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BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
November 17, 2020
Part of
Public Record

1065 (Sub-No. 2)
STB DOCKET NO. AB-~~1065X~~

INDIANA SOUTHWESTERN RAILWAY CO.-ABANDONMENT EXEMPTION-IN
POSEY AND VANDERBURGH COUNTIES, IN

LANDOWNERS' PETITION AND MOTION
FOR ADVERSE ABANDONMENT

FILED
November 17, 2020
SURFACE
TRANSPORTATION BOARD

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November 17, 2020
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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	THE APPLICABLE PROCEDURAL HISTORY AND UNDERLYING FACTS ARE NOT REALLY IN DISPUTE	3
III.	ALL OF THE TRIAL TESTIMONY FROM THE <i>MEMMER</i> TRIAL CONFIRMS ALL OF THE UNDERLYING FACTS AND SUPPORTS JUDGE SWEENEY’S OPINION AND ORDER IN <i>MEMMER</i>	8
IV.	THE STANDARD FOR ADVERSE ABANDONMENT IS WHETHER THE “PUBLIC CONVENIENCE AND NECESSITY REQUIRE OR PERMIT THE ABANDONMENT”	22
V.	THE TRIAL TESTIMONY FROM <i>MEMMER</i> ESTABLISHES THAT ISW HAD THE INTENT TO ABANDON WHEN THEY SOUGHT THE BOARD’S PERMISSION TO ABANDON IN 2010, ISW RECEIVED THE BOARD’S PERMISSION TO ABANDON IN BOTH 2010 AND 2011, ISW REMOVED THE RAILS AND TIES IN 2012, THERE HAS BEEN NO TRAIN TRAFFIC SINCE 2004, THERE IS NO PROSPECT FOR SHIPPERS TODAY EITHER, AND IT IS STILL ISW’S INTENT TO ABANDON	27
	A. In This Case, There Should Actually Be No Dispute That There Is No Need For Continuing Rail Traffic.....	27
	B. Under These Facts, the Board Should Conclude That the “Public Convenience and Necessity Require or Permit the Abandonment,” Just Like the Board Already Concluded in Both 2010 and 2011.....	28
VI.	CONCLUSION	32

TABLE OF AUTHORITIES

<i>Birt v. Surface Transp. Bd.</i> , 90 F.3d 580 (D.C. Cir. 1996)	31, 32
<i>Butler v. United States</i> , Case No. 17-667L	2
<i>CSX Corp. & CXT Transp., Inc.—Adverse Abandonment Application</i> , 2002 WL 127074 (2002)	23, 25
<i>Chelsea Property Owners—Abandonment</i> , 8 I.C.C.2d 773, 1992 WL 233599 (1992)	23, 24
<i>Chicago & Northwestern Transp. Co. v. Kalo Brick & Tile Co.</i> , 450 U.S. 311 (1981)	22, 25
<i>Consolidated Rail Corp. v. Interstate Commerce Comm’n</i> , 29 F.3d 706 (D.C. Cir. 1994)	23, 25
<i>Memmer v. United States</i> , Case No. 14-135L	2, 7, 8, 27, 28
<i>Modern Handcraft, Inc.—Abandonment in Jackson County, Missouri</i> , 363 I.C.C. 969, 1981 WL 22670 (1981)	23, 24, 25, 27, 30
<i>New York Cross Harbor R.R. v. Surface Transp. Bd.</i> , 374 F.3d 1177 (D.C. Cir. 2004)	23
<i>Preseault v. Interstate Commerce Comm’n</i> , 494 U.S. 1 (1990) (“ <i>Preseault I</i> ”)	22, 31
<i>Preseault v. United States</i> , 100 F.3d 1525 (Fed. Cir. 1996) (“ <i>Preseault II</i> ”)	21
<i>Thompson v. Texas Mexican Ry. Co.</i> , 328 U.S. 134 (1946)	23

Statutes and Regulations

49 C.F.R. § 1105.7(c)	4
49 C.F.R. § 1105.11	4
49 C.F.R. § 1105.12	4
49 C.F.R. § 1152.29(e)(2)	<i>passim</i>
49 C.F.R. § 1152.50(d)(1)	4
49 U.S.C. § 10502(a)	25, 26
49 U.S.C. § 10903(a)	22, 25, 26, 28

I. INTRODUCTION

This Petition and Motion for Adverse Abandonment pertains to 17.2 miles of interconnecting Rail Lines extending (1) from milepost 227.5 at Poseyville, IN to milepost 240.2 near German Township, IN (approximately 12.7 miles) and (2) from milepost 277.5 at Cynthiana, IN to milepost 282.0 at Poseyville, IN (approximately 4.5 miles) (hereinafter “the Rail Line”). The Rail Line was operated by the Indiana Southwestern Railway Co. (hereinafter “ISW”) at all relevant times. No trains have run on the Rail Line since 2004 and, on October 25, 2010, ISW sought permission from the Board to abandon the Rail Line by filing their Petition for Exemption¹ wherein they filed their verified statement that there had been no train traffic for at least 2 years. The Board issued its Decision regarding the abandonment exemption on November 12, 2010 and, after authorizing abandonment, instructed ISW to file a Notice of Consummation under 49 C.F.R. § 1152.29(e)(2) by November 12, 2011.

Following the Board’s authorization for abandonment as set forth in its Decision on November 12, 2010, although the Indiana Trails Fund formally requested a public use condition on November 17, 2010 and the Town of Poseyville filed a formal notice of intent to file an Offer of Financial Assistance, the Board ultimately issued a Decision and NITU which became effective on May 23, 2011. ISW and the potential trail operator sought and received several extensions of the initial 180-day period to negotiate a trail use agreement, culminating in a deadline of November 8, 2013. Because the parties neither executed a trail use agreement nor sought another extension of time by the November 8, 2013 deadline, the NITU expired on its own terms.

¹ The Petition for Exemption, and all related filings with the Board, are obviously contained within STB Docket No. AB-1065X. As a result, although the Landowners will refer to and cite many documents previously filed with the Board, those documents are not now attached as Exhibits.

While the trail use agreement was being negotiated between May 23, 2011 and November 8, 2013, ISW removed both the rails and ties and salvaged the rails. The removal of the rails and ties and the salvage of the rails was completed in early 2012. After the rails and ties were removed and after the NITU expired on November 8, 2013, IWS never formally consummated abandonment pursuant to 49 C.F.R. § 1152.29(e)(2).

There are 45 Landowners filing this Petition and Motion for Adverse Abandonment. All of them own land adjacent to ISW's Rail Line. All 45 Landowners are also Plaintiffs in one of two pending takings lawsuits before the Court of Federal Claims. Nine of the Landowners are Plaintiffs in *Memmer v. United States*, Case No. 14-135L² and the other 36 Landowners are Plaintiffs in *Butler v. United States*, Case No. 17-667L.³ The *Memmer* case went to trial in Evansville, IN from April 29, 2019 through May 2, 2019 and in Peoria, IL on May 7, 2019. Following extensive post-trial briefing and closing arguments, Chief Judge Sweeney issued her Opinion and Order on November 2, 2020 (copy attached hereto as Exhibit A). Judge Sweeney is also presiding over the *Butler* case, which has been stayed pending the decision in *Memmer*, and which will now continue to be stayed pending potential motions for reconsideration and/or an appeal in *Memmer*.

A finding of adverse abandonment is necessary and appropriate under these facts because the standard for adverse abandonment, whether the public convenience and necessity require or

² The 9 Landowners/Plaintiffs in *Memmer* are Jeffrey Memmer, Gilbert Effinger, Larry & Susan Goebel, Owen Halpeny, Joseph Jenkins, Michael & Rita Martin, McDonald Family Farms of Evansville, Inc., Reibel Farms, Inc., and James & Robin Schmidt.

³ The 36 Landowners/Plaintiffs in *Butler* are Estate of Jean Bender, Robert Bender, Donald Blakenberger, William R. Butler, Suzanne J. Curry, Sylvester J. Elpers Revocable Trust, F & M Dam Trust, Barry Dean Gaslan, Alvin J. Gries Revocable Trust of 1995, Ivan Bender Farm, Inc., William D. & Mary Jane Kight Revocable Trust, Riga Kissel, Eugene Kuehn, David Lipking, Lockwood Farms, LLC, William Luigs, Bruce K. Martin, Poseyville Development, LLC, Robert Rueter, Kenneth Rexing, Frank D. Riley, Janet Schapker, Marthe Scheller, Stephen Schenk, Dorothy Schmitt, John O. Scmitt, Glen Seibert, Irene G. Siebert Trust, Harold Straub, Tenbarga Oil Co., Inc., Voegel Farm, LLC, Watzlavik Properties, LLC, Leo B. Will and Mary Jeanette Will Joint Life Estate, Wayne & Jacklyn Wiggins.

permit the abandonment, was met in 2010 when ISW filed their Petition for Exemption, was met in 2011 when the NITU was issued, and still is met today as both a matter of fact and a matter of law. There has been no train traffic on this Rail Line since 2004, since there have been no customers or shippers since 2004 and, in fact, the rails and ties were removed in late 2011 or early 2012. ISW is intentionally misusing the Board's regulations and procedures by intentionally failing to consummate federal abandonment after state law abandonment has already occurred and the end result of ISW's misconduct is the fact that the Landowners are still being blocked from using their land in any fashion whatsoever.

II. THE APPLICABLE PROCEDURAL HISTORY AND UNDERLYING FACTS ARE NOT REALLY IN DISPUTE

All of the procedural facts are not really in dispute. In fact, all of the facts presented to the Board in Docket No, AB-1065X and set forth herein were stipulated to by the parties before the *Memmer* trial. As a result, the entire procedural history is set forth either in the Board's own records or the stipulations at trial or both and then Judge Sweeney adopted them in her Opinion and Order (Exhibit A). In addition, because of the extensive trial record in *Memmer*,⁴ extensive testimony already exists from ISW and from all of the Landowners verifying all of the relevant facts.

The following stipulated facts in *Memmer* pertain to the history of the railroad and the Board's docket as well as the current status of ISW's abandonment:

1. The "Railroad Line" at issue in this case was originally constructed by the Evansville and Peoria Railroad, which thereafter became the Peoria, Decatur & Evansville Railway ("PD&E").

⁴ The Landowners are not attaching the entire Trial Transcript from the *Memmer* trial because it is voluminous but will, instead, attach relevant testimony as separate exhibits when necessary or appropriate.

2. The PD&E, including the Railroad Line that is the subject of this case, became part of the Illinois Central Railroad (“IC”) in 1900.

3. The Railroad Line went through a series of operators, including Evansville Terminal Company, Inc., (“EVTC”), and finally the Indiana Southwestern Railway Company (“ISW”).

4. In March of 2000, ISW, then a non-carrier subsidiary of Pioneer Railcorp, acquired the Railroad Line from EVTC and AB Rail Investments, Inc. ISW was among 17 Class III railroads controlled or owned by Pioneer Railcorp.

5. The Notice of Exemption was filed by ISW on October 25, 2010, to abandon 17.2 miles of interconnecting Rail Lines extending (1) from milepost 227.5 at Poseyville, IN, to milepost 240.2, near German Township, IN (approximately 12.7 miles) and (2) from milepost 277.5 at Cynthiana, IN. to milepost 282.0, at Poseyville, IN (approximately 4.5 miles).

6. The Board issued its Decision regarding ISW’s abandonment exemption on November 12, 2010. In its Decision, the Board stated that:

ISW has certified that:

- (1) no local traffic has moved over the line for at least 2 years;**
- (2) there is no overhead traffic on the line to be rerouted;**
- (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and**
- (4) the requirements at 49 C.F.R. § 1105.7(c) (environmental report), 49 C.F.R. § 1105.11 (transmittal letter), 49 C.F.R. § 1105.12 (newspaper publication), and 49 C.F.R. § 1152.50(d)(1) (notice to governmental agencies) have been met.**

The Board's Decision also states that "[P]ursuant to the provisions of 49 C.F.R. § 1152.29(e)(2), ISW shall file a notice of consummation with the Board to signify that it has exercised the **authority granted** and fully abandoned the line. If consummation has not been effected by ISW's filing of a notice of consummation by November 12, 2011, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire."

7. On November 17, 2010, the Indiana Trails Fund formally requested a public use condition, interim trail use condition, and statement of willingness to assume financial responsibility rather than an outright abandonment authorization of the approximately 17.2 miles of interconnecting Rail Lines. *See* STB Dkt. No. AB-1065-0-X, ID No. 228256.

8. On November 18, 2010, the Town of Poseyville filed a formal notice of intent to file an Offer of Financial Assistance to purchase the entire 17.2 mile Rail Line proposed for abandonment. *See* STB Dkt. No. AB-1065-0-X, ID No. 228265.

9. On November 23, 2010, ISW filed a reply stating that it was willing to negotiate interim trail use / railbanking with Indiana Trails Fund, Inc. *See* STB Dkt. No. AB-1065-0-X, ID No. 228306.

10. The Board issued a Decision and Notice of Interim Trail Use effective on May 23, 2011. *See* STB Dkt. No. AB-1065-0-X, ID No. 41362.

11. On November 22, 2011, the Indiana Trails Fund, Inc., filed a letter with the Board asking for an extension of time to continue to negotiate a trail use agreement for an additional 180 days. *See* STB Dkt. No. AB-1065-0-X, ID No. 231330.

12. On December 16, 2011, the Board issued a decision granting Indiana Trails Fund, Inc.'s request to continue to negotiate a trail use agreement with ISW through May 17, 2012. *See* STB Dkt. No. AB-1065-0-X, ID No. 42050.

13. On May 17, 2012, the Indiana Trails Fund, Inc., filed a letter with the Board asking for an extension of time to continue to negotiate a trail use agreement with ISW for an additional 180 days. *See* STB Dkt. No. AB-1065-0-X, ID No. 232323

14. On May 24, 2012, the Board issued a Decision granting Indiana Trails Fund, Inc.'s request to continue to negotiate a trail use agreement with ISW through November 13, 2012. *See* STB Dkt. No. AB-1065-0-X, ID No. 42415.

15. On November 14, 2012, the Indiana Trails Fund, Inc., filed a letter with the Board asking for an additional extension of time to continue to negotiate a trial use agreement with ISW for an additional 180 days. *See* STB Dkt. No. AB-1065-0-X, ID No. 233341.

16. On November 21, 2012, the Board issued a Decision and granted Indiana Trails Fund, Inc.'s request to continue to negotiate a trail use agreement with ISW through May 12, 2013. *See* STB Dkt. No. AB-1065-0-X, ID No. 42776.

17. On May 13, 2013, the Indiana Trails Fund, Inc., filed a letter with the Board asking for an additional extension of time to continue to negotiate a trail use agreement with ISW for an additional 180 days. *See* STB Dkt. No. AB-1065-0-X, ID No. 234217.

18. On May 23, 2013, the Board issued a decision granting Indiana Trails Fund, Inc.'s request to continue to negotiate a trail use agreement with ISW through November 8, 2013. *See* STB Dkt. No. AB-1065-0-X, ID No. 43110.

19. Because ISW and the trail operator neither executed a trail use agreement nor sought another extension of time by the November 8, 2013 deadline, the NITU expired on its own terms as of November 8, 2013.

20. While the trail use agreement was being negotiated, after the NITU was issued on May 23, 2011 and before it expired on November 8, 2013, ISW removed both the rails and ties and salvaged the rails.⁵

21. The removal of the rails and ties and the salvage of the rails were completed in early 2012.⁶

22. After the rails and ties were removed and after the NITU expired on November 8, 2013, the railroad never took that one last step—to file a simple letter to the Board—to formally consummate abandonment pursuant to 49 C.F.R. § 1152.29(e)(2).

23. There has been no train traffic on the Rail Line since 2004, there have been no shippers that wanted to use the Rail Line since 2004, there are no shippers currently who want to use the Rail Line, and there is no public convenience and necessity for continued rail traffic.⁷

24. Even though the NITU expired on November 8, 2013, and even though ISW failed to consummate abandonment under federal law, as testified to by Dan LaKemper (legal counsel for ISW), the railroad continued negotiations with potential trail operators and others (including the Landowners to see if they are willing to be blackmailed to get their own land back) to transfer or perhaps sell their interest in the corridor before they actually consummate federal abandonment under 49 C.F.R. § 1152.29(e)(2), and it is still ISW's clear intention to consummate the abandonment after at least 16 years.⁸

⁵ See discussion in Section III *infra*. Both Shane Cullen and Dan LaKemper, employees of ISW, testified at length during the *Memmer* trial concerning the removal of the rails and ties.

⁶ See discussion of Cullen's testimony and LaKemper's testimony *infra*.

⁷ See discussion in Sections IV and V *infra*.

⁸ See discussion of Dan LaKemper's testimony in Section V *infra*.

III. ALL OF THE TRIAL TESTIMONY FROM THE *MEMMER* TRIAL CONFIRMS ALL OF THE UNDERLYING FACTS AND SUPPORTS JUDGE SWEENEY'S OPINION AND ORDER IN *MEMMER*

The trial testimony in *Memmer* confirmed all of the basic underlying facts concerning the lack of train traffic since 2004 and the removal of the rails and ties in 2011 and 2012. All of the 9 Landowner/Plaintiffs testified during the *Memmer* trial concerning their ownership of the land, the highest and best use of their land, the fact that they would reclaim the corridor to the highest and best use of agricultural land, and how the blocking of their reversionary interest impacted their use of their land. They also testified concerning the fact that no trains used the Rail Line since 2004 and that the rails and ties were removed in 2011 and early 2012.

The 9 Landowner/Plaintiffs in *Memmer* can basically be divided into three categories based on the nature of their property adjacent to the railroad line. The three Landowner/Plaintiff fact witnesses who owned severed agricultural parcels are Larry Goebel, David McDonald, and Michael Martin. After describing their ownership and farming operations, each of the three Landowner/Plaintiff fact witnesses' testimony on the pertinent issues was as follows:

1. Larry Goebel (testimony attached hereto as Exhibit B)⁹

- Mr. Goebel has been farming all of his adult life, currently farms substantial acreage with his sons, his father and grandparents farmed the ground before he did, the railroad corridor severs his property into two different pieces, and the existence and presence of point rows create substantial problems and increased expense (see Tr. 100:1-101:7; 106:24-107:11; 108:19-24);
- **The last trains ran on the right-of-way approximately 18 years ago and the rails and ties were pulled up approximately 6 years ago**, the ballast is still on the right-of-way but some people came in from a nearby town and took the good ties, the ties were piled up on the right-of-way and he had to move some of the ties because they were coming out into the fields, he was specifically told that he was not allowed to do anything with the ties after they were left on the right-of-way, the ties "caught on fire one

⁹ The entire testimony from each witness is attached as an Exhibit and, although the transcript citations are from the overall Transcript of the *Memmer* trial, they are specifically contained within each specific Exhibit.

time and the firemen came out and put it out,” **he was actually combining when the salvage company pulled up the rails and ties and he went and talked to them and was specifically told that he had to stay off the right-of-way and they removed all of the rails and other metallic objects, left the ties piled up, took everything that had value with them and left the junk behind, including the ties** (see Tr. 107:24-108:18; 109:11-19; 127:4-25; 128:1-13);

- The railroad does not maintain the right-of-way, he sprays it and has been spraying it since 1979, and the biggest problem are trees and obnoxious weeds; even though the railroad has not maintained the right-of-way, he has not been allowed to get on the railroad property and, when the salvage people were there, he was specifically told that he was not allowed to get on the property or to do anything with the crossties; and he’s always been unable to use the right-of-way because it has always been the railroad’s property (see Tr. 105:14-19; 109:20-110:12; 129:23-130:8; 130:24-131:13);
- He would definitely reclaim the right-of-way if he had the opportunity and he would definitely plant crops on it, to reclaim the right-of-way he would simply level it in most places, and if he reclaimed it and got the right-of-way back he would be able to exclude people from his property (see Tr. 108:25-109:3; 111:9-112:3; 113:23-114:11);
- **The right-of-way in its present condition is causing trespassing problems**, people come down the right-of-way with 4-wheelers and take pumpkins and throw them at houses and off trestles, there are other trespassers, like hunters, there is more traffic on the right-of-way now since the rails are gone, he won’t take his grandchildren back to the right-of-way, and the hunting and traffic with 4-wheelers is a significant concern to him and they even get off the right-of-way with their ATV’s and get onto his farm and damage his crops (see Tr. 106:24-107:11; 107:12-23; 112:5-11; 112:12-113:1; 113:7-15); and
- He always thought whenever the trains stopped running that he would get his land back, he had a prior experience when the railroad abandoned a corridor and he was allowed to start farming it, and even though there was a railroad right-of-way previously, he expected to get his land back whenever the trains stopped running (see Tr. 111:9-16; 123:19-124:8; 139:4-9).

2. David McDonald (testimony attached hereto as Exhibit C)

- The original deed to Mr. McDonald’s farm dates back to a deed signed by Andrew Jackson in 1829 (see Tr. 78:9-19);

- The railroad severs his agricultural property and the resulting point rows create an irregularly shaped farm that costs more money and takes more time to farm (see Tr. 80:1-9; 84:9-85:7);
- **He didn't specifically remember the years trains stopped running but they weren't running too often 10 years ago, he actually witnessed the pulling up of the track and crossties, when they pulled them up they took the rails and all the metal to scrap and left the crossties piled in piles and piles and piles,** and he actually burned the ties after kids in the area used them to make forts (see Tr. 85:8-14; 85:18-86:2; 87:22-25);
- **The railroad has not and does not maintain the right-of-way,** a neighbor of his removed the trees on and near the right-of-way on his property years ago, he sprays to keep the right-of-way free of weeds (see Tr. 82:13-25; 87:12-21);
- He would definitely reclaim the right-of-way because the land is "pretty well flat" and he would like to get the point rows off of his farm, he would like to have the right-of-way back and he would farm it, and that he would reclaim it by digging a ditch next to the right-of-way, pushing the rock into the ditch, and then bulldozing the hump to make it level (see Tr. 83:25-84:8; 88:1-10; 88:11-25);
- **He has definitely had problems with trespassers, he described an incident with boys down on the corridor making forts out of the crossties for dove hunting and they were drinking and shooting guns,** and there has been a substantial amount of traffic with 4-wheelers or dirt bikes, and sometimes horses, and the horses eat the corn, and the activity has increased once the rails were pulled up (see Tr. 86:3-24; 86:24-87:9); and
- He definitely wants his land back because it has value to him, he would plant his farm differently if he could remove the point rows, and he always thought he would get the right-of-way back if trains stopped running on the right-of-way because his father told him that many years ago (see Tr. 88:1-25).

3. Michael Martin (testimony attached hereto as Exhibit D)

- His grandfather actually started farming the land around 1910, he has a lot of point rows and, as a result, it is much more expensive to farm, and he would like to remove the point rows in order to farm his fields differently (see Tr. 271:18-272:5; 287:19-288:2; 272:6-16);
- **He does not remember exactly when the last trains ran but the tracks and ties were pulled up around 2011, when the railroad pulled up the**

rails and ties they left the ties laying on the side in a pile and he removed them and stacked them all up in a pile so they would be out of the way, and there are still some ties present on the right-of-way and he has not burned them (*see* Tr. 272:17-273:11; 281:12-20);

- **He has removed some of the trees and brush from the right-of-way because the railroad does not maintain it**, and he has tried to spray for weeds on the right-of-way to spray for obnoxious weeds and to clear ground so he could get his sprayer through the right-of-way to the other side (*see* Tr. 270:20-271:17);
- He would reclaim the corridor if he could in order to put his land back together and he would plant his fields differently so he could have longer and straighter rows, his land is pretty flat and he could remove the rock and level it with a bulldozer, and it would increase the productivity on his farm (*see* Tr. 272:6-16; 273:18-274:12); and
- He actually sold a parcel of ground adjacent to the right-of-way and specifically retained the right-of-way in the transaction because he thought he owned it (*see* Tr. 288:12-16).

The second category of Landowner/Plaintiff fact witnesses own non-severed agricultural parcels as opposed to severed agricultural parcels. The issues confronted by these three Landowner/Plaintiff fact witnesses, Reibel Farms (Chris Reeves), Jeffrey Memmer, and Owen Halpeny (Patrick Siebert), are all of the same issues confronted by the three Landowner/Plaintiff fact witnesses in the severed agricultural category pertaining to their farming operations except with respect to the issue of point rows due to severance, and their pertinent testimony can be summarized as follows:

4. Reibel Farms/Chris Reeves (testimony attached as Exhibit E)

- Chris Reeves' mother-in-law originally bought the property in 1910 and he started farming it in 2005 (*see* Tr. 144:10-17);
- **The last trains ran approximately a year or so before he started farming in 2005, so probably 2004, the rails and crossties were pulled up in the 2010-2012 timeframe, the rails were all gone but the clean-up wasn't very good, there are still spikes and pieces of metal that he confronts and must deal with because they can cause problems for his equipment if they get out in the field, the salvage company just**

dumped the crossties on the property, many of them were piled up into many piles, they were rotten and some got out into the fields, the ties got hit by “lightning,” he burned all of the ties because they were just a mess, and they are all gone now (see Tr. 151:20-154:6; 162:6-24);

- **The right-of-way impacts his agricultural land because, the way it sits, water is dammed up on the north side, weeds constantly grow up and get into his fields, trees grow up and he must take care of them, he cleared out the right-of-way as best that he could, cut down the trees, and had someone come in with a backhoe with a chipper in it for the bigger trees, and the railroad did not maintain it at all so he had to spray and attempt to control the weeds and trees (see Tr. 146:23-147:15; 149:14-150:13; 154:25-155:14);**
- He would reclaim the right-of-way in a minute if given the opportunity, he would take the rock off of the right-of-way and reuse it somewhere or the county would take it to place in ditches where water is washing out, he would reclaim it because the cost to reclaim was substantially less than the land is worth, he would reclaim it to level and, once he got the rock off of the right-of-way, he would absolutely plant crops on it (see Tr. 156:12-157:16);
- **Trespassers leave beer bottles in the area that have to be cleaned up, people also hunt on the corridor but not as much as they used to, there are some ATV’s on the right-of-way, and he has privacy concerns with people coming onto his property, and theft concerns, because they can come in through the backside of his farm to his machinery shed (see Tr. 146:23-147:15; 154:7-24; 155:15-156:11); and**
- He always had the understanding and expectation that if the railroad stopped running trains that the land would revert back to the landowners because his father-in-law told him that many years ago (see Tr. 164:15-19).

5. Jeffrey Memmer (testimony attached as Exhibit F)

- He owns the “family farm” which was bought by his great-grandfather and handed down generation by generation (see Tr. 170:15-22; 185:2-20);
- Even though his farm is not severed by the right-of-way, if he could utilize it, it would provide better access to his land because it borders on Water Tank Road (see Tr. 175:7-24);
- **He believed that the last trains ran on the right-of-way around 2004, the tracks and ties were pulled up several years ago, he believes in 2010, the crossties were stacked on his property, and there are some**

still there now, but he didn't think all the ties were left behind at the time they were pulled up, and even though some crossties were left behind most are gone (see Tr. 176:3-10; 190:10-191:12; 195:24-196:2);

- **The railroad does not take care of or maintain the right-of-way, he has not removed any trees off of the right-of-way, but he has sprayed it to take care of the weeds** (see Tr. 174:16-23);
- He would reclaim the right-of-way if he could, the land within the corridor has value to him, there is some "overburden" on the right-of-way but somebody always need fill, he would simply give it away, and it would not be hard to do, the right-of-way could be and should be farmed and it would increase the productivity of the farm, and he has already had experience reclaiming a different corridor on the west side of his property and he has been farming the corridor ever since (see Tr. 171:23-172:17; 175:21-176:2; 176:22-178:19; 194:11-22);
- He states there is inappropriate activity on the corridor, mainly 4-wheelers and they leave the corridor and get on his farm (see Tr. 176:11-21); and
- He was not sure if he would get his land back when the trains stopped running and, at the time he acquired the property, he didn't have any understanding about who owned the railroad corridor on the northern side of the property (see Tr. 175:15-20; 186:9-24).

6. Owen Halpeny (Patrick Siebert) (testimony attached as Exhibit G)

- Although he has only farmed the Halpeny property for a few years, his family has farmed the land for decades, either his dad, uncle, and/or his brother (see Tr. 202:1-203:15);
- **He does not remember when the last trains ran, it has been a long time, and the rails and crossties were pulled up 7-10 years ago, they left the crossties piled up and some were just thrown on the bank haphazardly**, the crossties do not interfere with his farming unless kids throw some out into the field (see Tr. 207:24-209:1);
- **The right-of-way is not maintained by the railroad and he sprays every year to try to keep the weeds from infiltrating his fields** (see Tr. 207:13-23; 209:7-16);
- He would reclaim the right-of-way if he could, he would plant additional crops on it, he would have better access to his farm by being able to travel on the right-of-way, and he would reclaim the right-of-way by first getting rid of the crossties, digging the gravel out and cutting down all the trees

and brush, and he would then reclaim it to farm it because it has value to him (see Tr. 210:15-211:17); and

- He does see 4-wheelers on the corridor from time to time and he believes people hunt on the corridor but there isn't any substantial amount of traffic because the property is close to Cynthiana Road where there already is a lot of traffic (see Tr. 209:2-6; 209:17-210:6).

The final category of Landowner/Plaintiff fact witnesses consists of three Landowner/Plaintiffs, Gilbert Effinger, James Schmidt, and Joseph Jenkins, who own large wooded tracks or a residential parcel. Although the highest and best use of their parcels is not agricultural, they have the same issues as the severed and non-severed agricultural parcels, and testified as follows:

7. Gilbert Effinger (testimony attached as Exhibit H)

- The property has been in the Effinger family for over 100 years, he inherited the property from his father, the railroad runs on the border of it, and the property means a lot to him because it is from his family (see Tr. 52:18-53:8);
- Most of the property is woodlands but there are a few tillable areas, he uses the property for hunting, hiking, and recreation, he hunts turkeys, deer, squirrels, and rabbits, and he also uses it for firewood (see Tr. 55:1-23; 56:11-25; 72:15-17);
- **Trains have not run on the right-of-way for many years and the tracks are gone, he did not believe the tracks were there when he got the property in 2006, there are crossties stacked up on his property and he doesn't like that, the trees and brush are grown up on the right-of-way, and there are some ties piled up on pallets the last time he saw them was last fall, and he has not moved the ties that remain** (see Tr. 58:1-16; 73:10-25);
- **Nobody maintains the right-of-way, the trees and brush are grown up, if you wanted to make a walkway or something through it he couldn't do so because it is all grown up, and no one sprays for weeds and they grow outside of the corridor onto his property** (see Tr. 58:5-16; 58:20-59:7);
- If he had the opportunity to get the railroad right-of-way back he would want to do so because he would plant trees on it and/or put cover crops on the property for deer and wildlife instead of farming, and he would also like to exclude trespassers from the right-of-way and may put an extended

fence on it, because there is value in being able to exclude people from his property (see Tr. 58:17-19; 60:15-61:14); and

- Trespassers have been a problem because there have been people on his property that he did not approve of, there have been ATV's on the property, he does have concerns that people walk on the corridor and dump a lot of trash on the property, and someone dumped an old refrigerator in that area (see Tr. 59:8-60:1).

8. James Schmidt (testimony attached as Exhibit I)

- The property is totally wooded, and is rugged terrain, and there is a pond on the property, he has used the property for kids who were in 4-H and conducted frog jumping contests, and others have fished in the pond and his eldest son and a friend of the family have hunted for deer, and he has planted oak, maple, and walnut trees for the future and has used the wood to get firewood (see Tr. 252:24-255:5);
- **The trains stopped running shortly after he acquired the property, he thinks he remembers seeing a train go by in 2000 or 2002, the rails and ties were pulled up around 2011, they left some of the crossties on the property, and the crossties are still there and he is not sure how they would get them out** (see Tr. 255:14-256:10);
- **The railroad does not maintain the corridor** and he hasn't done anything regarding maintaining the corridor either, and he hasn't seen any ATV's in the area (see Tr. 256:12-25); and
- He would like to reclaim the right-of-way because he would like to plant more trees, he would like to preserve it as nature because he enjoys going out there to enjoy nature, and he may harvest trees in the future (see Tr. 257:24-258:12; 262:16-263:12).

9. Joseph Jenkins (testimony attached as Exhibit J)

- His property is a residential lot, the right-of-way is at the rear of his lot, and it is raised about a foot and a half (see Tr. 233:1-16; 234:25-235:9);
- **He believes the last trains ran on the right-of-way around 2004, they ran an engine through the area but it got derailed because they did not have enough ties down to keep it on the track, the rails and ties were picked up around 2011, they left partial ties when the rails and ties were pulled up, and in order to maintain the area he had to remove the ties and burn them** (see Tr. 235:10-236:5);

- He maintains the corridor now, he mows it and takes out trees if any grow, and the corridor is cleaned up now, with no trash or ties, and the grass is growing (see Tr. 236:6-16; 244:8-17; 245:9-24); and
- There were trespassers on the right-of-way, people with 4-wheelers came through, but the railroad or somebody put up “No Trespassing” signs which stopped the ATV’s, and he also has concerns about privacy and vandalism because people can “scope out his house” and they can get in his garage really easily, where he keeps his valuables (see Tr. 236:17-238:8).

In addition to the testimony from the 9 Landowner/Plaintiff fact witnesses during the *Memmer* trial, two railroad employees also testified. Mr. Cullen¹⁰ testified on behalf of ISW (Exhibit K) that **“loaded revenue train traffic” ceased in 2004** (Tr. 900:10-901:5) **and then confirmed that the rails and ties were removed and salvaged starting in late 2011 and concluding in early 2012** (Tr. 851:12-22; 853:11-22; 919:23-920:6). As Mr. Cullen testified, there should be no question that the rails and ties were removed from the right-of-way and that process of removal made the right-of-way unusable for continued rail traffic:

Mr. Cullen’s Testimony (testimony attached as Exhibit K)

Q. Okay. Now, as part of the salvage of the rails, you indicated that the rails were separated from the crossties and the crossties were merely left on the right-of-way, right?

A. Yes.

Q. All right.

And in fact, I think you described the process whereby the rails are removed from the crossties and that actually either damages or can destroy them, right?

A. Depending on method, yes.

Q. All right.

And although the crossties were left on the right-of-way, none of them were actually functional as crossties, were they?

¹⁰ Mr. Cullen has been employed by Pioneer RailCorp. since 2001 and, at the time of trial, served as Vice President of Mechanical Operations and, as such, oversaw all of ISW’s operations.

MR. WEIGERT: Objection. Mischaracterizes testimony.

THE COURT: If the witness knows, if the witness can answer, he can answer.

THE WITNESS: Our position was they were not functional. It was not economically viable to go back and pick them up.

BY MR. STEWART:

Q. All right.

Now, when you say that, essentially, none of the crossties were functional, that means that they were not economically viable to recover the ties and reuse them for the transportation of trains, right?

A. Economically viable for me to recover the ties.

Q. Right.

And then they would not be economically viable to recover the ties and reuse them, because the cost of labor to pick out the ties that would be salvageable is not economically viable, right?

A. That's correct.

Q. All right.

Now, Rail Lines are typically abandoned due to the overall condition of the roadbed, and that includes the crossties, right?

A. Yes.

Q. And also includes the traffic conditions on the rail line?

A. Yes.

Q. All right.

And you concluded that the tie condition on this particular rail bed was extremely deficient for operating trains, didn't you?

A. Yes.

Q. All right.

Now, since the crossties were not functional in the future as crossties, the only reason that the railroad left them was because they were not part of the salvage contract with

A & K, right?

A. Yes.

Q. All right.

And that's the only reason they were left there, isn't it?

A. They were left there, because we didn't have a need to pick them up at that time.

See Exhibit K, Tr. 905:5-907:12 (emphasis added).

After the NITU expired on November 8, 2013, ISW failed to consummate abandonment under 49 C.F.R. § 1152.29(e)(2). But, as testified to by Dan LaKemper, the General Counsel for ISW, the railroad still intended to abandon the corridor when the NITU expired, still continued negotiations with the potential trail operator up to the time of trial, even attempted to sell the corridor before they actually consummated abandonment, and always wanted to dispose of the Rail Line by either selling it to a trail operator or someone else—but, at no time after 2011 through today, were there any shippers or any intent to ever use the Rail Line in commerce (entire testimony attached as Exhibit L):

Mr. LaKemper's Testimony (testimony attached as Exhibit L)

Q. Okay. At that time November 8, 2013, did the trail group drop the ball in their failure to file a further request for a negotiating period extension?

A. They did not file for an extension.

Q. Okay.

A. That is correct.

Q. And ISW failed to remind them, right?

A. Apparently.

Q. Okay. It was still actually your intent at that point to negotiate with the trail group, wasn't it?

A. Yes.

Q. All right.

And it's -- and it is still your intent to follow through and finalize the abandonment or a trail use agreement, isn't it?

A. Yes.

Q. And it is -- it is a fact, isn't it, Mr. LaKemper, that to this day it is still your intent to find or negotiate for a trail use agreement?

A. We are pursuing that as a possibility, yes.

Q. All right.

Now, in fact, and I think you indicated this in response to Mr. Weigert's questions, you have had ongoing negotiations with the possible trail operator since November 8, 2013, haven't you?

A. Yes.

Q. All right.

And in fact, you're still having those discussions and negotiations, aren't you?

A. Yes.

Q. In fact, even the day before your deposition, which was April 2nd, as Mr. Weigert pointed out, you had had additional discussions about that with the potential trail operator, the day before your deposition, right?

A. Correct.

Q. Which would have been April 1, 2019, right?

A. Correct.

Q. So, those discussions are still ongoing to this day?

A. Correct.

Q. Right?

A. Yes.

Q. And they are still interested, aren't they?

A. They are.

Q. All right.

And you're still interested, aren't you?

A. Yes.

Q. All right.

In fact, I think you -- you're even looking for or were looking for a possible financing arrangement of some kind, were you not?

A. We were discussing financing arrangements with the

trail group, yes.

Q. In addition to the potential trail operator, you have had contacts with other parties who have shown an interest, haven't you?

A. Yes.

Q. Okay. But nothing has been signed to date?

A. Correct.

Q. All right.

So we're clear on this, the railroad has no current intention to reinstall the rails and ties, do you?

A. No.

Q. All right.

And despite the fact that the NITU expired on November 8, 2013, you have had ongoing discussions and negotiations to negotiate a deal and those negotiations and discussions have actually taken place within a month of this trial, right?

A. Correct.

Q. All right.

You actually foresee continuing your negotiations with the trail people, don't you?

A. Well, at the moment they're kind of on hold too, because of our potential buyout, but that is something that will likely be resumed by somebody.

Q. Okay. And you'd like that to happen, wouldn't you?

A. It's – it's – it's one option that the railroad has that allows it to fully divest the property in one transaction.

Q. And hopefully, you want this issue resolved one way or the other in the not too distant future, don't you?

A. Yes.

See Exhibit L, Tr. 967:16-968:6; 968:21-971:10 (emphasis added).

ISW's intentional failure to consummate abandonment under 49 U.S.C. § 1152.29(e)(2) is the only thing continuing the Board's jurisdiction over the Rail Line, even though the Board granted ISW's request to abandon, and it is also the only thing preventing all of the

Landowner/Plaintiffs from getting their land back. These facts are egregious because ISW always intended to abandon the Rail Line, as evidenced by and through their actions and the testimony of their own employees, and ISW's failure to formally consummate abandonment by filing one short paragraph with the Board pursuant to 49 C.F.R. § 1152.29(e)(2) obviously has nothing to do with any legitimate transportation purpose within the Board's jurisdiction. The Board should not tolerate ISW's blatant misuse of the Board's regulations and procedures.

Judge Sweeney's Opinion and Order after the *Memmer* trial systematically concluded that the government was liable for taking the Plaintiffs' property interest because the applicable property interest was an easement (prong 1 of *Preseault II*)¹¹ and the scope of the easements were limited to railroad purposes (prong 2 of *Preseault II*).¹² Judge Sweeney also concluded that the government was liable for a Fifth Amendment taking under well-established takings jurisprudence in rails-to-trails cases.¹³ After concluding that the government was liable for a taking of Plaintiffs' reversionary interest, the Court then addressed the issue of damages and, after recognizing that the facts of this case are "unique" and present "an issue of first impression,"¹⁴ Judge Sweeney concluded that the government was liable "to pay Plaintiffs just compensation for a temporary categorical taking that lasted from the date the board issued the NITU, May 23, 2011, to the date Indiana Southwestern's authority to abandon its railroad lines expired, January 7, 2014—a period of 960 days (2.63 years)."¹⁵

¹¹ See *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) ("*Preseault II*").

¹² See Opinion and Order, Exhibit A, at 11-22.

¹³ *Id.* at 22-51.

¹⁴ As Judge Sweeney pointed out, the two factual scenarios ordinarily occur after the NITU is issued—"first, when the issuance of the NITU leads to a trail use agreement,... the taking is permanent," and second, "when the issuance of a NITU does not lead to a trail use agreement, the NITU expires, and the railroad company decides to fully abandon its line by filing a notice of consummation, the taking is temporary...." See Opinion and Order, Exhibit A, at 51. The facts of this case are unique under the Trails Act because ISW neither entered into a trail use agreement nor consummated abandonment but, instead, abandoned the state law property interest by abandoning the right-of-way under state law while still intending to do one of the two ordinary scenarios.

¹⁵ *Id.* at 54.

All of the necessary testimony at trial relevant to the adverse abandonment motion now before the Board was confirmed in Judge Sweeney's Opinion and Order; (1) there has been no train traffic on the Railroad Line since 2004; (2) ISW filed their Verified Petition for Exemption requesting that the Board grant them abandonment authority on October 25, 2010; (3) the Board issued its Decision regarding the abandonment exemption on November 12, 2010 which authorized the abandonment; (4) the NITU became effective on May 23, 2011, which also authorized ISW to abandon the Rail Line and to remove the rails and ties; (5) ISW removed the rails and ties in late 2011 and early 2012 making the Rail Line unusable for continued rail traffic; (6) ISW failed to consummate abandonment under 49 C.F.R. § 1152.29(e)(2); and (7) ISW still intended to abandon the Rail Line at the time of trial and there was and is no prospect of any shippers ever needing or using the Rail Line now or ever again. Although it is unfortunate that ISW has intentionally held all of these Landowners hostage since 2004, under all of these undisputed facts, it is abundantly clear that there was and is no public convenience and necessity present to justify the Board's continued jurisdiction over the Rail Line, abandonment will not burden interstate commerce and will actually benefit the public, and the Board's jurisdiction should not be misused in this manner by ISW when state law property rights override any federal interest in interstate commerce.

IV. THE STANDARD FOR ADVERSE ABANDONMENT IS WHETHER THE "PUBLIC CONVENIENCE AND NECESSITY REQUIRE OR PERMIT THE ABANDONMENT"

The Board has "exclusive" and "plenary" authority to determine the abandonment issue.¹⁶ Under these facts, the Board should conclude that the "public convenience and necessity require or permit the abandonment" pursuant to 49 U.S.C. § 10903(a). Although a railroad typically seeks

¹⁶ See *Chicago & Northwestern Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 322 (1981); *Preseault v. Interstate Commerce Comm'n.*, 494 U.S. 1, 21 (1990).

the Board's permission to abandon, in an adverse abandonment case, instead of the railroad, a non-carrier seeks the issuance of an abandonment order from the Board. If the Board finds that the public convenience and necessity require or permit abandonment, the Board then issues its authorization or permission to abandon and that Order can then be used in any Court to establish that the Railroad Line is not required for rail service in interstate commerce. *See Thompson v. Texas Mexican Ry. Co.*, 328 U.S. 134, 144 (1946); *Modern Handcraft, Inc.—Abandonment in Jackson County, Missouri*, 363 I.C.C. 969, 1981 WL 22670 (1981); *Chelsea Property Owners—Abandonment*, 8 I.C.C.2d 773, 1992 WL 233599 (1992); *Consolidated Rail Corp. v. Interstate Commerce Comm'n.*, 29 F.3d 706, 708 (D.C. Cir. 1994); *CSX Corp. & CXT Transp., Inc.—Adverse Abandonment Application*, 2002 WL 127074 (2002); *New York Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177, 1180 (D.C. Cir. 2004).

The leading adverse abandonment case is *Modern Handcraft*. *Modern Handcraft*, as a non-carrier, filed an application with the ICC for a certificate of public convenience and necessity permitting abandonment on April 17, 1980. After recognizing the rule of law that a non-carrier can pursue an adverse abandonment proceeding, the ICC considered the facts that there had been no rail service or recognizable maintenance on the right-of-way for 12 years and that the only revenues generated by the line were produced by billboard rentals and parking lot licenses and concluded that a *de facto* abandonment of the line had taken place:

The record leaves no doubt that a *de facto* abandonment of the Freight Operation line has taken place. No rail service or recognizable rail track maintenance has taken place since September of 1968. Nor has there been any serious effort on the part of Freight Operation to solicit traffic or reinstate rail service. Indeed, the current use of the Rail Line for parking lot and billboard purposes is totally unrelated to the carrier's obligation to perform rail service. **The only objection to abandonment comes from the carrier itself, whose principal interest appears to be the price and terms for the sale of the right-of-way.**

See Modern Handcraft, 1981 WL 22670 at *2 (emphasis added).

The ICC went even further in *Modern Handcraft* and discussed the standard for obtaining permission to abandon a Rail Line and the relationship between federal jurisdiction and state jurisdiction. The ICC specifically concluded that the railroad was misusing the federal jurisdiction over the property to improperly interfere with other legitimate uses of the right-of-way:

The function of our exclusive and plenary jurisdiction over abandonments is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or obstruction of available rail service. We will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of State law where there is no overriding Federal interest in interstate commerce. Whereas here there have been no rail operations for over 12 years and no attempt to provide rail service, we can find no public benefit in preventing a State condemnation proceeding.

We find that the rail service which Freight Operation is authorized to perform is not required and that elimination of this line will not burden interstate commerce and will benefit the public. Although it is true that the grant of abandonment application is permissive and the railroad can choose not to surrender its common carrier status and obligations, a certificate of abandonment is evidence in any court proceeding that the line is not required by the public for rail operations.

See Modern Handcraft, 1981 WL 22670 at *3 (emphasis added).

There are two obvious and fundamental principles of law set forth in *Modern Handcraft*. First, there is no need for the Board to continue to exercise its exclusive and plenary jurisdiction over railroad lines and/or railroad abandonments when there is no overriding federal interest in continued rail operations. Second, the railroad should not be allowed to use continuing federal jurisdiction over a Rail Line as a shield against abandonment when there is no overriding federal interest in continuing rail operations. These basic principles have been reaffirmed by the Board and the Courts on numerous occasions. *See Chelsea Property Owners*, 1992 WL 233599 at *1-*4 (“we grant the appeals and find that the public convenience and necessity permit abandonment of the line” and “our jurisdiction may not be used to shield a carrier from the legitimate process of

state law”) (citing *Modern Handcraft*); *Consolidated Rail*, 29 F.3d at 712 (“more to the point, it is clear that the aim of § 10905 is not simply the maintenance of Rail Lines but the continuation of rail service”) (emphasis in original); *CSX Corp.*, 2002 WL 127074 at *4 (“where no overriding federal interest exists, we will not allow our jurisdiction to be used to shield a carrier from the legitimate processes of state law” and “here, we conclude that the public is best served by granting the adverse abandonment application”).

The standard for either an abandonment proceeding initiated by the railroad or an adverse abandonment proceeding advanced by a non-carrier is the same. Under 49 U.S.C. § 10903(a), the Board will grant its permission to abandon if “the present or future public convenience and necessity permit of such abandonment.” This standard was specifically referenced by the Supreme Court in *Kalo Brick*—“no carrier by railroad subject to this Chapter shall abandon all or any portion of the line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a **certificate that the present or future public convenience and necessity permit of such abandonment.**” See *Kalo Brick*, 450 U.S. at 320 (emphasis added). Under § 10903(a) and *Kalo Brick*, it must be demonstrated that there is no present or future need for railroad transportation. In other words, after the railroad files an application to abandon or discontinue in an abandonment proceeding or a non-carrier files for adverse abandonment, the Board can “permit” the abandonment or discontinuance only if they find that there is no continuing need for railroad services.

In the context of the Trails Act, since it must be demonstrated that there is no need for continuing rail traffic, § 10903(a) is used when there is a shipper or shippers presently utilizing the line and the railroad still desires to abandon the line because the railroad determines that it is no longer economically viable. Under § 10502(a), on the other hand, such as this case, the railroad

can use the exemption procedure when there has been no railroad traffic for two years. Under § 10502(a), the rail carrier is exempt from the requirements of § 10903(a), and in fact the Board can even initiate the proceeding, if the Board determines that “it is not necessary to carry out the transportation policy” or either (A) the transaction or services are of a limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power. In other words, when there has been no train traffic on the line for some considerable period of time, and the Board has determined that it is at least two years, the exemption procedure can be utilized to seek an abandonment or discontinuance of a Rail Line without a separate determination that the Rail Line is not needed for future public necessity and convenience.

The Trails Act operates in conjunction with these basic regulations. Under § 10903, basically in order to protect shippers, railroads are required to obtain permission to abandon and a CITU will ultimately be issued granting permission to abandon. Under § 10502(a), the exemption procedure, railroads can avoid the certification process if no train traffic has run for at least 2 years and, if that is the case, the Board will also permit the railroad to abandon the line because they deem the protection of shippers to be established and/or unnecessary (such as this case). In either case, the end result is that the Board permits the railroad to abandon the line such that the regular abandonment process or the exemption process is a permission that is ultimately granted by the Board, which has already happened in these cases. In essence, the Board already concluded that the standard for abandonment had been established, at ISW’s request, and the standard for adverse abandonment has also been established too since nothing has changed since 2011 when the Board first made that determination.

V. THE TRIAL TESTIMONY FROM MEMMER ESTABLISHES THAT ISW HAD THE INTENT TO ABANDON WHEN THEY SOUGHT THE BOARD'S PERMISSION TO ABANDON IN 2010, ISW RECEIVED THE BOARD'S PERMISSION TO ABANDON IN BOTH 2010 AND 2011, ISW REMOVED THE RAILS AND TIES IN 2012, THERE HAS BEEN NO TRAIN TRAFFIC SINCE 2004, THERE IS NO PROSPECT FOR SHIPPERS TODAY EITHER, AND IT IS STILL ISW'S INTENT TO ABANDON

A. In This Case, There Should Actually Be No Dispute That There Is No Need For Continuing Rail Traffic

The record has already been established that there has been no train traffic on this corridor since 2004, the rails and ties were removed in early 2012, there are no current shippers or railroad employees to protect, shippers have not needed any protection for over 16 years, and there is no need to protect shippers in the future either. Under these facts, ISW cannot really object because they readily admit that there has been no train traffic for 16 years, they removed the rails and ties in 2012, there is no need to protect shippers in the future either, and they have merely failed to consummate abandonment under 49 C.F.R. § 1152.29(e)(2) because they want someone, possibly including these Landowners who own the underlying fee, to pay them money in order to consummate abandonment. In fact, this record leaves no doubt, just like the result in *Modern Handcraft*, that a *de facto* abandonment has already taken place.

The abandonment of this Rail Line was established both by ISW's Notice of Exemption and the fact that ISW pulled up the rails and ties in 2012. In fact, when the Board granted permission to abandon in both 2010 and again in 2011, the Board had already determined that the "public convenience and necessity require or permit the abandonment." In addition, since two key fact witnesses from ISW testified during the *Memmer* trial, it is clear that ISW had the intent to abandon in 2010, followed through with their request for abandonment in 2010, received the Board's approval to abandon on two separate occasions in 2010 and 2011, removed the rails and ties in early 2012, which evidences their continued intent to abandon, and it has now been

confirmed that, even though ISW has not formally consummated abandonment, that it is still their intention to do so.

Although Mr. Cullen's testimony in *Memmer* (Exhibit K) dealt primarily with the removal of the rails and ties and the salvage of the rails, Mr. Cullen's testimony also clearly revealed that there has been no train traffic since 2004, that the rails and ties were in no condition to even support continued rail traffic, and that ISW did not have any customers and did not foresee the need for continued rail service in the future either.¹⁷

In addition to Mr. Cullen's testimony, Dan LaKemper, the General Counsel of ISW, also testified at length (Exhibit L). Mr. LaKemper explained the fact that ISW intended to abandon the right-of-way at the time the Notice of Exemption was prepared and filed in 2010, that even though the NITU expired ISW still had the desire to complete a deal, that continued discussions and negotiations took place to close a deal long after the NITU expired, and it was and still is ISW's intent to consummate the abandonment. In fact, there has been no train traffic since 2004, the rails and ties were removed in 2012, and there is no prospect or plan for future rail service on the line and ISW is waiting to consummate abandonment simply and solely to see if someone will pay them something in order for them to consummate abandonment.¹⁸

B. Under These Facts, the Board Should Conclude That the “Public Convenience and Necessity Require or Permit the Abandonment,” Just Like the Board Already Concluded in Both 2010 and 2011

Under these facts, the Board should conclude that the “public convenience and necessity requires or permit the abandonment” pursuant to 49 U.S.C. § 10903(a). In this case, there should be no dispute that there is no need for continuing rail traffic. The record has already been established that there has been no train traffic on this corridor since 2004, there are no current

¹⁷ See Exhibit K, Tr. 900:10-901:5; 905:5-907:12.

¹⁸ See Exhibit L, Tr. 967:16-968:16; 970:1-971:10.

shippers to protect, shippers have not needed any protection for over 16 years, and there is no need to protect shippers in the future either. ISW cannot reasonably or properly object to a decision of adverse abandonment either because they obviously have no shippers to protect and have had no shippers to protect for 16 years. In fact, ISW sought and received permission from the Board to abandon this Rail Line over 10 years ago, removed the rails and ties, received \$1.2 Million in salvage value for the rails, and has basically repeatedly admitted that there are no current shippers and no prospects for shippers in the future.

In the end, Mr. LaKemper ultimately confirmed that there was no alternative to abandonment because they did not want to keep the line in place without having any customers:

Q. And if you go back to page 21, it goes on to say that the only alternative to abandonment, which is the start of this next paragraph, would be for ISW not to abandon the line and to incur losses associated with the ownership of unused rail assets. Do you see that?

A. Yes.

Q. So, you didn't want to keep the line in place and have the costs associated with that course of action without having any customers on the line, right?

A. Correct.

Q. All right.

And given these two alternatives, one was to go ahead and abandon the line, which you started with this abandonment exemption procedure, and the other one was to not abandon the line, right?

A. That's the -- that's the two alternatives that are presented there, yes.

Q. And ISW, basically, concluded that to not abandon the line was an untenable alternative, correct?

A. We did not want to maintain the line in place.

See Exhibit L, Tr. 957:23-958:18 (emphasis added).

This record actually leaves no doubt, that a *de facto* abandonment has already taken place. The Board's ruling in *Modern Handcraft* should actually be dispositive under these facts because there should be no question that "public convenience and necessity requires or permits the abandonment" and the Rail Line is "not required for rail service in interstate commerce." In fact, the facts in this case are much more egregious than the facts in *Modern Handcraft* because:

- 1) There was no rail service or recognizable maintenance in *Modern Handcraft* for 12 years and it is 16 years in this case;
- 2) There was a *de facto* abandonment in *Modern Handcraft* just like there is here;
- 3) There has been no effort to solicit train traffic for at least 10 years in this case, just like *Modern Handcraft*, and ISW actually removed the rails and ties over 8 years ago, which made the Rail Line unusable for continued train traffic;
- 4) Just like *Modern Handcraft*, the Rail Line has not been used by anyone for 16 years and has no current usage either, and
- 5) Just like *Modern Handcraft*, ISW's only interest appears to be price and/or the terms of transfer.

As the Board pointed out in *Modern Handcraft*, the Board's exclusive and plenary jurisdiction over abandonments is to provide the public with a degree of protection concerning continuing rail service and the Board should not stand by and allow that jurisdiction to be used to shield ISW when there is no overriding federal interest in interstate commerce. In fact, just like in *Modern Handcraft*, ISW is actually misusing the federal jurisdiction over the Rail Line to improperly interfere with the Landowners' legitimate uses of the right-of-way. Here, just like in *Modern Handcraft*, rail service "is not required and that elimination of this line will not burden interstate commerce and will benefit the public."¹⁹ Under these egregious facts, the Board should

¹⁹ The benefit to the public, to these Landowners, is paramount because they can get their land back and put it to productive use. This fundamental tenet of property law is arguably the most basic and most important aspect of the law of the land in the United States. As noted by the esteemed scholar, Professor James W. Ely, Jr., "[P]erhaps the

not allow its jurisdiction “to be used to shield [ISW] from the legitimate processes of State law where there is no overriding Federal interest in interstate commerce.” The Board should conclude that the present and future public convenience and necessity permit the adverse abandonment of this Rail Line.

The case of *Birt v. Surface Transp. Bd.*, 90 F.3d 580 (D.C. Cir. 1996) is instructive on both the proper interpretation of the regulatory process involving rails-to-trails conversions and the continuing nature of the taking in this case even though the NITU expired. First, after interpreting the STB’s regulatory process and the Supreme Court’s Opinion in *Preseault I*, the D.C. Circuit stated that “before it can cease service on an established line, however, a railroad must obtain a ‘certificate of abandonment’ from the ICC” and “once in possession of an effective abandonment certificate, the railroad may at any time thereafter exercise its option to fully abandon the line by clearly exhibiting its intent to do so.” See *Birt*, 90 F.3d at 582-583. The “certificate of abandonment” referred to by the D.C. Circuit is the exact permission to abandon that was ultimately granted under either the CITU or the NITU process because, as the D.C. Circuit specifically held, the **“certificate of abandonment” is the permissive authority** for the railroad to abandon under the Trails Act.

Second, the D.C. Circuit in *Birt* discussed the relevant facts to be examined to determine if the railroad actually intended to abandon the line under state law and the inherent problems associated with extensions to consummate abandonment under federal law when the right-of-way has already been abandoned under state law. The Plaintiff in *Birt* attempted to argue that the Board lost jurisdiction over the corridor at issue because it was already abandoned under state law even

most important value of the Founding Fathers of the American constitutional period was their belief in the necessity of securing property rights.” See Property Rights in American History, Vanderbilt University, James W. Ely, Jr., <https://www.hillsdale.edu/educational-outreach/free-market-forum> (last visited 11/12/2020).

though they were negotiating for a possible trail use agreement under the CITU. The D.C. Circuit ruled that the Board did not lose its jurisdiction over the corridor at issue even though state law abandonment had occurred but identified the **inherent problem** with the Board's continuing jurisdiction when state law abandonment has occurred and the consummation of abandonment has not occurred:

“Nor does the Commission’s policy of granting extensions when presented with evidence of good-faith negotiations between the railroad and potential trail sponsor compromise the goal that a CITU is intended to advance—providing a defined window of opportunity for reaching agreement on a trails conversion. **Although extensions *ad infinitum* might frustrate that purpose by allowing the railroad to stop service without either relinquishing its rights to the easement or putting the right-of-way to productive use**, an extension of 30 or 60 days does not threaten such a result.

See Birt, 90 F.3d at 589 (emphasis added).

ISW in this case, unfortunately, through a combination of extensions to negotiate a trail use agreement (which failed) and their failure to consummate abandonment under federal law, has done exactly what the D.C. Circuit referred to in *Birt*. In this case, ISW abandoned the corridor as a matter of fact when they received the effective certificate of abandonment on two different occasions in 2010 and 2011 and, because they failed to consummate abandonment under federal law, **the Board is specifically allowing** ISW to stop service **without either** relinquishing its rights to the easement under federal law, thereby giving the land back to the Landowners, or putting the right-of-way to productive use.

VI. CONCLUSION

This Rail Line has effectively been abandoned for 16 years and a *de facto* abandonment occurred at least 10 years ago when ISW filed their Petition for Exemption and then removed and salvaged the rails and ties. The Landowners’ Petition and Motion for Adverse Abandonment must be granted because there have been no shippers to protect for 16 years, there is no overriding

federal interest in interstate commerce, and ISW should not be allowed or permitted to misuse the Board's jurisdiction as a shield against the Landowners' proper and legitimate property rights under state law. In this case, the benefits to the Landowners far outweigh any possible benefit to ISW and the land should be returned to the Landowners so they can put the land to productive use.

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CERTIFICATE OF SERVICE

I certify that I have this day served copies of this document upon all parties of record in this proceeding, by U.S. Mail, this 17th day of November, 2020.

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In the United States Court of Federal Claims

No. 14-135L
(Filed: November 2, 2020)

JEFFREY MEMMER, GILBERT
EFFINGER, LARRY GOEBEL AND
SUSAN GOEBEL, OWEN HALPENY,
MATTHEW HOSTETTLER, JOSEPH
JENKINS, MICHAEL MARTIN AND RITA
MARTIN, McDONALD FAMILY FARMS
OF EVANSVILLE, INC., REIBEL FARMS,
INC., JAMES SCHMIDT AND ROBIN
SCHMIDT,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

*
*
* Trial Decision; Rails-to-Trails; Fifth
* Amendment Taking; Indiana Law; Vacatur
* and Remand From Federal Circuit Before
* Addressing Merits of Cross-Appeals to
* Make a Record for Applying a Multifactor
* Test (as directed in Caquelin); Effect of
* Vacatur; Cognizable Property Interests;
* Liability for a Taking When No Trail Use
* Agreement Executed, NITU Expires, and
* Abandonment Not Consummated; Arkansas
* Game & Fish; Causation; Extent of Taking;
* Damages for a Temporary Taking
*
*
*

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OPINION AND ORDER

SWEENEY, Senior Judge

In this Rails-to-Trails case, plaintiffs own real property adjacent to railroad lines in southwestern Indiana. They contend that the United States violated the Just Compensation Clause of the Fifth Amendment to the United States Constitution by authorizing the conversion of the railroad lines into recreational trails pursuant to the National Trail Systems Act ("Trails Act"), thus acquiring their property by inverse condemnation. This case presents an issue of first impression: whether there is a compensable taking in the situation in which the issuance of a Notice of Interim Trail Use or Abandonment ("NITU") did not lead to a trail-use agreement, the NITU expired, and the railroad company did not file a notice of consummation of abandonment despite having no intention to use its line.

The court initially determined liability upon the parties' cross-motions for summary judgment. Thereafter, the parties reached a settlement on the proper amount of damages and the

EXHIBIT A

court entered judgment. Both plaintiffs and defendant appealed and then, shortly thereafter, jointly requested that the United States Court of Appeals for the Federal Circuit (“Federal Circuit”) vacate the court’s summary judgment decision and judgment to enable further proceedings consistent with the Federal Circuit’s decision in Caquelin v. United States (“Caquelin I”), 697 F. App’x 1016 (Fed. Cir. 2017) (per curiam). The Federal Circuit granted the parties’ request and vacated the court’s judgment in its entirety. Consequently, none of the court’s rulings and orders that provided the basis for that judgment survives, requiring the court to approach this case with a blank slate.

In accordance with the Federal Circuit’s mandate, the court on remand allowed additional discovery and then conducted a trial on liability and damages. As explained in more detail below, the court awards damages to plaintiffs in an amount to be determined in accordance with its findings and conclusions.

TABLE OF CONTENTS

I. BACKGROUND	3
A. Statutory and Regulatory Context.....	3
B. Fifth Amendment Takings and the Trails Act.....	6
C. Procedural History.....	7
II. LIABILITY: PROPERTY INTEREST.....	11
A. Legal Standards.....	11
1. Deed Construction	12
2. Scope of Easements	14
B. Findings of Fact.....	14
C. Conclusions of Law.....	18
1. Property Interests Acquired by Indiana Southwestern’s Predecessors	18
a. The Type A Deeds	18
b. The Type A-1 Deeds	19
c. The Smith Deed.....	19
d. The Davis Deed.....	20
e. The Side Track Deed.....	20
2. Scope of the Easements Acquired by Indiana Southwestern’s Predecessors	21
3. Existence of the Easements at the Time of the Alleged Taking	22
III. LIABILITY: FIFTH AMENDMENT TAKING	22
A. Legal Standards.....	22
1. Nature of a Taking	23
2. Causation.....	24

3. Abandonment Under Indiana Law.....	25
B. Findings of Fact.....	28
1. Proceedings Before the Board	28
2. Actions of Indiana Southwestern During the Proceedings Before the Board and Thereafter.....	31
3. The Character and Use of Plaintiffs' Properties	33
a. The Effinger Property	33
b. The Goebel Property	34
c. The Halpeny Property	36
d. The Jenkins Property.....	37
e. The Martin Property	38
f. The McDonald Family Farms Property.....	39
g. The Memmer Property	40
h. The Reibel Farms, Inc. Property	41
i. The Schmidt Property	42
C. Conclusions of Law.....	43
1. The Nature of the Alleged Taking	43
2. Causation.....	48
IV. DAMAGES: EXTENT OF THE CATEGORICAL TAKING	51
A. Legal Standard	51
B. Findings of Fact.....	52
C. Conclusions of Law.....	52
V. DAMAGES: PRINCIPAL AMOUNT OF JUST COMPENSATION	54
A. Legal Standard	54
B. Findings of Fact.....	55
C. Conclusions of Law.....	61
VI. DAMAGES: INTEREST AND COSTS	63
VII. CONCLUSION	64

I. BACKGROUND

A. Statutory and Regulatory Context

During the last century, the United States began to experience a sharp reduction in rail trackage. Preseault v. Interstate Com. Comm'n (“Preseault I”), 494 U.S. 1, 5 (1990). To remedy this problem, Congress enacted a number of statutes, including the Trails Act, 16 U.S.C. §§ 1241-1251 (2006). The Trails Act, as amended, provides for the preservation of “established

railroad rights-of-way for future reactivation of rail service” by authorizing the interim use of such rights-of-way as recreational and historical trails. Id. § 1247(d). This process is referred to as “railbanking,” and is overseen by the Surface Transportation Board (“Board”), id., the federal agency with the “exclusive” jurisdiction to regulate “the construction, acquisition, operation, abandonment, or discontinuance” of most railroad lines in the United States, 49 U.S.C. § 10501(b) (2006); accord Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 320-21 (1981) (declaring that the authority of the Interstate Commerce Commission—the Board’s predecessor, see 49 U.S.C. § 1302—over abandonments was both exclusive and plenary).

Before railbanking can occur, the railroad company must seek to abandon its line, either by initiating abandonment proceedings with the Board pursuant to 49 U.S.C. § 10903, or by seeking an exemption from such proceedings pursuant to 49 U.S.C. § 10502.¹ A railroad company that initiates abandonment proceedings may only abandon its line “if the Board finds that the present or future public convenience and necessity require or permit the abandonment” 49 U.S.C. § 10903(d); accord id. § 10903(e) (providing that the Board “shall” approve applications for abandonment if it “finds public convenience and necessity”). In addition, there is a class exemption from abandonment proceedings for railroad companies that “certif[y] that no local traffic has moved over the line for at least 2 years” and satisfy other specified criteria. 49 C.F.R. § 1152.50(a)-(b), (d)(1); see also id. § 1152.50(c) (finding, in accordance with 49 U.S.C. § 10502, that when the stated criteria are satisfied, abandonment proceedings are unnecessary to implement rail transportation policy or “to protect shippers from abuse of market power”). To invoke this class exemption, a railroad company must file a notice of exemption with the Board, id. § 1152.50(d)(2), and if the notice of exemption is complete, the Board must publish a notice in the Federal Register noting the submission within twenty days of filing, id. § 1152.50(d)(3).

In conjunction with the railroad company’s abandonment application or notice of exemption, the Board will entertain protests and comments from interested third parties. Id. §§ 1152.25, .28(a), .29(a). Of particular relevance in this case, interested third parties may submit a request for the interim use of the railroad line as a trail pursuant to 16 U.S.C. § 1247(d), seek a public-use condition pursuant to 49 U.S.C. § 10905, and make an offer of financial assistance (“OFA”) pursuant to 49 U.S.C. § 10904. Id.

If an interested third party submits a trail-use request to the Board that satisfies the requirements of 16 U.S.C. § 1247(d), the Board makes the necessary findings pursuant to 49 U.S.C. § 10502(a) or 49 U.S.C. § 10903(d), and the railroad company agrees to negotiate a trail-use agreement, the Board will issue one of two documents: if the railroad company initiated abandonment proceedings, the Board will issue a Certificate of Interim Trail Use or Abandonment (“CITU”), and if the railroad company is exempt from abandonment proceedings, the Board will issue a NITU. Id. § 1152.29(b)-(d). The effect of both documents is the same: to “permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and materials, consistent with interim trail use and rail banking . . . ; and permit the railroad to fully

¹ A railroad company may petition for an individual or class exemption, 49 U.S.C. § 10502(a)-(b), or, as relevant in this case, invoke a previously created class exemption, 49 C.F.R. § 1152.50 (2010).

abandon the line if no agreement is reached 180 days after it is issued, subject to appropriate conditions” Id. § 1152.29(d)(1); accord id. § 1152.29(c)(1). The Board will entertain requests to extend the 180-day deadline to enable further negotiations. If the railroad company and the interested third party execute a trail-use agreement, then abandonment of the railroad line is stayed for the duration of the agreement. Id. § 1152.29(c)-(d); 16 U.S.C. § 1247(d). If no trail-use agreement is executed, the railroad company is permitted to fully abandon the line. 49 C.F.R. § 1152.29(c)-(d).

Similarly, if an interested third party believes that it would be appropriate for the railroad line to be put to public use, “including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation,” 49 U.S.C. § 10905, it can seek the imposition of a public-use condition, 49 C.F.R. § 1152.28(a)(2). If the Board finds that the line is “appropriate for use for other public purposes,” the railroad company may dispose of the line “only under the conditions” imposed by the Board, which “may include a prohibition against the disposal of the rail assets for a period of not more than 180 days from the effective date of the decision authorizing the abandonment or discontinuance, unless the properties have first been offered, on reasonable terms, for sale for public purposes.” Id. § 1152.28(b); accord 49 U.S.C. § 10905.

Abandonment of a railroad line may also be postponed if an interested third party makes an OFA to subsidize or purchase the railroad line to continue rail service. 49 U.S.C. § 10904; 49 C.F.R. § 1152.27. If a railroad company filed an application for abandonment or a petition for an individual exemption, the OFA must be made and filed with the Board within four months of the railroad company’s application/petition or ten days of the Board’s decision granting the application/petition, whichever is earlier. 49 U.S.C. § 10904(c); 49 C.F.R. § 1152.27(b)(1), (2)(i). If a railroad company invoked a class exemption, the OFA must be made and filed with the Board within thirty days of the Board publishing notice of the exemption in the Federal Register. 49 C.F.R. § 1152.27(b)(2)(ii). “The Board will review each offer submitted to determine if a financially responsible person has offered assistance. If that criterion is met, the Board will issue a decision postponing the effective date of” its abandonment authorization, decision allowing an individual exemption, or notice of exemption, as appropriate. 49 C.F.R. § 1152.27(e)(1)-(2); accord 49 U.S.C. § 10904(d)(1). Abandonment is postponed until the railroad company and “a financially responsible person have reached an agreement on a transaction for subsidy or sale of the line” or, if an agreement is not reached, the Board establishes the conditions and amount of compensation for the transaction. 49 U.S.C. § 10904(d)(2). If an agreement is reached, abandonment of the line will not proceed. 49 C.F.R. § 1152.27(f). If no agreement is reached, the Board will vacate its decision postponing the effective date of its abandonment authorization, exemption decision, or notice of exemption, id. § 1152.27(g)(2), (h)(7), allowing the railroad company to abandon the line.

To exercise its abandonment authority, a railroad company must “file a notice of consummation with the Board to signify that it has . . . fully abandoned the line” either within one year of “the service date of the decision permitting the abandonment (assuming that the railroad intends to consummate the abandonment)” or, if a “legal or regulatory barrier to consummation exists at the end of the 1-year time period, . . . not later than 60 days after the satisfaction, expiration or removal of the legal or regulatory barrier.” Id. § 1152.29(e)(2). Upon

the filing of a notice of consummation, the Board is divested of jurisdiction over the abandoned railroad line and “state law reversionary property interests, if any, take effect.” Caldwell v. United States, 391 F.3d 1226, 1228-29 (Fed. Cir. 2004); see also 49 U.S.C. § 10904(g) (“Upon abandonment of a railroad line . . . , the obligation of the rail carrier abandoning the line to provide transportation on that line . . . is extinguished.”). In the absence of a timely filed notice of consummation, the railroad company’s authority to abandon the line “automatically expire[s].” 49 C.F.R. § 1152.29(e)(2).

B. Fifth Amendment Takings and the Trails Act

As described in more detail below, plaintiffs claim that the issuance of a NITU prevented them from obtaining fee simple ownership in the land underlying the railroad lines subject to the NITU and that, consequently, they are owed just compensation under the Fifth Amendment. The Fifth Amendment prohibits the federal government from taking private property for public use without paying just compensation. U.S. Const. amend. V. The United States Court of Federal Claims (“Court of Federal Claims”) possesses jurisdiction to entertain Fifth Amendment takings claims against the United States, 28 U.S.C. § 1491(a)(1) (2012); Morris v. United States, 392 F.3d 1372, 1375 (Fed. Cir. 2004), such as claims premised upon the conversion of a railroad line into a recreational trail pursuant to the Trails Act, Preseault I, 494 U.S. at 12-13.

To establish a taking, a plaintiff must first “identif[y] a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking.” Casitas Mun. Water Dist. v. United States, 708 F.3d 1340, 1348 (Fed. Cir. 2013); accord Klamath Irrigation Dist. v. United States, 635 F.3d 505, 520 n.12 (Fed. Cir. 2011) (“It is plaintiffs’ burden to establish cognizable property interests for purposes of their takings . . . claims.”). To demonstrate a cognizable property interest in a Trails Act case, a plaintiff must establish ownership in land adjacent to the railroad line described in the NITU and that ownership in that land can be traced to the railroad company’s acquisition. Brooks v. United States, 138 Fed. Cl. 371, 377 (2018). A plaintiff must also establish that the railroad company acquired an easement for railroad purposes that continued to exist at the time of the alleged taking. Ellamae Phillips Co. v. United States, 564 F.3d 1367, 1373 (Fed. Cir. 2009); Preseault v. United States (“Preseault II”), 100 F.3d 1525, 1533 (Fed. Cir. 1996) (en banc). With respect to this latter requirement, a court considers:

- (1) who owned the strips of land involved, specifically did the Railroad . . . acquire only easements, or did it obtain fee simple estates; (2) if the Railroad acquired only easements, were the terms of the easements limited to use for railroad purposes, or did they include future use as public recreational trails; and (3) even if the grants of the Railroad’s easements were broad enough to encompass recreational trails, had these easements terminated prior to the alleged

taking so that the property owners at that time held fee simples unencumbered by the easements.²

Preseault II, 100 F.3d at 1533 (footnote added); accord Ellamae Phillips Co., 564 F.3d at 1373.

“[I]f the court concludes that a cognizable property interest exists, it then determines whether the government’s action amounted to a compensable taking of that interest.” Casitas Mun. Water Dist., 708 F.3d at 1348. In Trails Act cases, a taking occurs when “government action destroys state-defined property rights,” either “by converting a railway easement to a recreational trail, if trail use is outside the scope of the original railway easement,” Ladd v. United States, 630 F.3d 1015, 1019 (Fed. Cir. 2010), or by compelling the continuation of a railroad-purposes easement to accommodate negotiations for a trail-use agreement, even if the negotiations are ultimately unsuccessful, see id. at 1025; Caquelin v. United States (“Caquelin III”), 959 F.3d 1360, 1364, 1367 (Fed. Cir. 2020). It is well settled that the Board’s issuance of a NITU, which forestalls the full abandonment of the railroad line, “is the government action that prevents the landowners from possession of their property unencumbered by the easement.” Ladd, 630 F.3d at 1023; accord Caquelin III, 959 F.3d at 1367 (“The NITU . . . was a government action that compelled continuation of an easement for a time; it did so intentionally and with specific identification of the land at issue; and it did so solely for the purpose of seeking to arrange, without the landowner’s consent, to continue the easement for still longer, indeed indefinitely, by an actual trail conversion.”); Barclay v. United States, 443 F.3d 1368, 1374 (Fed. Cir. 2006) (“The barrier to reversion is the NITU, not physical ouster from possession.”); Caldwell, 391 F.3d at 1233-34 (“The issuance of the NITU is the only government action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way.”); cf. Marvin M. Brandt Revocable Tr. v. United States, 572 U.S. 93, 104-05 (2014) (explaining that an easement is terminated when it is abandoned, leaving the owner of the servient estate with an “unencumbered interest in the land”).

C. Procedural History

On February 18, 2014, Jeffrey Memmer filed a complaint seeking just compensation under the Fifth Amendment for himself and as representative of a class of similarly situated individuals. In a subsequently filed amended complaint, Mr. Memmer was joined by additional plaintiffs: Gilbert Effinger; Larry and Susan Goebel (“the Goebels”); Owen Halpeny; Matthew Hostettler; Joseph Jenkins; Michael and Rita Martin (“the Martins”); McDonald Family Farms of Evansville, Inc. (“McDonald Family Farms”); Reibel Farms, Inc.; and James and Robin Schmidt

² The “alleged taking” in Preseault II was not a CITU or NITU, but was instead the conversion of the railroad-purposes easements to trails, because the agreement to allow the easements to be used as trails predated the Interstate Commerce Commission’s order allowing the discontinuation of railroad service. 100 F.3d at 1549-52; see also id. at 1552 (“Whether, at the time a railroad applies to abandon its use of an easement limited to railroad purposes, a taking occurs under an [Interstate Commerce Commission] order to ‘railbank’ the easement for possible future railroad use, and allowing in the interim for use of the easement for trail purposes, is a question not now before us. We offer no opinion at this time on that question.”).

(“the Schmidts”). In support of their claim for just compensation, plaintiffs allege that they own their property in fee simple; that prior to the Board’s issuance of the NITU, Indiana Southwestern Railway Company (“Indiana Southwestern”) owned an easement across each of their properties; that their properties would no longer be burdened by that easement if the easement was abandoned or authorized for use beyond its scope; and that but for the issuance of the NITU, they “would have the exclusive right to physical ownership, possession, and use of their property free of any easement for recreational trail use or future railroad use.”³ In its answer to the amended complaint, defendant admits only one allegation: the existence of the NITU. Defendant also asserts five affirmative defenses: (1) plaintiffs fail to state a claim upon which relief can be granted; (2) plaintiffs without an interest in the property allegedly taken lack standing; (3) plaintiffs who have had their interest in the subject property adjudicated in another action are estopped from adjudicating those interests in this case; (4) the claims of plaintiffs who have received compensation for their interest in the subject property are “extinguished by accord and satisfaction, payment, and/or release”; and (5) the claims that have been waived are barred.

After engaging in discovery regarding liability, the parties filed cross-motions for partial summary judgment. The parties generally contested two issues in those motions: (1) whether Indiana Southwestern’s predecessors in interest acquired easements to construct and operate their railroads and (2) whether the issuance of the NITU could effect a taking under the circumstances presented in the case (in other words, when a trail-use agreement is not executed, the NITU expires on its own terms, and the railroad company fails to consummate the abandonment of its line). The court rendered its liability decision in a July 10, 2015 Opinion and Order. See generally Memmer v. United States, 122 Fed. Cl. 350 (2015).

First, after acknowledging the undisputed facts that the plaintiffs owned property adjacent to Indiana Southwestern’s railroad lines and that Indiana Southwestern’s predecessors acquired a portion of those lines—adjacent to property owned by Reibel Farms, Inc.—via a prescriptive easement, id. at 354 & n.1, the court analyzed sixteen deeds through which Indiana Southwestern’s predecessors acquired the other relevant portions of the lines and determined that three of those deeds conveyed fee simple estates, id. at 358-64. Consequently, it dismissed the claims that derived from those deeds: Mr. Hostettler’s claim, part of the claim of Reibel Farms, Inc., and part of the Martins’ claim. Id. at 361-62, 364. Then, with respect to the claims derived from the thirteen deeds that conveyed an easement and the claim derived from the acquisition of a prescriptive easement, the court concluded that the scope of those easements did not encompass recreational trail use. Id. at 364. Finally, the court determined that binding precedent, including the Federal Circuit’s decision in Ladd, compelled the conclusions that the issuance of the NITU effected a taking and that “the taking is temporary, spanning from May 23, 2011, the effective date of the NITU, to November 8, 2013, the date the NITU expired.” Id. at 365-66.

After the court issued its liability decision, the parties engaged in discovery on the issue of damages and ultimately reached a settlement of the amount due for the claims that survived summary judgment. On April 11, 2017, the court, “[p]ursuant to [its] Opinion and Order, filed July 10, 2015, and Order, filed April 10, 2017, granting the parties’ request to enter judgment in

³ The amended complaint does not contain class allegations.

accordance with the Stipulation, filed April 7, 2017,” entered judgment pursuant to Rule 54(b) of the Rules of the United States Court of Federal Claims (“RCFC”).⁴

On June 9, 2017, defendant filed a notice of appeal indicating that it was appealing from the court’s summary judgment decision and the RCFC 54(b) judgment. Plaintiffs similarly cross-appealed the summary judgment decision and RCFC 54(b) judgment on June 21, 2017. In the docketing statement it filed with the Federal Circuit, defendant provided a “[b]rief statement of the issues to be raised on appeal”: “Whether the United States is liable for a taking of plaintiffs’ property where no trail use agreement was reached and the railroad ultimately elected not to abandon its line.” Docketing Statement of Appellant 2, Memmer v. United States, No. 17-2150 (Fed. Cir. July 13, 2017). In their docketing statement, plaintiffs identified the following issue for appeal: “Whether the lower court correctly ruled that the railroad owned fee simple in certain segments of the railroad corridor.” Docketing Statement of Cross-Appellant 2, Memmer v. United States, No. 17-2150 (Fed. Cir. July 13, 2017).

On the same day that plaintiffs filed their cross-appeal, the Federal Circuit issued its decision in Caquelin I. In that case, several months after the NITU expired on its own terms without the execution of a trail-use agreement, the railroad company consummated the abandonment of its line. Caquelin I, 687 F. App’x at 1018. On appeal, the government advanced an argument in tension with the Federal Circuit’s controlling precedent: that the “blocking of [the state law] reversion” that occurred for the 180 days between the issuance of the NITU and the expiration of the NITU “was not a categorical taking but instead calls for a multi-factor takings analysis.” Id. at 1019; *see also id.* (remarking that the government invoked the regulatory takings framework set forth in Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978), and the temporary takings analysis set forth in Arkansas Game & Fish Commission v. United States, 568 U.S. 23, 38-40 (2012)). Although it recognized that its controlling precedent dictated the result reached by the trial court, the Federal Circuit vacated the trial court’s judgment and remanded the case to the trial court to create “a fully developed record applying the multi-factor analysis the government urges” to enable the Federal Circuit to have “a concrete basis for comparison of the competing legal standards as applied.” Id. at 1020. Specifically, the Federal Circuit instructed the Caquelin trial court:

On remand, the Court of Federal Claims should conduct such proceedings—pre-trial, trial, and post-trial—as are necessary for an adjudication of how the government-advanced multi-factor analysis applies in this case, on the assumption that such an analysis is the governing standard. An opinion containing findings of fact and conclusions of law under such a standard—and also discussing what facts invoke which of the Supreme Court’s standards—would sharpen the focus of appellate consideration of the issues raised by the government in this case.

Id.

⁴ The only outstanding issue was the payment of costs pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, which was deferred until any appeals were resolved.

Because the issue on appeal in Caquelin I was also present in this case, the parties, before filing their opening appellate briefs, jointly moved the Federal Circuit to vacate this court's judgment and remand the case for proceedings "consistent with" the ruling in Caquelin I. Corrected Joint Mot. to Vacate and Remand to the Ct. of Federal Claims 1, Memmer v. United States, Nos. 17-2150, 17-2230 (Fed. Cir. Oct. 12, 2017). Specifically, they asserted:

[P]rinciples of judicial economy are best served by vacating the Court of Federal Claims' decision in this case and remanding for further proceedings like those ordered by this Court in Caquelin. Such a remand would allow development of a record that would further prime the case for this Court's review.

Id. at 5. The Federal Circuit granted the joint motion. In its order, it noted that in Caquelin I, "the Court of Federal Claims was asked to create a record applying the multi-factor analysis the government urged, so that this court could have a basis for comparison of the competing legal standards." Memmer v. United States, Nos. 17-2150, 17-2230, 2017 WL 6345843, at *1 (Fed. Cir. Nov. 16, 2017). It therefore ordered that "[t]he Claims Court's judgment is vacated and this case is remanded for further proceedings consistent with this order."⁵ Id.

On remand, the parties engaged in additional discovery related to the multifactor analysis and then filed pretrial briefs. The court conducted a pretrial conference in Washington, DC on November 27, 2018. It then held a trial from April 29 to May 2, 2019, in Evansville, Indiana, and on May 7, 2019, in Peoria, Illinois. The parties filed posttrial briefs, after which the court heard closing arguments on October 28, 2020.

The remainder of this opinion sets forth the court's findings of fact and conclusions of law, as required by RCFC 52(a)(1),⁶ with respect to both liability and damages.⁷

⁵ On May 29, 2020, the Federal Circuit issued its decision in Caquelin III, rejecting the multifactor analysis urged by the government and affirming the trial court's conclusion that the standard set forth in Ladd "remains governing precedent." 959 F.3d at 1366-70. Nevertheless, because the Federal Circuit's mandate requires the court to engage in a multifactor analysis, it will do so.

⁶ The court derives the facts from the parties' Joint Stipulations of Fact for Trial ("Jt. Stip."), the transcript of testimony elicited during trial ("Tr."), and the exhibits admitted into evidence as part of the trial record ("PX," "DX," or "JX"). Citations to the trial transcript will be to the page number of the transcript and the last name of the testifying witness.

⁷ As reflected in the procedural history, this case is back before the court after the Federal Circuit granted the parties' joint motion to (1) vacate the court's summary judgment decision and RCFC 54(b) judgment and (2) remand the case for proceedings similar to those ordered in Caquelin I. As a consequence of the Federal Circuit's vacatur, during trial, plaintiffs were required to establish all elements of a taking—possession of cognizable property interests, that the government's action constituted a compensable taking, and the amount of damages—after which the burden of persuasion shifted to defendant to rebut plaintiffs' evidence. See, e.g., Falcon v. Gen. Tel. Co., 815 F.2d 317, 320 (5th Cir. 1987) ("When the Supreme Court vacated [the trial court's] decision, it swept away all that was tied to that judgment."); In re Joy Glob.,

II. LIABILITY: PROPERTY INTEREST

The court begins its analysis, as it must, by determining whether plaintiffs have cognizable property interests that were the subject of the alleged taking. Casitas Mun. Water Dist., 708 F.3d at 1348.

A. Legal Standards

In general, state law governs the determination of the property interest acquired by a railroad company. See Preseault II, 100 F.3d at 1534 (“The question of what estates in property were created by these turn-of-the-century transfers to the Railroad requires a close examination of the conveying instruments, read in light of the common law and statutes of [the state] then in effect.”). Moreover, the acquisition of property rights is governed by the law in effect at the time the rights were acquired. See id.; Hash v. United States, 403 F.3d 1308, 1315 (Fed. Cir. 2005); accord Clark v. CSX Transp., 737 N.E.2d 752, 758 (Ind. Ct. App. 2000) (remarking that, “in construing a deed,” courts in Indiana “consider[] the instrument relative to the statutes in effect at the time of the conveyance”).

Inc., 381 B.R. 603, 612 (D. Del. 2007) (holding that when a grant of summary judgment had been vacated, “the situation is as if there were no prior proceedings” on summary judgment); see also Rumsfeld v. Freedom NY, Inc., 329 F.3d 1320, 1332 (Fed. Cir. 2003) (holding that when a judgment is vacated, the “vacated judgment ‘has no preclusive force either as a matter of collateral or direct estoppel or as a matter of the law of the case,’” and therefore the tribunal whose judgment was vacated is “free to come to different factual conclusions the second time around without revisiting its decision in the earlier vacated decision” (quoting U.S. Philips Corp. v. Sears Roebuck & Co., 55 F.3d 592, 598 (Fed. Cir. 1995))); Exxon Corp. v. United States, 931 F.2d 874, 877 (Fed. Cir. 1991) (“Law of the case . . . merely requires a trial court to follow the rulings of an appellate court. It does not constrain the trial court with respect to issues not actually considered by an appellate court, and thus has long been held not to require the trial court to adhere to its own previous rulings if they have not been adopted, explicitly or implicitly, by the appellate court’s judgment.” (footnote and citation omitted)); McGowan v. Sec’y of HHS, 31 Fed. Cl. 734, 737 (1994) (“The law of the case doctrine does not affect the power of a court to reconsider its interlocutory decisions. The court may change any interlocutory decision up until the entry of final [judgment].” (citing Jamesbury Corp. v. Litton Indus. Prods., Inc., 839 F.2d 1544, 1551 (Fed. Cir. 1988), overruled on other grounds by A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020 (Fed. Cir. 1992) (en banc))). This is not to say that the court would reach different conclusions on the title issues that were in dispute during the summary judgment stage and to which the parties did not stipulate for purposes of trial, namely, the interpretation of the deeds through which Indiana Southwestern’s predecessors acquired their property interests in the railroad lines. But absent that analysis, there would be no grounds to consider whether the Board’s issuance of the NITU constituted a taking and the amount of damages to which plaintiffs might be entitled.

1. Deed Construction

At the time the deeds were executed, Indiana law provided:

Any conveyance of lands worded in substance as follows: “A.B. conveys and warrants to C.D.” [here describe the premises] “for the sum of” [here insert the consideration] the said conveyance being dated and duly signed, sealed and acknowledged by the grantor, shall be deemed and held to be a conveyance in fee simple to the grantee, his heirs and assigns

Ind. Rev. Stat. ch. 23, § 12 (1852) (recodified at Ind. Rev. Stat. ch. 18, § 2927 (1881)). Further, “if it be the intention of the grantor to convey any lesser estate, it shall be so expressed in the deed.” *Id.* § 14 (recodified at Ind. Rev. Stat. ch. 18, § 2929 (1881)). Of course, not all deeds conform to the statutory language. With respect to such deeds:

There are several rules of construction to be used when construing the meaning of a particular deed. The object of deed construction is to ascertain the intent of the parties. In so doing, a deed is to be regarded in its entirety and the parts are to be construed together so that no part is rejected. Where there is no ambiguity in the deed, the intention of the parties must be determined from the language of the deed alone. . . .

A deed that conveys a right generally conveys only an easement. The general rule is that a conveyance to a railroad of a strip, piece, or parcel of land, without additional language as to the use or purpose to which the land is to be put or in other ways limiting the estate conveyed, is to be construed as passing an estate in fee, but reference to a right-of-way in such a conveyance generally leads to its construction as conveying only an easement.

Brown v. Penn Cent. Corp., 510 N.E.2d 641, 643-44 (Ind. 1987) (citations omitted); accord Ross, Inc. v. Legler, 199 N.E.2d 346, 348 (Ind. 1964) (“A deed, when the interest conveyed is defined or described as a ‘right of way,’ conveys only an easement in which title reverts to the grantor, his heirs or assigns upon the abandonment of such right-of-way.”); Richard S. Brunt Tr. v. Plantz, 458 N.E.2d 251, 256 (Ind. Ct. App. 1983) (considering a deed in which the grantors “convey[ed] and quit claim[ed] . . . , for railroad purposes, the following real estate,” and holding that “[r]eference to the intended use of the land indicate[d] that an easement was conveyed” because “the grantors would have no reason to specify the use if conveying a fee simple”). But see Poznic v. Porter Cnty. Dev. Corp., 779 N.E.2d 1185, 1190-92 (Ind. Ct. App. 2002) (holding that a deed that conveyed to the railroad company “[f]orever, a strip of land for railroad purposes” conveyed a fee simple and, in so holding, declined to treat the phrase “for railroad purposes” as limiting language, noted that the deed did not include a statement indicating that the deed would be void if the strip of land was not used for railroad purposes, and remarked that the deed did not include the term “right-of-way”).

“Deeds generally contain three important clauses: the granting clause, the habendum clause, and the descriptive clause.”⁸ Clark, 737 N.E.2d at 758. Reference to a “right-of-way” may appear in any of them. See, e.g., Ross, Inc., 199 N.E.2d at 349 (rejecting, as “an overrefinement of the rules of construction,” the contention that use of the term “right-of-way” in the descriptive clause of a deed is meaningless when the term is not included in the deed’s granting clause or habendum clause, and holding that “[t]he description clause of a deed may be employed to describe the quality as well as the dimensions and quantity of the estate conveyed”); CSX Transp., Inc. v. Rabold, 691 N.E.2d 1275, 1278 (Ind. Ct. App. 1998) (holding that when the term “right-of-way” is used in the descriptive clause “in reference to the subject matter of the deed,” and the deed does not contain the term “fee simple,” the deed conveys an easement); see also Prior v. Quackenbush, 29 Ind. 475, 478 (1868) (“The office of the habendum is properly to determine what estate or interest is granted by the deed, though this may be performed, and sometimes is performed, by the premises, in which case the habendum may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises.” (internal quotation marks omitted)); Claridge v. Phelps, 11 N.E.2d 503, 504 (Ind. App. 1937) (“[W]hen the granting clause of a deed is general or indefinite respecting the estate in the lands conveyed, it may be defined, qualified, and controlled by the habendum.”). But see Clark, 737 N.E.2d at 758 (remarking that when the term “right-of-way” appears “outside of the granting clause, the term is of limited value because it has two meanings[:] 1) a right to cross over the land of another, an easement, and 2) the strip of land upon which a railroad is constructed”). Indeed, even if the granting clause “favors the construction of the deed as conveying a fee simple absolute to the railroad company, such language is just a factor in determining whether the parties intended to grant a fee or an easement”; courts will also examine “other parts of the deed to see if the grantor expressed an intention to convey a lesser estate than fee simple.” Tazian v. Cline, 686 N.E.2d 95, 98 (Ind. 1997).

In addition to language expressly defining or describing the interest conveyed, evidence of the parties’ intent to convey an easement may appear in the title of the deed. See Clark, 737 N.E.2d at 758 (remarking that although “the cover and title of the instrument” are not considered “where the granting language is clear and unambiguous[,] . . . the title may provide additional evidence of intent where the language of the deed is unclear”). Such evidence may also include the amount or type of consideration described in the deed. See Tazian, 686 N.E.2d at 99 (“When attempting to ascertain the intent of the parties to a conveyance to a railroad, appellate courts of this state look at the consideration paid to the grantee railroad.”); Richard S. Brunt Tr., 458 N.E.2d at 255 (“[W]here the consideration is nominal or where the only consideration is the benefit to be derived by the grantor from the construction of the railroad rather than the full market value for the interest acquired reflects the intent to create an easement.”). However, neither the title of the deed nor the consideration described therein conclusively establishes the conveyance of an easement. See Clark, 737 N.E.2d at 758 (“[T]he title . . . is not dispositive of the nature of the conveyance.”), 759 (“[L]ack of consideration or nominal consideration alone is

⁸ The granting clause contains “[t]he words that transfer an interest in a deed or other instrument,” Granting Clause, Black’s Law Dictionary 845 (11th ed. 2019); the habendum clause is the part of a deed or other instrument “that defines the extent of the interest being granted and any conditions affecting the grant,” Habendum Clause, id. at 854; and the descriptive clause contains “the dimensions and quantity of the estate conveyed,” Ross, Inc., 199 N.E.2d at 349.

not sufficient cause for setting aside a deed. . . . [N]ominal monetary consideration, alone, does not make the instrument ambiguous, nor does it create an easement.”); Richard S. Brunt Tr., 458 N.E.2d at 255 (“Although such consideration is not by itself persuasive that the parties intended to convey an easement, it is just one more factor held to indicate an easement . . .”).

Ultimately, in construing deeds purporting to convey property interests to a railroad company, courts must be cognizant that:

Public policy does not favor the conveyance of strips of land by simple titles to railroad companies for right-of-way purposes, either by deed or condemnation. This policy is based upon the fact that the alienation of such strips or belts of land from and across the primary or parent bodies of the land from which they are severed, is obviously not necessary to the purpose for which such conveyances are made after abandonment of the intended uses as expressed in the conveyance, and that thereafter such severance generally operates adversely to the normal and best use of all the property involved. Therefore, where there is ambiguity as to the character of the interest or title conveyed such ambiguity will generally be construed in favor of the original grantors, their heirs and assigns.

Ross, Inc., 199 N.E.2d at 348; see also Penn Cent. Corp. v. U.S. R.R. Vest Corp., 955 F.3d 1158, 1160 (7th Cir. 1992) (“The presumption is that a deed to a railroad . . . conveys a right of way, that is, an easement, terminable when the acquirer’s use terminates, rather than a fee simple.”).

2. Scope of Easements

If the court concludes that Indiana Southwestern’s predecessors acquired easements to construct and operate their railroads, it must then ascertain whether the scope of those easements includes their use for recreational trails. “[S]tate law controls the basic issue of whether trail use is beyond the scope of the right-of-way.” Barclay, 443 F.3d at 1374 n.4 (citing Toews v. United States, 376 F.3d 1371, 1376-77 (Fed. Cir. 2004)). The Indiana Supreme Court has held that recreational trails are not within the scope of easements created for railroad purposes. Howard v. United States, 964 N.E.2d 779, 784 (Ind. 2012). Furthermore, under Indiana law, when a railroad company acquires a right-of-way through adverse possession, it obtains a prescriptive easement for railroad purposes. See Hoffman v. Zollman, 97 N.E. 1015, 1017 (Ind. App. 1912) (“A prescriptive right, where there is no color of title, cannot be broader than the claims which the user evidences. Ordinarily there is no user by a railroad company beyond a user for the purposes of a right of way.”); accord Macy Elevator, Inc. v. United States, 97 Fed. Cl. 708, 734-35 (2011) (“[U]nder Indiana law when a railroad acquires property by prescription or by condemnation, a railroad generally obtains an easement for railroad purposes.”).

B. Findings of Fact

The following facts are relevant to determining whether plaintiffs have cognizable property interests that were the subject of the alleged taking.

The interconnecting railroad lines at issue in this case are located in Posey and Vanderburgh Counties, Indiana, situated (1) between milepost 227.5 at Poseyville, Indiana and milepost 240.2 near German Township, Indiana and (2) between milepost 277.5 at Cynthiana, Indiana and milepost 282.0 at Poseyville, Indiana. JX 1 at 3-4. The railroad was constructed by predecessors of the current owner of the lines, Indiana Southwestern,⁹ Jt. Stip. ¶¶ 1-4, which is a subsidiary of Pioneer Railcorp, *id.* ¶ 4.

Indiana Southwestern's predecessors acquired the segments of the railroad lines relevant in this case by one of two means. First, they acquired a 4.42-acre segment through adverse possession; Reibel Farms, Inc. owns a parcel of land adjacent to this segment. JX 61; JX 62 at 11; JX 63 at 2; *see also* Jt. Stip. ¶ 26 (indicating that the parcel owned by Reibel Farms, Inc. is adjacent to the railroad lines). Second, they acquired the remaining segments by deed. JX 63 at 2. All of the plaintiffs own parcels adjacent to these segments. *Id.* The deeds, all dated between 1880 and 1882, JX 39 to JX 54, can either be grouped into one of two categories or assessed individually.¹⁰

The first seven deeds ("Type A deeds") contain language that is substantially similar to the following:

Right of Way Deed

Know all men by these Presents that [grantor(s)] for and in consideration of the construction of the [railroad] and for the further consideration of [amount], do grant, warrant and convey to the said [predecessor railroad company] its successors and assigns a strip of land [number] feet in width, being a strip [number] feet wide on each side of the center line of said Railway as it now is located through his land . . . described as follows to wit: [Description of land]. It being distinctly understood that this grant is for the purpose of construction, maintenance and operation of said Railway.

JX 39; *accord* JX 40 to JX 44; JX 45 (containing similar language, but with the last sentence instead providing: "It being distinctly understood that the above described Real Estate is to be used exclusively for Railroad purposes."). The amounts of consideration set forth in these deeds and the approximate land area conveyed are as follows:

⁹ The railroad lines were constructed by Evansville and Peoria Railroad, which subsequently became the Peoria, Decatur & Evansville Railway. Jt. Stip. ¶ 1. The Peoria, Decatur & Evansville Railway became part of the Illinois Central Railroad in 1900. *Id.* ¶ 2. Thereafter, the lines were operated by a series of railroad companies. *Id.* ¶ 3. In March 2000, Indiana Southwestern acquired the lines from Evansville Terminal Company, Inc. and AB Rail Investments, Inc. *Id.* ¶¶ 3-4.

¹⁰ For convenience, the court uses certain category and deed names suggested by plaintiffs in their motion for partial summary judgment.

Grantor(s)	Amount	Area
Wm. Marquis	\$100.00	2.75 acres
N. Marquis et al.	\$100.24	Unspecified portion of 3.5 acres
A.H. Fretageot et al.	\$20.05	Unspecified portion of 3.5 acres
Jane Owens et al.	\$60.14	Unspecified portion of 3.5 acres
Moses Endecott	\$1000.00	8.24 acres
L. Williams et al.	\$1.00	1.44 acres
Leroy Williams & wife	\$250.00	0.97 acres

JX 62 at 6, 8-9, 12. Mr. Halpeny, Mr. Memmer, and Mr. Jenkins own parcels adjacent to the land conveyed by the Type A deeds. JX 39 to JX 45; JX 63 at 2; see also Jt. Stip. ¶¶ 19, 22-23 (indicating that the parcels owned by these plaintiffs are adjacent to the railroad lines).

The next six deeds ("Type A-1 deeds") contain language that is substantially similar to the following:

Know all men by these Presents that [grantor(s)] for and in consideration of the construction of the [railroad] and for the further consideration of [amount], do grant, warrant and convey to the said [predecessor railroad company], its successors and assigns, a strip of Land [number] feet in width, being a Strip [number] feet wide on each side of the center line of said Railway as it now is Located through his Land . . . , described a follows, to wit:

[Description of land].

It being distinctly understood that this grant is for the purpose of construction, maintenance and operation of said Railway.

JX 46; accord JX 47 to JX 51. The amounts of consideration set forth in these deeds and the approximate land area conveyed are as follows:

Grantor(s)	Amount	Area
H. Hillenbrand and wife	\$400.00	4.45 acres
H. Goebel and wife	\$75.00	2.04 acres
S. McDonald et al.	\$100.00	1.92 acres
A.N. Martin and wife	\$700.00	6.04 acres
H.L. Graff and wife	\$175.00	3.07 acres
A.R. Grimm	\$257.50	5.16 acres

JX 62 at 1-5. The Goebels, McDonald Family Farms, the Martins, Mr. Effinger, and the Schmidts own parcels adjacent to the land conveyed by the Type A-1 deeds. JX 46 to JX 51; JX 63 at 2; see also Jt. Stip. ¶¶ 20-21, 25, 27 (indicating that the parcels owned by the Goebels, McDonald Family Farms, Mr. Effinger, and the Schmidts are adjacent to the railroad lines); id. ¶ 24 (indicating that two of the parcels owned by the Martins are adjacent to the railroad lines).

Finally, there are three deeds that do not belong to a group. The first such deed (“the Smith deed”) provides:

Right of Way Deed

Know all men by these presents, that Elizabeth Smith for and in consideration of the Benefits to be derived from the construction of the [railroad] and for the further consideration of one hundred Dollars . . . do grant, warrant and Convey to the said [predecessor railroad company] its successors and assigns a Strip of land sixty six feet in width being a Strip thirty three feet wide on Each Side of the center line of said Rail Road as it now is located through her land . . . described as follows to wit: [Description of land] it is hereby understood that Said Rail Road Company shall make one good farm crossing for the use and benefit of Said Elizabeth Smith said crossing to be made at a point to be designated by the Said Elizabeth Smith.

JX 52. With this deed, Ms. Smith conveyed approximately 1.22 acres, JX 62 at 11, and this acreage is adjacent to a parcel owned by Mr. Hostettler, JX 52; JX 63 at 2.

The second individual deed (“the Davis deed”) provides:

Right of Way Deed

Know all men by these Presents, That Joseph Davis and Mary C. Davis . . . for and [in] consideration of the benefits to be derived from the construction of the [railroad], and for the further consideration of One Hundred and Seventy-five Dollars . . . do grant, warrant and convey to the said [predecessor railroad company], its successors and assigns, a strip of Land sixty-six feet in width, being a strip thirty-three feet wide, in each side of the center line of said Railroad as it now is located through his land . . . , described as follows to wit: [Description of land] and it is hereby understood that the said Joseph Davis shall have the right to a water canal along said line on the south side of said R.R. on said strip of land [and] that said Joseph Davis reserves the timber on said right of way and that said R.R. Co. shall make one good crossing for the use and benefit of said Davis wherever he may designate.

JX 53. With this deed, the Davises conveyed approximately 2.4 acres, JX 62 at 11, and this acreage is adjacent to a parcel owned by Reibel Farms, Inc., JX 53; JX 63 at 2.

The third individual deed (“the side track deed”) provides:

This Indenture Witnesseth That Abner N. Martin and Cynthia Martin . . . Convey and Warrant to [predecessor railroad company] for the sum of One Dollar the following Real Estate . . . to wit:

Commencing at a point on the West boundary of their right of way of the E.D.&E [sic] Road where said Railway crosses the Base Line on the South side of the South East quarter of Section (31) . . . , thence running in a North Westerly direction along the right of way of said [railroad] 900 feet, thence West 50 feet[,] thence South Easterly 900 feet, thence 50 feet to place of beginning. The same to be theirs and their own as long as said Side track and Depot are in use any failure or removal will make this Deed none and void.

JX 54. With this deed, the grantors conveyed either 1.03 acres, *id.*, or 0.65 acres, JX 62 at 4-5, and this acreage is adjacent to a parcel owned by the Martins, JX 54; JX 63 at 2. As of March 1993, no side track or depot existed on or near the acreage. JX 64.

C. Conclusions of Law

1. Property Interests Acquired by Indiana Southwestern's Predecessors

As noted above, plaintiffs have established that they own land adjacent to the railroad lines and that their property interests trace back to the land acquired by Indiana Southwestern's predecessors for the construction of a railroad. Thus, the court turns to the first factor described in Preseault II and Ellamae Phillips Co.: whether Indiana Southwestern's predecessors acquired easements or fee simple estates.

Determining the property interest acquired by Indiana Southwestern's predecessors through adverse possession is straightforward: As previously noted, such an acquisition results in a prescriptive easement for railroad purposes. However, ascertaining the nature of the property interests conveyed by the sixteen deeds at issue requires a more searching analysis.

a. The Type A Deeds

The seven Type A deeds share the following characteristics: (1) they bear the title "Right of Way Deed"; (2) they "grant, warrant and convey . . . a strip of land"; and (3) they indicate either that the "grant is for the purpose of construction, maintenance and operation" of a railroad or that the "Real Estate is to be used exclusively for Railroad purposes." The granting clauses in the deeds conveyed strips of land to Indiana Southwestern's predecessors for varying amounts of consideration. If the deeds contained nothing more than the granting clauses, then they would have conveyed fee simple interests in the strips of land. *See* Ind. Rev. Stat. ch. 23, § 12 (1852). However, the deeds also included habendum clauses indicating that the strips of land were to be used for railroad purposes. The habendum clauses qualify, without contradicting, the estates conveyed in the granting clauses. *See* Prior, 29 Ind. at 478; Claridge, 11 N.E.2d at 504. Indeed, had the parties intended to convey fee simple interests in the strips of land, they would have had no reason to specify the use of the land in the habendum clauses. *See* Richard S. Brunt Tr., 458 N.E.2d at 256. Because deeds should be construed so that no part is superfluous, Brown, 510 N.E.2d at 643, the court concludes that the parties intended to convey easements, and not fee simple interests, in the strips of land. This conclusion is buttressed by the fact that these deeds

were recorded with the title “Right of Way Deed.”¹¹ See Clark, 737 N.E.2d at 758. Moreover, to the extent that the “railroad purposes” language in the habendum clause renders the deed ambiguous, public policy favors construing the deeds as conveying easements. See Ross, Inc., 199 N.E.2d at 348.

The Indiana Supreme Court’s decision in Tazian does not compel a different result. In Tazian, the deed’s granting clause provided: “[The grantors] do grant and convey and warrant . . . a strip of land . . .” 686 N.E.2d at 96. The habendum clause provided that the railroad company was “to have and to hold all and singular the said premises in and by these presents released and conveyed unto the [railroad company] forever for the uses and purposes therein expressed.” Id. As the Indiana Supreme Court explained, the phrase “for the uses and purposes therein expressed” referred to the uses and purposes described in the granting clause, and the granting clause contained no limitation on the uses and purposes of the strip of land. Id. at 101; accord id. (“[T]his deed does not describe the interest conveyed as a railroad right of way nor does the language limit the conveyance as for railroad purposes or railroad uses.”). In contrast, the habendum clauses in the seven Type A deeds specified the uses and purposes of the strips of land that were the subjects of the granting clauses. The court in Tazian found further support for its conclusion that the deed conveyed a fee simple interest to the railroad company in the use of the word “forever” in the habendum clause. Id. The Type A deeds do not specify that the grants to Indiana Southwestern’s predecessors were to be in perpetuity. In sum, the decision in Tazian does not control the outcome in this case. The Type A deeds conveyed easements.

b. The Type A-1 Deeds

The six Type A-1 deeds share the following characteristics: (1) they “grant, warrant and convey . . . a strip of Land” and (2) they indicate that the “grant is for the purpose of construction, maintenance and operation” of a railroad. But for the lack of titles identifying them as right-of-way deeds, the Type A-1 deeds are substantially the same as the Type A deeds previously described. Consequently, the court concludes that the parties to the Type A-1 deeds intended to convey easements, and not fee simple interests, in the strips of land.

c. The Smith Deed

The Smith deed possesses the following characteristics: (1) it is titled “Right of Way Deed”; (2) it reflects that the grantor did “grant, warrant and Convey . . . a Strip of land”; and (3) it does not indicate that the strip of land would be used for railroad purposes. The body of the deed—the granting clause, the habendum clause, and the descriptive clause—does not include any language that describes the strip of land being conveyed as a right-of-way or limits

¹¹ The monetary consideration paid by Indiana Southwestern’s predecessors for the rights-of-way described in the Type A deeds (and, in fact, in all of the deeds at issue) ranged from \$1 to \$1000. Although the payment of a nominal amount of consideration can suggest the conveyance of an easement, Tazian, 686 N.E.2d at 99; Richard S. Brunt Tr., 458 N.E.2d at 255, the court is unable to determine whether the consideration paid was nominal (aside from the two deeds indicating the payment of \$1) because the record lacks any evidence regarding the value of land in southwestern Indiana in the late 1800s.

the use of the strip of land to railroad purposes. In such circumstances, the deed conveys a fee simple estate. See Brown, 510 N.E.2d at 644; accord Ind. Rev. Stat. ch. 23, §§ 12, 14 (1852). The fact that the deed is titled “Right of Way Deed” does not alter the unambiguous nature of the conveyance. See Clark, 737 N.E.2d at 758. Nor can public policy override an unambiguous grant. See Ross, Inc., 199 N.E.2d at 348. In short, the Smith deed conveys a fee simple estate in the described strip of land. And because Indiana Southwestern owns the strip of land in fee simple, the issuance of the NITU could not have disturbed the property rights of the adjacent property owner—Mr. Hostettler. Defendant is therefore entitled to judgment in its favor with respect to Mr. Hostettler’s claim.

d. The Davis Deed

The Davis deed possesses the following characteristics: (1) it is titled “Right of Way Deed”; (2) it reflects that the grantors did “grant, warrant and Convey . . . a Strip of land”; (3) it indicates in the habendum clause that the grantors had “the right to a water canal along said line on the south side of said R.R. on said strip of land” and “reserve[d] the timber on said right of way”; and (4) it does not indicate that the strip of land would be used for railroad purposes. In contrast to the Smith deed, the Davis deed refers to the strip of land as a right-of-way in the habendum clause. The presence of the term “right-of-way” in the body of a deed can signal that the deed conveys an easement. See id. at 348-49; Brown, 510 N.E.2d at 644; CSX Transp., Inc., 691 N.E.2d at 1278. However, the term “right-of-way” has two meanings; it can refer to both the right to cross land and the land itself. Clark, 737 N.E.2d at 758; CSX Transp., Inc., 691 N.E.2d at 1278. In the Davis deed, the habendum clause indicates that the grantors reserved the right to a water canal on the south side of the railroad “on said strip of land,” and the right to the timber “on said right of way.” Thus, a plain reading of the habendum clause reveals that “right of way” is being used as a synonym for “strip of land,” and therefore refers to the land itself, and not the right to cross it.

Because the body of the deed does not include any language that describes the strip of land being conveyed as a right-of-way (in the easement sense of the phrase) or limits the use of the strip of land to railroad purposes, the deed conveys a fee simple estate. See Brown, 510 N.E.2d at 644; accord Ind. Rev. Stat. ch. 23, §§ 12, 14 (1852). As with the Smith deed, the fact that the Davis deed is titled “Right of Way Deed” does not alter the unambiguous nature of the conveyance. See Clark, 737 N.E.2d at 758. Nor can public policy override an unambiguous grant. See Ross, Inc., 199 N.E.2d at 348. In short, the Davis deed conveys a fee simple estate in the described strip of land. And because Indiana Southwestern owns the strip of land in fee simple, the issuance of the NITU could not have disturbed the property rights of the adjacent property owner—Reibel Farms, Inc. Defendant is therefore entitled to judgment in its favor with respect to the portion of the claim of Reibel Farms, Inc. that derives from the Davis deed.

e. The Side Track Deed

The side track deed reflects that (1) the grantors did “Convey and Warrant . . . Real Estate” to the railroad company, (2) the consideration paid by the railroad company was one dollar, (3) the real estate would remain with the railroad company “as long as said Side track and Depot are in use,” and (4) “any failure or removal will make this Deed none and void.” Unlike

the easement-conveying deeds in Macy Elevator, Inc., which provided that “[w]hen said land herein released Shall cease to be used for Rail Road purposes, it shall revert back to the original tract” and “Said land 66 feet wide to be held and enjoyed by Said RailRoad Company So long as it shall be used for a Rail Road & no longer,” 97 Fed. Cl. at 716, the side track deed lacks any of the typical language suggesting that it conveys an easement rather than a fee simple; the term “right-of-way” is not used, there is no statement that the “Real Estate” being conveyed is to be used for “railroad purposes,” and the existence of nominal consideration, on its own, does not create an easement. See Brown, 510 N.E.2d at 644; Clark, 737 N.E.2d at 759; Richard S. Brunt Tr., 458 N.E.2d at 255. Rather, the form of the side track deed follows the contemporaneous statutory language deemed to convey a fee simple estate. See Ind. Rev. Stat. ch. 23, §§ 12, 14 (1852). Because the deed did not convey an easement to the railroad company, the current owners of the adjacent parcel—the Martins—could not have any property rights that would have been affected by the issuance of the NITU.

But even if the side track deed conveyed an easement to the railroad company, the Martins would not prevail because the deed included a contingency that (1) rendered the easement determinable and (2) would have led to the termination of the easement before the Board issued the NITU. A determinable easement, like a determinable fee, “terminate[s] upon the happening of the event upon which its existence is conditioned without any action by the grantor of the estate or his successors in interest.” Erie-Haven, Inc. v. First Church of Christ, 292 N.E.2d 837, 841 (Ind. Ct. App. 1973); see also Lindsay v. Wigal, 250 N.E.2d 755, 756 (Ind. App. 1969) (“[T]he words[] ‘as long as’ create a determinable fee which reverts ipso facto on the happening of the stated event.”). The evidence in the trial record reflects that at some point in time prior to March 1993, one of Indiana Southwestern’s predecessors removed the side track and depot from or near the parcel conveyed by the side track deed. This removal terminated the interest held by the railroad company—whether it was an easement or fee simple estate—leaving Indiana Southwestern with no interest in the parcel at the time the Board issued the NITU.¹² Thus, the issuance of the NITU would have had no effect on the property rights of the adjacent property owners, such as the Martins. Defendant is therefore entitled to judgment in its favor with respect to the portion of the Martins’ claim that derives from the side track deed.

2. Scope of the Easements Acquired by Indiana Southwestern’s Predecessors

Having concluded that Indiana Southwestern’s predecessors obtained easements through adverse possession and the Type A and Type A-1 deeds, the court proceeds to the next inquiry set forth in Preseault II and Ellamae Phillips Co.: what is the scope of those easements? Specifically, are the easements limited to use for railroad purposes, or are they broad enough to encompass use for recreational trails? All thirteen of the deeds reflect that the conveyances were for the purposes of constructing, maintaining, and operating a railroad, and under Indiana law,

¹² Relatedly, the trial record lacks evidence that the Martins are the heirs of Abner N. Martin and Cynthia Martin, such that they would be the beneficiaries of the reversion. See also JX 26 (reflecting that the Martins purchased their parcels in October 2008 from Eugene W. Kuehn, Charlotte A. Kuehn, Jerry W. Schmidt, and Shirley A. Schmidt); Tr. 268-69 (Martin) (stating that the Martins purchased their parcels in a private sale from a mentee of Mr. Martin’s father).

recreational trails are not within the scope of such easements. Moreover, a railroad company obtains a railroad purposes easement when it acquires property to construct and operate its railroad by prescription. Accordingly, the easements possessed by Indiana Southwestern at issue in this case are limited to use for railroad purposes.

3. Existence of the Easements at the Time of the Alleged Taking

The final inquiry under Preseault II and Ellamae Phillips Co. is whether Indiana Southwestern's easements terminated before the alleged taking. Plaintiffs contend that the taking occurred when the Board issued the NITU, and further contend that thereafter, Indiana Southwestern took actions that, under state law, constituted the abandonment of the railroad lines. The trial record lacks any evidence that Indiana Southwestern or its predecessors abandoned the easements, or that the easements were otherwise terminated, prior to the issuance of the NITU. Thus, the court concludes that at the time of the alleged taking, the parcels held in fee simple by adjacent landowners were encumbered by the easements. Accordingly, those plaintiffs who own parcels adjacent to the easements conveyed by the Type A and Type A-1 deeds—Mr. Halpeny, Mr. Memmer, Mr. Jenkins, the Goebels, McDonald Family Farms, the Martins, Mr. Effinger, and the Schmidts—and obtained through adverse possession—Reibel Farms, Inc.—have cognizable Fifth Amendment property interests.¹³

III. LIABILITY: FIFTH AMENDMENT TAKING

Having determined the existence of cognizable property interests at the time of the alleged taking, the next inquiry is whether those interests were, in fact, taken. Casitas Mun. Water Dist., 708 F.3d at 1348. In its vacated summary judgment decision, the court, relying on the Federal Circuit's decision in Ladd, treated the Board's issuance of the NITU as a categorical physical taking. However, the Federal Circuit's remand order in this case and the Federal Circuit's decision in Caquelin III require the court to revisit its holding.

A. Legal Standards

The court must address two overarching issues to determine whether the government is liable for a taking in the circumstances presented in this case: (1) the nature of the alleged taking and (2) whether the government's action—the NITU—caused a taking. The resolution of the

¹³ By deed, Mr. Halpeny's parcel extends to the centerline of the adjacent railroad line, JX 20 (deed), and the parcel owned by McDonald Family Farms encompasses the entire relevant segment of the adjacent railroad line, JX 17 (deed); JX 19 (map). The remaining named plaintiffs did not acquire the land underlying the adjacent railroad line when they acquired their parcels. JX 11 (Memmer deed); JX 14 (Goebel deed); JX 23 (Reibel Farms, Inc. deed); JX 26 (Martin deed); JX 29 (Effinger deed); JX 32 (Jenkins deed); JX 34 (Jenkins map); JX 35 (Schmidt deed). Under Indiana law, their parcels extend to the centerline of the adjacent railroad lines. See Macy Elevator, Inc., 97 Fed. Cl. at 719-20 (noting that it is well settled in Indiana that when deeds do not include the railroad right-of-way, the adjoining fee owners own to the centerline of the right-of-way, subject to the easement).

first issue is dictated by the Federal Circuit's decisions in Ladd and Caquelin III, but must be addressed due to the Federal Circuit's mandate.

1. Nature of a Taking

"When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002). Takings in Trails Act cases constitute such categorical physical takings. See Caquelin III, 959 F.3d at 1367-70; Ladd, 630 F.3d at 1025. Depending on the circumstances, these takings can be permanent or temporary. Caquelin III, 959 F.3d at 1367; Ladd, 630 F.3d at 1025; Barclay, 443 F.3d at 1378; Caldwell, 391 F.3d at 1234.

Another type of taking relevant to this case (due to the Federal Circuit's remand order) is temporary noncategorical physical takings. In Arkansas Game & Fish, the United States Supreme Court ("Supreme Court") held that "government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection" and that "[w]hen regulation or temporary physical invasion by government interferes with private property," a number of factors are relevant to determining whether a "compensable taking" has occurred: (1) the duration of the interference; (2) "the degree to which the invasion is intended or is the foreseeable result of authorized government action," (3) "the character of the land at issue," (4) "the owner's 'reasonable investment-backed expectations' regarding the land's use," and (5) the "[s]everity of the interference" 568 U.S. at 38-39; see also Ark. Game & Fish Comm'n v. United States, 736 F.3d 1364, 1370 (Fed. Cir. 2013) ("[T]o determine whether a taking has occurred, a court must consider whether the injury was caused by authorized government action, whether the injury was the foreseeable result of that action, and whether the injury constituted a sufficiently severe invasion that interfered with the landowner's reasonable expectations as to the use of the land."). Although the Federal Circuit held in Caquelin III that the multifactor test set forth in Arkansas Game & Fish did not apply to a Trails Act taking triggered by a NITU, the court must assume that it may apply in such a situation to execute the Federal Circuit's mandate.¹⁴

¹⁴ In Caquelin, the government argued in the alternative that in a Trails Act case in which the NITU expired without the execution of a trail-use agreement, the alleged taking should be analyzed as a noncategorical regulatory taking. Caquelin III, 959 F.3d at 1362; see also Penn Central, 438 U.S. at 124 (identifying the relevant factors as "[t]he economic impact of the regulation on the claimant . . . , the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action"). However, as the Federal Circuit reaffirmed in Caquelin III, a taking under the Trails Act is a physical, not a regulatory, taking. 959 F.3d at 1368; accord Ladd, 630 F.3d at 1025. Thus, although the Federal Circuit's remand instructions require the court to "create a record applying the multi-factor analysis the government urged" in Caquelin, the court, like the trial court in Caquelin, will limit its analysis to the factors described in Arkansas Game & Fish. Indeed, there is no need to separately address the Penn Central factors since they are, in large part, incorporated into the Arkansas Game & Fish factors. See Caquelin v. United States ("Caquelin II"), 140 Fed. Cl. 567,

2. Causation

In addition to determining the nature of the alleged taking, a court must ascertain whether the government action caused the injury alleged by the plaintiff. As noted above, a taking occurs in a Trails Act case when the government prevents the vesting of a state-law reversionary interest by converting a railroad-purposes easement into a recreational trail or by compelling the continuation of a railroad-purposes easement to accommodate negotiations for a trail-use agreement. Caquelin III, 959 F.3d at 1364, 1367; Ladd, 630 F.3d at 1019; Barclay, 443 F.3d at 1374; Caldwell, 391 F.3d at 1233. The NITU is the government action that prevents the reversionary interest from vesting. Caquelin III, 959 F.3d at 1367; Ladd, 630 F.3d at 1023; Barclay, 443 F.3d at 1374; Caldwell, 391 F.3d at 1233-34.

However, in Caquelin III, the Federal Circuit observed that a NITU is a necessary, but not a sufficient, requirement to establish a taking. It explained:

It is a fundamental principle of takings law that a government action is not a taking of property if, even in the absence of the challenged government action, the plaintiff would not have possessed the allegedly taken property interest. St. Bernard Parish Gov't v. United States, 887 F.3d 1354, 1359-60, 1362 (Fed. Cir. 2018); see United States v. Archer, 241 U.S. 119, 132 (1916). That causation principle focuses on comparing the plaintiff's property interest in the presence of the challenged government action and the property interest the plaintiff would have had in its absence. See Preseault I, 494 U.S. at 24 (O'Connor, J., concurring) (endorsing the proposition, acknowledged by the government, that "the existence of a taking will rest upon the nature of the state-created property interest that [the landowners] would have enjoyed absent the federal action and upon the extent that the federal action burdened that interest"). It reflects a causation principle hardly unique to takings law. See, e.g., Babb v. Wilkie, 140 S. Ct. 1168, 1178 (2020) (explaining general but-for rule governing damages and certain other result-altering relief).

Caquelin III, 959 F.3d at 1371. The Federal Circuit then applied this "causation principle" to the situation presented in the case before it—in which the railroad company fully abandoned its line by filing a notice of consummation after the NITU expired without the execution of a trail-use agreement.¹⁵

581-82 (2018), aff'd, 959 F.3d at 1360 (observing that two of the Arkansas Game & Fish factors are similar to or derived from the Penn Central factors); Def.'s Posttrial Br. 56-62 (merging, in the legal contentions, the "economic impact" factor of Penn Central and the "severity" factor of Arkansas Game & Fish).

¹⁵ The issuance of a NITU can result in three general outcomes. First, the railroad company and potential trail operator could reach a trail-use agreement, leading to the conversion of the railroad-purposes easement into a trail. See, e.g., Barclay, 443 F.3d at 1372; Caldwell, 391 F.3d at 1231-32, 1234 n.7. Second, the railroad company and potential trail operator could allow the NITU to expire without reaching a trail-use agreement and, thereafter, the railroad

The challenged government action is the legally mandated maintenance of the easement through denying abandonment authority to the railroad. It is undisputed that, without abandonment by the railroad, the easement would remain. It follows that the NITU would not have altered the continuation of the easement during the NITU period—i.e., would not have caused the only alleged taking of property—if the railroad would not have abandoned the rail line during that period even in the absence of the NITU.

Id. It therefore held “that there is no taking until the time as of which, had there been no NITU, the railroad would have abandoned the rail line, causing termination of the easement that the NITU continued by law.”¹⁶ Id. at 1372; see also id. at 1370 (“The precise timing [of abandonment] is immaterial to liability if abandonment would have occurred during the NITU period . . .”).

3. Abandonment Under Indiana Law

Plaintiffs, in addressing causation, argue that Indiana Southwestern abandoned the railroad lines under state law. “Property law in Indiana provides that, upon abandonment by the railroad, a railroad easement terminates and the fee simple interest in the land reverts to the grantor, or the grantor’s heirs, assigns or devisees.” Consol. Rail Corp. v. Lewellen, 682 N.E.2d 779, 782 (Ind. 1997). By statute, “a right-of-way is considered abandoned if”:

company exercises its abandonment authority and fully abandons the railroad line by filing a notice of consummation. See, e.g., Caquelin III, 959 F.3d at 1362. Third, as in this case, the railroad company and potential trail operator could allow the NITU to expire without reaching a trail-use agreement and, thereafter, the railroad company does not exercise its abandonment authority and fully abandon the line by filing a notice of consummation.

¹⁶ The Federal Circuit explained that its holding was consistent with its analyses and conclusions in Caldwell, Barclay, and Ladd. Caquelin III, 959 F.3d at 1371-72 (observing that the holdings in all three prior cases “incorporate[d] the causation inquiry” it described). Specifically, it noted that “nothing in those opinions suggests that a party in those cases argued to this court that, even in the absence of the NITU, the railroad would not have abandoned the rail line until some date that would make a difference to the outcome of the issue on appeal—whether timeliness, in Caldwell and Barclay, or liability for a taking, in Ladd . . .” Id. at 1372. It is clear that the Federal Circuit intended its “clarification of [its] case law on the timing of a NITU-based taking” to be binding on the Court of Federal Claims, see id. at 1371-72, and this court intends to treat it as binding. However, it is worth noting that the Federal Circuit’s holding appears to be inconsistent with its prior holding in Ladd that a plaintiff has a complete cause of action when a NITU is issued (in other words, the plaintiff’s claim accrued) and subsequent events “cannot be necessary elements of the claim,” 630 F.3d at 1024, suggesting that the holding in Ladd remains binding, see Barclay, 443 F.3d at 1373 (“Panels of this court are bound by previous precedential decisions until overturned by the Supreme Court or this court en banc.”).

(2) After February 27, 1920, both of the following occur:

(A) The Interstate Commerce Commission or the United States Surface Transportation Board issues a certificate of public convenience and necessity relieving the railroad of the railroad's common carrier obligation on the right-of-way.

(B) The earlier of the following occurs:

(i) Rails, switches, ties, and other facilities are removed from the right-of-way, making the right-of-way unusable for continued rail traffic.

(ii) At least ten (10) years have passed from the date on which the Interstate Commerce Commission or the United States Surface Transportation Board issued a certificate of public convenience and necessity relieving the railroad of its common carrier obligation on the right-of-way.

Ind. Code § 32-23-11-6(a) (2011); see also Lewellen, 682 N.E.2d at 783 (noting that “the common law on whether abandonment has occurred was superseded by” statute in 1987). However, “[a] right-of-way is not considered abandoned if the Interstate Commerce Commission or the United States Surface Transportation Board imposes on the right-of-way a trail use condition under 16 U.S.C. 1247(d).”¹⁷ Ind. Code § 32-23-11-7; see also 16 U.S.C. § 1247(d) (2006) (“[I]f such interim use [as a trail] is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If [an entity] is prepared to assume full responsibility for the management of such rights-of-way . . . , then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use . . . and shall not permit abandonment . . . inconsistent or disruptive of such use.”).

At the time that the original version of Indiana Code section 32-23-11-6 was enacted,¹⁸ federal law provided that “rail carrier[s]” could abandon their railroad lines through formal abandonment proceedings if the Interstate Commerce Commission found “that the present or future public convenience and necessity require[d] or permit[ted] the abandonment” and “issue[d] to the rail carrier a certificate describing the abandonment,” 49 U.S.C. § 10903 (1982), or upon the Interstate Commerce Commission recognizing that the rail carrier was exempt from

¹⁷ This provision was added to the Indiana Code as section 32-5-12-7 in 1995, see 1995 Ind. Acts 2100, 2124-25 (section 4 of Public Law 40-1995), and recodified as section 32-23-11-7 in 2002, see 2002 Ind. Acts 187, 280, 295 (section 8 of Public Law 2-2002).

¹⁸ The original version of the statute provided that abandonment occurred when “the Interstate Commerce Commission issues a certificate of public convenience and necessity” and the railroad company removes the “rails, switches, ties, and other facilities . . . from the right-of-way.” Lewellen, 682 N.E.2d at 783 & n.7; see also id. at 783, 784 n.9 (reflecting that these two requirements were included in the subsequent version of the statute enacted in 1995).

formal abandonment proceedings, *id.* § 10505; 49 C.F.R. § 1152.50(d)(3) (1986). These actions—issuance of a certificate of public convenience and necessity (also referred to as a certificate of abandonment) and the recognition of an exemption—constituted authorization for the rail carrier to abandon its line. See 49 C.F.R. §§ 1152.26(a)(1), .50(d)(2)-(3) (1986); see also *id.* § 1152.29(c)(1), (d)(1) (providing that a CITU and a NITU authorized abandonment 180 days after issuance); *Preseault I*, 494 U.S. at 7 n.5 (observing that if a trail-use agreement is not reached within 180 days of the issuance of a CITU or NITU, the CITU or NITU “automatically converts into an effective certificate or notice of abandonment”). That authorization relieved the rail carrier “of its obligation to furnish rail service.” *Hayfield N. R.R. Co. v. Chi. & N.W. Transp. Co.*, 467 U.S. 622, 635 (1984). It was then up to the rail carrier to take the steps necessary to fully abandon its line. See *Black v. Interstate Com. Comm’n*, 762 F.2d 106, 112-13 (D.C. Cir. 1985) (discussing what a rail carrier was required to do to fully abandon its line after receiving a certificate of public convenience and necessity,¹⁹ as well as the “more searching and functional inquiry about the actual intent” of the rail carrier employed by many federal courts to determine whether a line had been abandoned). Once a rail carrier fully abandoned its line, the Interstate Commerce Commission no longer possessed jurisdiction over the line. *Preseault I*, 494 U.S. at 6 n.3 (citing *Hayfield N. R.R. Co.*, 467 U.S. at 633; Rail Abandonments, 54 Fed. Reg. 8011, 8012 (Feb. 24, 1989)).²⁰

The requirement that a certificate be issued at the conclusion of formal abandonment proceedings was removed from federal law effective January 1, 1996.²¹ See ICC Termination

¹⁹ To fully abandon its line, a rail carrier was required to cease operations and cancel tariffs. See *Black*, 762 F.2d at 112. A prior requirement that the rail carrier file a letter with the Interstate Commerce Commission indicating that the abandonment was consummated was eliminated in 1984. See, e.g., *Consol. Rail Corp. v. Surface Transp. Bd.*, 93 F.3d 793, 798 (D.C. Cir. 1996); Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903, 61 Fed. Reg. 67,876, 67,879 n.10 (Dec. 24, 1996) (to be codified at 49 C.F.R. pts. 1105, 1152).

²⁰ In *Hayfield N. R.R. Co.*, the Supreme Court stated that the Interstate Commerce Commission’s “authorization of an abandonment” in a nonconditional certificate of abandonment brought the Commission’s “regulatory mission to an end” and that “issuing a certificate of abandonment terminate[d] the Commission’s jurisdiction . . .” 467 U.S. at 633. However, in so stating, it relied on Interstate Commerce Commission precedent reflecting that it was the “exercise” of the authority granted in the certificate of abandonment (or the full abandonment of the railroad line after a certificate was issued) that terminated the Commission’s jurisdiction. *Id.* at 634. Indeed, in *Preseault I*, decided six years later, the Supreme Court relied on the entirety of the discussion in *Hayfield N. R.R. Co.* for its conclusion that “[o]nce a carrier ‘abandons’ a rail line pursuant to authority granted by the Interstate Commerce Commission, the line is no longer part of the national rail system, and . . . as a general proposition [Interstate Commerce Commission] jurisdiction terminates.” 494 U.S. at 6 n.3; accord 54 Fed. Reg. at 8012 (“[O]nce a carrier exercises the authority granted in a regular abandonment certificate the line is no longer part of the national transportation system.”).

²¹ No such certificate had been required at the conclusion of exemption proceedings. See 49 C.F.R. § 1152.50 (1986); Modification of Procedure for Handling Exemptions Filed Under 49

Act of 1995, Pub. L. No. 104-88, §§ 2, 102(a), 109 Stat. 803, 804, 823-25. Therefore, the Board “dispense[d] with the issuance of certificates and instead simply issue[d] ‘decisions granting’ an application.” 61 Fed. Reg. at 67,880. However, the Board decided that it would “continue to refer to ‘Certificates of Interim Trail Use or Abandonment’ in the trail use context in part to distinguish an application proceeding from an exemption proceeding.” *Id.* In other words, when ruling on an abandonment application, the Board will issue either a decision (when not imposing a trail-use condition) or a CITU (when imposing a trail-use condition). Although the Indiana legislature recodified section 32-23-11-6 in 2002, it did not amend the statute’s language to reflect this change in federal law. Compare Ind. Code § 32-23-11-6 (2003), with Ind. Code § 32-5-12-6 (2001).

B. Findings of Fact

The following facts are relevant to determining the nature of the alleged taking and whether the NITU caused a compensable taking.

1. Proceedings Before the Board

Indiana Southwestern determined that it no longer needed the railroad lines at issue in this case for rail service. Tr. 955 (LaKemper); accord id. at 958 (“We did not want to maintain the line in place.”). It therefore began to discuss removing the track from the lines. See DX 108 at 531 (addressing, on July 28, 2010, “the section of track we are going to pull up”), 558 (reflecting an offer, dated July 27, 2010, to “pay Pioneer Railcorp \$1,040,000 for all rail, plates, joint bars, turnouts and miscellaneous scrap steel [and other track material] from said line,” leaving behind the ties, signal appurtenances, and bridges); see also Tr. 912 (Cullen) (stating an assumption that the discussions began in the July 2010 time frame), 956 (agreeing that the intent to salvage the track materials was formed during the spring or summer of 2010).

On October 25, 2010, Indiana Southwestern submitted to the Board a notice of exemption pertaining to the railroad lines in which it represented that it had satisfied all of the requirements for seeking a class exemption from abandonment proceedings and declared that it would consummate the abandonment of the lines “on or after January 15, 2011.” JX 1 at 3-6; see also Tr. 962 (LaKemper) (“The purpose of the filing is to terminate [the] common carrier obligation and abandon the line . . .”). In particular, it certified “that no local traffic has moved over the subject . . . lines . . . for at least two years” and “that there is no overhead traffic on the Lines that has been, or would need to be, rerouted as a result of the proposed abandonment.” JX 1 at 8; accord id. at 5 (remarking that “the Lines have been dormant for over two years,” that “no traffic has moved over the Lines for some time,” and that “the Lines have not been used for local rail shipments for over twenty-four (24) months”). Indeed, the last loaded revenue train ran on the lines in 2004. Tr. 901 (Cullen); accord id. at 151 (Reeves), 196 (Memmer), 235 (Jenkins); see also id. at 58 (Effinger) (stating that it had “been many years” since trains ran along the lines), 85 (McDonald) (stating that trains did not run “too often” as of ten years before trial), 123-24 (Goebel) (stating that a few trains had run on the lines since early 2000), 207-08 (Siebert)

U.S.C. 10505, 45 Fed. Reg. 85180 (Dec. 24, 1980) (setting forth the exemption procedure that was later codified at 49 C.F.R. part 1121 in September 1991).

(stating that it had “been a long time” since trains ran on the lines and when they did, it was usually only one per week), 255 (Schmidt) (stating that he remembered last seeing a train go by in 2000 or 2002), 272 (Martin) (stating that it had “been a long time” since trains ran along the lines). In subsequent correspondence with the Board, Indiana Southwestern noted that “there was weekly (or less) train service over the line” over the prior two years that “was to move empty rail cars over and onto the line for rail car storage purposes only.” DX 2.29; accord Tr. 893, 896-99 (Cullen) (stating that after 2004 and until 2009, there was storage traffic on the lines, both empty cars and cars that were not empty, for which Indiana Southwestern received payment). It asserted, and the Board later agreed, that such movements did not disqualify it from invoking the class exemption. DX 2.8 at 1; DX 2.29.

On November 12, 2010, the Board published a notice in the Federal Register in which it acknowledged Indiana Southwestern’s representations in its notice of exemption, indicated that in the absence of an OFA the exemption would be effective on December 14, 2010, and noted that the deadlines for making a trail-use/railbanking request and requesting a public-use condition were November 22, 2010, and December 2, 2010, respectively. Indiana Southwestern Railway Co.—Abandonment Exemption—in Posey and Vanderburgh Counties, IN, 75 Fed. Reg. 69,520, 69,520 (Nov. 12, 2010); accord JX 2 at 1-2; see also 49 C.F.R. § 1152.50(d)(3) (describing the applicable submission deadlines). The Board further provided:

Pursuant to the provisions of 49 C.F.R. § 1152.29(e)(2), [Indiana Southwestern] shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by [Indiana Southwestern’s] filing of a notice of consummation by November 12, 2011, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

75 Fed. Reg. at 69,520; JX 2 at 3.

Two interested third parties sought to prevent abandonment. On November 17, 2010, Indiana Trails Fund, Inc. filed a request for a public-use condition and the interim use of the railroad lines for a trail. Jt. Stip. ¶ 7. The following day, the Town of Poseyville, Indiana (“Poseyville”) submitted a notice of its intent to file an OFA. Id. ¶ 8. Indiana Southwestern responded to both submissions. On November 18, 2010, it advised the Board that it was “willing to negotiate interim trail use/rail banking with . . . Indiana Trails Fund, Inc.” JX 5. Not long thereafter, it provided Poseyville with the information and documentation necessary for Poseyville to prepare its OFA. DX 2.8 at 2.

With respect to the OFA, Indiana Southwestern supplied Poseyville with information indicating that the value of the railroad lines was \$3,812,580—\$1,008,000 for the land and \$2,804,580 for the track materials. Id. at 3. To arrive at the latter amount, Shane Cullen, Vice President of Mechanical Operations for Pioneer Railroad Services, Inc., a subsidiary of Pioneer Railcorp, Tr. 836-37 (Cullen), calculated the retail value of the rails, ties, and ballast on the lines, id. at 858, 861, 868; DX 108 at 607. He estimated that the value of the rails and related steel material was \$2,480,000, the value of the ties was \$174,580, and the value of the ballast was \$150,000. DX 108 at 607; cf. id. at 607 (reflecting an estimated scrap value of the rails and

related steel material of \$1,040,000), 619 (reflecting that Indiana Southwestern received an offer on November 18, 2010, to purchase the reusable ties for \$45,000 or, in the alternative, to provide for the disposal of all ties for \$83,193). To estimate the value of the ties, Mr. Cullen made certain assumptions regarding the quality of the ties and the number of ties of each quality that existed on the lines, Tr. 868-69, 871 (Cullen), with those assumptions based on both his experience and his knowledge that the ties would need to be of a particular quality to support empty storage traffic on the lines, id. at 879-81; accord id. at 878 (stating that he did not inspect the lines when making his assumptions). Poseyville filed its OFA on December 20, 2010, seeking to purchase the lines for \$376,600—\$240,000 for the land and \$136,600 for the net salvage value of the track materials. DX 2.8 at 2-3.

The Board's Director of the Office of Proceedings issued a decision regarding the OFA on December 23, 2010. Id. at 1. The Director concluded that Poseyville was financially responsible and therefore it postponed the effective date of the abandonment exemption. Id. at 3. With respect to the trail-use and public-use-condition requests, the Director noted that because Indiana Trails Fund, Inc. had satisfied the statutory requirements and that Indiana Southwestern had agreed to negotiate a trail-use agreement, the imposition of a public-use condition and issuance of a NITU "would be appropriate commencing with the effective date of the exemption." Id. at 5. "However," the Director noted,

an OFA takes priority over a request for issuance of a NITU or for a public use condition. Therefore, issuance and effectiveness of the NITU and the public use condition will be delayed until the OFA process has been completed. If agreement is reached on the sale of the line, the NITU and the public use condition would be unnecessary and unavailable. If no agreement is reached on the OFA, the appropriate decision will be issued.

Id.

Indiana Southwestern appealed the Director's determination that Poseyville was a financially responsible offeror. JX 6 at 1. In a decision bearing a service date of April 8, 2011, the Board concluded that Poseyville was not financially responsible for the purpose of proceeding with the OFA process. Id. The Board then declared that its decision would become effective on May 23, 2011, and that it would "impose the trail use condition and make effective the public use condition" on the decision's effective date. Id. at 7. Specifically, the Board ordered:

3. The abandonment exemption will become effective on May 23, 2011, subject to . . . the condition that [Indiana Southwestern] shall keep intact the right-of-way, including potential trail-related structures, . . . and shall refrain from disposing of the corridor (other than the track, ties and signal equipment), for a period of 180 days from May 23, 2011, until November 19, 2011, to enable any state or local government agency, or other interested person, to negotiate the acquisition of the lines for public use. . . .

. . . .

7. If an agreement for interim trail use/rail banking is reached by November 19, 2011, and notice [sic], trail use may be implemented. If no agreement is reached by that time, [Indiana Southwestern] may fully abandon the line

Id. at 7-8. Thus, the Board's decision—served on April 8, 2011, and made effective on May 23, 2011—constituted a NITU. Jt. Stip. ¶ 10; see also DX 2.15 (reflecting that the Board, in a decision served on September 23, 2011, denied Poseyville's request for reconsideration).

Indiana Trails Fund, Inc. sought and received four extensions of the initial 180-day period to negotiate a trail-use agreement, culminating in a deadline of November 8, 2013. Jt. Stip. ¶¶ 11-18; see also 49 C.F.R. § 1152.29(d) (reflecting that a NITU can be issued only with the agreement of the railroad company); Tr. 814 (counsel for the parties) (stipulating that Indiana Southwestern agreed to each of these extensions). It did not seek a further extension. Tr. 967 (LaKemper); see also id. (stating that it was Indiana Trails Fund, Inc.'s responsibility to seek an extension). Consequently, the NITU expired on its own terms, and Indiana Southwestern had sixty days—or until January 7, 2014—within which to file a notice of consummation to signify that it fully abandoned the railroad lines. See 49 C.F.R. § 1152.29(e)(2). However, Indiana Southwestern did not file a notice of consummation with the Board.²² Tr. 816 (Kitay), 939, 953, 968 (LaKemper). Nevertheless, Indiana Southwestern's intent remained to either finalize the abandonment or execute a trail-use agreement. Id. at 967-68 (LaKemper); accord id. at 970 (agreeing that at the time of trial, Indiana Southwestern did not intend to reinstall the tracks that had been removed).

2. Actions of Indiana Southwestern During the Proceedings Before the Board and Thereafter

Indeed, Indiana Southwestern's discussions with Indiana Trails Fund, Inc. to sell the railroad lines continued after the expiration of the NITU, id. at 969; accord DX 117 at 1, but had not been "reduced to offers or draft documents," Tr. 942 (LaKemper). See also id. at 971 (stating that the discussions were temporarily "on hold" due to the "potential buyout" of Pioneer Railcorp); cf. id. (stating that Indiana Southwestern also engaged in on-and-off discussions with Poseyville to sell the lines that were never "reduced to offers or draft documents"). In addition,

²² In addition, as of the last day of trial, no one had filed an adverse abandonment application to request that the Board deem the railroad lines abandoned notwithstanding Indiana Southwestern's decision not to file a notice of consummation to signify that it had fully abandoned the lines. Tr. 816-17 (Kitay); see also id. at 786 (stating that the Board has a process in which "a third party can come in and ask the Board to find that there's no further need for the line as part of the national rail transportation system," and that if such a request is granted, "the Board's jurisdiction over the right-of-way ceases"). However, after trial, the Board rejected a request by landowners in another case before the court to direct Indiana Southwestern to show cause why these same lines should not be deemed abandoned, Pls' Notice of Decision Ex. A, ECF No. 166-1 (indicating that the request was made on September 11, 2019, and denied on January 24, 2020).

on April 4, 2019, plaintiffs' counsel sent an electronic-mail message to Daniel A. LaKemper, General Counsel for Pioneer Railroad Services, Inc., Tr. 935-36 (LaKemper), offering to purchase what was characterized as the easement interest in the corridor for \$100,000 and seeking to reach a deal before the commencement of trial on April 29, 2019. Id. at 942-43; DX 117 at 2-3. Indiana Southwestern did not pursue the expression of interest, Tr. 943 (LaKemper), because Pioneer Railcorp was "in discussions about a possible buyout and [its] buyer . . . prohibited [it] from engaging in those kinds of transactions or discussions pending arriving at a deal with them," id. at 944. Accord DX 117 at 1-2; see also Tr. 944-45 (LaKemper) (stating that the buyer intended to purchase Pioneer Railcorp and all of its subsidiaries, including Indiana Southwestern).

In the meantime, as authorized by regulation and the NITU, Indiana Southwestern took steps to dispose of the track and other materials on the railroad lines. On August 2, 2011, Indiana Southwestern executed a Scrap Rail Sales Agreement with A&K Materials Inc. ("A&K") in which A&K agreed to pay Indiana Southwestern \$1.2 million to purchase and remove "the switches, rail and other metallic track materials" from the lines. DX 113 at 3-8; accord Tr. 844-45 (Cullen) (stating that "materials" included "[a]ll the steel rail track material, which is the rails, joint bars, plates, spikes and bolts and nuts"); cf. Tr. 913 (Cullen) (stating that A&K had been one of three bidders for the project). A&K was to "leave all bridges, culverts, signal systems, road crossings, and other structures, fixtures, and facilities intact and undamaged." DX 113 at 7; accord id. at 3; see also Tr. 888-89 (Cullen) (stating that there is "additional cost" with removing a road crossing due to the need to close the road and then replace the road surface). In addition, it could move the ties "away from the center of the right of way" but not from the right-of-way itself, and was prohibited from allowing the ties or "other materials . . . to obstruct, block, or alter the drainage of the right of way or any surrounding property." DX 113 at 7. Indeed, although Mr. Cullen estimated that there were approximately 48,160 ties on the lines with a total value of \$174,580,²³ DX 108 at 607, he determined that "[i]t was not economically viable to go back and pick them up," Tr. 905 (Cullen); accord id. at 906-07 (agreeing that the condition of the ties left in the railroad corridor was "extremely deficient for operating trains" and that the sole reason they were left behind was because they were not part of the agreement with A&K), 982-83 (LaKemper) ("If [the ties] had had value to . . . A&K or some other contractor, [Indiana Southwestern] probably would have sold the ties as well. . . . These were old branch line ties and . . . it's unlikely that after they've been removed from the rails there would[] be much usable surface left."). The deadline for the removal work was April 1, 2012. DX 113 at 4.

A&K complied with the terms of the contract, removing all rails (except those in road crossings) and moving the ties from the center of the railroad lines by the deadline. Tr. 849-54 (Cullen); accord id. at 920 (stating that the work was completed by early February 2012); DX 114 (reflecting a \$1.2 million payment to Indiana Southwestern); cf. Tr. 976 (LaKemper) (stating

²³ Based on his experience, Mr. Cullen assumed that half of the ties were junk and would need to be sent to a landfill at a cost of \$120,400, that a quarter of the ties were reusable on railroad tracks (relay number one grade) and could be sold for \$174,580, and that the remaining quarter of the ties were reusable—but perhaps not in railroad tracks—and could be sold for \$120,400. Tr. 870-71, 873-75, 878-82 (Cullen).

that Indiana Southwestern apparently sent a train to the lines in September 2011 to “assist in the salvage of the rail”). Indeed, a number of the testifying plaintiffs (or plaintiffs’ representatives) recalled that the tracks were removed in the 2010-2012 time period. *See* Tr. 85-86 (McDonald), 152, 162 (Reeves), 190 (Memmer), 208 (Siebert), 235 (Jenkins), 255 (Schmidt), 272 (Martin). And all of them noted that the ties were left behind in piles or stacks. *See id.* at 58, 73 (Effinger), 85-86 (McDonald), 108-09, 128 (Goebel), 153, 162 (Reeves), 176, 190-91 (Memmer), 208 (Siebert), 235-36 (Jenkins), 255-56 (Schmidt), 273 (Martin). After A&K completed its work, Indiana Southwestern performed no maintenance along the railroad lines, such as spraying for weeds or removing vegetation. *Id.* at 916 (Cullen); *accord id.* at 58-59 (Effinger), 87 (McDonald), 105 (Goebel), 150 (Reeves), 174 (Memmer), 209 (Siebert), 256 (Schmidt), 271 (Martin); *see also* PX 1.D (photo of the railroad corridor adjacent to the Memmer property); PX 2.D (photo of the railroad corridor adjacent to the Goebel property); PX 3.D (photo of the railroad corridor adjacent to the McDonald Family Farms property); PX 4.D (photo of the railroad corridor adjacent to the Halpeny property); PX 5.D (photo of the railroad corridor adjacent to the Reibel Farms, Inc. property); PX 6.D (photo of the railroad corridor adjacent to the Martins’ property); PX 7.D (photo of the railroad corridor adjacent to the Effinger property); PX 8.D (photo of the railroad corridor adjacent to the Jenkins property); PX 9.D (photo of the railroad corridor adjacent to the Schmidts’ property). Rather, many of the plaintiffs or their lessees performed such maintenance. Tr. 82, 87 (McDonald), 105, 114, 131 (Goebel), 147, 149-50, 154-55 (Reeves), 174 (Memmer), 207, 209 (Siebert), 236, 245 (Jenkins), 256 (Schmidt), 270-71 (Martin).

3. The Character and Use of Plaintiffs’ Properties

Finally, to comply with the Federal Circuit’s mandate to apply the multifactor test described in Arkansas Game & Fish, the court finds the following facts regarding the parcels involved in this case.

a. The Effinger Property

The property owned by Mr. Effinger is a 47.45-acre parcel, roughly rectangular in shape, with the railroad line running along its western boundary. *Id.* at 57 (Effinger); JX 30; JX 31. *But see* Tr. 52 (Effinger) (stating that the parcel includes 44 acres). The only structure on the parcel is a cell phone tower. Tr. 55 (Effinger). The parcel is hilly and mostly wooded, but has three areas of tillable land. *Id.* at 55, 67-68; *see also* JX 30 (reflecting that the parcel is classified as agricultural land that includes 12 acres of tillable land and 35.45 acres of woodland). Mr. Effinger does not farm the tillable areas himself; at the time of trial someone else farmed the eastern tillable area, and up until two years prior to trial, his brother farmed the western tillable area. Tr. 55, 69, 72 (Effinger). Due to ditches being washed out on the property at the time of trial, the middle and western tillable areas could not be accessed for farming purposes, but a neighbor kept the western tillable area mowed. *Id.* at 69-70, 72. Mr. Effinger uses the land primarily for hunting deer, squirrels, rabbits, and turkeys; recreational activities such as hiking; and obtaining firewood. *Id.* at 56-57, 72.

The parcel has been in Mr. Effinger’s family for over 100 years. *Id.* at 52. Mr. Effinger was deeded the parcel from his father on January 31, 2006, for a small sum, *id.* at 53-54, 65-66;

JX 29; the parcel had been part of a larger parcel that his father divided among his children, Tr. 66 (Effinger). The parcel has sentimental value for Mr. Effinger, and thus he does not intend to sell it even though he has “had offers to sell half of that property . . . for a lot of money . . .” Id. at 53; accord id. at 74. Mr. Effinger has insurance in case someone gets injured on the parcel. Id. at 60. Indeed, there have been trespassers, some of whom have dumped trash in the railroad corridor. Id. at 59-60.

Mr. Effinger would like to get the railroad corridor back. Id. at 60. He would plant cover crops so that the wildlife could have something to eat and also sees value in erecting a fence along the centerline of the corridor to keep trespassers off of the parcel. Id. at 60-61; cf. id. at 59 (stating that there is a barbed-wire fence between the western boundary of the parcel and the corridor). Prior to this lawsuit, Mr. Effinger had heard that there was a plan to put a trail in the corridor, but he had never seen the NITU. Id. at 75. He understands that he may need to buy the corridor from Indiana Southwestern to use it. Id. at 62.

b. The Goebel Property

The property owned by the Goebels consists of two nonadjacent parcels classified as agricultural land: an irregularly shaped, 59.81-acre parcel and a triangular, 3-acre parcel.²⁴ JX 15; JX 16; see also JX 15 (reflecting that the larger parcel includes 60.42 acres of tillable land and 1.66 acres of nontillable land, while the smaller parcel includes 3 acres of tillable land); JX 16 (reflecting that all but a small portion of the triangular parcel is farmed). The railroad line runs diagonally through roughly the middle of the larger parcel, with an approximately 30-acre portion to the west of the line and a 38-acre portion to the east of the line, and along the longest side of the triangular parcel. JX 16; Tr. 101, 106, 116 (Goebel). The larger parcel is flat, Tr. 106 (Goebel), and the triangular parcel has a steep bank and a stream running through it, id. at 132, 136. The parcels are part of a 630-acre farm operated by Mr. Goebel and his son. Id. at 100, 104, 115 (Goebel). Mr. Goebel grows corn, wheat, soybeans, and pumpkins, with average yields of 210 bushels of corn per acre, 55 bushels of soybeans per acre, and 4000 pumpkins per season. Id. at 102-04; see also PX 11 at 5-6 (“Average yield is as follows: corn 225-250 bushels per acre; soybeans 70-80 bushels per acre single crop and 50 bushels per acre double crop . . . ; winter wheat 100 bushels per acre; and . . . 3,000-4,000 pumpkins per acre.”). The soil “Productivity Index is 149 which is average to good for the area.”²⁵ PX 15 at 29.

²⁴ The total acreage of each parcel is set forth in the tax assessor’s records as the “legal acres” and the “parcel acreage.” JX 15. The totals are less than the “measured acreage” in the same records. Id. In addition, the totals differ from those offered by Mr. Goebel during trial. See Tr. 116-18 (Goebel) (stating that the larger parcel includes approximately 68 acres and the triangular parcel includes “probably” 5 to 6 acres).

²⁵ The “Productivity Index” is a measurement developed by the United States Department of Agriculture; the scale “probably” goes up to “200.” Tr. 381 (Matthews).

The two parcels, and the larger farm of which they are a part,²⁶ have been in Mr. Goebel's family for a long time. Tr. 110-11, 120 (Goebel). Mr. Goebel initially leased the parcels from his cousin in 1979. Id. at 100, 121. At that time, he understood that the railroad line could be abandoned at some time in the future. Id. at 123-25. Then, when he purchased the parcels in February 2000, JX 14; accord Tr. 122 (Goebel), his understanding evolved to believing that the line might be abandoned, based on the small number of trains being run. Tr. 123-25 (Goebel). He first learned that Indiana Southwestern was considering abandoning the line approximately five or six years before his May 2018 deposition, when the tracks were being removed. Id. at 127; accord id. at 109 (stating that the tracks were removed "probably" six years before trial).

Mr. Goebel witnessed the removal of the tracks; the rails were taken from the railroad corridor, the ties were piled up to the side of the line, and the ballast was left in place. Id. at 107-09, 128, 130-31. Subsequently, someone took all of the "good" ties that remained, leaving the bad ones and other "junk" behind. Id. at 108, 128.

An individual helping to remove the tracks told Mr. Goebel that no one was permitted on the railroad corridor, and "no trespassing" signs were posted where the corridor intersects with roads. Id. at 108-11, 129. Nevertheless, there is a problem with trespassers on the corridor that has worsened since the tracks were removed: trespassers hunt, ride their four-wheelers along the corridor and into the adjacent fields, and, during pumpkin season, pick the pumpkins and then take them to throw at houses and off of trestles. Id. at 107, 112-13. In addition, Mr. Goebel crosses the corridor at one location to access the two sides of the larger parcel. Id. at 133.

The existence of the railroad corridor has required Mr. Goebel to expend greater efforts and incur greater expenses to farm his parcel. For example, he must use point rows to farm his parcel, which "wastes fertilizer and . . . wastes seed[,] and it's hard to harvest and hard to plant" ²⁷ Id. at 108.

Mr. Goebel has always understood that when trains stopped running along the railroad line, he would get that land back. Id. at 111, 139. If he owned the railroad corridor, he would also be able to exclude the trespassers. Id. at 114. In addition, he would level it where he could and farm on it, which would increase his crop yields. Id. at 108-09, 111-12, 114; accord id. at 132 (stating that it would not be difficult to level the corridor on the large parcel, but that leveling the triangular parcel would not be feasible due to a ditch along the line; nevertheless, he could still farm up to the ditch). One of plaintiffs' expert witnesses, David Matthews,²⁸ opined that converting the corridor from nontillable land to tillable land would have cost approximately

²⁶ Mr. Goebel's 630-acre farm includes a farm previously owned by his great-grandfather and a 140-acre farm previously owned by his cousin. Tr. 111, 115-16 (Goebel).

²⁷ Point rows are created when planting an irregularly shaped field. See Tr. 93-94 (McDonald). Point rows will overlap with the end rows that surround a field, leading to double planting on the overlap. Id.

²⁸ The court qualified Mr. Matthews as an expert appraiser. Tr. 313 (court).

\$1750 on the date the NITU was issued: \$33 to chisel plow the railroad bed and \$1716 to cut and fill the ditches alongside the railroad bed with a bulldozer.²⁹ Id. at 408 (Matthews); PX 15 at 33; see also PX 11 at 6 (indicating that “[s]ome ballast would need to be removed or buried”). Further, plaintiffs’ other expert witness, James B. Kliebenstein,³⁰ opined that there would be a return of approximately \$13 to \$17 for every dollar spent on converting the corridor. PX 11 at 8; Tr. 623 (Kliebenstein). However, defendant’s expert on what a reasonable buyer of agricultural land might consider, Charles McCarty,³¹ opined that reclaiming a corridor is not quick or easy due to (1) the need to remove ballast from the corridor, a costly process; (2) the severe compacting caused by the operation of the railroad; (3) the length of time it takes for soil productivity to improve; (4) drainage concerns; and (5) the potential need to coordinate with owners of neighboring parcels. Tr. 752-59 (McCarty).

Mr. Goebel first heard that the railroad corridor might be converted to a trail around the time the track was removed. Id. at 128 (Goebel). He was aware that Indiana Southwestern wanted the adjacent landowners to buy back the corridor. Id. at 113.

c. The Halpeny Property

The property owned by Mr. Halpeny is a 34-acre parcel classified as agricultural land that is split into two parts by a county road: a large acute-trapezoid-shaped area on the east side of the road and a very small triangular-shaped area on the west side of the road. JX 21; JX 22; see also JX 21 (reflecting that the parcel includes 33.6 acres of tillable land); JX 22 (reflecting that the entire parcel is farmed); Tr. 202 (Siebert) (stating that the parcel includes 33 acres), 204-05 (stating that the triangular portion of the parcel is likely farmed by a neighbor). The railroad line runs along the southern boundary of the parcel perpendicular to the county road. JX 22; Tr. 207 (Siebert). Corn and soybeans are grown on the parcel in rotation, with yields of “a little over 200” bushels of corn per acre and “from 60 to 70, maybe 75” bushels of soybeans “on a really, really good year.” Tr. 205 (Siebert); accord PX 11 at 9 (“Average yield is as follows: corn 240 bushels per acre and soybeans 65 bushels per acre.”). The soil “Productivity Index is 148 which is average for the area.” PX 17 at 31.

Mr. Halpeny acquired the parcel from his mother in September 1993, JX 20, and has leased the parcel to Patrick Siebert since 2016, Tr. 213 (Siebert). Mr. Siebert’s family has farmed the parcel as long as Mr. Siebert can remember; before Mr. Siebert, the parcel was

²⁹ A chisel plow uses “deep tines that . . . dig up and fluff up the ground” that may have been compacted by the operation of a railroad. Tr. 390 (Matthews). Using a chisel plow costs \$25 per acre, id. at 391, and using a bulldozer costs approximately \$2 per cubic yard of earth moved, id. at 388, 391.

³⁰ The court qualified Dr. Kliebenstein as an expert in agricultural economics and farm management. Tr. 594-95 (court).

³¹ The court allowed Mr. McCarty to testify only on the topic of what a reasonable farmer would do with a railroad corridor. Tr. 743 (court); see also id. at 742-43 (government counsel), 746-48 (colloquy between the court and government counsel).

farmed by his father and brother, and before that, by his father's uncle. Id. at 202-03; see also id. at 203 (stating that Mr. Siebert's father and brother leased the parcel on a crop-share basis with Mr. Halpeny, retaining three-fifths of the proceeds). Mr. Siebert rents the parcel for \$200 per acre. Id. at 202; see also id. at 332 (Matthews) (suggesting that this rent "may be a sweetheart deal"). In a good year, he realizes a profit of "maybe" \$200 per acre. Id. at 206 (Siebert).

Mr. Siebert does not cross the corridor to access the parcel because access is possible from the county road. Id. at 207, 209. However, there have been trespassers on the railroad corridor—people on four-wheelers and hunters. Id. at 209, 211-12.

Mr. Siebert does not want a trail on the railroad corridor because it would create more traffic and more trash. Id. at 209-10. In fact, he would like to get the corridor back. Id. If he owned the corridor, he would also have better access to the parcel. Id. at 210. In addition, he would dispose of the ties, dig out the gravel, cut down the trees and brush, and plant additional crops. Id. at 210-11. Mr. Matthews opined that converting the corridor from nontillable land to tillable land would have cost approximately \$6500 on the date the NITU was issued: \$25 to chisel plow the railroad bed and \$6481 to cut and fill the ditches alongside the railroad bed with a bulldozer. Id. at 433 (Matthews); PX 17 at 25; see also PX 11 at 9 (indicating that "[s]ome ballast would need to be removed or buried"). Further, Dr. Kliebenstein opined that there would be a return of approximately \$2 for every dollar spent on converting the corridor. PX 11 at 11; Tr. 638 (Kliebenstein). But cf. Tr. 752-59 (McCarty) (stating the difficulties involved in reclaiming the land), 762-63 (stating that a tenant might be reluctant to incur the expenses of reclamation without assurances from the landowner that he or she could farm the land for long enough to recover the expenses).

d. The Jenkins Property

The property owned by Mr. Jenkins is a 66-foot-by-165-foot residential lot with the railroad line running along its eastern boundary. JX 33; JX 34; Tr. 233, 247 (Jenkins). Mr. Jenkins purchased the lot on contract for \$8000, fulfilling the contract around 1995 or 1996. Tr. 232, 240; see also JX 32 (reflecting that in October 2001, the lot was conveyed to Mr. Jenkins pursuant to a dissolution decree). He finished building his house on the lot in 2006 and then built a separate garage. Tr. 233-34, 247 (Jenkins). It cost Mr. Jenkins approximately \$70,000 to build the house. Id. at 247.

When Mr. Jenkins purchased the lot, there were trains running along the railroad line. Id. at 241, 246. The presence of the line reduced the price that Mr. Jenkins paid for the lot, as did the presence of a mobile home and two tin buildings on the lot. Id. at 241-43. Upon the removal of the tracks, ballast or smaller rocks (now covered by grass) and some partial ties (subsequently burned by Mr. Jenkins) were left behind. Id. at 235-36, 244-45. Trespassers are a concern for Mr. Jenkins, especially with respect to the possible theft of property from his yard or his garage. Id. at 237-38. Indeed, people on four-wheelers used to trespass on the corridor until "no trespassing signs" were posted, and other people walk their dogs on the corridor. Id. at 236-37.

Although Mr. Jenkins did not purchase the lot with the understanding that he owned the railroad corridor or the expectation that he would eventually obtain the corridor, id. at 243, 246,

“over a period of time when [he] learned that they were going to give it up, [he] thought it would be nice to have to extend [his] property out,” id. at 247-48. In fact, if the corridor was returned to Mr. Jenkins, he has considered possibly drilling for oil on it. Id. at 238. If, on the other hand, the corridor was converted into a trail, Mr. Jenkins would be concerned, but would not erect a privacy fence because it would be too costly and would make it more difficult to mow his lawn. Id. at 238, 246-47; cf. id. at 234 (stating that there used to be a chicken-wire fence separating the corridor from his lot, but that the town removed it when it buried a sewer pipe along the railroad line). Prior to his deposition, Mr. Jenkins had not seen the NITU. Id. at 248.

e. The Martin Property

The property owned by the Martins consists of two adjacent parcels: a rectangular, 64.35-acre parcel classified as agricultural land, and an irregularly shaped, 112.39-acre parcel used as agricultural land (but classified as residential land). Id. at 268-69, 276-78 (Martin); JX 27; JX 28; see also JX 12 (reflecting that the smaller parcel includes 42.48 acres of tillable land and 20.1 acres of woodland, and that the larger parcel, which is deemed to be “residential,” includes 98.06 acres of tillable land); JX 28 (reflecting that all but the wooded area of the parcels and the railroad corridor are farmed). But see Tr. 268 (Martin) (indicating that the parcels include 197 acres), 277 (same). The railroad line runs diagonally through the parcels. JX 28; Tr. 271 (Martin). The parcels are a portion of the little more than 1000 acres farmed (and roughly 300 acres owned) by Mr. Martin. Tr. 267 (Martin). Mr. Martin grows corn, soybeans, and wheat on the parcels. Id. at 270. The quality of the soil is good. Id. at 269; accord PX 19 at 29 (noting that the soil “Productivity Index is 150 which is average to good for the area”). Consequently, Mr. Martin can achieve yields of 200 bushels of corn per acre, 55 to 70 bushels of soybeans per acre, and 80 to 100 bushels of wheat per acre. Tr. 269-70 (Martin); accord PX 11 at 12 (“Average yield is as follows: corn 200 bushels per acre[]; double crop soybeans 62-65 bushels per acre; winter wheat 80-90 bushels per acre.”).

Mr. Martin began leasing the parcels around 2004 on a crop-share basis, retaining two-thirds of the proceeds. Tr. 280-81 (Martin). Then, in October 2008, the Martins purchased the parcels in a private sale. Id. at 268-69; JX 26. They paid \$5500 per acre, for a total of \$1.1 million—probably one half of the parcels’ value if sold at auction. Tr. 269 (Martin). They then sold the portion of the larger parcel north of the railroad line—88 acres of farm land—for \$10,000 per acre, but retained the right to the railroad corridor. Id. at 278-80, 288. The existence of the railroad line running through the parcels did not affect the price the Martins paid for them, id. at 281, but does increase the costs involved in farming the land because of the additional seeds and fertilizer Mr. Martin needs due to the point rows, id. at 271-72; cf. id. at 284-85 (stating that a stream on the larger parcel also requires the use of point rows).

Mr. Martin had seen trespassers on the railroad corridor “for a couple of years,” but not since trees starting growing on the corridor. Id. at 273. Mr. Martin himself crosses the corridor using one of three legal crossings. Id. at 281-82.

Mr. Martin would like to get the railroad corridor back and join his parcels. Id. at 272. If he owned the corridor, he would be able to plant his fields with longer and straighter rows, increasing his productivity. Id. at 272, 274. But see id. at 283-84 (stating that he had not thought

about how he would plant his fields in the absence of the corridor). To accomplish this result, he would need to remove the rock and any structure lying underneath, and then use a bulldozer to level the area (which is pretty flat). *Id.* at 273-74. Mr. Matthews opined that converting the corridor from nontillable land to tillable land would have cost approximately \$16,300 on the date the NITU was issued: \$3960 to remove small and medium trees, \$118 to chisel plow the railroad bed, and \$12,243 to cut and fill the ditches alongside the railroad bed with a bulldozer. *Id.* at 416 (Matthews); PX 19 at 33; see also PX 11 at 12 (indicating that “[s]ome ballast would need to be removed or buried”). Further, Dr. Kliebenstein opined that there would be a return of approximately \$2.50 to \$3 for every dollar spent on converting the corridor. PX 11 at 14; Tr. 628 (Kliebenstein). But cf. Tr. 752-59 (McCarty) (stating the difficulties involved in reclaiming the land). Prior to his deposition, Mr. Martin had not seen the NITU. Tr. 284 (Martin).

f. The McDonald Family Farms Property

The property owned by McDonald Family Farms is a square, 38-acre parcel classified as agricultural land. *Id.* at 91 (McDonald); JX 18; JX 19; see also JX 18 (reflecting that the parcel includes 24.1 acres of tillable land and 13.9 acres of woodland); JX 19 (reflecting that all but a small portion of the parcel is farmed); Tr. 93 (McDonald) (agreeing that there are woods on a small portion of the parcel). The railroad line runs diagonally across the southwest portion of parcel, splitting the parcel into a 31-acre portion north of the line and a triangular, 7-acre portion south of the line. JX 19; Tr. 91-92 (McDonald). The parcel is part of a 160-acre farm owned by McDonald Family Farms, which in turn is owned by David McDonald and his three children in equal shares. Tr. 78, 83, 92, 95 (McDonald). Mr. McDonald currently grows corn and soybeans in rotation, and has previously planted wheat and alfalfa on the parcel. *Id.* at 80. The soil quality is “very good.” *Id.* at 81-82; accord PX 16 at 29 (noting that the soil “Productivity Index is 149 which is average to good for the area”). Consequently, Mr. McDonald has obtained good yields for his crops: 242 bushels of corn per acre and 71 to 72 bushels of soybeans per acre. Tr. 82 (McDonald); see also PX 11 at 15 (“Average yield is as follows: corn 180-200 bushels per acre and soybeans 60-70 bushels per acre.”).

The parcel has been in Mr. McDonald’s family since 1829, when Andrew Jackson deeded it to one of Mr. McDonald’s ancestors. Tr. 78 (McDonald). In fact, Mr. McDonald’s great-great-grandfather conveyed the easement to a predecessor of Indiana Southwestern. *Id.* at 97. Mr. McDonald’s father inherited the parcel from his mother in 1968, and then deeded the parcel to McDonald Family Farms in 1981 for nominal consideration. *Id.* at 79, 96; JX 17. McDonald Family Farms did not acquire the parcel because it believed that it ultimately would get back the railroad corridor. Tr. 97-98 (McDonald).

After the tracks were removed, Mr. McDonald eventually burned the ties that were left behind upon discovering that trespassers has used them to construct hunting blinds on his parcel. *Id.* at 86-87. Trespassers—people on four-wheelers, dirt bikes, and horses—have become more prevalent since the tracks were removed. *Id.* at 87.

The presence of the railroad corridor has required Mr. McDonald to expend greater efforts and incur greater expenses to farm his parcel. For example, Mr. McDonald created two crossings over the corridor to access the smaller portion of the parcel, one before the tracks were

removed and one thereafter. Id. at 83, 90-91. In addition, he must use point rows to farm his parcel, which requires him to overplant and overfertilize. Id. at 84. Consequently, it costs him fifteen percent more to farm the parcel with the corridor than it would without the corridor. Id. at 84-85.

Mr. McDonald would like to get the railroad corridor back. Id. at 88. His father told him that when the trains stopped running along the railroad line, the corridor would revert back to the owner of the parcel. Id. If he owned the corridor, he would dispose of the ballast by burying it in a ditch alongside the corridor, level the railroad bed, and farm the land. Id. Doing so would alleviate the need to use point rows. Id. Mr. Matthews opined that converting the corridor from nontillable land to tillable land would have cost approximately \$1750 on the date the NITU was issued: \$23 to chisel plow the railroad bed and \$1877 to cut and fill the ditches alongside the railroad bed with a bulldozer. Id. at 391-93 (Matthews); PX 16 at 33; see also PX 11 at 15 (indicating that “[s]ome ballast would need to be removed or buried”). Further, Dr. Kliebenstein opined that there would be a return of approximately \$7 for every dollar spent on converting the corridor. PX 11 at 17; Tr. 633 (Kliebenstein). But cf. Tr. 752-59 (McCarty) (stating the difficulties involved in reclaiming the land).

g. The Memmer Property

The property owned by Mr. Memmer consists of two adjacent parcels classified as agricultural land: a right-trapezoid-shaped, 78.75-acre parcel and a right-trapezoid-shaped, 1-acre parcel. JX 12; JX 13; see also JX 12 (reflecting that the two parcels include 76.9929 acres of tillable land); JX 13 (reflecting that almost the entirety of the two parcels is farmed). But see Tr. 184 (Memmer) (estimating that the larger parcel includes 87 acres). The railroad line runs along the entire northern boundary of the parcels, and Water Tank Road runs parallel to a portion of the other side of the line. Id. at 175, 181; JX 13. The parcels are part of a 170.3-acre farm that Mr. Memmer leases to Pathway Family Farms. DX 11 at 7; Tr. 173 (Memmer). For the ten years preceding trial, the sole crop grown on the parcels was corn. Tr. 173 (Memmer). The soil quality is “[v]ery good.” Id. at 174; accord PX 14 at 31 (noting that the soil “Productivity Index is 170 which is average to good for the area”). In 2018, the farm obtained a yield of up to 300 bushels of corn per acre. Tr. 174 (Memmer); see also PX 11 at 18 (“Average corn yield is 240 bushels per acre.”).

The farm has been in Mr. Memmer’s family for four generations. Tr. 170 (Memmer); accord id. at 170 (stating that Mr. Memmer’s great-grandfather purchased the farm), 185 (same). Mr. Memmer’s maternal grandparents sold the farm to Mr. Memmer’s parents for \$300 per acre. Id. at 185. Mr. Memmer began working for his parents on the farm in 1973. Id. at 170-71, 186. He inherited a one-half interest in the farm in 1999 when his father died, id. at 185, and continued to farm the land until 2006, id. at 171, 173, 187. Thereafter, the farm was leased to Harold Bender Farms. Id. at 173, 187. In the meantime, in November 2007, his mother conveyed the remaining one-half interest in the farm to him, reserving for herself a life estate. JX 11. Mr. Memmer obtained full ownership of the farm when his mother died in 2010. Id.; Tr. 171 (Memmer); accord Tr. 186 (Memmer) (stating that his mother’s estate settled in 2011). He began leasing the farm to Pathway Family Farms in 2013. Tr. 173 (Memmer); see also id. at 187 (stating that the last year of the lease to Harold Bender Farms was 2012). For the 2018 crop

year, the rent was \$450 per tillable acre, id. at 189; DX 11 at 7; the rent for 2013 through 2016 was similar, Tr. 189 (Memmer); see also id. at 175-76 (stating that the rent has been “about \$425 an acre per year”), 332 (Matthews) (stating that this rent is “really high”). Mr. Memmer has not attempted, and has no plans, to sell the farm. Id. at 190 (Memmer).

Mr. Memmer would like to get the railroad corridor back, but was not sure that he would be able to do so when the trains stopped running. Id. at 175. If he owned the corridor, he would be able to access his parcels from Water Tank Road and exclude people from the parcels. Id. at 175-77; see also id. at 176 (stating that trespassers—mostly just people on four-wheelers—have accessed the corridor and entered his land). In addition, he would remove the dirt and overburden—a task that could take a couple or a few years, id. at 177, 194, 196—and then plant crops on it, increasing the farm’s productivity. Id. at 177; see also id. at 177 (indicating that he would reuse or give away the dirt and overburden), 194 (stating that he would give away the overburden). Mr. Matthews opined that converting the corridor from nontillable land to tillable land would have cost approximately \$1300 on the date the NITU was issued: \$34 to chisel plow the railroad bed and \$1300 to cut and fill the ditches alongside the railroad bed with a bulldozer. Id. at 444 (Matthews); PX 14 at 33; see also PX 11 at 18 (indicating that “[s]ome ballast would need to be removed or buried”). Further, Dr. Kliebenstein opined that there would be a return of approximately \$11 for every dollar spent on converting the corridor. PX 11 at 20. But cf. Tr. 752-59 (McCarty) (stating the difficulties involved in reclaiming the land).

h. The Reibel Farms, Inc. Property

The property owned by Reibel Farms, Inc. is an irregularly shaped (roughly, a right trapezoid), 79.159-acre parcel classified as agricultural land. JX 24; JX 25; see also JX 24 (reflecting that the parcel includes 78.1849 acres of tillable land); JX 25 (reflecting that the entire parcel is farmed). But see Tr. 160 (Reeves) (estimating that the parcel includes “probably 95” acres, “give or take”). The railroad line runs along the entire northern boundary of the parcel.³² JX 25; Tr. 149 (Reeves). The parcel is part of a 119-acre farm leased to Reeves Grain Farm LLC, which is owned by Chris Reeves and his wife. Tr. 142, 144, 159 (Reeves). Mr. Reeves currently grows corn and soybeans in rotation. Id. at 147-48. The soil is high quality. Id. at 149; accord PX 18 at 31 (noting that the soil “Productivity Index is 164 which is average to good”). Consequently, Mr. Reeves has obtained, on average, 240 bushels per acre of corn. Tr. 148-49 (Reeves); accord PX 11 at 20-21 (“Average yield is as follows: corn 230-240 bushels per acre; soybeans 68 bushels per acre.”).

The parcel has been in Mr. Reeves’s wife’s family since 1910. Tr. 144, 163 (Reeves). Mr. Reeves’s in-laws purchased the parcel from his father-in-law’s parents in 1960, id. at 163, and in October 1993, transferred the parcel to Reibel Farms, Inc., JX 23. Reibel Farms, Inc. is owned by Mr. Reeves’s mother-in-law, Treva Reibel. Tr. 142, 163-64 (Reeves). Mr. Reeves

³² Indiana Southwestern holds roughly one-half of the railroad line bordering the parcel as an easement and owns the remainder of the line bordering the parcel in fee simple. See supra Section II.C.1; see also PX 18 at 30 (depicting the locations of the two parts of the line); JX 60 to JX 61 (containing valuation maps that depict the two parcels acquired by Indiana Southwestern’s predecessors and describe how those parcels were acquired).

began farming the parcel in 2005, paying a minimum of \$250 per acre, but usually more, to lease the land.³³ *Id.* at 144, 149-50. Due to its proximity to Poseyville, people have wanted to purchase the parcel, but it is not for sale so long as Mr. Reeves is farming it or owns it. *Id.* at 151.

After the tracks were taken up, the good ties were eventually removed, *id.* at 152, and Mr. Reeves burned the remaining ties, which were rotten, *id.* at 153. Trespassers—mostly just people drinking beer, but occasionally people on all-terrain vehicles—have accessed the railroad corridor. *Id.* at 147, 154-55; *see also id.* at 154 (stating that there used to be rabbit hunters on the corridor, but that he had not seen one in at least five years), 155-56 (expressing concern that trespassers could get injured on the parcel or steal from his machinery shed). In addition, Mr. Reeves was exploring hiring someone to fill in the ditch along the bottom of the railroad bed because water drains from his parcel to the ditch and the ditch stays wet, promoting unwanted tree and weed growth. *Id.* at 147, 151.

Mr. Reeves does not want a trail on the railroad corridor and would like to get the corridor back. *Id.* at 156. His father-in-law told him that when the trains stopped running along the railroad line, the corridor would revert back to the owner of the parcel. *Id.* at 164. If he owned the corridor, he would remove the rocks and dirt (the railroad bed is raised approximately four to five feet above the parcel, *id.* at 151), and farm it. *Id.* at 156-57. Mr. Matthews opined that converting the corridor from nontillable land to tillable land would have cost approximately \$2000 on the date the NITU was issued: \$26 to chisel plow the railroad bed and \$1950 to cut and fill the ditches alongside the railroad bed with a bulldozer. *Id.* at 427 (Matthews); PX 18 at 25; *accord* Tr. 156 (Reeves) (stating his estimate that it would cost less than the \$13,000 to \$15,000 per acre that the land is worth to reclaim the corridor); *see also* PX 11 at 6 (indicating that “[s]ome ballast would need to be removed or buried”). Further, Dr. Kliebenstein opined that there would be a return of approximately \$5 for every dollar spent on converting the corridor. PX 11 at 23; Tr. 646 (Kliebenstein). *But cf.* Tr. 752-59 (McCarty) (stating the difficulties involved in reclaiming the land), 762-63 (stating that a tenant might be reluctant to incur the expenses of reclamation without assurances from the landowner that he or she could farm the land for long enough to recover the expenses). Mr. Reeves was not aware that Indiana Southwestern wanted landowners to purchase the corridor to reclaim it. *Id.* at 58 (Reeves).

i. The Schmidt Property

The property owned by the Schmidts is an irregularly shaped, 20-acre residential lot with the railroad line running in a gradual curve along the lot’s eastern boundary. *Id.* at 255, 260 (Schmidt); JX 36; JX 37. *But see* Tr. 259 (Schmidt) (stating that the lot contains 21.7 acres), 264 (same). The Schmidts purchased the lot in 1998 for \$155,000 with the intent of building a house on it. Tr. 252, 258-59, 264 (Schmidt); *accord* JX 35. They ultimately did not build a house because they were able to buy a nearly new house from some friends instead. Tr. 252, 262 (Schmidt). However, they do not plan to sell the lot because they would like to see it preserved in its natural state. *Id.* at 262-63.

³³ The evidence in the trial record does not indicate when Reibel Farms, Inc. began to lease the parcel to Reeves Grain Farm LLC.

The lot has a pond, but otherwise is completely wooded, *id.* at 252-53, 259-60, 264; JX 37, and at the time the Schmidts purchased it, it had an “estimated wooded value” between \$10,000 and \$12,000, Tr. 252-53 (Schmidt). Mr. Schmidt has planted some oak and walnut trees on the lot, and has in the past used the lot for firewood, *id.* 254-55, but has no plans to harvest the wood, *id.* at 264. In addition, the lot has “[l]ots of ups and downs,” *id.* at 252-53; access to the railroad corridor requires traversing a ravine with a steep slope, *id.* at 256-57, 261-62.

The Schmidts have allowed their oldest son and a family friend to hunt deer on the lot, *id.* at 254, and Mr. Schmidt is concerned that he might encounter other hunters who might have accessed the lot via the railroad corridor notwithstanding the “no trespassing” signs he posted, *id.* at 257.

If the Schmidts obtained the railroad corridor, Mr. Schmidt could plant more trees or feed the deer. *Id.* at 258. Mr. Schmidt could not recall seeing the NITU prior to his deposition. *Id.* at 263.

C. Conclusions of Law

The facts elicited during trial inform both of the issues the court must address to determine whether plaintiffs with cognizable property interests have established a taking: (1) the nature of the alleged taking and (2) causation. Although the resolution of the causation issue could render the other issue moot, the court addresses it second to facilitate compliance with the Federal Circuit’s mandate.

1. The Nature of the Alleged Taking

As an initial matter, binding Federal Circuit precedent provides that the type of taking involved in Trails Act cases is a categorical physical taking. See *Caquelin III*, 959 F.3d at 1367-70; *Ladd*, 630 F.3d at 1025. Accordingly, to the extent that a taking occurred in this case, it was a categorical physical taking.

Notwithstanding this conclusion, the court must apply the multifactor test set forth in *Arkansas Game & Fish* for the assessment of temporary noncategorical physical takings to comply with the Federal Circuit’s mandate.³⁴ The first factor identified by the Supreme Court is the duration of the government’s interference with the property interest at issue.³⁵ *Ark. Game & Fish*, 568 U.S. at 38. In this case, the Board issued the NITU on May 23, 2011, preventing Indiana Southwestern from exercising its authority to fully abandon the railroad lines. The bar to

³⁴ Given the Federal Circuit’s subsequent determination that the multifactor test set forth in *Arkansas Game & Fish* is not applicable to a Trails Act taking triggered by a NITU, see *Caquelin III*, 959 F.3d at 1369-70, the court’s analysis, while complete, is concise.

³⁵ In Trails Act cases, duration is a factor that bears upon the compensation owed to a landowner, not to the government’s liability for a taking. *Ladd*, 630 F.3d at 1025; *Caquelin II*, 140 Fed. Cl. at 579.

abandonment remained in place for almost two-and-one-half years, until the NITU's expiration on November 8, 2013.³⁶ During this period, the affected plaintiffs were unable to reclaim the land underlying the easements and use it for their own purposes—whether it be to farm, plant trees or other vegetation, or explore for oil—or to take steps to exclude others. Such an extended deprivation of the use of the land weighs in favor of concluding that a taking occurred. Accord Caquelin II, 140 Fed. Cl. at 579-80 (concluding that a 180-day total deprivation of the use of land weighed in the landowner's favor); see also Banks v. United States, 138 Fed. Cl. 141, 149 (2018) (observing that “[t]emporary takings of less than six years have been held to be compensable”).

The second factor identified in Arkansas Game & Fish is “the degree to which the invasion is intended or is the foreseeable result of authorized government action.” 568 U.S. at 39. There can be no dispute that the affected plaintiffs’ inability to use the land underlying the easements was both intended and the foreseeable result of the Board’s issuance of the NITU. Accord Caquelin III, 959 F.3d at 1367 (“The NITU . . . compelled continuation of an easement . . . intentionally and with specific identification of the land at issue; and it did so solely for the purpose of seeking to arrange, without the landowner’s consent, to continue the easement for still longer . . . by an actual trail conversion.”); Caquelin II, 140 Fed. Cl. at 580 (“The [Board] issued the NITU with intent to block [the plaintiff] from any use of the corridor segment while a potential trail use was being negotiated. . . . [T]he result of the NITU was foreseeable, as the very point of a NITU is to prevent a landowner’s reversionary interest from taking effect so the trail negotiating process can take place.”); Banks, 138 Fed. Cl. at 150 (“The owners of the underlying fee are precluded from using their own land. That result requires no great foresight to anticipate.”). Accordingly, this factor weighs in favor of concluding that a taking occurred.

The third Arkansas Game & Fish factor is “the character of the land at issue”³⁷ 568 U.S. at 39. Most of the land bordering or surrounding the railroad lines is farm land with good soil and crop yields. Mr. Goebel described average yields of 210 bushels of corn per acre, 55 bushels of soybeans per acre, and 4000 pumpkins per season. Mr. Siebert described yields of more than 200 bushels of corn per acre and from 60 to 75 bushels of soybeans per acre. Mr. Martin agreed that the soil quality is good and described yields of 200 bushels of corn per acre, 55 to 70 bushels of soybeans per acre, and 80 to 100 bushels of wheat per acre. Mr. McDonald stated that the soil quality was very good and described good yields of 242 bushels of corn per acre and 71 to 72 bushels of soybeans per acre. Mr. Memmer stated that the soil quality was very good and described a yield in 2018 of up to 300 bushels of corn per acre. And, Mr. Reeves agreed that the soil quality is high and described average yields of 240 bushels of corn per acre.

³⁶ Plaintiffs contend that the duration of the taking is indefinite. Because interference that lasts for two-and-one-half years is sufficient to support the conclusion that a taking occurred under the Arkansas Game & Fish multifactor test, the court defers addressing plaintiffs’ contention until it reaches the issue of the extent of the alleged taking.

³⁷ As noted by the trial court in Caquelin II, this factor is not relevant in determining liability in a Trails Act case since liability in such a case does not depend upon the nature of the land; rather, this factor is relevant to determining just compensation. See 140 Fed. Cl. at 581 n.22; accord Banks, 138 Fed. Cl. at 150.

Indiana Southwestern does not maintain the railroad corridor adjacent to any of the farm land, but the farmers all take steps to ensure that weeds and other vegetation do not grow on the corridor and then spread into their fields. Thus, the corridor mainly consists of residual ballast or rocks, with a limited amount of weeds and other vegetation. Reclamation of the corridor would allow the land to be used to grow crops.

The remaining land bordering the railroad lines is wooded or residential in nature. With respect to the Effinger and Schmidt parcels, the line borders woodland and is suitable for planting trees or cover crops for wildlife to feed on. With respect to the Jenkins parcel, the line runs along the rear of the backyard of a small, unwooded lot in a residential neighborhood. Indiana Southwestern does not maintain the railroad corridor adjacent to these parcels. Mr. Jenkins maintains the portion of the corridor adjacent to his parcel, and it mainly consists of residual ballast or rocks, with a limited amount of weeds and other vegetation. However, neither Mr. Effinger nor Mr. Schmidt maintains the portions of the corridor adjacent to their parcels and they are therefore overgrown with vegetation.

In short, the portions of the railroad corridor adjacent to the parcels at issue do not exhibit any characteristics that would prevent the NITU from triggering a taking. Therefore, the third Arkansas Game & Fish factor weighs in favor of concluding that a taking occurred.

The fourth factor identified by the Supreme Court is “the owner’s ‘reasonable investment-backed expectations’ regarding the land’s use.” Ark. Game & Fish, 568 U.S. at 39. It is unclear whether this factor has any relevance for an alleged physical taking outside of the flooding context presented in Arkansas Game & Fish. See In re Upstream Addicks & Barker (Texas) Flood-Control Reservoirs, 146 Fed. Cl. 219, 261 (2019) (“[F]looding cases can pose an exception to the quotidian rule that physical takings do not involve consideration of ‘reasonable investment-backed expectations.’ . . . Despite the evident tension of transposing this factor from the regulatory to the physical takings context, Arkansas Game & Fish clarifies that reasonable expectations are a relevant consideration in connection with physical takings cases of this particular nature.”); see also Banks, 138 Fed. Cl. at 150 (“In Arkansas, the Court noted that distinct investment-backed expectations are a matter often informed by the law in force in the State in which the property is located. There can be no need for further consideration here. The only issue is whether plaintiffs owned a fee estate. If so, then the entire premise behind Preseault II is that they have a right under state law to expect the return of unfettered access when a railroad easement comes to an end.” (citation omitted)). Nevertheless, because the court has been instructed to apply the Arkansas Game & Fish factors in this case, it will endeavor to assess plaintiffs’ reasonable investment-backed expectations.

Under this factor, the court examines whether plaintiffs had investment-backed expectations for the use of the land underlying the railroad lines and whether such expectations were reasonable. See Cienega Gardens v. United States, 331 F.3d 1319, 1345-46 (Fed. Cir. 2003). But see Caquelin III, 959 F.3d at 1370 (rejecting the proposition that the government could “mandate an easement, without giving rise to takings liability, so long as, during the time of the easement, the landowner could or would not have made productive use of the land on which the easement ran”); In re Upstream Addicks & Barker, 146 Fed. Cl. at 261 n.23 (“Perhaps the Supreme Court’s inclusion of the words ‘investment-backed’ [in Arkansas Game & Fish]

invites too strong a reference to regulatory takings law. Simply referring to ‘reasonable expectations’ would capture the context in which the Court used the factor in Arkansas Game & Fish.’). Further, although the Supreme Court in Arkansas Game & Fish did not specify precisely when, in the case of a temporary physical invasion of land, a plaintiff’s expectations should be measured, it implied that they need not be measured as of the time the plaintiff acquired the land.³⁸ See 568 U.S. at 39 (observing that the flooding caused by the government had no historical precedent, thereby implying that events that occurred between the time of acquisition and the time of the government action were relevant to assessing the plaintiff’s expectations); see also Caquelin II, 140 Fed. Cl. at 582-84 (analyzing the plaintiff’s expectations for the use of her land during the time the NITU was in effect and disregarding the government’s contentions that the plaintiff lacked any expectation regarding the use of her land at the time she acquired it and that the plaintiff lacked an investment-backed expectation because she inherited the land).

In this case, the railroad lines are adjacent to land used by six plaintiffs for agricultural purposes. The four plaintiffs who farm the parcels themselves or lease the parcels to others to farm testified that they would reclaim the railroad corridor if they could and then farm the reclaimed land. Similarly, the individuals leasing the other two agricultural parcels testified that they would like to see the corridor reclaimed for farming. The soil quality on all six parcels is average or better and the land in the corridor could therefore be put to productive use for growing crops. Mr. Kliebenstein testified that these six plaintiffs would receive a positive return on their reclamation investment. And although Mr. McCarty testified as to the general difficulties in reclaiming railroad corridors for farming purposes, he did not state that these six plaintiffs would not receive a positive return on their reclamation investments. Based on this evidence, the owners of the agricultural parcels had a reasonable expectation that the land in the corridor could have been made into productive farm land but for the Board’s issuance of the NITU. Thus, the fourth Arkansas Game & Fish factor weighs in favor of concluding that a taking of the corridor adjacent to the parcels owned by the Goebels, Mr. Halpeny, the Martins, McDonald Family Farms, Mr. Memmer, and Reibel Farms, Inc. occurred.

With respect to the portions of the railroad corridor adjacent to the wooded and residential parcels, the plaintiffs who owned those parcels testified that they would reclaim the corridor if they could: Mr. Effinger would plant cover crops to provide food for wildlife, Mr. Schmidt would either plant trees or feed the deer, and Mr. Jenkins would incorporate it into his parcel and possibly drill for oil. Although these are all productive uses, the trial record lacks any

³⁸ In contrast, a plaintiff alleging a regulatory taking must “establish a reasonable investment-backed expectation in the property at the time it made the investment.” Cienega Gardens v. United States, 503 F.3d 1266, 1288 (Fed. Cir. 2007). Such an analysis “is designed to account for property owners’ expectation that the regulatory regime in existence at the time of their acquisition will remain in place, and that new, more restrictive legislation or regulations will not be adopted.” Love Terminal Partners, L.P. v. United States, 889 F.3d 1331, 1345 (Fed. Cir. 2018). Because this case does not concern the imposition of “new, more restrictive legislation or regulations,” *id.*, but instead concerns government action causing a physical appropriation of property, the court need not consider Mr. McCarty’s testimony regarding how the existence of a railroad corridor might affect a purchaser’s view of an adjacent parcel (i.e., the purchaser’s reasonable expectation), see Tr. 745-46 (McCarty).

evidence regarding the financial return that these three plaintiffs could realize upon their proposed uses of the adjacent corridor.³⁹ Accordingly, the fourth Arkansas Game & Fish factor does not tilt in either direction in the determination of whether a taking of these portions of the corridor occurred.

The fifth and final Arkansas Game & Fish factor is the “[s]everity of the interference” in the use of the land caused by the government’s action. 568 U.S. at 39. The issuance of the NITU compelled the continuation of Indiana Southwestern’s easements, preventing all use of the railroad corridor adjacent to plaintiffs’ parcels. Plaintiffs could not farm the corridor, build on the corridor, exclude trespassers from the corridor, or exercise any other rights inherent in owning land in fee simple. Accordingly, the interference was more than severe—it was complete.⁴⁰ Accord Caquelin II, 140 Fed. Cl. at 584; Banks, 138 Fed. Cl. at 150. This factor therefore weighs in favor of finding that a taking occurred.

In accordance with the above analysis, the court concludes that if the multifactor test described in Arkansas Game & Fish was applicable in Trails Act cases in general, and this case in particular, plaintiffs have established that a taking occurred. Of course, as confirmed by the

³⁹ The lack of evidence of financial gain is irrelevant to a categorical physical taking, such as the one that occurred in this case, because in such circumstances the landowners lose all of their property rights, which are, as a whole, inherently valuable. Indeed, although the value of some of these rights—such as the right to quiet enjoyment and the right to exclude trespassers—may not be easily quantifiable, they provide a clear benefit to the landowner that is diminished or eliminated by a categorical taking such as a forced continuation of an easement. That the deprivation of these valuable rights may not appropriately analyzed under the rubric of “reasonable investment-backed expectations” demonstrates the difficulty in applying the Arkansas Game & Fish factors to a categorical taking. Accord infra note 40.

⁴⁰ As alluded to by the trial court in Caquelin II, because a NITU forecloses all use of land underlying a railroad line, the noncategorical takings analysis described in Arkansas Game & Fish is inappropriate. See 140 Fed. Cl. at 584; accord Caquelin III, 959 F.3d at 1367, 1369-70. Moreover, because a NITU results in a physical taking, the court rejects defendant’s suggestion that it must assess the severity of the government’s interference using the parcel-as-a-whole approach. Accord Tahoe-Sierra, 535 U.S. at 322 (“When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.” (citation omitted)); Ideker Farms, Inc. v. United States, 136 Fed. Cl. 654, 680 (2018) (“Nor is the ‘parcel as a whole’ test applicable or appropriate for determining the severity of government-induced flooding in a physical takings case.”), recons. denied, 142 Fed. Cl. 222 (2019); see also Norman v. United States, 429 F.3d 1081, 1091 (Fed. Cir. 2005) (“[A] physical taking of any portion of private property will ordinarily result in compensation, while a regulatory taking becomes ‘categorical,’ and therefore requires compensation, only if the owner is deprived of all beneficial use of the ‘parcel as a whole.’”). However, to the extent that a parcel-as-a-whole analysis is relevant, defendant is correct that the portion of each affected plaintiffs’ larger parcel impacted by the NITU is objectively small in terms of land area.

Federal Circuit in Caquelin III, the Arkansas Game & Fish multifactor test is inapplicable in Trails Act cases. See 959 F.3d at 1369-70. Rather, as noted above, the compelled continuation of an easement caused by the issuance of a NITU is a categorical physical taking.

2. Causation

The sole remaining question with respect to liability is whether the Board's issuance of the NITU caused the injury alleged by plaintiffs—a compelled continuation of Indiana Southwestern's easements that prevented plaintiffs from acquiring fee simple interests in the underlying land by operation of state law. Defendant contends that plaintiffs cannot establish causation. Specifically, it argues that because the NITU expired without the execution of a trail-use agreement and Indiana Southwestern did not fully abandon the railroad lines by filing a notice of consummation, plaintiffs are in the same position they were in before Indiana Southwestern filed its notice of exemption and therefore suffered no injury. Plaintiffs counter that they were injured by the Board's issuance of the NITU—at least while the NITU was in effect—because a NITU automatically causes a taking under binding precedent. Moreover, plaintiffs contend, Indiana Southwestern did, in fact, abandon the lines under state law.

Under the standard articulated by the Federal Circuit in Caquelin III, the Board's issuance of the “NITU would not have altered the continuation of the easement during the NITU period—i.e., would not have caused the only alleged taking of property—if the railroad would not have abandoned the rail line during that period even in the absence of the NITU.” 959 F.3d at 1371. Accordingly, plaintiffs must establish that Indiana Southwestern would have abandoned the railroad lines in the absence of the NITU. Plaintiffs have satisfied their burden.

Indiana Southwestern decided that it no longer needed the railroad lines and therefore, on October 25, 2010, initiated the process for abandoning the lines by filing a notice of exemption with the Board. In its notice, it averred that it had satisfied all of the requirements to be exempt from abandonment proceedings, including having no local traffic move over the lines for at least the preceding two years, and represented that it would consummate the abandonment of the lines “on or after January 15, 2011.” JX 1 at 3-6. In a November 12, 2010 notice, the Board acknowledged Indiana Southwestern's submission and provided that in the absence of a regulatory barrier, such as an OFA or a NITU, the exemption would become “effective on December 14, 2010,” and Indiana Southwestern could fully abandon the lines by filing “a notice of consummation by November 12, 2011” JX 2 at 2-3.

Subsequently, the Board received an OFA and Indiana Southwestern agreed to negotiate a trail-use agreement (ultimately leading to the issuance of the NITU), creating regulatory barriers to Indiana Southwestern's ability to file a notice of consummation. Nevertheless, Indiana Southwestern continued its efforts to abandon the railroad lines. On August 2, 2011, while the NITU was in effect and as expressly permitted by regulation, it executed a contract with A&K in which A&K agreed to purchase and remove the rails and other metal material from the lines by April 1, 2012. A&K completed the work by early February 2012, well before the NITU expired. In addition, Mr. LaKemper testified that even after the NITU expired, it was Indiana Southwestern's intent to either finalize the abandonment or execute a trail-use agreement.

These facts reflect that Indiana Southwestern had every intent to abandon the railroad lines during the period of time that the NITU was in effect, and was prevented from doing so by the existence of the NITU. Further, the only evidence possibly suggesting that Indiana Southwestern might not have abandoned the lines between May 23, 2011, and November 8, 2013, is the fact that it did not file a notice of consummation within the sixty-day period following the expiration of the NITU, as legally required. However, what Indiana Southwestern chose to do (or not do) after the NITU expired is not particularly suggestive of what Indiana Southwestern was planning to do while the NITU was in place because such action (or inaction) might have been prompted by information learned or circumstances that arose after the NITU expired.⁴¹ See Caquelin III, 959 F.3d at 1370-71 (focusing on whether the railroad company would have abandoned its line “during the NITU” period). And even if it was suggestive, it is outweighed by the evidence demonstrating Indiana Southwestern’s intent to abandon the lines. Accordingly, the Board’s issuance of the NITU injured plaintiffs by compelling the continuation of Indiana Southwestern’s easements—despite Indiana Southwestern’s expressed intent to abandon the lines—and preventing them from acquiring fee simple interests in the underlying land.

Moreover, the evidence in the trial record reflects that Indiana Southwestern satisfied the requirements for abandonment set forth in Indiana Code section 32-23-11-6(a)(2) and that, in accordance with Indiana Code section 32-23-11-7, the railroad lines would have been considered abandoned under state law in the absence of the trail-use condition imposed in the NITU. As noted above, Indiana Code section 32-23-11-6(a)(2) sets forth two requirements for abandonment. First, the Board must “issue[] a certificate of public convenience and necessity relieving the railroad of the railroad’s common carrier obligation on the right-of-way.” Ind. Code § 32-23-11-6(a)(2)(A). Second, as relevant to this analysis, the railroad company must remove the “[r]ails, switches, ties, and other facilities . . . from the right-of-way, making the right-of-way unusable for continued rail traffic.” Id. § 32-23-11-6(a)(2)(B)(i).

The first requirement, when read literally, would prevent any abandonments from occurring under Indiana law after January 1, 1996, because after that date, there was no provision in federal law for the issuance of a certificate of public convenience and necessity. In other words, the statute ostensibly enacted to describe the requirements for abandonment actually prevents abandonment. This is an absurd result that cannot possibly reflect the intent of the Indiana legislature; if the legislature meant to foreclose all abandonments, it could have done so more simply. However, when reading the provision in its entirety, the legislative intent becomes evident. See Walczak v. Labor Works-Ft. Wayne LLC, 983 N.E.2d 1146, 1154 (Ind. 2013) (“We presume the General Assembly intended the statutory language to be applied logically and consistently with the statute’s underlying policy and goals, and we avoid construing a statute so as to create an absurd result.” (citation omitted)). Because a certificate of public convenience

⁴¹ Similarly, the evidence indicating that Indiana Southwestern continued to negotiate a trail-use agreement with Indiana Trails Fund, Inc. after the NITU expired and declined to entertain plaintiffs’ offer to purchase the railroad corridor several years thereafter is irrelevant to whether it would have abandoned the railroad lines between May 23, 2011, and November 8, 2013.

and necessity provided a railroad company with the authority to abandon a railroad line and that authority relieved the railroad company of its obligation to furnish service on the line, Hayfield N. R.R. Co., 467 U.S. at 635, the modern-day equivalent of the certificate of public convenience and necessity is the document issued by the Board that authorizes abandonment—the decision issued in response to an application for abandonment or petition for an individual exemption, or the notice recognizing that a railroad company has invoked a class exemption.

Here, the Board initially authorized Indiana Southwestern to abandon the railroad lines when it published its notice in the Federal Register on November 12, 2010. That authorization was postponed due to Poseyville's OFA and then reinstated when the Board issued the NITU on May 23, 2011. Indeed, in the NITU, the Board provided that Indiana Southwestern could abandon the lines if a trail-use agreement was not executed within 180 days and, in the meantime, could remove the rails, ties, and switches from the lines. Further, the pertinent regulation—49 C.F.R. § 1152.29(c)(1)—provides that the issuance of a NITU permitted Indiana Southwestern to discontinue service and cancel tariffs. Accordingly, by issuing the NITU, the Board authorized Indiana Southwestern to abandon the lines, relieving it of its common carrier obligation to provide rail service.⁴²

Defendant's contention that only the filing of a notice of consummation of abandonment would satisfy Indiana Code section 32-23-11-6(a)(2)(A) is not well taken. As noted above, when section 32-23-11-6(a)(2)(A) was initially enacted, federal law required the issuance of a certificate of public convenience and necessity. Although that certificate relieved a railroad company of its obligation to provide rail service on the relevant line, it was not the final step of the abandonment process such that its line was removed from the jurisdiction of the Interstate Commerce Commission. Rather, once a railroad company received the certificate, it needed to actually abandon the railroad line by, at a minimum, ceasing operations and cancelling tariffs. Consequently, the proper analogue to the "certificate of public convenience and necessity" identified in section 32-23-11-6(a)(2)(A) is not the notice of consummation that follows actual abandonment of a line and removes the line from the Board's jurisdiction, but the document providing the railroad company with the authority to abandon the line in the first instance.

Defendant also contests plaintiffs' ability to establish that Indiana Southwestern has satisfied the second requirement of section 32-23-11-6(a)(2). Plaintiffs assert that by removing the rails and switches from the railroad corridor and pulling up (but leaving behind) the ties, Indiana Southwestern rendered the railroad lines unusable for rail traffic. Defendant disagrees, arguing that to comply with the plain language of the provision, Indiana Southwestern was required to remove the rails embedded in the road crossings and the ties from the corridor, but did neither. Defendant's construction of the provision is overly precise.

⁴² That Indiana Southwestern did not ultimately perfect the abandonment by filing a notice of consummation with the Board is not relevant to determining whether the requirement described in Indiana Code section 32-23-11-6(a)(2)(A) was satisfied during the pendency of the NITU. However, as explained below, it is relevant to determining the extent of the taking for which defendant is liable.

There is no dispute that A&K, pursuant to its contract with Indiana Southwestern, dismantled the tracks on the railroad lines, removing the rails, switches, and other metallic components from the railroad corridor, but leaving the road crossings intact and leaving the ties alongside where the tracks had been located. Consequently, neither the rails embedded in the road crossings nor the ties were removed from the corridor. Nevertheless, it cannot seriously be contended that leaving these track components in the corridor made the corridor usable for rail traffic. According to Indiana Southwestern's employees, the reason the road crossings were left intact was the costs involved in closing the roads to allow for their removal and reconstructing the roads thereafter, and the primary reason why the ties were left behind was because it was not economically viable to remove them from the corridor. They further explained that it was unlikely that the ties could be used for rail service and that Indiana Southwestern had no intent to use its lines for rail service. Thus, the overwhelming evidence in the trial record reflects that after A&K completed its work in early 2012, the corridor was not, as stated in Indiana Code section 32-23-11-6(a)(2)(A), "usable for rail traffic."

In sum, plaintiffs have established that the Board's issuance of the NITU injured them by compelling the continuation of Indiana Southwestern's easements—despite Indiana Southwestern's expressed intent to abandon the lines and despite Indiana Southwestern's satisfaction of the requirements of Indiana Code section 32-23-11-6(a)(2)—and preventing them from acquiring fee simple interests in the underlying land.

IV. DAMAGES: EXTENT OF THE CATEGORICAL TAKING

Having determined that the government is liable for a categorical taking, the next inquiry concerns the extent of that taking. Plaintiffs urge the court to conclude that the taking extended beyond the expiration of the NITU and ultimately may be permanent because Indiana Southwestern has abandoned the railroad lines under Indiana law, prolonging the blocking of the reversion of state law property interests caused by the NITU. Defendant, on the other hand, contends that Indiana law is irrelevant and, if there is a taking in this case, it is temporary in nature and ended upon the expiration of the NITU.

A. Legal Standard

In Trails Act cases, the railroad company's actions subsequent to the Board's issuance of a NITU dictate the extent of the taking and, therefore, the amount of just compensation owed by the government. The Federal Circuit has provided clear guidance regarding the extent of the taking in two factual scenarios. First, when the issuance of a NITU leads to a trail-use agreement and, therefore, the conversion of a railroad-purposes easement to a trail, the taking is permanent because the adjacent fee owners are prevented indefinitely from using the land burdened by easement. Caquelin III, 959 F.3d at 1367; Caldwell, 391 F.3d at 1234. Second, when the issuance of a NITU does not lead to a trail-use agreement, the NITU expires, and the railroad company decides to fully abandon its line by filing a notice of consummation, the taking is temporary because the adjacent fee owners recover the land burdened by easement upon the abandonment by operation of state law. Caquelin III, 959 F.3d at 1362, 1367; Ladd, 630 F.3d at 1018, 1025; see also Barclay, 443 F.3d at 1378 (rejecting the contention that a "NITU should not be viewed as the taking because subsequent events might render the NITU only temporary").

However, the Federal Circuit has not considered the situation presented in this case, in which the issuance of the NITU did not lead to a trail-use agreement, the NITU expired, and the railroad company did not file a notice of consummation despite having no intention to use its line. Similarly, there is no precedent from the Court of Federal Claims that grapples with this situation. Consequently, this case presents an issue of first impression.

B. Findings of Fact

The facts relevant to the inquiry regarding the extent of the taking are set forth previously in more detail, but are summarized here for convenience. The last loaded revenue train ran on the railroad lines in 2004, the last local traffic on the lines ran no later than October 2008, and the last use of the lines for railroad car storage was in 2009. On October 25, 2010, Indiana Southwestern submitted to the Board a notice of exemption from abandonment proceedings. On November 12, 2010, the Board published a notice in the Federal Register in which it indicated that in the absence of an OFA, Indiana Southwestern's exemption would be effective on December 14, 2010, allowing Indiana Southwestern to fully abandon its lines by November 12, 2011. That authority was delayed by Poseyville filing an OFA. After disposing of Poseyville's OFA, the Board issued a NITU on May 23, 2011, imposing a trail-use condition and delaying Indiana Southwestern's ability to abandon the lines for an additional 180 days. On August 2, 2011, while the NITU was in effect, Indiana Southwestern contracted with A&K to remove the tracks from the lines by April 1, 2012. By that deadline, A&K took up the rails (except those in road crossings), removing them from the railroad corridor. A&K also took up the ties, leaving them along the lines within the corridor; on some portions of the lines, the good ties were eventually removed and/or the ties were destroyed. Ultimately, the NITU expired on November 8, 2013, no trail-use agreement was executed while the NITU was in effect or thereafter, and Indiana Southwestern did not file a notice of consummation by the January 7, 2014 deadline to signify that it fully abandoned the lines. Nevertheless, Indiana Southwestern's intent remained to either finalize the abandonment or execute a trail-use agreement.

C. Conclusions of Law

Under these facts, plaintiffs contend that the taking triggered by the NITU has continued beyond the expiration of the NITU and will eventually become permanent. Specifically, they argue that their state law reversionary interests were initially blocked by the Board's issuance of the NITU and continued to be blocked, after Indiana Southwestern abandoned its lines under state law, by the federal regulatory requirement that a railroad company consummate its abandonment of its line.⁴³ Defendant, without much elaboration, rejects plaintiffs' argument that

⁴³ Plaintiffs repeatedly invoke the third prong of the test set forth in Preseault II as bearing upon whether a taking has occurred and the nature of the taking. However, the three-part test in Preseault II merely describes what a court should consider when determining whether a plaintiff has a property interest that was affected by the government's action. See Preseault II, 100 F.3d at 1532-33. The court has already determined, applying the test from Preseault II, that all but one of the plaintiffs have a cognizable property interest, in other words, that Indiana Southwestern acquired easements for railroad purposes that existed at the time that the Board issued the NITU.

a taking exists due to the continuation of Board jurisdiction over the lines after the expiration of the NITU. Defendant's position is correct as a matter of law.

Pursuant to the Fifth Amendment, the federal government is liable to pay just compensation when it takes private property for public use. In a Trails Act case, the federal government takes a landowner's right to an unencumbered interest in her land by either permitting a railroad-purposes easement to be converted into a trail easement or, as in this case, by prolonging a railroad-purposes easement beyond the time it would have been extinguished under state law. In either scenario, the taking accrues when the Board issues a CITU or NITU. When a trail-use agreement is executed before a CITU or NITU expires, the taking is permanent because the original railroad-purposes easement is replaced by a new easement of an indefinite duration. When the CITU or NITU does not lead to a trail-use agreement and the railroad company instead consummates the abandonment of its line, the taking is temporary because the CITU or NITU only caused the railroad-purposes easement to be prolonged for a defined period of time, after which the easement was extinguished upon the consummation of abandonment and the landowner regained an unencumbered interest in her land.

In this case, the Board forced the continuation of Indiana Southwestern's railroad-purposes easements when it issued the NITU on May 23, 2011. The NITU did not lead to a trail-use agreement, and it ultimately expired on November 8, 2013. Had Indiana Southwestern filed a notice of consummation by the January 7, 2014 deadline, the railroad-purposes easements would have been extinguished and plaintiffs would have been left with unencumbered fee simple estates. However, Indiana Southwestern did not file such a notice. This failure had two consequences: (1) Indiana Southwestern's authority to abandon the lines expired and (2) the Board retained jurisdiction over the lines.

As previously explained, the determination of whether a railroad line has been abandoned under Indiana law is dependent upon whether, under federal law, the Board has granted the railroad company the authority to abandon the line and whether that authority is subject to a trail-use condition. Ind. Code §§ 32-23-11-6(a)(2)(A), 32-23-11-7. When the NITU (and, therefore, the trail-use condition) expired on November 8, 2013, the requirements for abandonment under Indiana law were satisfied: Indiana Southwestern had the authority to abandon its lines; the rails, switches, and ties were removed from the lines; and there was no trail-use condition in effect. Accordingly, under state law, the lines were considered to be abandoned. Normally, such an abandonment would have resulted in the extinguishment of the railroad-purposes easements. See Lewellen, 682 N.E.2d at 782. However, the Board possesses exclusive and plenary authority to regulate railroad abandonments, see 49 U.S.C. § 10501(b) (2006); Kalo Brick & Tile Co., 450 U.S. at 319-21, and has promulgated a regulation providing that a line is not fully abandoned until the railroad company files a notice of consummation, 49 C.F.R. § 1152.29(e)(2) (2010). This regulation preempts Indiana law.⁴⁴ As a consequence, the federal government was

⁴⁴ Presumably, in most circumstances, Indiana law will not conflict with federal law because railroad companies that obtain the authority to abandon their lines from the Board and remove the tracks from the lines either consummate the abandonment or execute a trail-use agreement. This case presents an atypical situation in which the railroad company takes neither course of action.

responsible for extending the railroad-purposes easements from the date the Board issued the NITU until the date Indiana Southwestern's authority to abandon its lines expired. After that date, Indiana Southwestern, not the federal government, was responsible for the continuation of the easement since the decision to fully abandon the lines was solely within its control.⁴⁵ Therefore, the federal government has not permanently taken plaintiffs' parcels.⁴⁶ Accord Navajo Nation v. United States, 631 F.3d 1268, 1274 (Fed. Cir. 2011) ("A takings claim must be predicated on actions undertaken by the United States, not [a third party].").

In sum, defendant is liable to pay plaintiffs just compensation for a temporary categorical taking that lasted from the date the Board issued the NITU, May 23, 2011, to the date Indiana Southwestern's authority to abandon its railroad lines expired, January 7, 2014—a period of 960 days (2.63 years).

V. DAMAGES: PRINCIPAL AMOUNT OF JUST COMPENSATION

The final task for the court is to determine the amount of just compensation due to plaintiffs for the temporary categorical taking. Plaintiffs devote fewer than two pages in their opening posttrial brief to this topic. They reproduce a chart summarizing the amounts of just compensation calculated by their expert, Mr. Matthews, in three different scenarios (a permanent taking, a temporary taking from May 23, 2011, to October 1, 2018, and a temporary taking from May 23, 2011, to November 8, 2013) and aver that defendant did not refute Mr. Matthews's testimony by offering its own damages evidence or expert testimony. But they do not describe the applicable legal standard or explain how the evidence in the trial record satisfies that standard. Defendant, in the fewer than two pages it devotes to the topic, provides a legal standard and asserts that plaintiffs have not satisfied that standard in general terms, but limits its assertion to the agricultural parcels at issue. Neither party revisits the issue of calculating just compensation in their responsive posttrial briefs. Nor did the parties address just compensation during closing arguments. Notwithstanding the deficiencies in the parties' submissions, the court must provide a complete analysis of the amount of just compensation due to plaintiffs.

A. Legal Standard

Just compensation, as described in the Fifth Amendment, "means the full monetary equivalent of the property taken." United States v. Reynolds, 397 U.S. 14, 16 (1970). In other words, the owner of the property taken "is to be put in the same position monetarily as he would have occupied if his property had not been taken." Id. For a temporary taking, "the just compensation to which the owner is entitled is the value of the use of the property during the temporary taking, *i.e.*, the amount which the owner lost as a result of the taking." Yuba Nat.

⁴⁵ Alternatively, an interested third party could try to force Indiana Southwestern to abandon the railroad lines by initiating adverse abandonment proceedings before the Board.

⁴⁶ Because this case does not present the scenario in which an ongoing temporary taking might ripen into a permanent taking—as in Balagna v. United States, 138 Fed. Cl. 398 (2018), in which the NITU remained pending after five years while a trail-use agreement was being negotiated—there is no need to fashion a unique remedy as plaintiffs request.

Res., Inc. v. United States, 904 F.2d 1577, 1580-81 (Fed. Cir. 1990). “The usual measure of” such loss of use “is the fair rental value of the property for the period of the taking.”⁴⁷ Id. at 1581; accord Kimball Laundry Co. v. United States, 338 U.S. 1, 7 (1949) (holding, when “it was known from the outset that this taking was to be temporary . . . , that the proper measure of compensation is the rental that probably could have been obtained”).

There is no set method for calculating fair rental value. See Am.-Hawaiian S.S. Co. v. United States, 124 F. Supp. 378, 381 (Ct. Cl. 1954) (“The ascertainment of value is not controlled by rigid rules or artificial formulae; what is required is a ‘reasonable judgment having its basis in a proper consideration of all relevant facts.’” (quoting Standard Oil Co. of N.J. v. S. Pac. Co., 268 U.S. 146, 156 (1925))), judgment entered, 130 Ct. Cl. 818 (1955); see also Yaist v. United States, 17 Cl. Ct. 246, 257 (1989) (“The court may use its judgment in selecting the method to determine fair market value.”). Furthermore, although “the ‘conventional’ method” of valuing an easement “is the ‘before-and-after’ method, i.e., ‘the difference between the value of the property before and after the Government’s easement was imposed[,]’ . . . there may be appropriate alternative valuation methods for the taking of an easement.” Otay Mesa Prop., L.P. v. United States, 670 F.3d 1358, 1364 (Fed. Cir. 2012) (quoting United States v. Va. Elec. & Power Co., 365 U.S. 624, 632 (1961)); see also Balagna, 138 Fed. Cl. at 404 (observing that “the case law is not well developed with respect to valuing temporary takings in the rails-to-trails context”). Regardless of how it is calculated, fair rental value must account for the physical condition of the property at the time of the taking. See Rasmuson v. United States, 807 F.3d 1343, 1345-46 (Fed. Cir. 2015) (“[T]he fair market value of the land includes the physical remnants of the railway that would have remained on the landowners’ property but for the issuance of the NITUs. . . . [A] ‘before’ calculation that does not take into account the costs of removing the physical remnants of the railway will result in an artificially inflated value and yield a windfall to the landowner.”).

“The landowners have the burden of establishing the value of the railway corridor, which is a question of fact.” Id. at 1345.

B. Findings of Fact

Plaintiffs presented the appraisal reports and testimony of an expert appraiser, Mr. Matthews, to support their claim for just compensation. Mr. Matthews explained that determining just compensation for a temporary taking triggered by a NITU is a two-step process: estimating the lost rent for the duration of the taking and then discounting the rent to its present value. Tr. 344-45, 348-49 (Matthews); cf. id. at 362 (stating that because railroad companies typically used only a narrow strip of land within a railroad corridor to construct the railroad, much of the corridor has a rental value without needing any curative measures).

⁴⁷ Just compensation for a permanent taking is normally measured by the fair market value of the property taken, in other words, what a willing buyer would pay to a willing seller for the property. United States v. 50 Acres of Land, 469 U.S. 24, 29 & n.1 (1984); Yuba Nat. Res., Inc. v. United States, 821 F.2d 638, 641 (Fed. Cir. 1987). “[T]emporary reversible takings should be analyzed in the same constitutional framework applied to permanent irreversible takings” Yuba Nat. Res., Inc., 821 F.2d at 641.

There are several methods for estimating lost rent. One method is to determine the market value of a temporary easement by comparing sales of parcels unencumbered by a temporary easement to sales of parcels encumbered by a temporary easement, *id.* at 345, and then applying a rate of return to estimate rent, *id.* at 318-19. The difficulty with this approach is that the difference in sales prices between the two types of parcels is likely to be nominal, and an appraiser would not consider the existence of the easement when estimating the sales price of an encumbered parcel. *Id.* at 345-46.

Another method is to determine lost rent by identifying rents for parcels similar to the subject parcel (in other words, with the physical remnants of a railroad line) and adjusting those rents to account for differences between those parcels and the subject parcel. *Id.* at 344, 549. Mr. Matthews rejects this method because there is “[n]ot much data out there,” *id.* at 549, and it does not account for damages (such as the need to use point rows) caused by the taking, *id.* at 319, 549, which must be taken into consideration when ascertaining just compensation, *id.* at 339, 564, 569; *accord id.* at 551-52 (stating that although damages are difficult to appraise, they must be considered for an appraisal to be valid), 569 (stating that failing to ascertain damages “would make the appraisal void”).

A third method, used by Mr. Matthews, is to derive lost rent from the market value of the parcel—in essence, determining just compensation for a permanent taking and then applying a rate of return to estimate rent. *Id.* at 318-19, 339, 548. Under this method, the first task is to ascertain the market value of the subject parcel on the date of the taking, assuming that the parcel is unencumbered by an easement (the “before” condition). *Id.* at 317, 341, 368, 496, 560. Market value can be determined using a cost approach, an income approach, or a comparable sales approach. *Id.* at 320-22, 383. In this case, Mr. Matthews used the comparable sales approach. *Id.* at 321, 383. He identified sales of parcels that were the most similar to the parcels owned by plaintiffs and then adjusted the sales prices to account for differences between the parcels on factors such as the date of the sales, market conditions, soil quality, parcel shape, amount of tillable land, topography/flood potential, highest and best use, location, and availability of utilities. *Id.* at 321-22, 327-35, 385-86, 452, 554-56. Based on this data, he calculated the average value of land per acre, multiplied that amount by the number of acres in the subject parcel (which included the railroad corridor), and then subtracted the amount, if any, of the cost to cure.⁴⁸ *See, e.g., id.* at 386-87, 391-92; *see also id.* at 488-89 (stating that the parcel is appraised in the physical condition that existed on the date of the taking, which includes any remnants of the railroad bed that might need to be removed to use the land), 523 (stating that because an appraiser must assume that the railroad corridor has been reclaimed and is being used in the “before” condition even though the corridor has not been reclaimed, the cost to cure must be subtracted from the value of the parcel). The resulting amount was the estimated value of the

⁴⁸ For the agricultural parcels, the cost to cure is the cost to convert the railroad corridor into tillable land. Tr. 355, 390-93 (Matthews); *see also supra* Section III.B.3 (describing Mr. Matthews’s conclusions regarding the cost to convert the corridors into tillable land, Mr. Kliebenstein’s opinion that such a conversion was economically feasible, and Mr. McCarty’s opinion that such conversions are not quick or easy). There are no conversion costs for the residential parcels. Tr. 363 (Matthews); *accord* PX 20 at 26; PX 21 at 27; PX 22 at 27.

subject parcel in the “before” condition. See, e.g., *id.* at 392. The following table sets forth the amounts determined by Mr. Matthews to estimate the value of plaintiffs’ parcels in the “before” condition:

Parcel Owner	Acres	Per-Acre Value	Total Value	Cost to Cure	Indicated Value
Severed Parcels					
The Goebels	133.870	\$8400	\$1,124,500	\$1750	\$1,122,800
The Martins	287.820	\$7000	\$2,014,740	\$16,300	\$1,997,400
McDonald Family Farms	115.720	\$8150	\$943,100	\$1900	\$941,200
Nonsevered Parcels					
Mr. Halpeny	36.010	\$8700	\$313,287	\$6500	\$306,800
Mr. Memmer	90.355	\$9700	\$876,500	\$1300	\$875,200
Reibel Farms, Inc.	117.830	\$9100	\$1,072,253	\$2000	\$1,070,300
Wooded Parcels					
Mr. Effinger	62.450	\$7000	\$437,200	\$0	\$437,200
The Schmidts	20.000	\$7500	\$150,000	\$0	\$150,000
Improved Residential Parcel					
Mr. Jenkins	0.250	\$27,000	\$6800	\$0	\$6800

See PX 14 at 28; PX 15 at 36; PX 16 at 36; PX 17 at 28; PX 18 at 28; PX 19 at 36; PX 20 at 26; PX 21 at 27; PX 22 at 27.

The second task is to ascertain the market value of the land within the railroad corridor in the “before” condition by multiplying the average value of land per acre by the number of acres in the corridor, and then, for the agricultural and wooded parcels, subtracting from that amount any cost to cure. Tr. 394 (Matthews). The following table sets forth the amounts determined by Mr. Matthews to estimate the value of the land within the corridor in the “before” condition:

Parcel Owner	Acres	Per-Acre Value	Total Value	Cost to Cure	Indicated Value
Severed Parcels					
The Goebels	3.190	\$8400	\$26,800	\$1750	\$25,000
The Martins	5.480	\$7000	\$38,400	\$16,300	\$22,100
McDonald Family Farms	1.920	\$8150	\$15,600	\$1900	\$13,700
Nonsevered Parcels					
Mr. Halpeny	2.010	\$8700	\$17,500	\$6500	\$11,000
Mr. Memmer	1.605	\$9700	\$15,569	\$1300	\$14,300
Reibel Farms, Inc.	1.050	\$9100	\$9555	\$2000	\$7600
Wooded Parcels					
Mr. Effinger	1.560	\$7000	\$11,000	\$0	\$11,000
The Schmidts	2.770	\$7500	\$20,800	\$0	\$20,800

Improved Residential Parcel					
Mr. Jenkins	0.050	\$27,000	\$1400	\$0	\$1400

See PX 14 at 29; PX 15 at 37; PX 16 at 37; PX 17 at 29; PX 18 at 29; PX 19 at 37; PX 20 at 26; PX 21 at 27; PX 22 at 27.

The third task is to ascertain the market value of the property assuming that, on the date of the taking, the trail has been built and is being used (the “after” condition). Tr. 317, 341-42, 367, 395, 495-98, 502, 561 (Matthews). To determine this value, Mr. Matthews used the same sales as comparators and adjusted the sales price on the same factors he used in the “before” condition. *Id.* at 335, 397, 459, 465-66. The only substantial difference in adjustments between the “before” and “after” conditions was the parcel shape adjustment for the three agricultural parcels severed by a railroad line because in the “before” condition there were no point rows, but in the “after” condition, point rows are necessary. *Id.* at 335-36, 396-97. Based on this data, Mr. Matthews calculated the average value of land per acre, multiplied that amount by the number of acres in the subject parcel (which excluded the railroad corridor), *id.* at 395-96, and then, for the improved residential parcel, subtracted the cost to cure damages arising from the existence of the trail (the construction of a privacy fence), *id.* at 467-68. The resulting amount was the estimated value of the subject parcel in the “after” condition. *Id.* at 397-98. The following table sets forth the amounts determined by Mr. Matthews to estimate the value of plaintiffs’ parcels in the “after” condition:

Parcel Owner	Acres	Per-Acre Value	Total Value	Cost to Cure	Indicated Value
Severed Parcels					
The Goebels	130.68	\$8200	\$1,071,600	\$0	\$1,071,600
The Martins	282.34	\$6750	\$1,905,800	\$0	\$1,905,800
McDonald Family Farms	113.80	\$7800	\$887,600	\$0	\$887,600
Nonsevered Parcels					
Mr. Halpeny	34.00	\$8700	\$295,800	\$0	\$295,800
Mr. Memmer	88.75	\$9700	\$860,900	\$0	\$860,900
Reibel Farms, Inc.	116.78	\$9100	\$1,062,700	\$0	\$1,062,700
Wooded Parcels					
Mr. Effinger	60.89	\$7000	\$426,200	\$0	\$426,200
The Schmidts	17.23	\$7500	\$129,200	\$0	\$129,200
Improved Residential Parcel					
Mr. Jenkins	0.20	\$27,000	\$5400	\$1600	\$3800

See PX 14 at 34; PX 15 at 42; PX 16 at 42; PX 17 at 34; PX 18 at 34; PX 19 at 42; PX 20 at 30-31; PX 21 at 31-32; PX 22 at 31-32.

The fourth task is to determine the diminution of value of the parcel attributable to the taking by subtracting the market value of the parcel in the “after” condition from the market value of the parcel in the “before” condition. Tr. 398 (Matthews). This diminution of value is then allocated between the previously calculated market value of the land taken and the damages

to the remainder of the parcel. *Id.* at 373-74, 398, 568. The following table sets forth the amounts used by Mr. Matthews to calculate the diminution of value of the parcels, as well as his allocation of the diminution of value:

Parcel Owner	"Before" Value	"After" Value	Difference	Market Value of Land Taken	Damages
Severed Parcels					
The Goebels	\$1,122,800	\$1,071,600	\$51,200	\$25,000	\$26,200
The Martins	\$1,997,400	\$1,905,800	\$92,600	\$22,100	\$70,500
McDonald Family Farms	\$941,200	\$887,600	\$53,600	\$13,700	\$39,900
Nonsevered Parcels					
Mr. Halpeny	\$306,800	\$295,800	\$11,000	\$11,000	\$0
Mr. Memmer	\$875,200	\$860,900	\$14,300	\$14,300	\$0
Reibel Farms, Inc.	\$1,070,300	\$1,062,700	\$7,600	\$7,600	\$0
Wooded Parcels					
Mr. Effinger	\$437,200	\$426,200	\$11,000	\$11,000	\$0
The Schmidts	\$150,000	\$129,200	\$20,800	\$20,800	\$0
Improved Residential Parcel					
Mr. Jenkins	\$6800	\$3800	\$3000	\$1400	\$1600

See PX 14 at 35; PX 15 at 43; PX 16 at 43; PX 17 at 35; PX 18 at 35; PX 19 at 43; PX 20 at 31; PX 21 at 32; PX 22 at 33.

The final task is to apply a rate of return to the components of the diminution of value to determine the amount of annual rent lost due to the taking. Tr. 349-50, 399-400, 549 (Matthews). Mr. Matthews used a rate of return of 3.5% for the agricultural parcels, *id.* at 350, a rate of return of 5% for the wooded parcels, *id.* at 352, and a gross rent multiplier of 17 for the improved residential parcel, PX 22 at 36.⁴⁹ The following table sets forth the amounts used by Mr. Matthews to calculate plaintiffs' annual lost rent:

Parcel Owner	Market Value of Land Taken	Annual Rent for Land Taken	Damages	Annual Rent for Damages
Severed Parcels				
The Goebels	\$25,000	\$875	\$26,200	\$917
The Martins	\$22,100	\$774	\$70,500	\$2468
McDonald Family Farms	\$13,700	\$480	\$39,900	\$1397

⁴⁹ The gross rent multiplier is derived from an analysis of "sales and listing of rental properties in Posey County" and reflects the ratio of rent to sales price. See PX 22 at 36.

Nonsevered Parcels				
Mr. Halpeny	\$11,000	\$385	\$0	\$0
Mr. Memmer	\$14,300	\$501	\$0	\$0
Reibel Farms, Inc.	\$7,600	\$266	\$0	\$0
Wooded Parcels				
Mr. Effinger	\$11,000	\$550	\$0	\$0
The Schmidts	\$20,800	\$1040	\$0	\$0
Improved Residential Parcel				
Mr. Jenkins	\$1400	\$82	\$0	\$0

See PX 14 at 39; PX 15 at 47; PX 16 at 47; PX 17 at 39; PX 18 at 39; PX 19 at 47; PX 20 at 35; PX 21 at 36; PX 22 at 37.

Once the annual lost rent for the two components is estimated, the second step to determining the principal amount of just compensation is to discount that rent to its present value. Tr. 400, 488, 494 (Matthews). The multiplier used by Mr. Matthews for the agricultural parcels accounted for the number of growing seasons lost due to the taking and a 3.5% discount rate. Id. at 351, 400; see, e.g., PX 16 at 46 (indicating that Mr. Matthews used a multiplier of 2.8997 because “the present value of \$1.00 paid at the beginning of the period for three years, discounted at 3.5%[, has] the net present value of \$2.8997”); see also Tr. 350-51 (Matthews) (stating that the discount rate was the same as the rate of return because all that is being valued is land without depreciable assets). Because Mr. Matthews was calculating just compensation for a temporary taking spanning from May 23, 2011, to November 8, 2013, he determined that the number of lost growing seasons was three. Tr. 351 (Matthews). The multiplier used by Mr. Matthews for the wooded parcels accounted for a taking of 900 days (2.47 years) and a 5% discount rate. PX 20 at 34; PX 21 at 35; see, e.g., PX 20 at 34 (indicating that Mr. Matthews used a multiplier of 2.2654 because the “the present value of \$1.00 paid in years 1 & 2 with year three a partial payment of \$0.47, discounted at 5.0%[, has] the net present value of \$2.2654”). And the multiplier used by Mr. Matthews for the improved residential parcel accounted for a taking of 900 days (2.47 years) and a 3.5% discount rate. PX 22 at 36; see PX 22 at 36 (indicating that Mr. Matthews used a multiplier of 2.3236 because the “the present value of \$1.00 paid in years 1 & 2 with year three a partial payment of \$0.47, discounted at 3.5%[, has] the net present value of \$2.3236”). The just compensation due to the landowner is the present value of the lost rent plus (1) any costs to reclaim the railroad corridor in excess of the lost rent attributable to the land taken or (2) any costs to cure the damages caused by the existence of the trail. See, e.g., PX 16 at 44-45; PX 22 at 36-37; see also Tr. 552-53 (Matthews) (defining “excess cost to cure” damages). The following table sets forth the amounts used by Mr. Matthews to calculate the present value of plaintiffs’ lost rent and total just compensation; for the wooded and residential parcels, certain cells are empty because Mr. Matthews assumed that the duration of the taking was 2.47 years (900 days) rather than, as the court has determined, 2.63 years (960 days):

Parcel Owner	Present Value Factor	Present Value of Rent for Land Taken	Present Value of Rent for Damages	Excess Cost to Cure / Cost to Cure	Total Just Compensation
Severed Parcels					
The Goebels	2.8997	\$2500	\$2700	\$0	\$5200
The Martins	2.8997	\$2200	\$7200	\$0	\$9400
McDonald Family Farms	2.8997	\$1390	\$4000	\$500	\$5900
Nonsevered Parcels					
Mr. Halpeny	2.8997	\$1100	\$0	\$0	\$1100
Mr. Memmer	2.8997	\$1451	\$0	\$0	\$1500
Reibel Farms, Inc.	2.8997	\$800	\$0	\$0	\$800
Wooded Parcels					
Mr. Effinger	-	-	-	\$0	-
The Schmidts	-	-	-	\$0	-
Improved Residential Parcel					
Mr. Jenkins	-	-	-	\$1600	-

See PX 14 at 39; PX 15 at 47; PX 16 at 47; PX 17 at 39; PX 18 at 39; PX 19 at 47; PX 20 at 35; PX 21 at 36; PX 22 at 37.

C. Conclusions of Law

Through Mr. Matthews's expert appraisal reports and testimony, plaintiffs presented evidence of the fair rental value of their parcels. In response, defendant argues that "[p]laintiffs have not presented a valuation that comports with" the following "fundamental principles," Def.'s Posttrial Br. 68: (1) the proper measure of damages for a temporary taking is fair rental value; (2) fair rental value is "the price that a willing lessee would pay to a willing lessor, for the period of the [temporary] taking," *Heydt v. United States*, 38 Fed. Cl. 286, 309 (1997); and (3) fair rental value is an objective standard. Defendant contends that the portions of the railroad corridor adjacent to the agricultural parcels were not suitable to be farmed on the date the Board issued the NITU, that no reasonable farmer would lease the corridor for a temporary period, and, consequently, that the corridor had no fair rental value.

Defendant, in contending that no reasonable farmer would have leased the railroad corridor as-is on May 23, 2011, identifies a notable constraint in using fair rental value to measure damages for a temporary taking in a Trails Act case. In general, the portion of a railroad corridor adjacent to a plaintiff's parcel is typically a short and narrow strip of land upon which the remnants of a railroad line are situated, the duration of the taking may be very short (conceivably, as short as 180 days), and on the date of the taking, the precise duration of the taking is unknown. Thus, it is difficult to fathom that there would be a rental market for any such corridor. Nevertheless, the owners of land underlying the corridor often could have and would have put the land to productive use but for the taking. For example, an owner of an industrial or commercial parcel could build or expand a parking lot, an owner of a residential

parcel could reroute a driveway, or a farmer could plant more crops. Thus, the fact that no one would want to lease the parcels burdened with the physical remnants of a railroad line does not mean that the parcel lacks value. And the goal of just compensation is to put a landowner in the same position that she would have been in absent the taking by providing her with the amount lost due to the taking. Consequently, the lack of an actual willing lessee cannot be fatal to plaintiffs' claim for just compensation. See United States v. Miller, 317 U.S. 369, 374 (1943) ("Where, for any reason, property has no market resort must be had to other data to ascertain its value; and, even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety." (footnote omitted)). Plaintiffs owning agricultural parcels lost three growing seasons on the corridor due to the taking and should be compensated for that loss.

The method of valuation used by Mr. Matthews allowed him to estimate fair rental value of a railroad corridor in the absence of an active rental market for such land: applying a rate of return to the value of the land taken. This method, which the court and defendant have endorsed in other cases, see Hardy v. United States, 141 Fed. Cl. 1, 59-60 (2018), vacated in part on other grounds, 965 F.3d 1338 (Fed. Cir. 2020), provides an acceptable method of estimating fair rental value. Accord Am.-Hawaiian S.S. Co., 124 F. Supp. at 381.

With respect to the agricultural parcels, Mr. Matthews demonstrated that even accounting for the physical condition of the land, the land would generate income for the farmers; Dr. Kliebenstein opined that it was economically feasible for the farmers to convert the land; and plaintiffs testified that they would farm the land if given the opportunity to do so. Although Mr. McCarty testified on behalf of defendant that converting a railroad corridor into tillable land might not be quick or easy, he did not provide an opinion with respect to the time or effort required to convert the corridor running along or through the agricultural parcels at issue. Thus, the court has no basis to disturb Mr. Matthews's determination that these plaintiffs would lose all three growing seasons affected by the taking (2011, 2012, and 2013). Furthermore, nothing in the trial record provides a basis for rejecting the use of Mr. Matthews's method to estimate the fair rental value of the wooded and residential parcels.

Using his valuation method, Mr. Matthews determined the principal amount of just compensation due to each plaintiff. Defendant does not challenge the data underlying Mr. Matthews's calculations (such as the highest and best use of the parcels, the comparable sales, the adjustments, the costs to cure, the rates of return, or the discount rates) or Mr. Matthews's calculations themselves. Thus, plaintiffs have satisfied their burden of proving a principal amount of just compensation for a temporary categorical taking spanning from May 23, 2011, to January 7, 2014, for the plaintiffs who own agricultural parcels, as follows:⁵⁰

⁵⁰ Although Mr. Matthews assumed that the temporary taking spanned from May 23, 2011, to November 8, 2013, his calculations are not affected by the longer takings period determined by the court because he used the number of growing seasons rather than the number of years, and the number of lost growing seasons is not different.

Name	Just Compensation
The Goebels	\$5200
The Martins	\$9400
McDonald Family Farms	\$5900
Mr. Halpeny	\$1100
Mr. Memmer	\$1500
Reibel Farms, Inc.	\$800

For the plaintiffs who own wooded or residential parcels, Mr. Matthews's determination of just compensation was based on a temporary taking lasting 2.47 years rather than 2.63 years. Thus, the principal amounts due to Mr. Effinger, the Schmidts, and Mr. Jenkins for the temporary taking need to be recalculated.⁵¹

VI. DAMAGES: INTEREST AND COSTS

In addition to the principal amount of just compensation, plaintiffs are entitled to receive (1) interest on that principal amount and (2) reimbursement for their costs. Specifically, with respect to the former, "the Fifth Amendment's reference to 'just compensation' entitles the property owner to receive interest from the date of the taking to the date of payment as a part of his just compensation." United States v. Thayer-W. Point Hotel Co., 329 U.S. 585, 588 (1947). With respect to the latter, Section 304(c) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 provides:

The court rendering a judgment for the plaintiff in a proceeding brought under [28 U.S.C. § 1491] awarding compensation for the taking of property by a Federal agency . . . shall determine and award or allow to such plaintiff, as a part of such judgment . . . , such sum as will in the opinion of the court . . . reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

42 U.S.C. § 4654(c) (2006).

The parties did not address interest or costs during trial, in their posttrial briefs, or during closing arguments. The court cannot direct the entry of final judgment pursuant to RCFC 58 until all three components of just compensation—principal, interest, and costs—are determined.

⁵¹ This task should take little effort since it requires only the determination of a new present value factor (substituting 2.63 years for 2.47 years), multiplying that value by the annual rent for the land taken, and, for Mr. Jenkins, adding the cost to cure. Indeed, it appears that for Mr. Effinger, the new present value factor would be 2.4036 and the present value of lost rent would be approximately \$1322; for the Schmidts, the new present value factor would be 2.4036 and the present value of lost rent would be \$2500; and for Mr. Jenkins, the new present value factor would be 2.4679 and the present value of lost rent would be approximately \$202.

Further, to the extent that the parties wish to defer proceedings on costs, the court will not direct the entry of judgment pursuant to RCFC 54(b) until the appropriate interest rate and compounding frequency are determined.⁵²

VII. CONCLUSION

As set forth in more detail above, the court concludes that (1) the plaintiffs who own property adjacent to the easements conveyed by the Type A and Type A-1 deeds—Mr. Halpeny; Mr. Memmer; Mr. Jenkins; the Goebels; McDonald Family Farms; the Martins; Mr. Effinger; and the Schmidts—and obtained through adverse possession—Reibel Farms, Inc.—have cognizable Fifth Amendment property interests; (2) defendant is entitled to judgment with respect to the claim of Mr. Hostettler, the portion of the claim of Reibel Farms, Inc. that derives from the Davis deed, and the portion of the Martins' claim that derives from the side track deed; (3) defendant is liable to pay just compensation to the plaintiffs with cognizable property interests for a temporary categorical physical taking; (4) the temporary taking spanned from May 23, 2011, to January 7, 2014; (5) the principal amount of just compensation due to the Goebels is \$5200, the Martins is \$9400, McDonald Family Farms is \$5900, Mr. Halpeny is \$1100, Mr. Memmer is \$1500, and Reibel Farms, Inc. is \$800; and (6) the award of just compensation shall include interest from the date of the taking and costs pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

By **no later than Monday, November 16, 2020**, the parties shall file a joint status report in which they (1) set forth the principal amount of just compensation due to Mr. Effinger, the Schmidts, and Mr. Jenkins based on the court's rulings; (2) indicate whether they will stipulate to the appropriate interest rate and compounding frequency; and (3) propose a schedule for further proceedings.

IT IS SO ORDERED.

s/ Margaret M. Sweeney
MARGARET M. SWEENEY
Senior Judge

⁵² In the now-vacated RCFC 54(b) judgment, the court adopted the parties' stipulation that interest was to be calculated on the principal amount for the duration of the taking using the Moody's Aaa rate, compounded annually, and for the period following the taking at 3.65%, compounded annually. See also Tech. Coll. of the Low Country v. United States, 147 Fed. Cl. 364, 371 (2020) (holding that interest should be calculated using the Moody's rate and compounded quarterly); Hardy v. United States, 138 Fed. Cl. 344, 357 (2018) (same).

EXHIBIT B
TRIAL TESTIMONY OF LARRY GOEBEL

In the Matter of:

Jeffrey Memmer, et al. v. USA

April 29, 2019

Trial

Vol. 1

Condensed Transcript with Word Index



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97

1 would be my great-great-grandfather put the railroad
2 through there because at that time they needed a railroad.
3 It was handy to go to Armstrong, which is about
4 three-quarters of a mile to a depot. And I know they
5 bought boxcars of lime and things and put on the side there
6 at Armstrong. And there was an elevator there. They could
7 sell their wheat there. And even my grandfather, when he
8 come back from France after World War I, he come that way.
9 They met him at the depot here in Evansville to get to
10 Armstrong.

11 **Q Very interesting.**

12 **A Yeah.**

13 **Q Did you acquire your interest, or did the farm
14 company acquire its interest in the property because they
15 thought the railroad corridor might revert to ownership of
16 the farm at some point?**

17 **A Would you say that again?**

18 **Q Right. Did the farm company acquire its
19 interest in the property because it thought it might
20 ultimately gain that railroad corridor property back
21 again?**

22 **A Oh, no.**

23 **MS. MCCULLEY:** Your Honor, I'd like to object.

24 I think that it's already been asked and answered.

25 And I think that Mr. McDonald has already said that

98

1 his father had told him that if trains stopped
2 running, then the land would come back to the farm.

3 **THE COURT:** He did testify.

4 **MR. PINKSTON:** Your Honor, that was not my
5 question. My question was, did they acquire the
6 interest because they thought there would be a
7 reversion, not that there might be a reversion
8 sometime in the future.

9 **THE COURT:** So your question is the exclusive
10 reason?

11 **BY MR. PINKSTON:**

12 **Q Well, I should say, was it a reason?**

13 **A No.** No, we didn't think too much about the
14 railroad when we started the corporation.

15 **MR. PINKSTON:** All right. I think those are
16 all the questions I have, Your Honor.

17 **THE COURT:** Thank you.

18 **Q Thank you, sir.**

19 **A You're welcome.**

20 **MS. MCCULLEY:** I have no further questions,
21 Your Honor.

22 **THE COURT:** May the witness be excused?

23 **MS. MCCULLEY:** Yes, the witness may be excused.

24 **THE COURT:** Thank you.

25 **MS. MCCULLEY:** Your Honor, would it be all

99

1 right if we took maybe a 10-minute break?

2 **THE COURT:** That's fine. Thank you. We'll
3 recess.

4 (Court in recess, 11:16 a.m. to 11:29 a.m.)

5 **THE CLERK:** Court is back in session.

6 **MR. STEWART:** If we're on the record, we have
7 one witness now, Mr. Goebel. The rest of the
8 witnesses had to rearrange and come at 2:00, which is
9 during your lunch break; so we may not have another
10 witness before your lunch break. I apologize for
11 that. We'll see how long Mr. Goebel goes. Mr.
12 Reibel or Mr. Reeves is coming next, so we'll try to
13 get him early.

14 **THE COURT:** Thank you.

15 **MS. MCCULLEY:** Your Honor, I call Larry
16 Goebel.

17 **THE COURT:** Will you raise your right hand?

18 **LARRY GOEBEL,**

19 **THE WITNESS, HAVING BEEN DULY SWORN UPON HIS HONOR,**

20 **TESTIFIED AS FOLLOWS:**

21 **THE COURT:** Thank you. Please be seated.

22 **DIRECT EXAMINATION**

23 **BY MS. MCCULLEY:**

24 **Q Good morning, Mr. Goebel. Please state your
25 name for the record.**

100

1 **A Larry D. Goebel.**

2 **Q Okay. And tell me a little bit about your
3 educational background.**

4 **A Well,** I got a Bachelor of Science degree from
5 Purdue University in '72, in agriculture. And that's what
6 I planned to do all my life, is farm.

7 **Q Okay. And does your son farm with you?**

8 **A Yes.**

9 **Q And when did you begin farming?**

10 **A Well,** in '72, basically when I graduated from
11 Purdue, but I still was farming with my dad while I was
12 going to Purdue. I'd come home every weekend.

13 **Q Where do you live?**

14 **A On the farm.**

15 **Q On the farm. And what's that address?**

16 **A 4745 West Boonville New Harmony Road,
17 Evansville, Indiana.**

18 **Q Very good. So when did you purchase your
19 property?**

20 **A Well,** the first was '79, I think.

21 **Q Did you lease the property from your cousin in
22 '79?**

23 **A I leased the property from my cousin also in
24 '79.**

25 **Q Okay.**

101

103

1 A But the property that I first bought was my
2 great grandma's, I think, as far as I can tell.
3 Q So this property that abuts the rail corridor,
4 how many acres is that property?
5 A Well, there's 140 acres and another 40, so
6 there's 180 acres there that the railroad catty-corner goes
7 through.
8 Q Okay. Mr. Goebel, I'm going to hand you some
9 exhibits. For the record, this is what we've marked as --
10 MS. MCCULLEY: May I approach, Your Honor?
11 THE COURT: Certainly.
12 Q This is what we've marked as Joint Exhibit
13 Number 14. And do you recognize that document?
14 A Yes.
15 Q What is that?
16 A It's the warranty deed.
17 Q Okay. The deed to your property?
18 A Yes, ma'am.
19 Q This has been marked as Joint Exhibit 15. And
20 do you recognize that document?
21 A It's such little writing, but yes.
22 Q Is that the assessors' parcel report?
23 A This is the farm, 5700 West Boonville -- New
24 Harmony Road. And this includes my cousin's, and that's
25 what was purchased later. The first farm was my

1 Q So Larry, when you grow pumpkins, do you take
2 them to market?
3 A Yes.
4 Q We'll get into your pumpkins -- because there
5 was an issue with the pumpkins -- later.
6 A Okay.
7 Q So corn, beans, wheat, pumpkins. Tell me, when
8 you plant, what's your rotation?
9 A Well, we usually plant corn and then we plant
10 wheat and then pumpkins and beans.
11 Q Okay. And when do you harvest each one? When
12 do you plant and when do you harvest?
13 A Well, we plant the corn of course as soon as we
14 can in April. And then the beans is after wheat usually.
15 We plant wheat in the fall and then harvest it in June.
16 And then we plant pumpkins after the wheat or soybeans.
17 Every third year, we plant pumpkins after the wheat. We
18 like to leave the ground lay for three years before we
19 plant it back in pumpkins.
20 Q What are the -- do you double crop?
21 A Yes.
22 Q Explain to me what double cropping means.
23 A Well, you plant wheat and then in June you
24 harvest the wheat and you plant soybeans or pumpkins. And
25 you harvest that in the fall, of course.

102

104

1 great-grandfather's and we purchased that in '79.
2 Q Okay. I'm going to hand you what has been
3 marked as Plaintiffs' Exhibit 2B, and see if you recognize
4 that.
5 A Yeah. That's the, yeah, the railroad
6 right-of-way.
7 Q On your property?
8 A Yes.
9 Q Okay. And this is Joint Exhibit 16. And do
10 you recognize what is outlined in yellow?
11 A Yes.
12 Q What is that?
13 A That's the -- that's the Schmidt Farm or the
14 farm we bought.
15 Q Okay. That's your property?
16 A Yes.
17 Q All right. So what kind of property do you
18 have?
19 A What kind?
20 Q Uh-huh. Is it agricultural?
21 A Sure. Yeah. That's all it is. We plant corn,
22 beans, wheat, and pumpkins. And we rotate.
23 MS. MCCULLEY: And Larry was going to bring me
24 some pictures of his pumpkins, and he forgot, but his
25 pumpkin patch is really, really neat.

1 Q So what are the benefits of double cropping?
2 A Well, you get a double yield, hopefully, if
3 everything goes right, but there's also more expenses in
4 that too.
5 Q So, on average, what's your yield for corn; how
6 many bushels?
7 A Well, I think our average is like 210 average
8 over the whole 630 acres that we farm. 630 is what we own.
9 I think our average is 210.
10 Q What about beans?
11 A Beans is about 55, I think. That's with wheat,
12 beans and early beans. I should have looked it up before I
13 came, but I'm pretty sure that's right.
14 Q Do you remember how many bushels you said in
15 your deposition?
16 It was more than 210.
17 A Huh?
18 Q All right. What kind of equipment do you use?
19 A We've got John Deere International, mainly.
20 Q So what's your -- is it a 12, 24?
21 A 16-row John Deere planter.
22 You didn't ask me how many pumpkins we get off our
23 acreage.
24 Q Yeah. How many pumpkins do you get?
25 A 4,000. 4,000.

105

1 Q Four thousand pumpkins. And they go from all
2 sizes?
3 A Yes, ma'am.
4 Q And when we were going to go to a trial in
5 October, I asked you to bring me some pumpkins, didn't I?
6 A Yes, but we didn't go.
7 Q We didn't go.
8 So you already told me when you plant, the cycle
9 that you plant. And then once you plant, like how often do
10 you fertilize?
11 A Well, we fertilize before we plant. On the
12 pumpkins, you have to spray a lot, fungicides and
13 insecticides, usually once a week or every ten days.
14 Q Let me ask you about that railroad
15 right-of-way. Does the railroad maintain it?
16 A No, not very good.
17 Q Do you spray?
18 A Yes. Everything where there's no trees on it.
19 Been spraying for, well, since '79.
20 Q Okay. Are your fields tiled?
21 A Yes.
22 Q And explain what you mean by tiled. What's
23 that process?
24 A Well, you put -- some of them are clay tiles
25 that's been in for years. But most of them are new plastic

106

1 tile. It's planted about about three foot in the ground,
2 and it's corrugated, and it's got holes in it. The water
3 comes down and goes in the tile and runs to the creek, so
4 it drains your fields.
5 Q So the railroad corridor on your property, if
6 you look at that Joint Exhibit 16 that I handed you -- it's
7 this one.
8 A Yes.
9 Q It says the railroad corridor bisects your
10 property. Does it go right through it?
11 A Yes.
12 Q Okay. Do you have access over the railroad
13 right-of-way?
14 A I have one place I can cross it, yes. We used
15 to have a bridge but it broke down and they wouldn't ever
16 fix it. Well, actually there's one place on the Schmidt
17 Farm and then one place a mile back on the Lookenheimer
18 Farm, maybe half a mile. And then on the Seibert Farm --
19 well, we're not talking about the Seibert.
20 Q So tell me about the topography of your farm.
21 Is it flat?
22 A On the Schmidt Farm it's flat, yes,
23 basically.
24 Q The railroad right-of-way splitting your
25 property, what kind of problems does that cause?

107

1 A Well, it's a major problem when we put in
2 pumpkins because people come down the railroad with their
3 four-wheelers and all that kind of stuff and they pick
4 pumpkins and take them and throw them at houses and throw
5 them off trestles and everybody gets mad at me. And I
6 don't like it.
7 Q Well, do you have trespassers besides the
8 pumpkin stealers?
9 A Yeah. And then there's hunters and everything
10 else you can imagine. It's always been a big thorn in our
11 side, the railroad.
12 Q And what about concerns you have now that --
13 let me ask you this: Now that the rails are gone, is there
14 more traffic?
15 A It's worse now.
16 Q Worse?
17 A Yes.
18 Q And what about during hunting season?
19 A It's bad. You don't even want to go back on
20 your property.
21 Q And you don't want to take your grandkids back
22 there on the property?
23 A No. No.
24 Q Okay. Is the ballast still on the
25 right-of-way, the rock?

108

1 A Yes.
2 Q So did they just leave ties stacked up on your
3 property?
4 A Yes. And people's come in from New Harmony and
5 got a lot of them, only the good ones. The bad ones are
6 still there. But a lot of people's came in and got the
7 good ones. But the farther back you get, they're all
8 laying there yet. And you're not allowed to -- well, I was
9 told I was not allowed to do anything with them.
10 Q But did you try to burn them?
11 A They caught on fire one time. The firemen came
12 and put it out and they closed Boonville New Harmony, and
13 it was quite an ordeal.
14 Q Okay. So let me go back to the point rows.
15 That was pretty fun. I'm going to go back to the point
16 rows. So the corridor bisecting your property, does it
17 cause point rows on your property?
18 A Yes.
19 Q Okay. How do you deal with point rows?
20 A Well, you just have to turn around and go back.
21 But I mean, you know, it wastes fertilizer and it wastes
22 seed and it's hard to harvest and hard to plant and all
23 that, you know. If I could, I'd like to bulldoze it down
24 and go straight through.
25 Q You mean reclaim the railroad right-of-way?

109

1 A Yeah.
 2 Q Would you put crops on it?
 3 A Sure.
 4 Q Okay. Do you remember when the last trains ran
 5 on that right-of-way? If you remember.
 6 A It's probably been 18 years ago, I would say.
 7 I don't know. I'm not that good with dates. I should
 8 have --
 9 Q But it's been a long time?
 10 A It's been a long time.
 11 Q Okay. Do you remember when the rails and cross
 12 ties were pulled up?
 13 A Probably six years ago.
 14 Q Okay. So going back to those cross ties, are
 15 they just stacked on the property?
 16 A They just pushed them over out of the way in
 17 piles, yeah, basically. Some of them I had to move because
 18 they were coming out into the field, because the bank is
 19 steep in places and they rolled down.
 20 Q Did you talk to somebody while they were
 21 pulling up the rails?
 22 A Yes, I did.
 23 Q And what did he tell you?
 24 A He said you're not allowed to do anything with
 25 them. Not allowed to get on the railroad property,

110

1 period.
 2 THE COURT: To whom did you speak or what
 3 organization did they represent? Was this the
 4 railroad?
 5 THE WITNESS: It was the guy pulling up the
 6 rails.
 7 BY MS. MCCULLEY:
 8 Q The salvage people?
 9 A I guess. And I asked him if they were going to
 10 get rid of the cross ties, and he said no. Then I said,
 11 well, can we? And he said, no, you're not allowed on the
 12 property.
 13 Q Do you have a friend, Mike Thomas?
 14 A Yes.
 15 Q Okay. Did he work for the railroad?
 16 A Supposedly, yeah, he was helping the railroad
 17 whenever they were sold, somehow or another.
 18 Q Did he tell you that if you used any part of
 19 the railroad that you would get a bill?
 20 A He told me that we couldn't even drive on any
 21 of the railroad right-of-way. He said, if you do, you're
 22 going to get a bill. And we got a letter later stating
 23 that fact. But it's been a lot of years ago.
 24 Q So has this been in your family, the property's
 25 in your family for a long time?

111

1 A Yes. They've all been in my family. I think
 2 the Lookenheimer Farm was my great-grandpa's, and this was
 3 my cousin's, the Schmidt Farm.
 4 Q Are there "no trespassing" signs on the
 5 right-of-way?
 6 A There is by Boonville New Harmony, yeah. They
 7 put -- I think on all the roads they put "no trespassing"
 8 signs.
 9 Q Let me ask you this: When you had your
 10 property bisected, was it your understanding that when
 11 trains stopped running, that you would get that land back?
 12 A Yes, that's what I always thought. They leased
 13 it to use, and they're not using it for that.
 14 Q Right. And what would you do to reclaim that
 15 right-of-way?
 16 A I'd just push it level in a lot of places.
 17 Q Okay. We already talked about trespassers.
 18 THE COURT: May I ask a question? When you
 19 said pushing it level, is that just using some
 20 earth-moving equipment? Is it difficult?
 21 THE WITNESS: Claiming it, I could do myself,
 22 but there's some places I won't be able to because
 23 they put a big ditch along the railroad track.
 24 THE COURT: When you say "they," is the
 25 railroad --

112

1 THE WITNESS: When the railroad went in, they
 2 put a big ditch along there.
 3 THE COURT: Thank you.
 4 BY MS. MCCULLEY:
 5 Q Do you have other privacy concerns about that
 6 right-of-way?
 7 A Do I have what?
 8 Q Other privacy concerns about the
 9 right-of-way?
 10 A Well, other than hunting and the people running
 11 up and down there, no, I guess not.
 12 THE COURT: But that's a -- I mean is it that
 13 you don't -- I just want to understand your
 14 testimony. I apologize. It was my impression from
 15 your testimony that you were concerned by trespassers
 16 coming on, whether they're stealing your pumpkins or
 17 any of the other activities that they were --
 18 THE WITNESS: Hunting or driving around with
 19 their four-wheelers or three-wheelers on the
 20 property.
 21 THE COURT: Sure. So that's a significant
 22 concern to you. But what you were indicating to
 23 counsel, everything she had asked you was sort of she
 24 exhausted the list of your concerns, that you have
 25 testified to all the concerns that you've thought of

113

1 with respect to trespassers?
 2 MS. MCCULLEY: Well, let me elaborate.
 3 THE COURT: Maybe not. I'm sorry. I
 4 apologize. I just wasn't sure about that one
 5 answer.
 6 BY MS. MCCULLEY:
 7 Q You have concerns about people riding ATVs and
 8 then getting off the right-of-way and getting on your
 9 land?
 10 A Yes. Yes.
 11 Q Does that happen?
 12 A Yes. They run around in the wheat and that's
 13 what's really aggravating in the winter time. And if they
 14 get out where there's hill ground and they run up and down
 15 the hills, it causes a lot of erosion.
 16 Q Well, were you aware that the railroad wanted
 17 the landowners to buy their land back, the right-of-way
 18 back?
 19 A When you guys or when somebody talked about it,
 20 yes.
 21 Q Did you also talk to Ken Rexing about it?
 22 A Yes.
 23 Q If you got to put your farm back together,
 24 would you farm it differently? Would you plant
 25 differently?

114

1 A Probably, yeah, places. Not everywhere, but
 2 places.
 3 Q Would your crop yield increase in productivity
 4 if you got that right-of-way back?
 5 A With the amount of acreage, yeah. And I
 6 wouldn't have to worry about all the spraying and the
 7 people coming in there and all that. It would be
 8 wonderful.
 9 Q So if you got the right-of-way back, you would
 10 be able to exclude people from your property?
 11 A Yeah.
 12 Q Okay. Thank you, Mr. Goebel.
 13 THE WITNESS: Did you want to see my pumpkin
 14 patch?
 15 THE COURT: I'll tell you, the Justice
 16 Department may have some questions for you. They get
 17 to cross-examine you. And I would love to see
 18 pumpkin pictures, but I don't think I will have that
 19 opportunity during this trial, so I'm disappointed.
 20 CROSS-EXAMINATION
 21 BY MR. WEIGERT:
 22 Q Good morning, almost afternoon, Mr. Goebel.
 23 A Good morning.
 24 Q It is Goebel?
 25 A Yeah.

115

1 Q My name is David Weigert, and I've got some
 2 questions.
 3 A Okay.
 4 Q Thanks for coming here today. I appreciate it.
 5 First, I'd like to clarify a couple of things
 6 about your property. You had said something about owning a
 7 total of 630 acres; is that right?
 8 A Yes.
 9 Q But the properties at issue here today with the
 10 railroad going through it or alongside it, those amount to
 11 less, right?
 12 A It's 140 and another 40 basically. Well, I'm
 13 not sure if you're talking about the Lookenheimer Farm or
 14 not.
 15 Q I'm talking about the two properties -- and
 16 we'll put up a map.
 17 A It's 180 acres.
 18 Q Okay. So I'd like to put up two aerials, if I
 19 could. One is very similar to Joint Exhibit 16, and that's
 20 DX 27.0009. And if you could cue up, we'll talk about that
 21 one as well. So here's 27.9. Mr. Goebel, do you recognize
 22 this aerial?
 23 A Yes.
 24 Q And what is that what? What does that depict?
 25 A Just a second. That's what I call the Schmidt

116

1 Farm, and it was 140 acres total. But right there, what
 2 you've got outlined is not 140 acres.
 3 Q Well, when you say outlined, are you talking
 4 about --
 5 A The yellow.
 6 Q -- the yellow all the way down and around?
 7 A Yeah.
 8 Q And how many acres is that?
 9 A It's 38. The one side is 38, and the other one
 10 is about -- I don't know -- another 30.
 11 Q So when you say one side, are you -- let's get
 12 our orientation straight. So is the direction upward, is
 13 that east?
 14 A 38 acres, yes, that's east.
 15 Q So the easternmost portion of the east of the
 16 railroad right-of-way is 38 acres?
 17 A Yes.
 18 Q And the portion on the west side there is about
 19 30?
 20 A About. My son took his out. There was ten
 21 acres taken out where the house is there.
 22 Q So is it fair to say then --
 23 A But everything that's outlined is 38 and about
 24 30.
 25 Q So 30 is --

117

1 A 68 acres that's outlined.
 2 Q And the 30 excludes the ten acres?
 3 A Yes.
 4 Q Now, if I could turn your attention, Mr.
 5 Goebel, to DX 27.00011, which is the aerial on the right
 6 there.
 7 A Yeah.
 8 Q Do you recognize that?
 9 A Yes. She gave me a picture of that.
 10 Q Is that similar to the one that you have in
 11 front of you?
 12 A Yeah, I got it.
 13 Q Does that have a JX number on it? It does not,
 14 right?
 15 A DX 16.
 16 Q The first one was JX 16 and the second one --
 17 A Yeah, I see it. I got it.
 18 Q Okay. Very good. Could you tell us which
 19 property that is?
 20 A That's part of this -- wait a minute.
 21 Q I'm talking about the triangular one to the
 22 right there.
 23 A Yeah, that triangle is part of the Schmidt
 24 Farm. I don't know why they split it up like that, but
 25 that's part of it.

118

1 Q Again on the orientation, is the upward
 2 direction east?
 3 A Yes.
 4 Q And approximately how many acres is within the
 5 yellow line on that aerial?
 6 A It's only -- I'm guessing it's probably only
 7 five acres or six that that represents. But we own both
 8 sides of that, and I don't know why they split it up like
 9 that.
 10 Q Okay. And to be clear, is there a railroad
 11 corridor depicted there?
 12 A Yeah. To the west.
 13 Q Is that on the west side of the property?
 14 A Yes.
 15 Q Along the edge; is that right?
 16 A Right.
 17 Q And to be clear, you call this the northern
 18 property on the left here?
 19 A Yeah.
 20 Q Southern property on the right, right?
 21 A Yes.
 22 Q The northern property, that's where you
 23 discussed with Ms. McCulley the railroad corridor bisects
 24 the property?
 25 A Right.

119

1 Q So other than that 68 acres, the 630 acres you
 2 represent has nothing to do with the case, right?
 3 A Well, there's 180 acres that the railroad goes
 4 through, but they've only outlined these two sections. I
 5 don't know why. I guess this is the section that was just
 6 leased. The others, I guess, was bought.
 7 Q Well, for our purposes here today we're going
 8 to focus on these two. Okay?
 9 A Okay.
 10 Q Very good.
 11 Now, I think Counsel showed you an exhibit called
 12 PX2D. Do you have that in front of you? It's numbered
 13 PX2D.
 14 A This?
 15 Q Yes. Which property does that photograph --
 16 A On the left.
 17 Q So that's from the northern property; is that
 18 correct?
 19 A Yes.
 20 Q Okay. Thank you.
 21 Now, both of these properties, are these
 22 properties abutting one another?
 23 A Well, no. There's a section in between that's
 24 mine. But, yeah.
 25 Q Okay. So you own the property in between these

120

1 two as well; is that correct?
 2 A Well, it's all part of the same farm.
 3 Q It's all part of the same farm?
 4 A I don't know why it was split up like that.
 5 Q Okay. That's fine. We'll just focus on these
 6 parts for our purpose. Okay.
 7 Now, these properties have been in your family
 8 for a long time, right?
 9 A Yes.
 10 Q And you have been using both of those parcels
 11 your whole life?
 12 A Well, since '79.
 13 Q Even though it was within your family, you
 14 didn't use them at all prior to that?
 15 A Right.
 16 Q So the first time you --
 17 A Well, the first time I farmed it -- my cousin
 18 farmed it before.
 19 Q Had you visited there prior?
 20 A I lived there, yeah.
 21 Q So you lived there and have been on those
 22 properties pretty much your whole life?
 23 A Yes. Yes.
 24 Q You said, I think, you're about 70 years old?
 25 A I'll be 70 in July.

121

1 Q You do not look 70.
 2 A Thank you. I feel like it sometimes.
 3 Q So is it fair to say you first went on this
 4 property way back in the 1950s, yourself?
 5 A I was born in '49.
 6 Q Okay. So is that a yes?
 7 A Yes.
 8 Q Great.
 9 And, as you said before, you leased both of these
 10 parcels from your cousin in 1979; is that true?
 11 A Yes.
 12 Q And after that, you farmed both of those
 13 parcels for about 20 years; is that right?
 14 A Well, until now, whatever that is.
 15 Q Oh, so you're farming it until now, right?
 16 A Yeah. We're still farming it.
 17 Q But the lease itself lasts about 20 years; is
 18 that right?
 19 A The railroad lease is what I'm talking about.
 20 Q Sorry. I'm referring to the lease you had with
 21 your cousin where you farmed it.
 22 A Oh, I farmed it, yeah.
 23 Q Is it correct to say that was from 1979 to
 24 about 1999?
 25 A Whatever is on the thing. I'm not that good

122

1 with dates.
 2 Q Sure.
 3 A But, yeah, that sounds about right.
 4 Q Why don't you look on that -- well, that's
 5 fine. That's fine. We can -- why don't we -- and did
 6 there come a time when you purchased this property?
 7 A Yes. I think it was '99.
 8 Q Okay. Do you know what the date of the deed
 9 was itself?
 10 A Date of the deed?
 11 Q The actual deed that you purchased that
 12 property with.
 13 I'd like to show the witness JX 14, please, which
 14 is a deed.
 15 Do you recognize this document?
 16 A Yes.
 17 Q Okay. Would you please look at the final page?
 18 I think it's Page 7 of that document, the last page of it
 19 where the signatures are. Do you see a date there? I know
 20 it's small print. What's the date there, the year?
 21 A 2000.
 22 Q There you go. Might that be the date that you
 23 actually acquired title to this property?
 24 A Yes. But I farmed it from '79 until then. I
 25 rented it from my cousin until he died, and then his kids

123

1 after that.
 2 Q Right. Thank you.
 3 So throughout that time when you were a kid, you
 4 were actually out in the fields as a child, right?
 5 A Yes.
 6 Q Did you hunt there and do other activities that
 7 the -- sorry, you have to speak audibly for the court
 8 reporter.
 9 A Yes.
 10 Q So ever since that time through the time that
 11 you leased the property from your cousin, through the time
 12 now that you bought it and have been farming it, there have
 13 been trains coming through, right?
 14 A Up until, yeah, they quit, yes.
 15 Q Until recent. And you were used to -- since
 16 1979, you've been farming around that train line on that
 17 northern property?
 18 A (No audible answer.)
 19 Q In 1979 -- I'm going to bring you back to 1979
 20 now because the timeline kind of matters here for us --
 21 when you first leased the property, at that time, did you
 22 have any expectations the railroad would be abandoning that
 23 corridor?
 24 A Well, I kind of did because we were farming
 25 ground over on Bender Road and there's a big old railroad

124

1 and they quit and they abandoned it and they went through
 2 some of our property there too. And they weren't really
 3 sending very many trains through. It was really lightly
 4 used. But then somebody else bought them and, you know,
 5 this place was keeping them going. But there's always
 6 rumors that they were closing, and, yeah.
 7 Q So that was all the way back to 1979?
 8 A Yes.
 9 Q Is that what you told us in your deposition?
 10 A Huh?
 11 Q Is that what you told us in your deposition?
 12 Why don't we -- I just want to show you -- why don't we
 13 project up that DX 26.0039.
 14 Do you remember appearing in about May of 2018, in
 15 a deposition, Mr. Goebel?
 16 A Yes.
 17 Q And you swore to tell the truth at that time,
 18 like you did today?
 19 A Yes.
 20 Q And I think my colleague Tyler Burgess asked
 21 you some questions then. Do you recall that?
 22 A (No audible answer.)
 23 Q Sir, I just want to focus your attention on
 24 Page 39 there.
 25 A Yeah. I think I said some day I would like to

31 (Pages 121 to 124)

125

1 get it back, was going to get it back, on 21.

2 **Q So let me focus you in on lines 14 and 17**
3 **there. The question: "Again, just to be clear, so in 1979**
4 **when you first leased the property, did you expect that the**
5 **railroad would abandon its corridor?" Answer: "Not in**
6 **1979, no." Did I read that correctly?**

7 A Yeah. I didn't think they'd do it in '79, but
8 I thought that it would happen because what's happened on
9 other property. You know, I was hoping that would
10 happen.

11 **Q That understanding that it might happen, did**
12 **that come at some point closer to the time you purchased**
13 **the property?**

14 A Yes.

15 **Q But you didn't at any time know when that would**
16 **happen; is that right?**

17 A No.

18 **Q And after you purchased the property, you**
19 **expected to continue farming like you had before; is that**
20 **right?**

21 A Well, I didn't have any choice.

22 **Q Okay. Now, you first learned that the railroad**
23 **might be trying to abandon the corridor across your**
24 **property about six or seven years ago; is that fair to**
25 **say?**

126

1 A Whatever I told you. I had the dates better
2 back then than I do now. I haven't really read this since
3 then, you know; but I tried to say whatever was true.

4 **Q I understand. Well, I can show you Page 31 of**
5 **that deposition; lines 24, 25, 31, and 32. At the bottom**
6 **of 31, top of 32.**

7 MS. MCCULLEY: Your Honor, I object. I think
8 that this is improper use of a deposition. He hasn't
9 even asked him a question. He's just having him read
10 from his deposition. And I just think that that --

11 THE COURT: Sustained.

12 MS. MCCULLEY: We're not impeaching him for a
13 prior inconsistent statement or anything like that,
14 so I think this is improper use of a deposition.

15 THE COURT: You have to pose a question.

16 MR. WEIGERT: I'd like to pose a question.

17 BY MR. WEIGERT:

18 **Q Does your review of that document refresh your**
19 **recollection regarding how long ago you first learned --**

20 MS. MCCULLEY: Still improper.

21 MR. WEIGERT: May I use that to refresh his
22 recollection?

23 MS. MCCULLEY: He needs to ask him a
24 question.

25 MR. WEIGERT: I'd like to use this document to

127

1 refresh his recollection.

2 THE COURT: Okay. That's permitted.

3 BY MR. WEIGERT:

4 **Q So does reviewing that testimony that you gave**
5 **us back in May of 2018 refresh your recollection regarding**
6 **when you first learned that the railroad was considering**
7 **abandoning the right-of-way property? And I'll refer you**
8 **specifically to Page 32: "Do you remember when that was?"**
9 **"Like I say, I think it was five or six years ago." Do you**
10 **see that? And that was in May of 2018.**

11 A Yes, that's what I said. I said I think it was
12 five or six years ago. It was in the fall of the year.

13 **Q And as you sit here today, does that refresh**
14 **your recollection about when you first learned about plans**
15 **to possibly abandon this corridor?**

16 A Well, I think they were pulling up the rails at
17 the time.

18 **Q Is that what alerted you to the possibility?**

19 A Yeah. They was pulling up the rails and I was
20 combining there and I went and talked to this dude.

21 **Q And what did this fellow tell you?**

22 A To stay off the property, that they weren't
23 going to take the ties, and that I was not allowed to get
24 on there and take the ties or do anything with any of the
25 property.

128

1 **Q So I think you testified before you saw them**
2 **remove the rails and other metallic objects; is that right?**

3 A They were in there with bulldozers and stuff,
4 yes.

5 **Q But they left all the ties there, right?**

6 A Well, yeah. Piled them up.

7 **Q And many ties are still in the right-of-way**
8 **today, right?**

9 A There was people that came in from New Harmony
10 and took them. The junk is still there, but anything good
11 is gone basically.

12 **Q And the junk includes ties as well?**

13 A Yeah.

14 **Q Okay. When did you first learn that there**
15 **might be a trail on this railroad right-of-way?**

16 A I don't know.

17 **Q Was that around that time, shortly thereafter,**
18 **after the rails and ties were pulled?**

19 A Yes. I think somebody told me about it. I
20 think it might have been Kenneth Rexing, but I'm not sure
21 no more.

22 **Q And you didn't know about any plans to possibly**
23 **build a trail there prior to that time, right?**

24 A No.

25 **Q Between 1979 -- I want to focus your attention**

32 (Pages 125 to 128)

129

1 back to that lease period you had from '78 to '99, back to
2 when you leased it from your cousin. You didn't farm on
3 the railroad corridor during that time, right?

4 A I've never farmed on the railroad corridor.

5 Q You've never farmed on that and that's because
6 it's your understanding you weren't allowed to; is that
7 right?

8 A Right.

9 Q And you explained why?

10 A Yeah.

11 Q And you mentioned something about signs, there
12 were signs that were posted along the right-of-way; is that
13 right?

14 A Yeah. They put them up as soon as they pulled
15 the rails out. Somebody came and put signs. I think
16 they're still there. Maybe it got knocked down by now, but
17 they're still there, I'm pretty sure.

18 Q And those signs said, "No trespassing, railroad
19 right-of-way"?

20 A Yes.

21 Q And you still can't farm there, right?

22 A No.

23 Q So the use of your property hasn't changed at
24 all during this entire time period, right?

25 A Well, it's changed in the fact that they come

130

1 in there and run around with their four-wheelers and steal
2 my pumpkins and stuff like that.

3 Q But you've always been unable to use the
4 right-of-way?

5 A Right.

6 Q And that's because it's always been railroad
7 property, right?

8 A Right.

9 Q Now, I think counsel -- you had a little
10 discussion with Ms. McCulley regarding what you might do if
11 you were able to reclaim the railroad right-of-way, right?

12 A Right.

13 Q So let's focus on that for a minute. So you've
14 already talked about the ties on there, on the
15 right-of-way, right, and some other junk. Did you call it
16 junk or whatever it is? What is that other stuff, by the
17 way?

18 A Just broken pieces of ties, I guess, really.
19 And they've got the old bridges still in place. And, I
20 don't know, grocery carts stuck on trains and popped off.
21 You know, just normal junk. I don't know.

22 Q It's railroad-related junk?

23 A Yeah.

24 Q And you mentioned also ballast; there's rock
25 ballast in there?

131

1 A Yeah.

2 Q And I think you mentioned weeds; you weed it?

3 A The trees is the biggest problem and, yeah, the
4 obnoxious weeds that they brought in right before they
5 closed. They brought in -- I can't even think of what it's
6 called. Snake weed, I think. You can't kill it with
7 anything. Came in from Illinois.

8 Q So it can be tough to remove that?

9 A No.

10 Q Oh.

11 A It's tough to get rid of it totally, but, yeah,
12 I've been spraying it. Because if I didn't, it would be
13 everywhere.

14 Q And you mentioned the part of your property
15 that you do farm is tiled, right?

16 A Yes.

17 Q You described what that means to the Court.

18 A Yes.

19 Q But this right-of-way is not tiled, right?

20 A No.

21 Q Now, if you were to farm that someday --

22 A It wouldn't matter because it's high and it's
23 got a lot of rock. It would drain.

24 Q You wouldn't have to add tiling to it?

25 A No.

132

1 Q You did mention, though, that there are some
2 steep banks, correct?

3 A On places not here. Well, yeah, on that little
4 one there's a steep bank.

5 Q So you're referring to the southern property
6 that we were talking about?

7 A Yeah.

8 Q Is it also true that there were ditches? You
9 talked about ditches along the tracks.

10 A On the little one.

11 Q That's on the little one?

12 A Yeah.

13 Q That's also the southern property, right?

14 A Yeah.

15 Q So if you were to eventually try to farm this
16 corridor, you'd have to clean all that out, right?

17 A Yeah.

18 Q And you'd have to level the ground; is that
19 right?

20 A Yeah. On the first section, it wouldn't be
21 hard at all. But on the second section, with that ditch
22 there, it wouldn't be feasible really. But you could still
23 farm up to the ditch. Yeah, you could still level it onto
24 the ditch. But you couldn't farm crossways.

25 Q Okay. Now, you just mentioned farming

133

1 crossways. That gets me to my next short line of
 2 questioning. I'm almost finished. Let's focus on the
 3 northern property on the left here that's on the wall. Mr.
 4 Goebel?
 5 A Yes.
 6 Q The larger parcel.
 7 A Yes.
 8 Q Okay. Now, that document that's projected up
 9 there has some red markings on it. Do you see that? I
 10 think it was from your deposition.
 11 A Yes.
 12 Q What are those markings?
 13 A That's where I cross. Driveways.
 14 Q So you drew those red markings on there?
 15 A Yes.
 16 Q So could you walk us through what the small red
 17 X's mean there, please?
 18 A Well, that's where I can actually cross the
 19 railroad right now, and that's always been a crossing.
 20 They let us cross there. We also have down further --
 21 Q Just to be clear for the record, you're talking
 22 about the red X's right in the middle of the property?
 23 A Right in the middle of the railroad track,
 24 yes.
 25 Q Thank you. Okay.

134

1 Yes. Continue, sir. Sorry. To the next X.
 2 Sorry. You were walking us through.
 3 A Well, there was a place down further that was a
 4 bridge and we could cross there, but it collapsed and they
 5 never did fix it. That happened when my dad was still
 6 alive 30 years ago, I guess.
 7 Q Okay. And --
 8 A But that's not on this existing property. I
 9 mean on the yellow; it's not in the yellow. It's still the
 10 same farm, but it's not in the yellow line.
 11 Q Let's focus on the red X's that are on the
 12 yellow line there.
 13 A Okay.
 14 Q Are those access points to this property that
 15 you use?
 16 A Yes.
 17 Q Then there's an X down in the bottom left. I
 18 think that's the northwest corner. Is that another point
 19 of access?
 20 A Yes. That's my son's driveway.
 21 Q Okay. And that's his home there?
 22 A Yes.
 23 Q That's the ten acres you sold to him?
 24 A Yes.
 25 Q What about that asterisk on the right side

135

1 which would be the southern side?
 2 A Well, that's my property too. That's part of
 3 the same farm.
 4 Q Why did you mark that; do you recall?
 5 A I don't know why I've got that marked.
 6 Q That's fine. Just for the record, I want to be
 7 clear that this is Exhibit DX 27.0009.
 8 Let's focus you in on DX 27.0011, the southern
 9 property. You can blow that up.
 10 Do you see any red markings here? Do you see
 11 along the yellow line?
 12 A Oh, yeah. There's two.
 13 Q What do those represent?
 14 A Well, that's where we cross, where we farm,
 15 where we drive.
 16 Q So those are your points of access to that
 17 property; is that right?
 18 A Yeah. It's all one field. I don't know why a
 19 triangle is outside of there, but it's all one field.
 20 Q Okay. And you actually farm this field; is
 21 that right?
 22 A Yes.
 23 Q What is that white strip that goes through --
 24 A That's a creek.
 25 Q -- through that property? That's a creek?

136

1 A Yes.
 2 Q I'm referring to the one --
 3 A The railroad's on the west side.
 4 Q Correct. So the railroad -- I'm not referring
 5 to that now. I'm referring to the white strip that goes
 6 right through this property.
 7 A Uh-huh.
 8 Q That's a creek?
 9 A Uh-huh.
 10 Q How do you farm around that creek?
 11 A Well, I farm with the creek.
 12 Q So parallel to the creek?
 13 A Yes.
 14 Q And you do the same along that corridor; is
 15 that correct?
 16 A Right.
 17 Q So you farm parallel to the corridor, right?
 18 A Right.
 19 Q Okay. I'd like to focus your attention now on
 20 the northern property. How do you farm this one? In other
 21 words, do you go parallel?
 22 A I go east and west.
 23 Q I'm talking direction.
 24 A Along Boonville New Harmony until I get back
 25 all the way on that shore, and then we go north and south.

137

1 But that don't even show the --
 2 **Q In fact, on this aerial you can sort of see**
 3 **lines going east and west, can't you?**
 4 A Yeah.
 5 **Q And does that represent the direction that**
 6 **you're farming that? Is that correct?**
 7 A Yes.
 8 **Q And I note that the edge, the eastern edge of**
 9 **your property is diagonal, right?**
 10 A Yes.
 11 **Q And so how do you deal with that diagonal?**
 12 A Well, I farm up against it like I do the
 13 railroad track. So it's diagonal on both sides.
 14 **Q Right. So, to deal with that, you farm west to**
 15 **east, east to west, west to east, east to west; is that**
 16 **correct?**
 17 A Right. Until I get down to the point, and then
 18 I go north and south.
 19 **Q And which point are you referring to?**
 20 A The south part.
 21 **Q Southwest?**
 22 A No.
 23 **Q Sorry. Southeast, I meant. Is that right?**
 24 A I guess it don't really show the point too good
 25 because of the --

138

1 **Q Oh, you're saying off the yellow?**
 2 A Part of it comes out, back of the woods there,
 3 yeah. I'm talking about from the woods that a way is
 4 basically what we farm, north and south. But some of it
 5 comes past the line. You can see it in the picture.
 6 **Q So the point you just mentioned is actually**
 7 **outside the yellow area?**
 8 A Most of it is. Yeah, most of it is. But the
 9 railroad track is still there and it's still our property,
 10 but we're not talking about that, I guess.
 11 **Q Right. So to the south -- you can use your**
 12 **pointer. That point that you mentioned is to the south of**
 13 **the southernmost yellow line of this property, correct?**
 14 **Just show the Court where the point is that you were just**
 15 **mentioning.**
 16 A This we farm this a way, up until about right
 17 in here. From here, we farm this a way. But about right
 18 in here, we go this a way.
 19 **Q And where was that point that you mentioned?**
 20 A Well, it's outside this section.
 21 **Q Down there to the south?**
 22 A Yeah.
 23 **Q And it's actually off this aerial photo,**
 24 **right?**
 25 A Most of it is, yeah.

139

1 MR. WEIGERT: No further questions.
 2 REDIRECT EXAMINATION
 3 BY MS. MCCULLEY:
 4 **Q Mr. Goebel, just to be clear, I think that you**
 5 **previously testified that although there's a railroad**
 6 **right-of-way previously, if trains stopped running and they**
 7 **abandoned it, you expected to get that land back; is that**
 8 **right?**
 9 A Yes.
 10 **Q Tell me your son's name again.**
 11 A Jeremy.
 12 **Q Jeremy. I just thought, since we had just a**
 13 **few minutes, Your Honor, share with Judge Sweeney about**
 14 **Jeremy's house and what's there, the llamas and --**
 15 A Oh, that son is Darren, my oldest son.
 16 **Q Darren, okay.**
 17 A Yeah. He has llamas and goats and horses out
 18 there.
 19 **Q Many horses. It's very interesting to be**
 20 **there. There was a llama out when we were there, and we**
 21 **were a little afraid. Anyway, it was a very unique**
 22 **property. Thank you, Mr. Goebel.**
 23 A Thank you.
 24 THE COURT: May the witness be excused?
 25 MS. MCCULLEY: Yes, the witness may be

140

1 excused.
 2 THE COURT: I assume no --
 3 MR. WEIGERT: No further questions.
 4 THE COURT: Thank you for coming in.
 5 THE WITNESS: Thank you, Your Honor.
 6 MR. STEWART: Your Honor, if we could take a
 7 lunch break now.
 8 THE COURT: That would be fine.
 9 MR. WEIGERT: I'm sorry, Your Honor. If we
 10 could move to enter those two defense exhibits that
 11 were referenced, those aerials that were projected on
 12 the wall, we would really appreciate that.
 13 THE COURT: I'll tell you what, you make a
 14 motion and see if we have any objection.
 15 MR. WEIGERT: Your Honor, the United States
 16 moves to enter the two aerial photographs we
 17 referenced in that cross-examination. They are
 18 marked DX 27.0009 and DX 27.0011.
 19 MS. MCCULLEY: No objection, Your Honor. But
 20 we would also like to offer Plaintiffs' Exhibit 2D.
 21 MR. WEIGERT: No objection.
 22 THE COURT: All the exhibits are admitted.
 23 Thank you.
 24 (Defendant's Exhibits Numbers 27.0009 and
 25 27.0011 were admitted into evidence.)

EXHIBIT C

TRIAL TESTIMONY OF DAVID MCDONALD

In the Matter of:

Jeffrey Memmer, et al. v. USA

April 29, 2019

Trial

Vol. 1

Condensed Transcript with Word Index



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77

79

TESTIFIED AS FOLLOWS:

THE COURT: Thank you. Please be seated.

MS. MCCULLEY: Your Honor, we wanted to inform the Court and the Defendants that Mr. McDonald previously had a stroke. And so if he shakes or stutters, then, you know, I just wanted to let the Court know that that's because he had a stroke.

DIRECT EXAMINATION

BY MS. MCCULLEY:

Q And, Mr. McDonald, if you can't hear me or you want me to repeat any question, you just ask me to repeat it. Okay?

A Yes.

THE COURT: I'm sorry about your health issue. If there's anything we can do to accommodate you, please let me know.

THE WITNESS: Thank you very much.

BY MS. MCCULLEY:

Q Good morning, Mr. McDonald.

A Good morning.

Q Tell me a little bit about your educational background.

A Well, I went to Armstrong School through the first eight grades, down the road from where I lived. Then I went to Reitz High School and then to Murray State

78

University.

Q Do you have a degree in animal science?

A I do.

Q Okay. When did you begin farming?

A 1976.

Q And are you here on behalf of McDonald Family Farms?

A That is true.

Q Do you own the farm with other family members?

A Yes.

Q And who also owns the farm with you?

A Myself and my three children. Each of us has 25 percent ownership.

Q How long has that farm been in your family?

A We got the deed signed by Andrew Jackson in 1829. But when they really got there, 1820 or so.

Q And do you live on the property?

A Yes, I do.

MS. MCCULLEY: Your Honor, may I approach?

THE COURT: Yes, certainly.

Q Mr. McDonald, I'm going to hand you what we've marked as Joint Exhibit 17. Do you recognize that?

A Yes, I do.

Q What is that?

A It's a quit claim deed for the farm from my father to the corporation.

Q Very good. What year was that?

A Well, we started in 1979. And I guess we did it in '81. My dad had a farm for a little while. But for myself and my brother to get the shares of the farm to protect inheritance tax from us.

Q Okay. I'm going to hand you what we've marked as Joint Exhibit 18. And do you recognize that document?

A Well, yes.

Q What is it? Is that assessors' parcel report?

A Yeah. I guess so, yeah.

MR. STEWART: Your Honor, may I interrupt the Court? Are you having a hard time hearing? I'm having a hard time hearing and I'm close. Can you scoot up a little or talk a little louder?

BY MS. MCCULLEY:

Q Mr. McDonald, I'm going to hand you what's been marked as Plaintiffs' Exhibit 3D. And tell me if you recognize that picture.

A I sure do.

Q All right. Tell me what that picture is.

A It's where the railroad went through our property.

80

Q Okay. Then I'm going to hand you what's been marked as Joint Exhibit 19. Do you recognize that?

A Yes.

Q What is that?

A That's that 40 acres that the railroad dissects through it.

Q So the railroad severs your property; is that what you're saying?

A It sure does, yes.

Q Okay. What type of property do you have?

A Farm ground.

Q Tillable agricultural land?

A Yes.

Q Okay. Tell me about your farming process. What do you grow?

A Corn and soybeans right now.

Q Okay. And what's your rotation?

A I have been using two years of corn followed by one year of soybeans.

Q Do you plant wheat?

A We used to.

Q And how about alfalfa?

A We used to have some alfalfa for our cattle.

Q Okay. Your farming operation historically, you've got a structure on your property that when you used

81

83

1 to raise hogs. Do you know what I'm talking about, the
2 barn?

3 A Yeah.

4 Q Tell us about that piece, that building.

5 A Well, it was built in 1911. The old one burned
6 down. And my great-grandfather and grandfather -- they
7 kept him out of school that year to help roll logs to make
8 the new barn. And it's been there. We take care of it. I
9 want to keep it.

10 Q It's special to you?

11 A It sure is.

12 Q And you've had -- well, there's been -- have
13 there been other kind of livestock besides hogs?

14 A Yeah. We used to have cattle and chickens when
15 I was younger.

16 Q And how come you don't raise hogs anymore?

17 A Well, everything kind of consolidated, the
18 industry. And I used to sell my hogs to MV Packing Plant,
19 or we used to have stockyards here in Evansville. But both
20 of them are gone. And the next place close to go is
21 Louisville, and that takes a lot of money to take them on a
22 semi there and have to have a semi. Well, the big business
23 has really taken over the industry.

24 Q Tell me about the soil quality on your farm.
25 Is it good soil quality?

82

1 A It's very good.

2 Q Do you recall your -- well, let me ask you
3 this: What's your average bushel for corn and beans each
4 year?

5 A Well, it varies. But the last two years, the
6 corn, it's been -- one year it was 242 bushels an acre.
7 Last year was down because we planted later, and it made
8 213. So we lost 30 bushels an acre from the year before.
9 And we had soybeans last year. But the year before, we had
10 71 or 72 bushels an acre, something like that.

11 Q Those are both pretty good yields, aren't they?

12 A Yes, it is.

13 Q Have you removed any trees or brush on or near
14 the railroad right-of-way?

15 A My neighbor did that years ago, cut them down
16 for firewood. And I kept it cleaned up with spraying it so
17 it didn't get too big to begin with. Trees and Johnson
18 grass, stuff like that.

19 Q Would it be bad if the weeds came onto your
20 crops?

21 A Be a lot more expense to kill the weeds.

22 Q So do you spray for the weeds?

23 A I do.

24 Q The railroad doesn't spray for the weeds?

25 A Not anymore. They used to a little bit.

1 Q Are your fields tiled?

2 A Yes.

3 Q Do they drain properly or adequately?

4 A Yeah.

5 Q Explain to Judge Sweeney what it means by
6 tiled.

7 A We put perforated tile in the ground, deep.
8 And it will draw water from inside of it for soil maybe 30
9 or 40 foot from inside the soil. Take the water, take it
10 to the closest ditch. So we can plant earlier or not drown
11 it out with water. That's common practice now.

12 Q How many acres is McDonald Family Farm?

13 A 160 that we own.

14 Q And does your family help you farm?

15 A My sons do some, when they can. They're both
16 working.

17 Q Mr. McDonald, on that picture, I wondered if
18 you would -- when we have a picture of that, when you mark
19 your crossings -- we'll have to find that. Can you just
20 tell us where your crossings are where you cross the
21 right-of-way?

22 A Sure. There was one right here. And after
23 they took out the rails, I go down here and cross myself.
24 It's at the end of a hill there in the middle of a field.

25 Q What's the topography of your farm? Is it

84

1 flat?

2 A Well, on that part there is flat, pretty well
3 flat.

4 Q Is the ballast still on the former railroad
5 right-of-way?

6 A Yeah.

7 Q The rock?

8 A Yeah.

9 Q So we talked about the corridor dissecting your
10 property. What kind of problems does that cause?

11 A Well, you have to turn and more to plant. And
12 you have to over-plant with your planter or your sprayer or
13 spreading fertilizer to get everything. Part of it is done
14 twice. And I've been watching it for the last several
15 years and it takes about close to 15 percent more input to
16 plant that.

17 Q Is that because of the point rows caused by the
18 corridor?

19 A Yes, that's true.

20 Q In 2018, did you use a bunch of profit money
21 for this fertilizer for the point row issues?

22 A Say that again.

23 Q In 2018, did you use profit money for
24 fertilizer specifically for the point row problem?

25 A Oh, sure. You have to every year.

85

87

Q What other issues does the irregular-shaped farm, the two triangles cause?

A Well, it used to have one field there, I guess, in my time, so, you know, it was easier to farm the square 40. And it's about a quarter of a mile, about a quarter of a mile. Now, you got to just use more inputs to farm it, from everything, from fuel to everything.

Q Mr. McDonald, do you remember when the last trains ran on that right-of-way?

A No, I sure don't. I couldn't tell you the right year.

Q Approximately? Were trains running ten years ago?

A Not too often.

Q Are the tracks and cross ties pulled up on that railroad right-of-way on your property?

A Yes.

Q Okay. Did you witness the cross ties and tracks being pulled up?

A Yes.

Q Okay. And what did they do when they pulled up the rails and the cross ties?

A Well, they took the rails and all the metal off, I guess to scrap it for used iron. They left the cross ties in bunches, you know.

right-of-way now?

A There's a lot of people going up and down with four-wheelers or dirt bikes and sometimes horses. Our neighbor found some horses in his corn field. People were riding them and letting them eat his corn while they was riding.

Q Did this activity increase once the rails were pulled?

A Oh, yeah. Yes, that's true.

Q Are you surprised that nobody's gotten hurt?

A That is true.

Q I think I already asked you this, but is the corridor maintained at all by the railroad?

A Oh, no.

Q And you spray for it?

A Yes.

Q What other concerns do you have about the corridor besides trespassers or ATVs?

A Well, I'd like to get the land back so I could get the point rows off my farm, for one thing. And it'd be easier to keep people off my property, you know.

Q Right. Well, I'm just going to ask you, did you burn the cross ties that were on your property?

A Oh, after the kids were down there making blinds or forts out of them, I did.

86

88

Q In piles?

A Piles and piles and piles, yes.

Q And there was an incident on your property with those cross ties. Can you tell Judge Sweeney about what happened?

A Yeah. Yes. One year -- or one night, I got home from shucking corn at another farm with my cousin. And there was four or five pickups down in my field. So my boys were there too. The three of us went down there. And there were young boys, like high school age, were shooting. They were hunting, I guess, doves. And they were drinking beer and left their pickups in my field. And they had to take the cross ties to make forts or blinds, you know, forts to hunt doves. They come back, you know. It's, I guess, a good place for young boys to have a good time.

Q Does that cause you concern?

A Sure.

Q About the right-of-way?

A Sure.

Q Is there any activity -- well, I guess I should -- I think you said they were drinking?

A Yes, they were.

Q And shooting guns?

A Yes. Beer. Had some beer.

Q So is there any activity on the railroad

Was it your understanding that when trains stopped running, that the property, the railroad right-of-way, would come back and the farm would be back together?

A That's what my father told me.

Q And would you like to have that railroad right-of-way back?

A Sure.

Q Would you farm it?

A Yes, I would.

Q What would you have to do to reclaim that railroad right-of-way?

A Well, I would dig a ditch along next to it and push the rocks into that and then bulldoze the remaining hump there level.

Q So does the land within that railroad right-of-way have value to you?

A Yes.

Q Okay. Would you plant your farm differently if you --

A Yeah. Yes.

Q Okay. Well, if you planted your farm differently, that would help alleviate the point rows, wouldn't it?

A Yes, it would.

89

1 **Q Thank you, Mr. McDonald.**

2 MS. MCCULLEY: Well, let me just ask -- thank
3 you. I have no further questions.

4 THE COURT: I have a question for you. I
5 believe you referred to Plaintiffs' Exhibit 3E with
6 this witness, or am I mistaken? And do you want to
7 move to admit it?

8 MS. MCCULLEY: Yes, your Honor. It's 3D, and I
9 would request that it be admitted.

10 THE COURT: Any objection from the United
11 States?

12 MR. PINKSTON: No, Your Honor.

13 THE COURT: The exhibit is admitted.

14 (Plaintiffs' Exhibit Number 3D was admitted
15 into evidence.)

16 MS. MCCULLEY: Thank you, Your Honor.

17 THE COURT: Mr. McDonald, this lady is with the
18 United States trial team, and she may point out
19 exhibits to you during their cross-examination.
20 That's why she's handing exhibits to you.

21 THE WITNESS: Okay.

22 CROSS-EXAMINATION

23 BY MR. PINKSTON:

24 **Q Mr. McDonald, my name is Dan Pinkston. I'm an**
25 **attorney with the Justice Department, representing the U.S.**

90

1 **in this case. I just have very few questions for you.**

2 **Could you look at right in front of you there's an**
3 **exhibit called JX 19.**

4 A Yes, sir.

5 **Q Does that look like an aerial photograph of**
6 **your property?**

7 A Yes, it is.

8 **Q And I noticed that your property, a portion of**
9 **your property, is in the yellow outlined area?**

10 A That's true.

11 **Q And it appears to be -- I think that photograph**
12 **is probably oriented with the east to the top of the --**

13 A Okay.

14 **Q -- photograph. Is that right?**

15 A Okay. Yes, it is.

16 **Q Okay. And then there's a line running**
17 **diagonally through that square. Is that the railroad**
18 **corridor?**

19 A That's true.

20 MR. PINKSTON: May I approach the witness?

21 THE COURT: Certainly.

22 **Q I note that on that exhibit, on the railroad**
23 **corridor itself, there are a couple of red marks.**

24 A Yes.

25 **Q Do those represent places where you cross the**

91

1 **railroad corridor?**

2 A Yes.

3 **Q To reach the lower part of the farm field?**

4 A Yes. The one, I didn't used to cross it till
5 they took the rails off. Now it's wider down there and
6 don't have to go over the culvert that we had to put in.

7 **Q So is the one you're pointing to the one**
8 **further to the east, or is it the other one?**

9 A Where the culvert is is more to the west.

10 **Q I understand.**

11 A The other one is to the east.

12 **Q I understand. Now, the corridor apparently**
13 **creates two divisions there.**

14 A Yes.

15 **Q Is the lower triangle on the southwest side, is**
16 **that approximately 38 acres?**

17 A Yes. The whole farm there is.

18 **Q And then the upper portion of the field on that**
19 **exhibit --**

20 A Oh, no.

21 **Q I'm sorry?**

22 A The whole field there is 38 acres, both, two of
23 them. The one to the southwest, which the railroad cuts
24 off, is about seven.

25 **Q Okay.**

92

1 A About 31 to the north of the railroad.

2 MR. PINKSTON: Okay. May I approach the
3 witness for a moment?

4 THE COURT: Certainly.

5 A That's 7 acres right in there; 31 here.

6 **Q Oh, I see. So this entire outlined area is the**
7 **38 acres?**

8 A Yes.

9 **Q I see. I understand. All right.**

10 **And do you own or does the farm own land to the**
11 **north of this --**

12 A Yes.

13 **Q -- field?**

14 A Yes.

15 **Q Okay. And is that --**

16 A Right here is where the house and everything
17 is, up here.

18 **Q Okay. So you've got the laser pointer up to**
19 **the --**

20 A Yes.

21 **Q Farther north?**

22 A Yes.

23 **Q Off of the photograph?**

24 A Yes.

25 **Q All right. And in the southwest corner, in**

93

95

1 that smaller --
 2 A Yes, sir.
 3 Q -- triangular field, it appears to be some --
 4 is that woods?
 5 A Yes, there is. There's a ditch, a drainage
 6 ditch, that goes right along those woods. And we can't get
 7 to that little corner without putting in a bridge.
 8 Q I see. So are there point rows created by the
 9 existence of those woods on that side?
 10 A A little bit, yes. There would be right along
 11 there.
 12 Q And point rows are basically if there's an
 13 angle in the field or the field is irregular and the end of
 14 the rows are not in a straight line; is that what point
 15 rows are?
 16 A Well, they have to plant end rows around the
 17 field, you know, so you can turn when you harvest. And
 18 when you're going the way you want to, then you get to the
 19 end rows and, yes, you overlap into the end rows every
 20 time, you know, planting more, a second time.
 21 Q I see.
 22 A I don't know if you understand what I mean or
 23 not.
 24 Q Well, as I understood it, there are -- if you
 25 have, for example, the diagonal here --

1 So it will -- it does not -- when I plow, I don't want to
 2 go the same way so it doesn't wash down the rows.
 3 Q I understand.
 4 A Work it different ways. That way, it will make
 5 more even. The field, I mean, more even.
 6 Q So you testified -- or is it the case that this
 7 particular piece of ground we're talking about, that's
 8 owned by McDonald Family Farms of Evansville?
 9 A That's true.
 10 Q And you're the president, or the CEO, of that
 11 company?
 12 A Yes.
 13 Q Such as it is, right?
 14 A That's what it is, yes.
 15 Q And your two sons and your daughter are also
 16 equal partners with you, or own equal shares?
 17 A That is true.
 18 Q You were shown a copy of a deed from 1981 that
 19 I believe was from your father, correct?
 20 A That's true.
 21 Q And you had farmed -- you had participated in
 22 farming the property before that, right?
 23 A That's true.
 24 Q And I think in your deposition you said that he
 25 had been gifting you with some shares prior to 1981?

94

96

1 A Yes, sir.
 2 Q -- you can't just go straight down a row, make
 3 a turn, and come back straight the same way because the end
 4 rows are farther apart?
 5 A From here, you can go fine there. But when you
 6 get here, you have to have a big turn here, you know, and
 7 go back and back and back.
 8 Q I understand.
 9 A And over here, we usually plant this like this.
 10 So we have point rows on each side, you know.
 11 Q So on that smaller portion, on the southwest,
 12 you generally plant going parallel with the corridor?
 13 A We do, yes.
 14 Q All right.
 15 A Less point rows. I mean we still have them,
 16 but longer row right here. And as we get over to the woods
 17 it's really short rows.
 18 Q Okay. So on the bigger portion, do you also
 19 plant parallel to the corridor?
 20 A No, sir. I plant east and west.
 21 Q I see.
 22 A You can see some lines there.
 23 Q Yes.
 24 A Usually I plow in the fall that way to slow
 25 down any washing, so it doesn't go over top of, you know.

1 A I was wrong. When I seen the -- we started the
 2 corporation, myself and my father and my brother, started
 3 looking at it in '79. We didn't -- he didn't do it, make
 4 that quit claim deed until '81. And then after that, you
 5 know, the paperwork was done and then he started gifting
 6 shares to myself and my brother.
 7 Q I understand.
 8 In 1981, with that transfer, did any money change
 9 hands in that transaction?
 10 A No, sir.
 11 Q How did your father, Gilbert McDonald, acquire
 12 the property?
 13 A He inherited it from my grandmother, his
 14 mother. And she died in '68, February '68.
 15 Q By the way, I thought it was remarkable that
 16 you said the original deeds were from the 1820s.
 17 A That's true.
 18 Q That your family has been on that property
 19 since -- it'll be the centenary this coming year.
 20 A Yes.
 21 Q Pretty amazing.
 22 Has the railroad corridor always been there, as
 23 far as you know? I mean, not forever, but in your
 24 knowledge?
 25 A Well, from what my fathers said, I guess it

97

1 would be my great-great-grandfather put the railroad
 2 through there because at that time they needed a railroad.
 3 It was handy to go to Armstrong, which is about
 4 three-quarters of a mile to a depot. And I know they
 5 bought boxcars of lime and things and put on the side there
 6 at Armstrong. And there was an elevator there. They could
 7 sell their wheat there. And even my grandfather, when he
 8 come back from France after World War I, he come that way.
 9 They met him at the depot here in Evansville to get to
 10 Armstrong.
 11 **Q Very interesting.**
 12 **A Yeah.**
 13 **Q Did you acquire your interest, or did the farm**
 14 **company acquire its interest in the property because they**
 15 **thought the railroad corridor might revert to ownership of**
 16 **the farm at some point?**
 17 **A Would you say that again?**
 18 **Q Right. Did the farm company acquire its**
 19 **interest in the property because it thought it might**
 20 **ultimately gain that railroad corridor property back**
 21 **again?**
 22 **A Oh, no.**
 23 **MS. MCCULLEY:** Your Honor, I'd like to object.
 24 I think that it's already been asked and answered.
 25 And I think that Mr. McDonald has already said that

98

1 his father had told him that if trains stopped
 2 running, then the land would come back to the farm.
 3 **THE COURT:** He did testify.
 4 **MR. PINKSTON:** Your Honor, that was not my
 5 question. My question was, did they acquire the
 6 interest because they thought there would be a
 7 reversion, not that there might be a reversion
 8 sometime in the future.
 9 **THE COURT:** So your question is the exclusive
 10 reason?
 11 **BY MR. PINKSTON:**
 12 **Q Well, I should say, was it a reason?**
 13 **A No. No, we didn't think too much about the**
 14 **railroad when we started the corporation.**
 15 **MR. PINKSTON:** All right. I think those are
 16 all the questions I have, Your Honor.
 17 **THE COURT:** Thank you.
 18 **Q Thank you, sir.**
 19 **A You're welcome.**
 20 **MS. MCCULLEY:** I have no further questions,
 21 Your Honor.
 22 **THE COURT:** May the witness be excused?
 23 **MS. MCCULLEY:** Yes, the witness may be excused.
 24 **THE COURT:** Thank you.
 25 **MS. MCCULLEY:** Your Honor, would it be all

99

1 right if we took maybe a 10-minute break?
 2 **THE COURT:** That's fine. Thank you. We'll
 3 recess.
 4 (Court in recess, 11:16 a.m. to 11:29 a.m.)
 5 **THE CLERK:** Court is back in session.
 6 **MR. STEWART:** If we're on the record, we have
 7 one witness now, Mr. Goebel. The rest of the
 8 witnesses had to rearrange and come at 2:00, which is
 9 during your lunch break; so we may not have another
 10 witness before your lunch break. I apologize for
 11 that. We'll see how long Mr. Goebel goes. Mr.
 12 Reibel or Mr. Reeves is coming next, so we'll try to
 13 get him early.
 14 **THE COURT:** Thank you.
 15 **MS. MCCULLEY:** Your Honor, I call Larry
 16 Goebel.
 17 **THE COURT:** Will you raise your right hand?
 18 **LARRY GOEBEL,**
 19 **THE WITNESS, HAVING BEEN DULY SWORN UPON HIS HONOR,**
 20 **TESTIFIED AS FOLLOWS:**
 21 **THE COURT:** Thank you. Please be seated.
 22 **DIRECT EXAMINATION**
 23 **BY MS. MCCULLEY:**
 24 **Q Good morning, Mr. Goebel. Please state your**
 25 **name for the record.**

100

1 **A Larry D. Goebel.**
 2 **Q Okay. And tell me a little bit about your**
 3 **educational background.**
 4 **A Well, I got a Bachelor of Science degree from**
 5 **Purdue University in '72, in agriculture. And that's what**
 6 **I planned to do all my life, is farm.**
 7 **Q Okay. And does your son farm with you?**
 8 **A Yes.**
 9 **Q And when did you begin farming?**
 10 **A Well, in '72, basically when I graduated from**
 11 **Purdue, but I still was farming with my dad while I was**
 12 **going to Purdue. I'd come home every weekend.**
 13 **Q Where do you live?**
 14 **A On the farm.**
 15 **Q On the farm. And what's that address?**
 16 **A 4745 West Boonville New Harmony Road,**
 17 **Evansville, Indiana.**
 18 **Q Very good. So when did you purchase your**
 19 **property?**
 20 **A Well, the first was '79, I think.**
 21 **Q Did you lease the property from your cousin in**
 22 **'79?**
 23 **A I leased the property from my cousin also in**
 24 **'79.**
 25 **Q Okay.**

EXHIBIT D

TRIAL TESTIMONY OF MICHAEL MARTIN

In the Matter of:

Jeffrey Memmer, et al. v. USA

April 30, 2019

Trial

Vol. 2

Condensed Transcript with Word Index



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263

1 A Yes, that's true.
 2 Q You would like to preserve it as
 3 nature, correct?
 4 A That's true.
 5 Q That's why you actually enjoy going
 6 out there to enjoy nature?
 7 A Yes.
 8 Q You would like to see it preserved,
 9 correct?
 10 A Yes.
 11 Q As long in your lifetime, correct?
 12 A Correct.
 13 Q Let's get Joint 6. Now, at your
 14 deposition you may recollect there was a document
 15 marked and people referred to it as a Notice of
 16 Interim Trail Use; do you have any recollection of
 17 that? You may or may not. I'm asking if you do.
 18 A Possibly. I knew that was under
 19 consideration.
 20 Q As of at least your deposition, you
 21 were not familiar with that particular document,
 22 correct?
 23 A I can't say I remember, recall
 24 offhand.
 25 Q As far as you're concerned, since

264

1 you've owned the property, your use of the property
 2 has not changed, correct?
 3 A Correct.
 4 MR. MACAYEAL: No further questions, Your
 5 Honor.
 6 THE COURT: I have a question.
 7 It sounds like you're growing various species
 8 of trees on the property. Do you intend at some point
 9 to harvest the trees or is it strictly to create your
 10 own private preserve or habitat for hunting?
 11 THE WITNESS: Not so much of hunting. I mean
 12 that's part of it. I don't intend to harvest it
 13 because it's such a rugged area. I've heard in the
 14 past and it's some pretty scary stories of what's left
 15 behind. I don't intend to harvest it, no.
 16 THE COURT: Thank you.
 17 REDIRECT EXAMINATION
 18 BY MS. MCCULLEY:
 19 Q I just want to clarify that in 1998
 20 you purchased that property for \$155,000, right?
 21 A Correct.
 22 Q Is it 21.7 acres?
 23 A That's correct.
 24 Q And it's all wooded mostly?
 25 A Correct.

265

1 Q So you paid over \$7,000 an acre in
 2 1998; is that right?
 3 A That's correct. I didn't figure the
 4 math, but if that's what it comes out, that's what it.
 5 Q Thank you very much for being here.
 6 Thank you, Your Honor. That's all I have.
 7 The witness may be excused.
 8 MR. MACYEAL: No further questions, Your
 9 Honor.
 10 THE COURT: You are excused. Thank you for
 11 coming.
 12 MS. MCCULLEY: Your Honor, we call Michael
 13 Martin.
 14 MICHAEL MARTIN
 15 THE WITNESS, HAVING BEEN DULY SWORN UPON HIS HONOR,
 16 TESTIFIED AS FOLLOWS:
 17 DIRECT EXAMINATION BY MS. MCULLEY:
 18 Q Please state your name for the
 19 record.
 20 A Michael H. Martin.
 21 Q Mr. Martin, I'm going to try to be as
 22 brief as I can because I know you're in planting
 23 season; you are planting. I know that you've had your
 24 deposition taken twice; once where counsel for the
 25 government didn't show up so here we are.

266

1 I'll try not to be too redundant on the
 2 questions that we asked you before. I'll just try to
 3 hit the highlights.
 4 Tell me a little bit about your educational
 5 background.
 6 A I went to high school at Mater Dei in
 7 Evansville. I went to Purdue University for four
 8 years. That's about it for education.
 9 Q And you're a farmer?
 10 A Yes.
 11 Q Do you also coach high school
 12 softball?
 13 A I coach Mater Dei High School girls
 14 softball in Evansville. I do residential remodeling.
 15 I have been to Haiti four times. I'm getting ready to go
 16 back in August to build a school; so I stay busy.
 17 Q It sounds like it.
 18 Tell me where you live.
 19 A I live at 14727 North Posey County
 20 Line Road, Poseyville.
 21 Q So you know what property we're
 22 talking about that's in this lawsuit?
 23 A Yes.
 24 Q Do you have other property besides
 25 the farm in this lawsuit?

267

1 A Yes.
 2 Q How many acres of farmland do you
 3 farm?
 4 A A little over 1,000.
 5 Q How many do you own?
 6 A 330 roughly.
 7 Q I'm going to hand you what's been
 8 marked Joint Exhibit 26. Do you recognize that
 9 document?
 10 A Yes.
 11 Q What is that?
 12 A That's a Warranty Deed when I bought
 13 this property that we're talking about.
 14 Q I'm going to hand you Joint Exhibit
 15 28. Is that the property that you're talking about
 16 that that deed belongs to?
 17 A Yes.
 18 Q I think there's some on the back, too.
 19 A Yes.
 20 Q I'm going to hand you what's been
 21 marked as Joint Exhibit 27. Do you recognize that?
 22 A Yes.
 23 Q Is that the assessor parcel report?
 24 A Yes.
 25 Q Then I'm going to hand you what's

268

1 been marked as Plaintiffs' Exhibit 6-D. Do you
 2 recognize that?
 3 A Yes.
 4 Q Is that the railroad right-of-way on
 5 your property?
 6 A Yes.
 7 MS. MCCULLEY: Your Honor, would like to offer
 8 those into evidence Plaintiffs' Exhibit 6-D.
 9 MR. MACYEAL: No objection.
 10 THE COURT: So admitted.
 11 (Plaintiffs' Exhibit Number 6-D as admitted
 12 into evidence.)
 13 MS. MCCULLEY: Thank you.
 14 BY MS. MCCULLEY:
 15 Q How many acres is this farm that
 16 adjoins the railroad right-of-way?
 17 A Originally it was 197, but then I
 18 sold 37 acres, I think.
 19 Q When did you buy that property?
 20 A My memory is not what it was. I
 21 think around 2010, I think. I don't remember.
 22 Q Well, we can probably figure that out
 23 by the deed.
 24 A I don't remember.
 25 It says 2008.

269

1 Q Mr. Martin, did you buy that property
 2 from — did you get kind of a brother-in-law deal on
 3 your property?
 4 A Not a brother-in-law, but my dad was
 5 a mentor to the fellow that sold me the ground. He
 6 owed him a lot. So he sold the property to me as a
 7 favor. It was a private sale. He didn't put it up
 8 for auction. If he had put it up for auction, it
 9 probably would have went for twice the value, and I've
 10 also done a lot of work for this gentleman over the
 11 years before the sale.
 12 Q What type of property is this;
 13 farmland?
 14 A Yes.
 15 Q Does it have a little wooded area?
 16 A Yes.
 17 Q I guess I should have asked you: Do
 18 you remember how much you paid your dad's friend?
 19 A I paid 5,500 an acre, 1.1 million.
 20 Q Is this mostly tillable land?
 21 A Except for the woods, yes.
 22 Q How about the soil quality, is it
 23 good soil quality?
 24 A Yes. It can raise 200 bushel of
 25 corn, which is good for my area.

270

1 Q Your crops that you plant, do you do
 2 corn and soybeans?
 3 A And wheat, yes.
 4 Q So you double crop?
 5 A Yes.
 6 Q I think we've already discussed
 7 double cropping here with other witnesses so I won't
 8 make you do that.
 9 A Okay.
 10 Q You told me about corn averaged 200
 11 bushels maybe. What about beans, soybeans?
 12 A Beans is a double crop for me. I
 13 don't raise the early beans. Early beans will make a
 14 little bit more, but the double crops is a better
 15 rotation for me. So the double crops can run anywhere
 16 from 55 to 70 bushel an acre.
 17 Q Then your wheat on top of that?
 18 A Yes; it can run anywhere from 80 to
 19 100 bushel an acre.
 20 Q Have you removed trees and brush on
 21 that property?
 22 A Yes, some of it.
 23 Q How about some by the railroad
 24 right-of-way?
 25 A Yes.

271

1 Q Have you sprayed for weeds on the
2 railroad right-of-way?
3 A I tried to, yes.
4 Q You do that so that the weeds don't
5 encroach on your property or on your crops is that
6 right?
7 A In fact, this winter there were
8 sprouts and tree growing on the railroad track so I
9 did this by hand; I removed them, I sawed them all
10 down so I could get my sprayer through the
11 right-of-way to spray the obnoxious weeds because you
12 can't let Johnson grass and stuff get going.
13 Q So the railroad is not maintaining
14 the right-of-way at all, are they?
15 A No.
16 Q So you're having to do it?
17 A Yes.
18 Q The railroad right-of-way bisects
19 your field, doesn't it?
20 A On a diagonal, yes.
21 Q Do you have point rows?
22 A Yes, lot of them.
23 Q Does it cause more difficulty in
24 farming when you have a bisect?
25 A Yes. We you do have point rows, you

272

1 plant more seed than what you need to do, more
2 fertilizer for overlap. There's a lot more expense to
3 it, yes.
4 Q So it cost you more money?
5 A Yes.
6 Q Would you like to have that land put
7 back together and have that right-of-way gone?
8 A Sure.
9 Q Would you plant your fields
10 differently if you were able to do that?
11 A Yes.
12 Q Because now do you have to plant them
13 in like different ways? If it was put together, you
14 could plant it --
15 A You would have longer rows and
16 straighter rows, yes.
17 Q Do you remember when the tracks and
18 ties were pulled up?
19 A I'm going to guess around 2011. I'm
20 not sure.
21 Q Do you remember when the last trains
22 ran?
23 A No, I don't. It's been a long time.
24 Q When they pulled up -- did they pull
25 the rails?

273

1 A And the ties, yes.
2 Q What did they do with the ties?
3 A They left them laying on the side.
4 Q In piles?
5 A Yes.
6 Q Are they still there?
7 A I removed them and stacked them all
8 in a pile on one end of the field so they would be out
9 of the way, yes.
10 Q You haven't burned them?
11 A No.
12 Q A lot of people have.
13 Is there any activity on that railroad
14 corridor now; like ATVs or people walking?
15 A There was for a couple of years, but
16 since the trees and sprouts are growing up, they
17 haven't.
18 Q If you could reclaim that land, I
19 think you said you would, you would reclaim that
20 railroad right-of-way?
21 A Yes.
22 Q What would you have to do to reclaim
23 that railroad right-of-way?
24 A I would have to remove the rock. I
25 think there's another type of structure underneath the

274

1 rock. I'm not sure what that is. Then I would have
2 to get a bulldozer and level it.
3 Q So you could just bulldoze and level
4 it?
5 A Yes.
6 Q Because it's not --
7 A No.
8 Q It's pretty flat?
9 A Yes.
10 Q If you could do that, would that
11 increase your productivity on your farm?
12 A Sure.
13 Q Mr. Martin, thank you so much for
14 coming. I don't have any further questions for now.
15 CROSS EXAMINATION
16 BY MR. MACAYEAL:
17 Q Good morning, Mr. Martin. I'm Jamie
18 MacAyeal. Here to ask you a few questions for the
19 government.
20 Could I please direct your attention to that
21 JX 28, which is the aerial of your property.
22 A Okay.
23 Q This was the entirety of the property
24 that you purchased for the 1.1 million. There's an
25 area that's outlined in yellow?

275

1 A Yes.
 2 Q Then there's the bisect, the line
 3 kind of bisects; do you see?
 4 A Yes.
 5 Q All the yellow line that we have
 6 marked there, is that the property that you paid 1.1
 7 million for?
 8 A That's part of it.
 9 Q There's additional property?
 10 A Yes.
 11 Q Is that shown here on the aerial?
 12 A I think it's on the back page, isn't
 13 it?
 14 Q The next?
 15 A Yes.
 16 Q Let me get that up. This is a
 17 two-page exhibit. Can we get both pages up? We've
 18 having some technical difficulty. Perhaps I can just
 19 ask.
 20 JX 28 there's a page down at the bottom says
 21 000001; do you see that?
 22 A Yes.
 23 Q Then the next page is 2, correct?
 24 A Yes.
 25 Q First of all, let's get the

276

1 orientation. Page Number 1, JX 28, page 000001, the
 2 orientation on that page, looking up at the top of the
 3 page, what direction is that?
 4 A That is east.
 5 Q So to the left, as you're holding the
 6 page in front of you, north is to your left?
 7 A Yes.
 8 Q Then turning to the JX 28, page 2, is
 9 that property depicted there is or is not contiguous
 10 to the one on the other page?
 11 A Yes.
 12 Q It's contiguous?
 13 A Yes.
 14 Q So that would be then to the west?
 15 A West of the first property we talked
 16 about, yes.
 17 Q But it's not visible on page 000001?
 18 A Yes, you're right.
 19 Q It is or is not?
 20 A Not.
 21 Q I thought you said they were
 22 contiguous?
 23 A Well, one juts up a little further.
 24 Q Is there another parcel that's
 25 in between the two pictures?

277

1 A I'm lost right now.
 2 Q We'll try to get the pictures up on
 3 the wall here.
 4 A Yes, it's all on one page, yes. Yes.
 5 It's just not outlined in yellow on the front page.
 6 Q Actually if you look at 000001, you
 7 see where the corridor runs through?
 8 A Yes.
 9 Q There's kind of a darker part of the
 10 photograph, right?
 11 A Yes.
 12 Q If you turn to the page, the other
 13 one, you're going to actually see that same imagine,
 14 correct?
 15 A Yes.
 16 Q These two parcels are next to each
 17 other?
 18 A Yes.
 19 Q So those two parcels together make up
 20 the 197 acres?
 21 A Yes.
 22 Q You also mentioned though, I believe,
 23 there was an area that had been subdivided?
 24 A Well, it's been sold, but I retained
 25 the rights to the railroad track property; in other

278

1 words, the land that was sold is northeast of the
 2 railroad track.
 3 Q Which exhibit would be best to
 4 identify where that is? We have both of them up.
 5 A 00001.
 6 Q Let's look at 01. We were talking
 7 then about sort of a dark figure in the middle of that
 8 page. Show us where that is on 02.
 9 A Wait a minute. This here?
 10 Q Yes. That figure, that sort of dark.
 11 A Where is the house at? Do you see
 12 that house there? Where is that?
 13 Q It should be up to the north or to
 14 the east.
 15 A Right there is the house.
 16 Q Yes. So let me try to --
 17 A That railroad track would be right
 18 through here, wouldn't it?
 19 Q Let me try to describe this so that
 20 anybody who is reading it can actually understand it.
 21 Let's go to page 000001; do you see that?
 22 A Yes.
 23 Q The corridor bisects that particular
 24 parcel, correct?
 25 A Yes.

279

1 Q To the south there is what appears to
2 be a home in sort of irregular shaped parcel, smaller
3 parcel?
4 A Yes.
5 Q Do you want to point to that?
6 A (WITNESS COMPLIES WITH REQUEST.)
7 Q Now on the other photograph, 02, we
8 can actually see that same home, correct?
9 A Yes.
10 Q That would be, in 02 it's actually
11 above the outline figure, correct, on the page?
12 A Yes.
13 Q So that helps us out there.
14 Tell us where the part that you sold was.
15 A Right up in here -- (indicating).
16 Q So that would be on 000001. You're
17 pointing to the parcel that is to the northern parcel?
18 A North.
19 Q North of the corridor, correct?
20 A Yes.
21 Q Then it would be part of an area in
22 the northeast when then your property was sold to
23 somebody, Nancy Gumble?
24 A Yes.
25 Q You sold that for 10,000 an acre?

280

1 A Yes.
2 Q And that was considerably lower than
3 you had paid, which was about 5,500, correct?
4 A Yes.
5 Q So that illustrates, I think, that
6 you did in fact get a good deal on the property?
7 A Yes.
8 Q You mentioned that there was, I was
9 trying to understand, you mentioned a 37-acre parcel
10 in your deposition. Which one is that?
11 A Well, she bought two, but one was I
12 think a year apart.
13 Q I'm actually referring to --
14 A The 88 acres.
15 Q You mentioned the 37-acre lot and
16 that only 14 acres was tillable. I wasn't sure.
17 A That 37 was on another farm in Posey
18 County that I sold the same year, I'm sorry.
19 Q Has nothing to do with this property?
20 A No. It was 88, I think, to Nancy
21 Gumble.
22 Q That's why I was confused.
23 Before you purchased the property, you were
24 renting it starting around 2004, correct?
25 A I think.

281

1 Q That was a crop share situation,
2 one-third/two-thirds?
3 A Yes.
4 Q And you got the two-thirds?
5 A Yes.
6 Q Did it change to a cash rent at any
7 point?
8 A I don't think so.
9 Q But nowadays cash rent is more
10 normal?
11 A Yes.
12 Q Of course, when you bought the
13 property, you knew about the corridor, correct?
14 A Yes.
15 Q It did not affect the price you paid
16 for it?
17 A No.
18 Q I think you confirmed that there are
19 still some ties there?
20 A Yes.
21 Q You don't have any problems crossing
22 the corridor?
23 A No. We just drive across the rock.
24 Q You don't have to worry about going
25 through a so-called legal crossing?

282

1 A Well, I think the owner told me I had
2 three legal crossings, but I do use those legal
3 crossings.
4 Q Yes. But you don't need to because
5 you can cross where you want?
6 A No, because the roadbed has got
7 ditches on both sides.
8 Q So you have to use the legal
9 crossing?
10 A Right.
11 Q Let's go back to the, I referenced
12 the 01 number. Because of that corridor then, do you
13 attempt to align your rows parallel to the corridor?
14 A No. Up in this area --
15 Q You're pointing at the northeast
16 corner.
17 A We start on the straightest edge.
18 Q Show us where that is.
19 A This would be right here --
20 (indicating).
21 Q So we're looking then at the
22 northwest part of the diagram?
23 A In other words, when we farm, we try
24 to find the straightest line of the field and then
25 that takes us to the point rows by the railroad track.

283

1 Q So you find the longest straightest
2 line?
3 A Yes.
4 Q Then you go off of that?
5 A Yes.
6 Q And then you just fill in?
7 A Yes.
8 Q So if the corridor weren't there, how
9 would you -- let me make sure I understand.
10 A I haven't thought about it. Didn't
11 think this would ever happen.
12 Q At present you start at the northwest
13 corner and you go down the corridor and you keep going
14 back and forth?
15 A Okay. Like here -- (indicating).
16 Q No. That would be the north,
17 correct?
18 A I'm just using this as an example.
19 Q Okay.
20 A Like here, we would start here and go
21 along the road, straight up that road.
22 Q In that particular instance, on the
23 smaller parcel that's to the south of the corridor,
24 you would actually go in a --
25 A East/west.

284

1 Q -- east/west?
2 A Yes.
3 Q Because the longest line is the line
4 where your house is?
5 A Yes. Then you line up the point rows
6 over here.
7 Q I got you. So at present then, if
8 the corridor were gone, you couldn't say how it would
9 change your --
10 A No, I haven't thought about it.
11 Q Let's put up JX 6.
12 Do you recall that we had your deposition
13 about a year ago or so and various documents were
14 marked; do you remember that?
15 A Yes.
16 Q I just want to confirm that the
17 Notice of Interim Trail Use, as least as of your
18 deposition, you had never seen that before, correct?
19 A No.
20 Q One more thing about the point rows.
21 Go back to JX 28.
22 Aside from the corridor, are there any other
23 features that would cause you to be unable to take the
24 longest, straightest, plowing method or crop method --
25 A Well, there's parcel woods, also, yes.

285

1 Q Could you perhaps show us where those
2 are?
3 A There's the woods -- (indicating).
4 Q I mean within the property outlined
5 by yellow, which is the subject of the lawsuit.
6 A No, there's no woods in there.
7 Q Are there any creeks or other
8 features that might cause point rows?
9 A There's a creek, if I can find it.
10 Right there, I think.
11 Q So here we're talking about, we
12 talked before about something that's within the yellow
13 confines which is a darker shade, right?
14 A Yes.
15 Q And the creek then runs along, you
16 can see the line, it kind of defines that dark shade?
17 A Yes.
18 Q Why is one part darker, one lighter?
19 A It depends on what time of the year
20 they took these aerial views. It might be a green
21 crop. It might have been corn there and some other
22 crop in the yellow. I'm not sure why it would be.
23 Q You don't mix two crops during the
24 same time, do you?
25 A No.

286

1 Q If you do corn, you do corn?
2 A Yes, but I don't plant the whole farm
3 in corn. In other words, this would be beans over
4 here or this could be corn here. I'm not sure.
5 Q Are you limited to the amount of corn
6 you can grow?
7 A No, not anymore. We used to.
8 Q Well, for example, is the area that's
9 darker that we talked about, do you see that?
10 A Yes.
11 Q Is that all tillable?
12 A Yes.
13 Q Except for the creek?
14 A Yes, and the railroad.
15 Q And the corridor. What about the
16 area that's lighter though to the north; that's your
17 property, correct?
18 A It should be tillable.
19 Q Why would it be different?
20 A Might have been a different crop in
21 there. I don't know.
22 Q But I just asked you, you don't do
23 two different types of crops at the same time, do you?
24 A Not in the same field, but contingent
25 fields could be different crops.

15 (Pages 283 to 286)

287

1 **Q You might consider that a different**
2 **field?**

3 **A** Yes, if that's the creek. If there's
4 a creek there, I can't get to it from there.

5 **Q If there's a creek, you consider it a**
6 **different?**

7 **A** Yes. FSA does, too.

8 **Q So you might do corn in one field,**
9 **which is bounded by a creek and the corridor and a**
10 **road?**

11 **A** Yes.

12 **Q And then there's another part that**
13 **you might have a different crop on?**

14 **A** Yes.

15 **Q Thank you for clarifying that.**

16 **I don't believe I have any further questions.**

17 **REDIRECT EXAMINATION**

18 **BY MS. MCCULLEY:**

19 **Q I just have a couple, Mr. Martin.**

20 **How long has your family farmed the farmland?**

21 **A** That?

22 **Q All of your farmland.**

23 **A** My grandpa started farming probably
24 in late teens, 1910, somewhere in there.

25 **Q Your family has been farming for a**

288

1 **long time; is that right?**

2 **A** Yes.

3 **Q Then you also mentioned that you,**
4 **when you subdivided a certain area of your farm,**
5 **there's not houses in that subdivision, are there?**

6 **A** In my ground?

7 **Q No. In the area that you sold to be**
8 **subdivided.**

9 **A** No.

10 **Q It's still farm, right?**

11 **A** Yes.

12 **Q You say that you retained the**
13 **railroad right-of-way; is that because you thought you**
14 **owned it?**

15 **A** Yes. It was surveyed off so I
16 retained the property where the railroad track is.

17 **Q I think that's all the questions I**
18 **have.**

19 **MR. MACAYEAL:** No further questions.

20 **MS. MCCULLEY:** The witness maybe excused.

21 **THE COURT:** Thank you for coming.

22 **MS. MCCULLEY:** Your Honor, just a little
23 housekeeping. I offer Exhibit 8-D.

24 **MR. MACAYEAL:** No objection.

25 **THE COURT:** Admitted.

289

1 (Plaintiffs' Exhibit Number 8-D as admitted
2 into evidence.)

3 **MR. STEWART:** Your Honor, we're going to call
4 **Mr. David Matthews.** Can you give us a five-minute
5 break to set up?

6 **THE COURT:** Take ten minutes.

7 **We're in recess.**

8 ----- (OFF THE RECORD) -----

9 **CLERK:** All rise. The United States Court of
10 Federal Claims is back in session.

11 **THE COURT:** Please be seated.

12 **MR. STEWART:** Your Honor, plaintiffs calls
13 **Mr. David Matthews.**

14 **DAVID MATTHEWS**

15 **THE WITNESS, HAVING BEEN DULY SWORN UPON HIS HONOR,**
16 **TESTIFIED AS FOLLOWS:**

17 **DIRECT EXAMINATION BY MR. STEWART:**

18 **Q Will you please state your full name**
19 **for.**

20 **A** Charles David Matthews. I go by
21 David Matthews.

22 **Q Mr. Matthews, I'm going to spend a**
23 **few minutes going through your resume and**
24 **qualifications and experience in the nature of a voir**
25 **dire so you can be qualified as an expert witness.**

290

1 **Okay?**

2 **A** Okay.

3 **Q To aid you in that process I'm going**
4 **to hand you a copy of your resume that was attached to**
5 **all of your appraisal reports and ask you if you can**
6 **identify it? It is Plaintiffs' Exhibit 12.**

7 **A** (WITNESS REVIEWS DOCUMENT.)

8 That would be the resume I included in the
9 appraisal from the 2016 appraisal. It stops, it looks
10 like, 2014.

11 **Q If you need to refer to that at any**
12 **point to refresh your recollection, feel free to do**
13 **so.**

14 **First, Mr. Matthews, are you employed?**

15 **A** I am.

16 **Q Where is your employment?**

17 **A** David Matthews Associates,
18 Incorporated.

19 **Q And where is it headquartered?**

20 **A** About two blocks from here at 420
21 Main Street, Evansville, Indiana.

22 **Q Before we get into your employment**
23 **history and description of David Matthews Associates,**
24 **will you briefly go through your educational**
25 **background for the Court?**

EXHIBIT E

TRIAL TESTIMONY OF CHRIS REEVES/REIBEL FARMS

In the Matter of:

Jeffrey Memmer, et al. v. USA

April 29, 2019

Trial

Vol. 1

Condensed Transcript with Word Index



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141

1 (Plaintiffs' Exhibit 2D was admitted into
2 evidence.)
3 MS. MCCULLEY: Thank you.
4 MR. WEIGERT: Thank you, Your Honor.
5 THE COURT: As you know, originally I was going
6 to break at 12:50. It may run an hour. So -- and I
7 think you said your witness would not be available
8 until 2:00; is that right?
9 MR. STEWART: Supposed to be here at 2:00.
10 THE COURT: That works perfectly then. Thank
11 you. We are in recess until 2 p.m.
12 (Court in recess, 12:24 p.m. to 2:00 p.m.)
13 THE COURT: Counsel are ready to proceed?
14 MS. MCCULLEY: Yes, Your Honor.
15 THE COURT: Thank you very much.
16 MS. MCCULLEY: Plaintiffs call Jeffrey Chris
17 Reeves.
18 THE COURT: Good afternoon, Mr. Reeves. Would
19 you raise your right hand, please?
20 JEFFREY CHRIS REEVES,
21 THE WITNESS, HAVING BEEN DULY SWORN UPON HIS HONOR,
22 TESTIFIED AS FOLLOWS:
23 THE COURT: Thank you. Please be seated.
24 DIRECT EXAMINATION
25 BY MS. MCCULLEY:

142

1 **Q Mr. Reeves, do you go by Chris?**
2 A Yes.
3 **Q So are you here on behalf of Reibel Farms?**
4 A Yes.
5 **Q And who owns Reibel Farms?**
6 A Treva Reibel, my mother-in-law.
7 **Q Your mother-in-law?**
8 A Yes.
9 **Q Okay. So does Reeves Grain Farm LLC lease the**
10 **farm from your mother-in-law?**
11 A Yes, that's correct.
12 **Q Tell me a little bit about your educational**
13 **background.**
14 A Well, I graduated high school, went to college.
15 And after one year, then I went to farming.
16 **Q Okay. And so right after your first year of --**
17 **you've been farming for how long?**
18 A Probably grain farming about 13 years. I was
19 in the livestock for four years.
20 **Q So do you still have livestock now?**
21 A No. Actually, as of last August, no.
22 **Q Where do you live?**
23 A I live in Poseyville. 96 North Walnut Street,
24 Poseyville, Indiana.
25 **Q Do you live close to the farm?**

143

1 A Yes. Yes. Within a quarter of a mile, eighth
2 of a mile.
3 **Q Does your mother-in-law live across the street**
4 **from the farm?**
5 A Yes.
6 **Q And your mother-in-law, is her name Janet**
7 **Reibel?**
8 A Treva Reibel.
9 **Q Treva Reibel?**
10 A Treva.
11 **Q And are you her agent?**
12 A Yes.
13 **Q On your property -- because you also own**
14 **property; is that right?**
15 A Yes.
16 **Q Okay. Do you have grain farms or grain bins, I**
17 **mean?**
18 A Yes, we do.
19 **Q How many grain bins do you have?**
20 A On all our farms? Four bigger bins. And then
21 we have what they call hopper bins. Probably four or five
22 of those.
23 **Q What's a hopper bin?**
24 A It's a bin that has a cone on the bottom.
25 **Q Oh, I see.**

144

1 A Other one is just a flat-sided bin with a flap,
2 which has a sweep auger. So we have both.
3 **Q I know what you're talking about now. And do**
4 **you have some harvesters on the property as well?**
5 A As far as combines, no. We plant and do all
6 the tillage work and so forth, but we have someone come in
7 and custom harvest ours.
8 **Q How many acres is the farm?**
9 A Wheat farm? Right at 650 acres.
10 **Q And as far as Reibel Farms, how many acres is**
11 **the Reibel Farm?**
12 A 119.
13 **Q How long has your family farmed this land?**
14 A My mother-in-law, they bought this property I
15 think in 1910.
16 **Q Then did you start farming the land in 2005?**
17 A 2005, yes.
18 **Q Okay. How much is your lease per acre?**
19 A I think the minimum is like \$250 an acre, but
20 we usually pay more. Just depends on the prices.
21 **Q Okay.**
22 MS. MCCULLEY: Your Honor, may I approach?
23 THE COURT: Certainly.
24 **Q Mr. Reeves, I'm going to hand you what's been**
25 **marked as JX 23. Have you seen this document or are you**

36 (Pages 141 to 144)

145

1 familiar with this document?
 2 A Yes.
 3 Q Okay. What is it?
 4 A Looks like a deed for the land.
 5 Q Okay. Now I'm going to hand you what's been
 6 marked as Joint Exhibit Number 24. And do you recognize
 7 this document?
 8 A I've probably seen it, but right now I can't
 9 say I have. I think I have. I'm trying to look at the
 10 numbers to see if the numbers coincide. I've seen these
 11 documents. I can't tell the numbers. But this is Reibel
 12 Farms.
 13 Q Yeah. Reibel Farms?
 14 A Yes.
 15 Q Okay. I'm going to hand you what's been marked
 16 as Joint Exhibit Number 25. Do you recognize that parcel
 17 of land?
 18 A Yes.
 19 Q Okay. What is that?
 20 A That is the land for Reibel Farms.
 21 Q Okay.
 22 A Yes.
 23 Q And then how about this document; do you
 24 recognize what this is?
 25 THE COURT: And what is the document number?

146

1 MS. MCCULLEY: I'm sorry, Your Honor. This is
 2 5B.
 3 A That is the railroad track, where the railroad
 4 tracks were at.
 5 MR. MACAYEAL: Your Honor, could we get a copy
 6 of that document?
 7 THE COURT: Sure.
 8 MR. MACAYEAL: Is it in the book? 5B?
 9 MS. MCCULLEY: Here, David.
 10 MR. MACAYEAL: Thank you.
 11 BY MS. MCCULLEY:
 12 Q Is the white stuff the rock that's still left
 13 on the right-of-way?
 14 A That's the rock left on that right-of-way.
 15 Q Okay. And that's the right-of-way right
 16 there?
 17 A Yes. Correct.
 18 Q Very good.
 19 So your parcel of land that was the one outlined
 20 in the yellow, how does that -- and I just refer to it as
 21 your land even though it's your mother-in-law's.
 22 A Sure.
 23 Q How does that railroad right-of-way affect your
 24 parcel?
 25 A First of all, there's a number of reasons.

147

1 One, where it sits, the ground that goes to it goes at an
 2 angle toward it, so water sits on the north end of our
 3 property. So we always have water there. Actually, I was
 4 there last week. And it stays wet. Weeds grow up,
 5 pollinate, get in your field. Trees grow up, if I didn't
 6 mow it; but I mow it. Have to keep the weeds out of it and
 7 the trees from growing. Because trees grow and they shed
 8 your property and you can just figure 30, 40, 50 feet. You
 9 get no yield if you go by a tree. There's no yield. And I
 10 say no yield. Very little yield. And we worry about -- we
 11 live right next to Poseyville. This is right next to
 12 Poseyville. And you have kids and so forth coming down
 13 through there. And beer bottles out along the edge.
 14 You've got to clean those up every year so they don't get
 15 under your tractor tires.
 16 Q Are you pretty meticulous about your farm?
 17 A Yes, ma'am.
 18 Q Tell me about that.
 19 A I keep everything mowed. I try to keep the
 20 roadways mowed. I take weed eaters around signs because I
 21 want it to look that way. I just try to keep everything
 22 real nice and neat. That's just the way I do it.
 23 Q Tell me about what you plant. What do you
 24 plant on that farm?
 25 A Mostly we plant corn and soybeans. Wheat has

148

1 been planted on the farm. Since I've had it, I have not
 2 planted wheat. So it's mostly corn and soybean rotation.
 3 Q So do you rotate every year, or do you rotate
 4 --
 5 A It varies. Now, I'm going to start rotating
 6 every year. Before that, we rotated two years of corn, one
 7 year of beans.
 8 Q Okay. And when do you plant corn typically?
 9 A You like to plant corn April 15th.
 10 Q Okay. And when do you harvest?
 11 A September, October. Just depends. Early to
 12 mid September. Later you plant, later you harvest. It
 13 depends how much you want to dry. If you want to run it
 14 through a dryer, you can start first of September. We let
 15 most of ours dry out in the field pretty well.
 16 Q How often do you have to fertilize the corn?
 17 A You fertilize it before you plant it. And then
 18 you side dress with some fertilizer. And sometimes you put
 19 some nutrients on the corn -- depends on -- once you do
 20 your research or your testing, once the corn is growing,
 21 what you have to put on. Sometimes nothing. Sometimes
 22 something.
 23 Q Typically how many bushels of corn do you yield
 24 a year?
 25 A Around 240 bushel an acre. Some years not as

37 (Pages 145 to 148)

149

151

1 good. Some years -- on average, probably 240. But it's
2 getting better every year. New technology, it just gets
3 better all the time.

4 **Q Does the farm, does it have high quality**
5 **soil?**

6 A Absolutely. Some of the best in Posey
7 County.

8 **Q Have you planted yet this year?**

9 A No. Hardly anybody has. Haven't hardly even
10 did any field work yet.

11 **Q Why is that?**

12 A Because of the weather. Wet. Too wet.

13 **Q Too wet, okay.**

14 **Where is the railroad corridor on that -- where is**
15 **it bound?**

16 A It's on the north side of our property.

17 **Q Okay. Did you clear out that railroad**
18 **right-of-way the best you could?**

19 A Clean it up?

20 **Q Yeah.**

21 A Yes.

22 **Q Did you hire somebody with a chipper?**

23 A Yes. Right when I started farming it. Before
24 I farmed it, my brother-in-law farmed it. Then he got
25 moved toward Omaha for his work. Anyway, we started

150

1 farming in '05. Some trees started growing up. I've got a
2 ditch bank mower that I can cut trees three or four inches
3 in diameter and chop them up. They were bigger; you know,
4 six, eight, ten inches. So we had a guy come in. Henry
5 Bigg actually came in. It's a trackhoe with a chipper on
6 it. And cleaned it and dressed it all up so those trees
7 didn't get real tall. But they were growing everywhere out
8 in the -- rotting off. They were just everywhere.

9 **Q So does the railroad take care of that?**

10 A None whatsoever. Zero.

11 **Q So that's why the trees grow and you had to**
12 **chip them?**

13 A Absolutely. Yeah.

14 **Q Tell me about the access you have -- well, do**
15 **you access, use access over the right-of-way?**

16 A No.

17 **Q But there's another parcel that --**

18 A Yes.

19 **Q -- is severed; is that right?**

20 A There's another parcel that's not actually with
21 this one -- it's a little farther to the east -- that we do
22 cross the railroad track, to where it actually splits our
23 field in half.

24 **Q Right. And of this parcel that we're talking**
25 **about, the Reibel Farms, tell me about the topography. Is**

1 **it flat?**

2 A No. The top of the railroad track is flat. Of
3 course, it's raised up from ours. Like I say, it's higher.
4 I would guess four to five feet higher than actually our
5 land. So when our land runs in that, the water has to go a
6 certain way. Which it does; it just digs a ditch every
7 year. And with this year, all the water, it has gotten
8 bitter. Actually, I called this morning, actually talked
9 to a guy about going in there and doing some work just to
10 try to fill that ditch in.

11 **Q Have people been trying to buy that parcel of**
12 **land?**

13 A Always.

14 **Q Always?**

15 A It's right next to Poseyville. A lot of people
16 want it.

17 **Q But it's been in your wife's family --**

18 A Not for sale as long as I farm it, if I own it,
19 no.

20 **Q Do you remember the last time trains ran, Mr.**
21 **Reeves?**

22 A Yeah. The year or so before we started
23 farming. Like 2004, I think, since a train's been on it
24 that I know. Yes.

25 **Q Okay. Do you remember when the rails and cross**

152

1 **ties were pulled up?**

2 A 2010, 2012, I think. Somewhere in there. Six,
3 seven, eight, nine years ago. I don't know.

4 **Q Did the railroad or some salvage company haul**
5 **the rails away?**

6 A I would guess. A lot of our work is done in
7 Griffin where our other farm is at, so we're not there all
8 the time to do it; but, yeah, it was slowly taken away.
9 Some of the things were taken away and them come back and
10 got some other things.

11 **Q But the rails are gone?**

12 A The rails are gone, but the cleanup wasn't very
13 good.

14 **Q Do you still have spikes?**

15 A We have spikes, pieces of metal where the
16 spikes go through to hold the ties down. You have to
17 really watch it there, yeah.

18 **Q And can that cause problems for your farm**
19 **equipment?**

20 A Yeah. I mean, it just depends on how much. If
21 it gets out in the field, it can. But it's not a lot out.
22 Just on the edge of the field. Of course, it's not in the
23 field itself. But when I mow it, I've got to kind of watch
24 out because I want to keep the weeds down.

25 **Q Let's talk about the cross ties. What did they**

153

1 do with the cross ties?

2 A I guess lightning hit them. They're all
3 gone.

4 Q Well, did they just dump them on your
5 property?

6 A Yes. They didn't stack them. They just piled
7 up. They weren't just spread out. They were piled up.
8 There was a number of piles. And they would be on that
9 side of the railroad track, next to your field, in the
10 middle. They were cross ways. No rhyme or reason. And
11 they were rotten.

12 Q Did that cause problems when they would get in
13 the —

14 A Yes. We had to push some over, out of our
15 field, back onto the property, to the railroad part.

16 Q What happened to the ties?

17 A Like I said, they got burnt.

18 Q No lightning strike?

19 A No lightning strike. I burnt the ties. They
20 were just a mess. They were rotten. There were just holes
21 in them. You could pick them up. Railroad ties are heavy.
22 You could just pick them up and move them where you want.
23 That's how bad they were. I think they actually took the
24 better ties with them. Yeah, they took the better ties.

25 Q I know, because —

154

1 A I think.

2 Q -- I believe you told me that you want a
3 pristine farm.

4 A Yes.

5 Q Did that bother you that those ties were —

6 A Absolutely. I can't stand it.

7 Q Is there any activity on the corridor right
8 now?

9 A No. Not for -- just people go down there and
10 drink beer.

11 Q Trespassers?

12 A Yes.

13 Q Do people hunt on the corridor?

14 A Yeah. Not as much as they used to. Used to do
15 a lot of rabbit hunting on those. Not as much as they used
16 to. Very seldom. Actually, I haven't seen a rabbit hunter
17 in probably five years that I've seen.

18 Q Do the trespassers, if they're drinking beer or
19 whatever, do they leave trash?

20 A Beer bottles.

21 Q Beer bottles?

22 A Beer bottles or beer cans.

23 Q Does that bother you?

24 A Yes.

25 Q Do weeds spread out the side of the railroad

155

1 right-of-way?

2 A Absolutely.

3 Q Does that cause problems?

4 A We just have to use a chemical and spray them
5 or work them up as tillage.

6 Q Because would that cause a problem for your own
7 field?

8 A Absolutely. Your yield goes down tremendously
9 when you start getting weeds in there. The problem is, if
10 they grow up on the railroad track then you have seeds.
11 And seeds, they get in your field. Some of these seeds,
12 like Johnson grass, that could be there for like five or
13 six years before it germinates. So you've got a long-term
14 problem.

15 Q Tell me other concerns that you have about that
16 railroad right-of-way besides just trespassers. Do ATVs
17 ride on it?

18 A There are some, but you don't see them very
19 often. Every now and then, you do.

20 Q Do you have privacy concerns of people coming
21 onto your property?

22 A Yes. More so -- people are people. Kids are
23 kids. More so in today world, it's liability. They get
24 hurt on your property, then that's what concerns me more
25 than anything. If they do, that's what concerns us.

156

1 Q Do you have any concerns regarding theft of
2 anybody coming on your property?

3 A Yes. Because they can come in through the
4 backside of our farm machinery shed and so forth. And our
5 tools, yeah, that concerns us.

6 Q Do you have any other concerns?

7 A Not really. Mostly just that type of things.

8 Q Would you want a trail on that property, a
9 recreational trail?

10 A No, not really, because I think there are
11 better places than that.

12 Q Okay. If you could -- if that railroad, if you
13 could reclaim it, would you reclaim that right-of-way?

14 A Absolutely, in a minute.

15 Q What would you do to reclaim it?

16 A First I'd take the rock off, which we'd either
17 reuse it somewhere or we'd go down in places where the
18 county, they need some around where water is washing out on
19 their ditches. They'll take the rock. We'll take the dirt
20 and decide what kind of quality it is. Either pile it up
21 or reuse it somewhere. Tillable. I know I could reclaim
22 that less than 13, 15 thousand dollars an acre. And that's
23 what it may be worth. I just bought land for \$13,000 an
24 acre, so.

25 Q So if you were to reclaim it, would you just

157

1 **push the bed back down?**
 2 A We would level it out once we got the rock and
 3 stuff off.
 4 **Q Then would you plant crops on it?**
 5 A Absolutely.
 6 **Q Yeah?**
 7 A We'd do a soil test and do whatever we had to
 8 put in to get the soil back up to where it could grow a
 9 crop.
 10 **Q Have you ever gotten any estimates on**
 11 **reclaiming the right-of-way?**
 12 A No.
 13 **Q Okay.**
 14 A But we do other things like that as far as
 15 track work, so we roughly know what that would be, pretty
 16 close.
 17 **Q Have you ever had any conversation with anybody**
 18 **at the railroad about abandonment or using that land?**
 19 MR. MACAYEAL: Objection, Your Honor. Hearsay.
 20 MS. MCCULLEY: I'm asking if he personally has
 21 had any conversations with --
 22 THE COURT: He can certainly say if he's had a
 23 conversation.
 24 MR. MACAYEAL: But the contents of the
 25 conversation would be hearsay offered to prove the

158

1 truth of whatever the railroad was thinking of doing.
 2 THE COURT: We haven't gotten there yet.
 3 MR. MACAYEAL: Yes.
 4 THE WITNESS: Could you repeat the question?
 5 BY MS. MCCULLEY:
 6 **Q Sure. Have you ever had any conversations with**
 7 **anybody at the railroad about that right-of-way?**
 8 A Not with the railroad. With my father-in-law
 9 who also talked to the railroad people.
 10 **Q Did that involve an oil spill?**
 11 A Coal spill.
 12 **Q Coal spill?**
 13 A Yeah. They spilled coal on my in-laws'
 14 property.
 15 **Q Mr. Reeves, have you heard that the railroad is**
 16 **wanting the landowners to buy that land back?**
 17 MR. MACAYEAL: Objection, Your Honor. Hearsay.
 18 THE COURT: If he knows. And then you can
 19 explore how he -- he can answer the question.
 20 THE WITNESS: Repeat it, please.
 21 BY MS. MCCULLEY:
 22 **Q Have you heard that the railroad, Pioneer Rail,**
 23 **would like the landowners to buy their land back, those**
 24 **easements back?**
 25 A I have not heard that.

159

1 MS. MCCULLEY: I don't have any further
 2 questions, Your Honor.
 3 THE COURT: Thank you.
 4 CROSS-EXAMINATION
 5 BY MR. MACAYEAL:
 6 **Q Good afternoon, Mr. Reeves. I'm Jamie**
 7 **MacAyeal. I'll ask a few questions --**
 8 A Sure.
 9 **Q -- for the Government.**
 10 **So you and your wife have a corporation called**
 11 **Reeves Grain Farm?**
 12 A We have several corporations. That's one of
 13 them.
 14 **Q Is that --**
 15 A LLC.
 16 **Q Is that the one that leases the Reibel**
 17 **property?**
 18 A Correct. Reibel Farms Inc.
 19 **Q Let's put up DX 37.**
 20 MR. MACAYEAL: Your Honor, may Ms. Gilbride
 21 help the witness find an exhibit?
 22 THE COURT: Certainly.
 23 BY MR. MACAYEAL:
 24 **Q Do you have Exhibit DX 37 in front of you,**
 25 **sir?**

160

1 A Yes, I do.
 2 **Q I'll represent to you that this was a document**
 3 **that was marked at your deposition, which was about a year**
 4 **ago. Do you remember that?**
 5 A Yes.
 6 **Q Okay. And the last page, DX 37.0008, is an**
 7 **aerial photo. Do you see that?**
 8 A Yes, I do.
 9 **Q And that would be the same as was referenced**
 10 **earlier, the JX 25, I believe?**
 11 A I think so, yes.
 12 **Q This one, though, however, you made some**
 13 **markings on it, correct?**
 14 A Yeah.
 15 **Q Now, you have a yellow border, so to speak.**
 16 **You see that?**
 17 A Uh-huh.
 18 **Q Is that the 119 acres?**
 19 A No, it's not.
 20 **Q What is the acreage?**
 21 A That, I couldn't tell you because the property
 22 actually goes across the railroad track on the other side,
 23 part of it. So I would think there's probably 119 -- I'd
 24 say probably 95, give or take.
 25 **Q The land that is marked in yellow, what does**

161

1 the yellow marking signify to you?
 2 A That is owned by Reibel Farms Inc.
 3 Q And that's the area where the corridor runs
 4 through the north of that parcel?
 5 A Yes.
 6 Q And the page is facing north/south,
 7 east/west?
 8 A Yes. Correct.
 9 Q Down at the -- there's a little cutout that has
 10 an X.
 11 A Yes.
 12 Q What does that X mean?
 13 A That is the barn grain bins, and we actually
 14 purchased that from my in-laws. So Reeves Land owns that,
 15 LLC.
 16 Q That's your property?
 17 A Reeves Land LLC owns that.
 18 Q Then to the south of that X, there's a circle.
 19 A That's where I live.
 20 Q That's where you live?
 21 A Yes.
 22 Q Then there's some cross hatches on the photo
 23 too?
 24 A Yes.
 25 Q Which would be to the west of where you live.

162

1 What does that represent?
 2 A Those actually are owned by Reibel Farms also,
 3 but it's in city limits.
 4 Q It's in city limits?
 5 A Yeah.
 6 Q Okay. All right. Now, let me go to -- when
 7 were all the ties removed?
 8 A Somewhere around 2010, '12, I think, give or
 9 take.
 10 Q Were there any left at all?
 11 A Any ties?
 12 Q Yes.
 13 A You mean when they removed them? Oh,
 14 absolutely. There were a lot of ties left. I was thinking
 15 you meant railroad tracking. The ties have been there.
 16 Q Let me clarify. The rails are gone?
 17 A The rails were probably, I'm thinking, 2010,
 18 '12, is what I'm thinking.
 19 Q Okay. As far as the ties are concerned, the
 20 wooden ties, some of those are still there?
 21 A Some of them are on the railroad track. Not
 22 many of them on my property. There are some actually right
 23 on that railroad track, on the other side, which is the
 24 neighbor's property.
 25 Q Now, just to clarify, the property that is

163

1 shown on DX 37-0008, that is owned by Reibel Farms,
 2 correct?
 3 A Correct.
 4 Q Reibel Family Farms Inc., correct?
 5 A Reibel Farms Inc.
 6 Q Reibel Farms Inc. Okay.
 7 And the property was previously owned by your --
 8 the property was owned by your mother's father from 1910,
 9 your mother-in-law's father?
 10 A No. My father-in-law's father.
 11 Q Your father-in-law's father. Okay.
 12 A Yes.
 13 Q And then your mother-in-law and father-in-law
 14 bought it --
 15 A My father-in-law's father -- father, yes.
 16 Trying to get this straight.
 17 Q It was a parent of one of your in-laws?
 18 A Yes.
 19 Q Then in 1960, your wife's parents purchased the
 20 property?
 21 A Yes.
 22 Q And then at some point that property was
 23 transferred to the corporate entity?
 24 A Yes.
 25 Q But that corporate entity is owned by your

164

1 mother-in-law?
 2 A Correct. My father-in-law passed away.
 3 Q Pardon?
 4 A My father-in-law's passed away. Just my
 5 mother-in-law, yes.
 6 Q So your mother-in-law is still alive?
 7 A Yes.
 8 Q And she owns the corporation?
 9 A Yes.
 10 Q She's the only owner?
 11 A Yes.
 12 MR. MACAYEAL: No further questions.
 13 REDIRECT EXAMINATION
 14 BY MS. MCCULLEY:
 15 Q Mr. Reeves, was it your understanding that if
 16 the railroad stopped running trains, that the land would
 17 come back to the landowners?
 18 A From my father-in-law, yes, that's what he told
 19 me.
 20 MS. MCCULLEY: Your Honor, we'd like to offer
 21 Plaintiffs' Exhibit 5D.
 22 MR. MACAYEAL: No objection, Your Honor.
 23 THE COURT: Admitted. (PX5D was admitted.)
 24 MS. MCCULLEY: Great. Thank you. I have no
 25 further questions.

41 (Pages 161 to 164)

165

1 THE COURT: Any redirect by the Government?
 2 MR. MACAYEAL: No, Your Honor.
 3 THE COURT: Thank you. The witness is excused.
 4 Thank you.
 5 MR. MACAYEAL: Your Honor, just for the record,
 6 we'd like to move into evidence the deposition
 7 exhibit, which is the same as JX 25, because it has
 8 the witness's markings on it that he testified to.
 9 That would be DX 37.
 10 MS. MCCULLEY: You mean Mr. Reeves' deposition?
 11 MR. MACAYEAL: Our DX 37 is a composition of
 12 the actual document, including his markings.
 13 THE COURT: The witness has left the witness
 14 box. And what is the Plaintiffs' position?
 15 MS. MCCULLEY: Your Honor, I think that's an
 16 improper use of the deposition. I mean, he was here
 17 for live testimony. If they had any questions about
 18 the deposition, they had the opportunity to ask him.
 19 So I think it's improper, and I object.
 20 MR. MACAYEAL: Your Honor, a statement by a
 21 party opponent is always admissible as an exception
 22 rule to hearsay, regardless of availability. That's
 23 a general rule. Any statement that this witness
 24 makes is admissible, unless they're saying that
 25 they're not trusted.

166

1 THE COURT: That's fair. It will be
 2 admitted.
 3 (Defendant's Exhibit Number 37 was admitted
 4 into evidence.)
 5 MR. MACAYEAL: Thank you, Your Honor.
 6 THE COURT: Just the one?
 7 MR. MACAYEAL: The photo.
 8 THE COURT: Do you want to rename it, or is
 9 it -- we're not admitting the entire deposition; it's
 10 just that one exhibit?
 11 MR. MACAYEAL: At this point, we're not moving
 12 as to the deposition, but we may get to that because
 13 some of our experts are relying on the things in the
 14 deposition. But the reason why that particular
 15 document which has a page number --
 16 THE COURT: Well, I'm going to have you do
 17 that. Because if a witness was sitting in the
 18 witness box, that individual's deposition is not
 19 coming in in lieu of -- they're sitting there. You
 20 can ask them all the questions you want. Depositions
 21 don't come in in lieu of live testimony unless the
 22 witness is unavailable. And that gentleman was very
 23 much available.
 24 MR. MACAYEAL: I think, Your Honor, as to this
 25 particular exception to the rule against hearsay, it

167

1 actually doesn't matter whether the witness is
 2 available. But we can --
 3 THE COURT: I understand that, but we aren't
 4 there yet. I'm letting this particular exhibit in,
 5 but it's going to be your job to mark it, give it a
 6 number and mark it, and then give a copy to your
 7 opposing counsel as well as the court reporter.
 8 MR. MACAYEAL: It's in the book, Your Honor.
 9 THE COURT: I understand that --
 10 MR. MACAYEAL: We'll re-mark it.
 11 THE COURT: Right now, it's part of a
 12 deposition exhibit.
 13 MR. MACAYEAL: It's right now DX 37.
 14 THE COURT: It's in fact a transcript -- I'm
 15 sorry.
 16 MR. MACAYEAL: No, no, no. That's a --
 17 THE COURT: I apologize. It's DX 37, and
 18 that's the only -- excuse me. I thought it was
 19 several -- I thought there were three or four
 20 exhibits in 37.
 21 MR. MACAYEAL: 37 has got Deposition Exhibit 1
 22 from the deposition. We put another sticker on
 23 there, 37. And the particular page we were using has
 24 a Bates number, pursuant to the Court's procedure,
 25 which was 0008.

168

1 THE COURT: Sorry. 37 is just --
 2 MR. MACAYEAL: 37 is actually all the same
 3 document. They have already been admitted as Joint
 4 Exhibits. It's just that they have the deposition
 5 exhibit sticker on them to show that they were at the
 6 deposition. The contents are already in evidence,
 7 except for the markings which he made.
 8 THE COURT: A part of 37 is the quit claim
 9 deed?
 10 MR. MACAYEAL: The deed, the evaluation, and
 11 then a photo.
 12 THE COURT: What you said was part of the --
 13 there's no deposition testimony; it's just --
 14 MR. MACAYEAL: The deposition has also been
 15 marked, but this is the exhibit.
 16 THE COURT: Right. I apologize. Thank you
 17 very much for the clarification. This computer is
 18 slower than molasses in January. And if -- if the
 19 same exhibit has already been admitted, then I don't
 20 want to have duplication.
 21 MR. MACAYEAL: Well, it's not total duplication
 22 because there's markings from the deposition.
 23 THE COURT: But only on the map, correct?
 24 MR. MACAYEAL: It's just a map. That's all.
 25 THE COURT: Right. It's eight pages.

EXHIBIT F
TRIAL TESTIMONY OF JEFFREY MEMMER

In the Matter of:

Jeffrey Memmer, et al. v. USA

April 29, 2019

Trial

Vol. 1

Condensed Transcript with Word Index



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169

1 MR. MACAYEAL: Everything in 37 is already in
2 evidence.
3 THE COURT: Right.
4 MR. MACAYEAL: Except for the markings. I put
5 the markings up and I asked him, is this the same
6 thing as the one that's in evidence? And he said
7 yes.
8 THE COURT: Right. I understand that.
9 MR. MACAYEAL: So we just want the markings in
10 evidence.
11 THE COURT: That's fine. That's fine. Thank
12 you. (DX 37.0008 was admitted.)
13 MR. MACAYEAL: Again, it's DX 37.0008.
14 THE COURT: Right.
15 MS. MCCULLEY: Are you ready, Your Honor?
16 Plaintiffs would like to call Mr. Jeff Memmer.
17 MR. MEMMER: Supposed to swear in or something?
18 THE COURT: Just come right up here to the
19 witness box, Mr. Memmer. And if you would, raise
20 your right hand, please.
21 JEFFREY MEMMER,
22 THE WITNESS, HAVING BEEN DULY SWORN UPON HIS HONOR,
23 TESTIFIED AS FOLLOWS:
24 THE COURT: Thank you. Please be seated.
25 DIRECT EXAMINATION

170

1 BY MS. MCCULLEY:
2 Q Please state your name for the record.
3 A Jeffrey Memmer.
4 Q Mr. Memmer, tell me about your educational
5 background.
6 A I graduated high school. Then I started
7 farming.
8 Q Okay. And when did you begin farming?
9 A I graduated in 1973.
10 Q Okay. And where do you live?
11 A You want my address?
12 Q Uh-huh.
13 A My physical address is 7100 Wiggins Road,
14 Poseyville, Indiana.
15 Q Okay. And you have a family farm; is that
16 right?
17 A Correct.
18 Q And how long has it been in your family?
19 A I'm just thinking back. My great-grandfather
20 bought that farm, Mr. Bale.
21 Q So it's been in your family for a long time?
22 A Four generations.
23 Q And then did when did you acquire the
24 property?
25 A Like I said, you know, I graduated in 1973, and

171

1 I started working for my parents. We had a livestock and
2 grain farm. And after that, in 2006, I quit farming and
3 rented it out. My mother gave me like a living will. And
4 she passed in 2010. So then I inherited the farm.
5 Q Very good.
6 MS. MCCULLEY: May I approach, Your Honor?
7 THE COURT: Yes.
8 Q Mr. Memmer, I'm going to hand you what's been
9 marked as Joint Exhibit Number 11, and see if you recognize
10 that document.
11 A Okay. Yes.
12 Q And what is that document?
13 A That's where I acquired the farm.
14 Q So that's the deed basically to your property?
15 A Yes.
16 Q Okay. I'm going to hand you what's been marked
17 as Joint Exhibit Number 12. And have you seen that
18 document before?
19 A Yes.
20 Q Okay. Is that an assessor parcel report?
21 A Yes.
22 Q Very good.
23 Mr. Memmer, I'm going to hand you what's been
24 marked as 1D, and ask you if you recognize that picture?
25 A Okay. Appears to be the right-of-way.

172

1 Q On your property?
2 A Yes.
3 Q Okay. And now let me hand you Joint Exhibit
4 13. And is that your property that's outlined in yellow?
5 A The boundary is a little bit off. The west
6 side is off.
7 Q Okay.
8 A It's a little bit -- it's over here.
9 Q Oh. By, like, closer to the street?
10 A The boundary is right there.
11 Q Okay.
12 A There used to be a railroad right there, a
13 different railroad, and that used to be the boundary of the
14 railroad.
15 Q Mr. Memmer, did you reclaim that other railroad
16 on the other side?
17 A Yes.
18 Q Okay. So what kind of property is that? And I
19 mean, is it residential? Is it a farm?
20 A Farm. Farm ground.
21 Q Tillable agricultural land?
22 A Say it again.
23 Q Is it tillable agricultural land?
24 A Yes.
25 Q Describe the details of your farming process.

173

1 I know you rent it out now, but I mean, what's your typical
 2 farming process?
 3 A This farm has been in corn for the last
 4 probably ten years.
 5 Q Okay. And when would you plant the corn?
 6 A A good time is the middle of April.
 7 Q And then do you have to fertilize it?
 8 A Yes, we do.
 9 Q When do you typically harvest?
 10 A October 1st.
 11 Q Okay. Have you rented this farm to another
 12 entity?
 13 A Yes.
 14 Q And who would that be?
 15 A Pathway Farms.
 16 Q And did that start in 2013?
 17 A I think I started to rent -- I quit farming in
 18 2006.
 19 Q Did you rent it to anybody else?
 20 A Yes.
 21 Q And who would that have been?
 22 A Harold Bender Farms.
 23 Q Okay.
 24 A I think I rented it to Pathway in 2013.
 25 Q Okay. Tell me about the soil quality on this

174

1 farm. Is it good?
 2 A Very good.
 3 Q Okay. And so, how many bushels of corn would
 4 it typically produce?
 5 A I was riding on the combine last year. It's
 6 got a yield monitor on it. And it varied going through the
 7 field, but at one point it hit 300 bushel an acre.
 8 Q Is that a new technology?
 9 A Yes. When they're done with the farming, they
 10 can press a button and it'll tell them, you know, how many
 11 bushel the whole farm made. It'll give an average, how
 12 many acres that it covered.
 13 Q So do you remember what the yield was in 2011?
 14 If you do, you do. If you don't, you don't.
 15 A No, I don't.
 16 Q Have you guys removed any trees off that
 17 railroad right-of-way?
 18 A No.
 19 Q Do you spray it?
 20 A Yes, I have.
 21 Q Does the railroad take care of the right-of-way
 22 at all, maintain it at all?
 23 A No.
 24 Q Are the fields tiled and drained --
 25 A Yes.

175

1 Q -- adequately?
 2 According to your parcel, which side of the -- if
 3 I asked you that, I'm sorry. Where is the railroad
 4 corridor? North, south, east, west?
 5 A The one we're talking about is on the north
 6 side.
 7 Q Okay. If that railroad right-of-way was gone,
 8 would you have better access to your land?
 9 A Yes.
 10 Q Tell me about that.
 11 A There's a road up there, Water Tank Road.
 12 Just, you know, the farm would have access right there.
 13 They'd be able to haul the corn away or whatever you'd want
 14 to do with it.
 15 Q Mr. Memmer, was it your belief that, from
 16 your -- this is your family farm -- that when trains would
 17 stop running, that you would get your land back?
 18 A I wasn't sure.
 19 Q Pardon?
 20 A I wasn't sure. I didn't know.
 21 Q If you could reclaim it, would you reclaim
 22 it?
 23 A Yes.
 24 Q Okay. Let me ask you this: How much does your
 25 farm rent for?

176

1 A It's been going for about \$425 an acre per
 2 year.
 3 Q Were the tracks and ties pulled up on your
 4 property, on the railroad corridor?
 5 A Yes.
 6 Q Did they just leave the cross ties stacked on
 7 the property?
 8 A There's some up there right now, yes.
 9 Q Okay. And they're still there?
 10 A Yes, there's some of them up there.
 11 Q Okay. Are there -- let me just clarify. I'm
 12 going to ask you, is there any activity on that railroad
 13 corridor? And what I mean, like people walking on it,
 14 ATVs?
 15 A Yes.
 16 Q Like, what kind of activity is going on on that
 17 corridor?
 18 A Mostly four-wheelers.
 19 Q Do they leave the railroad corridor and get on
 20 your farm as well?
 21 A Yes.
 22 Q If you could reclaim that railroad right-of-way
 23 and exclude people from being on that right-of-way and
 24 getting off that right-of-way to your land, would you do
 25 that?

177

1 A Yes.
 2 Q So the land has value to you that's within the
 3 corridor; is that right?
 4 A Yes.
 5 Q What would you do to reclaim that land within
 6 the railroad corridor?
 7 A It's right there by the town, by the Water Tank
 8 Road. I would just -- there's always somebody needing
 9 fill. There's some overburden on it. I would just give it
 10 away. It may take a few years, but I'm sure that it would
 11 not be hard to do.
 12 Q Okay. If that railroad corridor was gone,
 13 would that farm be planted differently? It may or may not.
 14 A No. No. It's just right on the edge of the
 15 farm.
 16 Q If that right-of-way could be farmed, would you
 17 put crops on it?
 18 A Yes.
 19 Q Would that increase productivity of the farm?
 20 A Yes.
 21 Q Mr. Memmer, when we talked about this other
 22 right-of-way over here on the other side that you
 23 reclaimed, what did you do to reclaim that property, that
 24 railroad right-of-way?
 25 A There really wasn't much to do. There wasn't

178

1 any overburden there. It was just right on the edge of the
 2 farm again. And we just went right down the middle of the
 3 road bed. Mr. Harper took half, and we took half. That
 4 way, you know, we keep it clean, keep the weeds down. We
 5 just plowed around.
 6 Q Did you bulldoze it over?
 7 A Didn't need to.
 8 Q Was it flat?
 9 A There was a little bit of cinder there and
 10 stuff where they'd made the road bed, but I just took it
 11 and hauled it home and used in to make road.
 12 Q Okay. So do people use that abandoned railroad
 13 corridor that's been reclaimed?
 14 A No.
 15 Q Did you use it, the abandoned railroad corridor
 16 that you reclaimed?
 17 A We're farming it.
 18 Q You're planting crops on it?
 19 A Correct.
 20 Q Okay. Thank you, Mr. Memmer. That's all the
 21 questions I have for you today. You've got one more round
 22 here.
 23 A All right.
 24 CROSS-EXAMINATION
 25 BY MR. WEIGERT:

179

1 Q Good afternoon, Mr. Memmer.
 2 A Hi.
 3 Q Thank you for being here today. I appreciate
 4 your time. My name is David Weigert. I'm going to be
 5 asking you a few questions on behalf of the United States.
 6 A Okay.
 7 Q First, I'd like to clarify, talking about your
 8 property. I'm going to project up onto the wall there two
 9 different aerial photos. One is DX 35.0010, and the other
 10 is DX 11.0008.
 11 MR. WEIGERT: I'd like if, Your Honor, Ms.
 12 Gilbride could approach the witness and provide him
 13 with copies.
 14 THE COURT: Yes.
 15 BY MR. WEIGERT:
 16 Q So, Mr. Memmer, please take a moment to look at
 17 those two documents.
 18 Have you had a chance to review them?
 19 A Yeah.
 20 Q Let's talk about the one on the left. Do you
 21 recognize that one?
 22 A That's where I live.
 23 Q Okay. Is that the property that you were just
 24 talking about with Ms. McCulley?
 25 A Yes.

180

1 Q Okay. And do you recognize this aerial
 2 photograph on the right side there? It's also in your
 3 hand, if you can't see --
 4 A In the yellow, that's my -- that's my farm.
 5 Q That's your farm?
 6 A Yes.
 7 Q Okay. So let's focus on the property where the
 8 aerial photograph on the left here. I think -- I'll just
 9 represent that this is an aerial that was used in your
 10 deposition in May of 2018. Do you recall that? Do you
 11 recall being in a deposition?
 12 A Yes.
 13 Q And that was about a year ago and you were
 14 sworn in like you were here?
 15 A Yes.
 16 Q Okay. Now I'm referring to DX 35.0010, which
 17 is the one on the left here. And you see some red markings
 18 on that, on the left?
 19 A Yes.
 20 Q Did you make those markings yourself?
 21 A Yes, I did, I think.
 22 Q And what do they represent?
 23 A They asked me about my farm. And they had the
 24 boundary wrong on the west side. The boundary is where I
 25 marked red.

181

1 Q Okay. So the red line on the west side. Now,
2 just to orient us, the upper side in this photo is north;
3 is that correct?
4 A Correct.
5 Q And the side on the left is west. So you
6 corrected the boundary on the western side here using that
7 red line; is that right?
8 A Correct.
9 Q And the railroad corridor you were talking
10 about is on the north side; is that right? You can see
11 that in the aerial?
12 A The one we're talking about is on the north
13 side, yes.
14 Q And the old one, you said that you reclaimed it
15 on the western edge?
16 A On the west side.
17 Q It's actually outside the western edge of your
18 property; is that correct?
19 A No. That was the boundary.
20 Q It was the boundary?
21 A That was the western side, western boundary of
22 the home farm.
23 Q Is it your understanding that you own property
24 under that corridor or overlapping that corridor on the
25 west side or just abutting up against it?

182

1 A Well, I mean, it's my understanding, the way it
2 was explained to me, that when the track was laid that they
3 took an easement.
4 Q Yes. Now, let's be clear. We're talking about
5 now this whole corridor on the left side?
6 A On the west.
7 Q On the west side, correct.
8 Let's get a time frame here. How long ago was it
9 that that portion was reclaimed as farmland?
10 A That's been a long time. If I were to guess,
11 20 years ago. I'm just guessing.
12 Q Okay. You said in your deposition, yeah. And
13 so -- okay. Now, is this area shown on the parcel to the
14 right, on the aerial photos to the right, is that area in
15 that -- and now I'm referring to DX 11.0008. Is that area
16 depicted in the yellow, within that yellow area on the
17 aerial, is that shown on the aerial to the left there?
18 A I don't understand your question.
19 Q Okay. Is the area -- if you look up at the
20 very northwest side -- I'll use a pointer here -- there, is
21 that the same area that's shown here?
22 A No.
23 Q It's not? This is a completely separate
24 parcel; is that correct? Where is this parcel relative to
25 this, is my question? Where is the smaller parcel? Is

183

1 this a smaller parcel, the one on --
2 A No. That's part of the -- that's up in the
3 corner.
4 Q Maybe I should let the witness show me.
5 A The picture on the right appears, to me, to be
6 about right there.
7 Q Now, if you orient yourself with the roads up
8 on the right --
9 A If I might interrupt.
10 Q Sure.
11 A There's a pond right there by that house, and
12 that appears to be the pond right there.
13 Q I see.
14 A That's the way it appears to me.
15 Q Okay. I was trying to orient us here.
16 A You can even see it says Water Tank Road. And
17 that's Water Tank Road.
18 Q Okay. So the scales may be off here?
19 A Yes.
20 Q So let's refer to -- is this a smaller
21 property? Is DX 11.0008 a smaller property within the
22 yellow lines than the one at DX 35.0010 on the left
23 there?
24 A That piece there appears to be right there.
25 Should be right there.

184

1 Q Okay.
2 A I'll say it again: Right there is Water Tank
3 Road.
4 Q Uh-huh.
5 A There's Poseyville. And there's Water Tank
6 Road, and there's Poseyville.
7 Q Let's refer -- the property, that property that
8 is smaller, correct, the one on the right there, the one at
9 11.0008, do you know how big that area is?
10 A No, I don't.
11 Q Okay. Well, let's just focus on the one on the
12 left then.
13 A Yes.
14 Q Let's just do that. How many acres is that
15 property?
16 A 87 acres, I think.
17 Q I'm focusing on -- 87 acres. Thank you very
18 much.
19 You had talked about there appear to be some
20 structures on that property; is that correct?
21 A That's where I live, right there.
22 Q Your house is there?
23 A And we've got seven grain bins and two machine
24 sheds.
25 Q And a couple of outbuildings; is that right?

185

1 A Yes.
 2 Q And you live in that house year-round; is that
 3 correct?
 4 A Correct.
 5 Q And the property was first purchased by your
 6 great-grandfather, Mr. Bale; is that right?
 7 A I believe that would be correct.
 8 Q And it was handed down generation by
 9 generation?
 10 A Yes.
 11 Q And there was a sale each time - is that
 12 correct - until it made it to your parents?
 13 A My mother and father said they bought it from
 14 their parents.
 15 Q Okay. And it's your understanding that their
 16 purchase price was \$300 an acre, right?
 17 A That's what I was told, yes.
 18 Q And is it your parents bought that property
 19 from your mother's parents; is that correct?
 20 A Correct.
 21 Q But you didn't pay for your property, right?
 22 A I inherited it.
 23 Q You inherited half an interest when your father
 24 passed away in 1999; is that correct?
 25 A Correct.

186

1 Q And you inherited the other half in 2011 when
 2 your mother passed and her estate was settled in that year,
 3 right?
 4 A It was settled in 2011.
 5 Q Right. She passed in 2010?
 6 A Correct.
 7 Q Settled in 2011?
 8 A I believe that to be right, yes.
 9 Q And your parents farmed the property for the
 10 time they owned it, right?
 11 A Yes.
 12 Q They did farm it. And at the time you acquired
 13 the property through inheritance, you didn't have any
 14 understanding about who owned the railroad corridor on the
 15 northern side of your property, did you?
 16 A No.
 17 Q You said you started farming the property in
 18 1973; is that right?
 19 A No. I worked for my parents when I graduated
 20 high school.
 21 Q Oh, okay. So you graduated high school in
 22 1973?
 23 A Correct. And I just started working for
 24 them.
 25 Q I see. And did your work involve farming this

187

1 property?
 2 A Correct. We had a grain and livestock farm.
 3 Q I see. Thank you. And that started in 1973?
 4 A I graduated, yes.
 5 Q And is it right to say that you farmed it then
 6 until 2006?
 7 A Yes.
 8 Q And as you were discussing before -- we don't
 9 have to rehash, but just to get a timeline clear -- in
 10 2006, you leased the property to Bob and Chris Bender; is
 11 that right?
 12 A I think so. I'm not exactly sure of the date.
 13 That was the approximate date.
 14 Q Of 2006?
 15 A Yes.
 16 Q And they held that lease until through 2012; is
 17 that correct?
 18 A Their last year was 2012.
 19 Q Okay. And that was an informal lease; is that
 20 right?
 21 A No. We had a written -- it was just -- it was
 22 formal, but we had something written down. It never was
 23 notarized.
 24 Q You don't have a copy of that?
 25 A No, I don't.

188

1 Q Then after that lease, you leased the property
 2 again, same property, to Pathway Family Farms; is that
 3 right?
 4 A Correct.
 5 Q And that lease started in 2013, right?
 6 A Correct.
 7 Q Is it correct that from 2013 to 2016 Pathway
 8 leased that property but without a written lease; is that
 9 right?
 10 A Yes, we had a lease.
 11 Q You did have a written lease?
 12 A Yes.
 13 Q You just don't have that today; is that
 14 right?
 15 A I didn't keep them, no.
 16 Q And after that, you continued -- there was
 17 another lease agreement dated 2017, right, also with
 18 Pathway; is that right?
 19 A Yes.
 20 Q And that was called a Farmland Lease Agreement;
 21 is that right?
 22 A Yes.
 23 Q Okay. I'm going to show you an exhibit, DX
 24 11.0007.
 25 Mr. Memmer, have you had a chance to review

189

1 that?
 2 A Yes.
 3 Q Do you recognize that document?
 4 A Yes.
 5 Q What is that?
 6 A That's the agreement that we had.
 7 Q Okay. Between you and Pathway?
 8 A Correct.
 9 Q Okay. And, now, if you look at DX 11.0007,
 10 which is that first page of that document. That document
 11 has two pages; is that right? Does it have a page on the
 12 back there, DX 11.0008? Okay. Never mind. Excuse me.
 13 Let's just focus on that one, 0007. If you look at item
 14 number 9 there, the cash rent for that property at that
 15 time was \$450 per tillable acre; is that right?
 16 A Correct.
 17 Q For a total of \$76,635; is that right?
 18 A Correct.
 19 Q And it's your recollection that rental price
 20 was very close to the rental price prior to that, for the
 21 2013 to 2016 period?
 22 A Yes.
 23 Q And the condition of that property is very
 24 similar today as it was then, right?
 25 A Yes.

190

1 Q You never attempted to sell that property, you
 2 said?
 3 A No.
 4 Q And you have no plans to sell it?
 5 A No.
 6 Q Now, the railroad corridor at issue in this
 7 case runs along the northern edge of your property. We had
 8 seen that in that last photograph. Let's just put up DX
 9 35.0010.
 10 Now, you said the rails were taken up and that was
 11 several years ago; is that right?
 12 A Yes.
 13 Q And that was after you inherited the property,
 14 right, that the rails were taken up?
 15 A I think they took it up about 2010.
 16 Q About 2010, to your recollection? Could it
 17 have been a little bit later? Could it have been 2012?
 18 A It was approximately 2010, '11.
 19 Q Okay. But the ties were left behind, right?
 20 A There's some up there right now.
 21 Q I'm taking you back to that time. In your
 22 recollection, were all the ties left behind at that time?
 23 A No, I don't think so.
 24 Q Okay. Were most of the ties? I don't know if
 25 you can tell us that today.

191

1 A I'd say most are gone, yes.
 2 Q I'm sorry. But taking you back to the time the
 3 rails were taken up, would you say that most of the ties
 4 were left behind in the right-of-way; is that fair to
 5 say?
 6 A They took it all up about the same time.
 7 Q And they took away the metal, they took away
 8 the rails; is that correct?
 9 A Yes. I mean, that's valuable, I would
 10 assume.
 11 Q But they left the ties behind, right?
 12 A There's some up there right now.
 13 Q Okay. You don't have to cross that railroad
 14 corridor on the northern edge of your property to reach
 15 your property, do you?
 16 A No.
 17 Q And other than the mowing or the weeding, you
 18 haven't used that property for farming or any other
 19 reason?
 20 A Say it again.
 21 Q Other than mowing or weeding, you haven't used
 22 that railroad corridor for farming or any other purpose?
 23 A No.
 24 MS. MCCULLEY: Your Honor, I'm going to object
 25 to this line of questioning because they can't use it

192

1 legally. So to ask him if they're using it before or
 2 after, it's a legal issue for Your Honor to decide.
 3 THE COURT: It's leased property, correct?
 4 MR. WEIGERT: It's a factual question, and it
 5 is leased, yes.
 6 THE COURT: It is leased, so.
 7 MR. WEIGERT: I can ask whether his lessee, if
 8 that would help.
 9 THE COURT: If you intend to argue that the
 10 plaintiff hasn't been putting the soil to a good use
 11 himself, it would really be a facetious argument and
 12 somewhat disingenuous. That's not your intent, but I
 13 just couldn't understand the line of questioning when
 14 one of the first things Mr. Memmer testified to is
 15 that the property is leased. And since it's a farm,
 16 you may want to find out what the lessee is doing.
 17 MR. WEIGERT: Thank you, Your Honor. You're
 18 absolutely right. Not trying to get any arguments at
 19 all. Trying to get out the facts here, and I should
 20 have said lessee. Thank you for that.
 21 BY MR. WEIGERT:
 22 Q So I ask you, Mr. Memmer, other than mowing and
 23 weeding, to your knowledge has your lessee used that
 24 corridor for farming or any other purposes?
 25 A No.

193

1 **Q** Prior to 2006, when you were doing farming, did
 2 you use it for any purposes?
 3 **A** No. It was a railroad, I mean.
 4 **Q** It's your understanding it was railroad
 5 property?
 6 **A** Correct.
 7 **Q** And you were prevented from using it for that
 8 reason?
 9 **A** (No audible answer.)
 10 **Q** Now, you mentioned -- let's see. So throughout
 11 this time that your property's been farmed both by you and
 12 by your lessees, neither your lessees nor you have
 13 reclaimed that corridor for farm use, right?
 14 **A** The railroad, no.
 15 **Q** I'm talking about that one on the northern
 16 side. And you've not reclaimed it because the ownership
 17 status has been uncertain or because it was in railroad
 18 hands; is that right?
 19 **A** It was questionable, the ownership.
 20 **Q** Okay. Now, I think you talked a little bit
 21 before about what would be necessary if you were to have
 22 the opportunity to reclaim that railroad corridor. Let me
 23 ask you a couple of questions about that, if I could. You
 24 said you tiled or that your farm is tiled; is that right?
 25 **A** Most farmers will lay tile on their wetter

194

1 parts. It'll help drain. Like now, it's a wet period and
 2 they lay tile to --
 3 **Q** And that's what you did on your farm?
 4 **A** Yes.
 5 **Q** Or your tenant did?
 6 **A** Yes.
 7 **Q** Okay. And if you were to reclaim that railroad
 8 corridor for farm use, would you need to tile it?
 9 **A** Well, there's tile nearby. Tile will work, you
 10 know, it'll draw 60 foot either way.
 11 **Q** Okay. And you said there's an overburden on
 12 there you need to remove?
 13 **A** Yes.
 14 **Q** Is that right? And you said that might take a
 15 few years to remove that; is that right?
 16 **A** I would just, if I were to have that
 17 right-of-way, I would just give it away, that overburden.
 18 **Q** That would take some time, however; is that
 19 right?
 20 **A** Yes.
 21 **Q** I think you said a few years, right?
 22 **A** Yes.
 23 **MR. WEIGERT:** No further questions.
 24 My colleague is pointing out, if Your
 25 Honor would indulge us, we would like to move to

195

1 enter the exhibits that were shown by projection, and
 2 that would be --
 3 **THE COURT:** If you would give me the exact -- I
 4 think I know what they are, but I don't want to step
 5 on your toes.
 6 **MR. WEIGERT:** To be absolutely clear, one was
 7 DX 35.0010. The other was DX 11.0008.
 8 (Defendant's Exhibits Numbers 35.0010 and
 9 11.0008 were admitted into evidence.)
 10 **MS. MCCULLEY:** No objection, Your Honor.
 11 **THE COURT:** Admitted. Both.
 12 **MR. WEIGERT:** Thank you, Your Honor.
 13 Oh, Your Honor, I'm sorry. There is a third.
 14 It's DX 11.0007, and that is entitled Farmland Lease
 15 Agreement.
 16 **THE COURT:** Any objection?
 17 **MS. MCCULLEY:** No objection, Your Honor.
 18 (Defendant's Exhibit Number 11.0007 was
 19 admitted into evidence.)
 20 **THE COURT:** Admitted.
 21 **MR. WEIGERT:** Thank you.
 22 **REDIRECT EXAMINATION**
 23 **BY MS. MCCULLEY:**
 24 **Q** Mr. Memmer, do you remember the last time
 25 trains ran on that right-of-way?

196

1 **A** I think it was around 2004, they quit
 2 running.
 3 **Q** And then you were asked about if you were to
 4 reclaim that railroad right-of-way, would it take years to
 5 reclaim it or years to give away the overburden?
 6 **A** I mean it would take a little time. I don't
 7 know how long it would take. But, I mean, it would take --
 8 I'm assuming in a year or two it would be reclaimed.
 9 **Q** All right. Very good. Thank you, Mr. Memmer.
 10 **THE COURT:** Is there any cross?
 11 **MR. WEIGERT:** No, thank you.
 12 **THE COURT:** Will you be re-calling this witness
 13 for anything?
 14 **MS. MCCULLEY:** No, Your Honor.
 15 **THE COURT:** Thank you for coming in, Mr.
 16 Memmer.
 17 **THE WITNESS:** Thank you.
 18 **MR. STEWART:** Your Honor, our next witness is
 19 not here yet. Supposed to be here at 3:15. Can we
 20 take a ten-minute break or something until he gets
 21 here?
 22 **THE COURT:** In about two moments. I have on my
 23 list that plaintiffs examined one of the witnesses, I
 24 think it was Mr. Memmer, but I can't swear to that,
 25 1D. Do you intend to introduce that into evidence?

EXHIBIT G

TRIAL TESTIMONY OF PATRICK SIEBERT/HALPENY

In the Matter of:

Jeffrey Memmer, et al. v. USA

April 30, 2019

Trial

Vol. 2

Condensed Transcript with Word Index



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201

1 THE CLERK: All rise. United States Court of
 2 Federal Claims is back in session.
 3 THE COURT: Good afternoon, everyone. Please
 4 be seated. We're back on the record.
 5 MS. MCCULLEY: Ready?
 6 THE COURT: Ready.
 7 MS. MCCULLEY: Plaintiffs call Patrick Siebert.
 8 THE COURT: Good afternoon. If you'd raise
 9 your right hand.
 10 PATRICK SIEBERT,
 11 THE WITNESS, HAVING BEEN DULY SWORN UPON HIS HONOR,
 12 TESTIFIED AS FOLLOWS:
 13 THE COURT: Thank you. Please be seated.
 14 DIRECT EXAMINATION
 15 BY MS. MCCULLEY:
 16 Q And please state your name for the record.
 17 A Patrick Siebert.
 18 Q Siebert. I'm sorry, Mr. Siebert. Tell me
 19 about your educational background.
 20 A Just a high school education. And like I said,
 21 I was also a union carpenter for 30-something years.
 22 Retired union carpenter and part-time farmer.
 23 Q And where do you live?
 24 A 7100 St. Wendel Cynthiana Road, Poseyville,
 25 Indiana.

202

1 Q Do you live on the farm property?
 2 A Yes.
 3 Q Do you own the property that we're talking
 4 about?
 5 A No, I do not.
 6 Q Okay. And who owns that property?
 7 A Owen Halpeny.
 8 Q And where does he live?
 9 A In North Carolina.
 10 Q How many acres is the farm?
 11 A That he owns, is 35 acres.
 12 Q Okay. And how long has your family farmed this
 13 land?
 14 A Well, I'm almost 60 years old; and as far back
 15 as I can remember, we farmed it. My dad farmed it and his
 16 uncle farmed it before him.
 17 Q I'm curious, have you ever met Owen Halpeny?
 18 A No. Owen Halpeny, Sr., I did, years ago.
 19 Q And do you lease the property?
 20 A yes.
 21 Q What's your lease? How much do you lease it
 22 for?
 23 A \$200 an acre.
 24 Q Is Mr. Halpeny a family friend of your family?
 25 Owen, Sr., were they family friends?

203

1 A I don't know how they got started. That was
 2 before my time.
 3 Q Okay. Prior to your farming it, when your
 4 brother and dad farmed it, did your brother and dad farm it
 5 before you did?
 6 A Yes.
 7 Q Okay. Did they do it on a crop share basis?
 8 A Yes.
 9 Q Do you remember how much -- what the
 10 percentages were for Halpeny and Siebert?
 11 A To my knowledge, it was three-fifths,
 12 two-fifths.
 13 Q Okay. And your brother and dad getting the
 14 three-fifths?
 15 A Right.
 16 MS. MCCULLEY: My I approach, Your Honor?
 17 THE COURT: Yes.
 18 Q I'm going to show you what we have marked as
 19 Joint Exhibit Number 20. Have you seen this document
 20 before?
 21 A No, I have not.
 22 Q Okay. Did you look it over and does it look
 23 like a deed to Mr. Halpeny?
 24 A Right.
 25 Q For his property?

204

1 A Yes.
 2 Q I'm going to hand you what's been marked as
 3 Joint Exhibit 21. And have you seen this document before?
 4 A Not to my knowledge, no.
 5 Q Okay. I'm going to hand you what we've marked
 6 as Plaintiffs' Exhibit 4. And do you recognize that
 7 picture?
 8 A Yeah. It looks like the rubbish along the
 9 railroad track.
 10 Q On the property that you farm, on the Halpeny
 11 Farm?
 12 MR. MACAYEAL: Which picture is that?
 13 MS. MCCULLEY: This is 4D.
 14 MR. MACAYEAL: 4D.
 15 BY MS. MCCULLEY:
 16 Q And now I'm going to hand you what's been
 17 marked as Joint Exhibit 22. Does that look like the farm?
 18 A Yes.
 19 Q What's this little piece over here?
 20 A I know at one time there used to be some trees
 21 there. Mom and Dad talked about it when they cut them
 22 down, that it was actually part of the property. It's on
 23 the other side of the road. It's just a little triangle.
 24 Q Is it a little economic remnant? Is it used
 25 for anything?

205

- 1 A Well, I'm sure the people across the road
2 probably farm that little piece. I don't know how much it
3 is, actually.
- 4 Q Okay. So this is farmland, correct?
- 5 A Yes.
- 6 Q And what kind of crops do you plant?
- 7 A Corn and soybeans.
- 8 Q And do you do that on a yearly basis?
- 9 A Rotate, yeah. Usually one year and then next
10 year will be different.
- 11 Q When do you plant the corn?
- 12 A Well, I would hope it would have been in by
13 now, but the rain -- normally try to get in April to May,
14 middle of May, something like that.
- 15 Q And you haven't been able to plant yet this
16 year?
- 17 A No.
- 18 Q When do you typically harvest corn?
- 19 A Usually around middle of September.
- 20 Q Okay. How about soybeans; when do you
21 typically plant soybeans?
- 22 A Just shortly after. Same time. First of
23 May.
- 24 Q And when do you typically harvest soybeans?
- 25 A Probably more like the end of September, first

206

- 1 of October.
- 2 Q What about your productivity; how many bushels
3 per acre is typical for -- I'm going to call it your farm
4 because it's easier to call it your farm.
- 5 A Right. This acreage here, corn, we're getting
6 a little over 200 bushel an acre; beans, anywhere from 60
7 to 70, maybe 75 on a really, really good year.
- 8 Q Do you plant wheat?
- 9 A No, we do not.
- 10 Q Did you used to plant wheat?
- 11 A Yes. My dad and brother did years ago.
- 12 Q Okay. What's your, if you know, your per acre
13 income after, you know, your rent, etc., etc.?
- 14 A You talking about profit or are you talking --
- 15 Q Profit.
- 16 A On a good year, depending on the price, maybe
17 200 an acre.
- 18 Q Okay. Have you made any improvements to the
19 property?
- 20 A Well, there was tile put in it years ago. Tile
21 and some terraces put in.
- 22 Q Okay. And what was the purpose of putting tile
23 and terraces in?
- 24 A Well, to drain, for field drainage. And also
25 the terraces on the hillside, it keeps it from washing.

207

- 1 Q And on the property, where is the railroad
2 corridor? I mean, like, is it south, north, east, west?
- 3 A It's on the south side.
- 4 Q The south side, okay.
- 5 Explain the access you have over the railroad
6 right-of-way and where it's located, your access.
- 7 A To the railroad or to the field itself?
- 8 Q Across the -- to get across the railroad
9 right-of-way for your fields.
- 10 A We don't cross the right-of-way to get to the
11 fields. We've actually got a driveway off the county road
12 there that we use to get in.
- 13 Q Can you use the railroad right-of-way to spray
14 for weeds?
- 15 A Yes, we could. And it's something that's a
16 problem, trying to keep all that stuff down every year.
- 17 Q Okay. What's the topography of the corridor?
18 Is it raised? Is it even?
- 19 A On this property here, it's actually raised.
- 20 Q Okay. Is the railroad bed built up?
- 21 A On most of it. Now, the upper end, like the
22 east end of it, it's pretty much level for about 200 feet
23 or so.
- 24 Q Do you remember when's the last time trains
25 ran?

208

- 1 A No, I do not.
- 2 Q Has it been a long time?
- 3 A It's been a long time.
- 4 Q Okay. Do you remember how often trains would
5 go by?
- 6 A Back then, when they quit, maybe once a week,
7 two times a week at the most.
- 8 Q Do you remember when the rails and cross ties
9 were pulled up?
- 10 A I can't say for sure, no.
- 11 Q Has it been seven years, eight years ago?
- 12 A I'd say seven to ten, something like that,
13 yeah.
- 14 Q Okay. And the cross ties, did they leave the
15 cross ties on your property, on the right-of-way?
- 16 A Yes.
- 17 Q Are they just piled?
- 18 A Yes. Some piled. Some just throwed on the
19 bank haphazardly, you know.
- 20 Q And you haven't burned them or anything?
- 21 A No.
- 22 Q All right. Is there any activity -- well, do
23 the cross ties interfere with farming operations?
- 24 A Not right now, no, unless kids get underneath
25 there, playing around. Sometimes they'll throw some out in

209

1 the field. I don't know what they're doing, but...

2 **Q Okay. And is there activity on the corridor?**

3 A Now and then you'll see four-wheelers or

4 side-by-sides driving down through there.

5 **Q Do people hunt on the corridor?**

6 A Yeah, I think so.

7 **Q Okay. And is the corridor maintained at all by**

8 **the railroad?**

9 A No.

10 **Q And so do you spray for weeds, to keep the**

11 **weeds off your fields?**

12 A Yes, we do.

13 **Q Why is that important?**

14 A Well, if you don't, some of these weeds will

15 have almost a million seeds. If you don't, you're just

16 hurting yourself for the next year or years to come.

17 **Q So do you have privacy concerns about the**

18 **railroad right-of-way and people trespassing on the**

19 **railroad right-of-way?**

20 A If it was to go to a bike path or something,

21 yes, definitely. We don't want a lot of traffic out there.

22 Just more trash, more everything.

23 **Q Do you notice trash on the right-of-way now?**

24 A It's hard to say whether it comes from there or

25 from the road. You know, people just throw stuff out all

210

1 the time.

2 **Q What road are you close to?**

3 A St. Wendel Cynthiana Road.

4 **Q Is that kind of a busy street?**

5 A It's a county road. Yeah, it's got quite a bit

6 of traffic on it.

7 **Q Okay. Regarding that railroad right-of-way and**

8 **people having access to it and being on the railroad**

9 **right-of-way, do you have concerns about theft?**

10 A Not for us. We don't leave anything down

11 there. We don't park anything down there.

12 **Q Would you want a trail on that railroad**

13 **right-of-way?**

14 A No, I would not.

15 **Q If you were able to reclaim that railroad**

16 **right-of-way, would you do it?**

17 A Yes.

18 **Q And would that allow you to plant additional**

19 **crops?**

20 A Depending on where the property line is. I

21 don't know whether it runs down the middle of the track or

22 where, but yeah.

23 **Q And would you have better access to your farm**

24 **by being able to travel on the right-of-way?**

25 A Yes.

211

1 **Q What would you do to reclaim that**

2 **right-of-way?**

3 A Well, first, I guess you'd have to get rid of

4 the cross ties and, you know, dig the gravel out and cut

5 down all the trees that are left behind, the brush and

6 trees. That would be the first steps.

7 **Q Have you cut down any trees?**

8 A Yeah.

9 **Q You have? And is that because the railroad is**

10 **not maintaining it anymore?**

11 A Right. If you don't cut them down, they're

12 laying out in the field and just...

13 **Q So let me ask you this: Does the land within**

14 **that former railroad corridor have value to you?**

15 A Yeah, I would think so.

16 **Q If you could farm it?**

17 A Right.

18 **Q Have you heard that the railroad wants the**

19 **landowners to buy the land back?**

20 A I have heard that, yes.

21 MS. MCCULLEY: I have no further questions,

22 Your Honor. Thank you.

23 THE COURT: Have you had problems on your

24 property with either ATVs or other off-the-road

25 vehicles using the railroad corridor or the old

212

1 railroad line?

2 THE WITNESS: Well, they go through, yeah.

3 Yeah. I don't know. You know, if you farmed it,

4 they probably wouldn't. I say one thing, they don't

5 get out in the fields, so...

6 THE COURT: That's good. Thank you.

7 CROSS-EXAMINATION

8 BY MR. MACAYEAL:

9 **Q Mr. Siebert, Jamie MacAyeal. I'm here for the**

10 **United States. I'd like to ask a few questions.**

11 **I'd like to direct your attention to the aerial,**

12 **JX 22. We'll put that up on the wall for anybody else who**

13 **wants to follow, but I'm directing you to the exhibit**

14 **before you. Let me direct your attention to -- you talked**

15 **about the triangular piece of property.**

16 A Yes.

17 **Q Now, is there a road between the larger parcel**

18 **and that little bitty triangle?**

19 A Right.

20 **Q And at that particular location where the road**

21 **is, are there still railroad ties? Excuse me. Not**

22 **railroad ties. Rails?**

23 A Until last week, there was. They just tore

24 them out last week. The county is getting ready to repave

25 the road, so they tore it out.

213

1 Q Thank you.
 2 Now, you started leasing the property in 2016,
 3 correct?
 4 A Right.
 5 Q And that's an oral lease?
 6 A Yes.
 7 Q You don't own the property, correct?
 8 A No.
 9 Q Mr. Halpeny owns the property?
 10 A Right.
 11 Q And the only communications you have with him
 12 are just to send him rent checks, correct?
 13 A Right.
 14 MR. MACAYEAL: No further questions, Your
 15 Honor.
 16 MS. MCCULLEY: No questions, Your Honor.
 17 THE COURT: And will the witness be recalled?
 18 MS. MCCULLEY: No, Your Honor. But I'd like to
 19 enter into evidence Plaintiffs' Exhibit 4D. And we
 20 already have these in; Joint Exhibits 20, 21, and 22.
 21 THE COURT: They've already been admitted, so
 22 it's just Exhibit --
 23 MS. MCCULLEY: 4D.
 24 MR. MACAYEAL: No objection, Your Honor.
 25 THE COURT: Admitted.

214

1 (Plaintiffs' Exhibit 4D admitted into
 2 evidence.)
 3 MS. MCCULLEY: Thank you, Your Honor.
 4 THE COURT: You're excused. Thank you.
 5 THE WITNESS: Thank you.
 6 MS. MCCULLEY: Your Honor, I don't think that
 7 we have any more witnesses for today. We have three
 8 more fact witnesses for tomorrow and then expect for
 9 Mr. Matthews to go on after those three witnesses.
 10 THE COURT: Very good. Before we adjourn for
 11 the evening, are there any housekeeping matters for
 12 the Plaintiff?
 13 MS. MCCULLEY: No, Your Honor, not that I can
 14 think of.
 15 THE COURT: Are there any housekeeping matters
 16 for the United States?
 17 MR. PINKSTON: Yes, Your Honor. We were
 18 wondering if the trial date for next week has been
 19 set for the folks in Peoria?
 20 THE COURT: We do have the -- we actually do
 21 have the courthouse. Are the Plaintiffs available on
 22 the -- we talked about the 7th or the 8th.
 23 MR. PINKSTON: We are. We are.
 24 THE COURT: Very good. And the witnesses?
 25 MR. PINKSTON: I haven't heard back from the

215

1 witnesses.
 2 THE COURT: I'm assuming if they're available,
 3 your witnesses are ready to go?
 4 MS. MCCULLEY: The only issue might be Mr.
 5 LaKemper. I have heard that his -- I know that he's
 6 got some health issues. And so that might, you know,
 7 create a problem. But otherwise, we'll be good to
 8 go.
 9 THE COURT: Well, since there's only two
 10 witnesses, as I recall, anyway; and Mr. LaKemper is
 11 one of two, is he now unavailable for health reasons?
 12 Have you all discussed this?
 13 MR. STEWART: I can speak for the plaintiffs,
 14 Your Honor. We did not discuss it, but we did get an
 15 email on Thursday or Friday from Mr. LaKemper's
 16 lawyer. His name escapes me at the moment. He was
 17 on the phone last week during the telephone
 18 conference. And he simply sent an email. I believe
 19 it said that Mr. Cullen would be available, but Mr.
 20 LaKemper was either in the hospital or had some
 21 medical tests. I thought he said he would get back
 22 to us, but we have not heard anything yet.
 23 MR. MACAYEAL: That's my understanding as well.
 24 We don't know for sure. We know there may be some
 25 health issues, but we don't know. We need to hear

216

1 from counsel.
 2 THE COURT: For now we will stay firm with the
 3 7th. And if we get one of the two, if we have to
 4 come back or return to Peoria, we'll do so, but I
 5 hope that won't be necessary. Perhaps we could even
 6 do his testimony via conferencing, video
 7 conferencing. I always prefer to see someone rather
 8 than video conferencing, but it looks like we may.
 9 MS. MCCULLEY: Yes, Your Honor. This is the
 10 email from Mr. LaKemper's attorney. This confirms
 11 Shane Cullen is available. He said Dan LaKemper had
 12 set aside time as well. But to be transparent, Mr.
 13 LaKemper is battling health issues and that could be
 14 a factor. He's going to the doctor Monday morning
 15 and they'll know more then, so.
 16 THE COURT: All right. We are on for the 7th.
 17 We will have at least one witness. If perhaps
 18 counsel can talk to see if we can resolve the issue
 19 with regards to Mr. LaKemper, if we can either narrow
 20 the scope of the testimony if he's in and out of the
 21 hospital. It sounds like this is serious. And I
 22 don't want to bring someone into court unnecessarily.
 23 It's one thing if someone's able-bodied. If they're
 24 sick, I don't want to subject someone who is ailing
 25 to the pressures of a trial.

EXHIBIT H

TRIAL TESTIMONY OF GILBERT EFFINGER

In the Matter of:

Jeffrey Memmer, et al. v. USA

April 29, 2019

Trial

Vol. 1

Condensed Transcript with Word Index



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49

1 is minor.

2 Another factor is the duration of the
3 taking. First, there can be no duration because
4 there was no delay in reversion of the easement here,
5 since there was no event which would have triggered
6 reversion under federal law or state law. Plaintiffs
7 have claimed that there was a permanent taking, or a
8 temporary taking, the duration of which was either
9 the pendency of the NITU before it was terminated,
10 approximately two and a half years, or the time
11 period between the issuance of the NITU and the date
12 of the trial. In the summary judgment order, the
13 Court held that the duration of the taking, under the
14 Ladd theory, would be the period of the pendency of
15 the NITU, from May 23, 2011 to November 8, 2013, the
16 date the NITU expired.

17 Assuming there was a temporary taking,
18 the experts will testify that the proper method of
19 determining compensation is to estimate the rental
20 value of the portion of the property subject to the
21 easement for the period of time involved. We will
22 present expert testimony that there was no damage
23 because in the context of this case, the affected
24 areas had no rental value, and therefore there was no
25 just compensation required. We will also indicate

50

1 problems with the appraisal reports of plaintiffs'
2 experts.

3 There could be no permanent taking here.
4 As we will show, no event has happened that would
5 initiate a reversion of the railroad easements to
6 plaintiffs. Plaintiffs have no more right to
7 reversion at this time than they did the day before
8 the NITU, or before that.

9 The facts of this case are somewhat
10 unique. A permanent taking could conceivably result
11 when a trail agreement is reached and a trail
12 established, such that there is a permanent delay in
13 reversion of the easement despite cessation of the
14 railroad use. Some might argue that there could be
15 temporary taking where there is a period of time for
16 negotiation of a trail agreement and then termination
17 of the NITU followed by abandonment of the rail line
18 by the railroad. In contrast, here there was no
19 delay in reversion to the easement of the plaintiff
20 because there has never been an abandonment of the
21 rail line by Indiana Southwestern, either through the
22 federal process or pursuant to state law.

23 The underlying logic of the
24 rails-to-trails takings case is that a delay or
25 complete blocking of reversion of easements to the

51

1 property owners constitutes a taking. Here, that
2 essential predicate is missing. Nothing has happened
3 to trigger the reversion in the first place. There
4 is therefore no liability for a taking in this case.
5 And even if causation did exist, application of the
6 Arkansas Game and Fish factors leads to the
7 conclusion that there was no taking.

8 Thank you, Your Honor.

9 MR. HOUSKE: Ready to call our first witness,
10 Your Honor.

11 MS. MCCULLEY: Thank you, Your Honor. We're
12 going to call Gilbert Effinger.

13 THE COURT: Thank you.

14 MR. EFFINGER: Morning. Morning, everybody.

15 THE COURT: Good morning. Would you raise your
16 right hand, please?

17 GILBERT EFFINGER,

18 THE WITNESS, HAVING BEEN DULY SWORN UPON HIS HONOR,
19 TESTIFIED AS FOLLOWS:

20 THE COURT: Please be seated. There should be
21 a bottle of water there for you.

22 DIRECT EXAMINATION

23 BY MS. MCCULLEY:

24 **Q Please state your name for the record.**

25 A Gilbert Joseph Effinger.

52

1 **Q All right. And, Mr. Effinger, tell me about**
2 **your background, like maybe your educational background or**
3 **historical background here.**

4 A I grew up in Posey County. Went to St. Wendel
5 grade school for eight years; went to Mater Dei one year
6 and then three years at North Posey because transportation
7 was bad for me to get to school at Mater Dei.

8 And I went to the military in 1968. Spent 19
9 months in Germany. And I had relatives over there in
10 Europe. Stayed a few months with my family over there, got
11 to know them. I came home, went to work at Whirlpool and
12 many other places. I worked there six years, laid off all
13 the time. Finally got on at Vectren. It was SIGCORP at
14 the time; it's Vectren now. I worked for the power company
15 for almost 38 years and I retired two years ago next month.

16 **Q Very good.**

17 A That's about it. I'm 70 years old.

18 **Q All right. So tell me about the property that**
19 **is at issue in this case that's next to the rail corridor.**

20 A It's property been in the family for well over
21 a hundred years. It's been in the Effinger family for well
22 over a hundred years. The property that I inherited from
23 my dad, it's right at 44 acres. It's on the west side of
24 Fisher Road. And the railroad runs on the border of it to
25 another property on the other side. I don't even know who

53

owns that other property over there. But it's between two different properties. And that property means a lot to me because it is from the family. I've had offers to sell half of that property there for a lot of money, and I won't do it because it is property that's inherited; you know, it's family. Been there for so many years. I won't give it up. I could use the money, but I don't need that money for that reason. You know what I'm saying?

MS. MCCULLEY: Your Honor, may I approach?

THE COURT: Yes.

Q Mr. Effinger, I'm going to hand you what we've marked as Joint Exhibit 29.

A I've lost my glasses.

Q You lost your glasses?

MR. STEWART: Here they are.

THE WITNESS: Thank you.

THE COURT: Thank you.

BY MS. MCCULLEY:

Q Do you recognize that deed?

A Yes.

Q Is that the deed to your property?

A Yes, it is.

Q Is that the deed that you inherited the property from your father?

A Yes.

54

Q Okay. 2006?

A Yeah. I have a bad memory. But if I hadn't been going through some papers, I wouldn't have remembered. I don't know if anybody else has memory problems.

Q So, just to be clear, you inherited the property from your father in 2006?

A Yeah. Right.

Q Okay. You can read that better than I can.

A Says January 31st, 2006.

Q I'm going to handed you what's been marked as Joint Exhibit Number 30. And do you recognize that document?

THE COURT: I do have electronic copies.

MS. MCCULLEY: You do? Okay.

THE COURT: I'm going to hand them back. Thank you so much.

MR. MACAYEAL: We have those as well.

A Yeah.

Q Do you recognize that?

A Yeah. That's right.

Q Is that the appraiser parcel report for your property?

A Yes.

Q Now, I want to go over some of the particulars about your property. So I'm going to hand you what we have

55

marked as Joint Exhibit Number 31 and see if you recognize that.

MR. MCCULLEY: Do you guys want these?

MR. PINKSTON: I'll take it.

A Yes, I do.

Q All right. What is that?

A That's the property that's -- where it comes off Archer Road, there's a cell tower there. And then the other two places that are kind of yellow, light colored, those are the tops of the hills where it is tillable. And those three spots are where there's tillable property. And the rest of it's woodlands and very, very hilly.

Q Okay. So did you plant -- have you ever planted wheat on your property?

A There's a man that farms it a little bit for me. He keeps the trees from growing up on the top of the hills. But I never charge him anything. He's the one does it.

Q Okay. Do you have any structures on your property?

A No.

Q Okay.

A Other than that cell tower.

Q Have you made any improvements to the property?

A Not yet. I'm getting ready to because I've got

56

some flooding that's been washing out the creeks in the low areas. And I'm going to have that done when it quits raining.

Q Is there a fence on your property?

A There was a fence all the way around it at one time, for the cattle, that my great uncle had. And when the barn burned down back in '70 -- I don't remember what year it was -- '72 or '71, something like that, the cattle were killed in that fire, and so the fence is just rusting away now. There are still some signs of it.

Q So what do you use your property for?

A Hunting. All kinds of little recreational things. We like to hike and things like that. We enjoy it.

Q Do you chop wood?

A Yes. We make firewood. Anybody that needs firewood in my family, they can use it.

Q Very good. So hunting; do you hunt on the property?

A Yes.

Q And what do people hunt on the property?

A They hunt deer. They hunt turkeys, morels. Did I say squirrels and rabbits? And if you want, there's also wildlife, like raccoons and -- if you're interested in that kind of hunting, you can do it.

14 (Pages 53 to 56)

57

59

Q Are there certain seasons for certain hunting?

A Yes.

Q Is there a squirrel season?

A Yes.

Q When is the squirrel season?

A Starts August 15th and runs through the year.

Q Are there seasons for some of the other animals, like rabbits?

A Yeah. Rabbit season starts in the fall, like November. The deer season starts -- well, it depends. Bow season starts in October, I think. I don't do bow hunting. But the gun season is right around Thanksgiving, for two weeks. And then turkey is actually this month. I don't do any turkey hunting, but I know people that do go.

Q So the railroad corridor, where is it on your property?

A It's on the very west side of this picture here. You hold it -- if you're holding it -- I don't see directions on this map. The tower is on the east side. So you put that on your left, and then -- well, I'm sorry. East is always to the right when you're facing north, right? So -- but it's all the way to the opposite side there. It goes all the way along that property. That's where the railroad runs.

corridor?

A Well, yeah. Everything, it's all going together. There's a fence there. We had to cross that when I went down there to see it one time just recently. The barbed wire fence is still there. You have to be careful getting across it. Plus, the briars are all growed up around there.

Q So do you have trespassers on your property?

A There have been people on there that I didn't approve of. I don't know -- I've never caught them, but I know there's been some back there.

Q Have there been ATVs?

A At one time, yes.

Q Do you have concerns about that railroad right-of-way and theft?

A I guess I would have -- I can't say yes or no because, back there, if they're taking anything, the worst they could take is trees, I guess, if they wanted to steal some trees and stuff like that. But I don't know. I don't know if they're stealing anything. They do -- I'll tell you what they do do, though, is dump a lot of trash on the property.

Q Do you have a concern about that, people walking on that corridor and dumping trash?

A Yes. My son-in-law actually picked up an old

58

60

Q Mr. Effinger, do you remember the last time trains ran on that property?

A It's been many years. Heck, they've taken -- the tracks are gone.

Q That was my next question.

A Yeah, they're gone. It's been many years. I'd say I think even when I got the property in 2006, I don't think it was there anymore.

Q So do you have cross ties stacked up on your property?

A Yes. Yes, I do.

Q How do you feel about that?

A I don't like it. And also trees are growing up, brush and everything like that. If you want to make a walkway or something through that, you couldn't do it because it's getting all growed up.

Q If you had the opportunity to get that railroad right-of-way back, would you want to do that?

A Sure.

Q Is the corridor maintained today?

A No.

Q Does anybody spray for weeds or anything?

A No.

Q No? Well, do weeds spread outside of the corridor? I mean, do they grow onto your property from the

refrigerator that somebody dumped in that area.

Q Do you have insurance on your property?

A Yes, I do.

Q And why?

A Well, in case somebody gets hurt.

Q And how do you feel about having to have insurance on your property?

A I think everybody should have insurance on their property. It's a must.

Q Do you have it also because of that right-of-way behind your house with the people trespassing?

A Yeah. Trespassing and also for those people that are honest and hunt.

Q Well, we had talked about if you could get the railroad right-of-way back, you would want to do that, right?

A Yes.

Q And could you plant trees on it?

A I could put trees. I could put anything on that property back there. But I want to actually make it like for the deer and stuff, you know. I'd like to put some cover crops on the property instead of farming it so that the wild animals and everything have something to eat; even in the wintertime, you know, there's a chance there's

61

1 food there for them.

2 **Q If you got the railroad back, the corridor**
3 **back, would you be able to exclude -- would you be able to**
4 **exclude trespassers from that right-of-way?**

5 A Well, there would be a way. I could put an
6 extended fence out, yeah.

7 But do I understand half of that right-of-way belongs
8 to the other property across the road, too, so I'd have to
9 put the fence right down the middle there. And it's
10 getting all growed up.

11 **Q Well, I guess my question was, do you think**
12 **there's value in being able to exclude people from your**
13 **property?**

14 A Yeah. Keep the illegals out.

15 **Q Have you heard that the railroad wanted the**
16 **landowners to buy their own land back?**

17 MR. MACAYEAL: Objection, Your Honor. That's
18 hearsay.

19 THE COURT: The question was?

20 MR. MACAYEAL: Have you heard -- she's
21 apparently talking about an out-of-court statement.
22 So I would have to object, Your Honor. That's an
23 out-of-court statement.

24 MS. MCCULLEY: It can be rephrased.

25 THE COURT: Just rephrase.

62

1 BY MS. MCCULLEY:

2 **Q Are you aware that the railroad wants the**
3 **landowners to buy their own land back?**

4 MR. MACAYEAL: Objection, Your Honor. Lack of
5 foundation. The man isn't with the railroad. And I
6 don't know -- I guess we'll hear from the railroad,
7 but I think this is relying on statements that others
8 have made. Unless it's the railroad. Even if it's
9 the railroad, it's hearsay.

10 THE COURT: Certainly counsel can probe what
11 his understanding is.

12 BY MS. MCCULLEY:

13 **Q Mr. Effinger?**

14 A I understand that's what -- that we'll have to
15 buy it back if we want to use it.

16 **Q And where did you get that understanding**
17 **from?**

18 A From you people, actually.

19 MS. MCCULLEY: Your Honor, I don't have any
20 further -- well, let me just -- I don't have any
21 further questions.

22 **Q Thank you, Mr. Effinger.**

23 A Do I keep these?

24 MR. MACAYEAL: You can keep those, sir.

25 MS. MCCULLEY: Oh, wait, wait. I have one

63

1 more. I'm sorry, Jamie.

2 BY MS. MCCULLEY:

3 **Q Mr. Effinger, I forgot to look at these**
4 **pictures and ask you to look at these and see if you**
5 **recognize these. I've handed you 7D. And do you recognize**
6 **what these pictures are?**

7 A Yeah. That's where the property is, that
8 railroad property.

9 **Q So those are pictures of the railroad**
10 **right-of-way?**

11 A Uh-huh.

12 THE COURT: Are these demonstrative exhibits
13 that you're showing, or are these defendants'
14 exhibits?

15 MS. MCCULLEY: These are plaintiffs' exhibits.

16 THE COURT: I thought you said D7, and that's
17 why I said are they demonstrative.

18 MS. MCCULLEY: No. It's Plaintiffs' 7D.

19 THE COURT: Thank you.

20 BY MS. MCCULLEY:

21 **Q All right. Very good. Thank you, Mr.**
22 **Effinger.**

23 MS. MCCULLEY: Can I move to admit these
24 exhibits?

25 THE COURT: I'll tell you what, why don't you

64

1 identify -- there have been a number that you have
2 used throughout the witness's exam. Some were Joint
3 Exhibits so I assume there's going to be no
4 objection. But just so we have a clear record, could
5 we go through the exhibits that you've identified and
6 then we will --

7 MS. MCCULLEY: Yes, Your Honor. So there's
8 Joint Exhibits 29, 30, and 31. And then there's
9 Plaintiffs' Exhibit 7D.

10 THE COURT: I'm assuming -- did you also refer
11 to a 41 or was it just 31?

12 MR. MACAYEAL: Just 31, I believe, Your Honor.

13 THE COURT: Thank you. So with respect to
14 Joint Exhibits 29, 30, and 31, you have no objection
15 to those exhibits?

16 MR. MACAYEAL: No, Your Honor. We were under
17 the impression those were already in evidence, the
18 Joint Exhibits.

19 THE COURT: I understand that. I just wanted
20 to make sure there wasn't some change. And in fact
21 if you want, after we finish this, someone can move,
22 or plaintiffs' counsel wish to, I can admit the Joint
23 Exhibits.

24 Now, with respect to Plaintiffs' 7D, is there
25 any objection?

65

1 MR. MACAYEAL: The witness said that it's a
2 picture of his property, correct? No objection.
3 THE COURT: Plaintiffs' 7D is admitted.
4 (Plaintiffs' Exhibit Number 7D was admitted
5 into evidence.)
6 MS. MCCULLEY: Thank you, Your Honor.
7 CROSS-EXAMINATION
8 BY MR. MACAYEAL:
9 Q Morning, Mr. Effinger.
10 A Good morning.
11 Q My name's Jamie MacAyeal. I'm going to be
12 asking a few questions.
13 A All right.
14 Q Thank you for coming in. One thing I wanted to
15 clarify. I believe you were asked if you had inherited the
16 property in 2006. My understanding was that you got the
17 property by means of a deed from your father?
18 A Yeah. But I did pay him a small amount for the
19 property.
20 Q In other words, he was alive when he
21 transferred the property to you?
22 A Yeah.
23 Q So it wasn't like he had died and you inherited
24 it?
25 A No.

66

1 Q He basically deeded it to you?
2 A Yeah, he deeded it to me. I'm sorry.
3 Q All right. Now, I want to clarify that you
4 live in Wadesville, Indiana, correct?
5 A Yes.
6 Q So that's about 20 minutes from the property?
7 A Yes.
8 Q And the 44 acres that you have, that was part
9 of a larger parcel in the past, correct?
10 A Yes.
11 Q And that was the one that your great uncle or
12 your father's uncle was an owner of that?
13 A Yes.
14 Q And then your father inherited the larger
15 parcel, correct?
16 A Yes.
17 Q And he wanted you and your siblings each to
18 have a part of it, correct?
19 A Yes.
20 Q So you have a brother and a sister?
21 A I have -- there let me think here. Mark,
22 Margie, Patty, and Danny.
23 Q Okay. But your father divided up the property
24 amongst the siblings, correct?
25 A Yes.

67

1 Q And so you got a particular property, correct?
2 A Yes.
3 Q And that was 44 acres?
4 A Yes.
5 Q Now, you didn't get to pick that particular
6 property?
7 A No. But I was proud to have it because that
8 was where I spent most of my time growing up.
9 Q Right. And, in fact, before you owned it
10 through the deed, you were able to hunt on that when your
11 father owned it? Yes?
12 A Yes.
13 Q And actually you were able to hunt on any part
14 of that larger 110 acres, correct?
15 A Yes.
16 Q Now, the property itself is fairly hilly,
17 correct?
18 A Yes.
19 Q And there are ravines?
20 A Yes.
21 Q And there are ditches that drain water?
22 A Yes.
23 Q All right. And sometimes the low points wash
24 out?
25 A Yes.

68

1 Q All right. And the property has a lot of
2 trees, correct?
3 A Yes.
4 Q Now, why don't we go to DX 25. Let's see. I
5 think we should have a book for the witness, correct?
6 MR. MACAYEAL: Your Honor, may we approach to
7 get the book?
8 THE COURT: Certainly.
9 BY MR. MACAYEAL:
10 Q So I have, in the meantime -- we'll bring you
11 an exhibit to look at it, but it actually is up here on the
12 screen as well.
13 All right. So this is a -- you've had a deposition
14 taken. You remember that?
15 A Yeah.
16 Q Okay. This is one of the exhibits that was
17 marked, and it has -- keep turning. It has the picture of
18 your property. And I just wanted to use it because it was
19 marked at the deposition and discussed. All right. If you
20 turn to the page --
21 A There it is.
22 Q Yes. Now, if you look at that last page, and
23 it has a number on it, 352.
24 A 352?
25 Q Yes, 352 is the picture. So it's the last page

69

1 of Defendant's Exhibit 25. That would be the picture, the
 2 aerial of your property, correct? Yes?
 3 A Yes.
 4 Q Now, the property has those sort of lighter
 5 areas or what you would refer to as a bare spot, correct?
 6 A Yeah. That's the tops of the hills. That's
 7 where you --
 8 Q I'm sorry. Now, I guess orient me again on the
 9 direction of this. Is this -- you have three white spots
 10 within the yellow drawing, correct?
 11 A Uh-huh.
 12 Q The little one at the top, which direction is
 13 that?
 14 A That's east.
 15 Q That's east, okay. So we actually have to turn
 16 the photo --
 17 A Yeah.
 18 Q -- to get it to run north/south. So the part
 19 on the east, that's the particular part that you let a man
 20 put some crop on, correct?
 21 A He's got crop on it right now. Because of the
 22 ditches washing out, you can't get to the other two
 23 properties. That's why I've got to get it fixed.
 24 Q Okay. Now, the man who puts the crop out on
 25 the small spot, you just do that to keep the vegetation

70

1 from growing? Yes?
 2 A Keep the trees and stuff from starting to grow
 3 out there.
 4 Q Okay. And what he puts on there is winter
 5 wheat?
 6 A He's got it on there right now.
 7 Q But he doesn't pay anything for it?
 8 A I don't have (inaudible).
 9 Q So as of now, though, the other two parts, it's
 10 kind of difficult to get up to those other bare spots,
 11 correct?
 12 A We would be able to get to the first one, the
 13 middle one, because the ditch hadn't washed out real bad,
 14 but the other one we can't get to. One of the other
 15 neighbors mows that. We can't get to it this year until we
 16 get that fixed.
 17 Q Just so the record's clear, when you say "the
 18 first one," as you're looking, the small spot that you said
 19 the man puts the winter wheat on now, --
 20 A Yeah.
 21 Q When you say the first one, you're talking
 22 about the one at the bottom of the diagram, within the
 23 yellow line?
 24 A The one on the right there.
 25 Q Why don't we turn it?

71

1 A Right there.
 2 Q This is the way it is in the book, correct?
 3 A Yeah. The one at the top.
 4 Q The one at the top is where the winter wheat is
 5 being put, correct?
 6 A Right.
 7 Q And then the one at the bottom of the diagram
 8 -- and that would technically be to the west, correct?
 9 A Yeah. You've got the mark in the wrong place.
 10 You've gotta go to the --
 11 Q Why don't you use your exhibit. The one on the
 12 wall is just for the Court or anybody else to look at.
 13 A That one right there is the one that's the
 14 farthest away that's on the west side.
 15 Q Okay. So the bare spot, that is basically as
 16 the exhibit sits in the book, the little spot that has a
 17 little wheat is up at the top, correct?
 18 A Right.
 19 Q And then there's another spot down at the
 20 bottom within that yellow line, correct?
 21 A Yeah. Right.
 22 Q And that's the one you refer to as the first
 23 one when you --
 24 A I refer to this as the first one. That's the
 25 wheat and the tower. And this one here's the middle one.

72

1 And this is the far west one.
 2 Q Okay. Far west one. So the one -- you've
 3 never had crop on the far west one or the one in the
 4 middle, correct?
 5 A Yeah, I did till the ditch washed out.
 6 Q Okay. Was that you who put the crop there, or
 7 was that this other man?
 8 A No. My brother was farming it for a while.
 9 Q Okay. When was that?
 10 A Till about two years ago.
 11 Q All right. But since it's washed out, you
 12 haven't been up there?
 13 A Yeah. But I have got a neighbor keeping the
 14 grass cut, keeping everything mowed down.
 15 Q But as far as you're concerned, though, you
 16 just use the property for hunting?
 17 A Hunting, for cutting wood, things like that.
 18 Q And you still use it for hunting, correct?
 19 A Yeah.
 20 Q And some of your friends are allowed to go on
 21 there as well?
 22 A If they ask, yes.
 23 Q So as far as the corridor is concerned, though,
 24 it's a heavily vegetated area, correct?
 25 A Yeah. It's grew up bad right now.

73

1 Q And there's really -- as far as the actual rail
2 bed, there's very little that could be planted, correct?
3 A Yeah. It won't be -- you can't plant hardly
4 anything there, but you can keep people out with a fence.
5 Q Right. But if you wanted to plant it, you'd
6 have to clear it. And even if you did that, it wouldn't be
7 very much, right? There's little you can do with it as far
8 as cropping?
9 A Yeah. It's not very much.
10 Q All right. Now, I just wanted to clarify that
11 there are still some ties that are piled up on pallets?
12 A Yes.
13 Q And when was the last time you saw that?
14 A Last fall.
15 Q Okay. Now, have you moved those ties in any
16 way?
17 A No.
18 Q Okay. So they've been there for a long time
19 then, correct?
20 A I haven't been over there on the railroad for a
21 little while.
22 Q But you haven't actually measured where they
23 are in relationship to the centerline of the corridor, have
24 you?
25 A The ones I saw are on my side.

74

1 Q What do you mean by your side?
2 A My half of the railroad.
3 Q In other words, it wasn't on the side of the
4 other property?
5 A No.
6 Q And you've never tried to -- you have no
7 interest in selling your property, correct?
8 A No.
9 Q Because it has sentimental value?
10 A Yes.
11 MR. MACAYEAL: And let's put up a Joint
12 Exhibit. NITU, Joint Exhibit 6.
13 Your Honor, may we hand the witness the book?
14 THE COURT: Yes.
15 BY MR. MACAYEAL:
16 Q Now, at your deposition, there was a document
17 that was marked as Exhibit 3 and it was referred to as the
18 NITU. Do you remember that?
19 A The NITU?
20 Q Yeah. You don't have to if you don't remember.
21 A The NITU?
22 Q I'm not trying to stump you, but I just want to
23 clarify that, at least as of your deposition, you had never
24 seen the document that people referred to as the NITU?
25 A I don't think so, no.

75

1 Q And is that --
2 THE COURT: Do you want to provide the witness
3 with the entire name rather than the acronym?
4 MR. MACAYEAL: Yes.
5 THE COURT: Sometimes that can be helpful.
6 BY MR. MACAYEAL:
7 Q At your deposition there was a document that
8 was referred to as Notice of Interim Trail Use.
9 A Oh, yeah.
10 Q And at least as of the time of your deposition,
11 you had never seen that document, correct?
12 A No. But I heard about it before, that they
13 were going to put some trails in at one time.
14 Q Yeah, but as of your deposition you had no idea
15 what it was, correct?
16 A No.
17 Q And your use of the property has not really
18 changed as far as the corridor since you've owned it,
19 correct?
20 A No, it hasn't changed.
21 Q Thank you, sir. No further questions.
22 THE COURT: I have a question for you. Again,
23 simply because exhibits are marked as joint doesn't
24 mean they're admitted.
25 MR. MACAYEAL: That's been my understanding,

76

1 Your Honor.
2 THE COURT: Would you --
3 MR. MACAYEAL: We'll jointly move for all the
4 joint exhibits to be in evidence.
5 MR. STEWART: Agreed, Your Honor.
6 THE COURT: All the joint exhibits are so
7 admitted.
8 (All Joint Exhibits were admitted into
9 evidence.)
10 MR. MACAYEAL: Thank you.
11 MS. MCCULLEY: I have no more questions for Mr.
12 Effinger.
13 THE COURT: May the witness be excused?
14 MS. MCCULLEY: Yes. Thank you, Your Honor.
15 THE COURT: Thank you for coming in.
16 We can go off the record until the next
17 witness.
18 ---- (OFF THE RECORD) ----
19 MS. MCCULLEY: Your Honor, Plaintiffs call
20 David McDonald.
21 THE COURT: Very good. Mr. McDonald, would you
22 come forward, please? Thank you, sir. Would you
23 raise your right hand, please?
24 DAVID McDONALD,
25 THE WITNESS, HAVING BEEN DULY SWORN UPON HIS HONOR,

19 (Pages 73 to 76)

EXHIBIT I

TRIAL TESTIMONY OF JAMES SCHMIDT

In the Matter of:

Jeffrey Memmer, et al. v. USA

April 30, 2019

Trial

Vol. 2

Condensed Transcript with Word Index



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247

1 would have to drive around it to cut the lawn.

2 **Q I see. I understand.**

3 **Now, the way I understand it, and tell me if**
 4 **I'm wrong, you didn't purchase this property because**
 5 **there was an easement in the back. That's not the**
 6 **reason you bought it?**

7 A No. I bought it to live there.
 8 Brought my family up from Texas and we made a home and
 9 I started building the house.

10 **Q I remember from our deposition you**
 11 **built that house pretty much yourself?**

12 A Yes.

13 **Q I think you said you had something**
 14 **like \$70,000 in it?**

15 A Well, a little more than that. It
 16 was about 70,000 originally.

17 **Q Then you built that garage, too?**

18 A Yes; add a little more to that.

19 **Q Can we get Joint Exhibit Number 6,**
 20 **please.**

21 **When you bought the property, you didn't buy**
 22 **the property with the expectation you'd get that**
 23 **corridor back in any way, did you?**

24 A Not at the time I didn't know the
 25 railroad was going to give it up, but over a period of

248

1 time when I learned that they were going to give it
 2 up, I thought it would be nice to have to extend my
 3 property out.

4 **Q Very interesting what you're talking**
 5 **about with potential oil prospect in there. I hadn't**
 6 **heard that before. That's interesting.**

7 **Joint Exhibit Number 6, can you take a look at**
 8 **that?**

9 A (WITNESS REVIEWS DOCUMENT.)

10 **Q You can see at the top it says,**
 11 **Surface Transportation Board, Notice of Interim Trail**
 12 **Use. Have you ever seen this document before?**

13 A I don't think I have. I can't
 14 recall.

15 **Q Let me say one thing. I think you**
 16 **saw it at the deposition, but had you ever seen it**
 17 **before that?**

18 A I don't remember reading it either,
 19 sorry.

20 **Q How did you find out about this**
 21 **lawsuit?**

22 A How did I find out about it?

23 **Q Yes.**

24 A A bunch of people in town got to
 25 talking. I think I got a notice in the mail from

249

1 Stewart Wald & McCulley. I think it was a different
 2 name of a company at the beginning.

3 **Q The law firm?**

4 A The law firm, I think so.

5 **Q I have no further questions. Thank**
 6 **you very much.**

7 MS. MCCULLEY: I have no further questions,
 8 Your Honor, and the witness can be excused.

9 THE COURT: Thank you. You're excused.
 10 Thank you for coming.

11 MS. MCCULLEY: We call Jamie Schmidt.

12 JAMES E. SCHMIDT

13 THE WITNESS, HAVING BEEN DULY SWORN UPON HIS HONOR,
 14 TESTIFIED AS FOLLOWS:

15 DIRECT EXAMINATION BY MS. MCCULLEY:

16 **Q Please state your name for the**
 17 **record.**

18 A James E. Schmidt.

19 **Q Mr. Schmidt, tell me a little bit**
 20 **about your educational background.**

21 A All right. I grew up in Evansville.
 22 Went to Cynthia Heights, Reitz High School. Graduated
 23 with a bachelor of arts at the University of
 24 Evansville. Got my master's degree at IU and then I
 25 was a teacher.

250

1 **Q Where were you a teacher?**

2 A I was a teacher at Vogel Elementary;
 3 spent 16 years there. Then I went to McGary Middle
 4 School, when the middle school came in effect. I was
 5 two years there. Finished up at Stringtown, 32 years
 6 there. So it was 50 years all together.

7 **Q I don't need to ask you about your**
 8 **employment because you just told us.**

9 A Yes.

10 **Q Do you live on the property that's**
 11 **the subject of this lawsuit?**

12 A No, I don't.

13 **Q Where do you live?**

14 A I live at 12100 St. Wyndall Road.

15 **Q How long have you lived there?**

16 A Since 2002 I believe it is.

17 **Q Let me go through these documents so**
 18 **we can identify the property that we're talking about**
 19 **that's the subject of this lawsuit, if that's okay.**

20 **This is Joint Exhibit 35. Do you recognize**
 21 **that document?**

22 A Yes, I do.

23 **Q What is that document?**

24 A It's the Warranty Deed on the
 25 property in question here.

251

1 **Q Here is Joint Exhibit 36. Do you**
2 **recognize that?**

3 A Yes, I do.

4 **Q Is that like an assessor parcel**
5 **report?**

6 A Yes.

7 **Q Then I'm going to hand you Joint**
8 **Exhibit 37. Is that your property outlined in the**
9 **yellow?**

10 A Yes, it is.

11 **Q Here is Plaintiffs' Exhibit 9-D. Do**
12 **you recognize that?**

13 A Yes.

14 **Q What is that?**

15 A Looks like a shot down from the
16 bridge it looks like, which goes on Archer Road down
17 to the railroad right-of-way.

18 **Q Is it overlooking the railroad**
19 **right-of-way?**

20 A Yes.

21 MS. MCCULLEY: Your Honor, I would like to
22 offer Exhibit 9-D into evidence?

23 MR. MACAYEAL: No objection, Your Honor.

24 THE COURT: So admitted.

25 (Plaintiffs' Exhibit Number 9-D was admitted

252

1 into evidence.)

2 BY MS. MCULLEY:

3 **Q When did you purchase this property?**

4 A 1998.

5 **Q How much did you purchase that**
6 **property for?**

7 A 155,000.

8 **Q What were you going to do with that**
9 **property?**

10 A Well, we had been looking for years
11 for a place to live. I always wanted property. My
12 wife wanted a nice house, and we never could come up
13 with it. So we came up with this property and we had
14 plans to build a house on it.

15 **Q Then what happened?**

16 A Then my son's friend's parents were
17 going to move to Florida. They had just built a new
18 house, two or three years old, and they said, you want
19 to buy our house. It was like three acres, but it was
20 out in the country and a nice house so that's what
21 happened.

22 **Q But you kept this property?**

23 A Kept the property, yes.

24 **Q How would you describe this property?**

25 A It is totally wooded. It's rugged

253

1 terrain. Lot of ups and downs to it. I think it was
2 cut at one point, but when we bought the property,
3 this was the realtor talking, he said the estimated
4 wooded value in there was between 10 and 12,000, and
5 that was in '98. Nothing has been done to it since.

6 **Q Is there an pond on the property?**

7 A Yes.

8 **Q Is there a fence on the property that**
9 **-- is the fence off the railroad right-of-way?**

10 A No.

11 **Q I believe you said you have not made**
12 **any improvements on the property. You have not built**
13 **any structures or anything like that?**

14 A No.

15 **Q But you do do something interesting**
16 **with this property for educational purposes. Can you**
17 **explain to us what you have done in the past for**
18 **educational purposes? Because we know you have had a**
19 **big interest in education.**

20 A Our kids were in 4H so we kind of
21 stumbled across of having a frog jumping contest. When
22 we started going out there at night through the woods
23 trying to find frogs at the pond. Then the leaders of
24 the 4H wanted us to get frogs for kids that didn't
25 have them. So we did that, also. That's what we did

254

1 for a number of years. Of course, my kids are out of
2 4H. It's probably been five years, but I have a
3 grandson and I guess he'll want to eventually do frog
4 jumping, too.

5 **Q Did you guys do fishing on this pond**
6 **as well?**

7 A We did some, but I think what has
8 happened there, even before we got there, it's kind of
9 down in the valley and all the leaves have fallen in
10 and I don't think it's got much depth to it. We
11 didn't have much luck catching any kind of fish of any
12 size.

13 **Q Is there any kind of deer hunting on**
14 **the property?**

15 A Yes. My oldest son has hunted for
16 deer and a friend of the family has done deer hunting
17 in there.

18 **Q Have there been oak trees planted on**
19 **the property?**

20 A I did that from time to time. It's
21 pretty much oak, maple mix. I just, you know, put
22 some in there and planted a few walnuts, stuff like
23 that, for the future.

24 **Q Walnut trees are very -- worth a lot of**
25 **money, aren't they?**

255

1 A Yes. It will take a while.
 2 Q Do you also use property for
 3 firewood, to get firewood?
 4 A I have. I haven't done much of it
 5 recently, but yes, we did do some of that.
 6 Q Where is the railroad corridor
 7 located on your property?
 8 A It's the eastern part of the
 9 property. I guess it goes from southeast to
 10 northeast.
 11 Q Is it in the back of your property?
 12 A Yes. Generally when you enter the
 13 driveway, it slopes down towards the railroad.
 14 Q Do you remember when trains stopped
 15 running, when the last train was?
 16 A It was shortly after we had the
 17 property; I remember seeing a train go by. 2000,
 18 2002, somewhere maybe. I don't know for sure.
 19 Q It's been a while?
 20 A Yes.
 21 Q Do you recall when they pulled up the
 22 rails and ties?
 23 A Probably around 2011 or so. I can't
 24 say for sure.
 25 Q Did they leave the cross ties on the

256

1 property?
 2 A Yes. There are some there, yes.
 3 Q Are they still there?
 4 A Yes. It's hard to get them out, I mean,
 5 because, I said, it's a ravine. I'm not sure how they
 6 would get them out. They'd probably pull them out one
 7 direction or the other.
 8 Q Were they dislodged when they pulled
 9 up the rails?
 10 A They're kind of little stacks.
 11 Q They're in stacks.
 12 Is there any activity on that railroad
 13 corridor now?
 14 A Not to my knowledge. Maybe people
 15 walking by. I don't know otherwise.
 16 Q What about ATVs and things like that?
 17 A I haven't seen any.
 18 Q You haven't. Okay.
 19 Is the corridor maintained; meaning are the
 20 weeds cut down, are the trees kept down?
 21 A I haven't done anything particular.
 22 You know, I guess eventually trees and stuff will grow
 23 right up it.
 24 Q Does the railroad maintain it?
 25 A Not to my knowledge.

257

1 Q Do you have concerns about who could
 2 be or would be on that railroad right-of-way?
 3 A Well, I don't know who goes up and
 4 down it. They could come off of there and go up into
 5 the woods and hunt. I know who is hunting out there,
 6 who I told could hunt, but I don't know if others are
 7 going up in there. We have signs posted, no
 8 trespassing, and things like that.
 9 Q But if there were other people that
 10 were coming on the right-of-way and hunting on your
 11 property, that would concern you?
 12 A Yes, obviously. At times I don't
 13 know whether to walk out there or not during hunting
 14 season. I know people I said who are hunting, but
 15 there could be others. Just like now it's turkey
 16 season.
 17 Q Is the railroad right-of-way down
 18 like a little bit from your property?
 19 A Very much so. It goes down, and then
 20 if you want to go the right-of-way you have to go up.
 21 Yes, I would say it's a good drop. There's only one
 22 or two spots where you can actually get to the
 23 right-of-way without dropping off. It's pretty steep.
 24 Q If you could reclaim that
 25 right-of-way and make some kind of use of it, would

258

1 you do that? Let me give you a, for instance.
 2 We've landowners talk about putting forest for
 3 deer, for things like that, to see the animals and
 4 stuff things like that. Do you think that there are
 5 things that you could do with that right-of-way if it
 6 came back to you?
 7 A I could always plant more trees. I'm
 8 always planting trees anyway. Did that at Stringtown.
 9 Stringtown has a wooded area so over the years I've
 10 planted, just last fall I planted a white oak or two
 11 on the property. You can plant trees or you could
 12 feed deer.
 13 Q Thank you. I don't have any further
 14 questions.
 15 CROSS EXAMINATION
 16 BY MR. MACAYEAL:
 17 Q Good morning, Mr. Schmidt. My name
 18 is Jamie MacAyeal. I'm here for the government. I'm
 19 going to ask you a few questions.
 20 A Okay.
 21 Q Just to make sure I understand. You
 22 were looking for a place to live in the 1998 time
 23 period?
 24 A Yes.
 25 Q And you decided to buy a piece of

259

1 property to build a house on?
 2 A Yes.
 3 Q You paid 155,000 for it?
 4 A That's correct, yes.
 5 Q The top of it, it's a fairly wooded
 6 parcel you've testified, correct?
 7 A Yes.
 8 Q It's about 21, 22 acres?
 9 A 21.7 is what it says.
 10 Q Let me get that picture of the
 11 property up which is JX 37, which you have in front of
 12 you, I believe. That's the aerial.
 13 Can you see in kind of the middle there's an
 14 area outlined in yellow on that page; do you see that?
 15 A Yes.
 16 Q That's your property, right?
 17 A Yes.
 18 Q In the middle you talk about a pond,
 19 correct?
 20 A Yes.
 21 Q Is that pond visible from the
 22 photograph?
 23 A Yes.
 24 Q Could you use the pointer to point it
 25 out, to the Court where that is?

260

1 Your Honor, may we hand this to the witness?
 2 THE COURT: Yes.
 3 A (WITNESS SO INDICATES.)
 4 Q I can't read what that says on the
 5 exhibit. Right below the pond, there's some white
 6 letters, can you read that?
 7 A I can't really.
 8 Q That's okay.
 9 When you were thinking about building a house
 10 on there, you had talked about there was a level up in
 11 the property.
 12 A About up in that area right in there
 13 - (indicating).
 14 Q So if we're looking at this aerial as
 15 it is on the page, going up, that is the top of the
 16 page, that would be east?
 17 A West. East is where the railroad
 18 line was.
 19 Q So where the property kind of has a
 20 little point; do you see that?
 21 A Yes.
 22 Q That's north.
 23 A That's southwest as far as I know. I
 24 could be off on my direction.
 25 Q Let me get myself oriented.

261

1 Point where north is on this according to your
 2 understanding?
 3 A North as far as I know is there --
 4 (indicating).
 5 Q So the left of the page is south?
 6 A Yes.
 7 Q So that means the top of the page is
 8 west?
 9 A Yes.
 10 Q So the area where you were going to
 11 build the house would then be up in the southwest
 12 corner?
 13 A Yes.
 14 Q Now, and the corridor then would be
 15 on eastern part of the property?
 16 A Yes.
 17 Q And it curves around?
 18 A Yes.
 19 Q To get down in that corridor, the
 20 property then drops down?
 21 A Yes, it slopes down.
 22 Q It's like a ravine?
 23 A Yes.
 24 Q Then you get to the bottom is there a
 25 ditch or a stream?

262

1 A There is a small stream down there.
 2 Q You have to go uphill again to get on
 3 the corridor?
 4 A On the corridor, are you talking
 5 about the right-of-way?
 6 Q Yes, right-of-way.
 7 A Yes, you definitely have to go up.
 8 Q Then on the other side of that
 9 corridor, that's not your property?
 10 A No.
 11 Q That's a neighbor?
 12 A Yes.
 13 Q So the pond then is a natural pond;
 14 you didn't make it?
 15 A Somebody else I'm sure made it.
 16 Q It turned out then you didn't end up
 17 building a house because you bought the house from
 18 your friends that moved to Florida?
 19 A Yes.
 20 Q At this point in time you don't plan
 21 to build a house there, correct?
 22 A I don't, no.
 23 Q You have no intention at this point
 24 of selling it because you would not be happy if it was
 25 subdivided?

263

1 A Yes, that's true.
 2 Q You would like to preserve it as
 3 nature, correct?
 4 A That's true.
 5 Q That's why you actually enjoy going
 6 out there to enjoy nature?
 7 A Yes.
 8 Q You would like to see it preserved,
 9 correct?
 10 A Yes.
 11 Q As long in your lifetime, correct?
 12 A Correct.
 13 Q Let's get Joint 6. Now, at your
 14 deposition you may recollect there was a document
 15 marked and people referred to it as a Notice of
 16 Interim Trail Use; do you have any recollection of
 17 that? You may or may not. I'm asking if you do.
 18 A Possibly. I knew that was under
 19 consideration.
 20 Q As of at least your deposition, you
 21 were not familiar with that particular document,
 22 correct?
 23 A I can't say I remember, recall
 24 offhand.
 25 Q As far as you're concerned, since

264

1 you've owned the property, your use of the property
 2 has not changed, correct?
 3 A Correct.
 4 MR. MACAYEAL: No further questions, Your
 5 Honor.
 6 THE COURT: I have a question.
 7 It sounds like you're growing various species
 8 of trees on the property. Do you intend at some point
 9 to harvest the trees or is it strictly to create your
 10 own private preserve or habitat for hunting?
 11 THE WITNESS: Not so much of hunting. I mean
 12 that's part of it. I don't intend to harvest it
 13 because it's such a rugged area. I've heard in the
 14 past and it's some pretty scary stories of what's left
 15 behind. I don't intend to harvest it, no.
 16 THE COURT: Thank you.
 17 REDIRECT EXAMINATION
 18 BY MS. MCCULLEY:
 19 Q I just want to clarify that in 1998
 20 you purchased that property for \$155,000, right?
 21 A Correct.
 22 Q Is it 21.7 acres?
 23 A That's correct.
 24 Q And it's all wooded mostly?
 25 A Correct.

265

1 Q So you paid over \$7,000 an acre in
 2 1998; is that right?
 3 A That's correct. I didn't figure the
 4 math, but if that's what it comes out, that's what it.
 5 Q Thank you very much for being here.
 6 Thank you, Your Honor. That's all I have.
 7 The witness may be excused.
 8 MR. MACYEAL: No further questions, Your
 9 Honor.
 10 THE COURT: You are excused. Thank you for
 11 coming.
 12 MS. MCCULLEY: Your Honor, we call Michael
 13 Martin.
 14 MICHAEL MARTIN
 15 THE WITNESS, HAVING BEEN DULY SWORN UPON HIS HONOR,
 16 TESTIFIED AS FOLLOWS:
 17 DIRECT EXAMINATION BY MS. MCULLEY:
 18 Q Please state your name for the
 19 record.
 20 A Michael H. Martin.
 21 Q Mr. Martin, I'm going to try to be as
 22 brief as I can because I know you're in planting
 23 season; you are planting. I know that you've had your
 24 deposition taken twice; once where counsel for the
 25 government didn't show up so here we are.

266

1 I'll try not to be too redundant on the
 2 questions that we asked you before. I'll just try to
 3 hit the highlights.
 4 Tell me a little bit about your educational
 5 background.
 6 A I went to high school at Mater Dei in
 7 Evansville. I went to Purdue University for four
 8 years. That's about it for education.
 9 Q And you're a farmer?
 10 A Yes.
 11 Q Do you also coach high school
 12 softball?
 13 A I coach Mater Dei High School girls
 14 softball in Evansville. I do residential remodeling.
 15 I have been to Haiti four times. I'm getting ready to go
 16 back in August to build a school; so I stay busy.
 17 Q It sounds like it.
 18 Tell me where you live.
 19 A I live at 14727 North Posey County
 20 Line Road, Poseyville.
 21 Q So you know what property we're
 22 talking about that's in this lawsuit?
 23 A Yes.
 24 Q Do you have other property besides
 25 the farm in this lawsuit?

10 (Pages 263 to 266)

EXHIBIT J

TRIAL TESTIMONY OF JOSEPH JENKINS

In the Matter of:

Jeffrey Memmer, et al. v. USA

April 30, 2019

Trial

Vol. 2

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231

1 PROCEEDINGS
2 -----
3 CLERK: All rise. The United States Court of
4 Federal Claims is back in session.
5 THE COURT: Good morning. Please be seated.
6 MS. MCCULLEY: Plaintiffs call Joseph Jenkins.
7 JOSEPH JENKINS
8 THE WITNESS, HAVING BEEN DULY SWORN UPON HIS HONOR,
9 TESTIFIED AS FOLLOWS:
10 DIRECT EXAMINATION BY MS. MCCULLEY:
11 **Q Please state your name for the**
12 **record.**
13 A Joseph Charles Jenkins.
14 **Q Good morning, Mr. Jenkins.**
15 A I'm a little hard of hearing.
16 **Q Okay. I'll speak up. I'm sorry if**
17 **I'm yelling.**
18 **Tell me a little bit about your educational**
19 **background.**
20 A I have an associate's degree in
21 electronic engineering technology.
22 **Q And where do you work?**
23 A I work part-time at a Mount Vernon
24 flower shop right now. I'm retired.
25 **Q What did you do before you worked at**

233

1 **Q So what kind of property is your**
2 **property?**
3 A It's residential.
4 **Q I'm going to hand you what's been**
5 **marked as Plaintiffs' Exhibit 8-D. Do you recognize**
6 **that?**
7 A That's my backyard.
8 **Q That's your backyard. Okay. Then**
9 **I'm going to hand you what has been marked as Joint**
10 **Exhibit 34 and see if you recognize that.**
11 A That's an above aerial view of the
12 house and the property.
13 **Q When you're holding that picture, is**
14 **the railroad right-of-way on the right?**
15 A It's on this side over here --
16 (indicating) -- yes.
17 **Q What other structures are on your**
18 **property besides your house?**
19 A My garage, a 14-by-30 structure.
20 **Q Did you build the garage?**
21 A Yes.
22 **Q Did you build it yourself?**
23 A Yes.
24 **Q Did you build your house yourself**
25 **too?**

232

1 **Mount Vernon?**
2 A I worked for the CSX Railroad.
3 **Q What did you do for CSX Railroad?**
4 A I was a signal man.
5 **Q Where do you live?**
6 A 68 South Sharp Street, Poseyville,
7 Indiana.
8 **Q Okay. When did you purchase your**
9 **property?**
10 A I believe it was around '95. Made a
11 deal with the previous landowner to buy it on
12 contract.
13 **Q And is that contract fulfilled?**
14 A Yes.
15 **Q Let me hand you what's been marked as**
16 **Joint Exhibit 32. Do you recognize that document?**
17 A Commissioner's Deed.
18 **Q Yes.**
19 A Yes.
20 **Q Is that the deed on contract?**
21 A Yes.
22 **Q Let me hand you what's been marked as**
23 **Joint Exhibit 33. Do you recognize that document?**
24 A (WITNESS REVIEWS DOCUMENT.)
25 Looks like a tax assessor's record.

234

1 A Yes. I had some friends come over
2 and help. I didn't do it all by myself, but the
3 majority of it I did.
4 **Q And what year was that completed?**
5 A 2006.
6 **Q Is there a fence in the backyard?**
7 A There used to be.
8 **Q And what kind of fence did it used to**
9 **be?**
10 A It was a chicken wire fence.
11 **Q Do you know who tore it down?**
12 A The town did.
13 **Q Did they do that -- why did they do**
14 **that?**
15 A They were burying a pipe, a sewer
16 pipe in the back along the railroad tracks.
17 **Q Did they approach you in any manner**
18 **about putting those sewer pipes in?**
19 A No, they didn't and they didn't
20 approach me about tearing the fence down either; they
21 just went and did.
22 **Q Of course, we don't know if they**
23 **talked to the railroad about it, do you?**
24 A No.
25 **Q Is the railroad corridor flat?**

2 (Pages 231 to 234)

235

1 A No. It has a little bit of an
2 incline.
3 Q When you say "a little bit of an
4 incline," how big of an incline?
5 A Foot and a half.
6 Q So that's a little bit of an incline.
7 Is the ballast still there on the
8 right-of-way?
9 A It's covered by grass now.
10 Q Do you remember when the last trains
11 ran on that right-of-way?
12 A I believe it was around 2004, but for
13 some reason I seem to think they had an engine run
14 through there because it got derailed and they had to
15 bring in equipment to put it back up on the rails.
16 They didn't have enough ties down to keep it on the
17 track.
18 Q Do you remember when the rails and
19 the ties were picked up?
20 A About 2011.
21 Q Did they leave the ties on your
22 property?
23 A They left partial ties.
24 Q Did they leave them just haphazardly
25 on your property?

236

1 A No. They were uniform with the rail
2 itself. For me to cut the lawn, to maintain the area
3 there, I had to remove them and burn them so I could
4 have a flat area to keep the trees from growing and
5 whatever else might grow.
6 Q Do you maintain that corridor?
7 A Yes, I do.
8 Q What do you do to maintain it?
9 A Mow it. The neighbors help out, too.
10 They take the other side of the tracks sometimes
11 because they have a bigger mower. I mow that whole
12 stretch where the railroad used to go through, and
13 right next to it, 15, 20 feet over to the side.
14 Q Do you take out trees?
15 A Yes. If any grow, I make sure they
16 stay out.
17 Q Do you have trespassers on that
18 right-of-way?
19 A Yes, sometimes we do. We did have
20 people with four-wheelers come through, but then they put
21 up no-trespassing signs, somebody did, I think maybe
22 the railroad, little bitty, about yeah big --
23 (indicating).
24 Q So did that stop the ATV riders?
25 A Yes.

237

1 Q Do you have other people that walk
2 along the rail corridor?
3 A Yes, they walk their dogs. Sometimes
4 they stay on the side closest to, I guess it's Water
5 Street, I think is what it's called; the road right to
6 the right of the corridor.
7 Q With people walking on the corridor,
8 do you notice an increase in trash on the corridor?
9 A I do notice trash there, but I
10 haven't seen that much lately. I just cut my grass
11 the other day and I only seen one bucket.
12 Q Did you used to have people with
13 trash, leaving trash on the corridor?
14 A No.
15 Q Do you have concerns about people
16 stealing things?
17 A Yes, I do. If there was somebody
18 that walked back there and travel back there all the
19 time, they would see what I have in my possession and
20 come and take it. I've got fruit trees in the
21 backyard. There's no telling, somebody come along and
22 take the fruit. I wouldn't mind sharing, but, you
23 know.
24 Q But they can scope out your house
25 too?

238

1 A Right. They can get in my garage
2 real easy.
3 Q Do you have valuables in your garage?
4 A Yes, I do.
5 Q What kind of valuables do you have in
6 your garage?
7 A Law mowers, tools, hand tools, power
8 tools, weed eaters.
9 Q If that railroad right-of-way went
10 away and that property came back to you, are there
11 things that you could do with it?
12 A I was thinking if I had the ability
13 to drill for oil. If there is no -- I can't remember
14 what it's called. Where you have the rights to the,
15 the mineral rights. If there's no mineral rights on
16 that railroad track, there are a lot of oil wells
17 around that area. I just thought, wow, that would be
18 a great idea, if they would allow me to do that, drill
19 for an oil well and maybe hit oil.
20 Q So you thought about things that you
21 could do with that former corridor?
22 A Yes.
23 Q That's all the questions I have for
24 you. Thank you.
25 CROSS EXAMINATION

239

1 BY MR. PINKSTON:
 2 Q Good morning, Mr. Jenkins.
 3 A Good morning.
 4 Q May name is Dan Pinkston. I'm with
 5 the Justice Department. I think we met before.
 6 A Yes, I think so.
 7 Q We did a deposition last May it was.
 8 A Yes.
 9 Q I've just got a couple of questions
 10 relating to your property.
 11 Just so everybody can see it, we put up here
 12 on the wall Joint Exhibit 34, which I think you have
 13 in front of you already.
 14 A This one here.
 15 Q This is so everybody can see it.
 16 This photograph, is the top of this photograph
 17 north?
 18 A Yes, it is.
 19 Q So the easement or the corridor is
 20 there off to the right of the yellow box; is that
 21 correct?
 22 A That's east.
 23 Q That yellow box, that shows your
 24 property?
 25 A Yes.

240

1 Q You said that you obtained the
 2 property originally in 1995 or 1996?
 3 A '95 I think I did a deed contract.
 4 Q Could it have been that you made the
 5 deal for the deed contract in 1992 and then fulfilled
 6 the contract and actually purchased it in '95 or '96?
 7 A Actually I went to First Citizens
 8 Bank, which became Fifth Third, I went through them
 9 and got a loan to pay off the rest of the property. I
 10 can't remember if that was '96 or '97, but my dad
 11 cosigned for me and I got the property and took care
 12 of the previous owner.
 13 Q You recall what you paid when you
 14 paid off the land contract?
 15 A 8,000 was the original price I paid
 16 for the property.
 17 Q You said 8,000?
 18 A \$8,000.
 19 Q Then you paid 5,000 in '96, because
 20 you were doing rent-to-own there for a while?
 21 A Yes. He let me use the money I had
 22 paid for rent as down-payment towards the purchase.
 23 Q You were presented with a deed, which
 24 I think is Joint Exhibit 32, right in front of you.
 25 Is that dated in 2001?

241

1 A Yes.
 2 Q It's called Commissioner's Deed?
 3 A Yes.
 4 Q Is it the case that this deed in 2001
 5 is when the property was conveyed to you because of
 6 your divorce?
 7 A Yes, because of my divorce.
 8 Q You said that there were tracks there
 9 when you first came to the property?
 10 A Yes. They ran trains.
 11 Q They took up the tracks I think you
 12 said in 2011, 2012?
 13 A 2011, I think, somewhere around
 14 there.
 15 Q Is it the case that when you bought
 16 the property you paid a lower price because of the
 17 presence of the railroad corridor?
 18 A No. It was because of a mobile home
 19 that was on the lot and two tin buildings.
 20 Q Lets get DX 28.
 21 Your Honor, can we approach to give a copy of
 22 the exhibit to the witness?
 23 THE COURT: Yes.
 24 Q Do you recall that we were just
 25 talking about a few minutes ago where you and I had

242

1 this deposition where I asked you questions and you
 2 were under oath?
 3 A Yes.
 4 Q What's in front of you I'll represent
 5 to you is a transcript of the deposition, exactly what
 6 we said when we were there.
 7 MS. MCCULLEY: Your Honor, I object. There's
 8 no question posed to have him look at his deposition
 9 to, you know, have any kind of impeachment or anything
 10 like that.
 11 MR. PINKSTON: Well, I'm just establishing
 12 what this document is.
 13 THE COURT: If he recognizes it. Overruled.
 14 BY MR. PINKSTON:
 15 Q If you can look at page 19 of that
 16 document, all we're trying to do here is make sure
 17 that we all know what happened, what you recall as the
 18 facts.
 19 You see how there's numbers on the side there,
 20 like 1 through 25.
 21 A 1 through 25.
 22 Q Right. You go down to Number 21, see
 23 there it says, "Question: Did your purchase price for
 24 your property was that affected by the existence of
 25 this corridor here?" And your answer was, "Yes, it

243

1 was cheaper because the railroad track ran through it
2 and trains."

3 **Q Does that refresh your recollection?**

4 A That's what I said. I did not
5 remember saying that, but I did say that according to.

6 **Q Is that the case; do you think that**
7 **it was, that you paid something a little bit less or**
8 **more than that less because there was a railroad track**
9 **running through the back of your property?**

10 A I suppose so.

11 **Q When you bought the property, you**
12 **didn't think that you were purchasing an interest in**
13 **the corridor; is that correct?**

14 A I didn't know if I would some day
15 have an interest in it at all, to the best of my
16 knowledge.

17 **Q Have you ever tried to lease that**
18 **property out?**

19 A I did try to put a road across it one
20 time, and they told me it would cost me money to do
21 that.

22 **Q Who told you that?**

23 A The railroad did.

24 **Q When was that?**

25 A That was back in '96, '97, '98, some

244

1 years ago.

2 **Q That's when the tracks were still**
3 **there?**

4 A Yes. Actually I don't know who I
5 talked to. I told somebody. I think it was the
6 Indiana High Rail, but that's all I can remember. It
7 was many, many years ago.

8 **Q What does the corridor, the former**
9 **corridor look like now?**

10 A It's cleaned up. No trash. No ties.
11 Grass growing.

12 **Q So it's basically flat, but with a**
13 **little bit of a slope?**

14 A Yes.

15 **Q Is the slope going from west to east,**
16 **going up a little bit along the line of --**

17 A Yes.

18 **Q One of the things we have to do is**
19 **make sure that when we talk, that we don't talk at the**
20 **same time so the court reporter can make sure to get**
21 **both of us.**

22 **You said there's grass there now along that**
23 **corridor?**

24 A Yes.

25 **Q Is there ballast underneath it; is**

245

1 **that right?**

2 A Well, not what I would call ballast.
3 From what I remember working for the railroad, it's
4 little bitty rocks. They use natural, large-size rock.

5 **Q The grass growing there, is there**
6 **soil over the small rocks?**

7 A Some areas, yes. Some areas, no.
8 It's mostly grass.

9 **Q All right. Do you do anything with**
10 **the corridor?**

11 A Presently, no, other than maintain
12 it.

13 **Q Do you mow it?**

14 A Yes.

15 **Q You sometimes burn branches?**

16 A Yes.

17 **Q And yard waste there?**

18 A Yes.

19 **Q Sometimes you do that burning right**
20 **on the corridor?**

21 A Yes.

22 **Q Because there's a rock there**
23 **underneath it?**

24 A Yes.

25 **Q You do that for other people in the**

246

1 **neighborhood as well?**

2 A Other people in the neighbor burn
3 their trash there as well, but I don't do it for them.
4 Sometimes they burn my trash, my limbs.

5 **Q When you bought the property, you**
6 **didn't think you owned the corridor area, correct?**

7 A No. There was trains running on it.

8 **Q You've never put up a privacy fence**
9 **along the corridor, have you?**

10 A I just had the chicken wire fence is
11 all I had.

12 **Q You would be concerned if there was**
13 **actually a trail along the back through the corridor?**

14 A Yes, I would.

15 **Q If there's a trail, would you put up**
16 **a fence?**

17 A No, I wouldn't put up a fence.

18 **Q You would not put up a fence if there**
19 **was a trail?**

20 A No. That would be an expense that I
21 wouldn't want to incur.

22 **Q I understand. I take it then you**
23 **don't intend to put up a fence to screen the corridor**
24 **the way it is now?**

25 A Not any time soon. If I did that, I

247

1 would have to drive around it to cut the lawn.

2 **Q I see. I understand.**

3 **Now, the way I understand it, and tell me if**
 4 **I'm wrong, you didn't purchase this property because**
 5 **there was an easement in the back. That's not the**
 6 **reason you bought it?**

7 A No. I bought it to live there.
 8 Brought my family up from Texas and we made a home and
 9 I started building the house.

10 **Q I remember from our deposition you**
 11 **built that house pretty much yourself?**

12 A Yes.

13 **Q I think you said you had something**
 14 **like \$70,000 in it?**

15 A Well, a little more than that. It
 16 was about 70,000 originally.

17 **Q Then you built that garage, too?**

18 A Yes; add a little more to that.

19 **Q Can we get Joint Exhibit Number 6,**
 20 **please.**

21 **When you bought the property, you didn't buy**
 22 **the property with the expectation you'd get that**
 23 **corridor back in any way, did you?**

24 A Not at the time I didn't know the
 25 railroad was going to give it up, but over a period of

248

1 time when I learned that they were going to give it
 2 up, I thought it would be nice to have to extend my
 3 property out.

4 **Q Very interesting what you're talking**
 5 **about with potential oil prospect in there. I hadn't**
 6 **heard that before. That's interesting.**

7 **Joint Exhibit Number 6, can you take a look at**
 8 **that?**

9 A (WITNESS REVIEWS DOCUMENT.)

10 **Q You can see at the top it says,**
 11 **Surface Transportation Board, Notice of Interim Trail**
 12 **Use. Have you ever seen this document before?**

13 A I don't think I have. I can't
 14 recall.

15 **Q Let me say one thing. I think you**
 16 **saw it at the deposition, but had you ever seen it**
 17 **before that?**

18 A I don't remember reading it either,
 19 sorry.

20 **Q How did you find out about this**
 21 **lawsuit?**

22 A How did I find out about it?

23 **Q Yes.**

24 A A bunch of people in town got to
 25 talking. I think I got a notice in the mail from

249

1 Stewart Wald & McCulley. I think it was a different
 2 name of a company at the beginning.

3 **Q The law firm?**

4 A The law firm, I think so.

5 **Q I have no further questions. Thank**
 6 **you very much.**

7 MS. MCCULLEY: I have no further questions,
 8 Your Honor, and the witness can be excused.

9 THE COURT: Thank you. You're excused.
 10 Thank you for coming.

11 MS. MCCULLEY: We call Jamie Schmidt.

12 JAMES E. SCHMIDT

13 THE WITNESS, HAVING BEEN DULY SWORN UPON HIS HONOR,
 14 TESTIFIED AS FOLLOWS:

15 DIRECT EXAMINATION BY MS. MCCULLEY:

16 **Q Please state your name for the**
 17 **record.**

18 A James E. Schmidt.

19 **Q Mr. Schmidt, tell me a little bit**
 20 **about your educational background.**

21 A All right. I grew up in Evansville.
 22 Went to Cynthia Heights, Reitz High School. Graduated
 23 with a bachelor of arts at the University of
 24 Evansville. Got my master's degree at IU and then I
 25 was a teacher.

250

1 **Q Where were you a teacher?**

2 A I was a teacher at Vogel Elementary;
 3 spent 16 years there. Then I went to McGary Middle
 4 School, when the middle school came in effect. I was
 5 two years there. Finished up at Stringtown, 32 years
 6 there. So it was 50 years all together.

7 **Q I don't need to ask you about your**
 8 **employment because you just told us.**

9 A Yes.

10 **Q Do you live on the property that's**
 11 **the subject of this lawsuit?**

12 A No, I don't.

13 **Q Where do you live?**

14 A I live at 12100 St. Wyndall Road.

15 **Q How long have you lived there?**

16 A Since 2002 I believe it is.

17 **Q Let me go through these documents so**
 18 **we can identify the property that we're talking about**
 19 **that's the subject of this lawsuit, if that's okay.**

20 **This is Joint Exhibit 35. Do you recognize**
 21 **that document?**

22 A Yes, I do.

23 **Q What is that document?**

24 A It's the Warranty Deed on the
 25 property in question here.

EXHIBIT K
TRIAL TESTIMONY OF SHANE CULLEN

In the Matter of:

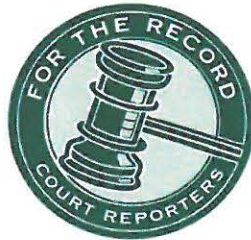
Jeffrey Memmer, et al. v. USA

May 7, 2019

Trial

Vol. 5

Condensed Transcript with Word Index



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832

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JEFFREY MEMMER, et al.,)
 Plaintiffs,)
 v.) Case No. 14-135L
 THE UNITED STATES,)
 Defendant.)

Courtroom B

U.S. District Court for the Central District of Illinois
 100 N.E. Monroe Street
 Peoria, Indiana
 Tuesday, May 7, 2019
 9:30 a.m.
 Trial Volume 5

BEFORE: THE HONORABLE MARGARET M. SWEENEY, CHIEF JUDGE

Reported by: Bobbi L. Hamlin, CCR, CSR, RMR

834

TESTIMONY INDEX

Shane Cullen
 Direct-Examination by Mr. Weigert Page 836
 Cross-Examination by Mr. Stewart Page 900
 Redirect-Examination by Mr. Weigert Page 928
 Daniel LaKemper
 Direct-Examination by Mr. Weigert Page 935
 Cross-Examination by Mr. Stewart Page 951
 Redirect-Examination by Mr. Weigert Page 975
 Direct-Examination by Mr. Stewart Page 981

EXHIBIT INDEX

NUMBER	MARKED	ADMITTED
DEFENDANT:		
108.0531		933
108.0558		933
108.0607		886
108-0619		899
108-0620		899
108-0621		899
108.0623		933
108.0718		933
108.0721		933
108.0722		934
108.0723		934

833

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835

EXHIBIT INDEX (Continued)

NUMBER	MARKED	ADMITTED
DEFENDANT:		
113		884
114		885
117		951
118		979

836

1 PROCEEDINGS
2 - - - - -
3 (Proceeding called to order, 9:38 A.M.)
4 THE COURT: This is not our usual set up, but I can
5 see all of you. This is great.
6 Well, welcome to Peoria. Good morning.
7 MR. WEIGERT: The United States calls Mr. Shane
8 Cullen.
9 (Witness was duly sworn.)
10 DIRECT EXAMINATION
11 BY MR. WEIGERT:
12 Q. Good morning.
13 A. Morning.
14 Q. Please, State your name for the record?
15 A. Shane Cullen.
16 Q. And that's spelled how?
17 A. S H-A-N-E C-U-L-L-E-N.
18 Q. My name is David Weigert. I'm an attorney with the
19 U.S. Department of Justice representing the United States in
20 this case.
21 We last spoke at your deposition on April 2, 2019,
22 here in Peoria. Do you recall that?
23 A. Yes.
24 Q. Where do you live, Mr. Cullen?
25 A. Peoria.

837

1 Q. Could you tell us something about your education?
2 A. I'm sorry?
3 Q. Could you tell us something about your education?
4 A. Graduated from Bradley in 2001.
5 Q. And what degree did you receive then?
6 A. Bachelor's in Business Administration.
7 Q. And are you currently employed?
8 A. Yes.
9 Q. Where?
10 A. Pioneer Railroad Services Incorporated.
11 Q. What is your position?
12 A. Vice president of mechanical operations.
13 Q. What are your duties, Mr. Cullen, in that position?
14 A. Oversee mechanical maintenance of way, car storage,
15 insurance claims, other duties as assigned.
16 Q. Is Pioneer Railroad Services, Inc. affiliated with
17 any other companies as parent companies or subsidiaries?
18 A. It's subsidiary, Pioneer Railroad Corporation.
19 Q. With Pioneer Railroad Corporation?
20 A. Yes.
21 Q. And is Pioneer Railroad Corporation a parent company
22 of other subsidiaries?
23 A. Yes.
24 Q. Including Indiana Southwestern Railway, Inc.?
25 A. Yes.

838

1 Q. Any others subsidiaries?
2 A. Sixteen to twenty of them, yes.
3 Q. And generally, what are those subsidiaries?
4 A. (No response.)
5 Q. What kind of businesses?
6 A. Most of them are operating railroad entities. There
7 are some in management functions and other miscellaneous
8 companies.
9 Q. Other miscellaneous companies?
10 A. Yes.
11 Q. Do you also have the same position, vice president of
12 mechanical operations, with Pioneer Railcorp and Indiana
13 Southwestern Railway, Inc.?
14 A. Pioneer Rail Incorporated I do and I oversee ISW.
15 Q. Okay. So, we're going to call Indiana Southwestern
16 Railway ISW?
17 A. Yes.
18 Q. Okay. So, you perform similar functions for ISW; is
19 that right?
20 A. Yes.
21 Q. How long have you been vice president of mechanical
22 operations?
23 A. About seven years.
24 Q. That would be since about 2012?
25 A. Yes.

839

1 Q. What was your previous position?
2 A. Vice president of transportation.
3 Q. And that was also with ISW?
4 A. Pioneer Railroad Corporation.
5 Q. How long had you been vice president of
6 transportation?
7 A. About eight years.
8 Q. Going back to 2004?
9 A. Roughly, yes.
10 Q. What positions did you hold before that, if any?
11 A. Trainmaster.
12 Q. And how long did you hold that position?
13 A. About three years.
14 Q. Back to about 2001?
15 A. Roughly.
16 Q. When did you start with Pioneer?
17 A. 2001.
18 Q. Have you worked continuously with the company since
19 that time?
20 A. Yes.
21 Q. Were you employed prior to 2001 at all?
22 A. Yes.
23 Q. With which organization?
24 A. Peoria Journal Star, local newspaper.
25 Q. How long were you with Peoria -- is it -- Journal

840

1 **Star?**
 2 A. Journal Star.
 3 Fifteen years.
 4 **Q. And what was your position there?**
 5 A. When I left I was the supervisor, afternoon
 6 supervisor, night processor.
 7 **Q. So, that was going back to about 1989?**
 8 A. Roughly.
 9 **Q. And before that you were in school?**
 10 A. Yeah.
 11 **Q. No further employment going back from there?**
 12 A. I started with the Journal Star when I was about 12 --
 13 **Q. Okay.**
 14 A. -- twelve or fifteen, give or take.
 15 **Q. Thank you.**
 16 I'd like to show you a document it's identified as
 17 **Joint Exhibit 6.**
 18 **Mr. Cullen, please take a moment to look at this**
 19 **document.**
 20 A. Okay.
 21 **Q. Do you recognize it?**
 22 A. It's a familiar documentation, but...
 23 **Q. Do you know what it is?**
 24 A. STB filing or decision.
 25 **Q. Does it -- is it identified as Notice of Interim Trail**

841

1 **Use Or Abandonment at the top?**
 2 A. Yes.
 3 **Q. Is it okay if we refer to that as an to NITU?**
 4 A. Okay.
 5 **Q. Have you heard of that before?**
 6 A. Yes.
 7 **Q. I just want to turn your attention to page two,**
 8 **paragraph two, it starts: ISW filed a verified notice of**
 9 **exemption under 49 C.F.R. pt. 1152, subpart F: Exempt**
 10 **Abandonments to abandon 17.2 miles of interconnecting rail lines**
 11 **extending between one milepost 227.5 at Poseyville, Indiana and**
 12 **milepost 240.2 near German Township Indiana, 12.7 miles; and to**
 13 **milepost 277.5 at Cynthiana, Indiana and milepost 282.0 at**
 14 **Poseyville, Indiana, approximately 4.5 miles.**
 15 **Do you recognize that as the intersecting rail lines**
 16 **at issue in this case?**
 17 A. You're referring to rail line -- are we talking about
 18 the piece removed?
 19 **Q. I'm referring to the 17.2 miles they just described**
 20 **there of interconnecting rail lines?**
 21 A. There's a difference in the mileage in the filings
 22 versus the operating set.
 23 **Q. Okay. Can you explain that?**
 24 A. About 228 is what we used from an operating
 25 perspective and 227.5 is what we used from a leave perspective.

842

1 **Q. And do you know why there's that difference?**
 2 A. No.
 3 **Q. Okay. Thank you.**
 4 **Well, for our purposes here I'm going to refer, if**
 5 **it's okay with you, I'm going to refer to that 17.2 miles**
 6 **described right there.**
 7 **You are familiar with those segments; is that right?**
 8 A. Yes.
 9 **Q. I'll refer to them as the rail line or the corridor or**
 10 **the right-of-way, okay, unless -- unless explained otherwise?**
 11 A. Okay.
 12 **Q. Thank you.**
 13 **I'm going to show you another document now, it's got**
 14 **Bates number D-X108.0639-52 to 06392.0652.**
 15 **Please, take a moment to review that document**
 16 **Mr. Cullen. Again, it's pages .0639 to .0652.**
 17 A. Okay.
 18 **Q. Do you recognize this document?**
 19 A. Appears to be the agreement that was returned to us
 20 from A & K with an A & K signature on it.
 21 **Q. Now, when you say agreement, are you referring -- what**
 22 **are you referring to?**
 23 A. Scrap rails sales agreement.
 24 **Q. And is there a fully executed version of that in this**
 25 **document?**

843

1 A. There's a fully executed copy.
 2 **Q. Okay. Well, let's focus on that. Is that Bates**
 3 **number D-X108.0641 to .0646?**
 4 A. Yes.
 5 **Q. What is that document?**
 6 A. It's a scrap rails sales agreement that's fully
 7 executed.
 8 **Q. And let's see, it's signed, it looks like on page**
 9 **00646 by two people. Who are those people?**
 10 A. Beth Wyatt with A & K. J. Michael Carr with Indiana
 11 Southwestern Railway.
 12 **Q. And Ms. Wyatt is the vice president of the Central**
 13 **Region for A & K Railroad Materials Inc.; is that correct?**
 14 A. Yes.
 15 **Q. And there's indication here that she signed on**
 16 **August 1, 2011; is that right?**
 17 A. Yes.
 18 **Q. And J. Michael Carr is the president of Indiana**
 19 **Southwestern Railway Company; is that correct?**
 20 A. Yes.
 21 **Q. And the date by his signature is August 2, 2011; is**
 22 **that right?**
 23 A. Yes.
 24 **Q. Okay. Are you familiar with this document?**
 25 A. Yes.

844

1 **Q. Have you seen it before?**
 2 A. Yes.
 3 **Q. In what context have you seen that?**
 4 A. When I contributed drafting it. Communicated with A &
 5 K on getting it signed. And I saw it in deposition again.
 6 **Q. Let me turn your attention to the first page of this**
 7 **Scrap Rail Sales Agreement. In the very first paragraph it**
 8 **says -- actually, I'm referring to the numbered section one. Do**
 9 **you see that?**
 10 A. Yes.
 11 **Q. On the first page it says: Seller will sell and buyer**
 12 **will purchase from seller the switches, rail and other metallic**
 13 **track materials and remove same from sellers railway.**
 14 **Do you see that?**
 15 A. Yes.
 16 **Q. And who is the seller there?**
 17 A. I'm sorry?
 18 **Q. Who is the seller that's referred to there?**
 19 A. ISW.
 20 **Q. ISW.**
 21 **Who is the buyer?**
 22 A. A & K.
 23 **Q. Are you familiar with that term "materials" as it's**
 24 **used in this agreement?**
 25 A. Yes.

845

1 **Q. What did -- what was included within that term?**
 2 A. All the steel rail track material, which is the rails,
 3 joint bars, plates, spikes and bolts and nuts.
 4 **Q. So, that included switches, rail and other metallic**
 5 **track materials; is that fair to say?**
 6 A. Steel portion of the switches, yes.
 7 **Q. What did the term "materials" not include; if you**
 8 **know?**
 9 A. Generally speaking, it wasn't including any ties,
 10 bridges, signals, anything on or along the right-of-way
 11 underneath.
 12 **Q. Did it -- did that term "materials" include other**
 13 **nonmetallic property?**
 14 A. There was a reference to a railcar, but I don't recall
 15 the outcome of that.
 16 **Q. You see at the end of section in the last sentence**
 17 **there it says: It is agreed by the parties that materials do**
 18 **not include bridges, culverts or similar structures.**
 19 A. Yes.
 20 **Q. Is that in accordance with your understanding?**
 21 A. Yes.
 22 **Q. What does the agreement say A & K will do with the**
 23 **materials?**
 24 A. Go in and remove the material.
 25 **Q. And -- and -- okay. And what stretch of rail line is,**

846

1 **under this agreement, is A & K supposed to remove those**
 2 **materials?**
 3 A. Sixteen point seven miles from 240.2 to 228 in the
 4 Cynthiana branch.
 5 **Q. So, is that 16.7 miles described in that section one**
 6 **there?**
 7 A. Yes.
 8 **Q. And it's described, as it says, removal of materials,**
 9 **I'm quoting, shall extend for approximately 16.7 miles on the**
 10 **ISW from ICR milepost 228.0, at Poseyville switch, C&IE MP**
 11 **282.0, at Poseyville, Indiana, to ICR milepost 240.2 near German**
 12 **Township, approximately 12.2 miles, and from C&EI milepost 277.5**
 13 **at Cynthiana, Indiana to C&EI milepost 282.0 at Poseyville,**
 14 **Indiana, approximately 4.5 miles, within Posey and Vanderburg**
 15 **counties in Indiana.**
 16 **And it defines that as location. Do you see that?**
 17 A. Yes.
 18 **Q. What -- what does C&EI mean there?**
 19 A. That's another railroad, but I don't know what it
 20 stands for.
 21 **Q. Okay. Might it stand for Chicago and Eastern Illinois**
 22 **Railroad?**
 23 A. It might.
 24 **Q. But you're not sure?**
 25 A. I don't know.

847

1 **Q. Okay. Do you know what ICR stands for?**
 2 A. I assume Illinois Central Railroad.
 3 **Q. And what are the relationship between those railroads**
 4 **and ISW? Do you know?**
 5 A. The best I can tell it was former owner/operators of
 6 the line.
 7 **Q. Those are the former owners?**
 8 A. Former railroad that ran on that line prior to being a
 9 short line.
 10 **Q. Okay. Now, is that the 16.7 miles you referred to**
 11 **before when we were reviewing the need to --**
 12 A. Yes.
 13 **Q. And again, it's different from the 17.2-mile rail line**
 14 **how?**
 15 A. Yes.
 16 **Q. Is it included -- is that 16.7 miles included wholly**
 17 **within the 17.2-mile rail line?**
 18 A. That would be my understanding.
 19 **Q. Is it your understanding also from looking at this**
 20 **agreement and how the description reads that that's the case?**
 21 A. My understanding would be 16.7 is the complete line to
 22 be pulled up.
 23 **Q. And it completely lies completely within the**
 24 **17.2 miles?**
 25 A. To me that's one and the same.

848

850

1 Q. Okay. And you're not sure what accounts for that 0.5
2 mile difference?

3 A. I do not.

4 Q. Okay. Let me turn your attention to paragraph 17 of
5 this agreement, section 17, it's comprised of four paragraphs.
6 Do you see that?

7 A. Yes.

8 Q. Let me focus you in on paragraph three of that section
9 17, if I could, it starts with: Buyer shall leave all bridges,
10 culverts, signal systems, road crossings and other structures,
11 fixtures and facilities intact and undamaged.

12 Do you see that?

13 A. Yes.

14 Q. Why was that there?

15 A. Because they were not responsible to remove any
16 bridges, culverts or signal systems or road crossings.

17 Q. What is a signal system?

18 A. Flashers that you see on the highway when a train is
19 going through. It could also be track control signals that --
20 we don't have that as ISW.

21 Q. Is that used for -- are signal systems used at
22 railroad intersections?

23 A. Highway railroad intersections and at intersections
24 between railroads and also to govern train movements on the
25 railroad itself, there are structures as used here.

1 Q. Let me now turn your attention to the next sentence in
2 that paragraph three of section 17, that says: Crossties, and
3 I'm quoting, may be moved away from the center of the
4 right-of-way, but shall not be removed from the right-of-way.

5 Do you see that?

6 A. Yes.

7 Q. Are crossties also known as just ties?

8 A. Yes.

9 Q. To your knowledge did A & K comply with that
10 provision?

11 A. Yes.

12 Q. Why was that included there?

13 A. Because they did not want the tie materials left just
14 recklessly discarded along the right-of-way.

15 Q. Let me turn your attention to the third sentence in
16 that same paragraph that says -- I'm sorry, this is the second
17 clause of that second sentence. Okay? And it says: Neither
18 the crossties, nor any other materials shall be allowed to
19 obstruct, block or alter the drainage of right-of-way or any
20 surrounding property.

21 What does that mean?

22 A. The ties shouldn't being recklessly discarded into
23 drainage ways and ditches.

24 Q. Are there drainage ditches within the right-of-way?

25 A. Yes.

849

851

1 Structures will be anything from a short shanty depot
2 to culvert or anything, anything that's got a manufacturer --

3 Q. Anything that's manufactured?

4 A. -- manufactured.

5 Q. That might include bridges?

6 A. Yes.

7 Q. What are fixtures as it's used here?

8 A. I'm not a hundred percent sure what he was referring
9 to as fixtures.

10 Q. But do you know what facilities mean -- means in this
11 context?

12 A. Facilities is normally office buildings, crew
13 locations.

14 Q. So, those items that we just described are to be left
15 intact and undamaged under this agreement; is that correct?

16 A. Yes.

17 Q. Okay. Under this provision A & K was also to leave
18 rails on road crossings; is that correct?

19 A. Yes.

20 Q. A & K also left rails and ties on bridges; is that
21 correct?

22 A. No, I believe they pulled them off the bridges.

23 Q. Did they leave rails -- rails on any other part of the
24 16.7-mile -- these 16.7-mile intersecting lines?

25 A. They shouldn't have, other than the road crossings.

1 Q. To your knowledge, did A & K comply with that
2 provision?

3 A. Yes, with one exception.

4 Q. Yes.

5 What was that exception?

6 A. We had a gentleman complain the ties were slipping
7 down a road bank. And I asked A & K to address it, which they
8 did.

9 Q. That was the only incidence of that nature that you
10 know of?

11 A. That I'm aware of.

12 Q. Let me turn your attention to section six entitled
13 time that reads, and that's on page .0642, see that?

14 A. Yes.

15 Q. That reads: Buyer shall have all work of removal and
16 restoration completed and shall vacate the property on or before
17 April 1, 2012.

18 Do you see that?

19 A. Yes. Yes.

20 Q. To your knowledge, did A & K, as the buyer, comply
21 with that provision?

22 A. I believe they did.

23 Q. Let me turn your attention to section two of this
24 agreement entitled purchase price.

25 That provision states: The purchase price payable

852

1 from buyer to seller for the materials is \$1,200,000 US dollars.
 2 Do you see that?
 3 A. Yes.
 4 Q. And was that the purchase price actually paid by A & K
 5 to ISW on this agreement?
 6 A. Yes.
 7 Q. Let me show you another document, it's Bates
 8 D-X108.0653 to 0654. Have you found that?
 9 A. Yes.
 10 Q. What is that document?
 11 A. Looks like the copy of the check and cover letter for
 12 the payment.
 13 Q. Have you seen this before?
 14 A. Yes.
 15 Q. So, that's a check. Who -- who was that check from?
 16 A. A & K.
 17 Q. And who is it to?
 18 A. ISW.
 19 Q. And the amount on that ISW?
 20 A. One point two million.
 21 Q. Okay. So, that's -- your understanding is that that's
 22 the same 1.2 million as is required under this Scrap Rail Sales
 23 Agreement; is that correct? Is that right?
 24 A. Yes.
 25 Q. And that's -- also, there's a reference in there to

853

1 the Evansville Project.
 2 Do you see that?
 3 A. Yes.
 4 Q. Is this project that's described in this agreement
 5 sometimes known as the Evansville Project?
 6 A. Yes, it's based out of Evansville, Indiana.
 7 Q. I note that the letter there, the cover letter for the
 8 check, is addressed to Pioneer Railroad Corporation, while the
 9 check is made out to ISW. Why is that?
 10 A. I don't know.
 11 Q. Okay. To your knowledge, did A & K timely perform all
 12 of its other obligations under this agreement?
 13 A. Yes.
 14 Q. They timely removed rails and other metallic materials
 15 from the rail line by the April 1, 2012 deadline?
 16 A. To the best of my knowledge, yes.
 17 Q. You're not aware of any extensions of that deadline?
 18 A. No.
 19 Q. Did -- and I think you said A & K complied with their
 20 requirement in Section 17 to leave all ties in the right-of-way;
 21 is that correct?
 22 A. Yes.
 23 Q. And to your knowledge, with one exception that you
 24 mentioned about ties in the drainage ditch, A & K did not allow
 25 crossties or other materials to obstruct, block or alter the

854

1 drainage of right-of-way; is that your understanding -- or of
 2 the property?
 3 A. That's my understanding.
 4 Q. And all road crossings were left intact with the rails
 5 in place; is that correct?
 6 A. Yes.
 7 Q. And all bridges, culverts signal systems or other
 8 structures, fixtures and facilities were left intact and not
 9 damaged; is that right?
 10 MR. STEWART: I object. A, it's repetitive. B,
 11 it's asked and answered. C, it's irrelevant.
 12 THE COURT: I'm going to let the Government
 13 continue.
 14 BY MR. WEIGERT:
 15 Q. You can answer.
 16 Do you want me to repeat the question?
 17 A. Please.
 18 Q. Is it true that A & K left, quote, intact and
 19 undamaged all bridges, culverts, signal systems and other
 20 structures, fixtures and facilities?
 21 A. Yes.
 22 Q. Let me turn your attention to Section 4 of this
 23 agreement.
 24 That's entitled Seller's Representations and
 25 Warranties.

855

1 Do you see that?
 2 A. Yes.
 3 Q. That section is comprised of two paragraphs. And
 4 focusing on the second one it says: Seller indemnifies and
 5 saves Buyer harmless from and against any and all damages,
 6 losses, liabilities and claims, including reasonable costs of
 7 attorney and litigation costs, as well as losses awarded against
 8 or incurred by Buyer in regard to Seller's breach of its
 9 representations and warrants in the Section 4.
 10 To your knowledge, was that indemnification ever
 11 exercised?
 12 A. No.
 13 Q. No, it was not?
 14 A. No, it was not.
 15 Q. And similar question on Section 5, that's Buyer's
 16 Representations -- I'm sorry -- that's -- yes, Buyer's
 17 Representations and Warranties.
 18 There's a -- you'll see that's a three-paragraph
 19 section. The final one is a similar one: Buyer indemnifies and
 20 saves Seller harmless from and against all losses awarded
 21 against or incurred buy Seller in regard to Buyer's breach of
 22 its representations and warrants in this Section 5.
 23 To your knowledge, was that indemnification provision
 24 ever exercised?
 25 A. No, it was not.

856

1 Q. Let me turn your attention to Section 7, that's
2 entitled Indemnities.

3 Can you review that for a moment?

4 Have any of those indemnities described in that
5 section been exercised?

6 A. Not to my knowledge, no.

7 Q. Okay. I want to turn your attention to Section 10,
8 that's entitled Default/Termination.

9 Do you see that?

10 A. Yes.

11 Q. And it refers to a notice of default.

12 Do you see that?

13 A. Yes, I see it.

14 Q. Do you know what that is?

15 A. I know what default is.

16 Q. To your knowledge, did either party in this -- to this
17 agreement ever issue a notice of default to the other?

18 A. No, not to my knowledge.

19 Q. Let me turn your attention to Section 12 entitled
20 Force Majeure.

21 Do you have an understanding of what force majeure?

22 A. Yes, I do.

23 Q. To your knowledge, was there a force majeure in this
24 case?

25 A. No, there was not.

857

1 Q. That provision was never exercised?

2 A. No, it was not.

3 Q. Let me turn to section 14 time of contractors. What
4 does that provide generally.

5 A. The right to subcontract work out if they chose to.

6 Q. To your knowledge, did A & K subcontract any of this
7 work out?

8 A. Not to my knowledge.

9 Q. And let me -- we're almost done here. Let me turn
10 your attention to Section 18, it's entitled Entire
11 Understanding. And I believe in there, there is reference to
12 modification.

13 To your understanding, was this agreement ever
14 modified from this point forward?

15 A. Not to -- not to my knowledge, no.

16 Q. Thank you.

17 I'm going to switch topic now. Let me ask this
18 question: Before -- before the rails, was there a time when A &
19 K pulled up the rails from the 16.7-mile line reference in this
20 agreement?

21 A. I'm sorry. I don't understand.

22 Q. So, we just discussed that A & K did pull up the rails
23 under that agreement; is that correct?

24 A. Correct.

25 Q. Okay. Before they did that, did you have an occasion

858

1 to determine the value of the rails and ties on, I'll call it,
2 the 17.2-mile corridor?

3 A. I did do some calculations of the value of it.

4 Q. And for what purpose did you prepare those
5 calculations?

6 A. Well, part of it was for reference material. Part of
7 it was for receipt of scrap material. Part of it was for the
8 legal department for -- I believe they were doing the OFA for
9 Poseyville.

10 Q. When you say the OFA for Poseyville, are you referring
11 to the Town of Poseyville's offer of financial assistance?

12 A. Yes.

13 Q. And do you recall what date, approximately, you did
14 that calculation?

15 A. I don't.

16 Q. Do you recall, approximately, what date the Town of
17 Poseyville filed its offer of financial assistance?

18 A. No, I wasn't actually involved in the OFA legal or
19 real estate.

20 Q. Okay. But you were involved in preparing ISW's
21 response to the town's OFA; is that correct?

22 A. I would have been responsible for the cost
23 calculations.

24 Q. The cost calculations?

25 A. I would have done no legal responses for anything of

859

1 that nature.

2 Q. How many ties are there per mile or were there per
3 mile on 17.2-mile corridor?

4 A. Well, rough calculation, I used 2800 ties per mile for
5 any typical railroad calculation. I never actually counted the
6 ties at ISW per mile.

7 Q. But your understanding is these 17.2 miles were pretty
8 standard in that regard?

9 A. They should have been standard, yes.

10 Q. So, you estimate there were, approximately, 2800 ties
11 per mile; is that right?

12 A. That's an approximation you can use in general terms.

13 Q. And from that number and from knowing 17.2 miles, did
14 you make a calculation of how many ties there were,
15 approximately, in 17.2 mile corridor?

16 A. It was based on 16.7, it was -- seems like it was
17 43,000 something.

18 Q. Let me turn your attention to a document D-X -- it's
19 -- it's Bates number D-X108.0608 to .0609. Should be in your
20 collection of documents there.

21 A. 0608.

22 Q. Correct.

23 To .0609.

24 Do you find that?

25 A. Yes.

860

1 **Q. Okay. What do you recognize this document as?**
 2 A. Not sure I have the right document here.
 3 **Q. Is that a letter with a Baker & Miller --**
 4 A. Yes.
 5 **Q. -- letterhead?**
 6 A. I've got it. I'm sorry.
 7 **Q. December 8, 2010; is that correct?**
 8 A. December 8, 2010, yes.
 9 **Q. It's a two-page document?**
 10 A. (No response.)
 11 **Q. Have you seen this document before?**
 12 A. I believe I saw it at the deposition.
 13 **Q. And what -- what -- what is the significance of this**
 14 **document; if you know?**
 15 MR. STEWART: Your Honor, objection. There's no
 16 foundation for this document. He may have seen it. He
 17 didn't write it. He didn't author it. He's already said he
 18 didn't know what it was no until he identified it as letter
 19 from a lawyer in Washington D.C.
 20 THE COURT: I'm going to sustain the objection,
 21 unless you can give me a reason why it shouldn't be
 22 sustained.
 23 BY MR. WEIGERT:
 24 **Q. Let me focus you, Mr. Cullen, on the last paragraph of**
 25 **that letter this may help make it the clear what your**

861

1 relationship was to this letter.
 2 There's some calculations there. Do you see those
 3 reflected in that paragraph of -- final paragraph of the letter?
 4 A. Yes.
 5 **Q. Did you have a role in -- in developing those**
 6 **calculations?**
 7 A. Yes.
 8 **Q. And what were those calculations?**
 9 A. Like, net liquidation value of the rail line?
 10 **Q. Okay. When you say rail line, do you mean the**
 11 **17.2-mile rail line?**
 12 A. Yes. Yes.
 13 **Q. Okay. And what were your calculations here as**
 14 **reflected here?**
 15 MR. STEWART: Your Honor, I object. Lack of
 16 foundation in any relevance whatsoever for this calculation.
 17 THE COURT: I have to agree. The witness said he
 18 didn't recognize the letter or didn't participate in
 19 preparing the letter.
 20 He recognizes some of the figures that appear in
 21 the letter it -- it -- it seems, but can you do a little --
 22 if you could connect the dots a little more, if you could,
 23 because you may be able to lay a foundation for it, but so
 24 far, that hasn't occurred. Thank you.
 25 MR. WEIGERT: Sure.

862

1 BY MR. WEIGERT:
 2 **Q. So, the author of this letter is William Mullens.**
 3 **Do you see that?**
 4 A. Yes.
 5 **Q. Do you know who that is?**
 6 A. Yes.
 7 **Q. Who is that?**
 8 A. Our D.C. attorney that handles these type of issues.
 9 **Q. Okay. And you mentioned that you did recognize the**
 10 **calculations in that final paragraph, right?**
 11 A. Yes.
 12 **Q. And you recognize them as your own, correct?**
 13 A. Yes.
 14 **Q. Are those calculations that Mr. Mullens requested from**
 15 **ISW?**
 16 A. Mr. Mullens probably requested them through our legal
 17 counsel who requested them from me.
 18 **Q. Thank you.**
 19 Just focusing -- let me -- let me -- just focusing on
 20 that paragraph there, it says: According -- let's see, based
 21 upon these documents as of the -- let me start from the
 22 beginning. As of this time ISW has no documents that
 23 specifically analyze the northwest procedures. The net
 24 liquidation value of the lines. ISW has received some
 25 confidential offers to purchase the rails, switches, diamonds,

863

1 ties, plates, signals and other track material for OTM.
 2 Does that accord with your recollection.
 3 MR. STEWART: Well, your Honor, first of all, the
 4 document speaks for itself.
 5 Second of all, the net liquidation value of this
 6 line for purposes of an OFA to the Town of Poseyville is
 7 completely irrelevant.
 8 MR. WEIGERT: Your Honor, it's very relevant
 9 actually to the -- to showing that --
 10 THE COURT: I'm sorry. I can't hear you. Could
 11 you --
 12 MR. WEIGERT: So the -- the value of this line is
 13 very relevant to the question of whether -- whether it's
 14 been abandoned and what the value of the property remaining
 15 on the line is, which we're going to get to.
 16 THE COURT: I will -- I will let the Government
 17 continue, but it will -- it will go to the weight.
 18 I certainly understood the testimony with respect
 19 to the cost of pulling -- well, the agreement with regard to
 20 pulling up all the salvage value that existed on the
 21 railroad line and that there was no damage to the
 22 property -- to the adjoining properties' owners, that no
 23 nuisance was created, but in terms of the other relevance, I
 24 I'm not quite following the Government's argument or -- but
 25 I'll let you proceed.

864

866

1 MR. WEIGERT: Thank you, Your Honor.

2 BY MR. WEIGERT:

3 **Q. Let me -- let me turn your attention to a second**
4 **document.**

5 THE COURT: Could I just, counsel, I apologize.
6 Are you trying to establish a value for the property with
7 this line of testimony?

8 MR. WEIGERT: We're trying to establish that the
9 railroad assigned a value, a positive value, to the ties, in
10 particular, that were left, the 48160 ties, as the witness
11 counted.

12 THE COURT: And how does that relate to the taking?

13 MR. WEIGERT: It has to do with the -- the state --
14 it has to do with the abandonment under the state law and
15 the state law provision, which the state law provision
16 provides that in order to abandon under state law the ties
17 have to be removed from the right-of-way.

18 And so, this testimony goes, in part, to showing
19 that the ties were not, in fact, removed.

20 And it also goes to show that they -- there wasn't
21 abandonment in the sense of discarding the ties, rather the
22 ties have some positive value from the railroad perspective
23 and also from potential bidder perspective, which we'll get
24 to. And so therefore, that's a railroad purpose, just like,
25 you know, a railroad can retain use of a right-of-way for

1 what the starting point here was in this story, okay, we
2 never have heard that -- we've never heard that at the time
3 that the rails were pulled up and the ties were -- the rails
4 were and the metallic objects removed, but the ties and
5 other nonmetallic property was left within the right-of-way
6 and that was under a requirement of this agreement. And --
7 and many of those items that were left in the right-of-way
8 were assigned a positive value by the railroad and also by
9 companies that bid to remove them.

10 THE COURT: Presumably, because they could -- they
11 could use them?

12 MR. WEIGERT: Exactly.

13 THE COURT: They could repurpose them.

14 MR. WEIGERT: Correct.

15 MR. STEWART: Your Honor, that's the whole point of
16 this dialogue.

17 THE COURT: Would you mind? I apologize. The
18 other reason I'm asking you to sit is because I can't hear
19 you as well. It's okay if you just to speak in the
20 microphone. Thank you.

21 MR. STEWART: That's the whole problem with this
22 exercise is that there is no testimony that they had value.

23 And in fact, it's contrary to this witness's
24 testimony and the next witness's testimony that they were
25 not functional and did not have any value.

865

867

1 railroad purposes other than train traffic.

2 And so, in this case --

3 THE COURT: What would -- could you give me --

4 MR. WEIGERT: -- storage of valuable ties.

5 THE COURT: Could you give me an example?

6 MR. WEIGERT: Well, being the ties in this case, and
7 I think we've heard testimony on this were, stacked neatly
8 in many cases within the right-of-way. Okay.

9 THE COURT: I've heard disparate testimony on that.
10 I don't think many of the landowners would agree that the
11 ties were stacked neatly.

12 MR. WEIGERT: Okay. They were left -- through
13 this witness we will learn, I believe, that all ties were
14 left under this -- under this agreement they were all
15 required to be left in the right-of-way under the Scrap Rail
16 Sales Agreement --

17 THE COURT: Well, that --

18 MR. WEIGERT: -- all 48160 ties were required to be
19 left.

20 THE COURT: That doesn't mean that they were left
21 that way or that they -- given people that were going up and
22 down the track that they were -- that they were left
23 undisturbed.

24 MR. WEIGERT: Over time there may have been change.
25 I'm trying to establish that initially what the --

1 And so, he's -- and it's also a false and
2 misleading issue for the Court to even say that they had
3 value or that they were -- we will stipulate that they were
4 left in some way on the railroad right-of-way, but that's a
5 far cry from what he's actually trying to establish that
6 they served any railroad purpose.

7 MR. WEIGERT: Your Honor, counsel has just
8 illustrated precisely why we need this testimony, because
9 he's made an assertion that we believe to be false. And we
10 would plan to show it through documents and this witness.

11 THE COURT: Okay. Well, I'm going to allow you to
12 proceed. And Mr. Stewart will have the opportunity to
13 cross-examine if they think it's even necessary.

14 Thank you very much.

15 MR. STEWART: Thank you, Your Honor.

16 BY MR. WEIGERT:

17 **Q. Mr. Cullen, I'd like to show you another document,**
18 **this one is Bates numbered, it comes right of the one you just**
19 **looked at, one you just looked at fully, executed letter. I'm**
20 **going to show you one just prior to that. And that is Bates**
21 **numbered D-X108.0605 to D-X108.0607.**

22 **Do you see that, Mr. Cullen?**

23 A. Yes, I see it.

24 **Q. What is that, if you know?**

25 A. A letter to the Town of Poseyville discussing the NLV

868

1 by the railroad.

2 **Q. And -- and by NLV what do you mean?**

3 A. Net liquidated value, what the railroad would be, in
4 theory, worth.

5 **Q. Okay. Are you referring to the chart on or table on**
6 **page D-X108.0607?**

7 A. Yes.

8 **Q. Do you know who prepared that table?**

9 A. Yes.

10 **Q. Who?**

11 A. I did.

12 **Q. And is that a table of your calculations of the values**
13 **of both rail and ties?**

14 A. Yes.

15 **Q. And ballast as well, correct?**

16 A. Yes.

17 **Q. Let's focus in on the third section of that chart**
18 **entitled Tie Disposal.**

19 **Do you see that?**

20 A. Yes.

21 **Q. And can you tell me what that -- what your**
22 **calculations were in that section?**

23 A. Well, on the rail line I made some assumptions on what
24 the ties that would be junked in the landfill, as I said ground,
25 would be and the cost to dispose of those. And made assumptions

869

1 that there would be some ties, potentially, still on the ground
2 that would have relay value to them. There's number one or
3 number two-grade type tie.

4 **Q. Okay. Let's start with a total number of ties. How**
5 **many total -- how many ties in total did you calculate here?**

6 A. Roughly 48,000.

7 MR. STEWART: Your Honor --

8 BY MR. WEIGERT:

9 **Q. And that was calculated as 2800 tiles per mile times**
10 **17.2 miles; is that correct?**

11 A. Seventeen point two or sixteen point seven.

12 MR. STEWART: May I interpose an objection that this
13 is already admitted to be an assumption on his part as to
14 the ties that were either functional or nonfunctional for
15 purposes of preparing this quotation; and other than the
16 assumption that he's already admitted, there's no other
17 foundation for this whatsoever.

18 MR. WEIGERT: Your Honor, I'm happy to probe the
19 foundation for that assumption.

20 THE COURT: Thank you.

21 BY MR. WEIGERT:

22 **Q. Mr. Cullen, you said you made an assumption regarding**
23 **the percentages of ties here that were either junk/landfill or**
24 **that were relay number one or relay number two; is that correct?**

25 A. Yes, that's correct.

870

1 **Q. And just so we got your terms straight: What does**
2 **relay mean?**

3 A. Relay means the used material can be reused.

4 **Q. Okay. And what's the difference between relay number**
5 **one and relay number two?**

6 A. Well, relay number one and number two are gradings of
7 ties, they're subjective in nature. Some people would only use
8 number one, classify it as a tie to be put back on tracks and
9 classify it as usable only in landscape, not usable in track.
10 So, depending on who's grading it, it would have the decision
11 making on it.

12 **Q. Okay. And -- and in this case, you gave three grades**
13 **to the 48,160 ties. I'm just adding those numbers. And you**
14 **gave them three different grades yourself; is that correct?**

15 MR. STEWART: Your Honor, I object to the from of
16 the question as referring to them as three grades. They may
17 be three different assumptions, but he did not go out and
18 look at the ties and make any determination as to their
19 functionality.

20 MR. WEIGERT: Your Honor, I'm attempting -- I'm in
21 the middle of attempting to create a foundation here, if he
22 would let me finish, I would really appreciate it.

23 THE COURT: Yes. The objection is sustained. You
24 can continue.

25 MR. WEIGERT: Thank you.

871

1 BY MR. WEIGERT:

2 **Q. So, just trying to work through here how you, you**
3 **know, how you developed these numbers, Mr. Cullen.**

4 So, you know, just to be clear, what we got here,
5 you -- you have broken up these 48,160 ties into three
6 categories; is that fair to say?

7 A. Yes.

8 **Q. Okay. Now, the first category is junk/landfill. What**
9 **does that mean?**

10 A. That means that in all likelihood as they sat on the
11 track they were junk, not supporting the rail.

12 **Q. Okay. What's the basis for your determination that**
13 **half of these ties, working with these numbers here, half of**
14 **these ties were in that category?**

15 A. Because over the years that rail line, the traffic
16 didn't sustain the rail line. So, therefore, maintenance of
17 ties and such were not replaced and upgraded over time.

18 **Q. And the basis for your determination there is your**
19 **position as vice president of mechanical and operations and your**
20 **direct experience with ties in this railroad line, correct?**

21 A. Yes.

22 **Q. And how did you make the determination that another**
23 **-- that a quarter or 12,040 of these ties fit into the category**
24 **of relay number one?**

25 MR. STEWART: Your Honor, objection to the form of

872

1 the question. He did not make that conclusion. He made an
2 assumption.

3 And to ask this witness whether he made a
4 conclusion that a quarter of these ties were relay one or
5 relay two is totally improper and lacks foundation.

6 MR. WEIGERT: Your Honor, I'm in the middle of
7 laying a foundation. I think this goes to weight.

8 Frankly, I'm going to establish this witness is in
9 the best position of any witness we've seen and I think any
10 witness we could see to make this determination. This falls
11 squarely within his responsibilities on a daily basis for
12 this railroad. And so, he's really the -- that's the reason
13 that the railroad asked this witness to prepare these
14 calculations. He's the person in the best position to do
15 so.

16 MR. STEWART: Your Honor, if I might add, I
17 apologize, but the proof is ultimately in the pudding here,
18 because they did not ever divide these ties into relay one
19 or relay two and they were all left and discarded after they
20 were pulled up.

21 And so this exercise of going and trying to
22 establish whether this assumption was ultimately correct, we
23 ultimately know the assumption was wrong and so, as a
24 result, this foundation is -- is totally irrelevant.

25 THE COURT: Well, you'll have the opportunity to

873

1 ask those questions on cross-examination. So, I will permit
2 it.

3 You may continue.

4 MR. WEIGERT: Thank you, Your Honor.

5 BY MR. WEIGERT:

6 **Q. So, let's focus in, Mr. Cullen, on that second**
7 **category relay number one, if we could. You have assigned that**
8 **category to 12,040 ties; is that correct?**

9 A. Yes.

10 **Q. And what value did you assign to each tie in that**
11 **category?**

12 A. Relay number \$14.50.

13 **Q. Why did you choose that number?**

14 A. That was most likely market price at the time.

15 **Q. The market price at the time?**

16 A. (No response.)

17 **Q. And how did you determine that?**

18 A. Because I buy ties from various vendors. So I would
19 have been paying for them at that time.

20 **Q. Thank you.**

21 **And so, did you do the calculation to figure out the**
22 **total value of those 1240 ties here?**

23 A. No, my Excel did.

24 **Q. And how did -- and you operated the Excel?**

25 A. Yes.

874

1 **Q. How did your operation of Excel result in this --**
2 **what -- what number resulted?**

3 A. One hundred seventy-four thousand five hundred eighty
4 dollars.

5 **Q. And is that the result of a simple multiplication of**
6 **12,040 times \$14.50?**

7 A. Yes, that's supposed to be.

8 **Q. And for the record, that number of the -- the**
9 **resulting number, \$174,580, right?**

10 A. Yes.

11 **Q. Let's focus on the category relay number two. How**
12 **many ties did you place in that category?**

13 A. Twelve thousand.

14 **Q. And 40?**

15 A. Yes.

16 **Q. And what value did you assign to each item in that**
17 **category?**

18 A. Ten dollars.

19 **Q. And did you similarly use Excel to calculate the**
20 **result from multiplying those two numbers 12,040 times \$10?**

21 A. Yes.

22 **Q. And what was the result?**

23 A. One hundred twenty thousand four hundred.

24 **Q. One hundred twenty thousand four hundred dollars?**

25 A. Yes.

875

1 **Q. And so, is it fair to say that for relay number one**
2 **and relay number two, if you add those values together, they**
3 **equal close to \$300,000?**

4 A. Yes.

5 **Q. Now, let's just to be -- to be -- for the record,**
6 **let's focus back on the junks/landfill category; how many ties**
7 **did you put in that category?**

8 A. Twenty four thousand eighty.

9 **Q. Okay. And what value did you assign to each of those**
10 **ties?**

11 A. Five dollars 5 to the negative.

12 **Q. Okay. And did you use Excel to multiply 24,080 times**
13 **negative \$5?**

14 A. Yes.

15 **Q. And what resulted?**

16 A. One hundred twenty thousand four hundred dollars.

17 **Q. And what did you do next in your calculation?**

18 A. Summed those totals up accounting for the negatives,
19 of course.

20 **Q. And what was result of that summation?**

21 A. One hundred seventy-four thousand five hundred eighty
22 dollars.

23 **Q. And was that \$174,580 the net liquidation values you**
24 **calculated of all 48,160 ties?**

25 A. Yes.

876

878

1 **Q. And that's a positive value, correct?**
 2 A. Yes.
 3 **Q. Let me focus your attention on ballast value. What**
 4 **value did assign the ballast?**
 5 A. One hundred fifty thousand dollars.
 6 **Q. What was your basis of your assigning that value?**
 7 A. Just put a value to it from reclaiming ballast in the
 8 past.
 9 **Q. Based on your experience in buying and selling**
 10 **ballast?**
 11 A. Yes.
 12 **Q. And was your best estimation based on that experience**
 13 **of what the market value was at that time; is that correct?**
 14 A. Yes.
 15 **Q. And that's to -- that's a positive value, right?**
 16 A. Yes.
 17 **Q. And under the A & K Scrap Rail Sales Agreement, was**
 18 **the ballast left within the 16.7-mile line?**
 19 A. Yes, it was.
 20 **Q. Yes, it was?**
 21 A. Yes.
 22 **Q. Thank you.**
 23 THE COURT: May I ask a question? The ballast is
 24 rock, correct, here?
 25 THE WITNESS: That's correct.

1 was: Did you, when you performed your calculations, did you
 2 ever go out and actually look at the condition of the ties
 3 and crossties or did you simply do calculations sitting at
 4 your desk, knowing that there were -- you assumed that there
 5 were X number of ties and crossties and maybe half of them
 6 would be unusual -- unusable and then the other half
 7 would -- you would divide into two categories, relay number
 8 one and the other would be relay number two?
 9 THE WITNESS: The assumption would be that there
 10 would be some relays in it and I calculated from the desk.
 11 I have seen the line in the past prior to the time I
 12 calculated this.
 13 THE COURT: You didn't go out --
 14 THE WITNESS: I did not go out and look at it, but
 15 in order to have the rail line intact and be able to operate
 16 empty I traffic on it, there's got to be the assumption that
 17 there's some decent ties in there to hold the rails
 18 together.
 19 THE COURT: Okay. And --
 20 THE WITNESS: Now --
 21 THE COURT: It's okay.
 22 THE WITNESS: When we do take the rail up in the
 23 process of taking rail up they do tear the tie up, so to
 24 speak, or destroy the tie, depending on how strong the tie
 25 is, much like you take a nail out of a piece of wood. If

877

879

1 THE COURT: Does that -- I would -- and that
 2 would be very heavy to remove and costly, too. Does
 3 anyone -- have you seen instances in which a railroad or
 4 some other entity, organization, will come and pay for
 5 ballast or is it a matter of if someone wants to use the
 6 land it just has to be destroyed? What -- what --
 7 THE WITNESS: I have purchased ballast from a
 8 railroad that's been taken up. So, I buy it as reclaimed
 9 ballast.
 10 THE COURT: Oh, you buy it.
 11 THE WITNESS: Railroad short lines will buy it. It
 12 will not be meet class one specs. So, class one would be
 13 like Norfolk Southern, Burlington Northern. Short lines, we
 14 use it.
 15 THE COURT: Right.
 16 THE WITNESS: People along the line have requested
 17 to purchase some for their driveways, whatever purposes they
 18 want to us it for. So, yes, as reused.
 19 THE COURT: Okay.
 20 THE WITNESS: And you have to take into account
 21 freight to move it to where you want to, because it,
 22 obviously, diminishes the value of it. If it costs you more
 23 to move it and pick it up than it does where you can buy it
 24 out of quarry.
 25 THE COURT: And the other question I have for you

1 that piece of wood is rotted or ruined, it's going to
 2 destroy that piece of wood. If it's a good, strong piece of
 3 wood, then the nail can be taken out and that wood reused.
 4 THE COURT: Okay. So, in the entire universe the
 5 total number of ties was 48,160 and you just assumed that
 6 half of them would end up in a landfill and then the other
 7 half would be evenly split between relay number one and
 8 relay number two?
 9 THE WITNESS: Correct.
 10 THE COURT: Okay. Thank you.
 11 BY MR. WEIGERT:
 12 **Q. And -- and again, would -- the bases of your**
 13 **assumptions were what?**
 14 A. (No response.)
 15 **Q. Your experience?**
 16 A. Based on experience and knowing that we have operated
 17 empty storage traffic on that line.
 18 Generally, class one track means you can operate a
 19 certain parameter. You have to have at least five ties attached
 20 to a rail out of roughly 13 ties per rail, roughly 50 percent.
 21 Roughly 50 percent of those ties had to be useable as leg in the
 22 track prior to taking it out. So, that's the reason I used a 50
 23 percent calculation knowing that, unfortunately, once they're
 24 taken out, those ties will simply be destroyed.
 25 THE COURT: Is there literature that instructs

880

1 estimators to value railroad ties this way that -- that half
2 will be salvageable and the other half will have to go to,
3 as you have said, junk or landfill or is it just -- I'm not
4 trying to minimize your experience, I don't mean it that
5 way, or is it -- is this a formula that you've come up with?

6 THE WITNESS: Some vendors have a documented
7 classifier for relay ties, number of splits, whether they
8 have all four corners on each end, how many plates in them,
9 how many spike holes have been in them, how many times have
10 they been turned. So, they do have internal documentation
11 that they classify them.

12 Therefore, the number of ties per rail, there is
13 clear documentation that the FRA requires a certain number
14 of ties for that rail, the 213 track standards, you can
15 refer to that. And they will tell you five good ties per
16 rail length in order to meet class one.

17 You can go with less than five, it would be what
18 they call excepted track. There's limitations on it. You
19 cannot perform certain type of service.

20 So in theory, yes, there would be some
21 documentation out there. I did not use that.

22 THE COURT: Right.

23 THE WITNESS: Based on my knowledge, based on
24 calculations, which would be quick, simple calculations. So
25 I, basically, just using logic, knowing that half the ties

881

1 were probably going to be junk, the other ties I split
2 between one and two, assuming that there's going to be some
3 use for them.

4 THE COURT: And do you sort of know just based on
5 your experience that half will be junk, is it because ties
6 versus rail ties is it that specific types of ties along a
7 track get greater wear or have some spikes driven through
8 them or is it just happenstance?

9 THE WITNESS: Well, the tie that is -- were in this
10 track, some of this was probably original tie they were put
11 in to when they were replaced.

12 THE COURT: Oh, okay.

13 THE WITNESS: Not with the original rail line,
14 would have been too old. Depending on the quality of the
15 tie it could be anywhere up to 35 years, depending on the
16 environment. A relay tie you buy would be about half of
17 that.

18 So, if you buy a relay tie number one I would
19 expect to get 10 or 15 years of life out of that tie, but if
20 it's been spiked once and it's been turned once, probably
21 been tamped a few times.

22 Tamping mechanically raises a tie and pulls it up
23 and tamps the rock beneath it, to solidify that tie, to
24 straighten the rail, to give you good alignment, elevation
25 and such. So those ties, depending on their condition, they

882

1 could have various states of repair and quality. So, I
2 don't know that there's really a good answer to your
3 question.

4 There's only one type of railroad tie that goes
5 underneath the rail, depending on the rail size, depending
6 on how many ties are required to support that rail size,
7 generally speaking, the heavier the rail in terms of weight
8 the less number of ties that you can get away with operating
9 on that track. The lighter the weight of the rail the more
10 ties you have to have under that track that are in good
11 shape.

12 So the ISW, unfortunately, was to the point where
13 it was no longer an operating railroad. It wasn't
14 justifying its existence in terms of revenue to put ties
15 back into it. So, those ties were just, basically, decaying
16 underneath the rail. So, we were at a point where we felt
17 we couldn't operate it anymore.

18 THE COURT: Very good. Thank you.

19 MR. WEIGERT: Your Honor, based on the discussions
20 we have been having, I would like to move into evidence the
21 Scrap Rail Sales Agreement, DX-108.0641 to DX-108.0646.
22 That's the final version.

23 MR. STEWART: Your Honor, I actually have no
24 objection to the admissibility of that exhibit, but it's
25 actually separately marked as Defendant's Exhibit 113 on

883

1 their exhibit list. It would be much easier to have it
2 admitted as Defendant's Exhibit 113 as opposed to all the
3 Bates number stamps.

4 MR. WEIGERT: Is that the same?

5 Your Honor, it appears that the -- the exhibit that
6 counsel is referring to the DX 113 is a partially executed
7 version of this agreement, not the final version. This is
8 the final version.

9 Am I correct?

10 Okay. I have now -- counsel -- my own cocounsel
11 has clarified for me what DX-113 is agreeable. That's fine
12 to use.

13 THE COURT: Thank you, Mr. Thomas. Very good.
14 So -- so we're actually admitting or have we already
15 admitted? We haven't admitted that. So, Plaintiff's
16 Exhibit --

17 MR. WEIGERT: It's Defendant's Exhibit.

18 THE COURT: This is my hearing. I'm sorry. I
19 thought Mr. Stewart said that. I thought it was odd that
20 you would move this exhibit. I thought you said there was a
21 separate standalone exhibit.

22 MR. STEWART: It's separately listed as Defendant's
23 Exhibit 113.

24 THE COURT: I'm sorry. Thank you. So, you're --
25 am I correct you're moving in Defendant's Exhibit 113?

884

1 MR. WEIGERT: That's correct, your Honor.
 2 THE COURT: That is without objection. It's
 3 admitted.
 4 (Defendant's Exhibit Number 113 was admitted
 5 into evidence.)
 6 My apologies. The acoustics are a little
 7 problematic for me. Thank you.
 8 MR. WEIGERT: For the record, DX-113, that we're
 9 moving in, is actually comprised of two emails and two
 10 versions of the Scrap Rail Sales Agreement. Only the first
 11 version is the fully executed. The second version is
 12 partially executed, that only has the -- the signature of
 13 Ms. Wyatt on behalf of A & K; does not have Mr. Carr's
 14 signature from ISW.
 15 So -- but it does include the final agreement
 16 itself. So, it's okay with us if we call it the exhibit. I
 17 just want to be clear for the record. So, the document
 18 we've been referring to with this witness was the fully
 19 executed version is in that exhibit.
 20 THE COURT: Very good.
 21 MR. WEIGERT: Thank you.
 22 BY MR. WEIGERT:
 23 **Q. Now, Mr. Cullen, I want to --**
 24 MR. WEIGERT: I would also move to admit the check
 25 and cover letter that we discussed, the check for

885

1 1.2 million and the cover letter that was the payment under
 2 this agreement.
 3 MR. STEWART: Your Honor, I similarly have no
 4 objection. It's separately marked as Defendant's
 5 Exhibit 134. I mean, excuse me, 114.
 6 MR. WEIGERT: Yes. That's right, your Honor.
 7 THE COURT: So, you're moving for the admission of
 8 114.
 9 MR. WEIGERT: Of Defendant's Exhibit 114. Thank
 10 you.
 11 THE COURT: Without -- and there is no objection
 12 and it, therefore, is admitted.
 13 (Defendant's Exhibit Number 114 was admitted
 14 into evidence.)
 15 BY MR. WEIGERT:
 16 **Q. Mr. Cullen, I'd like to turn your attention back to**
 17 **what's been marked DX-108.0607. That's the chart we were**
 18 **discussing.**
 19 **See that? The chart of values for the ties and other**
 20 **materials? It's .0607. Do you see that?**
 21 A. (No response.)
 22 **Q. Now, was -- were those the calculations reflected on**
 23 **that chart, you said they were your calculations, right?**
 24 A. Yes.
 25 **Q. Are -- are those calculations -- excuse me.**

886

1 **Did -- did you use those calculations as reflected on**
 2 **that chart to help you develop the numbers that appear in final**
 3 **letter marked DX-108.068 to .0609?**
 4 A. They came out of the same process, yes.
 5 MR. WEIGERT: Your Honor, I'd like to move to admit
 6 into evidence just the chart for now DX-108.0607 into
 7 evidence.
 8 MR. STEWART: Plaintiffs object, your Honor, for all
 9 the reasons previously stated. Lack of foundation and
 10 relevance.
 11 THE COURT: I will admit it.
 12 (Defendant's Exhibit Number 108.0607 was admitted
 13 into evidence.)
 14 MR. WEIGERT: Thank you, your Honor.
 15 BY MR. WEIGERT:
 16 **Q. And Mr. Cullen, let me ask you a question, turn your**
 17 **attention to something we talked about before: A road crossing,**
 18 **prior to the rails being picked up, the rails elsewhere being**
 19 **picked up under the Scrap Rail Sales Agreement, included rails,**
 20 **correct?**
 21 A. That's correct, yes.
 22 **Q. And did it include any other of the materials**
 23 **described in that agreement?**
 24 MR. STEWART: I object, your Honor, to any relevance
 25 whatsoever for the grade crossings that are not at issue in

887

1 this case.
 2 BY MR. WEIGERT:
 3 **Q. I think they are part of the -- am I correct that the**
 4 **crossings are part of the 16.7-mile line, also part of the**
 5 **17.2-mile line?**
 6 A. There were road crossings within those, yes.
 7 **Q. Approximately how many?**
 8 A. I don't know. Eight to ten maybe.
 9 **Q. Okay. And how -- what types of railroad materials**
 10 **were included in a crossing?**
 11 MR. STEWART: Objection. Relevance, your Honor.
 12 THE COURT: I think -- let the Government's counsel
 13 speak.
 14 MR. WEIGERT: Your Honor, these, again, this goes
 15 to, among other things, the statutes and the requirement to
 16 take rails out of the right-of-way. This is within the 17.2
 17 mile right-of-way. So, it's relevant.
 18 THE COURT: I'm going to allow this line of
 19 questioning.
 20 BY MR. WEIGERT:
 21 **Q. And so, all I am trying to ask this witness, perhaps**
 22 **unartfully, is what is in an intact rail crossing before the**
 23 **rails are picked up? What -- how is the crossing like that**
 24 **typical crossing like this within this particular right-of-way**
 25 **constructed?**

888

890

1 A. It would have a base of some sort, usually hardpan,
2 may have asphalt or rock, from that rock, sub ballast, and then
3 you will have actual railroad ballast.

4 For those crossings, prior to going to the all ballast
5 crossings, so the ballast will be there, the ties will sit on
6 the ballast, the rail would be laid on the ties with the plates,
7 fasteners, spikes. And then what, depending on the type of
8 surface, asphalt probably, some type of guardrail, timber
9 perhaps, on the inside; outside might even be another piece of
10 rail used to use as mud rail or guardrail. I don't think any of
11 those are concrete panel crossings. So, I think probably timber
12 asphalt in them for roads surface.

13 **Q. And you have direct, personal experience with those**
14 **particular crossings in the 17.2-mile corridor, correct?**

15 A. Yes.

16 **Q. Let me turn your attention to --**

17 THE COURT: May I ask a question, please?

18 MR. WEIGERT: Sure.

19 THE COURT: Would I be correct in assuming that it
20 would be expensive to remove the railroad crossings?

21 THE WITNESS: There is additional cost, because,
22 obviously, if you remove the track you have to replace the
23 road surface.

24 THE COURT: And it's held down by asphalt, rock and
25 ballast, which is rock, as well?

889

1 THE WITNESS: Track structures are actually held
2 down by its own weight.

3 THE COURT: I mean, around the railroad crossing it
4 sounds like it was reinforced, the crossing itself has
5 additional reinforcement?

6 THE WITNESS: The sub pan underneath would be
7 somehow reinforced, whether you go down to hard pan that you
8 can tamp against, if you don't have that, you can put
9 asphalt in there, concrete or other material or larger rock,
10 riprap, then you put your sub ballast, then you can tamp
11 from there. But you have to have something to keep it from
12 sinking and something to tamp your ties against.

13 THE COURT: So, it would be more expensive to
14 remove the railroad crossing than regular line of track;
15 would that be correct?

16 THE WITNESS: Well, the actual removal so much
17 isn't the issue. It's the -- the cost of road closure setup
18 in order to be able to pull that out and put something back
19 in that window.

20 THE COURT: Oh, okay.

21 THE WITNESS: Otherwise you would have, obviously,
22 a hole that's going be eight to ten-foot wide.

23 THE COURT: Okay. Thank you.

24 BY MR. WEIGERT:

25 **Q. So, let me ask you this question: Did -- did you ever**

1 **receive a bid or bids for the removal of ties from the 17.2 mile**
2 **right-of-way?**

3 A. I believe Progress did provide a bid to remove the
4 ties.

5 **Q. By Progress, you're referring to Progress Rail**
6 **Services?**

7 A. Yes.

8 **Q. Let me show you a document, it's at Bates number**
9 **DX-108.0619 to 0621.**

10 **This appears to be an email chain with the oldest**
11 **email being dated June 25, 2010, and the newest one dated**
12 **January 11, 2011; is that correct?**

13 A. Yes.

14 **Q. And am I correct in saying that you are either the**
15 **recipient or the author of every one of the emails in this**
16 **thread?**

17 A. Yes.

18 **Q. And as a general matter, what does the -- what is the**
19 **subject matter of this email thread?**

20 A. Focusing on a portion of the bid to dispose of the
21 ties. Purchase ties that would be expected to be grade one and
22 grade two.

23 **Q. Along that line, let me focus you in on one of the**
24 **emails in this thread dated November 18, 2010 at 11:11 a.m. it's**
25 **on the first page. Do you see that at the bottom?**

891

1 A. (No response.)

2 **Q. It's an email from someone named Ken Upton to you.**

3 A. Yes, I see it.

4 **Q. Okay. Who is Ken Upton?**

5 A. Progress Rail representative.

6 **Q. I see.**

7 **There's a courtesy copy to Pat Cole. Who is Pat Cole?**

8 A. I'm sorry?

9 **Q. Sorry. Just curious. It says CC: Pat Cole, who is**
10 **that?**

11 A. Pat Cole is another gentleman at Progress.

12 **Q. And this was sent to you so that you received it; is**
13 **that correct?**

14 A. Well, the initial email I sent in.

15 **Q. I'm talking about the one -- the email from Ken Upton**
16 **to Shane Cullen of November 18, 2010 at 11:11 a.m., bottom one**
17 **on the first page?**

18 A. Yes, Ken sent it to me.

19 **Q. What is that talking about?**

20 A. Well, he was willing to pay for the grade one and two
21 ties and charge to dispose of the junk ties.

22 **Q. Okay. And so, reading from this it says: Shane, I'll**
23 **give you two options on the ties.**

24 **And I take it that's the first one to dispose of all**
25 **ties, the cost to you will be \$83,193 total.**

892

1 And what I take the second one, if we take the relay
2 number one and number two's and number 33's and scrap on the
3 right-of-way, we will pay you \$45,000.

4 See that?

5 A. Yes, I see it.

6 Q. And so, what did that mean to you?

7 A. Well, he was offering either to dispose of all the
8 ties or buy the ones that would be relay condition and leave
9 the junk ties on the right-of-way.

10 Q. So, number 33's are for the junk ties?

11 A. That's my understanding, yes.

12 Q. And relay number one and two were the ones that had
13 values you calculated, right?

14 A. Yes.

15 Q. Did you take up Mr. Upton on his offer?

16 A. No. No.

17 Q. Instead the ties were left in the right-of-way; is
18 that right?

19 A. Yes.

20 Q. But it's fair to say Mr. Upton assigned a positive
21 value, the relay number one and number two tie; is that right?

22 A. He did, keeping in mind his bid was lower than A & K.

23 Q. His overall -- the overall net amount of his bid was
24 lower?

25 A. Yes.

893

1 Q. Thank you.

2 And is that the reason that you went with A & K over
3 Progress?

4 A. Yes.

5 Q. Okay. Let me turn your attention to a different
6 topic. Rail use. Let me focus you in on the 17.2-mile
7 corridor. Has there been any train traffic on that corridor
8 since 2004?

9 A. Define train traffic. What is train traffic to you?

10 Q. Maybe you can help me out here. I'm referring to it
11 as any type of train whatsoever, it could be storage -- for
12 storage purposes or otherwise.

13 A. After 2004 there would have been storage traffic on
14 that line.

15 Q. And what do you mean by storage traffic?

16 A. Those are railcars stored for customers, own them or
17 lease them, a place for them to go, because they don't have any
18 particular use for them at that particular moment in time. So,
19 we, depending on the agreement, either lease or offer track
20 space for storage.

21 Q. And who are some of your biggest storage customers?

22 A. Anybody in the industry CIT, ARL, all the major car
23 owners.

24 Q. And what are some of the reason they would want to
25 store their cars on their rails?

894

1 A. They store them their because they don't have any
2 lessee for them to use them SNBA or CIT or ARL, all acronyms,
3 but they own the rail car, but they don't actually use the rail
4 car. So, they lease it to other entities: Cargill or ADM or
5 some other company. And during times of -- certain times they
6 don't have lessees for those cars, they put them in storage.
7 The Cargill and ADM of the world, if you don't have any use for
8 that car at that particular time, would put them in storage.
9 Grain cars would be a prime example of cars, seasonal storage,
10 because they're only used in harvest time, most of the time,
11 used at harvest time. Often times, during the middle of the
12 summer, covered hoppers used for grain, would be put in storage.

13 Q. And is it fair to say that ISW and you use the
14 17.2-mile corridor for storage?

15 MR. STEWART: Your Honor, first of all, I object to
16 this whole line of questioning. The possible storage or use
17 of a small portion of the 17.2 miles for storage of cars or
18 even empty cars is irrelevant as a matter of law and it's
19 irrelevant to the exemption procedures.

20 The exemption procedures specifically define train
21 traffic for purposes of utilization of the train traffic and
22 it's defined by the STB as local traffic that either
23 originated or terminated on the line. Does not include the
24 storage of cars or even the use of it for empty cars.

25 So, in essence, they're trying to impeach their own

895

1 exemption procedure, your Honor. And I object to it for
2 foundation purposes and for relevance.

3 MR. WEIGERT: Your Honor, I haven't finished this
4 line of questioning yet.

5 I believe this witness will show that not all the
6 cars are empty. I believe this witness will show that these
7 cars are not all non-revenue. They're actually revenue
8 generating. And that therefore, they fall outside of the
9 legal definition that counsel is referring to.

10 THE COURT: Are you saying that they're revenue
11 generating, because someone is paying, in essence, to park
12 there, just store their car on the line? Is that --

13 MR. WEIGERT: Well --

14 THE COURT: It's contrary to the definition read by
15 Mr. Stewart.

16 MR. WEIGERT: I think that's a question of law and
17 will go to -- can be discussed later.

18 But I think that the facts will get out with this
19 witness may show that that is, you know, we would argue not
20 the case.

21 THE COURT: Well, I'll let you pursue it. And if
22 Mr. Stewart has some cross he can, but ultimately, it's --
23 I'll let you make the record.

24 MR. WEIGERT: Thank you, your Honor.

25 BY MR. WEIGERT:

896

1 Q. So, just being clear, I want to be clear about sort of
2 categories of -- of cars that were running on the rails after
3 2004. Okay?

4 So, you put them all in a classification called
5 storage; is that right?

6 A. Yes.

7 Q. Okay. And I think there was some reference to empty
8 storage.

9 Was there also storage ago of cars in the 17.2-mile
10 corridor that were not empty?

11 A. Yes.

12 Q. And what types of materials did those cars hold?

13 A. The only thing I can think of offhand is the chemical
14 cars for a couple storage cars that stored loaded an empty
15 product.

16 Q. And who are those customers?

17 A. Savic is one of them. DSN is another.

18 Q. Can you spell Savic?

19 A. S-A-V-I-C.

20 Q. And what kind of chemicals, to your knowledge, were
21 stored on that corridor?

22 MR. STEWART: Your Honor, I object. Completely
23 irrelevant as to what was actually stored in those cars.
24 And he has not laid any foundation whatsoever to show that
25 any of the local traffic, whether they stored materials or

897

1 not, either originated or terminated on the line, which is
2 the specific definition of local train traffic by the STB
3 itself.

4 THE COURT: You're correct. Sustained.

5 MR. WEIGERT: It's -- oh, and also, yeah, I said
6 that that, actually, is not the only reason we're offering
7 this evidence. It's also has to do with state law
8 abandonment. So, there are multiple purposes. That's not
9 the main one. The main one is state law abandonment, which
10 counsel has felt is a critical issue in this case.

11 THE COURT: I'll let you proceed.

12 MR. WEIGERT: Thank you, Your Honor.

13 BY MR. WEIGERT:

14 Q. Mr. Cullen, so, what we're learning here is after 2004
15 there was storage cars stored on these rails that were not just
16 empty, correct?

17 A. Yes, that's correct.

18 Q. Some of them were full -- some of them were full with
19 chemicals, right?

20 A. Chemicals or other product, yes.

21 Q. And what were some of chemicals that were kept in
22 these cars?

23 A. I don't know the specific type of chemical.

24 Q. Okay. And was ISW paid for this type of use?

25 A. Yes.

898

1 Q. And let's see, during -- how much was it paid?

2 A. Depending on commodity, depending on agreement, on
3 average, switch or loaded car can be around \$300. And I would
4 collect it on the inbound switch and the outbound switch for
5 empty cars, probably in that timeframe around \$100, \$125 for
6 inbound, \$125 for the outbound.

7 Q. And of this traffic on that corridor, what was the --
8 the last run, to your knowledge, most recent run?

9 A. The most recent price?

10 Q. Sorry, the most recent use for this purpose?

11 A. (No response.)

12 Q. In other words, what date did the most -- did -- what
13 is the most recent date upon which these type of cars ran on
14 that corridor?

15 MR. STEWART: I'd object to the form of the question
16 as ran on the corridor, your Honor.

17 BY MR. WEIGERT:

18 Q. Well, you put it -- you're the railroad guy. You put
19 it --

20 A. I think we determined the last storage was even 2009.
21 I think it was 2009 was the last storage report that we had ran.

22 Q. The last storage report?

23 A. That we had ran.

24 Q. Okay.

25 A. Seven, eight and nine.

899

1 Q. Okay. And to your knowledge, was there any other kind
2 of traffic on the 17.2 mile corridor after 2009?

3 A. There may have been. I mean, it was still -- it would
4 still have been intact until A & K removed it.

5 THE COURT: But are you aware of any?

6 THE WITNESS: I can't recall specific cars.

7 THE COURT: But you do recall -- the last time, to
8 your memory, that you can recall was 2009?

9 THE WITNESS: 2009 is the last time I can confirm I
10 document that we had railcars out there in storage.

11 THE COURT: Okay. Thank you.

12 MR. WEIGERT: Thank you.

13 BY MR. WEIGERT:

14 Q. Let me turn your attention to another document DX-2.29
15 pages 0001 to 0002. You have it in your...

16 (Recess.)

17 MR. WEIGERT: Your Honor, before we continue, based
18 on my discussion with Mr. Cullen, I'd like to move into
19 evidence the email thread we discussed with the progress for
20 the relay ties, Bates number DX-108.0619 to DX-108.0621.

21 MR. STEWART: Same objections, your Honor,
22 foundation and relevance.

23 THE COURT: All right. I will admit them over
24 objection.

25 (Defendant's Exhibit Numbers 108.0619 to 108.0621)

900

1 were admitted into evidence.)

2 MR. WEIGERT: Thank you, Your Honor.

3 And upon further reflection, I note that the
4 additional document I was going to discuss is already in
5 evidence. So, I can spare this witness and spare this Court
6 further discussion, pending any potential redirect. Thank you.

7 THE COURT: Okay.

8 CROSS-EXAMINATION

9 BY MR. STEWART:

10 Q. Good morning, Mr. Cullen.

11 Let me first go back and discuss the discontinuance of
12 train traffic. And did you, as part of this case, perform some
13 research concerning the discontinuance of train traffic along
14 this line?

15 A. Yes, we did.

16 Q. And in order to obtain that information, and I'm --
17 and I'm focusing on the last revenue load movement, you
18 requested a report from the director of operations center, did
19 you not?

20 A. Yes.

21 Q. All right.

22 And after you requested that information, you actually
23 received the information. And based on the information you
24 received in your research you made a conclusion as to when the
25 last loaded revenue train traffic took place, did you not?

901

1 A. That's correct.

2 Q. And in fact, based on that research, you concluded
3 that the last loaded revenue train you used on the applicable
4 rail line ceased in 2004, correct?

5 A. Yes.

6 Q. All right.

7 And I know Mr. Weigert asked you some questions about
8 the possible storage of cars. But first of all, you are not
9 aware of any storage of cars anywhere on the 17.2 miles after
10 2009, are you?

11 A. I can't recall specific cars.

12 Q. And in fact, there was no discussion whatsoever as to
13 even if there were cars stored there in the 2007, 2008 or 2009
14 timeframe, where those cars might have been stored, was there?

15 A. Not following your question.

16 Q. Okay. There was no discussion about where those cars
17 might have been stored during that timeframe, was there?

18 MR. WEIGERT: Objection. Mischaracterizes
19 testimony.

20 THE COURT: And I can't hear -- could you -- would
21 you mind? I apologize, would you mind sitting or -- so, I
22 just or speak into the microphone.

23 MR. WEIGERT: Your Honor, I just object as to
24 mischaracterization of the testimony. I believe the witness
25 testified that the location was the 17.2 mile corridor that

902

1 storage --

2 MR. STEWART: I will rephrase it, your Honor.

3 THE COURT: Thank you.

4 BY MR. STEWART:

5 Q. My question was: You didn't have any idea where along
6 the 17.2 miles those cars were stored, do you?

7 A. Not specifically, no.

8 Q. Okay. You are familiar with the Scrap Rail Sales
9 Agreement with A & K and the ISW, are you? In fact, you
10 testified about that?

11 A. Yes.

12 Q. And so, time wise, the very first paragraph of the
13 agreement says that was entered into on August 1, 2011, correct?

14 A. I don't have it in the front of me. Okay.

15 Q. I'm not trying to trick you. We can put it back up on
16 the screen, if you want.

17 A. That's fine.

18 Q. And I think the fully executed document was signed on
19 August 1st by one of the parties and August 2, 2011 by the other
20 party. Do you remember that?

21 A. Yes.

22 Q. Okay. And that contract, so we're clear on that, was
23 with A & K to remove and salvage all of the switches, rail and
24 other metallic track materials, correct?

25 A. Yes.

903

1 Q. And in paragraph two it states that the purchase price
2 is a million two, right?

3 A. Yes.

4 Q. In fact, they gave, exhibit up there, that showed that
5 that check was paid almost immediately after the agreement was
6 entered into, was it not?

7 A. Yes.

8 Q. All right.

9 So, the agreement was entered into around August 1,
10 2011. And that check for a million two was paid within a couple
11 weeks thereafter, right?

12 A. Yes.

13 Q. All right.

14 Now, although the rails and the other metallic track
15 materials were salvaged as part of that contract, the cross-ties
16 were not part of that contract, were they?

17 A. No, they were not.

18 MR. WEIGERT: Objection. They were, your Honor,
19 this mischaracterizes testimony. Again, they were part of
20 the contract in that they were required to be left in the
21 right-of-way. So, in that sense they with part of the
22 contract.

23 THE COURT: I -- it was my understanding -- let
24 counsel rephrase so we're all clear.

25 It was my understanding Plaintiff's counsel was

904

1 asking about those materials that had been removed pursuant
 2 to the contract, but I'll let --
 3 BY MR. STEWART:
 4 **Q. The crossties were not actually part of the salvage**
 5 **contract that they paid a million two for, was it?**
 6 MR. WEIGERT: Same. Objection.
 7 THE COURT: Why is it an improper question?
 8 MR. WEIGERT: Just that there was an express
 9 provision, your Honor, in this agreement that -- and it's
 10 Section 17, that requires crossties may be moved away from
 11 the center of the right-of-way, but shall not be removed
 12 from the right-of-way. So in that sense it's part of the
 13 contract and part of the over put. So, that was my point
 14 there.
 15 THE COURT: And -- and -- and your question was
 16 they were not removed?
 17 MR. STEWART: No.
 18 My question was they were not salvaged as part of
 19 1.2 million dollar contract.
 20 THE COURT: I think it's perfectly.
 21 MR. WEIGERT: Agreed, your Honor.
 22 THE COURT: Oh, thank you.
 23 MR. WEIGERT: Thank you.
 24 BY MR. STEWART:
 25 **Q. Now --**

905

1 THE COURT: Did we get an answer?
 2 MR. STEWART: I -- I'm not sure.
 3 THE WITNESS: They were not salvaged as part of the
 4 contract.
 5 BY MR. STEWART:
 6 **Q. Okay. Now, as part of the salvage of the rails, you**
 7 **indicated that the rails were separated from the crossties and**
 8 **the crossties were merely left on the right-of-way, right?**
 9 A. Yes.
 10 **Q. All right.**
 11 **And in fact, I think you described the process whereby**
 12 **the rails are removed from the crossties and that actually**
 13 **either damages or can destroy them, right?**
 14 A. Depending on method, yes.
 15 **Q. All right.**
 16 **And although the crossties were left on the**
 17 **right-of-way, none of them were actually functional as**
 18 **crossties, were they?**
 19 MR. WEIGERT: Objection. Mischaracterizes
 20 testimony.
 21 THE COURT: If the witness knows, if the witness
 22 can answer, he can answer.
 23 THE WITNESS: Our position was they were not
 24 functional. It was not economically viable to go back and
 25 pick them up.

906

1 BY MR. STEWART:
 2 **Q. All right.**
 3 **Now, when you say that, essentially, none of the**
 4 **crossties were functional, that means that they were not**
 5 **economically viable to recover the ties and reuse them for the**
 6 **transportation of trains, right?**
 7 A. Economically viable for me to recover the ties.
 8 **Q. Right.**
 9 **And then they would not be economically viable to**
 10 **recover the ties and reuse them, because the cost of labor to**
 11 **pick out the ties that would be salvageable is not economically**
 12 **viable, right?**
 13 A. That's correct.
 14 **Q. All right.**
 15 **Now, rail lines are typically abandoned due to the**
 16 **overall condition of the roadbed, and that includes the**
 17 **crossties, right?**
 18 A. Yes.
 19 **Q. And also includes the traffic conditions on the rail**
 20 **line?**
 21 A. Yes.
 22 **Q. All right.**
 23 **And you concluded that the tie condition on this**
 24 **particular rail bed was extremely deficient for operating**
 25 **trains, didn't you?**

907

1 A. Yes.
 2 **Q. All right.**
 3 **Now, since the crossties were not functional in the**
 4 **future as crossties, the only reason that the railroad left them**
 5 **was because they were not part of the salvage contract with**
 6 **A & K, right?**
 7 A. Yes.
 8 **Q. All right.**
 9 **And that's the only reason they were left there, isn't**
 10 **it?**
 11 A. They were left there, because we didn't have a need to
 12 pick them up at that time.
 13 **Q. Okay. And although the contract that we referred to**
 14 **earlier was signed on August 1st and August 2, 2011, the work**
 15 **and planning actually started long before that, didn't it?**
 16 A. Yes.
 17 **Q. All right.**
 18 **And in fact, you're familiar with the term picking up**
 19 **the track materials or picking up the rails, aren't you?**
 20 A. Yes.
 21 **Q. All right.**
 22 **Let me hand you what is marked DX-108.0531.**
 23 **May I approach, your Honor?**
 24 THE COURT: Please. Thank you.
 25 MR. WEIGERT: Objection, your Honor. Outside the

908

1 scope of the direct.

2 THE COURT: I haven't heard --

3 MR. STEWART: That it is. If we can identify it,
4 we'll talk about when the work began to actually salvage the
5 rails and ties and remove the rails and ties in this
6 particular project.

7 THE COURT: It actually is within the scope.

8 MR. WEIGERT: Withdraw.

9 BY MR. STEWART:

10 Q. All right.

11 Now, Mr. Cullen, I have handed you what has been
12 marked as well -- it's marked as Cullen Exhibit Number 7 at your
13 deposition, but for the Court it's DX-108.0531, in the bottom
14 right-hand corner.

15 Do you see that?

16 A. Yes.

17 Q. All right.

18 And this is an email to you from Mr. Carr.

19 Do you see that?

20 A. Yes.

21 Q. All right.

22 And in fact, this is dated, the original email to you
23 from Mr. Carr, is dated July 28, 2010, is it not?

24 A. Yes.

25 Q. And who is Mr. Carr?

909

1 A. He is president.

2 Q. And he actually inquires of you, he says: Can you get
3 me a PDF of a map of the section of track we are going to pull
4 up.

5 Do you see that?

6 A. Yes.

7 Q. All right.

8 And then you actually responded and actually attached
9 a map of the area of the track that were you going to pull up,
10 correct?

11 A. Yes.

12 Q. All right.

13 You also at or about the same time were receiving
14 other bids, were you not?

15 A. I believe so.

16 Q. All right.

17 So, I don't want to bore the Court and all the parties
18 with going through the long list of these, but on, for example,
19 on July 27, 2010, which was the day before this email from
20 Mr. Carr, and roughly three months before the petition for
21 exemption was even filed, you had received a bid from Pioneer
22 rail about the picking up of the rails and ties, had you not?

23 MR. WEIGERT: Your Honor, I object to this line of
24 questioning as irrelevant and redundant. We all agree the
25 track was pulled up.

910

1 MR. STEWART: Well, if we all agree that the rails
2 and ties were pulled up, your Honor that's exactly the
3 language the Court referred to last Wednesday during trial.
4 They're trying to take the position that the ties were not
5 pulled up.

6 MR. WEIGERT: I didn't say ties. This says track.

7 MR. STEWART: Well --

8 MR. WEIGERT: Track is not ties.

9 MR. STEWART: If you let me go through this, then
10 we'll get to that.

11 THE COURT: You may proceed.

12 THE WITNESS: You said Pioneer Rail. I would
13 not -- we wouldn't be --

14 BY MR. STEWART:

15 Q. I'm sorry, email to Pioneer Rail. Let me pull that
16 out, Exhibit Number 11, and I'll just show this to you.

17 Did I say Pioneer Rail? I meant Progress Rail.

18 Let me show you, Mr. Cullen, what has been marked as
19 -- well, it's DX-105.0558 that was marked as Cullen Exhibit
20 Number 11 during your deposition.

21 Do you see that?

22 A. Yes.

23 Q. All right.

24 And this is a letter to you from Progress Rail
25 Services. Do you see that?

911

1 A. Yes.

2 Q. And it is dated July 27, 2010, right?

3 A. Yes.

4 Q. And it is, actually, the day before you received the
5 email from your boss, Mr. Carr, which was dated July 28, 2010,
6 correct?

7 A. Yes.

8 Q. And this is a bid from Progress Rail for \$1,040,000 to
9 remove all rail plates, joint bars, turnouts and miscellaneous
10 scrap steel from the line.

11 Do you see that?

12 A. Yes.

13 Q. All right.

14 And if this is dated July 27, 2010, when did this work
15 actually start to begin the process of salvaging the rail and
16 removing the ties?

17 MR. WEIGERT: Objection. Foundation. This work?
18 Progress wasn't given any contract. There was no work under
19 progress.

20 MR. STEWART: I'll rephrase, your Honor.

21 BY MR. STEWART:

22 Q. Where -- where -- when was the effort initiated to
23 pick up the track materials from this section of the rail line?

24 A. Spring of 2012.

25 Q. I'm sorry. When was the work commenced to actually

912

1 start the effort to obtain a contract to remove the track
2 materials from the track?

3 A. First discussed?

4 Q. Yes.

5 A. I don't recall, specifically. I would assume
6 somewhere around this timeframe.

7 Q. Okay. And this is in late July of 2010?

8 A. Yes.

9 Q. And the contract was entered into in August of 2011,
10 right?

11 A. Yes.

12 Q. All right.

13 THE COURT: Mr. Stewart, I'm sorry to stop you.
14 Just so the record is correct, you're referring to DX-108?
15 You said 105. Did you mean 105.0558.

16 MR. STEWART: I did, your Honor. If I misspoke, I
17 apologize.

18 THE COURT: No worries. I just want to make sure
19 we have a clear record.

20 MR. STEWART: Okay.

21 BY MR. STEWART:

22 Q. Now, what does it mean to you, Mr. Cullen, when your
23 boss refers to the track we are going to pull up. What does
24 that mean to you?

25 A. The segment of rail from 240.2 south of Poseyville out

913

1 to Cynthiana.

2 Q. Okay. That is the process that was actually
3 documented in the contract with A & K in August of 2011, right?

4 A. Yes.

5 Q. All right.

6 Did you also, and I don't want to belabor this, did
7 you also get other bids from other people after this period of
8 time in July of 2011 -- I'm sorry -- July of 2010 before A & K
9 was actually chosen?

10 A. We had three bids.

11 Q. Okay.

12 A. Progress, J. Smith and A & K.

13 Q. Now, let me show you what has been marked or which is
14 DX-108.0623, which was marked as Cullen Exhibit Number 28 at
15 your deposition.

16 Do you see that?

17 A. Yes.

18 Q. And this is interesting, because this is actually --
19 first of all, what is the date on it?

20 A. May 13, 2011.

21 Q. All right.

22 And this is ten days before the notice of interim
23 trail use became effective on May 23, 2011, right?

24 A. That I don't know.

25 Q. Okay. Well, we -- the Court will take judicial notice

914

1 of that, since it came into evidence before and it's stipulated
2 to, but the date of this is May 13, 2011 and it's an email from
3 Shane Cullen to Shane Cullen, right?

4 A. Yes.

5 Q. All right.

6 And this refers to, if you look at it, it refers to
7 the -- the fact that it is -- that ISW, if you start first of
8 the second paragraph, it says ISW has authority to start this
9 work as of Monday May 23rd.

10 Do you see that?

11 A. Yes.

12 Q. And the ISW is requesting final proposal offers in
13 line to secure a contract and receive payment by Monday May
14 23rd.

15 Do you see that?

16 A. Yes.

17 Q. Now, up above where it talks about the rail line it
18 actually talks about the 17.2 miles. And then it says the
19 project is to consist of the removal of rails, switches, OTM,
20 ties and ballast; no bridges, culverts and other structures are
21 not included and are not to be removed or damaged.

22 Do you see that?

23 A. Yes.

24 Q. All right.

25 And why was ISW anxious to start this process and get

915

1 it completed so that you were paid by May 23, 2011?

2 A. I don't know that.

3 Q. Okay. Why was this email even written? Why did you
4 write an email to yourself?

5 A. I believe this email was sent out to the vendors that
6 were bidding on the project and this is a blind copy to myself.

7 Q. Okay. I'm sorry.

8 A. Blind copy would have went to myself. This is a copy
9 to myself.

10 Q. Okay. So, this is what you sent out to the three
11 vendors that you were communicating with about the possibility
12 of entering into this salvage contract?

13 A. Yes.

14 Q. All right.

15 And you just retained a copy for yourself?

16 A. Yes.

17 Q. All right.

18 And then instead of getting this work started on
19 May 23, 2011, and instead of getting paid on May 23, 2011 or
20 shortly thereafter, the contract was entered into August 1st and
21 August 2nd of 2011 and payment occurred just shortly thereafter
22 in August of 2011, correct?

23 A. Yes.

24 Q. All right.

25 Isn't it true, Mr. Cullen, that since the rails and

916

1 ties were removed in 2012 that the railroad has done no
2 maintenance of any kind?

3 A. On the section where the rail has been pulled up?

4 Q. Yes.

5 A. Other than what A & K performed, that would be
6 correct.

7 Q. Okay. So, when A & K finished their work in the
8 pulling of the rails and ties the fact of the matter is that
9 there has been no maintenance performed by the railroad since
10 that time?

11 A. Correct.

12 Q. All right.

13 And so, the railroad has not, for example, sprayed for
14 weeds in approximately seven years at a minimum, right?

15 A. That's probably correct.

16 Q. And have not mowed it or made any attempt to remove
17 growth, vegetation, weeds and/or trees, have you?

18 A. That's correct.

19 Q. Now, I think we've established that after the rails
20 were removed and salvaged, the crossties were simply just left
21 there, right?

22 A. Yes.

23 Q. And there are approximately 2800 crossties per mile,
24 right?

25 A. Approximately.

917

1 Q. And so, you did an assumption or estimation that there
2 were roughly 48,000 crossties were just left on the premises,
3 correct?

4 A. Yes.

5 Q. All right.

6 Now, I want to go back to exhibit -- well, it's
7 Deposition Exhibit Number 26. You remember the bid you received
8 to dispose of all the crossties was \$83,193.

9 Do you remember that?

10 A. Yes.

11 Q. And this was a bid where you would be paying them to
12 remove all of the crossties, right?

13 A. Yes.

14 Q. And that bid was received, actually, on November 18,
15 2010.

16 Do you remember that?

17 A. Yes.

18 Q. All right.

19 And that was, approximately, six months before the
20 notice of interim trail use even became effective and 10 or
21 11 months before the actual salvage contract was signed, right?

22 A. Yes.

23 Q. All right.

24 A. I don't know. I don't know about the trail document.

25 Q. Okay. So, if the notice of interim trail use was

918

1 May 23, 2011, and this was November of 2010, that would be
2 approximately six months before the notice of interim trail use?

3 A. Yes.

4 Q. All right.

5 And it -- and this bid was received on November 18,
6 2010. And the actual salvage contract was not entered into
7 until August 1st of 2011. So, approximately, ten months before
8 the salvage contract was entered into, correct?

9 A. Yes.

10 Q. All right.

11 Now, these 48,000 crossties left a real mess, didn't
12 they?

13 A. The mess is your interpretation.

14 Q. How would you describe 48,000 crossties strewn about
15 -- about a strip 100 feet wide for 17 miles? How would you
16 describe it?

17 A. Ties that were left on the right-of-way.

18 Q. All right.

19 Let me turn your attention to DX-108.0718. This was
20 Cullen Deposition Number 46. And this is an email to you dated
21 February 2, 2012.

22 Do you see that?

23 A. Yes.

24 Q. And this is an email to you from an individual named
25 Joe Lupfer, L-U-P-F-E-R in Cynthiana, Indiana, is it not?

919

1 A. Yes.

2 Q. And he emailed you to tell you that it looks like, if
3 you look there in the second line, A & K Rail Works has gotten
4 all the rail removed and are done with whatever they are going
5 to do.

6 Do you see that?

7 MR. WEIGERT: Objection. Calls for hearsay. All
8 hearsay.

9 BY MR. STEWART:

10 Q. Yeah, this is what this email says, isn't it?

11 THE COURT: This is an email he received?

12 MR. STEWART: It's an email he received from
13 Mr. Joe Lupfer on February 2, 2012.

14 MR. WEIGERT: If he's using this to establish the
15 truth of the matter asserted, it's hearsay.

16 MR. STEWART: I'm -- I'm -- I'm going to establish
17 several things by this email, your Honor, but also the
18 timetable of when the work was completed.

19 THE COURT: You can proceed.

20 MR. STEWART: All right.

21 BY MR. STEWART:

22 Q. Now, I don't know that I got an answer to that
23 question. It looks like he says there that A & K Rail Works has
24 gotten all the rail removed and are done with whatever they're
25 going to do.

920

1 Do you see that?

2 A. Yes.

3 Q. And does that coincide with your recollection or -- or

4 knowledge that the -- the work was completed on or about this

5 time in early February of 2012?

6 A. Yes.

7 Q. All right.

8 It goes on to say there now there is a lot of

9 crossties and mess left behind.

10 Do you see that?

11 A. Yes. All right.

12 Q. All right.

13 At that's the way Mr. Lupfer described it to you was

14 there that there was a real mess left behind, right?

15 A. That's his description, yes.

16 Q. All right.

17 And then he actually is looking for some work, is he

18 not?

19 He says: Do you have any updates on the rails to

20 trails taking over or any other info on selling some of the

21 property or cleaning it up?

22 Do you see that?

23 A. Yes.

24 Q. All right.

25 How did you respond to Mr. Lupfer?

921

1 A. I don't believe so. I think I forwarded that to Dan.

2 Q. Okay.

3 A. Forwarded back to Joe, copy to Dean, legal counsel.

4 Q. All right.

5 Now, let me hand you what has been marked as -- well,

6 is Bates stamped DX-108.0721, which was marked as Cullen

7 Deposition Number 48 during your deposition.

8 Do you see that?

9 A. Yes.

10 Q. All right.

11 Now, if you'll look at the first page of this, there

12 is another email from Mr. Lupfer to you dated March 21, 2012.

13 Do you see that?

14 A. Yes.

15 Q. And so, this is almost exactly one month after the

16 prior email from Mr. Lupfer, which was -- actually, I take that

17 back, it's almost six or seven weeks before the prior one was

18 February 2, 2012, and this one is March 21, 2012.

19 Do you see that?

20 A. Yes.

21 Q. And he's asking you for updates on the 17 miles of

22 abandon rail line.

23 Do you see that?

24 A. Yes.

25 Q. And he indicates to you that the farmers are concerned

922

1 about the old crossties and junk floating in the fields when it

2 floods.

3 Do you see that as well?

4 MR. WEIGERT: Your Honor, I'm going to have to have

5 a standing objection regarding hearsay. I think counsel is

6 trying to confuse matters and establish the matters asserted

7 by these parties that's not in court. I think it's hearsay.

8 MR. STEWART: I'll rephrase the question, your

9 Honor.

10 THE COURT: Thank you.

11 MR. WEIGERT: I may have to have a standing

12 objection here, because he keeps repeating these words that

13 really are hearsay. I think he's trying to confuse matters.

14 MR. STEWART: I'll rephrase the question, your

15 Honor.

16 THE COURT: Thank you.

17 BY MR. STEWART:

18 Q. Are you aware that farmers were complaining about the

19 old crossties floating in the ditches or in their fields?

20 A. I am aware by this email that he thinks so, yes.

21 Q. Okay. Were you aware of that as of March 21, 2012?

22 A. Yes.

23 Q. All right.

24 He also then talks about complaints about the street

25 crossings in town.

923

1 Were you aware of any complaints from people about the

2 street crossings in town?

3 A. Seems like Poseyville had made a comment regarding to

4 them.

5 Q. Okay. And then he indicates that he was still

6 interested in cleaning it up or working something out with

7 somebody.

8 Do you see that?

9 MR. WEIGERT: I have to object. I think the witness

10 is testifying from this document, not from his own personal

11 knowledge.

12 THE COURT: And you are correct. So, it has to be

13 his -- his personal knowledge. Simply because another

14 individual writes to this witness, to Mr. Cullen, and

15 describes certain things, it could be his way of seeking

16 business. The descriptions may be accurate, they may not

17 be, but let's see how you can probe this.

18 BY MR. STEWART:

19 Q. Did you communicate with Mr. Lupfer about doing some

20 clean-up work on this project after the 48,000 railroad ties

21 were left behind?

22 A. I don't recall a discussion after the fact.

23 Q. Okay. And he indicated on several different occasions

24 that he was interested in cleaning it up, didn't he?

25 A. Let me correct that. I think originally I had

924

1 telephone calls with him and then forwarded this email to Dan
2 once I found out what he wanted.

3 **Q. Okay. And he continued to try to get your interest in**
4 **actually hiring him to clean up the railroad ties that were left**
5 **behind, didn't he?**

6 A. Yes.

7 **Q. All right.**

8 Let me hand you -- well, first of all, did you discuss
9 this matter of the clean up of the crossties with anyone else,
10 other than Mr. Lupfer?

11 A. Mr. Lupfer was soliciting for business, really wasn't
12 a discussion. I didn't have a detailed discussion with anybody
13 else except Progress Rail in the initial bids.

14 **Q. Let me hand you what has been marked as Defendant's**
15 **Exhibit 108.0723, And you did follow up with respect to**
16 **Mr. Lupfer's comment about leaving a real mess behind, didn't**
17 **you?**

18 A. I'm sorry, say again.

19 **Q. You did follow up concerning Mr. Lupfer's comment**
20 **about a real mess left behind, didn't you?**

21 A. Well, there was incidence where someone reported ties
22 were getting off the right-of-way.

23 **Q. Okay. And if you'll look at the -- your email at the**
24 **bottom of this chain on DX-108.0723, you sent an email to**
25 **Mr. Jim Huenefeldt, didn't you?**

925

1 A. Yes.

2 **Q. And who is Mr. Jim Huenefeldt?**

3 A. He is a representative of A & K.

4 **Q. Okay. And in fact, and this is dated March 22, 2012,**
5 **is it not?**

6 A. Yes.

7 **Q. And you actually inquired of Mr. Huenefeldt to advise**
8 **on the tie and mess comments, did you not?**

9 A. Yes.

10 **Q. All right.**

11 And then there was a further exchange with Mr.
12 Huenefeldt, was there not?

13 A. Further what?

14 **Q. Further email exchange with Mr. Huenefeldt?**

15 A. Yes.

16 **Q. All right.**

17 And you respond to him on March 22, 2012 about the
18 fact that there had been -- that there had been a concern stated
19 that they were in the drainage ways and to float in the field.
20 In the mess comment: Are they piled or strung out?

21 Do you see that?

22 A. Yes.

23 **Q. All right.**

24 And even before that, even before you responded, he
25 inquired of you as to whether or not you wanted those ties

926

1 **picked up, did he not?**

2 A. He did.

3 **Q. And he says: Do you want us to get you a number to**
4 **pick up the ties?**

5 **Do you see that?**

6 A. Yes.

7 **Q. And you responded: No. The concern was if they were**
8 **in the drainage ways to float in the field and the mess comment,**
9 **are they piled or strewn out, right?**

10 A. Yes.

11 **Q. And he responded to you, didn't he?**

12 A. Yes.

13 **Q. And he never gave you a bid specifically to pick up**
14 **the ties, did he?**

15 A. I don't recall one.

16 **Q. All right.**

17 MR. WEIGERT: I have to interpose an objection.
18 This appears to be just a portion of a longer email thread.
19 There's page two at the bottom. And there's a continuation
20 of this email thread on DX-108.0722, that prior page.

21 MR. STEWART: Your Honor, this is the way it was
22 produced to us.

23 If Mr. Weigert wants to ask further questions about
24 this topic, he certainly can.

25 MR. WEIGERT: I'll just -- I'm just alerting the

927

1 Court and for the record noting that that is just a
2 portion -- half of an email thread that is two pages long.
3 And counsel is misleading the Court and making a bad record
4 if he's just including the second page.

5 MR. STEWART: Your Honor, I'm entitled to ask this
6 witness cross-examination questions on this email exchange
7 with Mr. Huenefeldt. And if the Government wants to ask
8 follow-up questions concerning the topic or any other topic,
9 they're more than welcome to?

10 THE COURT: I will let you proceed?

11 MR. STEWART: Okay.

12 THE COURT: The Government can point out the way in
13 which you may or may not be misleading me.

14 BY MR. STEWART:

15 **Q. Now, after you inquire a second time to Mr. Huenefeldt**
16 **about the mess comments, Mr. Huenefeldt responded to you, didn't**
17 **he?**

18 A. Yes.

19 **Q. And his comment was: I'm going to talk to my people,**
20 **but I am certain that they aren't in drainage ways and they**
21 **should be piled off to the side. Some farmers, myself being**
22 **one, have to find things to complain about.**

23 **Do you see that?**

24 A. Yes.

25 **Q. Did he ever respond to you to let you know as of**

928

1 **March 22, 2012, whether or not the ties that were left behind**
2 **were stacked up or just thrown about?**

3 A. There is a later email that he acknowledged it was
4 done.

5 **Q. Okay. And when was that done?**

6 A. I want to say in April, end of April.

7 MR. STEWART: Okay. I have no further questions,
8 your Honor.

9 MR. WEIGERT: I have just a couple of additional
10 questions on redirect.

11 REDIRECT-EXAMINATION

12 BY MR. WEIGERT:

13 **Q. First of all, Mr. Cullen, I think you mentioned that**
14 **none of the ties were functional economically or economically**
15 **viable for me to reuse; is that correct?**

16 A. Yes.

17 **Q. Nevertheless, you assigned a value of close to**
18 **\$300,000 total for half of the 48,160, correct?**

19 MR. STEWART: Objection, your Honor. That's not
20 his testimony before and it was an assumption without
21 actually even observing the condition of the crossties.

22 MR. WEIGERT: I think we've been through that, your
23 Honor. I think there was a sufficient basis for establishing
24 that this witness has a better basis than any other person to
25 value those ties that were left.

929

1 THE COURT: Well, what --

2 MR. WEIGERT: I'm just referring to the value
3 testimony that's already been made and pointing out the
4 distinction between the testimony he gave to Mr. Stewart
5 that he, for his own purposes, decided that they were not
6 economical for him to reuse. That is not the same statement
7 that they were -- they did not have value is that the
8 equivalent to a statement they do not have value in the
9 market.

10 MR. STEWART: Your Honor, they obviously do not have
11 value. They're still there.

12 And the question for the Court to decide is whether
13 they're functional for continued rail traffic, not whether
14 they have any value whatsoever.

15 THE COURT: I understand both of your arguments. I
16 will -- I -- I don't have to set a value with respect to the
17 ties.

18 The witness has testified he did not go out and
19 inspect the ties. He simply used his own methodology in
20 determining what he thought they were -- they were worth.

21 And for purposes of this trial, liability doesn't
22 hang in the balance of the precise amount of the value of
23 those ties.

24 But I'm going to let you proceed and let you clear
25 up what you think were any -- whatever you want to pursue.

930

1 MR. WEIGERT: Thank you, Your Honor.

2 BY MR. WEIGERT:

3 **Q. Just want to point out also that this bidder, Progress**
4 **Rail Services, may have assigned a positive value to the relay**
5 **ties of \$45,000; isn't that right, Mr. Cullen?**

6 A. Yeah. Yes.

7 **Q. But you chose not to sell those ties to Progress Rail**
8 **Services, because the net price that they were offering you for**
9 **the whole Evansville Project was lower than the price you**
10 **actually got from A & K, correct?**

11 A. Yes.

12 **Q. Okay.**

13 Let know now turn your attention to that one page
14 exhibit that counsel pointed you to DX-108.0723.

15 Do you see that?

16 A. (No response.)

17 **Q. Okay. I'd now like to turn your attention to the page**
18 **just prior to that, DX-108.0722. Now you tell me if I'm right**
19 **or wrong here, but do these two pages taken together represent a**
20 **single email thread comprised of emails every single one I think**
21 **you were either the author of recipient; is that true?**

22 A. Yes, it appears to be.

23 **Q. And let me turn your attention to that first page of**
24 **this email thread at the bottom there's an email from Shane**
25 **Cullen to Jim Huenefeldt and it's dated March 22, 2012 at**

931

1 3:05 p.m. and it reads: Well, this guy is after the job. So
2 like I -- so, like I stated, it's probably a good bit of
3 marketing.

4 Do you see that?

5 A. Yes.

6 **Q. What did you mean by that?**

7 A. I'm sorry.

8 **Q. I'm just wondering what you meant by this?**

9 A. This guy was, obviously, soliciting for work.

10 **Q. Right.**

11 And you -- and -- and the statement he made regarding
12 the condition of ties on the right-of-way, were -- were his
13 opinion, right?

14 A. The opinion of the gentleman soliciting for work?

15 **Q. Of Mr. Lupfer.**

16 A. Yes.

17 **Q. And did you have any independent knowledge of that**
18 **accorded with that or was that just his opinion?**

19 A. That was just his opinion.

20 **Q. You had no independent basis to support that opinion,**
21 **right?**

22 A. Correct.

23 MR. WEIGERT: No further questions, except to say
24 that if counsel moves for page two of this exhibit of this
25 email thread to be entered into evidence, we would ask that

932

1 page one be admitted as well.
 2 THE COURT: I haven't -- there's been no motion.
 3 MR. WEIGERT: Okay.
 4 MR. STEWART: Are you finished? I'm sorry.
 5 MR. WEIGERT: I have no further questions for
 6 now. Thank you.
 7 MR. STEWART: I have no more questions, your Honor,
 8 but I'm sorry, but I do want to offer those exhibits. And I
 9 have no objection whatsoever for him offering a second paged
 10 to that exhibit.
 11 THE COURT: Okay. So, would you, please, make
 12 clear which exhibits you are entering into evidence? I know
 13 they're all DX exhibits, I believe, starting with ten?
 14 MR. STEWART: Yes, your Honor, the first one is
 15 DX-108.0531.
 16 THE COURT: Any objection?
 17 MR. THOMAS: Just a minute, your Honor.
 18 THE COURT: Okay. Thank you.
 19 MR. WEIGERT: What is the full range of pages there,
 20 counsel?
 21 MR. STEWART: I'll just go with DX-108.0531.
 22 Attached to it is a map of the rail line, your Honor, which
 23 we can exclude. So, it's just the one page DX108.0531.
 24 MR. WEIGERT: No objection, your Honor.
 25 THE COURT: Admitted.

933

1 (Defendant's Exhibit Number 108.0531 was admitted
 2 into evidence.)
 3 The next exhibit?
 4 MR. STEWART: DX-108.0558.
 5 MR. WEIGERT: No objection, your Honor.
 6 THE COURT: Admitted.
 7 (Defendant's Exhibit Number 108.0558 was admitted
 8 into evidence.)
 9 MR. STEWART: The next one is DX-108.0623.
 10 MR. WEIGERT: No objection, your Honor.
 11 THE COURT: Admitted.
 12 (Defendant's Exhibit Number 108.0623 was admitted
 13 into evidence.)
 14 MR. STEWART: The next one is DX-108.0718.
 15 MR. WEIGERT: No objection, your Honor.
 16 THE COURT: Admitted.
 17 (Defendant's Exhibit Number 108.0718 was admitted
 18 into evidence.)
 19 MR. STEWART: The next one is DX-108.0721.
 20 MR. WEIGERT: No objection.
 21 THE COURT: Admitted.
 22 (Defendant's Exhibit Number 108.0721 was admitted
 23 into evidence.)
 24 MR. STEWART: And the last one is DX-108.0723.
 25 And I believe the Government wanted to add 0722 and

934

1 we have no objection.
 2 MR. WEIGERT: No objection if that 0722 is added.
 3 THE COURT: And -- and 23 as well.
 4 MR. WEIGERT: Correct, those two as well.
 5 THE COURT: Admitted.
 6 (Defendant's Exhibit Number 108.0722 and 108.0723
 7 were admitted into evidence.)
 8 THE COURT: Any redirect?
 9 MR. WEIGERT: No, your Honor.
 10 May I suggest, given it's a little after 12 noon,
 11 that we perhaps break for lunch?
 12 THE COURT: Very good.
 13 Is the witness excused?
 14 MR. WEIGERT: The witness is excused.
 15 THE COURT: Very good. Thank you.
 16 When shall we resume? How long do you like for
 17 lunch?
 18 MR. WEIGERT: An hour and 15 minutes, your Honor.
 19 THE COURT: An hour 15. So, 1:30.
 20 MR. WEIGERT: Sure.
 21 (Recess.)
 22 MR. WEIGERT: United States calls Daniel A.
 23 LaKemper.
 24 THE COURT: If Mr. LaKemper would come forward and
 25 take the witness box.

935

1 (Witness was duly sworn.)
 2 DIRECT EXAMINATION
 3 BY MR. WEIGERT:
 4 **Q. Good afternoon, Mr. LaKemper.**
 5 A. Afternoon.
 6 **Q. Please, state and spell your name for the record?**
 7 A. Daniel A. LaKemper. D-A-N-I-E-L. A.
 8 L-A-K-E-M-P-E-R.
 9 **Q. My name is David Weigert. I'm an attorney with the**
 10 **U.S. Department of Justice representing the United States in**
 11 **this case.**
 12 **I believe we last spoke at your deposition on April --**
 13 **April 2, 2019, here in Peoria.**
 14 **Do you recall that?**
 15 A. Yes.
 16 **Q. Where do you live, Mr. LaKemper?**
 17 A. Morton, Illinois.
 18 **Q. Tell us about your educational background?**
 19 A. I have BS from Bradley University. JD from the
 20 Creighton University School of Law.
 21 **Q. And where are you currently employed?**
 22 A. I'm sorry.
 23 **Q. With whom are you currently employed?**
 24 A. Pioneer Railroad Services Inc.
 25 **Q. What is your current position?**

26 (Pages 932 to 935)

EXHIBIT L

TRIAL TESTIMONY OF DAN LAKEMPER

In the Matter of:

Jeffrey Memmer, et al. v. USA

May 7, 2019

Trial

Vol. 5

Condensed Transcript with Word Index



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832

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JEFFREY MEMMER, et al.,)
 Plaintiffs,)
 v.) Case No. 14-135L
 THE UNITED STATES,)
 Defendant.)

Courtroom B

U.S. District Court for the Central District of Illinois
 100 N.E. Monroe Street
 Peoria, Indiana
 Tuesday, May 7, 2019
 9:30 a.m.
 Trial Volume 5

BEFORE: THE HONORABLE MARGARET M. SWEENEY, CHIEF JUDGE

Reported by: Bobbi L. Hamlin, CCR, CSR, RMR

834

TESTIMONY INDEX

Shane Cullen	
Direct-Examination by Mr. Weigert	Page 836
Cross-Examination by Mr. Stewart	Page 900
Redirect-Examination by Mr. Weigert	Page 928
Daniel LaKemper	
Direct-Examination by Mr. Weigert	Page 935
Cross-Examination by Mr. Stewart	Page 951
Redirect-Examination by Mr. Weigert	Page 975
Direct-Examination by Mr. Stewart	Page 981

EXHIBIT INDEX

NUMBER	MARKED	ADMITTED
DEFENDANT:		
108.0531		933
108.0558		933
108.0607		886
108-0619		899
108-0620		899
108-0621		899
108.0623		933
108.0718		933
108.0721		933
108.0722		934
108.0723		934

833

A P P E A R A N C E S

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835

EXHIBIT INDEX (Continued)

NUMBER	MARKED	ADMITTED
DEFENDANT:		
113		884
114		885
117		951
118		979

932

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 3 MR. WEIGERT: Okay.
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 20 MR. WEIGERT: Sure.
 21 (Recess.)
 22 MR. WEIGERT: United States calls Daniel A.
 23 LaKemper.
 24 THE COURT: If Mr. LaKemper would come forward and
 25 take the witness box.

935

1 (Witness was duly sworn.)
 2 DIRECT EXAMINATION
 3 BY MR. WEIGERT:
 4 **Q. Good afternoon, Mr. LaKemper.**
 5 A. Afternoon.
 6 **Q. Please, state and spell your name for the record?**
 7 A. Daniel A. LaKemper. D-A-N-I-E-L. A.
 8 L-A-K-E-M-P-E-R.
 9 **Q. My name is David Weigert. I'm an attorney with the**
 10 **U.S. Department of Justice representing the United States in**
 11 **this case.**
 12 **I believe we last spoke at your deposition on April --**
 13 **April 2, 2019, here in Peoria.**
 14 **Do you recall that?**
 15 A. Yes.
 16 **Q. Where do you live, Mr. LaKemper?**
 17 A. Morton, Illinois.
 18 **Q. Tell us about your educational background?**
 19 A. I have BS from Bradley University. JD from the
 20 Creighton University School of Law.
 21 **Q. And where are you currently employed?**
 22 A. I'm sorry.
 23 **Q. With whom are you currently employed?**
 24 A. Pioneer Railroad Services Inc.
 25 **Q. What is your current position?**

26 (Pages 932 to 935)

936

1 A. General counsel.
 2 **Q. What are your duties as general counsel?**
 3 A. I handle the legal matters that are directed to me by
 4 the president.
 5 **Q. And who is the president?**
 6 A. J. Michael Carr.
 7 **Q. Are you also an officer of that company?**
 8 A. No.
 9 **Q. Is Pioneer Railroad Services affiliated with other**
 10 **companies as a parent or subsidiary?**
 11 A. No. Pioneer Services is the subsidiary. Pioneer Rail
 12 Corporation is the parent corporation.
 13 **Q. And does Pioneer Railcorp have other subsidiaries?**
 14 A. Yes.
 15 **Q. Those are wholly owned?**
 16 A. Yes.
 17 **Q. Is one of those Indiana Southwestern Railway Inc.?**
 18 A. Illinois -- Indiana Southwestern Railway Company, yes.
 19 **Q. Company?**
 20 A. Yes.
 21 **Q. And we'll be referring to as ISW. Is that okay?**
 22 A. Yes.
 23 **Q. In addition to Pioneer Railroad Services Inc. you act**
 24 **as general counsel for Pioneer Railcorp and all its**
 25 **subsidiaries, including ISW?**

937

1 A. All of the subsidiaries except Heartland Rail
 2 Investments, which is a, technically, I guess, subsidiary. I
 3 cannot act as general counsel for that entity.
 4 **Q. Okay. But for the other entities you do?**
 5 A. Yes.
 6 **Q. Okay. When did you start working for Pioneer or one**
 7 **of it's affiliated companies?**
 8 A. 1986.
 9 **Q. What was your first position there?**
 10 A. I was outside counsel.
 11 **Q. I'm sorry, you were out?**
 12 A. Outside counsel.
 13 **Q. Oh, outside counsel.**
 14 **And what was your next position?**
 15 A. I was part-time inhouse for a while. Then I was out
 16 house again. Then I came inhouse for several years. Then I was
 17 out again. And since 2010 I think I've been full time inhouse
 18 counsel.
 19 **Q. And did you take a hiatus between 2001 and 2003?**
 20 A. Yes, I took a job with a small law firm. I still did
 21 occasional work for Pioneer.
 22 **Q. Okay. And were you inhouse prior to 2001?**
 23 A. Yes.
 24 **Q. For how long prior?**
 25 A. Since 1992.

938

1 **Q. Okay. Are you familiar with the definition of the**
 2 **17.2-mile rail corridor at issue in this case?**
 3 A. Definition?
 4 **Q. Yes. Are you familiar with that 17.2-mile rail**
 5 **corridor at issue in this case?**
 6 A. I'm aware of that corridor, yes.
 7 **Q. And is that corridor comprised of interconnecting rail**
 8 **lines extending between one mile most 227.5 at Poseyville,**
 9 **Indiana and milepost 240.2 near German Township, Indiana, which**
 10 **is approximately 12.7 miles and the stretch between milepost**
 11 **277.5 at Cynthiana, Indiana and milepost 282.0 at Poseyville,**
 12 **Indiana, approximately 4.5 miles?**
 13 A. I haven't memorized the milepost numbers, but it
 14 sounds right.
 15 **Q. Okay. I'll just be referring to that corridor here**
 16 **as "corridor" or "rail line" or "right-of-way," unless**
 17 **specified otherwise. Okay?**
 18 A. I would prefer you don't refer to it as rail line
 19 because that can get confusing with ISW and the two lines that
 20 comprise that. So, corridor is fine.
 21 **Q. Okay. We'll use corridor then. Thank you.**
 22 **Are you familiar with the notice of exemption that was**
 23 **filed -- any type of notice of exemption that was filed by ISW**
 24 **in that case?**
 25 A. Generally, yes.

939

1 **Q. And was that filed, as far as you know, in October**
 2 **of -- on October 25, 2010?**
 3 A. It was October 2010. I don't remember the exact day.
 4 **Q. That's fine.**
 5 **And the 17.2-mile corridor we just mentioned was the**
 6 **subject of that exemption notice; is that right?**
 7 A. Yes.
 8 **Q. And did -- and ISW was the filer there or was it a**
 9 **different entity?**
 10 A. It was ISW.
 11 **Q. Okay. And did ISW end up filing a notice of**
 12 **consummation of abandonment?**
 13 A. No.
 14 **Q. Does the railroad believe it still holds a -- still**
 15 **holds property rights in the 17.2-mile corridor in combination**
 16 **of fee and easement?**
 17 MR. STEWART: Object, your Honor, to the form of
 18 that question. It calls for, actually, speculation and
 19 conjecture and also legal conclusion.
 20 THE COURT: Sustained. Rephrase, please.
 21 BY MR. WEIGERT:
 22 **Q. Do you, in your capacity as general counsel, believe**
 23 **that ISW holds an interest in the 17.2 mile corridor?**
 24 MR. STEWART: Same objection, your Honor. Calls for
 25 legal conclusion. Really, frankly, doesn't matter what

27 (Pages 936 to 939)

940

1 Mr. LaKemper thinks about the title and ownership, since the
2 Court has already ruled.

3 THE COURT: I will allow the witness to testify to
4 his personal understanding.

5 MR. WEIGERT: Thank you, your Honor. That's all
6 I'm asking.

7 THE WITNESS: Okay. I'm sorry. Would you repeat
8 the question?

9 BY MR. WEIGERT:

10 Q. Sure.

11 Is your personal understanding as general counsel for
12 ISW that ISW currently holds property rights in the 17.2 mile
13 railroad corridor that --

14 A. That is my understanding, yes.

15 Q. And can you characterize the rights as you understand
16 it?

17 A. As you said, combination fee/easement. I think
18 there's some condemnation rights. There may be some adverse
19 possession. I don't remember.

20 Q. And do you know, approximately, the percentage it's
21 held in fee versus the percentage it's held in easement?

22 MR. STEWART: Your Honor, I object. Totally
23 irrelevant. Lacks any foundation whatsoever.

24 THE COURT: I'll allow the Government to ask the
25 witness what he understands about the corridor. It's not

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1 binding on me. It's just his understanding as general
2 counsel, which is -- no, I didn't mean that to any -- any --
3 diminish you in your capacity as general counsel.

4 THE WITNESS: My understanding is based upon the
5 appraisal that we received from the local appraiser back at
6 the time of the STB filing. I don't remember what his exact
7 percentages were, but he was an Indiana real estate expert.
8 I am not, so...

9 BY MR. STEWART:

10 Q. Is it your understanding that the vast majority is
11 held in fee?

12 MR. STEWART: Your Honor, I object for the record.

13 THE COURT: Well, this -- I will sustain that
14 objection.

15 MR. WEIGERT: I'll move on.

16 THE COURT: If the Government wants to put on this
17 appraiser to testify to what his or her findings are or were
18 at the time, then that's fine, but otherwise, no.

19 MR. WEIGERT: I'll move on.

20 BY MR. WEIGERT:

21 Q. Mr. LaKemper, have you tried to sell -- let me put it
22 another way.

23 Has ISW tried to sell its interest in the 17.2-mile
24 corridor?

25 A. Referring to the entire corridor?

942

1 Q. Or any portion thereof?

2 A. We did sell a small portion of it to Cynthiana back
3 around the time of the filing.

4 We have had ongoing discussions with what I call the
5 trail group, I think is the Indiana Trails Foundation, about
6 selling the entire corridor.

7 We have had some off and on discussions with the City
8 of Poseyville about it -- the entire corridor, at least the
9 Poseyville to Evansville part of it, but there's been no -- none
10 of it's been reduced to offers or draft documents, it's all been
11 discussion.

12 Q. Have Plaintiffs in this case offered to acquire the
13 easement interest in the 17.2-mile corridor?

14 A. Well, there was a discussion, short discussion. I
15 believe they, again, were looking at more than just the
16 easement, but we -- we didn't pursue that at that time.

17 Q. And what -- when was that time?

18 A. Few weeks ago.

19 Q. And were there any conditions on that? Would you say
20 that there was an offer made at that time?

21 A. I wouldn't -- I wouldn't characterize the as a legal
22 offer. I would characterize it as an expression of interest.

23 Q. Was -- was there an amount associated with that
24 expression of interest that was offered to be paid to ISW?

25 A. Yes, there was.

943

1 Q. And how much was that?

2 A. It's in the email. I don't remember.

3 Q. So, you -- did you say learned about this by email; is
4 that right?

5 A. Yes, it was made by email, as I recall.

6 Q. And you recall if that -- well, let's see if that
7 expression of interest came along with any conditions?

8 A. Well, I mean, I would expect in any real estate deal
9 there would be conditions, but I don't -- I don't remember
10 anything stuck out in my mind as other than, you know, they
11 wanted the property.

12 Q. Was there a condition regarding the timing of the
13 transaction?

14 A. Well, they wanted to do it very quickly.

15 Q. How quickly?

16 A. Talking about within a couple weeks.

17 Q. Before a certain date?

18 A. Before trial date.

19 Q. Before the trial date in this case?

20 A. Yes.

21 Q. And that would be April 29th, 2019; is that right?

22 A. I think so.

23 Q. Did the railroad agree to pursue this expression of
24 interest?

25 A. No, we did not.

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1 **Q. Why not?**

2 A. Because we're currently in discussions about a
3 possible buyout and our buyer has prohibited us from engaging in
4 those kinds of transactions or discussions pending arriving at a
5 deal with them or --

6 **Q. Are you at liberty to share with us who the potential
7 buyer is?**

8 A. Probably not.

9 **Q. Who -- who is that buyer? I'll just ask the question.**

10 A. Do I have to answer?

11 THE COURT: I don't give legal advice. I render
12 legal decisions, but I don't give legal advice.

13 THE WITNESS: Well, I think I have a problem
14 answering that, unless the Judge tells me I have to.

15 BY MR. WEIGERT:

16 **Q. Okay. Maybe we can talk about the nature of the
17 interest of that buyer.**

18 **What is the nature of the interest of that buyer?**

19 A. They want to buy Pioneer Railcorp and including all of
20 its subsidiaries.

21 **Q. Would that also include ISW?**

22 A. Yes.

23 **Q. And would that also include the 17.2-mile corridor?**

24 A. Yes.

25 **Q. That's the corridor at issue in this case, right?**

1 THE WITNESS: Thank you, Your Honor.

2 BY MR. WEIGERT:

3 **Q. I would like to show you a document that's been marked
4 PNR-000040 to PNR-000043.**

5 A. Thank you.

6 MR. WEIGERT: And I'll just represent for the
7 record that this appears to be an email thread containing
8 emails dated from April 4, 2019 to April 9, 2019. And that
9 Mr. LaKemper is listed as either the author or recipient of
10 every one of those emails.

11 BY MR. WEIGERT:

12 **Q. Is that right, Mr. LaKemper?**

13 MR. STEWART: Your Honor, while the witness is
14 reviewing this, I need to interpose an objection to this
15 entire line of questioning as being totally irrelevant.

16 THE COURT: Well, we'll have to wait to hear what
17 the question is before we -- and it's -- this exhibit has
18 been marked 117? Is that DX-117?

19 MR. WEIGERT: It is.

20 THE WITNESS: Yes.

21 MR. WEIGERT: Defense Exhibit 117.

22 THE COURT: Not trying -- I wasn't trying to be
23 flip. I just really -- I just want to make sure we're all
24 on the same page.

25 MR. WEIGERT: That was very helpful.

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1 A. Yes.

2 **Q. And is the closing date set yet for that acquisition?**

3 A. No.

4 **Q. Do you expect that closing date will be set soon?**

5 A. If we're -- we're going to have a board meeting to
6 vote on a -- an agreement or you know, yes or no. And my
7 understanding is, it's going to be next week.

8 THE COURT: I'm sorry, I just -- I don't understand
9 the testimony. It was my understanding -- I thought you
10 said there was an -- was the expression of interest that you
11 mentioned that by the -- by a farmer or was or are you
12 talking current time that you have a firm offer to sell or
13 is that the more nebulous expression of interest?

14 THE WITNESS: We cannot pursue the what I described
15 was an expression of interest from the Plaintiffs in their
16 purchase of the corridor, because of our obligations to the
17 potential buyer of our company.

18 THE COURT: Understood now.

19 If -- if either counsel believes it's appropriate
20 to obtain more details regarding the sale, I'm not saying
21 that it is, we could keep that portion of the transcript
22 under seal. So I just want to make that offer.

23 It sounds like it may not be relevant, but so, it's
24 not necessary, but I just want to make that offer.

25 Thank you. I just wanted to make -- thank you.

1 THE COURT: This wasn't from someone else's
2 deposition. Whole different pagination within your trial
3 exhibits. So, thank you.

4 MR. WEIGERT: It was a good question. Thank you.
5 Appreciate it.

6 THE WITNESS: I sent some of these emails and some
7 of these emails were sent to me.

8 BY MR. WEIGERT:

9 **Q. That's right.**

10 **So, you -- do you recall this chain?**

11 A. Generally, yes.

12 **Q. Let me focus your attention on an email dated April 4,
13 2019 at 12:03 p.m. I believe it's a -- the first one in this
14 thread and therefore, the last in the document.**

15 A. Okay.

16 **Q. Now, that is an email from Elizabeth McCulley
17 addressed to you; is that right?**

18 A. Yes.

19 **Q. Copy to Thomas Stewart?**

20 A. Yes.

21 **Q. And let me turn your attention to the second to last
22 full paragraph, there it says -- the first sentence says:
23 Taking all this into consideration on behalf of all of our
24 landowners, we will offer \$100,000 for the easement portions of
25 the entire 17.2 miles.**

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1 **Do you see that?**

2 A. Yes.

3 MR. STEWART: Your Honor, I object to the use of
4 this exhibit in this fashion.

5 First of all, there's not a question pending. He's
6 just trying to read it to the witness. And it's also
7 entirely irrelevant to any issue in this lawsuit.

8 MR. WEIGERT: Your Honor, I'm going to ask a
9 question. This has nothing to do with -- this particular
10 one has to do with refreshing his recollection regarding
11 what this interest or offer consisted of.

12 THE COURT: All right. Proceed.

13 BY MR. WEIGERT:

14 **Q. So, Mr. LaKemper, this says: We will offer \$100,000.**
15 **Does that help clarify whether or not this was an offer or mere**
16 **expression of interest?**

17 A. Well, I mean, I guess you could characterize it as an
18 offer, but I don't think if I had said, yes, I'll take it, it
19 would be a binding contract. So, I mean...

20 **Q. And let me focus on the next section it says: We will**
21 **offer \$100,000 for the easement portions of entire 17.2 miles.**

22 **Does that refresh your recollection as to whether it**
23 **was for just the easement portions?**

24 MR. STEWART: Your Honor, I object to this entire
25 line of questioning as being totally relevant to anything.

1 questioning is not violative of any of the rules. So, you
2 may proceed.

3 MR. WEIGERT: Thank you, Your Honor.

4 And I'm happy to discuss more about the relevance
5 if you'd like, but let's just proceed for now.

6 BY MR. WEIGERT:

7 **Q. Let me point -- so -- so, again, if could you answer**
8 **that question, that would be great.**

9 A. Well, my understanding would be based on the appraisal
10 that we got that I referred to previously.

11 **Q. That's okay. I'm interested in your understanding.**

12 A. (No response.)

13 **Q. How much less -- so, I'm asking you, this says**
14 **90 percent easement. And what is your understanding?**

15 A. I don't remember what that appraisal came in at
16 exactly.

17 **Q. That's okay.**

18 A. I think it was somewhere around 50/50, but you know,
19 without having it in front of me, which I mean, I think you have
20 it, if you want to --

21 **Q. That's fair.**

22 THE COURT: And I --

23 BY MR. WEIGERT:

24 **Q. As you sit here, I'm not -- I'm not asking more than**
25 **that, because it's going to, you know, your interactions here**

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1 Our landowners want the land back. And they made an offer
2 for it. I'll stipulate to that.

3 But to use this witness as trying to testify about
4 a particular offer on this particular land at any point in
5 the time is totally irrelevant to whether there was a taking
6 or not.

7 THE COURT: Overruled.

8 THE WITNESS: Well, they characterize the easement
9 portions as -- as being approximately 90 percent of the line
10 in previous paragraphs. So, I guess in my mind it was
11 because we had a different breakdown of the amount that was
12 easement. I guess in my mind it was more than just what we
13 considered the easement.

14 BY MR. WEIGERT:

15 **Q. So, what you or ISW considers to be the easement is**
16 **less than 90 percent -- sorry -- the easement portions of the**
17 **corridor are less than 90 percent; is that correct?**

18 A. Yes, that's correct.

19 **Q. How much less?**

20 MR. STEWART: Your Honor, I object to this entire
21 line of questioning. What this witness may decide or think
22 about what is easement and what is fee has already been
23 ruled upon by this Court.

24 THE COURT: You're -- you're right. I'm just
25 getting his view. Nevertheless, this is -- this line of

1 and what -- what you know your response was to this.

2 **May I focus your attention on the next sentence. It**
3 **says: Our offer is contingent on the railroad's consummation of**
4 **abandonment under federal law or at least starting that**
5 **proceeding before April 29th. And the landowners will find a**
6 **way to dispose of the cross-ties as well so that you can still**
7 **avoid that cost.**

8 **Does that refresh your recollection as to the details**
9 **of the contingency that came along with this offer?**

10 A. Yes.

11 **Q. And let me ask you this: Did you -- does this --**

12 MR. WEIGERT: What I'd like to ask about this, your
13 Honor, that this be entered into evidence.

14 MR. STEWART: Objection, your Honor, for a variety
15 this of reasons.

16 THE COURT: I -- that does not come as a surprise.
17 I'll admit the document.

18 (Defendant's Exhibit Number 117 was admitted
19 into evidence.)

20 MR. WEIGERT: Thank you, Your Honor.

21 I have no further questions with possible redirect.

22 CROSS-EXAMINATION

23 BY MR. STEWART:

24 **Q. While you've got Exhibit 117 in front of you --**

25 A. (No intelligent response.)

952

1 Q. -- if you'll turn your attention to that very first
2 email exchange that Mr. Weigert was referring to.

3 Do you see that?

4 A. (No response.)

5 Q. And the last page of the first full paragraph.

6 A. First full paragraph? Okay.

7 Q. Yeah.

8 And it says: Our position is really quite simple.

9 Do you see that?

10 A. Yes.

11 Q. The need to start the taking of the corridor has been
12 abandon under state law when the rails and ties were removed.
13 And I put in parenthesis removed in quotes, because we frankly,
14 cannot believe how stupid the Government's position is on that.

15 And your landowners are entitled to receive
16 compensation for either a continuing taking or a permanent
17 taking, depending on what happens in these discussions.

18 Do you see that?

19 A. Yes.

20 Q. And that was the -- a statement of our position that
21 we made to you?

22 A. That's what -- that's what it says.

23 Q. Okay. And it goes on to say that the analysis of
24 issues based on taking law is only part of the equation for
25 lawyer landowners since they have not been able to use the

953

1 corridor, because ISW never formally consummated abandonment
2 under federal law.

3 Do you see that?

4 A. Yes.

5 Q. I don't remember if Mr. Weigert asked you a question
6 or not. Your abandonment under federal law, you have not
7 actually consummated under federal law as of yet, have you, Mr.
8 LaKemper?

9 A. We haven't.

10 Q. Okay. And then it goes on to say: We know that you
11 previously told us that ISW never formally abandon the corridor,
12 because you didn't have to and that you were looking for some
13 compensation for the interest that you still hold under federal
14 law.

15 Do you see that?

16 A. I see that.

17 Q. And more than the money for a taking, our landowners
18 simply want to reclaim the corridor and start farming it.

19 Do you see that?

20 A. I see that.

21 Q. Okay. As a result we are interested in formulating
22 some model where everybody wins.

23 Do you see as well?

24 A. Yes.

25 Q. Okay. Now, I want to direct your attention first to

954

1 Joint Exhibit Number 1.

2 MR. WEIGERT: Objection, your Honor, outside the
3 scope.

4 MR. STEWART: You recall I referred to Joint Exhibit
5 Number 1 in detail.

6 THE COURT: You did. So --

7 MR. WEIGERT: I'll wait and see.

8 THE COURT: Okay.

9 MR. WEIGERT: Thanks.

10 THE COURT: As of now your objection is overruled.

11 BY MR. STEWART:

12 Q. Let me hand you a copy, Mr. LaKemper, so you have one
13 in front of you.

14 A. Okay.

15 Q. Now, that document Exhibit Number 1 is dated
16 October 25, 2010.

17 Do you see that?

18 A. Yes.

19 Q. It was actually your intent to seek and receive
20 abandonment authority for the 17.2 miles at issue when you filed
21 that notice of exemption, was it not?

22 MR. WEIGERT: Objection. Outside the scope.

23 THE COURT: Overruled.

24 BY MR. STEWART:

25 Q. Was it not, Mr. LaKemper?

955

1 A. It was -- it was our intention to cease rail service.

2 We -- we were aware -- became aware very quickly of the interest
3 of the trail rail which would have, I guess, prevented a
4 complete abandonment.

5 Q. My point is: Is that at the time that this was filed
6 on October 25, 2010, you specifically sought authority from the
7 STB to abandon the line, correct?

8 A. ISW sought authority to abandon the line, yes.

9 Q. Yes, that's the whole purpose of Joint Exhibit Number
10 1 was to get that authority?

11 A. Correct.

12 Q. All right.

13 Now, the process you used was the exemption procedure,
14 was it not?

15 A. Yes.

16 Q. All right.

17 And that means, basically, that there would have been
18 no train traffic for at least two years?

19 A. Correct.

20 Q. All right.

21 Now, you'll turn to Exhibit D, which is on page 16 of
22 this exhibit.

23 A. Okay.

24 Q. It's entitled Certification of Compliance With
25 Environmental and Historic Report Requirements.

956

1 Do you see that?

2 A. Yes.

3 Q. This too was a requirement that you had to prepare to

4 fill out in order to get final authority from the STB to allow

5 you to abandon the line, correct?

6 A. Correct.

7 Q. All right.

8 Now, if you'll turn to page 20, and you'll look at the

9 actually the last sentence on that page, it says: Upon

10 obtaining authority to abandon the lines, ISW will salvage the

11 lines, track and track material and will dispose of the real

12 estate.

13 Do you see that?

14 A. Yes.

15 Q. All right.

16 And that was your intent. Actually, it was formed by

17 the company even prior to this time, was it not?

18 A. Yes.

19 Q. All right.

20 So, some time back in either the spring or the summer

21 of 2010 the company reached a conclusion that it was your intent

22 to go ahead and seek authority to abandon the line?

23 A. Yes.

24 Q. And then when this was filed, you actually

25 specifically told the Surface Transportation Board that upon

957

1 obtaining authority to abandon the line that you were going to

2 go ahead and salvage the lines track and track material.

3 Do you see that?

4 A. Yeah.

5 Q. All right.

6 Now, if you'll turn to the next page, which is page

7 21, and in the, what I'll call the second first full paragraph,

8 it's after that one line there, it says: As indicated above,

9 upon obtaining abandonment authority, ISW plans to remove the

10 line's rail and salvageable track material such as tie plates,

11 fasteners, crossties and possibly the upper layer of ballast.

12 Do you see that?

13 A. Yes.

14 Q. All right.

15 And at this time even as early as October of 2010, it

16 was the railroad's intent to remove and salvage all of the

17 salvageable track material, right?

18 A. Right.

19 Q. And the actual planning and negotiations for that

20 removal and evaluation process was even going on at the time

21 that that was filed in October of 2010, wasn't it?

22 A. I believe so.

23 Q. And if you go back to page 21, it goes on to say that

24 the only alternative to abandonment, which is the start of this

25 next paragraph, would be for ISW not to abandon the line and to

958

1 incur losses associated with the ownership of unused rail

2 assets.

3 Do you see that?

4 A. Yes.

5 Q. So, you didn't want to keep the line in place and have

6 the costs associated with that course of action without having

7 any customers on the line, right?

8 A. Correct.

9 Q. All right.

10 And given these two alternatives, one was to go ahead

11 and abandon the line, which you started with this abandonment

12 exemption procedure, and the other one was to not abandon the

13 line, right?

14 A. That's the -- that's the two alternatives that are

15 presented there, yes.

16 Q. And ISW, basically, concluded that to not abandon the

17 line was an untenable alternative, correct?

18 A. We did not want to maintain the line in place.

19 Q. Okay. Now, if you'll go on on page 21, and it's

20 really under land use there, the first full paragraph it says:

21 ISW believes that the proposed abandonment is consistent with

22 and would promote existing land use plans. And that the land

23 adjoining the lines consists of a combination of rural farmland

24 residential areas of some forested land.

25 Do you see that?

959

1 A. Yes.

2 Q. All right.

3 And at the bottom of that page, which is page 21, and

4 it goes on to page 22 it says: ISW does not believe that there

5 is any prime agricultural land that would be adversely affected

6 by the proposed abandonment. As indicated above, the land goes

7 through farmland, residential and forested land.

8 And then it says: Furthermore, the proposed rail line

9 abandonment should not in any way contribute to farmland loss

10 and could in fact, permit the abandon right-of-way to be

11 converted, wherever practicable, to farmland use.

12 Do you see that?

13 A. Yes.

14 Q. And what does that mean?

15 A. Well, it means that the abandonment is not going to

16 diminish the existing farmland in that area.

17 And there is the possibility that part of the

18 right-of-way will be converted to additional farmland.

19 Q. Okay. If it was abandoned and then, indeed, if it

20 reverted, you knew that the adjoining landowners would convert

21 it into productive farmland, didn't you?

22 A. Well, it was a possibility.

23 Q. In fact, you knew at that time and in fact, you

24 expected it to happen, didn't you?

25 A. One could assume that it was likely to happen to some

32 (Pages 956 to 959)

960

1 degree, yes.

2 **Q. Now, if you go to page 28, and the last paragraph**
 3 **under section five where it says: A brief narrative history.**
 4 **It starts off by saying: ISW intends upon the effectiveness of**
 5 **the class exemption to terminate its rail common carrier**
 6 **obligation over and to abandon the lines.**

7 **Do you see that?**

8 A. Yes.

9 **Q. And so, it was your intent at that point in time long**
 10 **before even the trail operators or the potential trail operators**
 11 **got involved, it was your intent to terminate your rail common**
 12 **carrier obligation and to go ahead and abandon the line,**
 13 **correct?**

14 A. That's what it says, yes.

15 **Q. All right.**

16 **And it says, again, that ISW would salvage the rail**
 17 **and track material that proposed positive net salvage value and**
 18 **reuse them elsewhere in its system.**

19 **Do you see that?**

20 A. Yes.

21 **Q. All right.**

22 **Now, ultimately, the effectiveness of the class**
 23 **exemption process that the railroad followed was the permission**
 24 **authority from the STB to abandon the line, wasn't it?**

25 MR. WEIGERT: Your Honor, I have to object to this

961

1 line. This document has been in evidence and counsel is
 2 just walking us through a document that could be addressed
 3 in briefing afterwards.

4 MR. STEWART: Well, your Honor, this is key for two
 5 reasons. One, they have brought up the issue of abandonment
 6 and their intent to abandon, which is specifically
 7 throughout this document.

8 Second of all, this is the very first time that any
 9 witness really knowledgeable about what this document
 10 contains has been on the witness stand and can testify about
 11 it.

12 And ultimately, your Honor, it is going to go
 13 directly, when I'm finished here, to the duration of the
 14 taking, which is a key question for this Court to decide.

15 THE COURT: I'll allow the testimony.

16 THE WITNESS: Could you repeat the question,
 17 please?

18 BY MR. STEWART:

19 **Q. The ultimate effectiveness of this class exemption**
 20 **process that the railroad followed was the permission or**
 21 **authority from the STB to abandon the line, was it?**

22 A. Yes.

23 **Q. So clearly, the entire purpose of the exemption**
 24 **process was to go ahead and terminate ISW's common carrier**
 25 **obligation and then go ahead and abandon the line, correct?**

962

1 A. The purpose of the filing is to terminate common
 2 carrier obligation and abandon the line, yes.

3 **Q. Okay. Now, you -- first, I don't know if you need to**
 4 **get into this or not. Well, I'm going to do it. It will just**
 5 **take a minute.**

6 **Let me hand you what has been marked as Joint Exhibit**
 7 **Number 2.**

8 **This has a service date at the top of November 12,**
 9 **2010, does it not?**

10 A. Yes.

11 **Q. All right.**

12 MR. STEWART: And this is, actually, the subject of
 13 joint stipulation number six, your Honor, for the record.

14 BY MR. STEWART:

15 **Q. But Mr. LaKemper, this is the STB statement on**
 16 **November 12, 2010, that they have actually accepted and approved**
 17 **the abandonment exemption, is it not?**

18 A. No, it's not.

19 It's a -- it's a notice that the abandonment filing
 20 has been made.

21 **Q. Okay. And if you'll look at page bottom of page**
 22 **three, it specifically says that pursuant to provisions of 49**
 23 **C.F.R. Section 1152.29-E2, ISW shall file a notice of**
 24 **consummation with the board to signify that it's exercised the**
 25 **authority granted in fully abandoning the line.**

963

1 **Do you see that?**

2 A. Yes.

3 **Q. All right.**

4 **And in fact, in that same paragraph it says: If**
 5 **consummation has not been effected by ISW's filing of notice of**
 6 **consummation any November 12, 2011, and there are no legal**
 7 **regulatory barriers to consummation, the authority to abandon**
 8 **will automatically expire.**

9 **Do you see that?**

10 A. Yeah.

11 **Q. All right.**

12 **And so, from that date, which is the date of -- this**
 13 **is November 12, 2010, the railroad had one year until November**
 14 **12, 2011, to file a consummation of abandonment under 49 C.F.R.**
 15 **Section 1152.29-E2, correct?**

16 A. At that time, yes.

17 **Q. Yes.**

18 **And that is really before the trail people got**
 19 **involved, right?**

20 A. Yes.

21 **Q. All right.**

22 **We, and I'm going to try to short circuit this,**
 23 **Mr. LaKemper, but the need to -- you've actually seen the notice**
 24 **of interim trail use in this case, have you not?**

25 A. Yes.

964

1 Q. And it is dated or becomes effective May 23, 2011,
2 right?

3 A. Without seeing it...

4 Q. All right. I'll give it to you.

5 Let me hand you, Mr. LaKemper, what has been marked as
6 Joint Exhibit 6.

7 This actually has a service date at the top of April
8 8, 2011.

9 Do you see that?

10 A. Yes.

11 Q. And then if you'll turn to page seven, where it says
12 it is ordered.

13 Do you see that?

14 A. Yes.

15 Q. And it says under 49 U.S.C. Section 10502 it says
16 the -- the? Well, not actually where I wanted to see it, but
17 if -- turn to paragraph two. I'm sorry.

18 It says: This proceeding to the extent to permit the
19 abandonment and exemption in this proceeding is to become
20 effective on May 23, 2011.

21 Do you see that?

22 A. (No response.)

23 Q. That's in the second paragraph, it is ordered.

24 A. Yes.

25 Q. Okay. Now, this particular document grants an initial

965

1 180-day period of time to negotiate a possible trail use
2 agreement, does it not?

3 A. Or an OFA.

4 Q. Okay. And you'll look at paragraph four, under it is
5 ordered, it says: If an interim trail use rail making agreement
6 is reached it must require the trail user to assume for the term
7 of the agreement full responsibility for management.

8 Do you see that?

9 A. Yes.

10 Q. And then if you look at paragraph five, it says: If
11 interim trail use rail banking is subject to future use of the
12 property for restoration of railroad operations and to the users
13 continuing to meet the financial obligations for the
14 right-of-way.

15 Do you see that?

16 A. Yeah.

17 MR. WEIGERT: Your Honor, I object to this line in
18 the sense that there's no questions.

19 THE COURT: Yes. I -- I agree sustained.

20 BY MR. STEWART:

21 Q. All right.

22 Is paragraph five, what is generally referred to as
23 the rail banking provision of the trails act, Mr. LaKemper?

24 MR. WEIGERT: Your Honor, I object. There's no
25 reason to lead this witness through this questioning.

966

1 THE COURT: I'm going to allow the witness to
2 answer, if he -- if -- if he can.

3 THE WITNESS: Some -- some people refer to it as
4 rail banking, yes.

5 BY MR. STEWART:

6 Q. Okay. Now, in paragraph seven, the second part of
7 that paragraph says: If no agreement is reached by that time,
8 which is November 19, 2011, which is the initial six-month
9 period of time to negotiate a possible trail use agreement, the
10 railroad was given authority to or -- or permission to fully
11 abandon the line, were they not?

12 A. Correct.

13 Q. All right.

14 Now, that's the first six-month period of time to
15 possibly negotiate a trail use agreement. And at that
16 particular time it was still your intent to abandon the line or
17 to enter into a trail use agreement, wasn't it?

18 A. Or to enter into an agreement with the town for an
19 OFA, one of those three.

20 Q. One of those three.

21 And then I think it's pretty clear, Mr. LaKemper, that
22 there were various extensions to continue negotiations after
23 May 23, 2011, through an including November 8, 2013, right?

24 A. There were multiple extensions.

25 Q. And I want -- want to go through all of them. I think

967

1 we've actually stipulated to all of that, but at that point in
2 time Mr. LaKemper, on November 8, 2013, why was there no further
3 request to continue those trail use negotiations?

4 A. Well, that's something you'd have to ask the trail use
5 people, because it's their responsibility to file that extension
6 request.

7 Q. And I believe you said earlier that either the trail
8 group dropped the ball or ISW failed to remind them to file for
9 another extension, right?

10 MR. WEIGERT: Objection. Foundation.

11 BY MR. STEWART:

12 Q. Is that right?

13 THE COURT: You could -- you can ask the witness
14 what his understanding was.

15 BY MR. STEWART:

16 Q. Okay. At that time November 8, 2013, did the trail
17 group drop the ball in their failure to file a further request
18 for a negotiating period extension?

19 A. They did not file for an extension.

20 Q. Okay.

21 A. That is correct.

22 Q. And ISW failed to remind them, right?

23 A. Apparently.

24 Q. Okay. It was still actually your intent at that point
25 to negotiate with the trail group, wasn't it?

968

1 A. Yes.
 2 Q. All right.
 3 And it's -- and it is still your intent to follow
 4 through and finalize the abandonment or a trail use agreement,
 5 isn't it?
 6 A. Yes.
 7 Q. All right.
 8 Now, you had no customers and you had and did not want
 9 any of that continued expense, even at that time, November of
 10 2013, right?
 11 A. Correct.
 12 Q. And nothing has been done in terms of filings with the
 13 STB, to your knowledge, since November 8, 2013, right?
 14 A. That's correct.
 15 Q. All right.
 16 And you have not formally consummated the abandonment
 17 under Section 1152.29-E2 even though permission to do so was
 18 granted on several occasions, right?
 19 A. Correct.
 20 Q. All right.
 21 And it is -- it is a fact, isn't it, Mr. LaKemper,
 22 that to this day it is still your intent to find or negotiate
 23 for a trail use agreement?
 24 A. We are pursuing that as a possibility, yes.
 25 Q. All right.

969

1 Now, in fact, and I think you indicated this in
 2 response to Mr. Weigert's questions, you have had ongoing
 3 negotiations with the possible trail operator since November 8,
 4 2013, haven't you?
 5 A. Yes.
 6 Q. All right.
 7 And in fact, you're still having those discussions and
 8 negotiations, aren't you?
 9 A. Yes.
 10 Q. In fact, even the day before your deposition, which
 11 was April 2nd, as Mr. Weigert pointed out, you had had
 12 additional discussions about that with the potential trail
 13 operator, the day before your deposition, right?
 14 A. Correct.
 15 Q. Which would have been April 1, 2019, right?
 16 A. Correct.
 17 Q. So, those discussions are still ongoing to this day?
 18 A. Correct.
 19 Q. Right?
 20 A. Yes.
 21 Q. And they are still interested, aren't they?
 22 A. They are.
 23 Q. All right.
 24 And you're still interested, aren't you?
 25 A. Yes.

970

1 Q. All right.
 2 In fact, I think you -- you're even looking for or
 3 were looking for a possible financing arrangement of some kind,
 4 were you not?
 5 A. We were discussing financing arrangements with the
 6 trail group, yes.
 7 Q. In addition to the potential trail operator, you have
 8 had contacts with other parties who have shown an interest,
 9 haven't you?
 10 A. Yes.
 11 Q. Okay. But nothing has been signed to date?
 12 A. Correct.
 13 Q. All right.
 14 So we're clear on this, the railroad has no current
 15 intention to reinstall the rails and ties, do you?
 16 A. No.
 17 Q. All right.
 18 And despite the fact that the NITU expired on
 19 November 8, 2013, you have had ongoing discussions and
 20 negotiations to negotiate a deal and those negotiations and
 21 discussions have actually taken place within a month of this
 22 trial, right?
 23 A. Correct.
 24 Q. All right.
 25 You actually foresee continuing your negotiations with

971

1 the trail people, don't you?
 2 A. Well, at the moment they're kind of on hold too,
 3 because of our potential buyout, but that is something that will
 4 likely be resumed by somebody.
 5 Q. Okay. And you'd like that to happen, wouldn't you?
 6 A. It's -- it's -- it's one option that the railroad has
 7 that allows it to fully divest the property in one transaction.
 8 Q. And hopefully, you want this issue resolved one way or
 9 the other in the not too distant future, don't you?
 10 A. Yes.
 11 MR. WEIGERT: Your Honor, I object to this line in
 12 that there's no Government action at issue here.
 13 MR. STEWART: Oh, please, forgive me, your Honor.
 14 The Government action is the requirement that they
 15 consummate abandonment under federal law, as you said in the
 16 opening statement.
 17 THE COURT: Agreed. The -- the objection is
 18 overruled.
 19 BY MR. STEWART:
 20 Q. All right.
 21 Let me turn just briefly, Mr. LaKemper, to the salvage
 22 of the rails and ties itself.
 23 And I think we already established that ISW started
 24 working on a contract to salvage the salvageable or valuable
 25 materials as early as the spring or summer of 2010, right?

972

1 A. I believe it was some time before the filing was made.
 2 Exactly when that --
 3 **Q. All right.**
 4 A. -- was, I wasn't involved in the beginning of those
 5 negotiations.
 6 **Q. Now, after the or during this process where the rails**
 7 **were salvaged and the ties were left behind, the process is to**
 8 **separate the rails from the crossties, right?**
 9 A. That's my understanding.
 10 **Q. All right.**
 11 **And you salvaged or the railroad salvaged the rails**
 12 **with this \$1,200,000 from A & K, because the rails obviously had**
 13 **value, did they not?**
 14 MR. WEIGERT: Objection. Way outside the scope.
 15 MR. STEWART: Your Honor, this is my
 16 cross-examination of this witness that they called and they
 17 talked repeatedly in this trial in the opening door
 18 repeatedly in this trial whether or not these had value --
 19 whether the ties had value.
 20 MR. WEIGERT: Your Honor, this counsel specifically
 21 decided not to call this witness. And he's treating this
 22 witness as a direct and going way beyond the scope of our
 23 direct.
 24 MR. STEWART: No, the contrary, your Honor. I am
 25 cross examining this witness and that's my right, because

973

1 the Government called this witness.
 2 THE COURT: Well, but there are contours that you
 3 have to observe within your cross-examination.
 4 As I recall, it was the last witness where the
 5 Government was trying to get in some evaluation testimony.
 6 It was not this witness.
 7 MR. STEWART: All right.
 8 BY MR. STEWART:
 9 **Q. Mr. LaKemper --**
 10 THE COURT: So, that's --
 11 MR. STEWART: So, you're sustaining the objection?
 12 THE COURT: So, I'm sustaining the objection.
 13 MR. WEIGERT: Thank you, Your Honor.
 14 BY MR. STEWART:
 15 **Q. Mr. LaKemper, the rails were part of the -- were part**
 16 **of the contract, because they had value, were they not?**
 17 MR. WEIGERT: Objection. Same objection, actually.
 18 THE COURT: What were you -- your -- where are you
 19 going?
 20 MR. STEWART: Your Honor, this witness is an expert
 21 on that contract, because he actually helped write it and
 22 approved it.
 23 And I wanted to explore the extent of the contract
 24 with this witness as it related to the ties.
 25 THE COURT: But I don't believe that came up during

974

1 the Government's direct.
 2 MR. WEIGERT: That's correct, it did not.
 3 And counsel had an opportunity to do this with the
 4 prior witness and he chose not to.
 5 THE COURT: That's correct.
 6 MR. STEWART: Your Honor, I believe I'll call this
 7 witness then in rebuttal and that's all -- that's all the
 8 questions I have at this time.
 9 THE COURT: All right. Well, then we'll --
 10 MR. WEIGERT: Your Honor, I remind the Court,
 11 humbly, that Plaintiffs have rested.
 12 MR. STEWART: We rested on your direct case, your
 13 Honor. We have not rested on rebuttal at all.
 14 THE COURT: And that's correct.
 15 MR. WEIGERT: I don't think -- did they say they
 16 were not planning rebuttal?
 17 MR. STEWART: No, we did not.
 18 THE COURT: No.
 19 In fact, I thought there -- there might be.
 20 As I recall the Government reserved their expert
 21 appraiser, Mr. Matthews, for possible rebuttal. And I think
 22 that was the only witness that they noted for rebuttal --
 23 noticed for rebuttal.
 24 MR. WEIGERT: I think that's right.
 25 THE COURT: So, do you have any -- and then we can

975

1 get into whether or not this witness can be called as
 2 rebuttal witness by the Plaintiff when -- so, we'll just --
 3 do you have any redirect?
 4 MR. WEIGERT: Briefly, your Honor.
 5 REDIRECT-EXAMINATION
 6 BY MR. WEIGERT:
 7 **Q. Mr. LaKemper, I would like to show you a document it's**
 8 **Defense Exhibit 118.**
 9 MR. WEIGERT: And I'll represent for the record
 10 that it's a -- another email thread it spans from June 4,
 11 2018, to June 5, 2018, and it's got Bates numbers PNR-000015
 12 to 16.
 13 BY MR. WEIGERT:
 14 **Q. Do you see that Mr. LaKemper?**
 15 A. Yes.
 16 **Q. And I believe you are either the author or the**
 17 **recipient of every one of these emails; is that correct?**
 18 A. I believe that's correct, yes.
 19 **Q. I'd like to turn your attention to the very last email**
 20 **in that thread, which is the first in this document, it's**
 21 **June 5, 2018 at 12:51 p.m.**
 22 **Do you see that?**
 23 A. Yes.
 24 **Q. And you write there and I quote: Just as a heads up,**
 25 **it looks like the last train probably ran 9/2/11.**

976

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1 Do you see that?

2 A. Yes.

3 Q. And that was a representation you made to Ms.
4 McCulley, I believe. What did you mean by that statement?

5 A. I'm sorry, what did I mean by what?

6 Q. I'm just curious what you meant by that -- that
7 statement there in your email?

8 A. Well, there was a question about trains running on the
9 line after the last revenue train ran, which started a two-year
10 clock running. And it appeared that there may have been a
11 company train, if you will, that ran September of 2011.

12 Q. And when you say company train, what do you mean by
13 that?

14 A. A train of the company sent out there to probably
15 assist in the salvage of the rail.

16 Q. And what is the basis for your understanding that the
17 last company train probably ran on September 2, 2011 -- a very
18 specific date?

19 A. I would have gotten that from the operations center.

20 Q. The operations center of ISW?

21 A. Yes.

22 Q. And does this concern the 17.2 mile corridor we've
23 been discussing?

24 A. Yes.

25 Q. So, this was a train that ran on 17.2 mile corridor

going to do, I suppose, is trying to impeach their own
witness, Mr. Cullen, that said the last revenue train
traffic was in 2004 or they're trying to impeach their own
exemption procedure that the STB passed about recent train
traffic within two years, either way, it's totally
irrelevant.

MR. WEIGERT: Your Honor, it's not outside the
scope, because counsel lead Mr. LaKemper through an
extensive discussion of environment and historical report as
part of exemption notice. The line had been out of service
for over two years, that was in 2010 referring to going back
to 2008, at least. And so, this is relevant within --
within the scope in that respect, number one.

Let me finish my response, please.

MR. STEWART: I haven't said anything yet.

THE COURT: Neither did I.

MR. WEIGERT: Okay. Excuse me.

Number two, it doesn't just go to that point in
compliance or not with the STB procedures, it also goes to
the question of state law abandonment practical way
abandonment as an issue in this case counsel has put forward
many theories of abandonment and this is relevant to
rebutting that.

MR. STEWART: Your Honor, my definition -- he said
the witness testified that it was possibly used during the

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1 September 2, 2011; is that correct?

2 A. Yes.

MR. WEIGERT: I have no further questions.

MR. STEWART: I don't have any further questions.

MR. WEIGERT: I'm sorry, one other point it -- I'd
like to enter Defense Exhibit 118 into evidence, please.

MR. STEWART: Objection, your Honor.

THE COURT: And -- and can we -- the exhibit you
just gave me?

MR. WEIGERT: Correct.

THE COURT: And did it -- I apologize. I thought
you said 119. It's 118.

MR. WEIGERT: I meant to say 118.

THE COURT: Okay. I wasn't -- you may very well
have. I just -- no -- no, I just -- I'm sorry there's a
little bit of a reverberation up here. And so, I just want
to make sure that the record is accurate.

And I apologize if I'm muddying it in any way.

All right.

MR. STEWART: Your Honor, object, because number
one, it was not the subject of my cross and so it's outside
the line of redirect.

Number two, it is irrelevant as a matter of law,
because as he testified, it was a company train and not an
overhead train traffic and at minimum what they're really

removal of the rails and ties. And anything that happened
as part of the process after the state law abandonment.

I have no idea what he is talking about practical
abandonment either, never heard a legal term or factual
term, but the fact of the matter remains this remains
totally irrelevant.

THE COURT: I -- I -- I'm going to allow the
exhibit to be admitted, but it will go to weight. I mean,
it will -- I'll afford it the weight that's appropriate.

It does say in the email it looks like the last
train probably ran. So, it is nothing definite there. So,
it's -- it's admitted.

It is admitted, but again, I'll give it the
appropriate weight. There's nothing definitive about when
the last train actually ran or the nature of the train or
anything else, so...

(Defendant's Exhibit Number 118 was admitted
into evidence.)

MR. WEIGERT: Thank you, your Honor. Nothing else
for redirect, your Honor.

THE COURT: Very good.

I assume no re-cross.

MR. STEWART: No recross, your Honor, but I would
like to call Mr. LaKemper very briefly on rebuttal.

MR. PINKSTON: Your Honor, the United States rests

980

1 it case at this point.

2 THE COURT: I have a big favor to ask you well,
3 Mr. Pinkston if you wouldn't mind, you see the microphone.
4 I don't care, you may come to the podium or you may be
5 seated, I just need to hear you. You have somewhat of a
6 soft voice any way.

7 MR. PINKSTON: Yes, Your Honor, I have
8 discovered that throughout the trial.

9 THE COURT: I can hear you crystal clear right now.

10 MR. PINKSTON: Right.

11 The United States rests, your Honor.

12 THE COURT: Okay. And I believe we had a request
13 from the Plaintiff to call a witness on.

14 MR. STEWART: Rebuttal, your Honor, briefly. I'd
15 like to call lead Mr. LaKemper on the stand, very briefly.

16 MR. PINKSTON: Your Honor, I'd like to object
17 the use of this witness as rebuttal witness primarily -- who
18 is this witness rebutting?

19 MR. STEWART: Rebutting the entire argument advanced
20 by the Government or attempted to be advanced by the
21 Government that the ties had any value.

22 MR. PINKSTON: We maintain our objection.

23 THE COURT: Pardon me?

24 MR. PINKSTON: We maintain our objection, your
25 Honor.

981

1 THE COURT: Is -- is -- is there a requirement that
2 you note -- you notice to your rebuttals -- that your
3 rebuttal witnesses are in advance of trial?

4 MR. STEWART: Not that I'm aware of, your Honor.

5 THE COURT: Okay. I know there was -- there was
6 some that you said that you thought you would call that you
7 are not calling.

8 MR. STEWART: I was alerting the Court so witnesses
9 would not be excused at the time.

10 THE COURT: Okay. Okay. I'm going to allow it and
11 we'll try and keep very narrow questions.

12 MR. STEWART: I promise, your Honor, only four or
13 five.

14 THE COURT: Okay. Okay.

15 MR. PINKSTON: Thank you, Your Honor.

16 THE COURT; thank you.

17 DIRECT EXAMINATION

18 BY MR. STEWART:

19 **Q. Mr. LaKemper, the rails were salvaged as part of the**
20 **contract with A & K, because they had value, right?**

21 A. Correct.

22 **Q. All right.**

23 **And the crossties were left behind, because they had**
24 **no value, correct?**

25 MR. WEIGERT: Objection. Foundation.

982

1 THE COURT: That's a fair objection. If you want
2 to lay a foundation.

3 MR. STEWART: All right.

4 BY MR. STEWART:

5 **Q. Mr. LaKemper, if the crossties had had any value to**
6 **the railroad, would they have been salvage as part of the**
7 **contract as well?**

8 A. If they had had value to the contractor A & K or some
9 other contractor, we probably would have sold the ties as well.

10 **Q. And in fact, they were left behind, because they**
11 **specifically had no value in your opinion, right?**

12 MR. WEIGERT: Objection. Foundation.

13 THE COURT: Overruled.

14 THE WITNESS: There was nobody that wanted to bid
15 on the ties, other than as a deduction from the amounts
16 given for the metal.

17 BY MR. STEWART:

18 **Q. And they were in no shape to be utilized to run trains**
19 **after they had been removed from the rails, were they?**

20 MR. WEIGERT: Objection. Foundation. This witness
21 has no personal knowledge.

22 THE COURT: Sustained.

23 Let's see if the foundation can be laid.

24 BY MR. STEWART:

25 **Q. You've been working for the railroad since, I believe**

983

1 **you said, 1982 or 1986?**

2 A. 1986.

3 **Q. Do you have an understanding or knowledge that when**
4 **the rails are separated from the ties and left out on the**
5 **railroad right-of-way, whether or not they are functional for**
6 **continued train use or not?**

7 A. If they were have any class one tie there's a
8 possibility some of them could be.

9 **Q. And these particular --**

10 MR. WEIGERT: Objection. Counsel is not letting the
11 witness finish his response.

12 BY MR. STEWART:

13 **Q. I apologize. I thought you were finished. Go ahead.**

14 A. These were old branch line ties and it's -- it's
15 unlikely that after they've been removed from the rails there
16 wouldn't be much useable surface left.

17 **Q. Okay. Thank you. That's all I have, Mr. LaKemper.**

18 THE COURT: Actually I have a question: Did you
19 use the term a branch line tie?

20 THE WITNESS: Yes.

21 THE COURT: Is that -- what precisely is a branch
22 line tie? Is it not a typical tie? Is it -- is it some
23 sort of inferior tie or is it just where a tie goes on the
24 track? What does that mean?

25 THE WITNESS: Well, in -- in a typical low density

984

1 what we would call branch line operation, like ISW, the ties
 2 would be smaller, older, lower quality than you're running
 3 70-mile an hour unit trains on the class one mainline.
 4 Their ties are going to be bigger, heavier, better quality.
 5 THE COURT: Okay. So, if I'm on Amtrak going from
 6 Washington to New York I'm not going to find branch line
 7 ties along that track?
 8 THE WITNESS: I think all of those are concrete
 9 now, but --
 10 THE COURT: Okay. Fair enough.
 11 THE WITNESS: -- assuming there are some that are
 12 still wood, you would not find branch line ties on that
 13 line. That's correct.
 14 THE COURT: Thank you.
 15 MR. WEIGERT: No further questions, your Honor.
 16 THE COURT: Very good. Then the witness is
 17 excused. Thank you very much --
 18 THE WITNESS: Thank you.
 19 THE COURT: -- for coming.
 20 THE WITNESS: Okay.
 21 THE COURT: You can just leave them right there,
 22 sir. Thank you so much.
 23 Before I close the record, I just want to make sure
 24 we get the one housekeeping matter: Are Plaintiffs and the
 25 Government satisfied that they have properly moved all their

985

1 exhibits into evidence and as counsel have said, this is not
 2 a trick question. I just want to make sure as you know for
 3 both sides we've tried to -- if someone's counsel has used
 4 an exhibit we try to make sure that it's -- they're
 5 cognizance of the fact this he didn't move for it to go into
 6 the record. And so we just want to -- I just want to make
 7 sure that everybody has their exhibits properly admitted.
 8 So, if you have any questions now about whether or not
 9 you've moved for the admission of a document you want in
 10 evidence, speak now or forever hold your peace and I'll
 11 start with Plaintiffs and then we'll move to the Government.
 12 MR. STEWART: I have two potential housekeeping
 13 issues, your Honor the. First one was Exhibit 23, the
 14 compilation, Plaintiffs Exhibit 23, which was the
 15 compilation of damages for a finite period until
 16 November 18th or November 8, 2013. And the second was until
 17 May 23, 2019. And the third was permanent take. I believe
 18 the Court excluded that, but said it could be used as a
 19 demonstrative exhibit and attached as part of the record.
 20 And then I made a comment at the time about substituting a
 21 23 dot A for that to actually summarize the testimony for
 22 the temporary take period through October 1, 2018, which was
 23 in all of the reports. And we're prepared to do that, your
 24 Honor if the Court allows it, otherwise we'll just leave the
 25 record as it is.

986

1 THE COURT: What is the government's view?
 2 MR. PINKSTON: Well, your Honor, our view is
 3 that could be used in post-trial briefing.
 4 THE COURT: I think that's the best way to proceed.
 5 MR. STEWART: That's fine, your Honor.
 6 THE COURT: Thank you.
 7 MR. STEWART: And then the second one is I'm not
 8 even sure there was an exhibit, to make sure the record is
 9 clear, we would request that the Court take judicial notice
 10 of Indiana State Law Abandonment Statute, which is Section
 11 32-23-11-6. We should ask the court to take judicial notice
 12 of that statutes early on. It was used in my opening
 13 statements. It been referred to several times during the
 14 trial. We didn't formally ask the Court to take judicial
 15 notice of it.
 16 MR. WEIGERT: Your Honor, you should be aware that
 17 that is just a portion of the Indiana statute at issue. And
 18 we would ask that that entire portion of chapter of the
 19 statute be included, if anything. And post-trial briefing
 20 will bring this out. So, it's unnecessary. We specifically
 21 want Section 7 in there and there are some sections that may
 22 be relevant as well.
 23 THE COURT: I'm not trying give you a hard time,
 24 but it seems like you're trying to have it both ways, either
 25 take judicial -- I'll just take judicial notice of that --

987

1 the entire section. And in addition, you can refer to
 2 whatever part you believe is appropriate in post-trial
 3 briefing. So that's -- so that's fine.
 4 Now, move on. Is there any -- so that completes
 5 the --
 6 MR. STEWART: Nothing further from the Plaintiff,
 7 your Honor.
 8 THE COURT: Is there anything for the Government,
 9 any other exhibits that you think that you --
 10 MR. PINKSTON: Your Honor, I think all the
 11 exhibits we were concerned with have been admitted.
 12 THE COURT: Excellent. Okay. Very good.
 13 Well then, I'm now closing the record.
 14 Hearing adjourned at 2:43 p.m.
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988		990	
1	CERTIFICATE OF REPORTER	1	113 884 7/29/2011 email chain with attachments from
2		2	Jim Huenefeldt, Subject: ISW CONTRACT
3	I, Bobbi Hamlin, a Certified Shorthand Reporter (IL),	3	CORRECTED
4	and Registered Merit Reporter within and for the State of	4	114 885 8/9/2011 letter from Karla Anderson,
5	Illinois, do hereby certify the foregoing hearing was taken by	5	Reference: Payment for Evansville Project
6	me to the best of my ability and thereafter reduced to	6	and Insurance Certificates
7	typewriting under my direction; that I am neither counsel for,	7	117 951 4/9/2019 email chain from Dan LaKemper,
8	related to, nor employed by any of the parties to the action in	8	Subject: RE: Memmer/Butler - ISW line
9	which this deposition was taken, and further that I am not a	9	118 979 6/5/2018 email chain from Dan LaKemper,
10	relative or employee of any attorney or counsel employed by the	10	Subject: RE: Poseyville
11	parties thereto, nor financially or otherwise interested in the	11	
12	outcome of the action.	12	
13		13	
14		14	
15	s/Bobbi Hamlin	15	
16	Registered Merit Reporter	16	
17	Certified Shorthand Reporter	17	
18	IL CSR #084-002797	18	
19		19	
20		20	
21		21	
22		22	
23		23	
24		24	
25		25	
989			
1	ADMITTED EXHIBITS		
2			
3	DX PAGE DESCRIPTION		
4	108.0531 933 7/28/2010 email from Shane Cullen, Subject:		
5	RE: ISW Abandonment		
6	108.0558 933 7/17/2010 letter from Ken Upton, RE:		
7	Indiana Southwestern Railway Co. take-up.		
8	Cynthiana Branch, Tail track and Mainline		
9	from MP 228-240.2		
10	108.0607 886 Chart of values for ties and other materials		
11	108-0619 900 1/11/2011 email chain from Ken Upton,		
12	Subject: RE: Evansville, IN Track		
13	108-0620 900 1/11/2011 email chain from Ken Upton,		
14	Subject: RE: Evansville, IN Track		
15	108-0621 900 1/11/2011 email chain from Ken Upton,		
16	Subject: RE: Evansville, IN Track		
17	108.0623 933 5/13/2011 email from Shane Cullen		
18	108.0718 933 2/2/2012 email from Shane Cullen, Subject:		
19	RE: railroad		
20	108.0721 933 3/21/2012 email from Joe <joelupfer@sit-		
21	co.net>, Subject: Rail property		
22	108.0722 934 3/22/2012 email chain from Jim Huenefeldt,		
23	Subject: RE: Rail Property		
24	108.0723 934 3/22/2012 email chain from Jim Huenefeldt,		
25	Subject: RE: Rail Property		