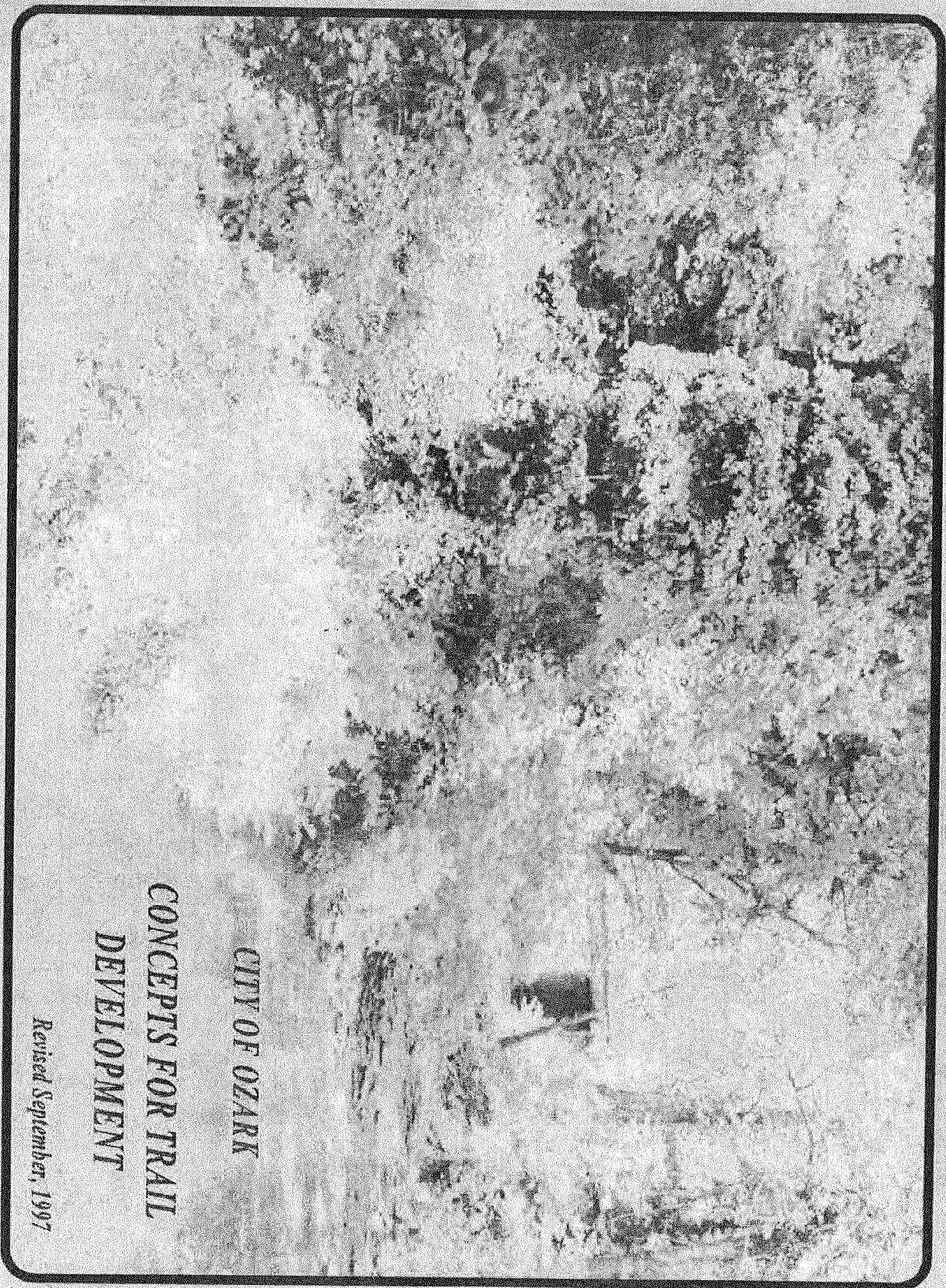




CITY OF OZARK

**CONCEPTS FOR TRAIL
DEVELOPMENT**

Revised September, 1997

CITY OF OZARK

CONCEPTS FOR TRAIL DEVELOPMENT

Prepared by:

Western Arkansas Planning and Development District

IN COOPERATION WITH

*The City of Ozark
and*

The Arkansas State Highway and Transportation Department

Revised September, 1997

*The contents of this report reflect the view of the
Western Arkansas Planning and Development District
and the City of Ozark
but may not necessarily reflect the official views or
policies of the Arkansas State Highway and Transportation Department*

Front Cover Photograph: The east fork of Gar Creek, west of N. 2nd Street in Ozark.

TABLE OF CONTENTS

	Page No.
INTRODUCTION	1
Background	1
Purpose	1
Study Area	1
PROJECT DESCRIPTIONS	4
North Bank Riverwalk	4
East Side City Park Trail	10
South Bank Riverwalk	11
ISSUES	14
Trail Locations	14
Maintenance	14
The Americans with Disabilities Act	14
Trail Amenities	16
ACTIONS FOR DEVELOPMENT	18
SELECT COST ESTIMATES AND MEANS OF FINANCING	19
Estimated Costs	19
Project Financing	20
APPENDICES	22

LIST OF MAPS AND DIAGRAMS

MAPS

	Page No.
1 General Location: City of Ozark and Proposed Trail Sites	3
2 City of Ozark: Proposed North Bank River Walk	5
3 City of Ozark Proposed North Bank Riverwalk Corridor, Phase II & Phase III:	
U.S. Army Corps of Engineers Land for Development by Tract Number	6
4 City of Ozark: Proposed East Side City Park Trail	7
5 City of Ozark Proposed East Side City Park Trail Corridor, Phase I & Phase II:	
U.S. Army Corps of Engineers Land for Development by Tract Number	8
6 City of Ozark Proposed East Side Park Trail Corridor, Phase III: U.S. Army	
Corps of Engineers Land for Development by Tract Number	9
7 City of Ozark: Proposed South Bank Riverwalk	12
8 City of Ozark Proposed South Bank Riverwalk Corridor: U.S. Army Corps of	
Engineers Land for Development by Tract Number	13

DIAGRAMS

A Accessible Walkway	15
B Trail Slope Cuts	17
C Guidelines for Trail Clearing	17

INTRODUCTION

Background

In 1993 the City of Ozark, through a Main Street Program grant, began planning for the revitalization of the downtown area. As part of that effort, the City, together with the Main Street Program of Ozark and the Western Arkansas Planning and Development District (WAPDD) conducted a downtown pedestrian study. This study identified four (4) pathways and the improvements necessary to create a safe, efficient and pleasant walking experience in downtown Ozark. The pathways link Scenic Highway 23 and the Ozark Bridge, the National Register Iron Mountain Railroad Depot, and the Franklin County Courthouse to the City's East Side Park. For the most part, the pathways traverse the existing city sidewalk system.¹

Study Purpose

To create a sense of unity and a continuity of connecting pedestrian facilities, the City also wishes to build a system of waterfront trails. Mentioned but not made part of the downtown pedestrian study, the proposed waterfront trails connect to the sidewalk network leading to Scenic Highway 23, the historic Depot, and East Side City Park.

¹ Western Arkansas Planning and Development District, City of Ozark Transportation Enhancement Program Planning, Fort Smith, 1994.

This report outlines the City's proposals for trail development on lands bordering the Arkansas River and its tributaries. Proposed projects include: 1) the construction of a trail along the Arkansas River south and southeast of the Iron Mountain Depot, 2) the development of a connecting hiking trail along the east and west banks of Gar Creek and along Hicks Creek, two tributaries of the Arkansas River, and 3) a riverwalk connecting the U.S. Army Corps of Engineers' Aux Arc Park to Scenic Highway 23. Issues involved in project implementation and actions required of the City for project development are addressed. Select project costs and the means of financing the activities are also included for consideration in project scheduling.

Study Area

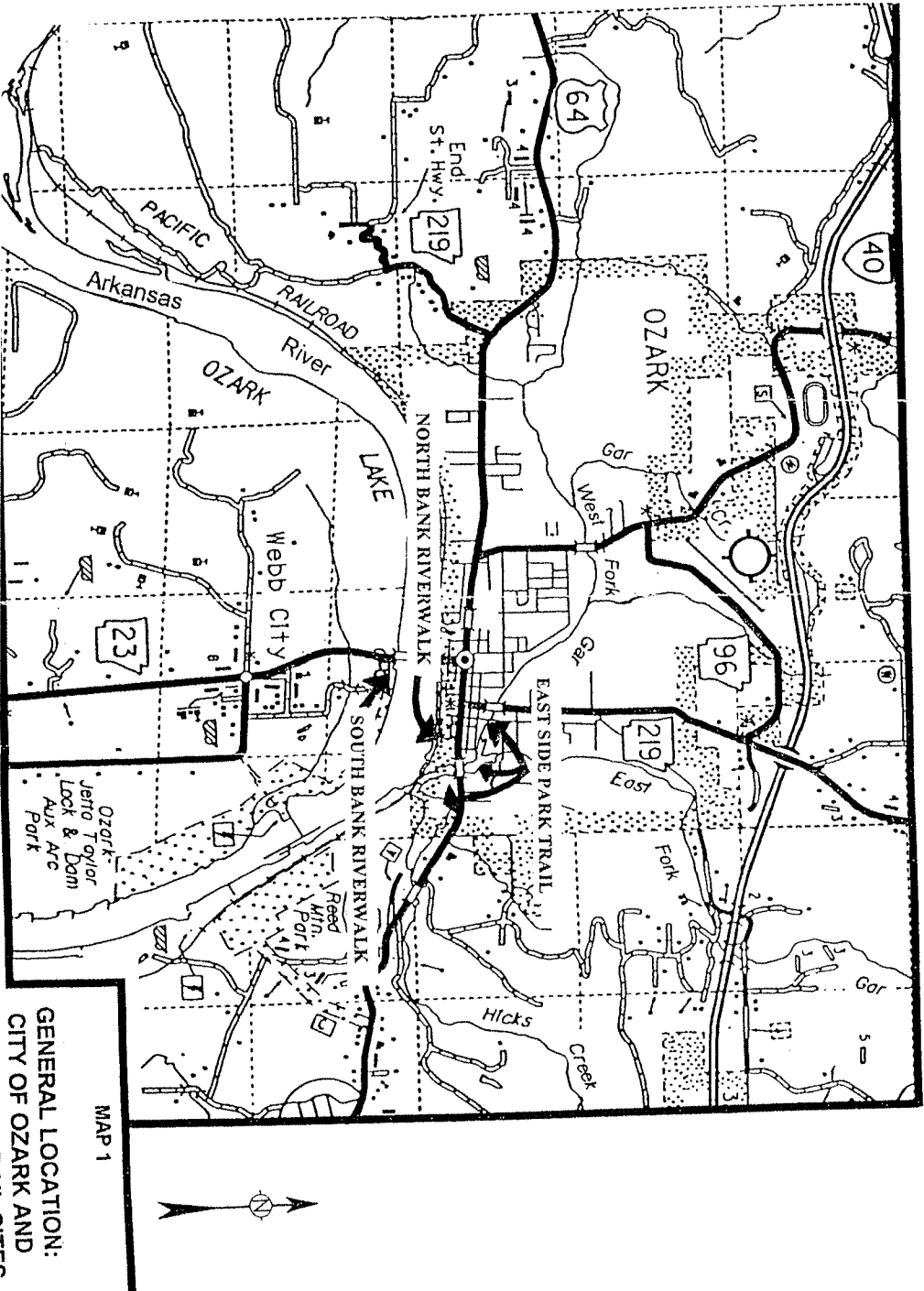
Two of the three trail projects identified in this report are encompassed in a 1/3 (+/-) sq. mile area located in the southeast section of the City of Ozark. Bordered by the Arkansas River and Arkansas State Highway (S.H.) 219, the area extends north to Spring Street and east about 1,500 feet beyond the current city limits. U.S. Highway 64 geographically divides the area east to west. It separates the City's commercial and industrial developments found along the River from the City's northern residential areas and East Side City Park. The area is split north to south by Gar Creek, which intersects Hicks Creek at its juncture with the Arkansas River.

East Side City Park is located along Gar Creek, immediately north

of U.S. 64. The City currently leases the park from the Corps of Engineers under lease number DACWO3-1-76-307. The proposed North Bank Riverwalk and the East Side City Park Trail will adjoin the East Side Park leased areas via Corps lands along Gar Creek, Hicks Creek, and the Arkansas River.

The third trail (South Bank Riverwalk) is located within the City of Ozark's Planning Jurisdictional Area, south of the City.² The trail lies on Corps of Engineers' lands bordered by the Arkansas River, S.H. 23, Aux Arc Park, and the residential community of Webb City. (Map 1)

² Provided by Arkansas State Statutes, Planning Jurisdictional Areas establish the boundaries for which the City prepares plans, ordinances, and regulations and can include all land lying within five (5) miles of the City's corporate limits.



PROJECTS DESCRIPTION

The waterfront trails, discussed below, are not presented in any order of development.

North Bank Riverwalk (A Three Phased Project)

Trail Length : Phase I - 1,400 ft.
(Estimate) Phase II - 1,500 ft.

Phase III - 1,400 ft.

Difficulty: Moderate
(Map 2)

The City, in 1994, was awarded Arkansas Transportation Enhancement Program funds for the restoration of the Iron Mountain Railroad Depot and the development of surrounding lands to tie the city landmark to planned pedestrian walkways located between downtown, the Depot, and the Arkansas River. The land linking the Depot to the Arkansas River lies south of the Depot between the Union Pacific Railroad (U.P.) tracks and the River's edge. The Arkansas River is relatively shallow along this tract of land which will facilitate the construction of boardwalks along the shoreline, if necessary. A sketch of a portion of the proposed riverwalk is found in the Appendices of this report.

Phase I of the three phased project, will trailhead at the refurbished Iron Mountain Railroad Depot, proceed east on River Street for one city block, cross the U.P. railroad tracks and then turn back west, terminating at a point approximating 3rd Street extended. Phase II trail construction connects to the Phase I proposal at a point south of the U.P. rail line and travels east to

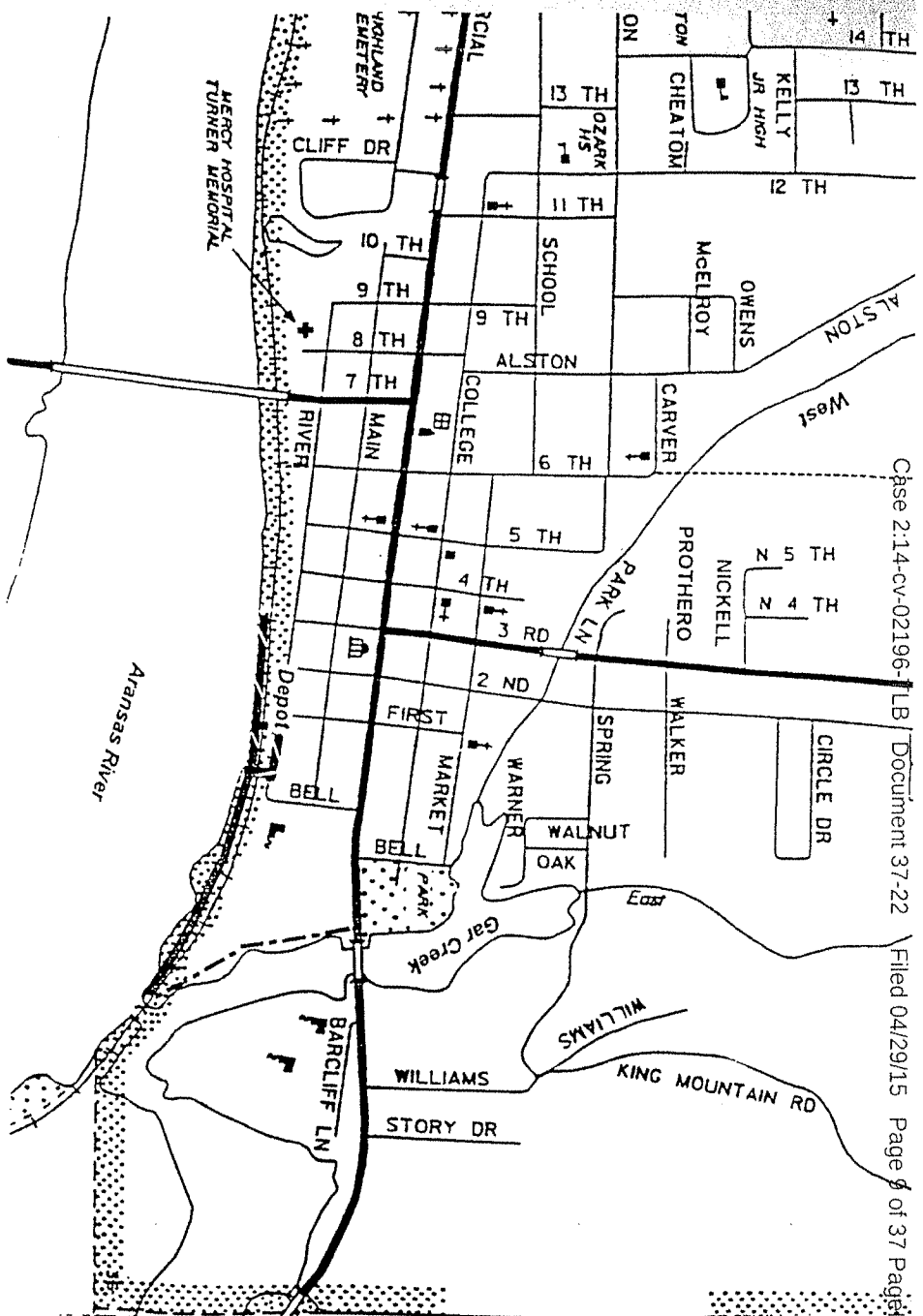
the mouth of Gar Creek. Walkers must retrace their steps back to their point of origin in the first and second phase development of the trail.

In Phase III, the trail picks up at the Phase II terminus at Gar Creek and continues north along the west back of the Creek, crosses U.S. Highway 64, to bring walkers into the City's East Side Park and its facilities. Total length of the North Bank Riverwalk is about 4/5 mile.

The walk, located within a few feet of the River, features excellent views of historic Ozark, views of the boats and river barges traveling the Arkansas River, and views of the Ozark Lock and Dam and Powehouse. Boats and barges can be seen looking through the dam. Activities along the trail will include fishing, waterfowl observation and photography.

Proposed North Bank Corridor: Corps of Engineers' Land, Tract Nos. 218*, 219*, 222, 263, 264, 265, and 293. Riverbank tracts of land for portions of the Phase I development are not listed. (Map 3)

* Note: Parts of Tract Nos. 218 and 219 are currently licensed to Chrisman Ready-Mix, Inc., License No. DACWO3-3-82-428, for storage of equipment and material. Informal talks with representatives from the City and Chrisman have agreed fencing and screening could be installed to allow for a trail to pass over the shoreline portion of these tracts. A formal agreement with the Corps of Engineers and Chrisman Ready-Mix, Inc. will need to be finalized prior to trail development in this area.



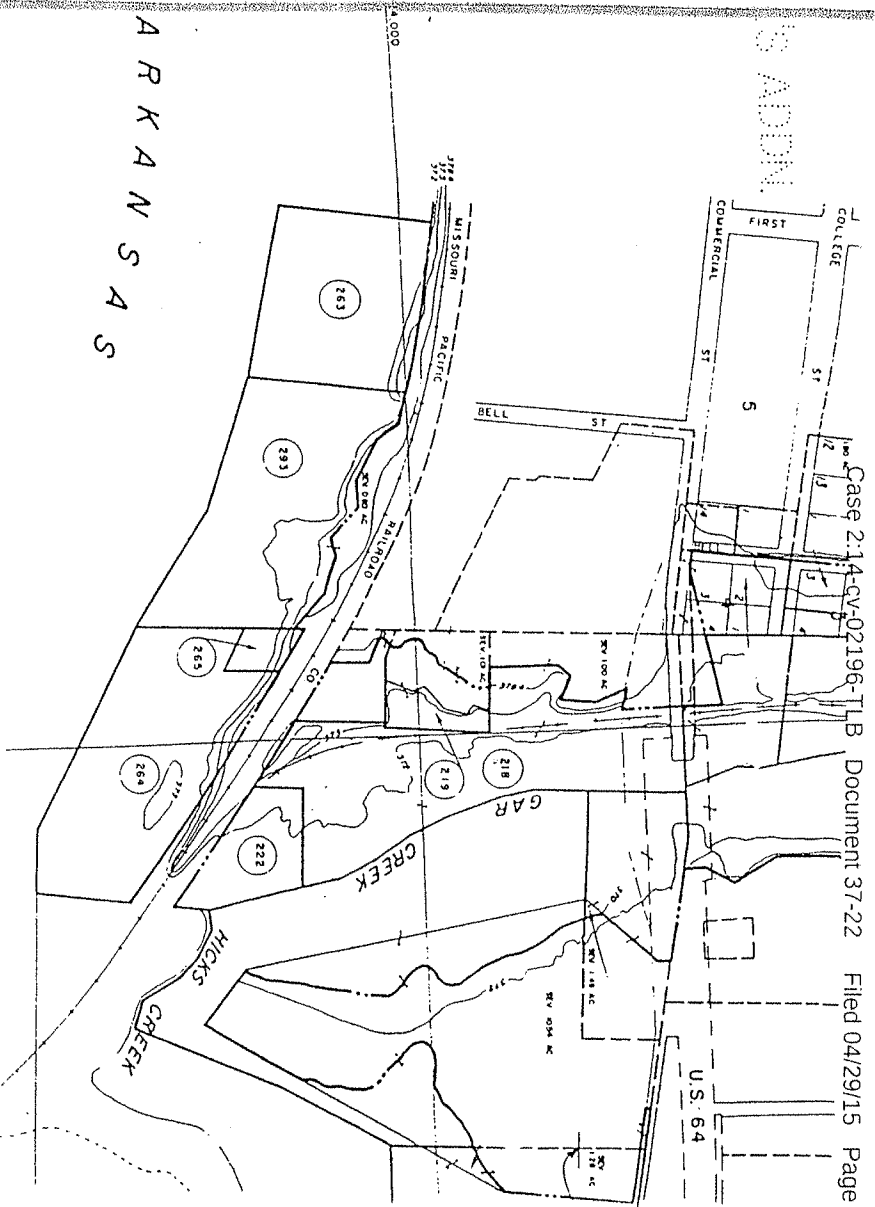
MAP 2

LEGEND
PHASE I
PHASE II
PHASE III

CITY OF OZARK
PROPOSED NORTH BANK RIVERWALK

S ADDN.

Case 2:14-cv-02196-TLB Document 37-22 Filed 04/29/15 Page 10 of 37 PageID #: 1537

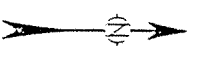


ARKANSAS

MAP 3

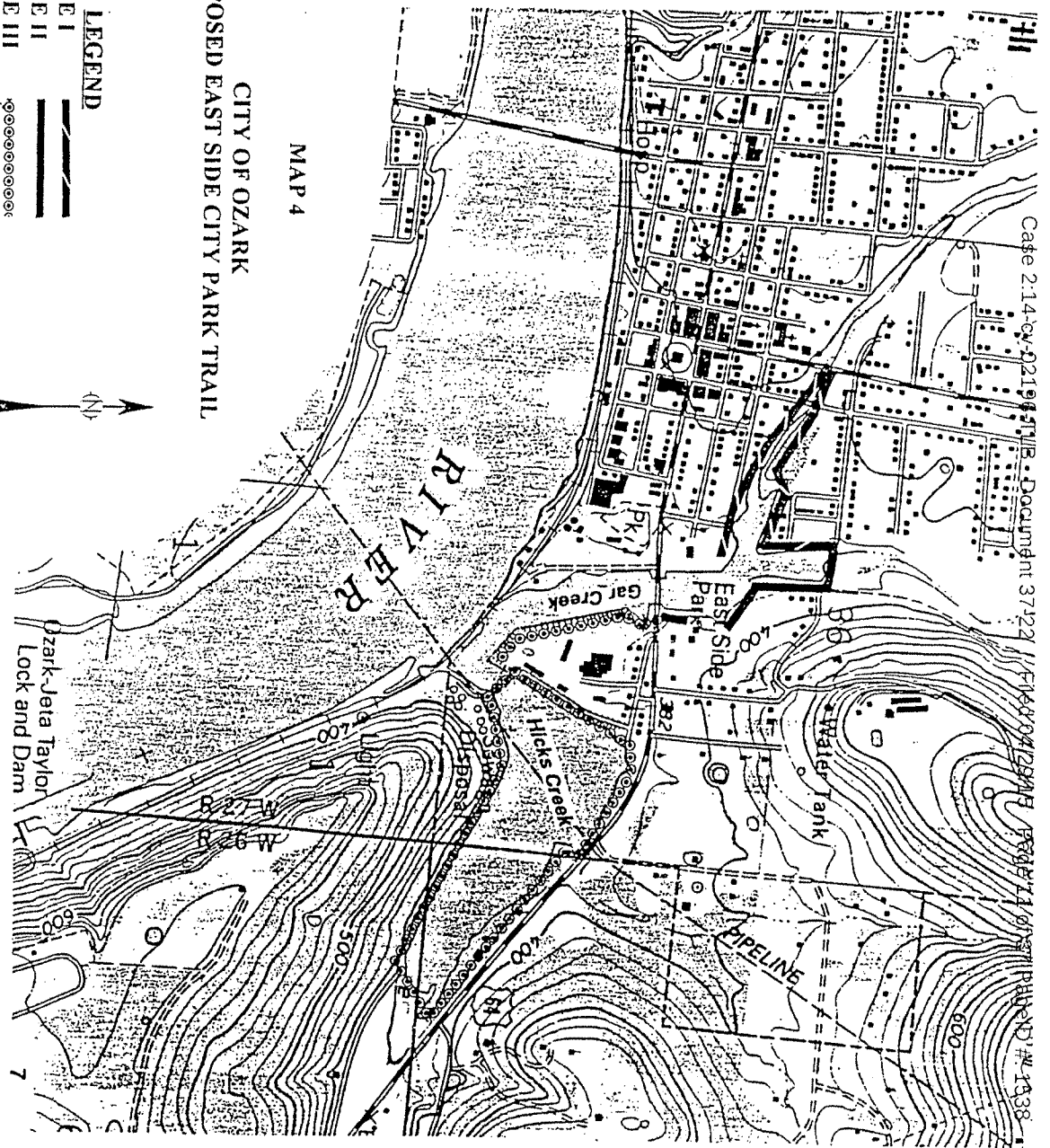
CITY OF OZARK
PROPOSED
NORTH BANK RIVERWALK CORRIDOR, PHASE II & PHASE III:
U.S. ARMY CORPS OF ENGINEERS
LAND FOR DEVELOPMENT BY TRACT NUMBER

LEGEND
 PHASE I
 PHASE II
 PHASE III

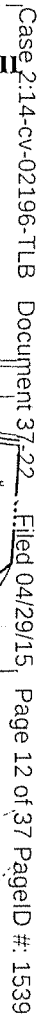


CITY OF OZARK
 PROPOSED EAST SIDE CITY PARK TRAIL

MAP 4



Case 2:14-cv-02194-B Document 37-22 Filed 04/22/19 Page 14 of 19
 PH-001-1938



**EAST SIDE CITY PARK TRAIL CORRIDOR, PHASE I & PHASE II:
U.S. ARMY CORPS OF ENGINEERS
LAND FOR DEVELOPMENT BY TRACT NUMBER**

East Side City Park Trail (A Three Phased Project)

Trail Length: Phase I - 4,200 ft.
(Estimate) Phase II - 2,000 ft.

Phase III - approximately 1.0 mi.

Difficulty: Easy (Map 4)

Accessibility makes this trail an ideal "urban" trail. The trail abuts residential development and should attract local fitness enthusiasts, families, and those individuals in pursuit of the recreational opportunities available in East Side City Park. Trees permanently shade major portions of the trail and public facilities are situated nearby in East Side Park proper. Initial trail construction (Phase I and II) covers the Gar Creek cove at East Side Park.

Phase I construction begins on trailheads at the existing parking lot at East Side Park and proceeds along the south bank of the west fork of Gar Creek to N. 3rd Street (State Highway 219). Crossing Gar Creek on the N. 3rd Street pedestrian bridge, the trail proceeds back along the north side of Gar Creek to its intersection with the east fork of Gar Creek. At this point the trail follows the west side of the east fork of Gar Creek to Spring Street. In Phase II, the trail crosses the Spring Street bridge over Gar Creek and then continues along the east bank of the Creek to U.S. Highway 64.

Walkers must retrace their steps to the trailhead in Phase I and Phase II development. However, the presence of pedestrian bridges at N. 2nd and N. 3rd Streets, and the trails' termini at

Spring Street and U.S. 64 Highway will allow walkers to lengthen or shorten their hike.

The third segment of East Side Trail crosses U.S. 64, transverses an access road atop the levee on the west bank of Gar Creek, crosses the Hicks Creek bridge located behind Cargill Inc., at the end of the access road, then loops around the Hicks Creek cove to return to its point of origin at U.S. Highway 64. The total length of the East Side Park Trail approximates 2.7 miles.

Proposed East Side Park Trail Corridor consists of: Gar Creek, West Bank, Parts of Corps of Engineers' Tract Nos. 232, 241, 243, 244, 246, 247, 248, 249, 242, 239, 236, 237, 251, and 252; Gar Creek, East Bank, Parts of Corps of Engineers' Tract Nos. 234, 233, and 227; Hicks Creek Area, Parts of Corps of Engineers Tract Nos. 141, 139, 135-2, 132, 130-1, 133, 142 and the North part of Tract No. 143. (Map 5 and Map 6)

Additionally Tract Nos. 253, 254, and 255 laying North of Spring Street should be leased from the Corps of Engineers for future development. The Corps of Engineers recently took Tract No. 255 out of their grazing lease program and planted the area in hardwood trees. This area will provide an excellent area for future trail development with primary emphasis on bird watching and wildlife viewing areas.

Also, Tract Nos. 135-1, 136, 137, and 138 located North of Highway 64 East at the East city limits could be used for future enhancement and development to beautify the entrance to the City

of Ozark. Beautification and use could include flower beds, signage, open areas for picnicking, etc. This area could easily be connected to trail areas of Hicks Creek and Gar Creek by simply installing cross-walks and "bike path" markings on the shoulder of U.S. Highway 64.

South Bank Riverwalk

Trail Length (Estimate): 1,040 ft.

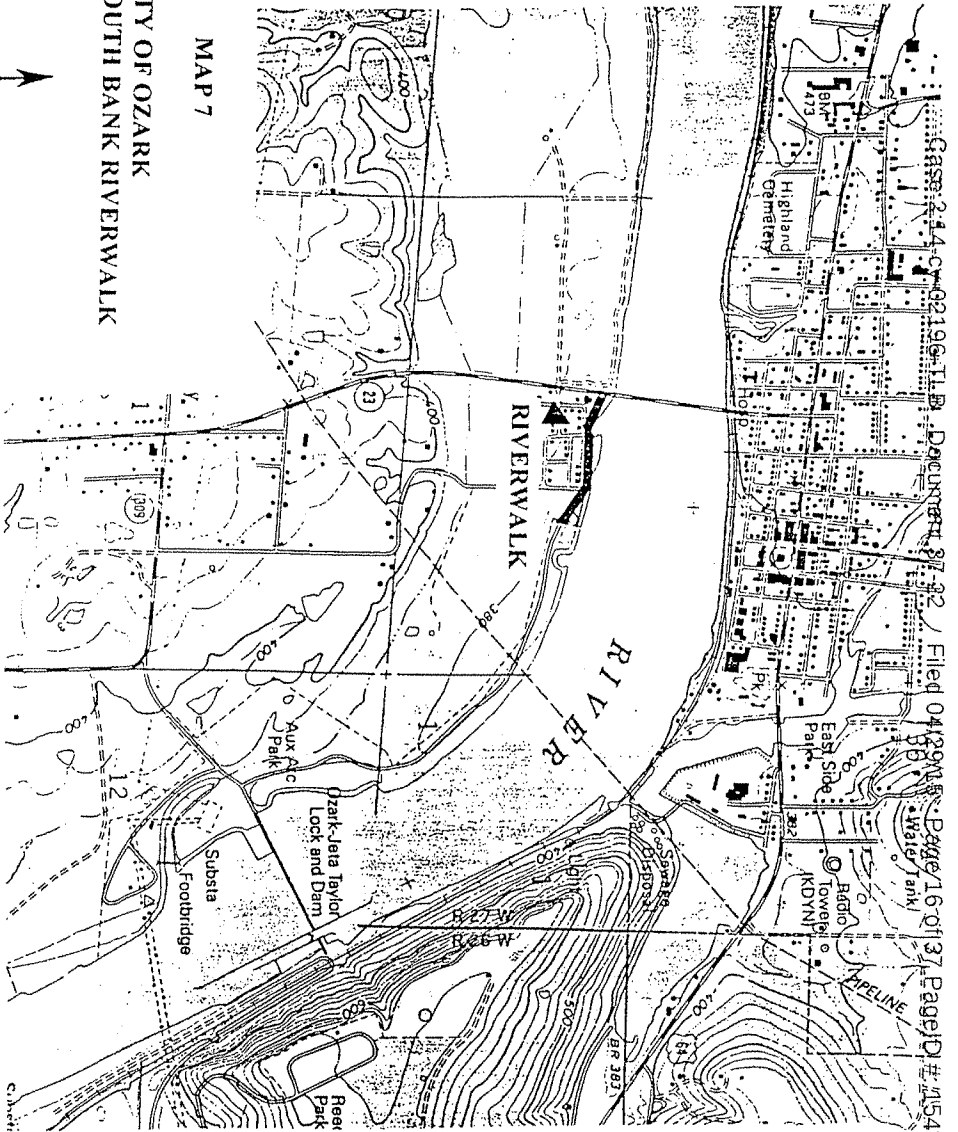
Difficulty: Easy (Map 7)

Located on the south bank of the Arkansas River, this riverwalk is a linear trail. The proposed trail begins at the northwest end of the U.S. Army Corps of Engineers' Aux Arc Park and proceeds west along the wooded riverbank to Scenic Highway 23. The trail affords good views across the river of historic Ozark including the Iron Mountain Depot and the Old Franklin County Jail (both buildings listed on the National Register of Historic Places), and the Franklin County Courthouse clock tower. The proposed trail also presents gorgeous views of the scenic Arkansas River and Ozark Bridge, which is classified as one of the 16 most beautiful bridge structures in the U.S. The public lands yield many examples of plant and wildlife native to the area.

The trail's access via Aux Arc Park predicated Corps of Engineers approval for use of the parking areas and for posting trailhead signs in Aux Arc Park.

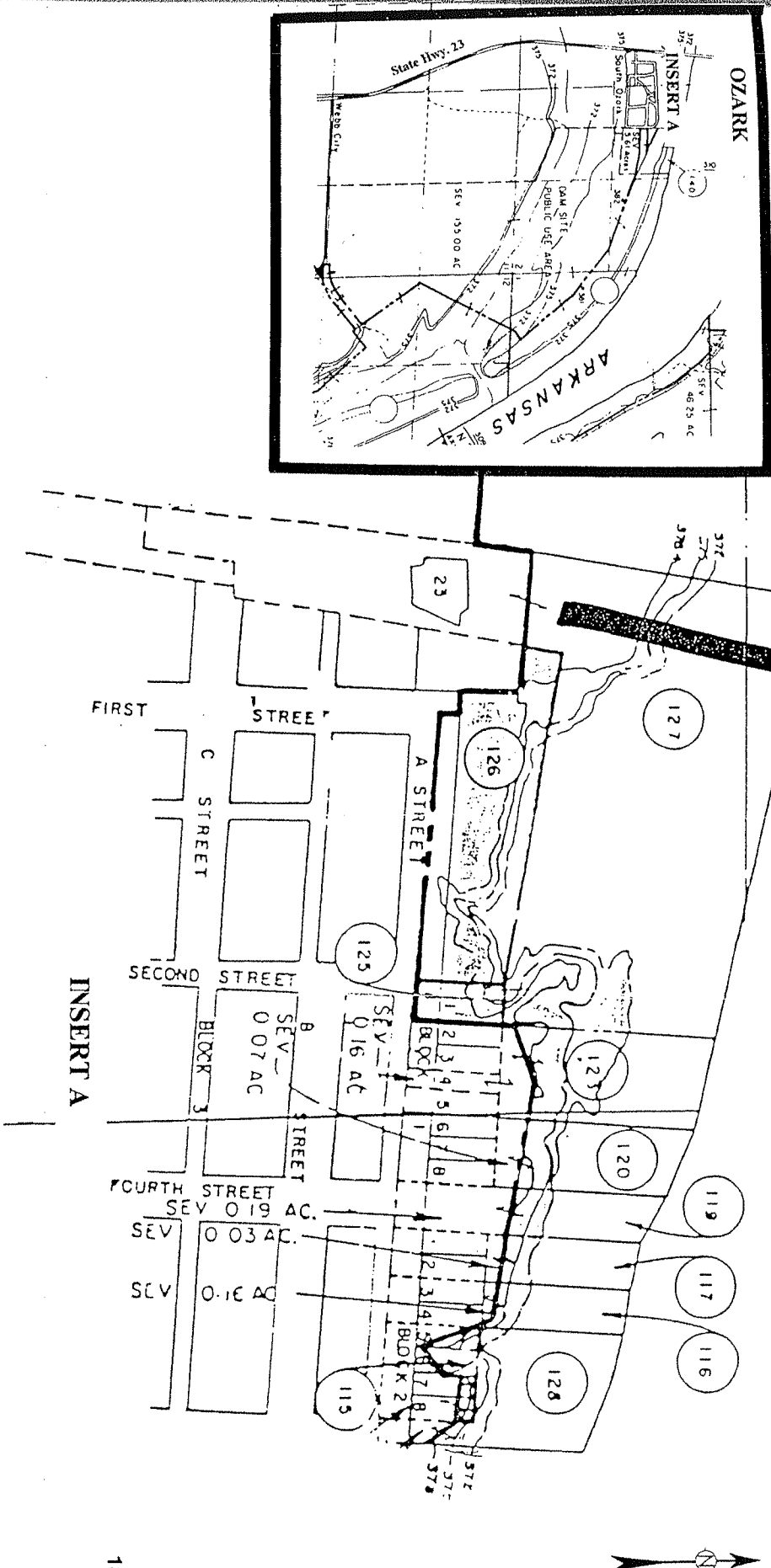
Proposed South Bank Riverwalk Corridor: Corps of Engineers' Land, Tract Nos. 127, 126, 125, 123, 120, 119, 117, 116, 128, 115, and 140. (Map 8)

Tract No. 126 has a large area of land that would offer development of a parking area and overlook of the Arkansas River, the Highway 23 River bridge, the downtown area of Ozark from the water side. This area could also serve as a trail head for the trail along the shore and connecting to Aux Arc Park. This trail would also benefit campers and visitors using the Corps of Engineers park, allowing them to walk to a better viewing area of the river bridge. Tract 126 is accessible to the public by First Street and A Street in South Ozark.



MAP 7
CITY OF OZARK
PROPOSED SOUTH BANK RIVERWALK

**CITY OF OZARK
PROPOSED
SOUTH BANK RIVERWALK CORRIDOR:
U.S. ARMY CORPS OF ENGINEERS
LAND FOR DEVELOPMENT BY TRACT NUMBER**



ISSUES

Trail Locations

Consideration in developing the proposed trails must include the significance of the site, topography, and the amount of modification planned for the site. A balance must be achieved between site modification and preservation. The proposed trails lie on lands owned and managed by the U.S. Army Corps of Engineers and come under the Corps' shoreline management plans and policy guidelines. The Corps must approve any work and/or activities performed on public lands held by them, and the planned use of the lands must not interfere with free access by the general public.

Maintenance

The City should identify and adopt management policies and goals for the lands to be acquired for trail development. Decision-making groups, including property owners neighboring the waterways and the Corps of Engineers, should be consulted for policy guidance and help in forming the plans and implementation strategies for trail and land maintenance.

The management policies developed should establish the duties and responsibilities of the City regarding maintenance and policing of the sites; allowable and non-allowable practices pertaining to cutting, dumping, structures, and other manipulation of shorelines; as well as the issuance and conditions of permits, if any.

Existing City land use plans and/or zoning plans and ordinances

should be amended to incorporate and reflect the lands to be leased and the new policies and regulations developed.

The Americans with Disabilities Act

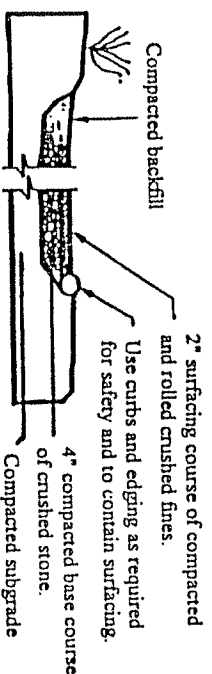
The Americans with Disabilities Act, ADA, requires the construction of facilities that offer disabled persons an opportunity to sample experiences similar to that available to the general public. Although the ADA most likely will not preclude the City from obtaining lease rights from the Corps for the identified lands bordering the River and its tributaries, compliance with ADA requirements may bear on the Corps' right of prior approval of any construction activities on those lands. Too, the City must comply with ADA standards if they wish to pursue State or Federal participation in the construction of the trails and/or trail amenities. Hence, segments of the proposed trails and the trail's associated parking area should be designed to meet a number of ADA specifications including width, surface material, and slope. Transition between the trail segment and the parking area also should be designed for accessibility and usability by the disabled. Recommended specifics for ADA walkway design and parking are as follows:

ACCESSIBLE WALKWAYS³

Grade	1:20, 5% max.
Width	2-way, 5 ft.
Cross slope	2% max.
Surface	Hard surface-crushed stone (Diagram A). ~ Subgrade cleaned and cleared to a depth of 6 in. below finished grade, compacted to 95% density. The use of a soil sterilant is recommended.

~ 4-in. Base course, 3/4 in. Crushed stone, compacted to 95% density. A binder of 2 to 3% Portland cement with water and gravel may be used.
~ 2 in. Surfacing course of crusher fines, rolled and compacted to 95% density. Cement binder is recommended.

DIAGRAM A: ACCESSIBLE WALKWAY



³ Interagency Guideline Task Group for Accessible Outdoor Recreation, *Design Guide for Accessible Outdoor Recreation*, Washington, D.C., U.S. Department of Agriculture and U.S. Department of Interior, 1990.

Parking spaces in a designated handicapped parking lot must be, at a minimum, eight (8) feet wide and have a five (5) foot wide adjacent access aisle for automobiles. For vans, an eight (8) foot access aisle is recommended. The handicapped accessible parking spaces may share an access aisle, but the parking spaces and access aisles must be level. The surface slopes should not exceed 1:50 in all directions.

Barrier-free trail lengths the City may wish to consider for construction include:

~ North Bank Riverwalk

Phase I: Trailhead to U.P. railroad tracks and/or riverfront. ADA parking can be provided at the Depot.

~ East Side City Park Trail

Phase I: Trailhead to a point east of N. 2nd Street. Marked and signed handicapped parking spaces can be provided in the City's East Side parking lot.

Phase III: Wheelchair access provided along the east bank of Gar Creek to a terminus north of U.S. 64. ADA parking facilities can be provided on the abandoned railroad right-of-way which intersects Spring Street.

~ South Bank Riverwalk

Entire length of riverwalk. ADA parking can be provided near the trailhead in Aux Arc Park.

Portions of the riverfront trails and creek trails not designed as ADA accessible should be natural surface trails. Construction involves clearing the pathway of obstructions, and ensuring the trail surface is compact and relatively smooth. The appearance would be of a groomed path. The idea is to enhance the appearance and enjoyment of the property by providing a trail through a cleared and/or mowed corridor, yet retain the lands natural characteristics for walkers. Diagram B depicts slope cuts for trails with up to 50 percent sideslope; Diagram C depicts typical corridor clearing guidelines.

Maps and information about the trail profiles should be displayed at trailhead kiosks and at designated parking areas. The profiles should include, in part, information on ADA accessibility, trail length, slope and surface material.

Trail Amenities

Landscaping is critical to making the trails enjoyable for trail users and, hence, encourage trail use. Selective plant and tree removals and/or placement will not only be aesthetically pleasing, but will attract and provide food and shelter for wildlife. Assistance with site development can be drawn from professionals, local civic groups, the school district or other community organizations.

The City, too, may wish to consider secondary attractions along the trail lengths. For example, a pier, period lighting, benches

and a pay telescope could be installed along the North Bank Riverwalk to enhance the project and provide additional activities for tourists and residents alike. Bird-blinds would be a natural secondary feature on the South Bank Riverwalk given the abundance and variety of waterfowl the River attracts. An additional parking area with benches and picnic tables possibly could be acquired for the East Side City Park Trail off N. 3rd Street, on the south side of Park Lane.

With all trails proposed, the City should develop self-guided brochures and kiosks displaying educational information on the history and natural resources of Ozark, the River and its tributaries. Additional descriptive signs pertaining to the River's wildlife and environs could also be placed along the trail lengths.

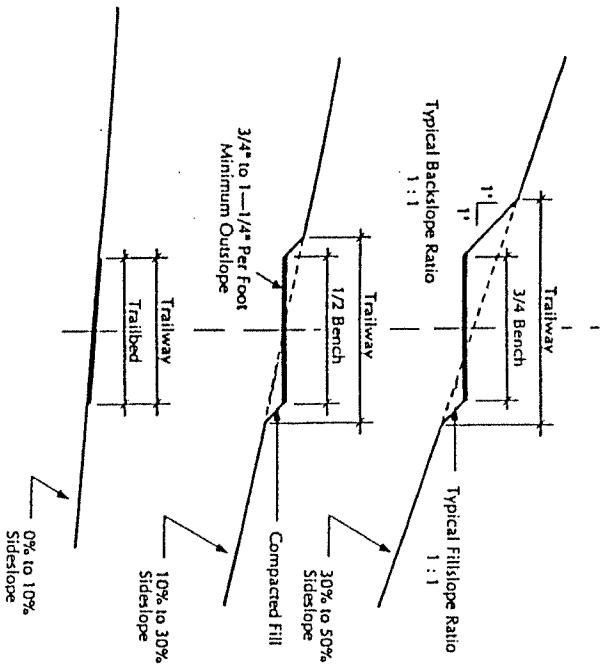


DIAGRAM B: TRAIL SLOPE CUTS⁴

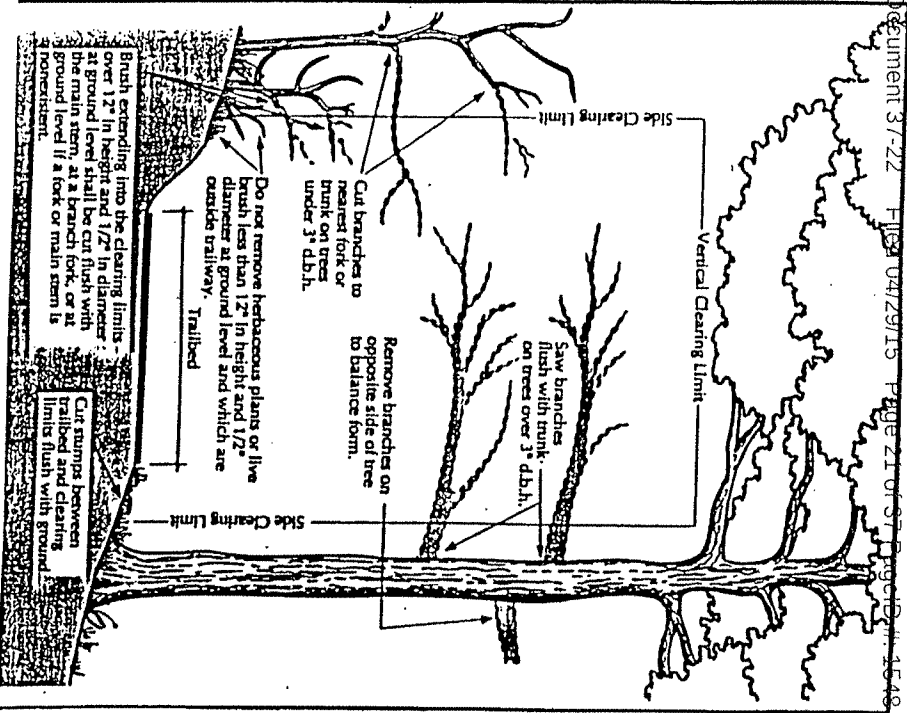


DIAGRAM C: GUIDELINES FOR TRAIL CLEARING⁴

⁴ Eastin, Ken, So you want to build a trail?, Little Rock, Arkansas Department of Parks & Tourism, 1991.

ACTIONS FOR PROJECT DEVELOPMENT

To initiate development of the trails presented in this report, the following steps are recommended.

1. Formalize plans for the recreational development of the River and its tributaries, identifying a time frame or horizon year for projects completions. Project staging should be based on such factors as community needs, construction costs, accessibility, proximity to city landmarks, etc. Solicit public views and comments in the selection and the prioritization of the phases for trail development.
2. Finalize Trail Plan. Identify short range and long range development plans and make the development plans available to the public.
3. Develop policies and regulations for site management and adopt volunteer agreements with local businesses and organizations on the annual maintenance of procured Corps of Engineers' lands.
4. Amend existing City land use plans and/or zoning plans to incorporate and reflect the lands to be leased and the new policies and regulations developed.
5. Develop a capital improvement program for implementation of the trail projects.
6. Appoint an oversight committee (i.e., permanent group) to manage all lands leased from the Corps of Engineers and to the implement the Trail Plan. Duties of the committee or group may include the search for and/or solicitation of outside funding assistance, recruitment of volunteer work groups, and overseeing the development of those projects identified under the short range implementation plan.

A draft land use management policy for City leased Corps of Engineers' lands and a draft City/public volunteer partnership program are provided in the Appendices of this report.

4. Submit development and management plans to the Corps of Engineers for review and lease approval.

SELECT COST ESTIMATES AND MEANS OF FINANCING PROJECT

Cost Estimates

Costs for trail development will vary depending on the type of trail constructed, terrain, soil type and ground preparation required, means of building the trail (volunteer vs. paid labor), etc.

The construction costs for native soil trails are usually minimal as much of the work can be done by volunteers. The standard width for a native soil trail is 18 to 24 inches; a six foot wide corridor is recommended. Native soil trails, though inexpensive to build, are labor intensive and will require consistent and careful maintenance and monitoring. Trail erosion problems may arise due to the trails proximity to the waterways. Periodic grading of the trails may become necessary to prevent the creation of ditches. Also a determination must be made concerning the necessity of constructing boardwalks along all or portions of the River in the North Bank Riverwalk. This area may be wet and, hence, sensitive to pedestrian traffic.

The following cost estimates, then, are for the trail lengths identified as potentially ADA accessible. The specific project costs are a function of detailed design and construction plans and are not included.

North Bank Riverwalk

Potential ADA Trail Segments:

- 1) Depot to U.P. railroad tracks (5 feet wide with compacted crusher fines surface, 4 inches of compacted base course and compacted subgrade, railroad tie edging)
300 linear ft. @ \$11 per linear ft. = \$ 3,300
- 2) U.P. tracts to riverfront (5 feet wide with gravel surface, railroad tie edging and steps)
100 linear feet +/- @ \$18 per linear ft. = \$ 1,800
- 3) Rail crossing at Bell Street extended (full depth omni standard rubber grade crossing, material and hardware)
24 linear ft. @ \$185 a tract ft. = \$ 4,440

Associated ADA Parking:

- 4) At Depot (2 spaces, 3000 sq. ft., asphalt with gravel base)

\$14,000

East Side City Park Trail

Potential ADA Trail Segments:

- 5) From trailhead, west towards N. 2nd Street (5 feet wide with compacted crusher fines surface, 4 inches of compacted base course and compacted subgrade, railroad tie edging) 500 linear ft +/- . @ \$11 per linear ft. = \$ 5,500

- 6) East bank of Gar Creek, from Spring Street to U.S. 64 Highway (5 feet wide with compacted crusher fines surface, 4 inches of compacted base course and compacted subgrade, railroad tie edging)

1,500 linear ft. @ \$11 per linear ft. = \$16,500

South Bank Riverwalk

Potential ADA Trail Segment:

- 7) Entire length of trail (5 feet wide with compacted crusher fines surface, 4 inches of compacted base course and compacted subgrade, railroad tie edging) 1,040 linear ft. @ \$11 per linear ft. = \$11,450

Project Financing

Several mechanisms are available for financing project construction . These include:

* General Municipal Revenues - these include property taxes, state income tax rebates, traffic fines, etc.

* General Obligation Funds - improvements initially can be paid for by borrowing money in the bond market. The debt would be

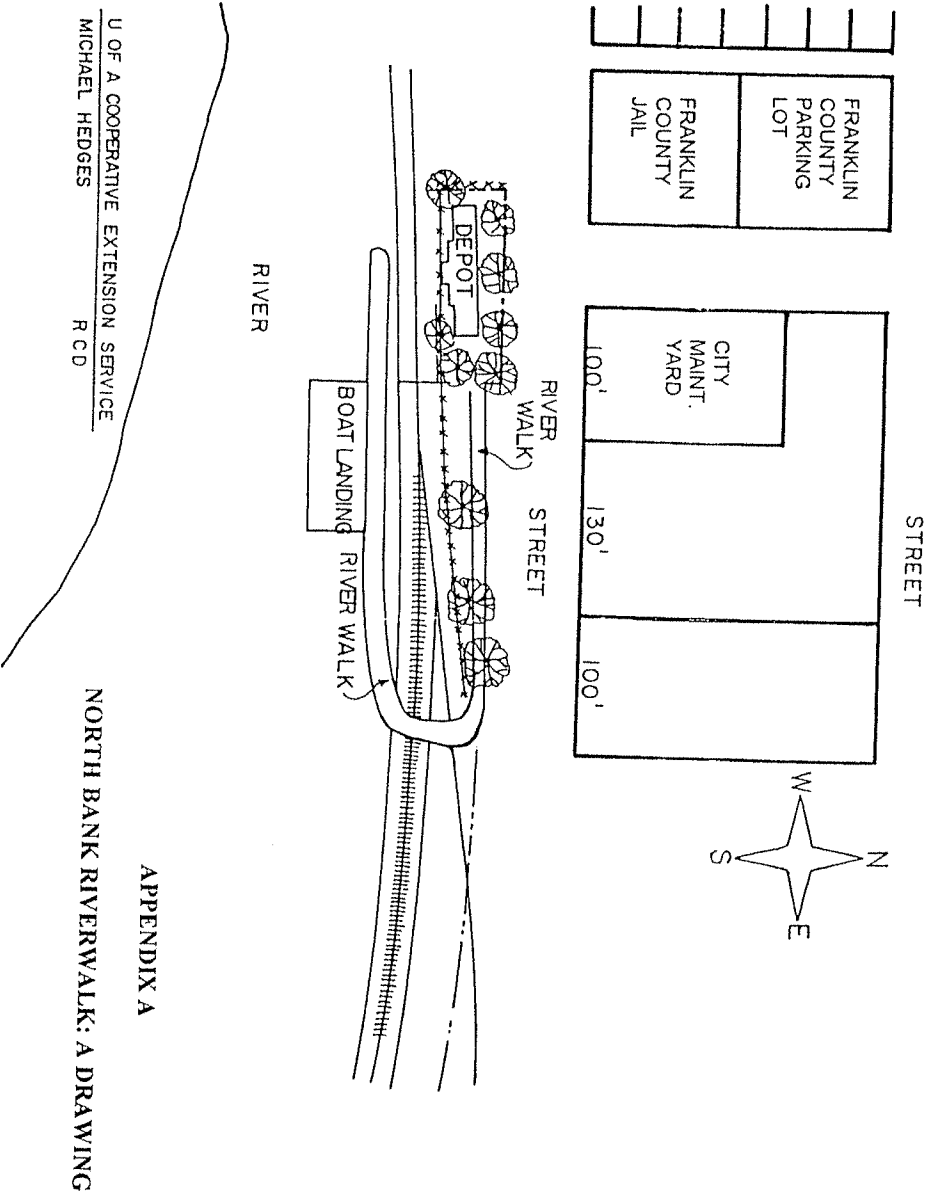
retired through general municipal revenues.

Funding assistance is also available through the annual Arkansas State Parks Outdoor Recreation "50/50" Matching Grant Program. The maximum grant amount is \$50,000. Grants are awarded through a competitive application process and on a matching basis to assist with the construction, development and improvement of local recreational projects including trail facilities, interpretative devices and trail markers, landscaping, and the support facilities needed like parking areas. Piers are eligible for Matching Grant Program assistance; however, the applicant must have first attempted to secure funding through The Sport Fish Restoration (SFR) program administered by the Arkansas Game and Fish Commission. Funds available under the SFR are based on a maximum State share of 75% and a minimum local share of 25%. "In-kind" services (labor) may be utilized for the sponsor's matching share.

Although the obligation of current funds and the allocation of additional funding for the Arkansas State Highway's Transportation Enhancement Program (TEP) are uncertain, these monies have been made available to applicants on an 80 percent federal and 20 percent local cash match basis. Eligible enhancement projects include pedestrian facilities when independent of new roadway construction or rehabilitation projects, including trail development.

APPENDICES

	Page No.
A. North Bank Riverwalk: A Drawing	23
B. A Preliminary Draft, City of Ozark Management Policies for City Leased Corps of Engineers' Lands	24
C. A Preliminary Draft, Adopt-A-Shoreline Guidelines and Policy for City Leased Corps of Engineers' Lands	29



APPENDIX B

(A Preliminary Draft)
City of Ozark
Management Policies
for
City Leased Corps of Engineers' Lands

By Order of the City of Ozark, Arkansas
(Month) 1997

The above policy was adopted by the City of Ozark, Arkansas (DATE)

City of Ozark
Management Policies
for
City Leased Corps of Engineers' Lands

PURPOSE

To provide additional recreational resources for area residents, the City of Ozark has leased certain tracts of Corps of Engineers' land bordering the Arkansas River, Gar Creek and Hicks Creek. The City, as the surface managing agency for the leased lands, is responsible for the daily operation and maintenance of these lands. The following management policies were developed by the City to control and protect the lands leased from the Corps, and to insure public use and access.

ISSUES

The management policies presented herewith, designed to protect, manage, and enhance the lands leased from the Corps of Engineers, involve the following issue areas:

- Establishment of a land use program responsive to the public's out-door recreational needs and demands;
- Provision of facilities for users of all ages and with various physical abilities;
- Establishment of land use standards and guidelines;
- Involvement of interested publics in management decisions; and
- Provision of opportunities for the public to participate in implementation activities through partnership relationships.

POLICIES

I. Management Plans

The City will establish long-range objectives and a schedule of proposed and possible projects for the lands leased from the Corps of Engineers. Beginning with the identification of issues and concerns, site specific management plans will be developed through public contacts with individuals, local officials and organizations, local and state agencies, industry, and various local groups. Plans developed may be changed, amended, or revised as issues and/or project sites dictate after appropriate public notice.

Project development will be accomplished in accordance with Corps of Engineers requirements.

II. Standards and Guidelines

A. Operational Procedures

The City shall implement a fiscally responsible, preventive maintenance program that complies with all state and federal health and public safety regulations in the operation and maintenance of lands leased from the Corps of Engineers.

The City shall submit an annual maintenance plan to the Corps which may include, but is not limited to, proposed:

- major expenditures;
- routine maintenance activities;
- new improvement plans; and if used
- a herbicide prior year usage report and a pesticide usage plan

B. Fences/Walkways and/or Steps

Leased Corps of Engineers' lands shall not be fenced or otherwise blocked to deny free public access to the shorelines. Walkways or steps may be constructed by the City with prior approval from the Corps of Engineers. Any walkways and steps constructed by the City : 1) shall not prohibit public access; 2) will be open for public use; and 3) maintained in a safe state. Any recreational plans developed by the City for lands leased from the Corps shall include provisions to mitigate encroachment on adjacent private property (i.e. screening, barrier fences, etc.).

C. Cutting, Mowing, and/or Removal of Dead Timber

Weeds and brush on lands leased from the Corps of Engineers may be cut and/or mowed by the City and by participants in the City's Adopt-A-Shoreline Program. In no case shall live trees larger than 4 inches d.b.h. (diameter at breast height) be cut without prior approval from the Corps of Engineers. The City and Adopt-A-Shoreline Program participants may remove dead timber from leased lands. The City may use chemicals approved by the U.S. Army Corps of Engineers for weed control

No other change in the configuration of the shoreline shall be permitted without prior approval from the Corps.

D. Other Non-allowable Practices

- No dumping of rubbish, trash, and/or garbage will be allowed on Corps of Engineers' lands leased by the City of Ozark. Regulatory and/or warning signs will be posted where warranted and the lands routinely monitored for maintenance control.
- No permanent structures will be built on lands leased from the Corps without prior approval from the Corps of Engineers.
- No piers or other flotation devices shall be constructed, or boats or equipment stored on the leased lands without prior approval from the Corps of Engineers.
- Private exclusive use will not be allowed. This would include private individuals mowing, brush removal, cutting or limbing of trees, placing lawn furniture, grills, swings, etc. onto the leased lands to give the appearance of private ownership.

III. City/Public Partnerships

Businesses and organizations shall be permitted to “adopt” and maintain the shoreline property leased from the Corps of Engineers. A written agreement shall be signed by the participant(s) agreeing to the terms of the City’s Adopt-A-Shoreline Program guidelines and policies pursuant of any activity upon Corps of Engineers’ lands leased by the City of Ozark. The recommended adoption period will be for one year, renewable at the request of the business or organization. The City reserves the right to deny an adoption or renewal request by a business or organization and to monitor the participants activities relative to safety and adherence to agreed upon guidelines and policy. (Date, Policy adoption)

APPENDIX C

(A Preliminary Draft)
Adopt-A- Shoreline
Guidelines and Policy for City Leased
Corps of Engineers' Lands

By Order of the City of Ozark, Arkansas
(Month) 1997

The above policy was adopted by the City of Ozark, Arkansas (DATE)

Adopt-A-Shoreline
Guidelines and Policy for City Leased
Corps of Engineers' Lands

To provide additional recreational resources for area residents, the City of Ozark has leased certain tracts of Corps of Engineers' land bordering the Arkansas River, Gar Creek and Hicks Creek. The City, as the surface managing agency for the leased lands, is responsible for the daily operation and maintenance of these lands. The following guidelines and policy were developed by the City to control and protect the lands leased from the Corps, and to insure public use and access.

Businesses and organizations shall be permitted to "adopt" and maintain the shoreline property leased from the Corps of Engineers. A written agreement shall be signed by the participant(s) agreeing to the terms of the City's guidelines and policies pursuant of any activity upon Corps of Engineers' lands leased by the City of Ozark. The recommended adoption period will be for one year, renewable at the request of the business or organization. The City reserves the right to deny an adoption or renewal request by a business or organization based on any one of the following criteria:

- 1) The effectiveness or absence of maintenance provided by the participant;
- 2) Harm to the public image of the City's "Adopt-A-Shoreline" program.

Cutting, Mowing and/or Removal of Dead Timber

Participants shall be permitted to cut and/or mow weeds and brush on lands leased from the Corps of Engineers. Participants shall also be allowed to remove dead timber from leased areas. In no case shall live trees be cut or chemicals applied for weed control without written permission of the City of Ozark.

No other change in the configuration of the shoreline shall be permitted without prior approval from the Corps and subsequent approval by the City. It is not permissible to extend or cut into the shoreline in any manner.

Other

- All maintenance activities performed by the participant will be restricted to the area assigned to the participant by the City. Eligible sites will be selected by the adopting participant and approved by the City. Sites considered by the City to be unsafe or inaccessible will not be eligible for adoption.

Each participating business or organization will designate a representative (contact person) who will be responsible for:

- 1) City notification and scheduling of group clean-up activities; 2) appraising their group of City guidelines and policies;
- 3) providing for and monitoring the safe conduct of group members; and 4) arranging the removal and proper disposal of all trash and rubbish collected.

Persons under the age of ---- will not be permitted to participate in the "Adopt-A-Shoreline" program. All persons between the ages of --- and ---- must be accompanied by at least one adult per 5 persons under the age of -----.

"Adopted" areas shall be maintained in a safe state. Participant activities shall not prohibit public use and access to the assigned area.

Participants will not use the "Adopt-A-Shoreline" program to promote self recognition or causes.

The City reserves the right to 1) deny the "adoption" of more than one project site per business or organization, and 2) monitor the participants activities relative to safety and adherence to stated guidelines and policy.

Sources: Policies on Land Use Around Arkansas Game and Fish Commission Lakes, May 1990, Arkansas State Highway and Transportation Department Adopt-A-Highway Program Guidelines, Policy Statement, and Agreement, July, 1996.

Adopt-A-Shoreline
Letter of Agreement

Adopting Organization _____
Street or Mailing Address _____
City _____
Property Location _____

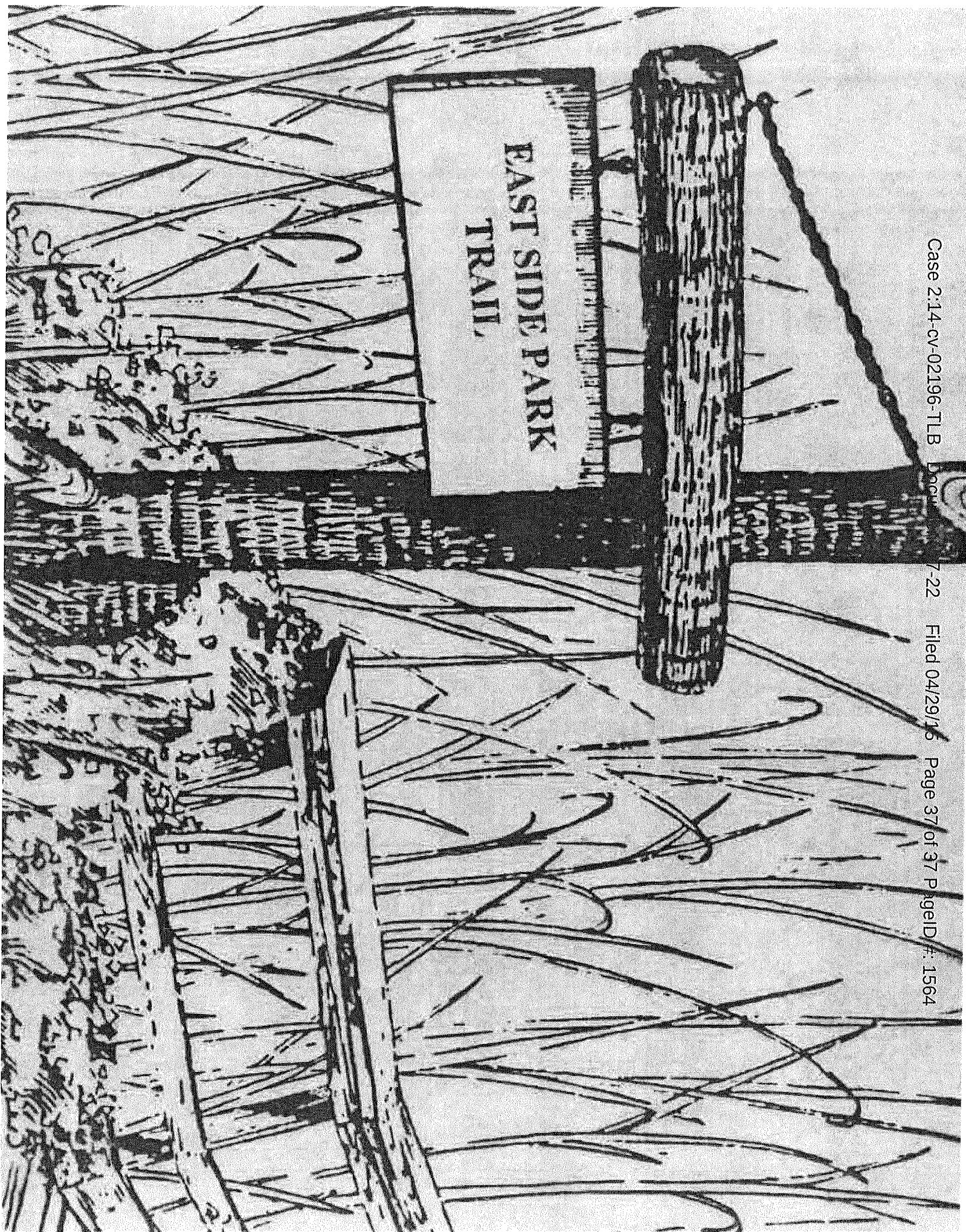
The undersigned hereto mutually agrees to volunteer to maintain the property described above within the guidelines and policies defined by the City of Ozark at least _____ times annually for one (1) year beginning _____, 199__ and ending _____, 199__.

In Witness whereof, the parties hereto have executed this Letter of Agreement on this _____ day of _____, 199__.

Mayor, City of Ozark

Authorized Signature

Contact Person: _____
Address: _____
Telephone #: _____



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

ARKANSAS STATE HIGHWAY COMMISSION PLAINTIFF

v. CASE No. 06-2010

UNION PACIFIC RAILROAD COMPANY;
6.57 ACRES, MORE OR LESS, OF CERTAIN
LANDS IN SEBASTIAN COUNTY, ARKANSAS;
AND ANY PERSONS OR ENTITIES CLAIMING
AN INTEREST THEREIN

DEFENDANTS

INTERVENOR

MEMORANDUM OPINION & ORDER

Before the Court are Plaintiff's Motion to Remand (Doc.

8) and Brief in Support (Doc. 9); Defendant's Response to Plaintiff's Motion to Remand (Doc. 10); and Defendant's Motion to Strike Declaration of Taking (Doc. 1-4). Plaintiff filed in State Court to condemn certain lands owned by Defendant, and Defendant removed the case to this Court. Plaintiff now argues this Court does not have jurisdiction because the Interstate Commerce Commission Termination Act ("ICTTA") does not preempt state law under these circumstances and further, pursuant to the Younger doctrine, this Court must abstain in this matter. For the reasons stated herein, Plaintiff's Motion to Remand is DENIED and the Defendant's Motion to Strike Declaration of Taking is GRANTED.

A. Background

On December 20, 2005, Plaintiff initiated this action in

the Circuit Court of Sebastian County asserting its right under the power of eminent domain and the police power pursuant to the authority and provisions of Ark. Act 419 of 1953, codified at Ark. Code Ann. §§ 27-67-301 to 321, to condemn land for highway system improvements. Plaintiff also requested temporary and permanent easements and an order granting immediate possession of the lands upon a Declaration of Taking. (Doc. 1-2).

The Defendant removed the case, pursuant to 28 U.S.C. § 1441, claiming this Court has original federal question jurisdiction of the action, pursuant to 28 U.S.C. § 1331, because Plaintiff's claims arise under the Constitution and laws of the United States. (Doc. 1-1). The Defendant also filed a Motion to Strike the Declaration of Taking alleging that the state court lacked jurisdiction to grant the order. The Defendant contends the property at issue includes railroad tracks used for railroad transportation and the Surface Transportation Board has exclusive jurisdiction over transportation by rail carriers, pursuant to 49 U.S.C. § 10501(b), and the ICCTA, 49 U.S.C. § 10101, which preempts all state efforts to regulate rail transportation. (Doc. 1-4). On March 10, 2006,¹ this Court granted Fort Smith Railroad

¹ The case was stayed upon request of the parties on March 23, 2006, until it was lifted on October 30, 2006, while the parties attempted to resolve the issues.

Company's Motion to Intervene in this case.

B. Standard of Review

A defendant may remove a state law claim to federal court when the federal court would have had original jurisdiction if the suit had been originally filed in federal court. 28 U.S.C. § 1441 (b); 28 U.S.C. § 1331. A case arises under federal law, for purposes of § 1331, when it is apparent from the face of the complaint, either that the cause of action was created by federal law or, if the claim is based upon state law, a substantial and disputed question of federal law is a necessary element of the state cause of action. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

Removal based on federal question jurisdiction is usually governed by the "well-pleaded complaint" rule. *Crispin v. May Dept. Stores Co.*, 218 F.3d 919 (8th Cir. 2000). This rule provides that federal jurisdiction may be invoked "only where a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987).

The "complete preemption" doctrine applies when "the preemptive force of certain federal statutes is deemed so 'extraordinary' as to convert complaints purportedly based on the preempted state law into complaints stating federal law claims from their inception." *Crispin*, 218 F.3d at 922. The

presence of a single federal claim gives the defendant the right to remove the entire case to federal court. *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996).

C. Discussion

Plaintiff argues the ICCTA does not preempt state law in the area of condemnation for the purpose of construction and improvements of a highway system. Defendant contends this Court has jurisdiction pursuant to the Commerce Clause, which was unchallenged by Plaintiff, and pursuant to the ICCTA wherein Congress expressly preempted state law. Defendant contends when Congress created ICCTA it abolished the Interstate Commerce Commission and replaced it with the Surface Transportation Board ("STB"). Plaintiff also argues the Court should abstain under the *Younger* doctrine.

In 1995 Congress enacted the ICCTA and included a "broadly worded preemption provision." *Iowa, Chicago, & Eastern R.R. Corp. v. Washington County*, 384 F.3d 557 (8th Cir. 2004). Plaintiff argues the Iowa case is on point as ICCTA fails to address the issue of highway safety and highway improvement. Defendant contends that argument is misplaced because in Iowa, the County was requesting a replacement of four bridges because of highway safety concerns which the County had proven to exist. *Id.* Defendant asserts the Eighth Circuit Court of Appeals recently upheld a determination by

the STB that a city's proposed condemnation of a railroad right of way was preempted by the ICCTA. *City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005).

The Court finds Iowa distinguishable from the case at hand because Iowa did not address condemnation but rather centered on highway safety. *Iowa*, 384 F.3d at 558. The issue was replacing existing bridges that were unsafe for crossing. *Id.* The Court noted it was the Federal Railroad Safety Act--not the ICCTA--that allowed for state regulation in cases involving safety. *Id.* at 560. The Federal Railroad Safety Act is not implicated since highway safety is not the issue in this case, and the *City of Lincoln* analysis is applicable.

In *City of Lincoln*, the Eighth Circuit made it clear that a taking which would prevent or unduly interfere with railroad operations and interstate commerce would be preempted by ICCTA. *City of Lincoln*, 414 F.3d at 860. The Court finds the ICCTA controls and preempts state law because the case involves highway construction and not highway safety.

Plaintiff also argues this Court should abstain under *Younger v. Harris*, 401 U.S. 37 (1971), from exercising jurisdiction over this action. Defendant contends comity is not undermined and this Court has an obligation to exercise jurisdiction given to it. The *Younger* abstention doctrine has a three-part test which must be satisfied for a case to merit

abstention: (1) whether the state proceedings constitute an ongoing state judicial proceeding; (2) whether the proceedings implicate important state interests; and (3) whether there is adequate opportunity in the state proceedings to raise constitutional challenges. *Younger*, 401 U.S. at 39.

Abstention is an extraordinary and narrow exception to the "virtually unflagging obligation" of federal courts to exercise the jurisdiction given them. *In re Burns & Wilcox, Ltd.* (8th Cir. 1995). In general, the *Younger* abstention doctrine "directs federal courts to abstain from granting injunctive or declaratory relief that would interfere with pending judicial proceedings." *Night Clubs, Inc. v. City of Fort Smith, Ark.* (8th Cir. 1998). Plaintiff argues that state judicial proceedings are ongoing because Plaintiff deposited the estimated amount of just compensation with the State Court and an Order of Possession was entered by the State Court. There are no ongoing judicial proceedings that require abstention in this case. The ICCTA clearly controls and the case was properly removed by the Defendant to this Court.

Additionally, Plaintiff filed a Declaration of Taking with the State Court on December 20, 2005, setting out the specific properties to be condemned and asking the State Court to issue an order effectuating the Declaration. Because the State Court does not have jurisdiction over this matter, the

Defendant's Motion to Strike Declaration of Taking should be granted.

D. Conclusion

Accordingly, Plaintiff's Motion to Remand (Doc. 8) is DENIED, and the Defendant's Motion to Strike Declaration of Taking (Doc. 1-4) is GRANTED.

IT IS SO ORDERED this 27th day of March, 2007.

/s/ Robert T. Dawson
Robert T. Dawson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION

ARKANSAS STATE HIGHWAY COMMISSION PLAINTIFF

vs. Civil No. 6:09-cv-06033

ARKANSAS MIDLAND RAILROAD COMPANY, INC.,
A DELAWARE CORPORATION, *et al.* DEFENDANT

**REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

On April 16, 2009, Defendant Arkansas Midland Railroad Co., Inc. ("AMR") filed a Motion To Strike and Vacate Order of Possession. (Doc. No. 4).¹ On April 16, 2009, Defendant Union Pacific Railroad Company ("UP") filed a Motion to Strike Declaration of Taking and Motion to Set Aside Order of Possession. (Doc. No. 5). On May 5, 2009, Plaintiff filed a response and brief to these motions. (Doc. Nos. 13, 14). These motions were referred to this Court by the Honorable Robert T. Dawson pursuant to 28 U.S.C. § 636(b)(1). (Doc. No. 11). On May 18, 2009, the Court conducted a hearing on these motions. This matter is now ready for decision.

I. Procedural Background

Plaintiff filed a complaint in the Circuit Court of Hot Spring County, Arkansas, requesting, through the power of eminent domain and the authority and provisions of Ark. Act 419 of 1953, codified at Ark. Code Ann. §§ 27-67-301 to 321, to condemn land for highway system improvements.² Plaintiff also requested temporary and permanent easements and an order granting

¹ The docket numbers for this case are referenced by the designation "Doc. No."

² *Arkansas State Hwy Commission v. Arkansas Midland Railroad Co., et al.*, Cause No. CV-2009-65-2.

immediate possession of the lands through a Declaration of Taking. (Doc. No. 2). The property Plaintiff seeks to condemn includes property used by Defendants for their railroad operations. On March 26, 2009, the Arkansas state court entered an Order of Possession granting Plaintiff immediate possession of Defendants' property which is used for their railroad operations.

Thereafter, Defendants removed this action to this Court pursuant to 28 U.S.C. § 1441, alleging federal question jurisdiction, pursuant to 28 U.S.C. § 1331 (issues arising under the Commerce Clause and the Interstate Commerce Commission Termination Act ("ICCTA")). The Defendants contend the property at issue includes railroad tracks used for railroad transportation and that the Surface Transportation Board ("STB") has exclusive jurisdiction over transportation by rail carriers in the United States, pursuant to the ICCTA, 49 U.S.C. § 10501(b), and 49 U.S.C. § 10101. Defendants further contend the ICCTA preempts all state action regulating rail transportation. (Doc. No. 1).

2. Factual Background

As stated above, Plaintiff seeks to acquire an interest, by way of a permanent construction easement, in the subject property located near Malvern, Arkansas. This property includes railroad tracks operated by the Defendants. Specifically, Plaintiff seeks to establish an "at grade" railroad crossing in an area where the AMR and UP conduct interchange operations.³ There is currently no crossing located in this area of track and Plaintiff is constructing a new road extension as part of the Hwy. 270 West Bypass Project, which will include the crossing at issue here.

Charles Lagan, Vice president and General Manager of AMR testified at the hearing.

³An "at grade" crossing is a crossing where the roadway and railroad are at the same level. Typically vehicles traveling on a roadway with an "at grade" crossing must stop and wait when a train is traveling on the railroad crossing the "at grade" crossing. Plaintiff's other option in this instance would be to construct an overpass or "grade separation" crossing, at significantly higher cost, to allow vehicle traffic to pass over the railroad.

According, to Mr. Laggan, AMR operates a freight rail service from Malvern, Arkansas to Mountain Pine, Arkansas. AMR's railroad line connects with the UP railroad line at a Malvern, Arkansas, interchange facility. The interchange facility is used to switch unloaded UP trains to AMR operation for the purpose of taking the unloaded train to a Martin-Marietta Quarry for loading. The fully loaded trains are then taken back to the interchange facility where operation control is returned to UP.

This interchange process occurs on an approximately two mile stretch of track. The typical length of train involved in this process is 95 cars or approximately one mile and can be longer.⁴ As part of the interchange process, several federally mandated procedures involving safety must be performed before the train can be moved. According to Mr. Laggan this process takes a minimum of one hour and can take up to four hours depending on schedules and crew availability. The parties agree that Arkansas law prohibits a train from blocking a highway railroad crossing for more than ten minutes. See A.C.A. 23-12-1007(b).

According to Mr. Laggan's testimony, based on the location of Plaintiff's proposed crossing, Defendant's will not be able comply with federally mandated safety procedures without violating Arkansas state law regarding the blocking of railroad crossings if an "at grade" crossing is established at the proposed location. Mr. Laggan also indicated there was no other location on AMR's rail line where interchange operations can occur other than the current location. It is the opinion of Mr. Laggan that AMR's operations, and consequently those of UP, will be adversely impacted by the construction of Plaintiff's proposed crossing.

⁴Mr. Laggan indicated the defendants plan to increase the typical size for the trains at issue from 95 to 135 cars in the near future.

3. Removal to Federal Court

This Court previously set out the applicable law regarding removal of an action from state court and the doctrine of preemption in a case similar to this one. *See Arkansas State Highway Commission v. Union Pacific Railroad Co.*, Cause No. 2:06-CV-02010 (W.D. Arkansas 2006)(Doc. 21).

A defendant may remove a state law claim to federal court when the federal court would have had original jurisdiction if the suit had been originally filed in federal court. 28 U.S.C. § 1441 (b); 28 U.S.C. § 1331. A case arises under federal law, for purposes of § 1331, when it is apparent from the face of the complaint, either that the cause of action was created by federal law or, if the claim is based upon state law, a substantial and disputed question of federal law is a necessary element of the state cause of action. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987). Removal based on federal question jurisdiction is usually governed by the “well-pleaded complaint” rule. *Crispin v. May Dept. Stores Co.*, 218 F.3d 919 (8th Cir. 2000). This rule provides that federal jurisdiction may be invoked “only where a federal question is presented on the face of the Plaintiff’s properly pleaded complaint.” *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987). The “complete preemption” doctrine applies when “the preemptive force of certain federal statutes is deemed so ‘extraordinary’ as to convert complaints purportedly based on the preempted state law into complaints stating federal law claims from their inception.” *Crispin*, 218 F.3d at 922. The presence of a single federal claim gives the defendant the right to remove the entire case to federal court. *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996).

Id. Further, the Plaintiff has not objected to the removal of this action to this court. Removal was appropriate in this case.

4. Discussion

a. Preemption: In 1995 Congress enacted the ICCTA and included a “broadly worded preemption provision.” *Iowa, Chicago, & Eastern R.R. Corp. v. Washington County*, 384 F.3d 557 (8th Cir. 2004)(Court found no preemption as issues of public safety were paramount in the State action at issue). Subsection 10501(b) of the ICCTA not only gives the STB exclusive jurisdiction over rail transportation, but also contains an express preemption provision. It provides, in full, as

follows:

(b) The jurisdiction of the [STB] over--

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

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State is exclusive. *Except as otherwise provided in this part, the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.* (emphasis added)

The Court in *Iowa* held that a state statute was not preempted by the ICCTA. Plaintiff

argues the *Iowa* case controls in the instant situation. The Defendants contend that reliance on *Iowa* is misplaced because of the factual differences in the instant case. In *Iowa*, the County requested replacement of four bridges because of highway safety concerns, which the County established regarding the four bridges. *Id.* In the instant case Defendants point out there is no allegation or proof of a public safety concern. Further, the Defendants assert the Eighth Circuit Court of Appeals has upheld a determination by the STB that a city's proposed condemnation of a railroad right of way was preempted by the ICCTA. *See City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005).

Just as it did in *Arkansas State Highway Commission*, Cause No. 2:06-CV-2010, this Court should distinguish *Iowa* from the instant case because the decision in *Iowa* did not address the state's right of condemnation but rather centered on the issue of highway safety. *Iowa*, 384 F.3d at 558. The issue in *Iowa* was replacing four existing bridges that the state proved were unsafe for crossing. *Id.* Here, the Plaintiff seeks to condemn railroad property to "provide for adequate right of way and highway facilities for the travel needs of the public." (Doc. No. 1-2, Declaration of Taking). The

Court in *Iowa* noted it was the Federal Railroad Safety Act—not the ICCTA—that allowed for state regulation in cases involving safety. *Id.* at 560.

The Federal Railroad Safety Act is not implicated in this matter since highway safety is not the issue in this case. Plaintiff has shown no evidence of any legitimate safety concern involved in this condemnation case.⁹ Plaintiff's stated purpose for this condemnation does not refer to any safety issue at all. Plaintiff makes no mention of safety issues in the Declaration of Taking or the Complaint. The Plaintiff did not present any evidence at the hearing regarding the issue of highway safety in construction of this proposed crossing. (Doc. No. 1-2). In short this is not a case which involves an issue of highway safety.

It is clear that a taking which would prevent or unduly interfere with railroad operations and interstate commerce is preempted by ICCTA. *See City of Lincoln*, 414 F.3d at 860. The Arkansas Supreme Court has recently held that attempts by Plaintiff to reopen a private crossing were preempted by the ICCTA. *See Anderson v. BNSF Ry. Co.*, 375 Ark. 466, ___ S.W.3d ___, (2009). Plaintiff argues the *Anderson* case is inapplicable here because *Anderson* involved a private crossing and this action involves a public crossing. Plaintiff's argument lacks persuasive force, as there is nothing in *Anderson* which can be read as limiting that holding to matters involving private crossings.

In this case the ICCTA controls and preempts state law because this case involves highway construction and not highway safety.⁶ The evidence shows that the construction of the proposed

Plaintiff attempted to raise the issue of safety at the hearing on the instant motions. However, the issue of safety was raised only as a general duty of the Plaintiff to consider safety in all decisions regarding the exercise of its authority over the highway system in the State of Arkansas. There were no specific safety issues raised in regard to the proposed "at grade" crossing in this matter.

Plaintiff's Complaint actually states the proposed condemnation is for "highway purposes" to allow the Plaintiff to construct and maintain highway facilities in Hot Spring County, Arkansas.

crossing would adversely impact railroad operations. Further, the only evidence presented in this case unequivocally shows that railroad operations would be burdened if the proposed condemnation were allowed to proceed.

The State regulatory scheme relied on by Plaintiff in this matter has been preempted by the ICCTA.

b. Abstention: Plaintiff urges this Court to abstain from exercising jurisdiction in this case

pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). Defendant contends the court should not exercise its discretion and should not abstain in this case. Generally, the Court should consider three factors the issue of abstention is raised: (1) whether the state proceedings constitute an ongoing state judicial proceeding; (2) whether the proceedings implicate important state interests; and (3) whether there is adequate opportunity in the state proceedings to raise constitutional challenges. *Younger*, 401 U.S. at 39.

As Defendants note in their briefing, Federal Courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976). The doctrine of abstention "directs federal courts to abstain from granting injunctive or declaratory relief that would interfere with pending judicial proceedings." *Night Clubs, Inc. v. City of Fort Smith, Ark.*, 163 F. 3d 475 (8th Cir. 1998). Plaintiff make the same argument for abstention here that was made in *Arkansas State Highway Commission*, Cause No. 2:06-CV-2010. That argument is as unavailing now as it was in *Arkansas State Highway Commission*. Judge Dawson held in that case:

Plaintiff argues that state judicial proceedings are ongoing because Plaintiff deposited the estimated amount of just compensation with the State Court and an Order of Possession was entered by the State Court. There are no ongoing judicial proceedings that require abstention in this case. *The ICCTA clearly controls and the case was properly removed by the Defendants to this Court.*

Additionally, Plaintiff filed a Declaration of Taking with the State Court on December 20, 2005, setting out the specific properties to be condemned and asking the State Court to issue an order effectuating the Declaration. *Because the State Court does not have jurisdiction over this matter, the Defendant's Motion To Strike Declaration of Taking should be granted.* (emphasis added)

Abstention is applicable where the relief sought would interfere with a pending state matter in a way that offends principles of comity and federalism. This is not a case where only state or local issues are raised. In fact this action raises significant federal issues of commerce and is subject to a comprehensive and preemptive federal regulatory scheme. For the foregoing reasons abstention is not appropriate here.⁷

4. Conclusion

Accordingly, the undersigned recommends, Defendant's AMR's Motion To Strike and Vacate Order of Possession (Doc. No. 4) and Defendant's UP's Motion to Strike Declaration of Taking and Motion to Set Aside Order of Possession (Doc. No. 5) be **GRANTED**.

The parties have ten (10) days from receipt of this Report and Recommendation in which to file written objections pursuant to 28 U.S.C. § 636(b)(1). The failure to file timely objections may result in waiver of the right to appeal questions of fact. The parties are reminded that objections must be both timely and specific to trigger *de novo* review by the district court. *See Thompson v. Nix*, 897 F.2d 356, 357 (8th Cir. 1990).

ENTERED this 26th day of May, 2009.

/s/ Barry A. Bryant
HON. BARRY A. BRYANT
U.S. MAGISTRATE JUDGE

⁷Based on these findings, I do not find it necessary to reach to other point raised by Defendant UP that Plaintiff's actions violate the dormant commerce clause.

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

CITY OF OZARK, a municipal corporation
Plaintiff,

vs.
UNION PACIFIC RAILROAD COMPANY,
Defendant.

(
)
(
)
)
)
)
)
)
)

CIVIL ACTION NO: 2:14-cv-02196-TLB

**UNION PACIFIC RAILROAD COMPANY'S
MOTION FOR SUMMARY JUDGMENT.**

For its Motion for Summary Judgment, by and through its attorneys, Friday, Eldredge & Clark, LLP, Union Pacific Railroad Company ("Union Pacific") states:

1. The City of Ozark, Arkansas has brought this claim against Union Pacific requesting damages for conversion, that a former crossing be re-installed, that the former crossing be

declared a public crossing, and for condemnation.

2. The Complaint should be dismissed for the following reasons: (1) the claims are preempted by federal law; (2) because the City has waited 13 years after the removal of the crossing to file this lawsuit, the City is barred by the doctrine of laches from now bringing these claims; (3) the City's request that Union Pacific remove the crossing constitutes a waiver of any claim by the City; (4) the City is estopped from now requesting that Union Pacific re-install the crossing; and (5) the condemnation action should be dismissed because the City lacks the authority to condemn the property at issue.

authority to condemn the property at issue.

3. Union Pacific adopts and incorporates herein its Memorandum of Law in Support of this Motion, which is filed contemporaneously herewith.

4. Union Pacific adopts and incorporates herein the following attached exhibits:

1. McNutt Deposition
2. Huston Affidavit 1
3. Key Deposition
4. McDaniel Deposition
5. Sneath Deposition
6. Canady Deposition
7. Trotter Deposition
8. Milam Deposition
9. K. Smith Deposition
10. Rule 30(b)(6) Notice and Response
11. Rinker Affidavit
12. Brooks Deposition
13. Ruck Deposition
14. Barr Affidavit
15. Chart of Crossing Use Testimony
16. Timmerman Deposition
17. Felkins Affidavit
18. Gilmer Deposition
19. Edgin Deposition
20. Corps Letter
21. Jones Deposition
22. Trail Concept
23. Case of *Arkansas State Highway Comm'n v. UPRR*, Case No. 06-2010 (W.D. Ark. 2007)
24. Case of *Arkansas State Highway Comm'n v. Arkansas Midland Railroad Company*, 6:09-cv-06033 (E.D. Ark. 2009)
25. Huston Affidavit 2
26. Wolf Affidavit
27. Case of *City of Siloam Springs, Ark. v. Kan. City S. Ry. Co.*, 12-5140 (W.D. Ark. Sept. 10, 2012)
28. Case of *City of North Little Rock v. Union Pacific Railroad Company*, 4:10cv01689 (E.D. Ark. April 21, 2011)
29. Kifer Affidavit
30. FRA Report
31. Sneath Letter
32. Anderson Deposition
33. R. Johnson Deposition
34. Mason Deposition
35. Michael Helmer Deposition
36. Alston Deposition
37. Stacy Deposition
38. T. Johnson Deposition
39. D. Johnson Deposition
40. Reeves Deposition
41. Barbara Bearden Deposition

- 42. Pickartz Deposition
- 43. J. Bearden Deposition
- 44. Hill Deposition
- 45. Maxey Helmer Deposition
- 46. Allred Deposition
- 47. Randolph Deposition
- 48. Bill Bearden Deposition
- 49. M. Chrisman Deposition
- 50. D. Whitson Deposition
- 51. Brown Deposition
- 52. Wilson Deposition
- 53. E. Whitson Deposition
- 54. Turner Deposition
- 55. R. Chrisman Deposition
- 56. Joe Powell Deposition
- 57. P. Smith Deposition
- 58. Janet Powell Deposition
- 59. Mann Deposition
- 60. Watson Deposition
- 61. G. McClellan Deposition
- 62. Birchler Deposition
- 63. Outlaw Deposition
- 64. R. McClellan Deposition
- 65. Brockett Deposition
- 66. Bond Deposition
- 67. Brooks Deposition
- 68. M. Post Deposition
- 69. A. Post Deposition

WHEREFORE, premises considered, Union Pacific Railroad Company respectfully requests that the Complaint be dismissed in full, for its attorneys' fees and costs, and for all other relief to which it is entitled.

Respectfully submitted,

Scott H. Tucker, AR 87176
Joseph P. McKay, AR 99006
Jamie Huffman Jones, AR 2003125
Friday, Eldredge & Clark, LLP
400 West Capitol Avenue
Suite 2000
Little Rock, Arkansas 72201-3522
Telephone: 501-370-1430
Facsimile: 501-244-5340
tucker@fridayfirm.com
jmckay@fridayfirm.com
jjones@fridayfirm.com
*Attorneys for Defendant, Union Pacific
Railroad Company*

By: /s/ Jamie Huffman Jones
Jamie Huffman Jones

CERTIFICATE OF SERVICE

I, Jamie Huffman Jones, hereby certify that the foregoing pleading was filed with the Clerk of Court using the CM/ECF Filing System on this 29th day of April, 2015, and said Clerk shall serve an electronic copy of same upon the following counsel of record:

Christopher D. Brockett
Sayre & Brockett
401 West Commercial Street
Ozark, AR 72949
cbrockett@bslawarkansas.com

/s/ Jamie Huffman Jones
Jamie Huffman Jones