

March 21, 2025

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VIA E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

ENTERED
Office of Proceedings
March 21, 2025
Part of
Public Record

Re: *The Burlington Northern and Santa Fe Railway Company—Abandonment Exemption—
in King County, WA*, STB Docket No. AB-6 (Sub-No. 380X)

Dear Ms. Brown:

I have attached for e-filing the Reply of King County, Washington to Petition to Reopen
and to Petitions for Declaratory Order in the above-referenced proceeding.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Charles A. Spitulnik

Attachment

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. AB-6 (Sub-No. 380X)

**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
—ABANDONMENT EXEMPTION—
IN KING COUNTY, WA**

**REPLY OF KING COUNTY, WASHINGTON TO
PETITION TO REOPEN AND TO PETITIONS FOR DECLARATORY ORDER**

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Dated: March 21, 2025

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. AB-6 (Sub-No. 380X)

**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
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IN KING COUNTY, WA**

**REPLY OF KING COUNTY, WASHINGTON TO
PETITION TO REOPEN AND TO PETITIONS FOR DECLARATORY ORDER**

King County, Washington (the “County”) hereby replies to (1) a Petition filed in this docket by Waverly Hills Club (“Waverly”) to Reopen NITU Decision Or, In the Alternative, Petition for Declaratory Orders (“Waverly Petition”) on January 28, 2025, and (2) a Petition filed by Raymond and Lael Spencer (the “Spencers”) in this docket for Declaratory Orders (“Spencers Petition”) on January 30, 2025. Waverly’s request that the Board should reopen and amend the Notice of Interim Trail Use (“NITU”) previously granted in these proceedings fails to satisfy the Board’s well-established standard justifying reopening proceedings to amend NITUs. Waverly and the Spencers (collectively, “Petitioners”) other requests for relief require the Board to opine on questions of state law that are more appropriately considered in—and in fact already are subject to—court proceedings. Finally, to the extent Petitioners request a declaratory ruling on the preemptive effect of the Board’s jurisdiction, the Board’s past precedent already provides clear guidance on the issues raised, making explication here unnecessary. Accordingly, the County requests that the Board deny the Petitions.

BACKGROUND

To avoid repetition, the County relies on and incorporates by reference the facts presented in its Motion to Stay filed in these proceedings on March 3, 2025. The County will instead highlight the following points:

These proceedings concern a 12.45-mile segment of railbanked right-of-way (the “Line”) located between Redmond and Issaquah that is owned by the County and falls within its jurisdiction. In 1998, BNSF (as abandoning railroad) and the County (as trail sponsor) agreed to railbank the Line pursuant to the Trails Act, and the Board issued a NITU authorizing trail use. *The Burlington Northern and Santa Fe Railway Co.—Abandonment Exemption—In King County, WA, AB-6 (Sub-No. 380X) et al.* (STB served May 13, 1998) (“NITU Decision”). A trail use agreement was reached and, as a result, the Line remains preserved as part of the interstate rail network and is available for reactivation of rail service at a future time. The County serves as the trail sponsor for the Line, and has constructed a trail on the Line, known as the East Lake Sammamish Trail.

Petitioners each own property adjacent to different segments of the Line. Waverly Pet. at 2; Spencers Pet. at 1. Petitioners each admit to separately encroaching on the Line. Waverly Pet. at 4, 42; Spencers Pet. at 3, 14. The Waverly Petition requested that the Board alternatively: (1) reopen the NITU Decision and “remove 21,688 square feet being used by the Club from the railroad right of way”; (2) declare that the County’s easement is held “in abeyance” so that the County cannot “preclude the Club’s use of the right of way or charge rent”; or (3) declare that the “Club’s use and minor improvements—grass, gravel parking, and security fence—are noninterfering as to potential future railroad and as to trail use.” Waverly Pet. at 43-44. The Spencers Petition seeks “a declaration that the County’s banked railroad easement is held in

abeyance or inactive, precluding it from asserting present rights to exercise a railroad easement and a declaration that the Spencers' described activities and improvements in the right of way do not interfere with trail use or potential future railroad use." *See* Spencers Pet. at 19.

On February 10, 2025, the County requested an extension of time to reply to the Petitions to March 21, 2025, which the Board granted on February 14, 2025.

Shortly after filing the Petitions, Waverly and the Spencers each initiated actions in federal court against the County, asserting largely the same claims and arguments that each asserted in these proceedings before the Board. *See* Motion of King County, Washington to Hold Proceedings in Abeyance, AB-6 (Sub-No. 380X) (Filed Mar. 3, 2025), at 3-4, Ex. 1, Ex. 2. Both cases are being heard by the same federal district court judge. *Id.* At 4, Ex. 5. On March 3, 2025, the County filed a motion requesting that the Board hold these proceedings in abeyance pending the outcome of this litigation ("Motion for Abeyance"). Neither Waverly nor the Spencers have filed in opposition to this request. As of filing of this Reply, the Board has not acted on the County's Motion for Abeyance. Accordingly, the County is hereby filing this Reply.¹

ARGUMENT

I. The Board should deny Waverly's request to reopen the proceedings and partially revoke the NITU because it has not demonstrated material error, new evidence, or substantially changed circumstances warranting revocation.

The Board should deny Waverly's request to reopen the proceedings and partially revoke the NITU because it has not demonstrated material error, new evidence, or substantially changed circumstances warranting revocation. "A petition to reopen must state in detail the respects in

¹ In filing this Reply the County is not rescinding its Motion for Abeyance. The County filed its Motion for Abeyance in an effort to reduce the administrative burden on the Board, given the considerable overlap between the Petitions and the court proceedings. *See* Motion for Abeyance at 1. However, because the Motion for Abeyance has not yet been granted and the County must reply to the legal arguments presented in the Petitions, the County believes that it is now appropriate to ask the Board to deny the Petitions.

which the proceeding involves material error, new evidence, or substantially changed circumstances. . . .” 49 C.F.R. § 1115.4. The alleged grounds must be sufficient to convince the Board that its prior decision in the case would be materially affected in order for reopening to be granted. *See Montezuma Grain v. STB*, 339 F.3d 535, 541-42 (7th Cir. 2003); *Canadian Nat’l Ry.—Control—EJ&E W. Co.*, FD 35087 (Sub- No. 8), slip op. at 4 (STB served Dec. 21, 2018). This standard is not met here.

Contrary to Waverly’s claims, there is no new evidence or substantially changed circumstances.² The facts in Waverly’s Petition reflect the opposite—that nothing has changed since railbanking was granted that could justify reopening these proceedings. First, Waverly asserts that a 2016 federal court decision, affirmed by the Ninth Circuit in 2018, which held that the County has exclusive control over the *entire* width of another segment of the Line, constitutes new evidence or changed circumstances. Waverly Pet. At 26. *See Hornish v. King County*, 182 F.Supp.3d 1124, 1130 (W.D. Wash., 2016) (“*Hornish I*”) *aff’d* 899 F.3d 680 (9th Cir. 2018) (“*Hornish II*”). Waverly misleadingly suggests that the facts of the case, which involved a 100-foot wide right-of-way, indicate that for the segment at issue here, the County does not need the entire width of the Line, which is 200 feet wide. Waverly Pet. At 22, 27-28. This is a distortion of the County’s position and of the decision in *Hornish I*, which determined that the County “is entitled to the exclusive use and possession of the area on, above, and below the surface of the Corridor for railroad purposes and incidental uses permitted by Washington law, including use as a recreational trail.” *Id.* at 1130. The holding that the County was entitled to exclusive use of the *entire* right-of-way in *Hornish I* applies here too, thereby defeating Waverly’s assertion that the

² Waverly states that it does not rely upon material error. Waverly Pet. at 26.

NITU should be revoked. *Hornish I* plainly does not constitute new evidence or changed circumstances.

The other grounds for new evidence or materially changed circumstances that Waverly provides merely reflect the status quo for this and many other railbanked lines and do not justify reopening. Waverly argues that the Line is somehow unique because it was granted under the 1875 Act, Waverly Pet. at 27, but this is hardly unique, let alone “new evidence” or changed circumstances. This fact was known or should have been known at the time of railbanking, and would have had no effect on the approval of interim trail use at that time, nor at any subsequent time.

Waverly tersely argues that “[n]o railroad company has sought to reactive that line in 27 years since the NITU was issued.” Waverly Pet. at 26, 28. While the intent of the Trails Act is to protect the possibility of reactivation, neither the Trails Act nor the Board’s authorizing statute, nor its implementing regulations, require reactivation of a railbanked rail line within a certain amount of time. *See* 16 U.S.C. § 1247(d); 49 U.S.C. §§ 10101 et seq.; 49 C.F.R. § 1152.29. Waverly cites to no precedent in support of its assertion that the passage of time is in any way relevant. If Waverly were correct, many older railbanked corridors would likewise have expired by now, but this is clearly not the case.

Waverly also briefly argues, again with no citation to precedent, that construction of a paved trail now means that the Line’s width may be narrowed, Waverly Pet. at 26, 28-29, but the Board has never made such a determination. Waverly cites to *Union Pacific R.R. Co.—Abandonment—Between Echo and Park City and Between Keetley Junction and Phoston, In Summit and Wasatch Counties, UT*, AB-33 (Sub-No. 55), slip op. at 1, 2006 STB LEXIS 65 at *1 to support its assertion that “[t]he mere fact that a portion of right of way is not needed” for a trail

is sufficient to remove it from the Board's jurisdiction. Waverly Pet. at 26, 29. But in that case, unlike this one, the trail sponsor itself requested amendment of the NITU and the railroad did not object to the request. *See Union Pacific*, AB-33 (Sub-No. 55), slip op. at 1, 2006 STB LEXIS 65 at *2. Waverly provides no precedent for a party other than the railroad with the reactivation right to invoke the Board's jurisdiction to narrow a trail sponsor's property interest in a railbanked right-of-way over the trail sponsor's objection.

Waverly is transparent that "[r]emoval [of 21,688 square feet of the Line from railbanked status] is the preferred relief because, with removal, the Waverly Beach area would be free of County meddling." Waverly Pet. at 29. However, this is not an adequate justification for eliminating the railbanked status of a segment of line and removing it permanently from the Board's jurisdiction against the wishes of the trail sponsor and rail easement's owner. To the contrary, it conflicts with the Trails Act's intent to "to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use." 16 U.S.C. § 1247(d). It also conflicts with the Board's responsibility to ensure the development and continuation of a sound rail transportation system by jeopardizing the legal protections afforded to preserve rail property for its intended use. *See* 49 U.S.C. § 10101(4). Because Waverly fails to provide a valid basis for reopening the proceedings and partially revoking the NITU, the Board should decline Waverly's invitation.

II. Petitioners' requests for the Board to opine on state law matters do not raise issues that are appropriate for the Board to resolve.

The Board should deny the Petitions because they primarily concern questions of state law that are not within the Board's jurisdiction and, therefore, not appropriate for a declaratory order. The Board is authorized to "issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e). But Petitioners' dispute rests on interpretation of the County

easement vis-à-vis Petitioners' underlying property interests, not questions regarding the Line's railbanked status or the Board's jurisdiction over it. There is, therefore, no justiciable controversy or uncertainty within the Board's authority to resolve.

No party disputes that the Line is railbanked, that the County serves as the trail sponsor, or that the Board retains jurisdiction over the Line. Nor does any party assert that the County's actions are jeopardizing the preservation of the Line for future rail purposes, such as selling off a portion of the Line. *See* Waverly Pet. at 4, 9 (acknowledging that the Line was railbanked in 1998); Spencers Pet. at 1-2 (similar). Accordingly, the Petitioners claims do not entitle them to relief through a declaratory order. *Cf. Sunflower Rails-Trails Conservancy, Inc. – Petition for Declaratory Order – Sale of Railbanked Right-of-Way*, FD 36034 slip op. at 4 (STB served Feb. 23, 2017) (granting petition for a declaratory order to determine that foreclosure and sale of a segment of a railbanked right-of-way was preempted) *with City of Sammamish, Wash. – Petition for Declaratory Order*, FD 36161, slip op. at 4 (STB served Mar. 29, 2018) (“Given that the dispute between the parties rests on a matter of state property law and may ultimately be resolved by the courts on state law grounds, the request for a declaratory order will be denied.”). Because the conditions for railbanking remain satisfied and no party that is entitled to change this status has requested such a change, the Board has no authority to remove any portion of the Line from its railbanked status. *See* 16 U.S.C. § 1247(d); 49 C.F.R. § 1152.29.

Instead of identifying a dispute subject to the Board's authority, Petitioners ask the Board to wade into state property issues and wield its power to undermine the County's property interest in and authority over the Line. *See* Waverly Pet. at 6-7, 31-32; Spencers Pet. at 4 n.2. For example, Waverly asks the Board to amend the County's easement, on the basis that the County is “misusing the railroad and trail easements” and is “going beyond the authority of the railroad easement . . .

and the trail easement.” Waverly Pet. at 4, 29-36. *See also* Spencers Pet. at 4, 11-13. But Waverly points to nothing that would qualify as misuse or going beyond the scope of the authority granted under the Trails Act. Instead, the facts Petitioners highlight, such as issuing violations for encroachments onto the Line, Spencers Pet. at 3, 5, Ex. 7, and requirements to obtain permission to use a portion of the Line, Waverly Pet. at 30, are entirely consistent with the County’s obligation as a trail sponsor to protect the integrity of the Line. *See Idaho N. & Pac. R.R.—Abandonment & Discontinuance Exemption—In Washington & Adams Counties, ID*, 3 S.T.B. 50, 59 (1998) (*quoting Iowa Southern R. Co.—Exemption—Abandonment*, 5 I.C.C.2d 496, 505 (1989), *aff’d sub nom Goos*, 911 F.2d 1283 (1990)) (the Board’s “chief concern, once a trail condition has been imposed, is that the statutory rail banking condition not be compromised, and that nothing occur that would preclude a railroad’s right to reassert control over the right-of-way at some future time to revive active service.”).

Petitioners’ requests are beyond the scope of the Board’s authority and are clearly inappropriate. For example, Waverly asserts that it “accepts that the railroad Corridor could be reactivated in the future and that could mean that Waverly Beach would lose its picnic and parking areas,” Waverly Pet. 36, yet fails to acknowledge or understand that its request to “de-railbank” a portion of the Line would permanently remove it from the Board’s jurisdiction and make it unavailable for future rail use. *See also id.* at 40-41. This demonstrates the incongruity of Waverly’s request, and the impropriety of granting it.

Similarly, Waverly asks the board to “authorize the Club’s use of the right of way with minor improvements.” *Id.* at 7. But the Board has no authority to grant a right for Waverly to encroach on the Line, and doing so would be contrary to the Trails Act, which was enacted to “prevent[] property interests from reverting under state law.” *Preseault v. ICC*, 494 U.S. 1, 8

(1990). More generally, Waverly asks the Board to confirm that the County’s easement is “held in abeyance” and to opine on whether the County may “exercise a general power as an easement holder to control usage of the land owned by [Waverly].” Waverly Pet. at 4, 29. In the same vein, the Spencers ask the Board to rule on the validity and effect of the County’s property interest: “The Spencers seek a declaration that King County holds the railroad easement in abeyance during this period that the railroad use has been discontinued such that the County cannot utilize the railroad easement as authority for controlling use of the right of way.” Spencers Pet. at 12. The Board generally declines to adjudicate property disputes, and should do so here. *See Petition of Union Pacific R.R. Co. for Declaratory Order*, FD 35960, slip op. at 6 (STB served Sept. 30, 2016). *See also V&S Ry.—Pet. for Declaratory Order—R.R. Operations in Hutchinson, Kan.*, FD 35459, slip op. at 7 (STB served July 12, 2012). The Board is not in a position to determine under state law the scope of the County’s easement in the Line or to alter that interest.

Both Petitioners characterize the County’s easement as being “held in abeyance,” Waverly Pet. at 7, 31, Spencers Pet. at 12, 13, 19, but there is no basis for this characterization, and the Petitioners cite to none. Petitioners confuse the Board’s regulatory grant of authority with the property interest in a rail easement. *See Allegheny Valley R.R. Co.—Pet. for Declaratory Order—William Fiore*, FD 35388, slip op. at 4 n.4 (STB served Apr. 25, 2011) (Noting in rail line acquisition case that the Board’s approval “cannot be viewed as conveying property rights to an applicant, as property ownership rights are determined by state law,”). The STB’s railbanking approval does not suspend a rail line owner’s property rights. While the Petitioners’ characterization is wrong, it is nevertheless not appropriate for the Board to grant the Spencers’ petition in order to opine on the effect of the County’s easement, since this is a question of state law.

Moreover, the question of the permissible scope of the County's use of its easement has already been settled in court. *Hornish I*, 182 F.Supp.3d at 1130, *aff'd Hornish II*, 899 F.3d at 686. In *Hornish I*, the U.S. District Court for the Western District of Washington was asked to determine the respective rights of the County and adjacent landowners along the same Line at issue in these proceedings. There, the district court noted that "[r]ailroads are public highways under Washington law and, "[i]n Washington, the owners of public highway easements retain exclusive control over uses incidental to their easements." *Id.* at 1129 (citations and quotations omitted). Accordingly, the district court held "that the County's rights are coextensive with the railroad's and that it is entitled to the exclusive use and possession of the area on, above, and below the surface of the Corridor for railroad purposes and incidental uses permitted by Washington law, including use as a recreational trail." *Id.* at 1130 (internal quotation marks and citation omitted). The court rejected the adjacent landowners' attempts to narrow the width of the Line over which the County had control, noting that the County's rights were "coextensive with the *entire tract* described in the instrument under which possession is claimed." *Id.* (emphasis added). The Ninth Circuit affirmed the district court's ruling in its entirety. *Hornish II*, 899 F.3d at 686. Both cases cite to a 100-foot right-of-way because that was the entire width of the right-of-way at issue in those proceedings, not because the court determined, or the County admitted, that the County's rights or use of a wider right-of-way would stop at 100 feet. *See Hornish I*, 182 F.Supp.3d at 1131; *Hornish II*, 899 F.3d at 699.

Petitioners cite to various caselaw to support their characterization of their rights vis-à-vis the County's, but these have no bearing on the Board's role. *See Waverly Pet.* at 32-33; *Spencers Pet.* at 17. Petitioners' reference to the easement nature of the County's interest in the Line has no bearing on the Board's jurisdiction or authority over a railbanked line. *See Spencers Pet.* at 4, 7;

Waverly Pet. at 32-33. For example, Waverly points to the County’s admission in a recent state court case that it owns only an easement, not fee simple interest, in the Line as somehow impacting the Board’s jurisdiction over it, *see* Waverly Pet. at 6 (citing *King County v. Abernathy*, 541 P.3d 983, 2 Wn.3d 697, 702 (Wash. 2024)). Waverly points to the rights granted under the 1875 Act as somehow supportive of its argument that the Board should “de-railbank” Waverly Pet. at 32-33, but there is no support for this. The fact that the County’s interest is in easement rather than fee simple is immaterial to the effect of the Board’s jurisdiction over a railbanked line. In fact, the effect of railbanking is to foreclose the possibility that adjacent property owners like Waverly and the Spencers with reversionary interests can whittle away slices of rail corridors, as Petitioners propose. *Preseault*, 494 U.S. at 8. However, the federal court hearing Petitioners’ claims in court can arrive at that decision without the Board’s assistance.

Waverly transparently seeks to “de-railbank” a portion of the Line so that the County’s “railroad and trail easements would no longer encumber the Club’s land.” Waverly Pet. at 30. Rather than adhering to the County’s requirements and plans for implementing trail use, Waverly appears to want to negotiate new rights through the Board. *See* Waverly Pet. at 41 (“The Club would accept a condition, potentially a covenant, requiring the Club to remove the fence and other improvements if required by the rail operator.”)³. This is not the Board’s role. Redefining and undermining the integrity of the County’s valid property rights to an easement of a properly railbanked rail line is beyond the Board’s authority and is not an appropriate use of the Board’s procedures. Accordingly, the Petitions should be denied.

³ Waverly already has that obligation in any event under the current state of the interests in and regulation of the line. If the County were to allow construction of any fence or other structure on a railbanked line that would interfere with reactivation of the rail service on the line, that would have to be removed in order to permit the rail service to resume.

III. The Board should decline to rule on how the County implements and manages its trail.

Although Petitioners request that the Board determine their encroachments on the Line do not interfere with the County's trail use, *e.g.*, Waverly Pet. at 35; Spencers Pet. at 16-18, whether the encroachments interfere with the County's implementation of trail use on the Line is largely outside of the scope of the Board's narrow role in implementing trail use on a railbanked line. The Board's oversight of railbanking is focused and essentially ministerial in many aspects—it does not have the discretion to deny (or revoke) railbanking that is properly undertaken. *See Citizens Against Rails to Trails v. STB*, 267 F.3d 1144, 1149-50 (D.C. Cir. 2001); *Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990); *Norfolk & W. Ry.—Aban. Exemption—Between Kokomo & Rochester in Howard, Miami, & Fulton Ctys., Ind.*, AB 290 (Sub-No. 168X), slip op. at 5 (STB served May 4, 2005); *Georgia Great S. Div., S. Carolina Central R.R. Co., Inc.—Abandonment and Discontinuance Exemption—Between Albany and Dawson, In Terrell, Lee, and Dougherty Counties, GA*, AB 389 (Sub-No. 1X), slip op. at 3 (STB served Feb. 2, 2004).

The Board's chief concern for a railbanked line is to ensure “that the statutory rail banking condition not be compromised, and that nothing occur that would preclude a railroad's right to reassert control over the right-of-way at some future time to revive active service.” *Idaho Northern*, 3 S.T.B. at 59 (*quoting Iowa Southern*, 5 I.C.C.2d at 505). “Nothing in [the Board's] Trails Act rules or procedures is intended to usurp the right of state, regional and local entities to impose appropriate safety, land use, and zoning regulations on recreational trails.” *Id.* Accordingly, “a trail use must comply with State and local land use plans, zoning ordinances, and public health and safety legislation.” *Id.*

In other words, the only appropriate grounds in this case for the Board to grant the requested Petitions would be to order Petitioners to stop undermining the County's efforts to

implement trail use and preserve the possibility of future reactivation of rail service. Petitioners' refusal to abide by the County's code and policies and attempts to reserve segments of the Line for their private use and benefit without adequate contractual safeguards interferes with the County's ability to use the Line for trail purposes (including for potential reactivation of rail service), which contradicts the intent and requirements of the Trails Act and implementing regulations. This is the opposite of good grounds to grant Petitioners relief.

Petitioners point to a previous settlement agreement with neighbors along the Line (the "SHO-KC Settlement Agreement" as termed by Waverly) as indicating that its use poses no conflict with trail or rail use. Waverly Pet. At 22-24; Spencers Pet. At 18. Waverly misses the distinction—the SHO-KC Settlement Agreement and the Exhibit 1 attached thereto establish the legal standard and basis for the County to ensure that those encroachments do not affect trail use or future reactivation of the right-of-way. *See* Waverly Pet. Ex. 29. The SHO-KC Settlement Agreement sets standards for acceptable changes that will not impact the County's trail use activities, such as that "[p]lantings/landscaping in the County's right of way must not adversely impact the health of other plantings on the trail or irrigation/mitigation projects on the trail," and that "[p]lantings/landscaping in the County's right of way must be consistent with City code requirements." *Id.* Ex. 1. Here, Waverly asks the Board for permission *carte blanche*, without any mechanism for the County to control or oversee Waverly's encroachments to make sure they do not interfere with trail use or future reactivation.

Petitioners argue that the County cannot exclude them from the Line for "non-trail reasons," Waverly Pet. At 7-8, 36-37; Spencers Pet. At 17, but it is Petitioners' use of the Line that infringes on the County's plans and policies regarding use of the Line. It is Petitioners who seek to encroach on the Line and use it for non-trail purposes without contractual and regulatory

safeguards to ensure the County can continue to control and manage the Line for interim trail use and potential future reactivation. Petitioners should not be granted Board authority to act in ways that undermine the intent of the Trails Act.

IV. The Board’s precedent provides ample guidance regarding the preemptive effect of the Board’s jurisdiction over encroachments on rail lines, including railbanked lines, and restatement here will not aid Petitioners.

Petitioners requests that the Board determine its existing encroachments on the Line do not interfere with trail use or future rail operations, *see* Waverly Pet. at 38-39, Spencers Pet. at 5, 19, but the Board has already provided clear guidance regarding how to approach the Board’s jurisdiction over disputes very similar to these. Further explication is neither necessary nor helpful.

The Board’s precedent makes clear “that the Board’s broad and exclusive jurisdiction over railroad transportation prevents the application of state laws that would otherwise be available . . . if those laws would have the effect of foreclosing, or unduly restricting, rail use, present or future.” *Sunflower*, FD 36034, slip op. at 5 n.9. The exercise of state property laws, such as condemnation actions, foreclosure and auction of land, or adverse possession claims, which serve to exclude the owner of a rail line—whether railbanked or active—are preempted. *Id.*, slip op. at 6 (foreclosure and auction sale railbanked right-of-way preempted); *City of Lincoln v. STB*, 414 F.3d 858, 862 (8th Cir. 2005) (assertion of eminent domain to reduce the width of a rail line preempted); *Jie Ao – Petition for Declaratory Order*, FD 35539 (STB served June 6, 2012) (adverse possession claim to remove strip of railbanked right-of-way preempted). Such actions may be preempted even if the particular portion of right-of-way is not currently being used, but because of the future potential use of the property for rail service. *Jie Ao*, FD 35539, slip op. at 6. “The fact that [a right-of-way] is rail banked, and there are currently no specific plans to reactivate this property, does not mean

that the property is not within the Board’s jurisdiction and might not be reactivated for future rail service.” *Id.* slip op. at 6-7.

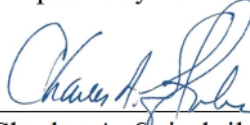
On the other hand, “routine non-conflicting uses, such as non-exclusive easements for at-grade crossings, are not preempted, as long as they would not impede rail operations or pose undue safety.” *Jie Ao*, FD 35539, slip op. at 5. Accordingly, “it is often possible for an easement that crosses over, under, or across a right-of-way, to co-exist with active rail operations without necessarily interfering with the latter. *Id.*, slip op. at 7.

Petitioners’ encroachments do not resemble the routine, non-conflicting at-grade crossing easement serving as the only means of accessing adjacent property that the Board could not conclude was preempted in *Jie Ao*. *See id.* at 7-8 (discussing Parcel E). Instead, they resemble the slice of right-of-way that the Board held in the same case was preempted. *See id.* at 6-7 (discussing Parcel D). However, as the Board concluded in *Jie Ao*, “property disputes involving prescriptive easements are general best addressed by state courts applying state law.” *Id.* at 8.

While the County does not believe that the Board should grant the Petitions, if it does, the County agrees with Petitioners that the Board should order a fuller development of the evidentiary record regarding the County’s use of the entire Line for trail use and for preservation of future rail service. *See* Waverly Pet. at 41-42; Spencers Pet. at 19.

WHEREFORE, and in view of the foregoing, the County respectfully requests the Board deny Petitioners’ Petitions.

Respectfully submitted,



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Counsel for King County, WA

Dated: March 21, 2025

CERTIFICATE OF SERVICE

I hereby certify that I have on the 21st day of March 2025, caused to be served a copy of the foregoing Reply upon all parties of record in this proceeding by email or by first-class mail.



Charles A. Spitulnik

Dated: March 21, 2025