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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
April 18, 2023
Part of
Public Record

THE STATE OF SOUTH DAKOTA ACTING BY
AND THROUGH ITS DEPARTMENT OF
TRANSPORTATION – PETITION FOR
DECLARATORY ORDER

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) Finance Docket No. 36697
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PETITION FOR DECLARATORY ORDER

By: Karla L. Engle
Special Assistant Attorney General
South Dakota Department of
Transportation
700 E. Broadway Ave.
Pierre, SD 57501-2586
(605) 773-3262

John H. LeSeur
Special Assistant Attorney General
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for the State of South Dakota
Acting by and Through Its Department
of Transportation

Dated: April 18, 2023

FEE RECEIVED
April 18, 2023
Surface
Transportation Board

FILED
April 18, 2023
Surface
Transportation Board

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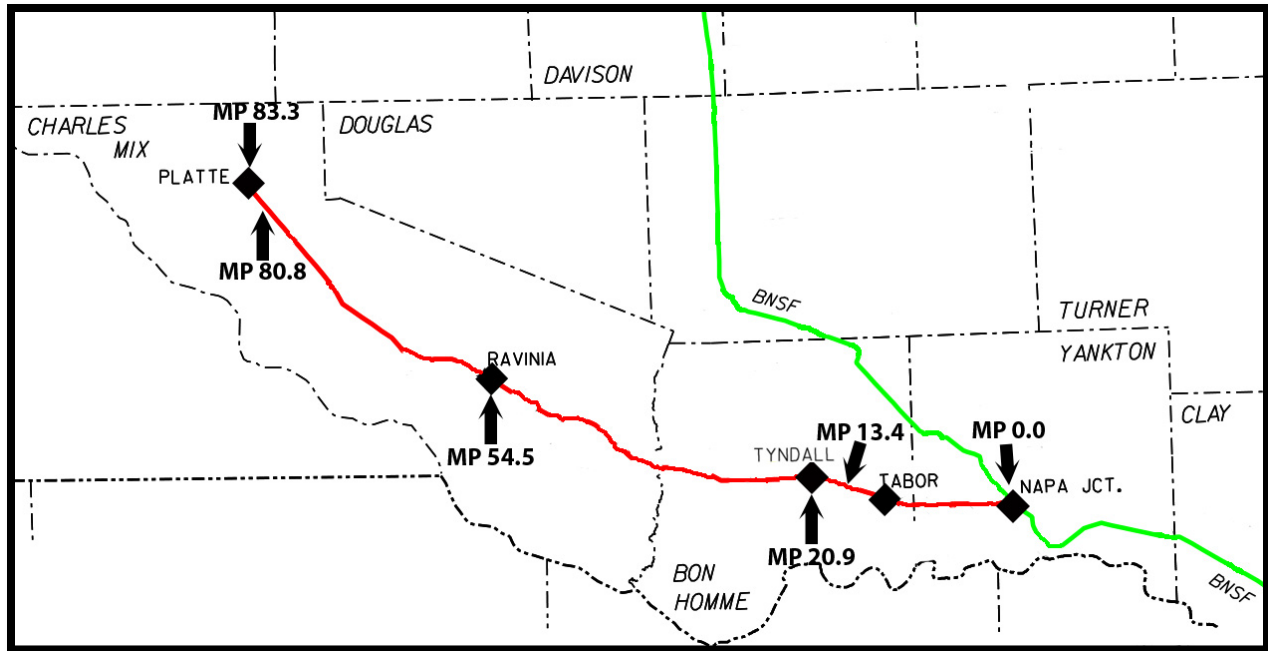
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PETITION FOR DECLARATORY ORDER

Pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the State of South Dakota acting by and through its Department of Transportation (“State”) requests that the Surface Transportation Board (“STB” or “Board”) issue a declaratory order terminating the modified certificate rights held by the Dakota Southern Railway Company (“DSRC”) over a State-owned rail line segment extending between Tyndall, SD at milepost (“MP”) 20.9, also known as Engineer’s Survey Station Number 1103+32, and Ravinia, SD at MP 54.5, also known as Engineer’s Survey Station 1707+17 (“Tyndall-Ravinia Segment”).

**I.
BACKGROUND**

1. The State owns the Tyndall-Ravinia Segment. It is a middle segment of a State-owned rail line right-of-way that was located between Napa Junction, SD (MP 0.00) and Platte, SD (MP 83.3) (“Napa-Platte Line” or “Line”):



2. The entire Napa-Platte Line was authorized for abandonment in 1980, but, prior to being abandoned, was acquired by the State.¹

3. In 2007, the State rail-banked the segment of the Line between Ravinia, SD (MP 54.5) and Platte SD (83.3)² and subsequently abandoned the Line right-of-way between MP 80.8 and 83.3.³ The Line segment between MP 54.5 and 80.8 remains rail-banked.⁴

¹ See *Napa-Platte Reg'l R.R. Auth. – Modified Rail Certificate*, FD 35026, slip op. at 1-2 (STB served June 14, 2007).

² See *S.D. Ry. – Notice of Interim Trail Use & Termination of Modified Rail Certificate*, FD 31874 (STB served July 17, 2007).

³ See *id.* (STB served March 4, 2022).

⁴ *Id.*

4. In 2016, the State entered into a Lease Agreement (“Agreement”) with DSRC. A copy of the Agreement (along with its Amendments) is appended in Attachment 1. The Agreement called for the State to lease to DSRC the portion of the Line between Napa Junction and Ravinia (“Napa-Ravinia Segment”). *See* Agreement at §§ 1-2. The Agreement went into effect on December 1, 2016 and has a ten-year term. *See id.* at §§ 3 & 22. The Agreement also called for DSRC to provide common carrier rail service over the Napa-Ravinia Segment on reasonable request and to obtain a modified certificate of public convenience and necessity from the Board authorizing its provision of this service. *See id.* at §§ 8 & 9.

5. On December 29, 2016, DSRC filed a notice with the Board for a modified certificate of public convenience and necessity to lease and operate the Napa-Ravinia Segment.⁵ The Board reviewed the notice, found that the Napa-Ravinia Segment “qualifies for a modified certificate,” and issued the requested certificate in 2017.⁶

6. In 2018, the parties executed Amendment No. 1 to the Agreement. That Amendment added a provision to § 21 addressing car storage. *See* Amendment 1 at § 1. The remaining terms of the Agreement remained in full force and effect. *See* Amendment 1, § 2.

⁵ *See Dakota S. Ry.—Modified Certificate of Pub. Convenience and Necessity – Yankton, Bon Homme, & Charles Mix Counties, S.D.*, FD 36086, slip op at 1 (STB served Jan. 25, 2017).

⁶ *Id.*, slip op. at 3.

7. In September 2020, the State and DSRC executed Amendment No. 2 to the Agreement (“Amendment 2”). Amendment 2 reduced the length of leased premises to the segment of the Line between Napa Junction (MP 0.0) and Tyndall (MP 20.9) (“Napa-Tyndall Segment”); called for DSRC to file a notice terminating its modified certificate for the portion of the Line that did not remain under lease (the Tyndall-Ravinia Segment); and stated that the amendment would become effective when DSRC’s modified certificate rights over the Tyndall-Ravinia Segment were terminated.

8. Amendment 2 states in pertinent part:

BACKGROUND

1. . . .
2. Having previously amended the AGREEMENT, the parties wish to further amend the AGREEMENT to account for a change in the length of the State-owned railroad facility that will be leased. The change will move the west termini from Ravinia, South Dakota, to Tyndall, South Dakota.
3. Dakota Southern intends to file a termination notice of its modified certificate for that portion of the State-owned railroad facility from Ravinia, South Dakota, to Tyndall, South Dakota. This filing will be made with the Surface Transportation Board, referred to in this Amendment as the “STB.” The parties intend that this Amendment take effect on the date the requested termination becomes effective.

THE STATE AND DAKOTA SOUTHERN
MUTUALLY AGREE AS FOLLOWS:

1. The effective date of this Amendment is the effective date of Dakota Southern's termination of its modified certificate for that portion of the State-owned rail facility from Ravinia, South Dakota, to Tyndall, South Dakota.
2. On the effective date of this Amendment [the Rail Facilities subject to the Agreement are those between Napa Junction and Tyndall].
3. Except as specifically modified in this Amendment, all terms and conditions of the AGREEMENT, together with Amendment Number 1 to the AGREEMENT, will remain in full force and effect.

Id.

9. Amendment No. 2 also referenced a resolution issued by the State Railroad Board on August 8, 2020 authorizing the State to execute Amendment No. 2 and to take action to rail-bank the Tyndall-Ravinia Segment. The resolution states in pertinent part:

[T]he South Dakota State Railroad Board, subject to the approval of the Governor, authorizes and directs the Secretary of the South Dakota Department of Transportation, or his designee, to execute all documents necessary to designate the segment of State-owned rail line stretching from Tyndall, South Dakota (Milepost 20.9) to Ravinia, South Dakota (Milepost 54.5) for interim trail use, including amending the lease of the line with Dakota Southern Railway Company and submitting the necessary documents to the Surface Transportation Board for such interim trail use.

Id. A copy of that resolution, which was approved on August 8, 2020, was attached as Exhibit A to Amendment 2.

10. The State agreed to enter into Amendment No. 2 because no shipper had made any request for common carrier service over the Napa-Ravinia Segment since 2007; the State believed that if any portion of the Line was going to be used in the near-term for freight service, it was likely to be on the Napa-Tyndall Segment; and the State planned to rail bank the Tyndall- Ravinia Segment, an action that would allow it to salvage and sell the track and related facilities on that Segment.

11. Following the parties' execution of Amendment 2, the State repeatedly requested DSRC to adhere to its contractual obligation to file a notice to terminate its modified certificate service rights over the Tyndall-Ravinia Segment. The Secretary's most recent request to DSRC was made in March 2023. However, DSRC has refused to do so.

ARGUMENT

The Board may issue a declaratory order to terminate a controversy or remove uncertainty. *See* 5 U.S.C. § 554(e) and 49 U.S.C. § 1321. DSRC's refusal to file a modified certificate termination notice has created a controversy which can, and should be, resolved by a Board order declaring that DSRC's modified certificate rights over the Tyndall-Ravinia Segment are terminated. Granting this declaratory relief is consistent with a fundamental purpose of the Board's modified certificate rules – to allow quick termination of modified certificates. Furthermore, such an order is consistent with Board precedent; will protect the State's right to control operations over a line that it owns; and will have no adverse effects on rail shippers.

A. The Board's Modified Certificate Rules

The Board's modified certificate rules are set forth at 49 C.F.R. Part 1150, Subpart C. Pursuant to these rules, if a state acquires a rail line that has been "approved for abandonment,"⁷ the state's acquisition of the line "is exempted from the Board's jurisdiction."⁸ Once a state acquires such a line, it can operate the line itself or it can elect to enter into a contract with an operator to provide service over the line.⁹ If this latter option is pursued, the state and the operator may decide that the service will be provided under a modified certificate.¹⁰ A modified certificate is a special form of service authorization that is exempted from the otherwise applicable public convenience and necessity standards governing the initiation of common carrier rail service.¹¹

A carrier seeking to provide or arrange service under a modified certificate does so by filing a notice at the Board containing information specified in the Board's rules.¹² Service can commence immediately after this notice is filed.¹³ The Board reviews the notice, and if it finds the notice complies with the Board's rules, it will issue a modified certificate notice.¹⁴ A carrier operating under a modified certificate is subject

⁷ 49 C.F.R. § 1150.22.

⁸ *Id.*

⁹ *Id.*

¹⁰ 49 C.F.R. § 1150.21.

¹¹ 49 C.F.R. § 1150.22.

¹² 49 C.F.R. §§ 1150.22, 1150.23

¹³ 49 C.F.R. § 1150.23(a).

¹⁴ *Id.*

to the common carrier obligation, but that obligation can be limited by preconditions agreed upon by the state and the operator, so long as the preconditions are included in the operator's modified certificate notice, and shippers on the line are notified of the preconditions.¹⁵

The Board's rules also exempt modified certificate operators from the statutory public convenience and necessity standards governing the termination of rail service.¹⁶ Under these rules, codified at 49 C.F.R. § 1150.24, a state can set the duration of the operator's service in its contract with the operator and the operator is required to provide 60 days' notice before it terminates service under its modified certificate:

§ 1150.24 Termination of service

The duration of the service [under a modified certificate] may be determined in the contract between the State and the operator. An operator may not terminate service over a line unless it first provides 60 days' notice of its intent to terminate the service. The notice of intent must be:

(a) Filed with the State and the Board, and

(b) Mailed to all persons that have used the line within the 6 months preceding the date of the notice.¹⁷

The Board's modified certificate rules were promulgated to incent states to purchase little-used rail lines by establishing fast-track, notice-based procedures for states to obtain and engage contractors of their choice to operate these lines:

¹⁵ 49 C.F.R. § 1150.22.

¹⁶ 49 C.F.R. § 1150.24.

¹⁷ 49 C.F.R. § 1150.24

A modified certificate is a type of license crafted by the Board's predecessor, the ICC, in a decision entitled Common Carrier Status of States, State Agencies, 363 I.C.C. 132 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). In that decision, the ICC used its exemption authority at 49 U.S.C. 10505 (now 49 U.S.C. 10502) to authorize states and state agencies to acquire, for the purpose of preserving the opportunity for rail service, rail lines that had been approved for abandonment or had been fully abandoned. *The ICC believed that states would be more likely to acquire such lines if the acquisition, and any future termination of service, could be accomplished without the need to comply with traditional regulatory requirements. As part of this process, the ICC established "modified certificates," under which operators over such state-owned lines could obtain and relinquish operating authority merely by providing notice to the agency pursuant to 49 CFR 1150.21-23.*

Black Hills Transp., Inc. d/b/a Deadwood, Black Hills & W. R.R. – Modified Rail Certificate, FD 34924, slip op. at 3 (STB served Jan. 27, 2010) (emphasis added).¹⁸

B. The State's Petition Should Be Granted

The State seeks declaratory order relief because DSRC has refused to voluntarily file a notice terminating its modified certificate rights over the Tyndall-

¹⁸ *Accord Beaufort R.R. – Modified Rail Certificate*, FD 34943, slip op. at 2 (STB served Mar. 19, 2008) (stating that the Board's modified certificate rules are intended "to encourage states to acquire" abandoned or authorized-to-be-abandoned rail lines, and, to achieve this objective, offer various regulatory incentives to states including establishing procedures "which [permit] operators over these state-owned lines [to] obtain and relinquish [modified certificate operating authority] merely by providing notice to the agency").

Ravinia Segment. The Board has granted similar requests in two recent cases – one of which involved the State – and should do the same here.¹⁹

On February 8, 2017, the State filed a declaratory order petition asking the Board to issue an order terminating the modified certificate rights held by a line operator, the Napa-Platte Regional Rail Authority (“NPRRA”), over the portion of the Napa-Platte Line between Tabor (MP 13.4) and Ravinia (MP 54.5). The State took this action after NPRRA refused to file its own termination notice.

The Board addressed the State’s petition in its decision served on June 14, 2017. The Board first held that it had jurisdiction to consider the State’s petition:

Here we have a common carrier rail line authorized for abandonment under 49 U.S.C. § 10903 and later acquired by the State and operated under a modified certificate of public convenience and necessity. Cessation of operations under a modified certificate does not require a Board license; rather, an operator may terminate its service with a 60-day notice to the State, the Board, and shippers. 49 C.F.R. § 1150.24. Because the modified certificate program is intended to offer a simple, streamlined approach for continuing operations on rail lines slated for abandonment, the Board believes that states should be allowed to seek the removal of an operator who declines to file the 60-day termination notice with the Board. The Board finds that a declaratory order proceeding is an appropriate mechanism for seeking to remove a modified certificate operator when that operator does not affirmatively consent.

South Dakota 2017, slip op. at 3. The Board proceeded to grant it:

Under the circumstances of this case, the Board will grant the State’s request for a declaratory order. NPRRA’s lease with

¹⁹ See *South Dakota – Pet. For Declaratory Order*, FD 36096 (STB served June 14, 2017) (“*South Dakota 2017*”); *Snohomish Cty., Wash. – Pet. For Declaratory Order*, FD 36295 (STB served Aug. 16, 2019) (“*Snohomish County*”).

the State has expired and, although the Board's regulations only provide a 60-day termination mechanism for the operator, they specifically state that the duration of service to be provided by the operator under a modified certificate "may be determined in the contract between the State and the operator." 49 C.F.R. § 1150.24. NPRRA has not filed any opposition to the State's request for a declaratory order to terminate its operating rights or otherwise attempted to explain why the expiration of the lease should not result in the termination of its operating rights. In addition, granting the proposed termination should not result in any adverse impact on shippers and the community, because a replacement carrier has already been granted the right to operate. NPRRA has not provided common carrier service over the Tabor-Ravinia Line since 2007, and DSRC has obtained a modified certificate of public convenience and necessity to provide common carrier service over the same line. (Pet. 3-4.) For these reasons, NPRRA's operating rights over the Tabor-Ravinia Line under the modified certificate are terminated.

Id.

On April 25, 2019, Snohomish County, Washington ("County") filed a declaratory order petition asking the Board to issue an order terminating the modified certificate rights held by a line operator, GNP Rly, Inc. ("GNP"), over a 0.2 mile County-owned line in Washington State. The County instituted this action after GNP refused to file voluntarily a termination notice.

The Board addressed the County's petition in its decision served on August 16, 2019. The Board first held that it had jurisdiction to consider the County's request, citing *South Dakota 2017*:

Operators under a modified certificate may terminate service after providing 60 days' notice to the state entity, the Board, and all persons that have used the line within the six months preceding the date of the notice. 49 C.F.R. § 1150.24. Additionally, the Board has held that a line owner may petition

the Board for a declaratory order to remove an operator that declines to file a 60-day termination notice. South Dakota—Pet. for Declaratory Order, FD 36096, slip op. at 3 (STB served June 14, 2017).

Snohomish County, slip op. at 3 (footnote omitted). The Board proceeded to grant the County's Petition, citing reasons similar to those set forth in *South Dakota 2017*:

Under the circumstances of this case, the Board will grant the County's request for a declaratory order terminating the modified certificate. Here, the County, as the owner of the Line, seeks the termination of GNP's operating rights under the modified certificate. The County asserts that it has terminated the Agreement between itself and GNP, and no one has disputed that assertion. Although the Board's regulations only provide the operator itself with a mechanism to terminate its operating rights (i.e., by filing a 60-day notice), the regulations specifically state that the duration of service to be provided by the operator under a modified certificate "may be determined in the contract between the State and the operator." 49 C.F.R. § 1150.24. No party, including GNP, has filed any opposition to the County's request for a declaratory order to terminate GNP's operating rights or otherwise attempted to explain why GNP's operating rights should not be terminated. In addition, granting the proposed termination would not result in any adverse impact on shippers or the community because there are no shippers on the Line and no rail traffic has moved on the Line since 1984. For these reasons, the modified certificate and the operating rights of GNP (and any successor in interest) over the Line are terminated.

Id., slip op. at 3-4 (footnote omitted). The Board should grant the State's Petition for the reasons set forth in *South Dakota 2017* and *Snohomish County*.

First, the Board clearly has jurisdiction to consider the State's Petition because the State owns the Tyndall-Ravinia Segment and DSRC has refused to file a modified certificate termination notice. *See Snohomish County*, slip op. at 3 ("[A] line

owner may petition the Board for a declaratory order to remove an operator that declines to file a 60-day termination notice.”); *South Dakota 2017*, slip op. at 3 (“[A] declaratory order proceeding is an appropriate mechanism for seeking to remove a modified certificate operator when that operator does not affirmatively consent.”).

Second, the event giving rise to the State’s request is the agreement between the State and DSRC, set forth in Amendment 2, to terminate DSRC’s lease of the Tyndall-Ravinia Segment. This termination is analogous to the lease terminations at issue in *South Dakota 2017* and *Snohomish County*. See *South Dakota 2017*, slip op. at 3 (“NPRRA’s lease with the State has expired”); *Snohomish County*, slip op. at 3 (“The County asserts that it has terminated the Agreement between itself and GNP”). Moreover, the State/DSRC Agreement, unlike the lease agreements at issue in *South Dakota 2017* and *Snohomish County*, expressly requires DSRC to file a notice terminating its modified certificate rights over the Tyndall-Ravinia Segment. See Amendment No. 2 (DSRC “intends to file a termination notice of its modified certificate [for the Tyndall-Ravinia Segment,]” a “filing [that] will be made with the Surface Transportation Board”).

Third, no shipper will be adversely impacted by terminating DSRC’s modified certificate over the Tyndall-Ravinia Segment because no shipper has used this Segment since 2007. See *Snohomish County*, slip op. at 4 (“[G]ranting the proposed termination would not result in any adverse impact on shippers or the community because there are no shippers on the [l]ine and no rail traffic has moved on the [l]ine since

1984.”). In addition, the State is not abandoning the Tyndall-Ravinia Segment, but instead has filed a request in this proceeding for Board authority to rail-bank this Segment. Rail-banking preserves the State’s ability to reactivate rail operations over the banked right-of-way in the future should there be a need to do so. *Cf. South Dakota 2017*, slip op. at 3 (“granting the proposed termination should not result in any adverse impact on shippers and the community, because a replacement carrier has already been granted the right to operate”).

Fourth, granting the State’s request advances the Board’s transportation policies. The Board’s modified certificate rules were created to incent states to purchase rail lines that otherwise would have been abandoned. *Id.* That objective is best advanced by allowing states to control the lines they purchase, including control in the form of obtaining orders from the Board terminating an operator’s modified certificate when the operator refuses to do so, which is the case here. *See id.* (“the Board believes that states should be allowed to seek removal of an operator who declines to file the 60-day termination notice with the Board”).

CONCLUSION

For the reasons set forth above, the State respectfully requests that the Board issue a declaratory order terminating DSRC's modified certificate operating rights over the Tyndall-Ravinia Segment.

Respectfully submitted,

By: Karla L. Engle
Special Assistant Attorney General
South Dakota Department of
Transportation
700 E. Broadway Ave.
Pierre, SD 57501-2586
(605) 773-3262

/s/ John H. LeSeur
John H. LeSeur
Special Attorney General
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: April 18, 2023

Attorneys for the State of South Dakota
Acting by and Through Its Department
of Transportation

VERIFICATION

STATE OF SOUTH DAKOTA)
)
COUNTY OF HUGHES)

I, Joel Jundt, Secretary, State of South Dakota Department of Transportation,
verify that I have read the foregoing Petition's Background Section, know the contents
thereof, and that the same are true as stated to the best of my knowledge, information and
belief.


Joel Jundt

Sworn to and subscribed
before me this 17th day
of April, 2023.

Witness my hand and official seal.



Notary Public in and for
the State of South Dakota



My commission expires 02/25/25

STATE OF SOUTH DAKOTA
DEPARTMENT OF TRANSPORTATION
LEASE AGREEMENT

911065

This Lease Agreement ("Agreement") is made and entered into by and between the South Dakota Department of Transportation, referred to in this Agreement as the "State," and Dakota Southern Railway Company, referred to in this Agreement as "Dakota Southern."

BACKGROUND:

- A. The State is owner of railroad property, including mainline tracks, sidings, and extra-width property and facilities commencing at the intersection of the North Sioux City to Mitchell line located in the West Half of the Southwest Quarter (W $\frac{1}{2}$ SW $\frac{1}{4}$) of Section Twenty-two (22), Township Ninety-four North (94N), Range Fifty-six West (56W) of the 5th P.M., also known as Milepost 0.0, and additionally known as Railroad Engineer's Survey Station Number 00+00, and extending in a westerly direction a distance of approximately 54.5 miles in and through the counties of Yankton, Bon Homme, and Charles Mix and terminating at the, westerly line of the Northwest Quarter of the Northeast Quarter (NW $\frac{1}{4}$ NE $\frac{1}{4}$) of Section Seventeen (17), Township Ninety-six North (96N), Range Sixty-four West (64W) of the 5th P.M., Charles Mix County, also known as Milepost 54.5, and additionally known as Railroad Engineer's Survey Station 1707+17, referred to in this Agreement as the "Rail Facilities."
- B. Dakota Southern wants to lease the Rail Facilities from the State.
- C. The parties now wish to enter into this Agreement for the lease of the Rail Facilities by Dakota Southern from the State on the terms and conditions as stated in this Agreement.
- D. The State has received the approval of the South Dakota State Railroad Board (the "Railroad Board") and the written consent of the Governor to enter into this Agreement for railroad purposes, as evidenced by the resolution attached to this Agreement as **Exhibit A**.

DAKOTA SOUTHERN AND THE STATE MUTUALLY AGREE AS FOLLOWS:

1. Purpose. The State leases the Rail Facilities to Dakota Southern, subject to the terms and conditions set forth in this Agreement. All property leased to third parties is identified in records on file at the South Dakota Department of Transportation, 700 East Broadway Avenue, Pierre, South Dakota 57501-2586. In addition, the State may exclude additional property at any time during the term of this Agreement with Dakota Southern's consent. The parties recognize and agree that this Agreement is for railroad purposes. Consequently, Dakota Southern will not unreasonable withhold its consent to exclude property not necessary for railroad purposes.
2. Facility Description. The State will permit Dakota Southern to use the Rail Facilities described in Background paragraph A above.
3. Effective Date. This Agreement is effective December 1, 2016. This Agreement supersedes Agreement Number 911022 that was executed by Dakota Southern on February 25, 2016, and by the State on March 24, 2016, and subsequently amended by the parties by an agreement executed by Dakota Southern on July 13, 2016, and by the State on July 15, 2016.
4. Condition of the Rail Facilities. Dakota Southern understands and agrees the Rail Facilities are leased in "AS IS" condition. The State will have no responsibility to make any improvement, modification, rehabilitation, maintenance, or other change to the Rail Facilities for the purpose of this Agreement.
5. Representations and Warranties. Dakota Southern accepts the Rail Facilities, "AS IS, WHERE IS" and "WITH ALL FAULTS." By signing this Agreement, Dakota Southern acknowledges that Dakota Southern has inspected the Rail Facilities, including all improvements and structures. Dakota Southern further acknowledges that no representations have been made by the State concerning the state or condition of the Rail Facilities or age of the improvements to the Rail Facilities.

6. Operating Rights. The State permits Dakota Southern to use any and all of the State's rights and licenses in and to the Rail Facilities to the extent necessary for the purpose of providing rail freight service and, if it can be accommodated without adversely affecting freight service, rail car storage. In the event individual or organizational motorcar clubs will be allowed to utilize the trackage under lease in this Agreement or sublease, as the case may be, then, and in that event, it will be the responsibility of the Dakota Southern to obtain a certificate of insurance showing the State of South Dakota, and Dakota Southern, as additional insureds, prior to any motorcar event; and, further, Dakota Southern will obtain from the individual recreational motorcar enthusiastic or organization, as the case may be, an indemnification agreement to be executed by the person or entity in charge of the motorcar event, indemnifying the State and Dakota Southern from any claim or liability arising out of the event, and will provide copies of said indemnification agreements to the State prior to any motorcar travel on the Rail Facilities. The rights granted Dakota Southern under this Agreement relate solely to the provision of rail service on the Rail Facilities. Dakota Southern will not use the Rail Facilities for any other purpose without the State's prior written authorization.
7. Administration of Rail Facilities. Notwithstanding any provision of this Agreement, the State will retain sole responsibility for the management of State-owned Rail Facilities and equipment not required for rail freight service. The State may grant leases, easements, licenses and all other similar property rights on the Rail Facilities for non-rail purposes, including but not limited to, placement on the Rail Facilities of utilities, fiber optic cables, pipeline, at-grade crossings and grade separations, and other non-rail related facilities and businesses, provided that such leases and easements, and licenses do not unreasonably interfere with Dakota Southern's rail operations. The State will be entitled to all revenues derived from such grants of property rights.
8. Government Approval. Upon execution of this Agreement, Dakota Southern will immediately prepare, file and obtain a modified certificate of public convenience and necessity from the Surface Transportation Board ("STB") to provide common carrier service on the Rail Facilities. The modified certificate will not contain any reservations on the provision of service. Dakota Southern will permit the State to review any proposed STB filings. Dakota Southern will be solely responsible for any costs incurred in obtaining the modified certificate.
9. Common Carrier Obligations. Dakota Southern will assume all common carrier obligations related to the operation of the Rail Facilities upon the effective date of this Agreement. No later than December 31, 2016, Dakota Southern will provide service to shippers requesting service on the Rail Facilities. Dakota Southern will, at Dakota Southern's sole expense, be responsible for making any repairs or improvements necessary to provide such service.
10. Liability. Dakota Southern will indemnify, hold harmless, and protect the State, its subdivisions and representatives, their officers, employees, successors, and assigns, from all suits, actions, or claims of any character brought because of any injuries or damage received or sustained by any person, persons, or property, including State-owned property, on account of any negligent act, omission, neglect or misconduct of Dakota Southern, its representatives, officers, employees, or agents.
11. Laws to be Observed. Dakota Southern will keep fully informed of all federal, state, and local laws, ordinances, regulations, injunctions, and all final orders and decrees of bodies of tribunals having any jurisdiction or authority, which in any way affect the performance of this Agreement, including without limitation any laws, rules, ordinances, regulations, orders, or decrees identified in this Agreement. Dakota Southern will at all times observe and comply with all such laws, rules, ordinances, regulations, and all final orders and decrees. Dakota Southern will protect, hold harmless, and indemnify the State and its representatives against any claim or liability arising from or based on the violation of any such law, rule, ordinance, regulation, injunction, or final order or decree.
12. Complaint Resolution Procedure. In the event the South Dakota State Railroad Board or South Dakota Department of Transportation, Office of Air, Rail, and Transit receives a written complaint regarding the conduct of operations on the facilities described in this Agreement, the South Dakota State Railroad Board (Board) may conduct a hearing to consider the allegations contained in the complaint. Reasonable prior notice of such hearing will be provided to all interested parties, including, but not limited to, the party filing the complaint, the program manager of the South Dakota Department of Transportation, Office of Air, Rail, and Transit, and Dakota Southern. Any hearing held pursuant to this provision will be informal in nature and not subject to the requirements of SDCL 1-26, and acts amendatory thereto. All interested parties will be allowed to present oral and written information to the Board. After considering all information presented, the Board

will issue a written decision, which will be binding on all parties to this Agreement as if incorporated as a provision herein. The decision of the Board will be final and no party will be entitled to any right of appeal from the Board's decision.

13. Insurance. Dakota Southern will maintain a Commercial General form of insurance covering liability in connection with any of its activities or operations on or near the Rail Facilities, including but not limited to Public Liability, Personal Injury, and Property Damage, Federal Employers' Liability Act Liability (or, if Workers' Compensation applies, Workers' Compensation coverage as required, or as optional, under applicable State law; which insurance must contain a specific waiver of the insurance company's subrogation rights against the State, Bill of Lading, and Foreign Rolling Stock Liability, and Contractual Liability, with such limits (consistent with the terms set forth below), deductibles and exclusions as the State may agree are satisfactory, provided however, that: (i) such limits will not be less than \$5 million per occurrence; and \$10 million in the aggregate; and (ii) policy terms will not exclude or limit coverage where activities or operations are on or near railroad tracks. The State will be named as an additional insured on such liability insurance policy. Any coverage afforded to the State as an additional insured, will apply as primary insurance of the State, and will not be deemed to be excess to any insurance issued in the name of the State. Such liability insurance must be purchased from an insurance company licensed to do business in South Dakota, and possessing a current Best's Insurance Guide Rating of A and Class X, or better.

Dakota Southern will furnish to the State, an Accord Certificate of Insurance satisfactory to the State, certifying the issuance to Dakota Southern of the policies of insurance providing the types of insurance and limits of liability prescribed above, and stating that the State, will be given not less than thirty (30) days' written notice by U.S. Certified mail (postage prepaid), prior to any material change, substitution or cancellation prior to normal expiration dates. Cancellation or expiration of any such insurance policies will not preclude the State from recovery there under for any liability arising under this Agreement.

Dakota Southern will provide the State with evidence of the liability insurance coverage required by this Agreement before Dakota Southern operates along the Rail Facilities and Dakota Southern will supply State with copies of its insurance policies and any amendments, as soon as they are available and with evidence of continued insurance coverage on January 1 of each year. Dakota Southern's failure to provide such evidence, within 7 days of any request therefore, will entitle the State, and to immediately terminate this Agreement without notice and without opportunity to cure such default. Dakota Southern acknowledges that the purchase of insurance as required by this Paragraph will not in any way limit Dakota Southern's liability to the State as set forth in this Agreement.

14. Personal Liability of Public Officials. In carrying out any of the provisions of this Agreement, or in exercising any power or authority granted to Dakota Southern by or within the scope of this Agreement, there will be no liability upon any member of the State, or its authorized representatives, either personally or as officials of the State, it being understood that in all such matters they act solely as agents and representatives of a political subdivision of the State of South Dakota.
15. Assignment. Dakota Southern will not assign its rights or delegate its duties under this Agreement or any part of this Agreement, without the State's prior written consent. An approved assignment, including assignments occurring by operator contracts, will not relieve Dakota Southern of Dakota Southern's primary responsibility to the State.
16. Amendment. No term or provision of this Agreement may be changed, waived, discharged, or terminated, except by an instrument in writing signed by the party against which the enforcement of the change, waiver, discharge or termination is sought; provided however, that when an emergency situation arises, changes in this contract may be made orally by authorized representatives of both parties by mutual agreement subject to immediate confirmation by written memorandum.
17. State Inspection. The State or its duly authorized representative, upon reasonable notice to Dakota Southern, reserves the right at all times to perform any and all necessary inspections over and across the Rail Facilities for the purpose of verifying compliance with the terms and conditions of this Agreement. Dakota Southern will promptly address any deficiencies identified by the State as a result of these inspections.
18. Responsibility for Rehabilitation. The State will have no obligation to rehabilitate the Rail Facilities.

19. Additions to Rail Facilities. As partial consideration for this Agreement, Dakota Southern will at a minimum make the following improvements to the Rail Facilities during each year of this Agreement:

- a. Installation of 3,000 crossties;
- b. Rehabilitation of three railroad crossings with heavy rail (115# or greater) and new ties; and
- c. Improvement of two miles of ditch drainage.

The State grants to Dakota Southern the right to make such further improvements and additions to the Rail Facilities as Dakota Southern may require to permit rail freight service. All improvements and additions to the Rail Facilities will be at Dakota Southern's sole expense, unless agreed to in writing by the State.

20. Maintenance. The State will have no obligation to perform any maintenance of the Rail Facilities. Dakota Southern will be responsible for the normal and regular work required to keep the Rail Facilities in an excepted track condition sufficient to provide service to shippers on the Rail Facilities. Such maintenance will include, but not be limited to, tie, rail, culvert and bridge repairs, tamping and lining, surfacing, tightening bolts, driving spikes, brush cutting and weed control, and other necessary repairs, and work. If the Rail Facilities are rehabilitated, then Dakota Southern will maintain the rail Facilities to their rehabilitated condition.
21. Rent Payments. As partial rent for the Rail Facilities, Dakota Southern will pay the State fifty percent (50%) of any fees billed for car storage originating or terminating at any point along the Rail Facilities (excluding switching fees). Dakota Southern will establish storage fees according to market conditions to ensure the rates are reasonable. The State's share of car storage fees will be calculated as of November 30 of each year and Dakota Southern will remit payment to the State by May 1 of the following year. Dakota Southern will not be required to remit any portion of the switching fees charged or collected for the Rail Facilities.

As additional rent for the use of the Rail Facilities, Dakota Southern will make an annual payment to the State equal to one and one-half percent (1.5%) of the gross revenues for any rail freight originating, terminating, or carried along any point on the Rail Facilities. Gross revenues will be calculated as of November 30 of each year and Dakota Southern will remit payment to the State by May 1 of the following year.

22. Term. This Agreement will continue in full force and effect for a period of ten (10) years from and after the effective date of this Agreement, unless terminated earlier pursuant to the terms of this Agreement. Upon termination of this Agreement, the Rail Facilities will be returned to the State in the same general condition, less normal wear and tear that cannot be obviated by routine maintenance, as existed on the effective date of this Agreement, except that all improvements and additions to the Rail Facilities will become the sole property of the State.
23. Termination by the State For Fault. If Dakota Southern fails to perform its obligations under this Agreement, and continues in such default for a period of sixty (60) days after written notice of such default from the State, then State may terminate this Agreement. Default includes, but is not limited to, nonpayment of rent, lapse of insurance, inadequate maintenance or repair of the Rail Facilities, and failure to provide safe and efficient common carrier rail service. Fraud, theft of State property, or any other criminal act, other than Class 2 Misdemeanors, would be a material breach of the Agreement, and is grounds for immediate termination of the Agreement by State. No advanced notice is required and there is no opportunity to cure the breach.
24. Termination of Modified Certificate. Upon termination or expiration of this Agreement, Dakota Southern agrees to promptly terminate its modified certificate before the STB and relinquish any other rights it may have to provide common carrier service over the Rail Facilities, subject to the requirements set out in 49 CFR 1150.24. If Dakota Southern fails to promptly terminate these rights, then the State is authorized and empowered to submit the requisite filings to the STB and take all other necessary steps to terminate any rights Dakota Southern may have to provide common carrier service over the Rail Facilities. Dakota Southern will reimburse the State for all expenses incurred to effectuate the termination of these rights.

25. Audit. Dakota Southern will keep detailed records, accounts, invoices, and supporting documentation pertaining to all costs paid for under this Agreement. Upon reasonable notice, Dakota Southern will allow the State, through any authorized representative, to examine and copy all records, accounts, invoices, and supporting documents.
26. The terms of this Agreement alone will control the relationship between the State and Dakota Southern.
27. Notice. Except as expressly provided otherwise, all notices or other communications hereunder will be in writing and will be deemed duly given, if delivered in person or by certified or registered mail, return receipt requested, first class postage prepaid, to the person specified herein as entitled to receive such notice, or to their duly authorized representative unless notice of a change of address is given pursuant to the terms of this provision.

For the State:
Program Manager
Office of Air, Rail, and Transit
SD Department of Transportation
700 Broadway Avenue East
Pierre, SD 57501-2586

For Dakota Southern:
President
Dakota Southern Railway Company
10100 N. Ambassador Drive, Suite 105
Kansas City, Missouri 64153

28. Severability. In the event any section, paragraph, sentence, clause or phrase contained herein will be determined, declared, or adjudged invalid, illegal, unconstitutional, or otherwise unenforceable, such determination, declaration, or adjudication will in no manner affect the other sections, paragraphs, sentences, clauses, or phrases of this Agreement, which will remain in full force and effect as if the section, paragraph, sentence, clause, or phrase declared, determined or adjudged, invalid, illegal, unconstitutional, or otherwise unenforceable was not originally a part thereof.
29. Entire Agreement. This Agreement and the Appendix attached hereto represent the entire agreement between the parties, and all previous communications, understandings, or agreement between the parties are hereby abrogated and withdrawn except as provided herein.
30. Force Majeure. This Agreement and any sublease is subject to force majeure, and is contingent on acts of God, weather conditions, tortious acts of third parties, restrictions imposed by any government or governmental agency, and other events beyond the control of parties. If performance under this Agreement or operability of the Rail Facilities is prevented by any of these causes, neither Dakota Southern nor the State is under any obligation to restore the operability of the Rail Facilities to enable resumption of performance under this Agreement. If restoration is not made, then this Agreement will be void without penalty to either party.

SIGNATURE PAGE FOLLOWS

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed and attested to by their duly authorized officers on the date and year first above written.

Dakota Southern Railway Company

By: [Signature]

Its: President

Date: Nov 30, 2016

(Corporate Seal)

State of South Dakota
Department of Transportation

By: [Signature]

Its: Secretary

Date: 11/30/16

Approved as to Form:

[Signature]
Special Assistant Attorney General

ACKNOWLEDGMENTS FOLLOW

CORPORATE ACKNOWLEDGMENT

STATE OF SOUTH DAKOTA)
): SS
COUNTY OF Hughes)

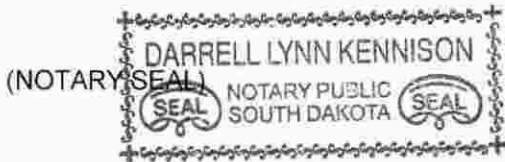
On this the 30th day of November, 2016, before me, Darrell Lynn Kennison, a Notary Public within and for said County and State, personally appeared Mike Williams, who acknowledged himself/herself to be the President, of Dakota Southern Railway Company, a corporation, and that he/she as such officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself/herself as such officer.

In witness whereof I hereunto set my hand and official seal.

Darrell Lynn Kennison

NOTARY PUBLIC

My Commission Expires: 01/24/2020



STATE ACKNOWLEDGMENT

STATE OF SOUTH DAKOTA)
): SS
COUNTY OF HUGHES)

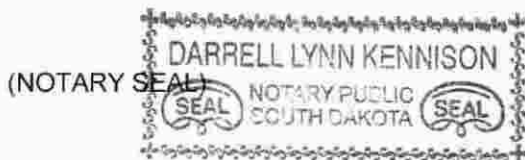
On this the 30th day of November, 2016, before me, Darrell Lynn Kennison, a Notary Public within and for said County and State, personally appeared Darin P. Bergquist, Secretary, South Dakota Department of Transportation, known to me or satisfactorily proven to be the person described in the foregoing instrument, and acknowledged that he executed the same in the capacity therein stated and for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.

Darrell Lynn Kennison

NOTARY PUBLIC

My Commission Expires: 01/24/2020



AMENDMENT NUMBER 1 TO AGREEMENT NUMBER 911065

BACKGROUND:

1. On December 1, 2016, the South Dakota Department of Transportation, referred to in this Amendment as the "State," and Dakota Southern Railway Company, referred to in this Amendment as "Dakota Southern," entered into a lease agreement, which agreement, referred to in this Amendment as the "AGREEMENT," was signed by a representative to each party and assigned Agreement Number 911065 by the State.
2. The parties wish to amend the AGREEMENT.

THE STATE AND DAKOTA SOUTHERN MUTUALLY AGREE AS FOLLOWS:

1. The following paragraph is inserted at the end of Section 21 of the AGREEMENT:

The parties acknowledge and agree that Dakota Southern entered into an agreement with a rail customer to provide car storage on the Rail Facilities and to collect repayment of accounts receivable. The period covered by the customer agreement was from 10/1/2015 to 9/30/2020. The parties further acknowledge and agree that revenue received by Dakota Southern for car storage under that customer agreement shall be \$2.75 per car per day for purposes of calculating rent owed to the State.

2. Except as modified by this Amendment, all other terms and conditions of the AGREEMENT will remain in full force and effect.
3. The South Dakota State Railroad Board (the "Board"), with the consent of the Governor, has authorized the Secretary of the Department of Transportation to execute this Amendment on behalf of the State. A copy of the fully executed resolution of the Board is attached to this Amendment as **Exhibit A**.

The parties have caused this Amendment to be executed and attested to by their duly authorized officers on the date and year first above written.

Dakota Southern Railway Company

By: [Signature]

Its: [Signature]

Date: 2/6/2018

(Corporate Seal)

State of South Dakota
Department of Transportation

By: [Signature]

Its: Secretary

Date: 4/9/18

Approved as to Form:

[Signature]
Special Assistant Attorney General

ACKNOWLEDGMENTS FOLLOW

CORPORATE ACKNOWLEDGMENT

STATE OF ~~SOUTH DAKOTA~~ ^{MISSOURI})
) : SS
COUNTY OF Platte)

On this the 6th day of February, 2018, before me, Erica L. Carper, a Notary Public within and for said County and State, personally appeared Mike Williams, who acknowledged himself/herself to be the President, of Dakota Southern Railway Company, a corporation, and that he/she as such officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself/herself as such officer.

In witness whereof I hereunto set my hand and official seal.



(NOTARY SEAL)

Erica L. Carper

NOTARY PUBLIC

My Commission Expires: March 08, 2020

STATE ACKNOWLEDGMENT

STATE OF SOUTH DAKOTA)
) : SS
COUNTY OF HUGHES)

On this the 9th day of February, 2018, before me, Bonnie R. Olson, a Notary Public within and for said County and State, personally appeared Darin P. Bergquist, Secretary, South Dakota Department of Transportation, known to me or satisfactorily proven to be the person described in the foregoing instrument, and acknowledged that he executed the same in the capacity therein stated and for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.

Bonnie R. Olson

NOTARY PUBLIC

My Commission Expires: June 18, 2021

(NOTARY SEAL)

AMENDMENT NUMBER 2
AGREEMENT NUMBER 911065
LEASE AGREEMENT BETWEEN STATE OF SOUTH DAKOTA
DEPARTMENT OF TRANSPORTATION AND
DAKOTA SOUTHERN RAILWAY COMPANY

BACKGROUND:

1. Effective December 1, 2016, the South Dakota Department of Transportation, referred to in the Amendment as the "State," and Dakota Southern Railway Company, referred to in this Amendment as "Dakota Southern," entered into a lease agreement, which agreement is referred to in this Amendment as the "AGREEMENT," and was signed by a representative to each party and assigned agreement number 911065 by the State.
2. Having previously amended the AGREEMENT, the parties wish to further amend the AGREEMENT to account for a change in the length of the State-owned railroad facility that will be leased. The change will move the west termini from Ravinia, South Dakota, to Tyndall, South Dakota.
3. Dakota Southern intends to file a termination notice of its modified certificate for that portion of the State-owned railroad facility from Ravinia, South Dakota, to Tyndall, South Dakota. This filing will be made with the Surface Transportation Board, referred to in this Amendment as the "STB." The parties intend that this Amendment take effect on the date the requested termination becomes effective.

THE STATE AND DAKOTA SOUTHERN MUTUALLY AGREE AS FOLLOWS:

1. The effective date of this Amendment is the effective date of Dakota Southern's termination of its modified certificate for that portion of the State-owned railroad facility from Ravinia, South Dakota, to Tyndall, South Dakota.
2. On the effective date of this Amendment, Background Paragraph A. of the AGREEMENT is amended to read as follows:
 - A. The State is the owner of railroad property, including mainline tracks, sidings, and extra-width property and facilities commencing at the intersection of the North Sioux City to Mitchell line located in the West Half of the Southwest Quarter (W1/2 SW1/4) of Section Twenty-two (22), Township Ninety-four North (94N), Range Fifty-six West (56W) of the 5th P.M., in Yankton County, South Dakota, also known as Milepost 0.0, and additionally known as Railroad Engineer's Survey Station Number 00+00, and extending in a westerly direction a distance of approximately 20.9 miles in and through the counties of Yankton and Bon Homme and terminating at a point approximately Thirty-three feet (33') east of the centerline of Four Hundred-Seventeenth (417th) Avenue where it crosses the centerline of said railroad, located approximately Four Hundred Ten (410) feet south of the Northwest (NW) corner of Section Five (5) and 33 feet east of the west section line of Section 5 all in Township Ninety-four North (94N), Range Fifty-nine West (59W) of the Fifth Principal Meridian (5th P.M.) in Bon Homme County, South Dakota, also known as Milepost 20.90 and additionally known as Railroad Engineers Survey Station Number 1103+32 near Tyndall, referred to in this Agreement as the "Rail Facilities."
3. Except as specifically modified by this Amendment, all terms and conditions of the AGREEMENT, together with Amendment Number 1 to the AGREEMENT, will remain in full force and effect.
4. The South Dakota State Railroad Board (the "Board"), with the consent of the Governor, has authorized the Secretary of the Department of Transportation to execute this Amendment on behalf of the State. A copy of the fully executed resolution of the Board is attached to this Amendment as **Exhibit A**.

This Amendment is binding upon the signatories not as individuals, but solely in their capacities as officials of their respective organizations and acknowledges proper action of State and Dakota Southern to enter into the same.

Dakota Southern Railway Company

By: [Signature]

Its: President

Date: Sept 16, 2020

(Corporate Seal)

State of South Dakota
Department of Transportation

By: [Signature]

Its: Secretary

Date: 9/17/20

Approved as to Form:
[Signature]
Special Assistant Attorney General

ACKNOWLEDGMENTS FOLLOW

CORPORATE ACKNOWLEDGMENT

STATE OF Missouri)
COUNTY OF Platte) : SS

On this the 16th day of September, 2020, before me, ERICA L CARPER, a Notary Public within and for said County and State, personally appeared Mike Williams, who acknowledged himself/herself to be the President, of Dakota Southern Railway Company, a corporation, and that he/she as such officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself/herself as such officer.

In witness whereof I hereunto set my hand and official seal.



(NOTARY SEAL)

Erica L Carper

NOTARY PUBLIC

My Commission Expires: March 8, 2024

STATE ACKNOWLEDGMENT

STATE OF SOUTH DAKOTA)
COUNTY OF HUGHES) : SS

On this the 17th day of September, 2020, before me, Kari Kroll, a Notary Public within and for said County and State, personally appeared Darin P. Bergquist, Secretary, South Dakota Department of Transportation, known to me or satisfactorily proven to be the person described in the foregoing instrument, and acknowledged that he executed the same in the capacity therein stated and for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.

(NOTARY SEAL)



Kari Kroll

NOTARY PUBLIC

My Commission Expires: 02/25/25

RESOLUTION NO. 2020-B10BE IT RESOLVED BY THE
SOUTH DAKOTA STATE RAILROAD BOARD

Whereas, SDCL 1-44-20 states: "The Department of Transportation, with the approval of the South Dakota State Railroad Board and the written consent of the Governor, may enter into agreements, contracts, leases (as lessor or lessee), or other arrangements with any corporation, partnership, individual, agency, or authority, on such terms and conditions as the department shall determine, including providing for the acquisition, operation, maintenance, and improvement of public rail lines, and the acquisition and disposition of any and all rights-of-way, land, facilities, fixtures and appurtenant structures, services and equipment, determined by the department to be necessary or appropriate []";

Whereas, SDCL 1-44-27 states: "The Department of Transportation shall obtain the approval of the Railroad Board in matters of operation, management, finance, marketing, and development of rail service over all properties and facilities acquired, leased, or controlled by the state []";

Whereas, in 2006, the Board and the Governor approved to railbank from Ravinia, South Dakota (Milepost 54.5) to Platte, South Dakota (Milepost 81.0) on the State-owned Napa-Platte rail line. The railbank ensures that the rail line remains intact for possible future rail service and other compatible purposes;

Whereas, the Department of Transportation (the "Department") requests to railbank an additional portion of the State-owned Napa-Platte rail line between Tyndall, South Dakota (Milepost 20.9) and Ravinia, South Dakota (Milepost 54.5);

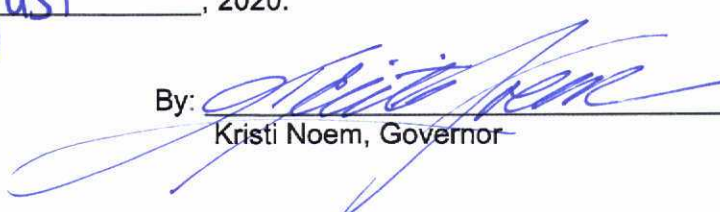
Whereas, the Department requests to proceed with filing of railbank status for the portion of the rail line from Tyndall, South Dakota (Milepost 20.9) to Ravinia, South Dakota (Milepost 54.5)

Now, Therefore, the South Dakota State Railroad Board, subject to the approval of the Governor, authorizes and directs the Secretary of the South Dakota Department of Transportation, or his designee, to execute all documents necessary to designate the segment of State-owned rail line stretching from Tyndall, South Dakota (Milepost 20.9) to Ravinia, South Dakota (Milepost 54.5) for interim trail use, including amending the lease of the line with Dakota Southern Railway Company and submitting the necessary documents to the Surface Transportation Board for such interim trail use.

SOUTH DAKOTA STATE RAILROAD BOARD

By: 

Jerry Cope, Chair

Approved this 8th day of August, 2020.By: 

Kristi Noem, Governor

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April 2023, I served a copy of the foregoing Petition by postage prepaid, first-class US mail on:

Mr. Michael Williams
President
Dakota Southern Railway Company
10100 N. Ambassador Drive, Suite 105
Kansas City, Missouri 64153

/s/ John H. LeSeur

John H. LeSeur