation during any of the proposed construction and that the project will involve penetration into the ground supporting the railroad tracks.<sup>3</sup>

Accordingly, summary judgment should enter in favor of Iowa Northern and against the JDD on the issue of preemption. It is entitled to injunction as pled in Count I of its

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<sup>1</sup> "Board" is so defined at 49 U.S.C.A. §10102(1)

<sup>2</sup> A sampling of cases (both for and against) helpful to this court are *Dakota, Minnesota & Eastern Railroad v. Iowa District Court for Louisa County*, 898 N.W.2d 127, 134 n. 7 (Iowa 2017) (overruled on other grounds), *Oregon Coast Scenic Railroad, LLC v. Oregon Department of State Lands*, 841 F.3d 1069 (9<sup>th</sup> Cir. 2016), *Tubbs v. Surface Transp. Bd.*, 812 F.3d 1141 (8<sup>th</sup> Cir. 2015), *Franks Investment Company v. Union Pacific Railroad Company*, 593 F.3d 404 (5<sup>th</sup> Cir. 2010), *Adrian & Blissfield R. Co. v. Village of Blissfield*, 550 F.3d 533 (6<sup>th</sup> Cir. 2008), *Emerson v. Kansas City Southern Ry. Co.*, 503 F.3d 1126 (10<sup>th</sup> Cir. 2007), *New York Susquehanna and Western Ry. Corp. v. Jackson*, 500 F.3d 238 (3<sup>rd</sup> Cir. 2007), *MD Mall Associates, LLC v. CSX Transportation, Inc.*, 288 F. Supp.3d 565 (E.D. Pa. 2017), *Gordon v. New England Central Railroad, Inc.*, 2017 WL 6327105 (D. Vt. 2017) (unpublished), *Waubay Lake Farmers Ass'n v. BNSF Ry. Co.*, 2014 WL 4287086 (S.D. S.D. 2014) (unpublished), *In re Katrina Canal Breaches Consolidated Litigation*, 2009 WL 224072 (E.D. La. 2009) (unpublished), *In re Union Pacific Railroad Company*, 582 S.W.3d 548 (Tex. App. 2018), *Village of Big Lake v. BNSF Ry. Co., Inc.*, 382 S.W.3d 125 (Mo. Ct. App. 2012), *Burlington Northern & Santa Fe Ry. Co. v. Department of Transp.*, 206 P.3d 261 (Or. Ct. App. 2009), *A & W Properties, Inc. v. The Kansas City Southern Railway Co.*, 200 S.W.3d 342 (Tex. App. 2006).

<sup>3</sup> The JDD has submitted affidavits of persons opining that the jack and bore method will not interfere with the operation of the rail line. Nonetheless, Iowa Northern's engineer has similarly sworn that it "cannot allow its trains or the trains of any other railroad to run over its Nora Springs tracks due to safety concerns and the dangers presented by such construction." Paragraph 10 of Exhibit A, filed with Iowa Northern's statement of undisputed and disputed facts. The parties' experts disagree on whether or not Iowa Northern *can* or *should* allow train traffic during the proposed construction, but it is undisputed that Iowa Northern *won't* allow it.



petition. The court directs Iowa Northern to propose an order granting injunction for this court's review and adoption or adaptation (copy to the JDD). The JDD may file comments or objections to the proposed order within 30 days of its submission.

With the entry of injunction, the court is unclear what further relief mandamus would provide. Prevention of entry and construction will be resolved by the injunction, and it seems to the court that the JDD has a choice about whether to seek relief in the Surface Transportation Board. No writ of mandamus should enter if the action is optional. The court accordingly denies mandamus relief.<sup>4</sup>

Both parties' motions as to the underlying merits are denied. The supporting documentation submitted by both parties establish a genuine issue of material fact as to whether the free flow of water is obstructed, impeded, or interfered with.

IT IS THEREFORE **ORDERED** that Plaintiff Iowa Northern Railway Company is entitled to summary judgment as set forth above.

Costs of this action will be assessed against Defendants Floyd County Board of Supervisors and Cerro Gordo County Board of Supervisors, acting as Trustees for Joint Drainage District No. 6 and 56.

Copy to:  
R. Jeffery Lewis and Kimberly P. Knoshaug for Plaintiff  
Robert W. Goodwin for Defendants

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<sup>4</sup> The court invites a Rule 1.904 motion to enlarge or amend if it misunderstands the mandamus relief requested.





State of Iowa Courts

**Type:** OTHER ORDER

|                    |                                                           |
|--------------------|-----------------------------------------------------------|
| <b>Case Number</b> | <b>Case Title</b>                                         |
| EQCV031386         | (CDW)IOWA NORTHERN RAILWAY CO VS FLOYD COUNTY BOARD ET AL |

So Ordered

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

Colleen Weiland, District Court Judge,  
Second Judicial District of Iowa

IN THE IOWA DISTRICT COURT IN AND FOR FLOYD COUNTY

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|                                         |                           |
|-----------------------------------------|---------------------------|
| IOWA NORTHERN RAILWAY COMPANY )         | CASE NO. EQCV031386       |
| Plaintiff/Petitioner, )                 |                           |
| vs. )                                   |                           |
| FLOYD COUNTY BOARD OF )                 | <b>DEFENDANTS' MOTION</b> |
| SUPERVISORS, AND CERRO GORDO )          | <b>TO RECONSIDER</b>      |
| COUNTY BOARD OF SUPERVISORS, )          |                           |
| Acting as Trustees for JOINT DRAINAGE ) |                           |
| DISTRICT NOS. 6 AND 56, )               |                           |
| Defendants/Respondents. )               |                           |

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COME NOW, the Defendants, Floyd County Board of Supervisors, and Cerro Gordo County Board of Supervisors, Acting as Trustees for Joint Drainage District Nos. 6 and 56, by and through their below signed attorney and respectfully move the Court to reconsider its Order granting Summary Judgment in favor of Plaintiff and state as follows:

**Northern Iowa's On-Going Duty  
Prevents Summary Judgment**

1. Summary Judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

"The judgment sought shall be rendered forthwith if ... there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law." (Emphasis added.) Ia. R. Civ. P. 1.981(3).

“The burden is on the party moving for summary judgment to prove it is entitled to judgment as a matter of law. *Hunter v. City of Des Moines Mun. Hous. Auth.*, 742 N.W.2d 578, 584 (Iowa 2007).” *Negrelle-Pule v. James Harmeyer, Inc.* (Iowa App. 2011) p. 7.

“The moving party has the burden to establish it is entitled to judgment as a matter of law, and the evidence must be viewed in the light most favorable to the nonmoving party. *Clinkscales*, 697 N.W.2d at 841.” *Hunter v. Des Moines Mun. Housing Authority* 742 N.W.2d 578, 584 (Iowa 2007).

2. The Plaintiff, Iowa Northern Railway Company (Iowa Northern), is not entitled as a matter of law to avoid and be excused from its on-going duty and responsibility under Sections 468.109 et seq., Code of Iowa, to construct the culvert in its embankment in accordance with the plans and specifications of the engineer appointed by the Defendant Joint Board acting as Trustees of JDD #6 & 56.
3. The Plaintiff, Iowa Northern Railway Company, under Section 468.109, Code of Iowa, has an on-going duty and responsibility to “construct and rebuild or reconstruct the necessary culvert or bridge” in accordance with “the plans, specifications, plat and profile of the engineer appointed by the board, and directing such company to construct such improvement according to said plans and specifications” “so as to not obstruct, impede, or interfere with the free flow of the water therein” (crossing its right-of-way).

The plans and specifications for the JDD 6 & 56 improvement project provides for the free flow of water through the railroad embankment with a 5.5 feet diameter smooth steel culvert draining water into an open ditch. Open

ditches, by necessity, must have enough depth to allow field tile to outlet their water in the banks of the ditch above the flow line of the water. The elevation of the bottom of the 5.5 feet diameter smooth steel culvert is 0.5 feet lower than the bottom of the new open ditch to ensure the free flow of water through the railroad embankment.

This on-going duty and responsibility is not static and must respond to changed conditions and increased demand.

“When a drainage improvement crossing the railroad’s right-of-way needs to be rebuilt or reconstructed, the board is responsible for drawing up plans for the rebuilding or reconstruction of the improvement and serving those plans on the railroad. *Id.* § 468.109. The railroad then has a duty to ‘build or rebuild the necessary culvert or bridge.’ *Id.* § 468.110. If the railroad refuses, the board ‘shall provide for the construction of the improvement’ and may file suit against the railroad to collect the cost. *Id.* § 468.112.” Chi. Cent. & Pac. R.R. Co. v. Calhoun County Bd. of Supervisors 816 N.W.2d 367, 375 (Iowa, 2012).

“Our supreme court construed an early version of section 468.11 as obligating the railroad company to build a new culvert or bridge over a planned drainage ditch improvement at its own expense even when ‘at or near’ this place there was a wooden box four by five feet through the embankment for the purpose of letting the water through.” *Mason City & Ft. Dodge Ry. Co. v. Bd. of Sup’rs*, 144 Iowa 10, 12, 121 N.W. 39, 39-40 (1909). The *Mason City* case sets out the expectation that a railroad company’s responsibility for allowing the natural flow of water to cross its embankments is not a static one; it does not cease after an initial improvement is built. The railroad company bears an ongoing responsibility to respect the public interest in the water course as changed conditions and increase use demand.

The court reasoned: “‘The increased volume of water and the improvement to carry it away are but the results of better drainage of tillable lands on either side of the track which the company was bound to anticipate.’ *Id.* at 13, 121 N.W. at 40.” Chicago Cent. & Pac. R.R. Co. v. Calhoun Cnty. Bd. of Supervisors (Iowa App., 2010) pp 14-15.



“Drainage district improvements must necessarily cross railroad rights-of-way. Sections 469.109 to 468.112 address how the cost of these intersections will be allocated between the district and the railroad. ... The railroad company is then directed to construct such improvement according to said plans and specifications at the place designated, across its right-of-way, and to build and construct or rebuild and reconstruct the necessary culvert or bridge where any ditch, drain, or watercourse crosses its right of way, so as not to obstruct, impede, or interfere with the free flow of the water therein, within thirty days from the time of the service of such notice upon it.

Iowa Code § 468.109. The construction must be done “according to the plans and specifications prepared by the engineer” of the drainage district and must be done within the time specified. *Id.* § 468.110. Should the railroad fail to construct the culvert or bridge within thirty days, the board may construct the intersection itself and collect the costs, including any necessary attorney’s fees, from the railroad. *Id.* §§ 468.109, .112” (Emphasis added.) Hardin Cnty Drainage Dist. 55, Div. 3, Lateral 10 v. Union Pac. RR Co. 826 N.W.2d 507, 510-511 (Iowa 2013).

4. The jack and bore method of installing the new 5.5 feet diameter smooth steel culvert at a depth of 15 feet to 16 feet below the rail line was chosen to avoid any interference with the operation of Northern Iowa’s rail line.

The jack and bore operation:

- Will be done in accordance with Iowa Northern’s own specifications for jack and boring culverts in its rail bed.
- Will be temporarily halted when trains pass through the area of the jack and bore operation.

- Will be stopped if the rail line moves more than 1/4-inch to ensure that there will be no interference with the operation of Northern Iowa's rail line.
5. Precision Tunneling, Inc., who will do the jack and bore installation of the new 5.5 feet diameter smooth steel culvert, is experienced in this work and did a jack and bore operation in the Iowa Northern's embankment in Hancock County, Iowa with no objection nor problem. The only difference with the Hancock County project is that Iowa Northern did not pay for the cost of the installation of the culvert, whereas Iowa Northern is expected to pay the costs of the culvert on this JDD 6 & 56 project.
  6. T. Scott Bannister's Affidavit speculated that there may be a problem with the jack and bore operation on this project, which is rebutted by the fact the jack and bore method in this project will be stopped if the rail line moves more than 1/4-inch, which ensures that there will be no interference with Iowa Northern's use of its rail line. As previously noted, such speculation and conjecture of Mr. Bannister's Affidavit does not generate a genuine issue of material fact, because it is speculation and conjecture.
  7. The Court notes that T. Scott Bannister in his Affidavit states that Iowa Northern will halt train operations on its tracks if the construction takes place.

However, if Iowa Northern halts its train operations, that is its own voluntary decision, which is without any rational basis because, as previously stated, if the rail lines move more than ¼-inch the jack and bore operation will be stopped to ensure that there will be no interference of Northern Iowa's use of its rail line.

8. Iowa Northern is improperly trying to be excused from and avoid its on-going statutory duty and obligation under Sections 468.109 et seq., Code of Iowa, to install or pay for the installation of the culvert in accordance with the plans and specifications of the engineer appointed by the Board of Trustees of JDD 6 & 56.
9. As a matter of law, Iowa Northern does not have the right to avoid, escape and thwart its duty and obligation under Sections 468.109 et seq. to install or pay for the culvert by simply saying it will halt train operations on the tracks – particularly when provisions exist to ensure there will be no interference with Iowa Northern's operation of its rail line. There is no federal pre-emption in this case since the action under the State Code does not interfere with the operation of the rail line. Adrian and Blissfield R Co. v. Village of Blissfield 550 F.3d 533, 541 (16<sup>th</sup> Cir. 2018), New York Sesquehanna v. Jackson 500 F.3d 238, 253 (3<sup>rd</sup> Cir. 2007).
10. Iowa Northern should not be allowed to avoid or escape its on-going statutory duty to construct or pay for the culvert through its rail bed, by simply saying it will halt operations of its rail line if the work is done.

WHEREFORE, Iowa Northern is not entitled to Summary Judgement because as a matter of law Iowa Northern has an on-going statutory duty and obligation to install or pay for the culvert in accordance with the plans and specifications of the engineer appointed by the Board, which cannot be avoided or escaped by simply saying it will halt train operations on the tracks if the construction takes place.

**Drainage District's Immunity From  
Injunction Prevents Summary Judgment**

11. The Order states that the Plaintiff Iowa Northern is entitled injunction as pled in Count I of its Petition.

12. However, the Iowa Supreme Court in Board of Water Works Trustees of Des Moines v. Sac County Board of Supervisors, 890 N.W.2d 50 (Iowa 2017) held “that drainage districts are immune from injunctive relief claims other than mandamus”. Id. at 890 N.W.2d, p. 52.

“In sum, a century’s worth of precedent including a case our court decided unanimously just four years ago, precludes any remedy against drainage districts other than mandamus.” Id. at 890 N.W.2d 60.

WHEREFORE, Iowa Northern is not entitled Summary Judgment granting injunctive relief.



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DEFENDANTS/RESPONDENTS**

Original: E-filed.

E-copies to:

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Kimberly P. Knoshaug

Lewis, Webster, Van Winkle & Knoshaug, L.L.P.

400 Locust Street, Suite 380

Des Moines, IA 50309

**Attorney for Plaintiff/Petitioner**

**CERTIFICATE OF FILING AND SERVICE**

The undersigned certifies that the foregoing instrument was electronically filed with the Clerk of Court, and electronically served on all attorneys of record, by using the electronic filing system on January 10, 2020.

Signature /s/Norma L. Aspengren

IN THE IOWA DISTRICT COURT FOR FLOYD COUNTY

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|                                             |                        |
|---------------------------------------------|------------------------|
| IOWA NORTHERN RAILWAY COMPANY, )            |                        |
| )                                           |                        |
| Plaintiff/Petitioner, )                     |                        |
| )                                           | Case No. EQCV030873    |
| vs. )                                       |                        |
| )                                           |                        |
| FLOYD COUNTY BOARD OF SUPERVISORS,) )       | PLAINTIFF'S RULE 1.904 |
| AND CERRO GORDO COUNTY BOARD OF )           | MOTION                 |
| SUPERVISORS, Acting as Trustees for JOINT ) |                        |
| DRAINAGE DISTRICT NO. 6 AND 56, )           |                        |
| )                                           |                        |
| Defendants/Respondents. )                   |                        |

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The plaintiff, Iowa Northern Railway Company ("Iowa Northern"), by and through counsel, in support of its Motion filed pursuant to Iowa R. Civ. Pro. 1.904, states as follows:

1. After granting summary judgment in favor of Iowa Northern the Court proposes to enter a permanent injunction against the JDD but invited this Motion on the issue of mandamus as a remedy.

2. The Iowa Supreme Court held, in answering certified questions from the Northern District of Iowa, that drainage districts are "...immune from injunctive relief claims other than mandamus. Bd. of Water Works Trs. of City of Des Moines v. Sac Cnty. Bd. of Supervisors, 890 N.W.2d 50, 52 (Iowa 2017) *citing*, Chi. Cent. & Pac. R.R., 816 N.W.2d at 374 (Iowa 2012)("Again in 2012, we reiterated our interpretation of chapter 468 precluding claims for money damages and limiting judicial relief to mandamus."), and *quoting*, Fisher v. Dallas County, 369 N.W.2d 426, 429 (Iowa 1985)("Suits have been allowed only to compel, complete, or correct the performance of a duty or the exercise of a power by those acting on behalf of a drainage district.").

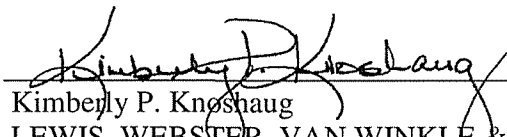
3. Iowa Code Section 661.1 provides that, “The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation, or person to do or **not to do an act**, the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station.” (Emphasis added).

4. Iowa Northern has no plain, speedy and adequate remedy in the ordinary course of the law. Iowa Code Section 661.7.

5. Mandamus will have the same effect as a permanent injunction. As Justice Appel has stated, “I am not sure the fine distinction between mandamus and injunction matters much.” Bd. of Water Works Trs. of City of Des Moines, id. at 89, (Appel, J., dissenting)

WHEREFORE, the plaintiff, Iowa Northern, respectfully requests that this enter a mandamus order on the issue of preemption and for such other and further relief that is appropriate under the facts and circumstances of this case.

Respectfully submitted,

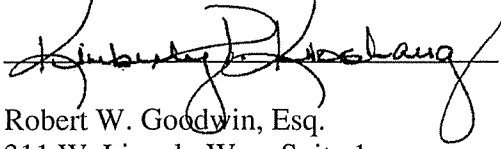
  
\_\_\_\_\_  
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Email: [KPK@lewislaw-ia.com](mailto:KPK@lewislaw-ia.com) (Kim Knoshaug)

ATTORNEYS FOR THE PLAINTIFF

#### Proof of Service

The undersigned certifies that a copy of the foregoing instrument was served by EDMS on each of the attorneys of record listed below in the above entitled

cause on the 27th day of January, 2020.

A handwritten signature in black ink, appearing to read "Robert W. Goodywin", written over a horizontal line.

Robert W. Goodywin, Esq.  
311 W. Lincoln Way, Suite 1  
Ames, Iowa 50010-3317

ATTORNEY FOR THE DEFENDANTS



IN THE IOWA DISTRICT COURT IN AND FOR FLOYD COUNTY

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|                                         |                                  |
|-----------------------------------------|----------------------------------|
| IOWA NORTHERN RAILWAY COMPANY )         | CASE NO. EQCV031386              |
| Plaintiff/Petitioner, )                 |                                  |
| vs. )                                   | <b>DEFENDANTS' RESISTANCE</b>    |
| FLOYD COUNTY BOARD OF )                 | <b>TO PLAINTIFF'S RULE 1.904</b> |
| SUPERVISORS, AND CERRO GORDO )          | <b>MOTION</b>                    |
| COUNTY BOARD OF SUPERVISORS, )          |                                  |
| Acting as Trustees for JOINT DRAINAGE ) |                                  |
| DISTRICT NOS. 6 AND 56, )               |                                  |
| Defendants/Respondents. )               |                                  |

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COME NOW, the Defendants/Respondents, Floyd County Board of Supervisors, and Cerro Gordo County Board of Supervisors, Acting as Trustees for Joint Drainage District Nos. 6 and 56, in Resistance to Plaintiff's Rule 1.904 Motion and state as follows:

1. The Plaintiff's Motion focuses on the judicial relief of Mandamus.
2. Mandamus is a drastic action brought to obtain an Order commanding an inferior tribunal board, corporation, or person to do or not do an act, the performance or omission of which is a duty required by law. (Emphasis added.) Section 661.1, Code of Iowa.

"Principles governing mandamus are well established. *Hewitt v. Ryan*, 356 N.W.2d 230, 233 (Iowa 1984). It is a drastic remedy to be applied only in exceptional circumstances. *Id.* It is not to be used to establish rights but to enforce rights that have already been established. *Stith v. Civil Serv. Comm'n of*

*Des Moines*, 159 N.W.2d 806, 808 (Iowa 1968). The writ can be used to compel a tribunal to act but not to control its discretion. *Id.* (Emphasis added.)” Allen v. Allen, No 9-394/08-1797 (Iowa App. 6/17/2009) (Iowa App. 2009).”

“The purpose of a writ of mandamus is to require action to enforce an established right and to enforce a corresponding duty imposed by law. 55 C.J.S. Mandamus § 51, *Pierce v. Green*, 229 Iowa 22, 39, 294 N.W.237.

‘Since, \* \* \* the purpose of a writ of mandamus is not to establish a legal right but to enforce one which has already been established, it is essential to the issuance of the writ that the legal right of plaintiff or the relator to the performance of the particular act of which performance is sought to be compelled must be clear, specific, and complete \* \* \*’. 55 C.J.S. Mandamus § 53a.

Mandamus can compel an inferior tribunal to act but cannot control its discretion. Section 661.2, Code of Iowa, *Hougen v. George*, 254 Iowa 1055, 1057, 120 N.W.2d 497. (Emphasis added.)” Stith v. Civil Service Commission of City of Des Moines, 159 N.W.2d 806, 808 (Iowa 1968).

“Principles governing mandamus are well established. It is a drastic remedy to be applied only in exceptional circumstances. It is not to be used to establish rights but to enforce rights that have already been established. *Stith v. Civil Service Commission of Des Moines*, 159 N.W.2d 809, 808 (Iowa 1968). The writ can be used to compel a tribunal to act but cannot control its discretion.” (Emphasis added.) Hewitt v. Ryan, 356 N.W.2d 230, 233, (Iowa 1984).

“A mandamus action is one ‘brought to obtain an order commanding an inferior tribunal, board, corporation, or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station.’ Iowa Code § 661.1. It should not be used to establish rights, but to enforce rights already established. *Hewitt v. Ryan*, 356 N.W.2d 230, 233 (Iowa 1984). A writ of mandamus should be issued only where ‘rights and duties are clear.’ *Reed v. Gaylord*, 216 N.W.2d 327, 332 (Iowa 1974).” (Emphasis added.) Berent v. City of Iowa, No. 3-719/02-1451 (Iowa App. 11/26/2003) p. 2.

3. The Defendants’ Joint Boards as Trustees of JDD 6 & 56 have a mandatory duty under Section 468.126, Code of Iowa, “to keep the improvement in repair.”

The Defendants' mandatory duty includes directing a railroad under Section 468.109, Code of Iowa, pursuant to the Engineer's plans and specifications to "construct or rebuild and reconstruct the necessary culvert or bridge where any ditch, drain, or water course crosses it's right-of-way, so as not to obstruct, impede, or interfere with the free flow of water therein..." (Emphasis added.)

The railroad has a duty under Sections 468.109 and 468.110, Code of Iowa, to construct the culvert.

If the railroad refuses to construct the culvert, the Board has the duty to construct the culvert.

"If a railroad company does not comply with a notice provided in Section 468.109, the board shall provide for the construction of the improvement under the supervision of the engineer in charge of the improvement." (Emphasis added.) Section 468.112, Code of Iowa.

"Iowa Code section 468.126(1) charges the board of supervisors with keeping a drainage improvement in repair so that it will function properly and perform the services intended. This duty is mandatory. Johnson, 246 Iowa at 551-52, 68 N.W.2d at 525." Hicks v. Franklin County Auditor 514 N.W.2d 431, 437 (Iowa 1994).

"Once a drainage improvement has been constructed, the board, acting as trustee for the drainage district, has a duty to 'keep the improvement in repair.' Iowa Code § 468.126(1). '[K]eeping a drainage ditch in repair [is] a mandatory statutory duty of the Board of Supervisors...' Welch v. Borland, 246 Iowa 119, 121, 66 N.W.2d 866, 868 (1954). If the board fails to perform the required repairs, then a mandamus action is the appropriate remedy for a complaining party." Chi. Cent. & Pac. R.R. Co. v. Calhoun Cnty. Bd. of Supervisors 816 N.W.2d 367, 373 (Iowa 2012).

"The board is responsible for seeing that repairs are made. Iowa Code § 468.126. When a drainage improvement crossing the railroad's right-of-way needs to be

rebuilt or reconstructed, the board is responsible for drawing up plans for the rebuilding or reconstruction of the improvement and serving those plans on the railroad. *Id.* § 468.110. If the railroad refuses, the board ‘shall provide for the construction of the improvement’ and may file suit against the railroad to collect the cost. *Id.* § 468.112.” (Emphasis added.) *Id.* at 816 N.W.2d 375.

“The Mason City case sets out the expectation that a railroad company’s responsibility for allowing the natural flow of water to cross its embankments is not a static one; it does not cease after an initial improvement is built. The railroad company bears an ongoing responsibility to respect the public interest in the water course as changed conditions and increased use demand. The court reasoned: ‘The increased volume of water and the improvement to carry it away are but the results of better drainage of tillable lands on either side of the track which the company was bound to anticipate.’ *Id.* at 13, 121 N.W.2d at 40.

The court continued:

In constructing its embankment or culvers or bridges through it, the company does so subject to the right of the state by appropriate agencies to provide for such use of the natural water course as subsequently may become necessary and proper for public interests.” (Emphasis added.) Chicago Cent. & Pac. R. R. Co. v. Calhoun Cnty. Bd. of Supervisors (Iowa App., 2010) pp. 14-15.

“As the court reads the statutory provisions, Iowa Code § 468.109 authorizes the board to notify a railroad company of necessary improvements for the drainage district that cross railroad rights-of-way, and to direct the railroad company to build such improvements. Iowa Code § 468.110 imposes upon railroads an affirmative duty to construct such improvements, and additionally, to build or rebuild the necessary culverts or bridges to carry the railroad’s roadbed over the improvement. If the railroad company refuses to fulfill its duty, the board may, under Iowa Code § 468.112, cause the work to be done, and then seek to recover the costs of the construction of the entire improvement, including the culvert or bridge, from the railroad in an action in Iowa district court.” (Emphasis added.) CNW v. Webster County Bd. of Sup’s 880 F. Supp. 1290, 1296 (N.D. Iowa, 1995).

“Iowa Code chapter 468 governs the creation and function of drainage districts. The purpose of drainage districts is to build and maintain drainage improvements that provide for the ‘drainage and improvement of agricultural and other lands, thereby making them tillable or suitable for profitable use.’ *Chi., M. & St. P. Ry. v. Mosquito Drainage Dist.*, 190 Iowa 162, 162, 180 N.W. 170, 170 (1920). ‘The

drainage of surface waters from agricultural lands ... shall be presumed to be a public benefit and conducive to the public health, convenience, and welfare.’ Iowa Code § 468.2 (2007). To achieve this goal, counties may ‘establish a drainage district and ... construct whatever [drainage improvement] is necessary for the public health, convenience, or welfare.’ Hicks v. Franklin Cnty. Auditor, 514 N.W.2d 431, 435 (Iowa 1994) (citing Iowa Code § 468.1).

Once a drainage improvement has been installed, it will eventually need to be repaired. Section 468.126 requires the board of supervisors to keep the improvement in repair in the following manner:

The board at any time on its own motion, without notice, may order done whatever is necessary to restore or maintain a drainage ... improvement in its original efficiency or capacity, and for that purpose may remove silt and debris, [or] repair any damaged structures...

Iowa Code § 468.126(1)(a).

The board is also allowed to consider replacing a tile line rather than repairing a tile line, if laying a new tile line would be ‘more economical.’ Id. § 468.126(1)(b). Instead of repairing an old improvement, the board may elect to construct a new improvement, so long as more rigorous procedural requirements are met.

...

Drainage district improvements must necessarily cross railroad rights-of-way. Sections 469.109 to 468.112 address how [826 N.W.2d 511] the cost of these intersections will be allocated between the district and the railroad. See Chi. & N.W. Transp. Co. v. Webster Cnty. Bd. of Supervisors, 880 F.Supp. 1290, 1295 (N.D.Iowa), aff’d, 71 F.3d 265 (8th Cir. 1995). When a proposed improvement crosses a right-of-way, section 468.109 requires the county auditor to serve notice on the railroad, indicating both the location of the improvement and the plans for how the improvement will cross the right-of-way. Iowa Code § 468.109; Chi. & N.W. Transp. Co., 880 F.Supp. at 1295. The railroad company is then directed to construct such improvement according to said plans and specifications at the place designated, across its right-of-way, and to build and construct or rebuild and reconstruct the necessary culvert or bridge where any ditch, drain, or watercourse crosses its right of way, so as not to obstruct, impede, or interfere with the free flow of the water therein, within thirty days from the time of the service of such notice upon it.

Iowa Code § 468.109. The construction must be done ‘according to the plans and specifications prepared by the engineer’ of the drainage district and must be done within the time specified. Id. § 468.110. Should the railroad fail to construct the culvert or bridge within thirty days, the board may construct the intersection itself and collect the costs, including any necessary attorney’s fees, from the railroad.



Id. §§ 468.109, .112.” (Emphasis added.) Hardin Cnty Drainage Dist. 55, Div. 3, Lateral 10 v. Union Pac. R.R. Co., 826 N.W.2d 507, 510-511 (Iowa 2013).

“We have long made clear that mandamus is the proper remedy to adjudicate claims that a drainage district is violating a duty imposed by an Iowa statute.” (Emphasis added.) Board of Water Works Trustees of City of Des Moines v. Sac County Bd. of Super’s. 890 N.W.2d 50, 59 (2017).”

4. The existing duties established by law in this case are:

- The Joint Board has a duty to keep JDD 6 & 56 in repair under Section 468.126(1), Code of Iowa.
- The Joint Board has a duty under Section 468.109, Code of Iowa, when a drainage district crosses the right-of-way of any railroad company to have the auditor provide notice to the railroad company “to build and construct or rebuild and reconstruct the necessary culvert or bridge (in accordance with the engineer’s plans and specifications) where any ditch, drain, or watercourse crosses its right-of-way, so as not to obstruct, impede, or interfere with the free flow of the water therein.”
- The Iowa Northern Railway Company has a duty under Section 468.110, Code of Iowa, to construct the 5.5 feet diameter smooth steel culvert in its embankment in Floyd County, Iowa.
- The Iowa Northern Railway Company, under Iowa Case Law, has an on-going duty to construct the 5.5 feet diameter culvert in its embankment to provide for the free flow of the water as held by Chi. Cent. & Pac. R.R. Co. v. Calhoun County Bd. of Supervisors 816 N.W.2d 367, 375 (Iowa 2012); Chicago Cent. & Pac. R.R. Co. v. Calhoun Cnty. Bd. of Supervisors (Iowa App. 2010) pp 14-15; Hardin Cnty Drainage Dist. 55, Div. 3, Lateral 10 v. Union Pac. R.R. Co. 826 N.W.2d 507, 510-511 (Iowa 2013); and Mason City & Ft. Dodge Ry. Co. v. Bd. of Sup’rs 121 N.W. 39, 40 (Iowa 1909).
- The Joint Board has a duty under Section 468.112, Code of Iowa, to provide for the construction of the culvert when the railroad refuses to construct the culvert pursuant to Section 468.110.

5. There is not an established, clear and specific duty for JDD 6 & 56 to not have the 5.5 diameter smooth steel culvert installed in Iowa Northern Railway Company’s

embankment to maintain the free flow of water needed to provide adequate drainage for the lands in JDD 6 & 56.

To the contrary, there is an established, clear and specific duty under Section 468.112, Code of Iowa, for the Board to provide for the construction of the culvert in the event the railroad refuses to install the culvert, as has occurred in this case. “If a railroad does not comply with a notice provided in Section 468.109, the board shall provide for the construction of the improvement under the supervision of the engineer in charge of the improvement.” (Emphasis added.) Section 468.112, Code of Iowa.

6. Even under the case law in regard to Federal pre-emption, there is no established, clear and specific duty for JDD 6 & 56 to not have the 5.5 feet diameter smooth steel culvert installed in Iowa Northern’s embankment to maintain the free flow of water needed to provide adequate drainage for the lands in JDD 6 & 56.

To the contrary, there is a presumption against Federal pre-emption. Franks Inc. Co. LLC v Union Pacific R.Co. 593 F.2d 404, 407 (5<sup>th</sup> Cir. 2010), and Gorden v. New England Cent. R. R. Inc. (D. VA. 2017) p. 9. There is a no Federal pre-emption when the action to be taken is not so draconian that it will prevent the railroad from carrying out its business in a sensible fashion. Adrian & Blissfield r. Co. v. Village of Blissfield 550 F.3d 533, 541 (6<sup>th</sup> Cir., 2008), and New York Susquehanna v. Jackson 550 F.3d 238, 254 (3<sup>rd</sup> Cir. 2017).

In our present case the installation of the 5.5 feet diameter culvert will not interfere with the railroad carrying out its business in a sensible fashion. The installation of the culvert will be monitored by a laser survey, and should the operation, which is approximately 15 to 16 feet below the rail line, cause the rail line to move more than ¼-inch, the operation will be stopped to ensure that there will be no interference with Iowa Northern's business and the use of its line. The operation will be conducted pursuant to Iowa Northern's own regulations and standards for the jack and bore method to be used to install the culvert, and all work on the installation of the culvert will be stopped while trains pass through the area.

7. The Iowa Northern Railway Company is asking this Court to establish a duty for JDD 6 & 56, and all drainage districts, to not perform their duty under Section 468.112, Code of Iowa, to provide for the construction of the culvert when the railroad voluntarily chooses to say it will not operate trains if the drainage district provides for the installation of the culvert when the railroad has refused to install the culvert as required by Section 468.110, Code of Iowa.

Furthermore, Iowa Northern Railway Company is asking this Court to establish a duty for JDD 6 & 56, and all drainage districts, to not perform their duty under Section 468.112, Code of Iowa, to provide for the construction of the culvert in spite of the fact that the jack and bore operation to install the culvert will be stopped to ensure that there will be no interference with the use of the railroad line if the track

should move more than ¼-inch during the operation, which in this case is 15 to 16 feet below the track, if the railroad chooses to say it will not operate trains if the drainage district provides for the installation of the culvert when the railroad has refused to install the culvert as required by Section 468.110, Code of Iowa.

8. It is clear that mandamus cannot be used to establish rights. See the Allen, Stith, Hewitt and Berent cases *supra*.
9. The Des Moines Waterworks case holds that mandamus is appropriate to enforce “a duty imposed by an Iowa Statute”. Iowa Northern Railway Company is asking this Court to establish a duty that is not based on an Iowa Statute. Iowa Northern Railway Company is asking this Court to establish a duty for JDD 6 & 56, and all drainage districts, to not comply with their duty under Section 468.112, Code of Iowa, to install a culvert if the railroad says that it will halt train operations on the tracks if the drainage district performs its mandatory duty under Section 468.112, Code of Iowa, to provide for the construction of the culvert.

WHEREFORE, the Defendants respectfully request that the Court reverse its Order granting Summary Judgment in favor of the Plaintiff, and that the Court grant the Defendants’ Motion For Summary Judgment against the Plaintiff.

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**ATTORNEY FOR**

**DEFENDANTS/RESPONDENTS**

Original: E-filed.

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Kimberly P. Knoshaug

Lewis, Webster, Van Winkle & Knoshaug, L.L.P.

400 Locust Street, Suite 380

Des Moines, IA 50309

**Attorney for Plaintiff/Petitioner**

**CERTIFICATE OF FILING AND SERVICE**

The undersigned certifies that the foregoing instrument was electronically filed with the Clerk of Court, and electronically served on all attorneys of record, by using the electronic filing system on January 30, 2020.

Signature /s/Joni C. Rentschler



IN THE IOWA DISTRICT COURT FOR FLOYD COUNTY

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|                                           |   |                          |
|-------------------------------------------|---|--------------------------|
| IOWA NORTHERN RAILWAY COMPANY,            | ) |                          |
|                                           | ) |                          |
| Plaintiff/Petitioner,                     | ) |                          |
|                                           | ) | Case No. EQCV031386      |
| vs.                                       | ) |                          |
|                                           | ) |                          |
| FLOYD COUNTY BOARD OF SUPERVISORS,        | ) | PLAINTIFF'S REPLY TO THE |
| AND CERRO GORDO COUNTY BOARD OF           | ) | DEFENDANTS' RESISTANCE   |
| SUPERVISORS, Acting as Trustees for JOINT | ) | TO ITS RULE 1.904 MOTION |
| DRAINAGE DISTRICT NO. 6 AND 56,           | ) | RE: MANDAMUS             |
|                                           | ) |                          |
| Defendants/Respondents.                   | ) |                          |

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The plaintiff, Iowa Northern Railway Company ("Iowa Northern"), by and through counsel, replies to the defendants' Resistance to its Rule 1.904 Motion regarding the entry of a mandamus order. In support of its Reply, the Railroad states as follows:

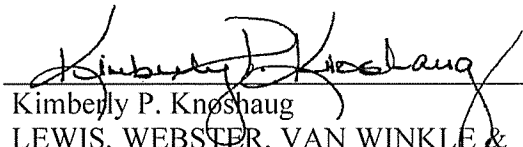
1. Iowa Northern *believes* (but cannot actually determine based upon a plain reading of the Resistance) that the JDD is arguing against the entry of a writ of mandamus on the basis that federal preemption under the ICCTA somehow creates a previously unestablished legal duty upon it in contravention of Iowa Code Section 468.112. If true, this is a nonsensical argument.

2. This Court's summary judgment ruling did not create any new duty; instead, it ruled that whether the JDD is permitted to proceed under Iowa Code Section 468.112 is a determination within the exclusive jurisdiction of the Surface Transportation Board ("STB"). The JDD has an existing duty to comply with federal law and cannot act to infringe upon or violate this duty.

3. Mandamus is, therefore, a proper remedy in that the JDD is commanded not to do an act (i.e., forcibly install the culvert through Iowa Northern's embankment) without obtaining the authority and an order allowing it to proceed from the STB.

WHEREFORE, the plaintiff, Iowa Northern, respectfully requests that this enter a mandamus order on the issue of preemption and for such other and further relief that is appropriate under the facts and circumstances of this case.

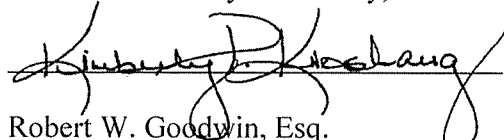
Respectfully submitted,

  
Kimberly P. Knoshaug  
LEWIS, WEBSTER, VAN WINKLE &  
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400 Locust Street  
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Telephone: (515) 243 – 1000  
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Email: [KPK@lewislaw-ia.com](mailto:KPK@lewislaw-ia.com) (Kim Knoshaug)

ATTORNEYS FOR THE PLAINTIFF

Proof of Service

The undersigned certifies that a copy of the foregoing instrument was served by EDMS on each of the attorneys of record listed below in the above entitled cause on the 3rd day of February, 2020.

  
Robert W. Goodywin, Esq.  
311 W. Lincoln Way, Suite 1  
Ames, Iowa 50010-3317

ATTORNEY FOR THE DEFENDANTS

IOWA DISTRICT COURT FOR FLOYD COUNTY

|                                  |   |                   |
|----------------------------------|---|-------------------|
| IOWA NORTHERN RAILWAY            | ) |                   |
| COMPANY,                         | ) | EQCV031386        |
|                                  | ) |                   |
| Plaintiff(s),                    | ) |                   |
|                                  | ) | Rule 1.904 RULING |
| vs.                              | ) |                   |
|                                  | ) |                   |
| FLOYD COUNTY BOARD OF            | ) |                   |
| SUPERVISORS and CERRO GORDO      | ) |                   |
| COUNTY BOARD OF SUPERVISORS,     | ) |                   |
| acting as Trustees for JOINT     | ) |                   |
| DRAINAGE DISTRICT Nos. 6 and 56, | ) |                   |
|                                  | ) |                   |
| Defendant(s).                    | ) |                   |

This court granted the Plaintiff's motion for summary judgment on January 3, 2020. Both parties timely filed motions under Iowa Rule of Civil Procedure 1.904 – Defendants moving the court reconsider its finding in favor of Plaintiff, and Plaintiff moving for writ of mandamus instead of writ of injunction.

The court again finds in favor of Plaintiff. True enough that there are arguments supporting both parties' positions, and the court has considered all that Defendants put forward. But, ultimately, what the Defendants want to accomplish requires boring into the embankment that supports Plaintiff's railway, and this court concludes that such activity falls within 49 U.S.C. § 10501(b).<sup>1</sup>

Both parties point out to the court that drainage districts are immune from injunctive relief claims other than mandamus. *Board of Water Works Trustees of City of Des Moines v. SAC County Board of Supervisors*, 890 N.W.2d 50, 57-62 (Iowa 2017). Accordingly, the court's order granting summary judgment in favor of Plaintiff is reconsidered. The court grants motion for summary judgment in favor of Plaintiff on the issue of pre-emption.

The prerequisites for mandamus are set forth in *Charles Gabus Ford, Inc. v. Iowa State Highway Commission*, 224 N.W.2d 639, 644 (Iowa 1974) (citation omitted):

a) duty enjoined by law upon the defendant, in the performance of which the plaintiff, if a private individual, has a personal interest; (b) a breach or

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<sup>1</sup> Akin to the factual scenarios – albeit not the legal posture – of *Tubbs v. Surface Transp. Bd.* 812 F.3d 1141 (8<sup>th</sup> Cir. 2015), *Waubay Lake Farmers Ass'n v. BNSF Ry. Co.*, 2014 WL 4287086 (D.S.D. 2014) (unreported), *In re Union Pacific Railroad Company*, 582 S.W.3d 548 (Tex.App.-Houston 2018) (finding against railroad because requiring the railroad “to restore and manage debris in the bayou under its bridge do not, on their face, require reconstruction of the bridge or govern the operation of trains moving passengers or property across the bridge.”)

non-performance of such duty by the defendant; (c) a legal right in the plaintiff to damages because of such non-performance; and (d) absence of any other adequate remedy in the ordinary course of the law.

The court concludes that these prerequisites are met. Defendants are right that they have a duty to keep the drainage district in repair. But they also have a duty to comply with federal law in doing so. The court here concludes that they must submit their proposal and intention, and the resulting dispute, to the Surface Transportation Board for a determination by that entity, before proceeding. Writ of mandamus will enter.

Plaintiff's request for writ of injunction is denied. Both parties' motions as to the underlying merits remain denied. Costs remain assessed to Defendants.

IT IS ORDERED that a writ of mandamus will issue under seal of this Court, or the Floyd County Clerk of Court as designee, directed to Defendants commanding that they refrain from installing a culvert through the embankment supporting Defendant's rail line and tracks at the location of Iowa Northern Bridge 210.8 at the west outskirts of or in the city of Nora Springs, Iowa, unless and until they have obtained authority or directive allowing it to proceed from the Surface Transportation Board.

Copy to:  
R. Jeffery Lewis and Kimberly P. Knoshaug for Plaintiff  
Robert W. Goodwin for Defendants



State of Iowa Courts

**Type:** OTHER ORDER

| <b>Case Number</b> | <b>Case Title</b>                                         |
|--------------------|-----------------------------------------------------------|
| EQCV031386         | (CDW)IOWA NORTHERN RAILWAY CO VS FLOYD COUNTY BOARD ET AL |

So Ordered

A handwritten signature in black ink, appearing to read "Colleen Weiland".

---

Colleen Weiland, District Court Judge,  
Second Judicial District of Iowa



IN THE IOWA DISTRICT COURT FOR FLOYD COUNTY

IOWA NORTHERN RAILWAY COMPANY  
Plaintiff-Petitioner(s)

vs.

CERRO GORDO COUNTY BOARD OF SUPERVISORS  
FLOYD COUNTY BOARD OF SUPERVISORS

Defendant/Respondent(s)

Case No. 02341 EQCV031386

WRIT  
OF MANDAMUS

Without Bond

Clerks Docket Events are: WOAT, WOCT,  
WOHC, WIDA, WOIJ and WRIT

To the Sheriff of FLOYD County,

You are hereby commanded SERVE

Other (specify) WRIT OF MANDAMUS

DESCRIPTION: DIRECTED TO DEFENDANTS COMMANDING THAT THEY REFRAIN FROM  
INSTALLING A CULVERT THROUGH THE EMBANKMENT SUPPORTING DEFENDANT'S RAIL  
LINE AND TRACKS AT THE LOCATION OF IOWA NORTHERN BRIDGE 210.8 AT THE WEST  
OUTSKIRTS OF OR IN THE CITY OF NORA SPRINGS, IOWA, UNLESS AND UNTIL THEY HAVE  
OBTAINED AUTHORITY OR DIRECTIVE ALLOWING IT TO PROCEED FROM THE SURFACE  
TRANSPORTATION BOARD

Date: 04/03/2020

Requested by



/s/ STEPHANIE SCHUETH, JSII

CLERK OF DISTRICT COURT  
FLOYD COUNTY IOWA