

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION**

**CITY OF OZARK, ARKANSAS,
a municipal corporation**

PLAINTIFF

v.

Case No. 2:14-CV-02196

**UNION PACIFIC RAILROAD COMPANY;
THE ARKANSAS STATE HIGHWAY &
TRANSPORTATION DEPARTMENT
(an Agency of) The State of Arkansas; and
THE ARKANSAS STATE HIGHWAY COMMISSION**

DEFENDANTS

MEMORANDUM OPINION AND ORDER

Now pending before the Court are Motions to Dismiss filed by Defendant Union Pacific Railroad Company ("Union Pacific") and Defendant The Arkansas State Highway & Transportation Department and The Arkansas State Highway Commission ("the State Defendants"). This case was originally filed in state court and removed to this Court on September 17, 2014. (Doc. 1). Union Pacific's first Motion to Dismiss (Doc. 10) and the State Defendants' first Motion to Dismiss (Doc. 5) were both filed in response to the original Complaint.

On October 2, 2014, Plaintiff City of Ozark, Arkansas ("the City") filed an Amended Complaint (Doc. 14), and shortly thereafter, Union Pacific filed a second Motion to Dismiss (Doc. 18), incorporating by reference the brief filed in support of its first Motion to Dismiss. The State Defendants also filed a second Motion to Dismiss (Doc. 21) and brief in support (Doc. 22). The City filed a Response (Docs. 23-24) to Union Pacific's Motions and a Response (Docs. 25-26) to the State Defendants' Motions. The State Defendants then filed a Reply (Doc. 30).

After careful consideration, the State Defendants' second Motion to Dismiss (Doc. 21) is **GRANTED**, and their first Motion to Dismiss (Doc. 5) is **DENIED AS MOOT**; and Union Pacific's first and second Motions to Dismiss (Docs. 10, 18) are **DENIED**.

I. BACKGROUND

The City seeks a declaratory judgment of this Court concerning an at-grade railroad crossing known as the Oliver Street Crossing ("the Crossing"). The City contends that the Crossing was originally designated a "public crossing," but in February 2001, Union Pacific closed it, impeding the public's access to the Arkansas River from that side of the city. The land lying between the River and the Crossing was and is leased by the City from the United States Army Corps of Engineers. The City alleges that Union Pacific's actions in unilaterally closing the Crossing violated state and local law.

The City also asks the Court to issue a permanent injunction preventing Union Pacific from obstructing or interfering with the City's use of the Crossing and development of the land adjacent to the Arkansas River. The City believes Union Pacific should be ordered to "immediately replace the Oliver St. Crossing at [Union Pacific's] sole cost, in addition to monetary compensatory damages . . . for unreasonably interfering with the Plaintiff's dedicated easement and with Plaintiff's access and construction on Plaintiff's leased property for approximately 13 years." (Doc. 14, p. 2). It appears the City plans to construct public hiking trails and other attractions in the area between the Crossing and the River in order to revitalize the downtown area and increase tourism.

As for the State Defendants, the City demands that the Court issue a writ of mandamus requiring the State to immediately inspect Union Pacific's right of way and order

Union Pacific “to rectify any public nuisance due to abandoned trash, equipment[,] railroad cars[,] or any other violation of Arkansas law.” *Id.* at p. 54. The City maintains that the State Defendants “refuse to inspect on a reasonable basis the UP Defendant’s right of way in the Plaintiff’s downtown and have further failed to require the UP Defendant to maintain its right of way in accordance with Arkansas law.” *Id.* at p. 52.

In the alternative to the above legal remedies, the City asks that it be allowed to enter upon Union Pacific’s land to survey it for the purpose of “acquir[ing] ownership of this land under the Plaintiff’s power of eminent domain for the sum of One Thousand Dollars (\$1,000.00).” *Id.* at p. 54. The City alleges that Union Pacific “has dumped trash, metal, timber, and leaves an abandoned railroad car on the railroad right of way that creates a nuisance to Plaintiff’s residents and visitors to the Plaintiff’s downtown area,” impedes the public’s view of the Arkansas River, and “creates a danger by obstructing the view of UP Defendant’s trains traveling on the railroad tracks.” *Id.* at p. 41.

The Amended Complaint contains a rather exhaustive history of the Oliver Street Crossing, beginning around the time of the Civil War until the present day. In reviewing the Amended Complaint, it appears that in 2001, the Oliver Street Crossing was listed on the Federal Railroad Administration’s Crossing Inventory as a “closed crossing,” the crossbuck sign was removed, and two stop signs were installed. The City maintains that “there is no evidence that Plaintiff, AH&TD, or any other representative of the State of Arkansas knew that [Union Pacific] removed the Plaintiff’s existing, dedicated and platted Oliver St. Crossing or even had the opportunity to voice approval or opposition to the closing of the Plaintiff’s existing, dedicated and platted Oliver St. Crossing in February 2001, as required by both Arkansas law and the AH&TD Rail Program.” *Id.* at pp. 22-23.

According to the Amended Complaint, in December 2004, a few years after Union Pacific closed the Crossing, the City contacted the Arkansas State Highway and Transportation Department "in an effort to reestablish the existing, dedicated and platted Oliver St. Crossing as there was a business owner that intended to place a riverboat attraction on the north bank of the Arkansas River as a tourist attraction." *Id.* at p. 33. Negotiations between the City and Union Pacific over the use and ownership of the Crossing apparently continued until August 2007, when the City provided Union Pacific with a copy of a study conducted by the University of Arkansas concerning a proposed trail development project ("the Project") to boost the City's economy. According to the City, Union Pacific "continued to delay responding to Plaintiff's various requests for meetings and discussing the reestablishment of Plaintiff's dedicated and platted Oliver St. Crossing." *Id.* at p. 35.

On July 30, 2011, the City's Mayor wrote to Union Pacific concerning the City's plans for the Project, asking the City be granted an easement across the railroad tracks at the site of the former Crossing to be used as a pedestrian right-of-way for those wishing to access the Arkansas River. (Doc. 14-7, pp. 18-19). Such an easement would make it "much safer to cross the railroad tracks to the Arkansas River." *Id.* at p. 19. In response to the City's easement request, Union Pacific stated that it was "skeptical that the Project's design can provide the necessary safety assurances." *Id.* at p. 21.

Negotiations concerning the Project continued until October 23, 2012, when Union Pacific's Director for Industry and Public Projects wrote to the City's Mayor, advising that Union Pacific still had "concerns over the inherently dangerous nature of an at-grade pedestrian crossing for the Project and the adverse effect the Project will have on railroad

operations.” *Id.* at p. 27. The letter continued, “Union Pacific believes a pedestrian overpass would be a less objectionable solution for the City but it cannot approve such a structure without specific design and location information.” *Id.*

Other letters attached to the Amended Complaint evidence the back-and-forth conflict between the City and Union Pacific over the Crossing. It appears that at some point nearly a decade ago, the City involved the State Defendants in this dispute, asking the State’s help in reopening the Oliver Street Crossing. *Id.* at p. 55. A 2005 letter from the Assistant Chief Engineer for the Arkansas State Highway and Transportation Department, addressed to the City’s Mayor and to Union Pacific, recommended that Union Pacific “work with the City of Ozark for the installation of a pedestrian crossing with locks and gates at this location.” *Id.* at p. 59. Despite the State’s intervention, no pedestrian crossing was built, as is clear from the more recent April 18, 2013 letter from Union Pacific to Arkansas State Representative Bill Gossage, in which Union Pacific stated that it still “does not approve of an at-grade crossing for the City’s project” and suggested again that the City “consider a pedestrian overpass as a safer alternative to an at-grade crossing.” *Id.* at p. 75.

The parties have not been able to come to an amicable solution to the Crossing problem. The City still desires to pursue its Project and develop the land near the Arkansas River for the benefit of the public. To do this, the City is convinced that a public access point for the proposed development is through the Oliver Street Crossing, which Union Pacific currently controls. Union Pacific, on the other hand, argues that the Crossing was lawfully closed in 2001, and the City has waited too long to contest the legality of the closing. Further, Union Pacific maintains that the City’s plan to create an at-

grade pedestrian crossing negatively impacts rail operations and poses significant safety concerns to the public and to employees of Union Pacific.

II. LEGAL STANDARD

To survive a motion to dismiss, the complaint must present “a short and plain statement of the claim that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The intention of this is to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In reviewing the complaint, the Court must “accept as true all of the factual allegations contained in the complaint.” *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 549 (8th Cir. 2008) (citing *Twombly*, 550 U.S. at 555–56). All reasonable inferences from the complaint must be drawn in favor of the plaintiff. *Crumpley–Patterson v. Trinity Lutheran Hosp.*, 388 F.3d 588, 590 (8th Cir. 2004).

When considering a motion to dismiss, the Court ordinarily does not consider matters outside the pleadings. See Fed. R. Civ. P. 12(d). The Court may, however, consider exhibits attached to the complaint and documents that are necessarily embraced by the pleadings, *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 697 n.4 (8th Cir. 2003). In the case at bar, Union Pacific has supplemented its first Motion to Dismiss with a number of affidavits (Docs. 10-2, 10-3, 10-8, 10-9), none of which have been considered, as they were not attached to either the original Complaint or the Amended Complaint and are not embraced by the pleadings. Union Pacific has also attached certain color photographs (Docs. 11-1, 11-2, 11-3), which in some cases have been marked with arrows and purport to demonstrate the “limited sight lines” at the Crossing. As these photographs were taken

in order to advance Union Pacific's arguments as to dismissal and are submitted in support of the affidavits the Court has already determined are inappropriate to consider on a motion to dismiss, these photographs have not been considered.

III. DISCUSSION

A. Motion to Dismiss State Defendants

The State Defendants are entitled to sovereign immunity in this case. Defendant Arkansas State Highway and Transportation Department is an agency of the State of Arkansas and is subject to the administrative control and direction of Defendant Arkansas State Highway Commission. Ark. Code Ann. § 27-65-102. Neither State Defendant has waived sovereign immunity in this matter. Absent a waiver of immunity, neither the States nor agencies acting under the control of the States may be subject to suit in federal court. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993).

Here, the City seeks the assistance of the federal court in issuing a writ of mandamus to certain agencies of the State of Arkansas, essentially in an attempt to force the agencies to look into the private parties' dispute about the ownership and maintenance of the Crossing and/or to make a determination that Union Pacific has allowed the Crossing to fall into disrepair. The Court lacks the authority to order State officials to conform their conduct to state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment."); *Thomas v. FAG Bearings Corp.*, 50 F.3d 502, 505-06 (8th Cir. 1995)

(attempting to force a state agency to take action against a private party in the context of a federal lawsuit violates principles of federalism, and such “disrespect for state autonomy in decision-making is precisely what the Eleventh Amendment was intended to avoid.”).

Considering these clear and established principles of law, all State Defendants are dismissed from this lawsuit with prejudice due to Eleventh Amendment immunity.

B. Motion to Dismiss Union Pacific

Union Pacific advances the following arguments in favor of dismissal: (1) the City's Amended Complaint is barred by the doctrine of laches; (2) the City's claims are preempted by the Interstate Commerce Commission Termination Act (“ICCTA”); (3) the City's lawsuit is barred by waiver and estoppel; (4) the City lacks the authority to condemn the property; and (5) the cause of action for conversion is not cognizable. All arguments will be addressed in turn below.

1. Laches

Union Pacific argues that the equitable doctrine of laches mandates dismissal of this lawsuit, as the City has unreasonably and inexcusably delayed in filing its lawsuit, and its delay had prejudiced Union Pacific. *See Brown-Mitchell, Kan. City Power & Light Co.*, 267 F.3d 825, 827 (8th Cir. 2001). However, “[i]t is generally a question of fact for the determination of a jury whether or not a given time is unreasonable” *N.Y. Life Ins. Co. v. Adams*, 235 S.W. 412, 415 (Ark. 1921). Under the circumstances, the City has set forth sufficient facts in its Amended Complaint to show that it was not sleeping on its rights since the Crossing was closed by Union Pacific. There is at least a material dispute of fact as to whether the City unreasonably delayed in filing the lawsuit, as it is evident that the City

and Union Pacific have been in nearly constant communication regarding this dispute over the past decade. For these reasons, laches is not a proper basis for dismissal.

2. Federal Preemption

The ICCTA is a “comprehensive regulatory scheme designed to deregulate the railroad industry and remove all state efforts to regulate railroads.” *State of S.D. v. Burlington N. & Santa Fe Ry. Co.*, 280 F. Supp. 2d 919, 931 (D.S.D. 2003). The Court finds that Union Pacific has failed to establish, at this stage in the litigation, that all or part of the City’s claims are preempted by the ICCTA.

The area of railroad track at issue is considered a “side track” by Union Pacific. In its brief in support of its first Motion to Dismiss, Union Pacific explains that “side tracks play an essential role and are vital to railroad operations because they allow the mainline to be open for other rail travel, which enhances the movement of commerce on the rail lines Specifically, side tracks allow for trains to ‘meet and pass’ each other on a single mainline track without the need to uncouple the train, as a train can pull into the side track to wait until the other train has passed and then immediately proceed onto the mainline.” (Doc. 11, pp. 10-11) (internal quotation and citation omitted).

Union Pacific argues that the side track at issue falls under the ICCTA’s broad preemptive scope, as the City’s proposed course of action with regard to the Crossing would negatively impact Union Pacific’s use of the side tracks and mainline facilities, as well as negatively impact switching operations. The Eighth Circuit has found that if a taking, condemnation, or other proposed use of railroad tracks “would prevent or unduly interfere with railroad operations and interstate commerce,” such action “would be

preempted” by the ICCTA. *City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858, 860 (8th Cir. 2005). At the motion-to-dismiss stage of proceedings, however, a court must draw all reasonable inferences from the complaint in favor of the plaintiff. It is unclear to the Court, based on the pleadings and supporting exhibits, whether the relief demanded by the City *would* prevent or interfere with railroad operations and interstate commerce and trigger federal preemption.¹ Accordingly, the Court declines to dismiss the case based on federal preemption at this stage of the proceedings.

3. Waiver and Estoppel

Based on the evidence now before the Court, there remain contested disputes of fact regarding whether the City waived any claim of right to the use of the Crossing or otherwise should be estopped from asserting such a right. Union Pacific contends that the Crossing was removed in 2001 at the City’s request and at Union Pacific’s sole expense. Demanding that Union Pacific re-install the Crossing would therefore be unjust. The City responds that it never gave permission or authorization for Union Pacific to remove the Crossing, and the removal was done contrary to law. In addition, the City maintains that it continuously asserted its rights as to the public’s use of the Crossing almost immediately

¹ Union Pacific attaches to its brief the unpublished 2011 opinion of the Honorable J. Leon Holmes in the case of *City of North Little Rock, Arkansas v. Union Pacific Railroad Co. and Arkansas Midland Railroad Co., Inc.*, 4:10-cv-01689 (E.D. Ark. April 21, 2011) (Doc. 10-7). According to Union Pacific, this case supports its argument that ICCTA preemption is justified when there exists the possibility that a taking, condemnation, or proposed easement “could” prevent or unduly interfere with railroad operations and interstate commerce. Although Judge Holmes uses the word “could” when referring to the preemption standard, see Doc. 10-7, p. 5, the Eighth Circuit employs the word “would” when applying the standard. Therefore, the Court finds that preemption should not be found at the motion-to-dismiss stage of a case when interference with railroad operations and interstate commerce is a mere possibility. The Court lacks sufficient facts to draw a conclusion at this time as to whether federal preemption would apply.

after the Crossing was closed. For these reasons, the Court will not dismiss the case at this time based on waiver and estoppel theories.

4. Propriety of Condemnation Action

Union Pacific argues that there is no authority to support a condemnation action because the property at issue is already serving a public use. A railway system is inherently beneficial to the public as a means of transporting goods and people across great distances. Union Pacific acknowledges that it is unclear under Arkansas law whether property that is already designated for a public use may be condemned in favor of a new and different public use.

Union Pacific cites to the case of *City of Helena v. Ark. Utilities Co.*, 208 Ark. 442, 443 (1945), in conceding that a public-to-public condemnation has occurred at least once in Arkansas. *City of Helena* involved a city's condemnation-for-purchase of an existing waterworks system. After considering *City of Helena*, as well as other cases cited in the parties' briefs, the Court defers its decision as to the propriety of a condemnation action in favor of further fact-finding on the matter. After the parties have taken discovery and are able to provide the Court with more information as to the nature of the public's existing use and desired use of the Crossing, another determination on the issue may be appropriate. However, the Court is persuaded at this time that a public-to-public condemnation is potentially cognizable as a matter of law. The City established its need for a "taking" for public use, at least sufficient to withstand a motion to dismiss pursuant to Rule 12(b)(6).

5. Cause of Action for Conversion

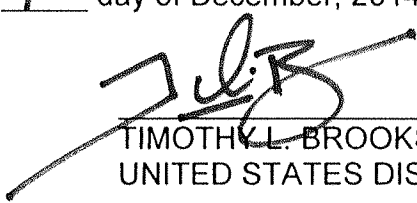
The City has dropped this cause of action from its Amended Complaint, which renders Union Pacific's argument moot.

IV. CONCLUSION

IT IS ORDERED that the State Defendants' second Motion to Dismiss (Doc. 21) is **GRANTED**, and the Arkansas State Highway and Transportation Department and the Arkansas State Highway Commission are **DISMISSED WITH PREJUDICE** from this lawsuit due to Eleventh Amendment immunity. Defendant Arkansas State Highway Commission's first Motion to Dismiss (Doc. 5) is **DENIED AS MOOT**.

IT IS FURTHER ORDERED that Defendant Union Pacific's first and second Motions to Dismiss (Docs. 10, 18) are **DENIED**.

IT IS SO ORDERED this 10th day of December, 2014.


TIMOTHY L. BROOKS
UNITED STATES DISTRICT JUDGE