

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

|                                        |   |                                    |
|----------------------------------------|---|------------------------------------|
| CITY OF OZARK, a municipal corporation | ) |                                    |
|                                        | ) |                                    |
| Plaintiff,                             | ) |                                    |
|                                        | ) |                                    |
| vs.                                    | ) | CIVIL ACTION NO: 2:14-cv-02196-TLB |
|                                        | ) |                                    |
| UNION PACIFIC RAILROAD COMPANY,        | ) |                                    |
|                                        | ) |                                    |
| Defendant.                             | ) |                                    |
|                                        | ) |                                    |

**UNION PACIFIC RAILROAD COMPANY’S MEMORANDUM OF LAW IN SUPPORT  
OF ITS MOTION FOR SUMMARY JUDGMENT.**

*Q: As far as you were concerned, did the mayor have the authority to go to the railroad and say, remove the crossing, without a formal vote being taken?*

*A: Well, I don’t think any of us questioned it. We thought, well, it’s just something—you know, it’s no use to anybody, just might as well take it out---*

**Current Mayor and Former Council Member T.R. McNutt, 84:13—20.**

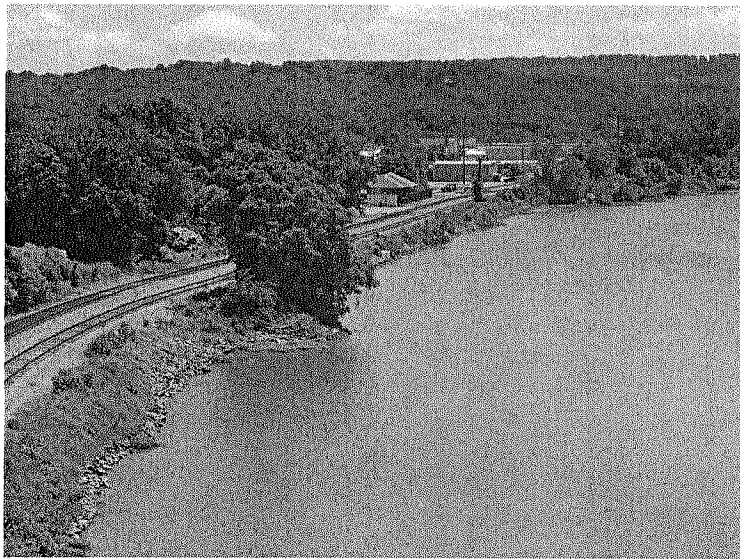
**I. INTRODUCTION.**

The City of Ozark’s (“City”) own Rule 30(b)(6) designee and current mayor admits that the Ozark City Council (“Council”) not only knew that its mayor requested Union Pacific to remove the grade crossing at issue, but also that no council member objected to the removal. (McNutt Dep., 84:13—20, attached to the Motion as Exhibit 1). The City asks that the Court ignore these undisputed facts and instead order Union Pacific to re-install the crossing in downtown Ozark. The Court should reject the City’s attempts to repudiate its own actions, and grant summary judgment in favor of Union Pacific on the basis of federal preemption because the proposed crossing would unreasonably interfere with railroad operations and pose undue

safety risks. The Court should further grant summary judgment based on the doctrines of laches, estoppel, and waiver. In addition, the prior public use doctrine precludes the City's condemnation.

## II. FACTUAL BACKGROUND.

The Arkansas River ("the river") winds its way adjacent to downtown Ozark, Arkansas, as illustrated in the following photograph:



On the south side of the river, there is a recreational vehicle park. On the north side of the river (illustrated above), also winding its way between the river and downtown Ozark, is a Union Pacific mainline track, and two side tracks that are commonly referred to as house tracks, which are often used to set out cars. (B. Huston Aff. 1, ¶3, attached to the Motion for Summary Judgment as Exhibit 2). In addition, between the mainline track and the river is a side track that is used as a storage track and for train meets, which allows one train to move from the mainline to this track so that another train can pass on the mainline. (*Id.* at ¶4, 6). The side track is the longest storage track on the Van Buren subdivision, which runs between Little Rock and Van Buren. *Id.*

At this location, just east of a railroad depot donated to the City by Union Pacific and across the street from the current post office, the City seeks the re-installation of a former crossing. (Key Dep., 11:22-24, attached to the Motion as Exhibit 3).

**The Crossing.** Prior to approximately 2001, an at-grade crossing existed in downtown Ozark at this approximate location. The crossing consisted of asphalt planks, or slabs, that went across the tracks. (McNutt Dep., 60:15.) It was only wide enough for one car to go across. (McNutt Dep., 62:25; McDaniel Dep., 19:9, attached to the Motion as Exhibit 4). It did not have flashing lights or gates. (Sneath Dep., 78:11, attached to the Motion as Exhibit 5).

**The Road.**<sup>1</sup> The City would like to call the street that traversed the tracks “Oliver Street.” Some witnesses testified that they had heard of an Oliver Street before; others testified that they had never heard it called Oliver Street.<sup>2</sup> Former Ozark Postmaster Robert Trotter testified that he was familiar with the city streets and that Oliver Street was not a recognized city address. (Trotter Dep., 15:10—21, attached to the Motion as Exhibit 7).<sup>3</sup> However, whether the road ever had a name is not a dispositive issue because:

- there is no evidence of any funds expended by the City for the purpose of maintaining an Oliver Street since at least 1975. (Attorney Brockett stipulation at Milam Dep., 11, attached to the Motion as Exhibit 8);
- there is no evidence of any ordinance accepting and recording a plat dedicating an Oliver Street for a public purpose. (Attorney Brockett stipulation at Milam Dep., 13);

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<sup>1</sup> For the sake of this pleading, Union Pacific simply refers to it as the “road” or the “crossing” without reference to “Oliver Street.”

<sup>2</sup> It is undisputed that a family named Oliver lived in a neighborhood south of the tracks pre-1970. (Canady Dep., 12:14—25, attached to the Motion as Exhibit 6).

<sup>3</sup> In fact, Ken Smith who was an owner of F&S Lumber Company in the 1950s and 1960s, had never heard of an “Oliver Street” despite the fact that he would have used the road to get to his company most every business day. (Smith Dep., 14:14—25, attached to the Motion as Exhibit 9).

- there is no documentation of any dedication of a street at this location by the City. (McNutt Dep., 114:8—12);
- there is no evidence of any recorded plat dedicating a street at this location to a public use. (McNutt Dep., 114:15; Key Dep., 128:25);
- there is no evidence of any City ordinance accepting a plat to dedicate a street at this location to public use. (McNutt Dep., 114:16—19; Key Dep., 129:4);
- there is no evidence that the City condemned a street at this location for a public use. (McNutt Dep., 114:20—23);
- there is no documentation of any dedication of a crossing at this location. (Key Dep., 128:22); and,
- there is no evidence of any City ordinance accepting a plat to dedicate a crossing at this location to public use. (Key Dep., 129:11).

Regardless of what it was called, if anything, the road that traversed the crossing was a dirt and gravel road. (McNutt Dep., 59:25; McDaniel Dep., 17:13). In fact, Current Mayor T.R. McNutt explained the condition of the road:

Mr. Brockett:

Okay. One final question and then I will let you out of here. Why would you—why do you classify this as a frivolous lawsuit?

Mayor McNutt:

Well, I just don't think it has—I just don't—talking to the older people around, and nobody ever heard of Oliver Street, and it was not a street—it was not a usable street. It was, it was not maintained by the city or anybody, and—I remember mud puddles, and people getting stuck, and branches, leaves, poles and things where they got unstuck. And it was that way for years and years when I was associated with it, when we lived down there by it. And I just never considered it a city street. And like I said a while ago, Ralph McKinney said it was a no-man's land, said the city never owned it, never maintained it.

(McNutt Dep., 159—160).<sup>4</sup>

Prior to 1970, there was a fair amount of land between the tracks and the river where there were houses and businesses. Propane tanks were situated immediately south of the tracks on Union Pacific's right-of-way. (McNutt Dep., 61:18—19). Missouri Pacific Railroad Company ("Missouri Pacific"), Union Pacific's predecessor, leased the land to a gas company. (Rinker Aff., ¶11)

Further southeast from the propane tanks, F&S Lumber Company had a building and a spur track that it also leased from Missouri Pacific. (McDaniel Dep., 17:23; Smith Dep., 12:5, 23:5—12). As a private company that sold to the U.S. Government, F&S Lumber was not open to the public and did not have its mail delivered. (Smith Dep., 19:2, 10:1—16). F&S Lumber closed in the mid-1960s. (Smith Dep., 10:1—16).

Further southeast from the lumber company, there was a barn where horses were kept. (Brooks Dep., 11:25—12:12, attached to Motion as Exhibit 12). Still further southeast, the City had a dump that was used by the public. (McNutt Dep., 61:18—19). South of the horse barn, but going away from the landfill, there was a small neighborhood consisting of several houses. (McDaniel Dep., 18:2—5).

**The "Great Flood" of the McKellen-Kerr Navigation Way.** In the late 1960s or early 1970s, the Army Corps of Engineers ("Corps") constructed the McKellen-Kerr Navigation Way, which flooded most of the land south of the Union Pacific tracks at the subject location. (McNutt Dep., 66:17—21). Everything south of the tracks, except the propane tanks, was gone. (McNutt Dep., 64:11—13 (dump), 64:25 (neighborhood); Key Dep., 47:15—18). In some places, the

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<sup>4</sup> It should be noted that Mayor McNutt has been designated as a corporate witness pursuant to a Rule 30(b)(6) notice and thus had a duty to educate himself. (Rule 30(b)(6) notice and response, attached to the Motion as Exhibit 10).

river is now 8 to 15 feet from the railroad tracks. (Ruck Dep. 125:15-21, attached to Motion as Exhibit 13; McNutt Dep., 52:21—25; Aff. of Mathew Bar, attached to Motion as Exhibit 14). In essence, the flooding destroyed any public use for the road. All that was left were the propane tanks on Union Pacific's right-of-way. However, that lease was ultimately terminated by Cornerstone Propane effective October 22, 1998. (Rinker Aff., ¶4). And by August 19, 1998, the propane tanks had been removed from the premises. (*Id.*)

By the late 1990s and the early 2000s, the crossing was rarely used if at all. The City named over 40 witnesses purportedly to testify regarding the public use of the crossing. Union Pacific has deposed all of them. The Chart attached to the Motion as Exhibit 15, is a compilation of their testimony and illustrates the rare use of the crossing after 1970 when the land was flooded. The City's Rule 30(b)(6) designee and current mayor T.R. McNutt admits that after the flood, there was no public use for the crossing or for the property south of the tracks. (McNutt Dep., 68:6).

**The City asked Union Pacific to take out the crossing.** From 1999 to 2003, Todd Timmerman was Mayor of Ozark. (Timmerman Dep., 13:25, attached to Motion as Exhibit 16). City funds were not used to maintain an "Oliver Street" during Mayor Timmerman's administration, and the crossing was rarely utilized. (Timmerman Dep., 27:24). Sometime around 2000 or 2001, Scott James, an Ozark resident, complained to Mayor Timmerman about the train horns that sounded for the crossing. (Timmerman Dep., 17:24—25; McNutt Dep, 73:7, 74:2; Felkins Aff., attached to the Motion as Exhibit 17; Gilmer Dep., 15—16, attached to the Motion as Exhibit 18). Following Mr. James' complaint, the Rule 30(b)(6) testimony by the City is that the council voted and Mayor Timmerman was given authority by the council to contact Union Pacific. (McNutt Dep., 76:22; Milam Dep., 27:19—21; Timmerman Dep., 24:20—23).

Following this Council Meeting, Mayor Timmerman spoke with Union Pacific's Manager of Industry and Public Projects, Charlie Felkins, and asked him to remove the crossing. (Timmerman Dep., 18:16—17; 19:10—13; Felkins Aff.; McNutt Dep., 83:25). Mayor Timmerman subsequently went back to the Council and showed a letter from Union Pacific whereby the railroad stated that it would take out the crossing and stop the horn blowing. (Milam Dep., 26:1—10; McNutt Dep., 80:3—16; Timmerman Dep., 22:19-25; 23:1-2; Edgin Dep. 20:1-6, attached to the Motion as Exhibit 19). None of the Council Members objected. (Milam Dep., 26:13; Timmerman Dep., 23:2; McNutt Dep., 80:3—16; Edgin Dep. 20:14—22; 21:10—13). Councilman Milam testified that he thought “we were all in agreeance [sic].” (Milam Dep., 32:25). Shortly thereafter, Union Pacific removed the crossing. (McNutt Dep., 82:4).

**Main Street Ozark and the plan to revitalize downtown Ozark.** Despite Mayor Timmerman's request to remove the crossing, the City subsequently developed plans that called for “a” crossing. The plans often had a crossing located other than where the subject crossing was located. But whether located east or west of the depot, the City made plans that would involve pedestrians crossing the railroad tracks.

The City's plan has multiple parts. First, the City had wanted to build a marina on the south side of the river. (Key Dep., 95:7—11). Recently, the Corps rejected the proposal for the marina. (Letter from the Corps, attached to the Motion as Exhibit 20).

Second, the City wants a floating dock built on the north shore, just south of the railroad tracks. (Jones Dep., 18-4—5, attached to the Motion as Exhibit 21; Key Dep., 21:7—12). For this floating dock to come to fruition, a grant has to be obtained, and the Corps must approve it. (Jones Dep., 20:11—20). Neither has occurred. (Jones Dep., 20:11—20). In fact, the plans for the floating dock are conceptual in nature only. (Ruck Dep., 124:12—14).

Third, the City has a conceptual idea for a walking trail. (Key Dep., 26:13—17). This trail would be located between the river and the railroad tracks on land owned by the Corps but leased to the City in 2001. (Key Dep., 26:13—17; Key Dep., 26:20—25). (See City of Ozark Concepts for Trail Development, Revised September 1997, attached to the Motion as Exhibit 26). It appears from looking at the concept that part of the trail would be on Union Pacific's right-of-way.

### **III. MOTION FOR SUMMARY JUDGMENT STANDARD.**

Union Pacific is entitled to summary judgment on all of the City's claims. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); see Fed. R. Civ. P. 56. In order to defeat a motion for summary judgment, the City must "make a showing sufficient to establish the existence of an element essential to [it's] case, and on which [it] will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, (1986). The City must go beyond the pleadings and come forward with specific facts showing a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The mere existence of some alleged factual dispute will not defeat a properly supported motion for summary judgment; rather, the disputed fact must be "outcome determinative" under applicable law. *Holloway v. Pigman*, 884 F.2d 365, 366 (8th Cir. 1989). A case founded on "speculation or suspicion" is not sufficient to survive a summary judgment motion. *Nat'l Bank of Commerce v. Dow Chem. Co.*, 165 F.3d 602, 610 (8th Cir. 1999). The facts in this case are undisputed and demonstrate that Union Pacific should be granted summary judgment. First, the Interstate Commerce Termination

Act (“ICCTA”) preempts the City’s lawsuit because the proposed crossing would unreasonably interfere with railroad operations and pose undue safety risks. Second, the doctrines of laches, estoppel, and waiver each apply to bar the City’s lawsuit.

**IV. ARGUMENT: SUMMARY JUDGMENT SHOULD BE GRANTED.**

- A. The proposed crossing is not an ordinary at-grade crossing. Instead, the crossing would unreasonably interfere with railroad operations and pose undue safety risks. Accordingly, the City’s action is preempted.**

Effective January 1, 1996, the ICCTA, 49 U.S.C. §10101, *et seq.*, revised railroad transportation law by abolishing the Interstate Commerce Commission and replacing it with the STB. 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). One of the purposes of the ICCTA is “to minimize the need for Federal regulatory control over the rail transportation system.” 49 U.S.C. §10101(2). Congress cautioned:

Nothing in this bill should be construed to authorize States to regulate railroads in areas where Federal regulation has been repealed by this bill . . . . The railroad carriers that comprise the railroad industry rely on a nationally uniform system of economic regulation. Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry’s ability to provide the “seamless” service that is essential to its shippers and would waken (sic, weaken) the industry’s efficiency and competitive viability.

S.Rep. 104-176. The preemptive effect of the ICCTA is a question of law for the court to decide.

*Natl’ Bank of Commerce v. Dow Chem. Co.*, 165 F.3d 602, 607 (8th Cir. 1999).

The Supreme Court has repeatedly stated that preemption is fundamentally a question of Congressional intent. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 510 (1996); *English*, 496 U.S. at 79.

Where, like here, the statute contains an express preemption provision, the preemption analysis

must focus in the first instance on the statute's plain wording because it necessarily contains the best evidence of Congress' preemptive intent. *Easterwood*, 507 U.S. at 664; *Chamber of Commerce of the U.S. v. Whitting*, 131 S.Ct. 1968, 1977, 179 L.Ed. 2d 1031 (2011). Subsection 10501(b) of the ICCTA contains a broad preemption provision and defines the jurisdiction of the Surface Transportation Board ("STB") 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). Broad preemption applies because the City's action threatens railroad transportation and the operation of a side track, switching, and mainline facilities.<sup>5</sup>

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<sup>5</sup> In discussing the ICCTA's preemption provision, House Report No. 104-311 notes that "[a]s used in [Subsection 10501(b)], 'State or Federal law' is intended to encompass all statutory, common law, and administrative remedies . . . ." H.R. Rep. No. 104-311, 104th Cong., 1<sup>st</sup> Sess. 1, 95, reprinted in 1995 U.S. Code Cong. & Ad. News 793, 807. Further, federal courts interpreting the last sentence of Subsection 10501(b), the ICCTA's preemption provision, have repeatedly observed that "[i]t is difficult to imagine a broader statement of Congress' intent to preempt State regulatory authority over railroad operations." *CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996) (quoted with approval in *Soo Line R.R. v. City of Minneapolis*, 38 F. Supp. 2d 1096, 1099 (D. Minn. 1998), and in *Norfolk S. Ry. v. City of Austell*, 1997 U.S. Dist. LEXIS 17236, at \* 15 (S.D. Ga.)); see also *Wis. Central LTD v. The City of Marshfield*, 160 F.Supp.2d 1009, 1013 (W.D.Wis. 2000) ("It is clear that the ICCTA has preempted all state efforts to regulate rail transportation.").

*i. The ICCTA expressly preempts state regulation of rail transportation.*

Union Pacific's use of the tracks on the property in question constitutes "rail transportation" within the meaning of the ICCTA preemption provision. "Transportation" is defined to include "a locomotive car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail. . . ." 49 U.S.C. § 10102(9)(A). The term "railroad" includes "a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation." 49 U.S.C. § 10102(6)(C). "Congress' intent in the [ICCTA] to preempt state and local regulation of railroad transportation has been recognized as broad and sweeping." *Union Pac. R.R. v. CTA*, 647 F.3d 675, 678 (7th Cir. 2011).

"Courts also generally recognize that eminent-domain actions that seek to take property containing active rail lines are categorically preempted by the ICCTA." *City of Girard v. Youngstown Belt Ry. Co.*, 979 N.E.2d 1273, 1282 (Ohio 2012). Thus, local authorities cannot order the railroad to remove the tracks or cease operations on the tracks. *See Wichita Terminal Association v. F.Y.G. Investments, Inc.*, 305 P.3d 13, 22 (Kan. App. 2013) ("STB has exclusive jurisdiction over the question of whether the [railroad operators] should be required to remove the north track and to construct a new track south of the existing tracks."); *Boston and Maine Corp. and Springfield Terminal R.R. Co. – Petition for Declaratory Order*, No. FD 35749, 2013 WL 3788140, at \*3 (STB Service Date: July 19, 2013) (ICCTA "plainly" preempts a local order directing the railroad to cease track operations for violating zoning laws); *Matter of Metro. Transp. Auth.*, 32 A.D.3d 943, 944 (NY. App. Div. 2006) (ICCTA preempts condemnation "effectively resulting in the forced relinquishment of the tracks and the discontinuance of any possible rail service over them"). ICCTA preemption has been applied to state eminent domain

statutes. *See City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005) (city's proposed use of eminent domain to acquire 20-foot strip of railroad right-of-way that might interfere with storing of materials moved by rail on remainder of right-of-way held preempted); *Buffalo S. R.R. v. Village of Croton-on-Hudson*, 434 F. Supp. 2d 241, 249 (S.D.N.Y. 2006) (granting injunction, on ICCTA preemption grounds, against village's commencement of eminent domain proceedings against proposed rail waste station); *Dakota, Minn. & E.R.R. Corp. v. South Dakota*, 236 F. Supp. 2d 989 (D.S.D. 2002).

For example, in *Soo Line R.R. Co. v. City of St. Paul*, 827 F.Supp.2d 1017 (D. Minn. 2010), the City sought to condemn a portion of the railroad's right of way. The district court relied on the definitions above to conclude that the proposed condemnation "falls squarely within the definition of 'transportation' . . . ." and that "[b]ecause the City's proposed condemnation seeking a permanent easement would be an act seeking to control [the railroad's] property, it is a form of regulation. . . [and] falls into the broad category of actions that are *per se* preempted under the ICCTA." *Id.* at 1021—22.

As indicated in *Soo Line*, Ozark's condemnation is an act to control Union Pacific's property and is thus regulation of rail transportation within the meaning of the ICCTA's preemption clause.

**ii. *The ICCTA expressly preempts state regulation of side tracks, switching operations, and mainline facilities.***

The City's requested relief impacts the use and operation of a side track, switching operations, and mainline facilities and is thus expressly preempted. *See Texas Central Business Lines Corp. v. City of Midlothian*, 669 F.3d 525 (5th Cir. 2012) (holding that the ICCTA preempts any local regulation that would "directly affect where rail lines could be situated, as

well as influence the distance between railroad tracks and the position of track-side equipment.”); *Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439, 443—44 (5th Cir. 2001) (“The language of the [ICCTA] could not be more precise, and it is beyond peradventure that regulation of KCS train operations, as well as the construction and operation of the KCS side tracks, is under the exclusive jurisdiction of the STB. . . .”); *Port City Prop. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1188 (10th Cir. 2008) (holding that “jurisdiction over ‘spur, industrial, team, switching or side tracks or facilities’ rests solely with the STB.”); Congressional Conference Report, H.R. Rep. No. 104-311 at 95, reprinted in 1995 U.S.C.C.A.N. 793, 807-08 (“Conforming changes made to reflect the direct and complete pre-emption of State economic regulation of railroads. The changes include extending Federal jurisdiction to matters relating to spur, industrial, team, switching or side tracks formerly reserved for State jurisdiction under former 10907.”)

This express preemption recognizes 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.” *Maynard v. CSX Transp., Inc.*, 360 F.Supp.2d 836, 842 (E.D. Ky. 2004). 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 proceed onto the mainline. *Fort Bend Cty v. The Burlington Northern & Santa Fe Ry. Co.*, 237 S.W.3d 355, 358 (Tex. App. 2007), review denied (Tex. June 6, 2008). See also *Pace v. CST Transp., Inc.*, 613 F.3d 1066, 1067-68 (11th Cir. 2010) (“The language of section 10501(b) plainly conveys Congress’s intent to preempt all state law claims pertaining to the operation or construction of a side track.”); *Smith v. CST Transp., Inc.*, 381 Fed. Appx. 885, 886 (11th Cir. 2010) (“Congress’s intent is clear

that any state law involving where to construct and how to operate a sidetrack is preempted.”). For example, where a county sought to condemn railroad property for the purpose of widening a public crossing, the condemnation was preempted because it would have interfered with the railroad’s use of a “side” track used for train meets. *Fort Bend Cty v. The Burlington Northern & Santa Fe Ry. Co.*, 237 S.W.3d 355 (Tex. App. 2007), *review denied* (Tex. June 6, 2008).

Because the City’s action negatively impacts the use of the side tracks and mainline facilities and negatively impacts switching operations, as discussed below, this lawsuit is expressly preempted. *See e.g. Ouachita R.R., Inc. v. Circuit Court of Union Cty.*, 361 Ark. 333, 343, 206 S.W.3d 811, 816 (2005) (holding that a claim for abandonment and adverse possession of the railroad’s right of way was preempted by the ICCTA because “the STB’s jurisdiction over the abandonment of tracks is exclusive and preempts any remedies available under state law.”).

Accordingly, the ICCTA *expressly* preempts the City’s action because it would adversely impact railroad transportation as well as switching and operations on both the side track and mainline facilities. The Court need not go further than this to dismiss the City’s lawsuit.

**B. The ICCTA Preempts an Action That Would Prevent or Unreasonably Interfere with Railroad Operations.**

Because the City’s proposed crossing would also unreasonably interfere with Union Pacific’s railroad operations and would pose a safety risk to Union Pacific employees, those utilizing the crossing, residents of the City, and the environment within the river, it is preempted for those reasons as well. *See 14500 Ltd. V. CSX Transp., Inc.*, 2013 U.S. Dist. LEXIS 39806 (N.D. Oh. 2013) (holding that state property law claims of adverse possession and prescriptive easement were preempted by the ICCTA); *B&S Holdings, LLC v. BNSF Ry. Co.*, 889 F.Supp.2d 1252, 1258 (E.D. Wash. 2012) (holding that state property law on adverse possession was preempted by the ICCTA); *Jie Ao and Xin Zhou, Petition for Declaratory Order*, FD 35539,

2012 STB LEXIS 206, 2012 WL 2047726 (STB June 6, 2012) (determining that the ICCTA completely preempted a state adverse possession claim); *Maumee & Western R.R. Corp. & RMW Ventures, LLC, Petition for Declaratory Order*, STB Finance Docket No. 34354, 2004 WL 395835, \*2 (March 2, 2004) (concluding that an eminent domain proceeding would be preempted if the easement prevented or unreasonably interfered with railroad operations).

The Eighth Circuit Court of Appeals applied this standard—prevents or unreasonably interferes with railroad operations—in *City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005). In that case, the city sought to condemn a portion of railroad right-of-way to use as a pedestrian and bicycle trail and to make improvements to a city drainage system. *Id.* at 858. The Eighth Circuit analyzed the railroad's evidence regarding the impact of the condemnation. This evidence included interference with the railroad's ability to get equipment to the tracks for maintenance and derailments as well as the increased safety risk to the public in the event of a derailment and during the loading of railcars. *Id.* at 859. Because the proposed condemnation would have unreasonably interfered with railroad operations, the Eighth Circuit affirmed the STB's determination that the city's action was preempted by the ICCTA. *Id.* at 861-62.

The Eastern and Western Districts of Arkansas have followed the rationale of *City of Lincoln*, holding that where a proposed action would prevent or unreasonably interfere with railroad operations, the ICCTA preempted the action. In *Arkansas State Highway Comm'n v. UPRR*, Case No. 06-2010 (W.D. Ark. 2007) attached to the Motion as Exhibit 23, Judge Dawson relied on *City of Lincoln* to strike a declaration of taking by the Arkansas Highway Department. The Highway Department had asserted its rights under eminent domain and the police power to condemn a portion of property owned by Union Pacific. *Id.* at 2. The Court found that the

property taken involved tracks used for railroad transportation and held that the ICCTA preempted the condemnation. *Id.*

In 2009, Judge Dawson again considered the effect of ICCTA preemption in *Arkansas State Highway Comm'n v. Arkansas Midland Railroad Company*, 6:09-cv-06033 (W.D. Ark. 2009) (attached to the Motion as Exhibit 24). There, the Commission filed a condemnation action in state court, which the railroads removed to federal court based on ICCTA preemption. The Commission sought land for highway improvements, including the installation of an at-grade crossing in an area where the Commission was constructing a new road extension. *Id.* at 2. The location was one where Union Pacific and the Arkansas Midland Railroad conducted interchange operations. The Arkansas Midland would take empty Union Pacific railcars to a local industry for loading, then return the loaded cars to the interchange point, whereupon Union Pacific would take them to the mainline and to various destinations. *Id.* at 3. The railroads presented evidence that the proposed crossing would be blocked up to four hours at a time so that the federally-mandated safety procedures could be performed, as is the case here. *Id.* There were no other locations that the operations could take place, as is the case here, without unreasonably interfering with already-existing operations. *Id.* (See *Huston Aff.* 2, attached to the Motion as Exhibit 25; *Wolf Aff.*, attached to the Motion as Exhibit 26). The magistrate judge concluded, and the district judge agreed, that the Commission's action was preempted because "[t]he evidence shows that the construction of the proposed crossing would adversely impact railroad operations." *Id.* at 6—7.

More recently, in 2012, Judge Hendren granted a railroad's motion to dismiss on the basis of ICCTA preemption. See *City of Siloam Springs, Ark. v. Kan. City S. Ry. Co.*, 12-5140 (W.D. Ark. Sept. 10, 2012), attached to Motion as Exhibit 27. In that case, the city sought a

permanent easement in state court for a hiking and biking trail on land running underneath a railroad bridge owned by the Kansas City Southern Railroad. *Id.* at 1. The railroad removed the action to federal court, and moved to dismiss pursuant to ICCTA preemption. *Id.* at 2. Judge Hendren noted that the condemnation was not preempted “unless the easement would ‘impede rail operations or pose undue safety risks.’” (*citing New Orleans & Gulf Coast Ry. v. Barrois*, 533 F.3d 321, 333 (5th Cir. 2008)). The bridge at issue was a timber bridge over which approximately 20 trains ran each day, traveling between 25 and 40 mph. *Id.* at 4. The railroad argued that the trail posed undue safety risks because materials from a train or the bridge might fall and hit a trail user. *Id.* The city argued that the risk could be alleviated by the construction of a corrugated roof. *Id.* at 5. In response, the railroad contended that a roof would interfere with its ability to inspect and maintain the bridge. *Id.* at 5-6. The Court held that ICCTA preemption applied, noting that the potential impact on the railroad’s ability to inspect and maintain its bridge had more than an “incidental effect” on railroad operations. *Id.* at 6. In addition, the Court held that the potential of debris falling on a trail user was an undue safety risk. *Id.* at 6—7. The Court did not require proof that someone had been hit by debris, only that there was a risk that it could occur.

The decisions from the Eastern District of Arkansas are in accord with those from the Western District of Arkansas. In *City of North Little Rock v. Union Pacific Railroad Company*, 4:10cv01689 (E.D. Ark. April 21, 2011) attached to Motion as Exhibit 28, the city sought to condemn railroad property for a pedestrian and biking trail. The Arkansas Midland and Union Pacific railroads filed motions to dismiss, arguing ICCTA preemption. The railroads presented evidence that the proposed easement would encroach upon an area used by Arkansas Midland for

transloading operations. *Id.* at 3. The railroads also submitted evidence regarding potential derailments. Judge Holmes noted:

Should a derailment occur on the team track or the Ashgrove lead, the railroad would likely need to bring large equipment onto the proposed easement. In response to evidence that the City might build a fence to separate the bicycle trail from the railroad track, Laggan testified any fence would interfere with Midland's ability to bring in large equipment needed in the rerailing process. Even the trail itself could constitute an obstacle because the necessary equipment would likely damage the trail. Laggan testified that the railroad switch itself is a high-risk area for derailments. Laggan also testified that the construction of a trail on the proposed easement would severely impact Midland's ability to conduct transloading and switching operations and to deal with derailments.

*Id.* at 3-4. "The evidence," concluded Judge Holmes, "demonstrates that the proposed easement could interfere with Midland's ability to operate its team track as well as its transloading and switching facilities and could interfere with efforts to address derailments." *Id.* at 4. Accordingly, the Court held that the ICCTA preempted the city's action, and the case was dismissed. *Id.*

As discussed below, what makes the proposed crossing at Ozark anything but ordinary is that there would be an unreasonable interference with railroad operations, and it would create undue safety risks that are not currently present. Because there are no genuine issues of material fact on these points, Union Pacific is entitled to summary judgment.

*i. The proposed crossing will unreasonably interfere with railroad operations.*

Parallel to the mainline on the northside are two side tracks that are commonly referred to as house tracks and are often used to set out cars. (Huston Aff. 1 at ¶3). In addition, parallel to the mainline track on the southside is a side track that is used as a storage track and for train meets, which allows one train to move from the mainline to this track so that another train can pass on the mainline. (*Id.* at ¶4, 6).

After Mayor Timmerman asked Union Pacific to remove the crossing, Union Pacific increased its use of the siding and the house tracks. (*See* Kifer Aff.) The increased use continues today, and re-installation of the crossing would unreasonably interfere with railroad operations as described below.

**a. Union Pacific increased its use of the facilities after the crossing was removed.**

A thirty-six year veteran of the railroad, Steve Kifer was a Manager of Operating Practices in 2000 when he began receiving complaints about train horns in Ozark and requests that the crossing be taken out. (Kifer Aff., ¶ 2, attached to the Motion as Exhibit 29). Kifer has personal knowledge of the use of the facilities in Ozark before and after the crossing was removed. (*Id.* at ¶ 3). After removal, the use increased because the capacity of the siding was increased by 600 feet. (*Id.* at ¶ 3). This 600 feet gain allowed Union Pacific to begin using the siding for train meets. (*Id.* at ¶ 3). Local trains (trains that service a local industry) could now be placed in the siding to allow other nearby sidings to be used for longer trains. (*Id.* at ¶ 3). Union Pacific also increased its storage of maintenance of way equipment (equipment used to maintain the tracks and facilities) in the siding. (*Id.* at ¶ 4). Again, this allows trains on the mainline to run more efficiently. (*Id.* at ¶ 4). Union Pacific is also able to store work trains (smaller trains that carry rock, ties, rails and the like that are used for maintaining the tracks) in the siding, which again frees up the mainline, resulting in more efficient operations. (*Id.* at ¶ 5). As Kifer explains, “with the increased footage Union Pacific changed its operations and began using the siding in ways that were not previously available.” (*Id.* at ¶ 6).

Union Pacific has continued to use the siding in the ways described by Kifer. The current Manager of Train Operations, Bill Huston, describes using the siding for train meets, storing maintenance of way equipment, and storing work trains. (Huston Aff. 2, ¶3). Further, Huston

describes using the siding for crew changes and for storing the power engine of the local crews. (*Id.* at ¶3). City witnesses admit that it is not uncommon to see equipment or trains stored on the side track at that location. (McDaniel Dep., 43:1—5; Sneath Dep., 90:10—13). (*See also* Key Dep., 131:9 (testifying that she sees cars on the side track “more than [she] would like, yes.”)).

As discussed in the next section, installing a crossing at this location would adversely impact railroad operations by a 44-118% reduction of rail line capacity, a 16% reduction in siding storage capacity, a loss of ability to conduct train meets, an increase of switching operations, an increase of labor costs, and an increase of transit times.

*ii. The interference with railroad operations.*

Gary Wolf, President of Wolf Railway Consulting, specializes in the forensic analysis of train accidents, including derailments, crossing accidents, and trespasser incidents.<sup>6</sup> Wolf has performed forensic analyses of the rail industry for over forty years and has investigated over 500 crossing and trespasser accidents. (Wolf Aff. ¶1). He has authored over 130 papers regarding train accident and vehicle dynamic analysis. (*Id.* at ¶.4). Wolf has analyzed the impact of the proposed crossing and opines:

Rail Line capacity would be significantly reduced (44-118%) on this segment of the Van Buren Sub if the Ozark siding could not be utilized by UP for train meets due to having to cut the crossing. Likewise, the Ozark siding storage capacity would be reduced roughly 16 % by having to cut the crossing 300 feet either side.<sup>7</sup>

If a train meet of over 10 minutes was to occur at the Ozark siding, the train would have to be cut at the proposed crossing. This would require roughly 1 man-hour of time to make the cut and eventually re-assemble the train. This would increase the labor

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<sup>6</sup> Wolf's curriculum vitae is attached to his affidavit as Exhibit 1.

<sup>7</sup> The Arkansas Highway and Transportation Department prohibits crossings blocked for more than ten minutes. See Rule X-1.1. See also A.C.A. § 23-12-1006.

costs for UP, and would increase the transit times of trains over the Van Buren Sub.

(*Id.* at p. 23.) Wolf has performed the analytical assessments to support his conclusions. He explained the loss of rail line capacity as follows:

I have performed an analytical assessment of rail line capacity with and without the proposed crossing. Rail line capacity is a measure of the number of trains that can pass through a given section of track in one hour. With the crossing installed, there is a very real possibility that UP would be limited in using the siding at Ozark due to the operational constraints of having to cut the crossing (as explained elsewhere in this report).

Based on a nominal train speed of 50 MPH on the Van Buren Sub (ignoring the short 45 MPH restriction through Ozark), and based on the fact that this is ABS (Absolute Block System) territory with nominal 9,000 ft. block spacing, and assuming a two block train separation, a rail line capacity calculation was performed with and without the siding at Ozark. The calculation can be found in Exhibit 9 attached hereto.

The results of this analysis show that without the siding at Ozark, the effective capacity between Alix and Poping is 1.66 trains per hour. However, with the siding in operation at Ozark, the capacity between Alix and Ozark improves to 2.4 trains per hour, an improvement of 44%. Additionally, with the siding at Ozark the capacity between Ozark and Poping improves to 3.62 trains per hour, an improvement of 118%.

From this analysis, if UP was unable to effectively utilize the siding at Ozark for train meeting and passing, it would have a significant material impact on train operating capacity of somewhere between 44% and 118%.

(*Id.* at 17—18.)

Wolf further explained the increased labor costs and transit times:

The installation of a crossing at the proposed site would force UP to separate cars (to be stored on the siding) at the crossing to allow vehicular traffic to pass over the crossing. Arkansas Statute 23-12-2007 3(b) deems it unlawful for a railroad company to obstruct a street crossing for more than ten minutes. In order to store railcars

in the siding, UP would be forced to leave a 300 foot gap on either side of the crossing.

Lost capacity on this siding would not only affect railcar storage capabilities, it would also impact the siding's ability to be used for train meets. The inability for UP to use the siding for train meets could affect scheduling and the basic movement of commodities.

A calculation was performed that shows the length of the Ozark siding track is approximately 4,300 feet from switch point to switch point. Removing roughly 250 feet from each end to cover the clear point distance, leaves approximately 3,800 feet of usable siding length. If UP was required to cut the proposed crossing 300 feet each side of the crossing, this would reduce the usable space in the siding by roughly 625 feet including the width of the crossing. This would equate to a reduction in usable siding capacity of approximately 16%, which would have a material impact on railroad operations.

If UP was required to cut the proposed crossing 300 feet on either side due to being in the siding greater than 10 minutes, it would require that a trainman walk from the lead locomotive back to the crossing, a distance of approximately 2,600 feet, or  $\frac{1}{2}$  mile. Assuming a person can walk on the ballast and slope of the ballast at a rate of nominally 2 MPH, it would require roughly 15 minutes to walk back to the crossing, approximately five minutes to perform the cut and shove to clear the crossing, and approximately five minutes to secure handbrakes. Assuming the person remains at the crossing (depending on timing of meet and dispatch priorities) it would require another 10 minutes to release handbrakes and reconnect the train, in addition to another 15 minutes to walk up to the head end of the train. Thus, the entire operation would require an additional 50 minutes of time to make a meet at the Ozark crossing. This would increase the labor cost of train operations and materially affect the efficiency of moving trains across the Van Buren Sub.

When a train is to be reconnected after standing for four or more hours, the crew members would have to perform an initial terminal brake test on the cut of cars that were not connected to the train, or subject to compressed air. In order to do an initial terminal brake test, both sides of the train must be inspected and the crew must check the piston travel. If the crew does cut the crossing, and it is less than four hours, they have to complete a set and release of the brakes. If the train is separated by 300 feet on both sides, the conductor has to be on the ground at the joint to reconnect the

train. Once the couplers come together, the conductor has to go in between the cars and lace the air hoses by putting the two glad hands together. Likewise, if trains have to be separated at the crossing, the conductor would have to set a sufficient number of hand brakes on the cut of cars that are separated. These procedures would increase the amount of labor time to move trains, have a negative material effect on train operations, and increase the risk of crew injury.

(*Id.* at 19—20.)

Manager of Train Operations Bill Huston further opined that if the proposed crossing were installed, “it is unlikely that Union Pacific could continue to use the Ozark siding for train meets, which would materially interfere with railroad operations by disrupting the flow of train movement.” (Huston Aff. 2, ¶ 2).

It is the existence and use of the siding, and the resulting interference, that is the key difference between *Franks* (and other cases relied upon by the City) and this case. *See Texas Central Business Lines Corp. v. City of Midlothian*, 669 F.3d 525 (5th Cir. 2012); *Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439, 443—44 (5th Cir. 2001); *Port City Prop. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1188 (10th Cir. 2008). And, even under a *Franks* “as-applied” preemption analysis, a crossing at this location would materially interfere with railroad operations, thereby preempting the City’s action.

For example, in *Ft. Bend County, Tx v. The Burlington Northern and Santa Fe Ry. Co.*, 237 S.W.3d 355 (Tex. App. 2007), the railroad operated a private two-lane crossing that had a mainline and a siding (a/k/a passing track), which was used for train meets. *Id.* at 358. The county sought to condemn railroad property at the crossing to make it into a public four-lane street. *Id.* The condemnation would have cut across the passing track. *Id.* The existence of this track was key to the case, as the Court explained that “here we are not considering a typical, routine crossing with a non-conflicting use.” *Id.* at 358. Instead, the Court noted that the passing

track “is an integral component in the operation of a single-track line as it enables multiple trains to use one main track by allowing trains on the same track heading in opposite directions to pass each other.” *Id.* The same is true at Ozark. The Court found that “[t]here is ample evidence in the record that placing the public crossing over the regular and passing tracks would interfere with railroad operations and cause safety hazards.” *Id.* at 359. Specifically, the Court noted that when trains are separated, there is a delay of approximately 45 minutes to reconnect them. *Id.* Further,

Other evidence showed that if the train sits unbroken for longer than four hours, a federal law is triggered specifying that a brake test must be done before moving the train. This federal brake test delays the train approximately 90 minutes, blocking the crossing during re-connection and the mandatory brake test.

*Id.* at 360. (*See also* Huston Aff. 1, ¶5 (discussing that a crossing will lead to increased brake safety inspections and switching operations). The same thing would happen at Ozark if the proposed crossing were installed. The Court held that “the condemnation has the effect of regulating Burlington [Railroad] now and in the future by affecting the speed and length of its trains.” *Id.* Further, the Court explained:

Burlington presented evidence that showed the need of an uninterrupted passing track at Booth for future operations, that the crossing interferes with current railroad operations, and that the crossing causes more federally-mandated air brake tests and has a negative economic effect on the railroad.

*Id.* The same is true in Ozark. Plus, Union Pacific would be adversely affected by the loss of storage and rail line capacity, the inability to conduct local train meets, and to stage cars (the process of loading and unloading cars). Accordingly, *Ft. Bend County* illustrates why the City’s action is preempted. *See also B&S Holdings, LLC v. BNSF Ry. Co.*, 889 F.Supp.2d 1252, 1258 (E.D. Wash. 2012) (holding that state property law on adverse possession was preempted by the

ICCTA in part because it would have divested the railroad of property it utilizes to conduct operations).

Similarly, *Wisconsin Central LTD v. The City of Marshfield*, 160 F.Supp.2d 1009 (W.D. Wis. 1000) supports a finding of preemption. In that case, the city's condemnation would have reduced the capacity of a siding track, which the Court noted was an "integral component" of the railroad's operations. *Id.* at 1011. Finding that the siding track is "transportation" as defined by the ICCTA, the Court held that the city's action was preempted. *Id.* at 1015—16.

As explained by Wolf and Huston, the re-installation of the proposed crossing would have the following adverse affects:

- reduction of rail line capacity by as much as 44-118%;
- reduction of the siding storage capacity by approximately 16%;
- loss of the ability to conduct local train meets at this location;
- increase of switching operations;
- increase of labor costs; and
- increase of transit times over the entire Van Buren subdivision.

Based on applicable precedent, these constitute an unreasonable interference with railroad operations such that ICCTA preemption bars the City's action.

**C. The proposed crossing poses undue safety risks.**

The City requests an at-grade crossing for both pedestrians and vehicles. Union Pacific's mainline tracks at this location are maintained to Class 4 standards pursuant to regulations promulgated by the Federal Railroad Administration, which sets the speed limit for freight trains at 60 miles per hour. (Huston Aff. 1). Approximately 10-20 trains travel on the mainline at this location each day. (*Id.* at ¶2-3.)

When evaluating the safety risks, the City's plans are an important consideration. The City wants to place a walking trail and a floating dock between the tracks and the river. The City intends that people will boat into town, eat and drink (potentially alcohol) at the City's establishments, and walk back across the crossing to the dock, possibly inebriated. Key, 26:13—17, 126:5. The City has admitted, through Rule 30(b)(6) designee Sneath, that it would not have to place flashing lights or gates at the crossing. (Sneath Dep., 78:18). A crossing at this location carries the risk that a train will strike a pedestrian or a vehicle, causing serious injury or death. (McNutt Dep., 51:10—15).

If it is shown that installation of the crossing would pose an undue safety risk, ICCTA preemption applies. *City of Siloam Springs, Ark. V. Kan. City S. Ry. Co.*, 12-5140 (W.D. Ark. Sept. 10, 2012). Of course, as a matter of law, a grade crossing is a place of danger. AMI 1804. With its motion, Union Pacific submits evidence of undue safety risks posed by a crossing at this location. These include: (1) the increased risk of a crossing accident; (2) the increased risk of a derailment and contaminant spill into the Arkansas river; (3) the increased risk of injury to Union Pacific employees; and (4) the increased risk of injury to pedestrians from climbing on or under railroad equipment blocking the crossing. Currently, these risks do not exist or are *de minimis*.

***i. Because of sight line issues, installing a crossing at this location increases the risk of a crossing accident.***

When there are cars or trains stored in the side track, an individual crossing the tracks headed north from the river would not be able to see an on-coming train on the mainline. And, the train's engineer would not be able to see the individual. Gary Wolf opines that "[t]here would be insufficient clearing sight distance for certain vehicles and pedestrians approaching the tracks from the south," and explains:

I have performed an analysis to determine the clearing sight distance available at the proposed crossing looking to the east for oncoming trains. Table 41 of the *Railroad-Highway Grade Crossing Handbook* (Exhibit 2) prescribes minimum safe clearing sight distances for various types of vehicles and a pedestrian located 15 feet from the near rail. For a train speed of 45 MPH, a "Car" would require 460 feet, a "Single-unit truck" (small utility truck) would require 820 feet, a "Bus" would require 895 feet, and a "Pedestrian" would require 790 feet. Since there would be two tracks at the crossing, it is assumed that UP would cut the crossing leaving a minimum of 300 feet clearance to the first standing railcar (see Exhibit 3 for this calculation). An analysis shows that a person located roughly 15 feet south of the south siding rail would be able to spot an oncoming westbound train when it was roughly 460 feet east of the proposed crossing (see Exhibit 4 for this calculation). This distance just meets the requirements for an automobile, but there is insufficient safe clearing sight distance for a small truck, a Bus, or even a pedestrian. Next, an analysis was performed assuming the motorist or pedestrian edged up onto the siding track (a risky proposition) to view an oncoming train. In this scenario, the clearing sight distance to an oncoming westbound train would be roughly 525 feet to the east (see Exhibit 5 for this calculation). This distance would meet the requirements for an automobile, but again, there is insufficient safe clearing sight distance for a small truck, a Bus, or a pedestrian.

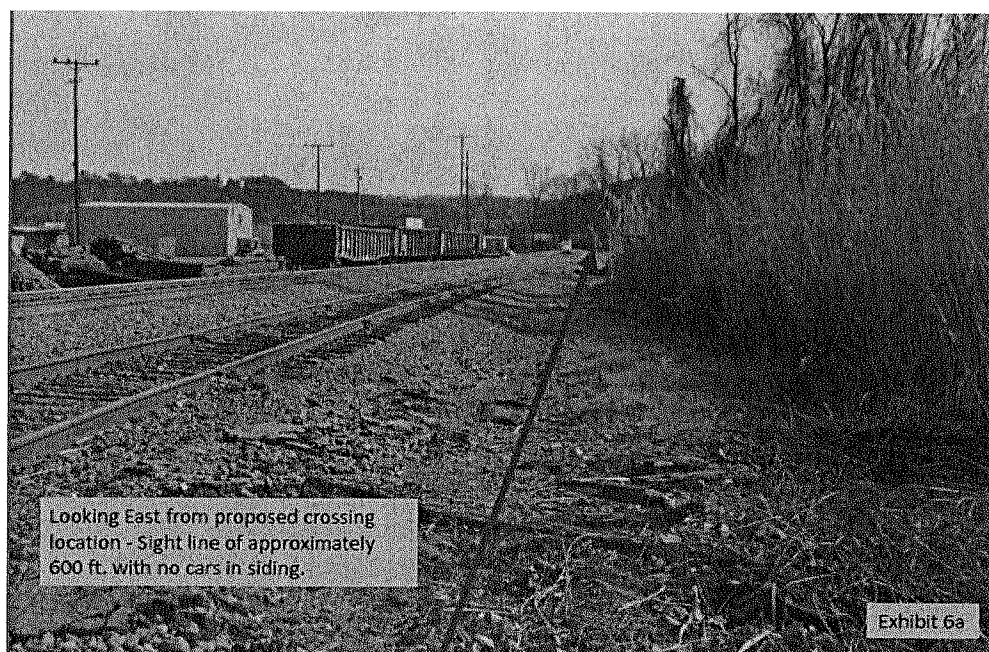
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When at the site of the proposed crossing, I took photographs looking east and west to illustrate the reduced sight lines due to the curvature, vegetation, and possibility of cars parking in the siding. Those photographs show the unobstructed view from a position of roughly 15 feet south of the south siding rail. I then took the same photographs and superimposed a block of freight cars over the siding at a location of approximately 300 feet either side (see Exhibits 6a – 6d). All of these photographs show that the sight lines are clearly compromised by the curvature, vegetation, and potential for parked freight cars; and the available sight lines do not meet the suggested clearing sight line distances in the *Railroad-Highway Grade Crossing Handbook* (Exhibit 2).

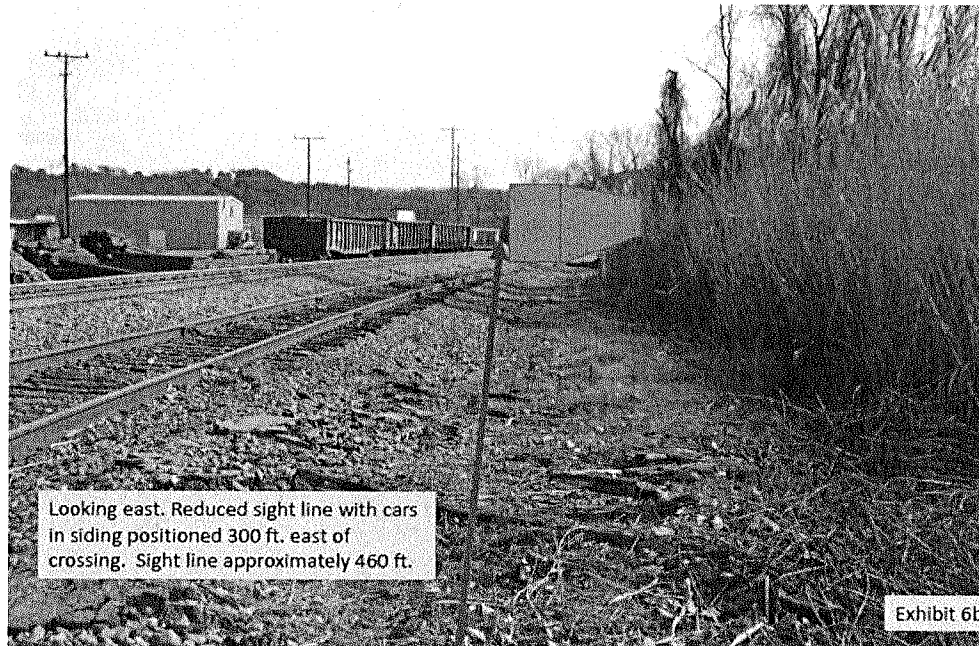
The clearing sight distance calculations outlined above, and my photographs taken at the site, show that motorist or pedestrian safety would be clearly compromised when trying to traverse the crossing from the south with standing railcars positioned the required 300 feet from the crossing. This situation would materially affect the safety of the motoring or walking public.

(*Id.* at 6—7.)

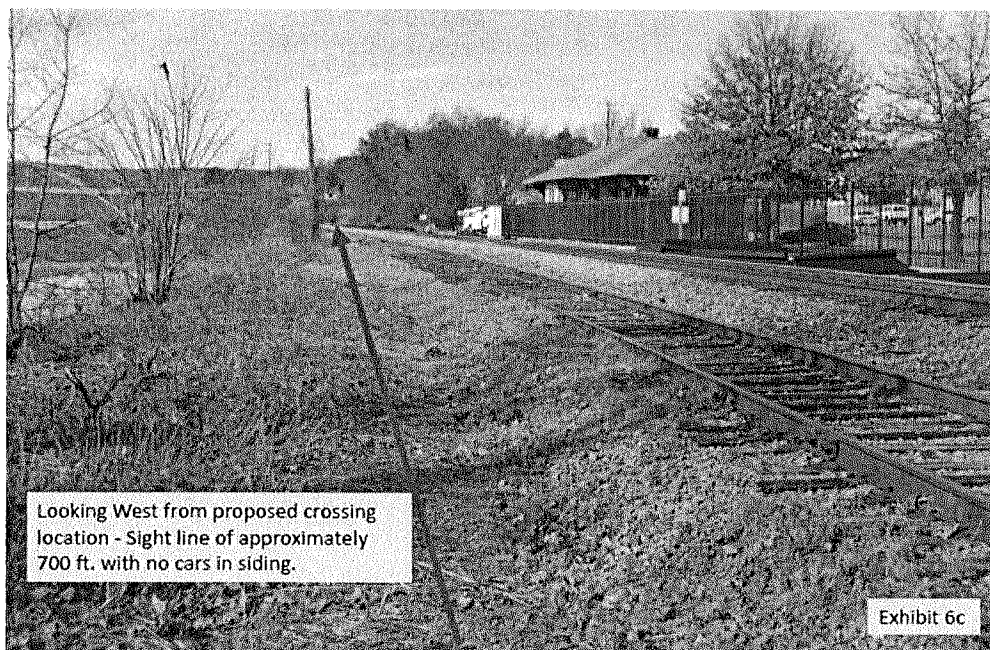
Photographs best illustrate Wolf's conclusions. For example, looking east from the proposed crossing and with no cars in the siding, the sight line is approximately 600 feet:



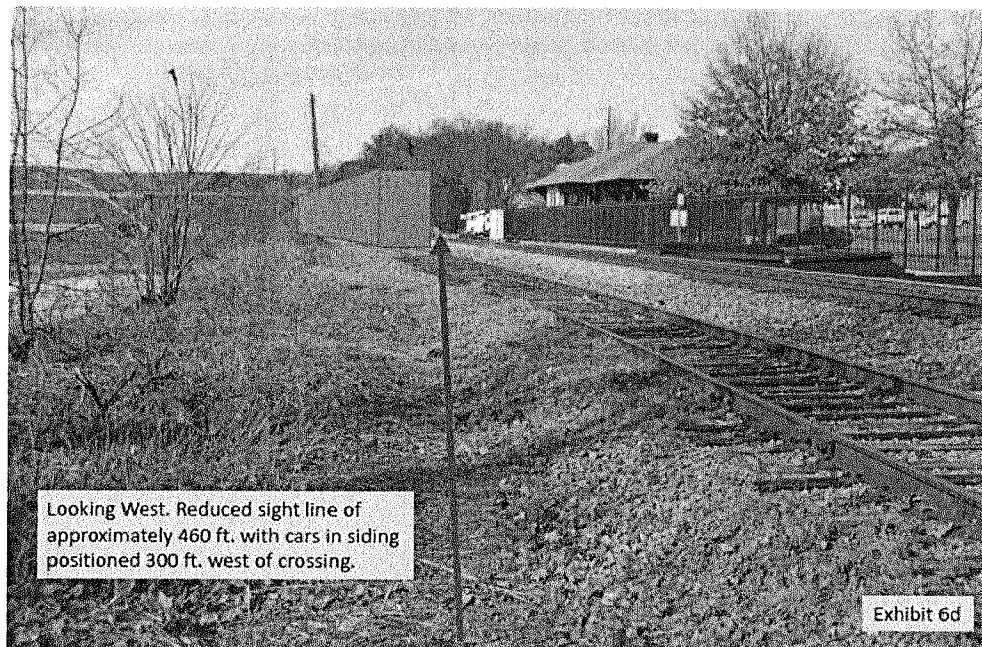
The sight line is reduced to approximately 460 feet when cars are placed in the siding 300 feet from the proposed crossing:



The same exercise can be done looking west from the proposed crossing. With no cars in the siding, the sight line is approximately 700 feet:



Looking west with cars in the siding 300 feet from the proposed crossing, the sight line is reduced to approximately 460 feet:



The sight line issue makes a grade crossing accident at this location a very real risk—one that currently does not exist. Such risks are likely why the Federal Railroad Administration has stated that it has a goal of closing 25% of all low volume crossings in the United States. (Wolf Aff., p. 5). To quote Wolf:

The safest crossing is a closed crossing, or one that doesn't exist. The FRA has been aggressive the past 15-20 years in advocating the closing of unneeded or dangerous crossings across the U.S. This aggressive stance and funding has resulted in a significant decline in grade crossing accidents and fatalities. There have been no stated plans for warning systems at this proposed crossing, and even the highest level of crossing protection (gates and flashing lights) does not guarantee safety. Roughly 50% of crossing accidents occur at crossings with gates and lights. Thus, installing this crossing, even with gates and flashing lights, will increase the risk that an incident will occur.

Kenneth Mead, Inspector General of the U.S. Department of Transportation made a statement to the U.S. House of Representatives Transportation and Infrastructure Committee in

2005, to wit, “The number of grade crossing collisions declined by 39 percent and fatalities fell by 47 percent to 332 deaths in 2003. Most of the progress FRA achieved came from closing about 41,000 crossings.”

The 2007 edition of the *Railroad-Highway Grade Crossing Handbook* states, “The first alternative that should always be considered for an at-grade crossing is elimination... Elimination of the crossing provides the highest level of crossing safety.”

(*Id.* at 16—17.)

The City admitted that if the crossing is re-installed, it will increase the amount of pedestrian traffic over the tracks, thereby increasing the risk for a crossing accident. (Key Dep., 117:7). The City acknowledged that people boating may be drinking alcohol. (Key Dep., 125:20—22). The City acknowledged that it is encouraging people to leave their boats to eat and drink at the City’s establishments, including alcohol, and that those people might walk across the tracks inebriated. (Key Dep., 126:1—16). Even without the risk of inebriation, the sight line problems alone are enough to create an undue safety risk.

Moreover, the City wants to put a walking trail next to the tracks, where a pedestrian standing on the south side of the tracks would be approximately eight feet from the river’s edge. (Ruck Dep., 125:15-21). The City wants families and children to play by tracks where freight trains can travel up to 60 miles per hour, and where railcars and hazardous equipment may be stored. These safety risks cannot be ignored. As the City’s Rule 30(b)(6) witness and current mayor stated “I just don’t think it’s safe to invite the public down to a place like that, you know, with a lot of trains, high speed trains go through there.” (McNutt Dep., 50:21—25).

- ii. *The proposed crossing increases the risk of derailment, the risk of a resulting injury to persons and damage to property in the path of the derailment, and the risk of contamination from hazardous materials.*

The trains running through downtown Ozark often carry hazardous materials such as petroleum, methyl bromide, yellow phosphorus, alcohol polyethoxylate, sodium hydrosulfide, and sodium hydroxide. (Huston Aff.1, ¶2—3; Key Dep., 110:5—14; Sneath Dep., 75:8). These chemicals are all toxic and potentially deadly if spilled. (Key Dep., 110:17). The City has admitted, through Rule 30(b)(6) designee Key, that a crossing at this location is fraught with risk factors for a derailment, including a railroad bridge, a spur, and a curve. (Key Dep., 111:7).

Derailment is a real risk at the location of the proposed crossing. Wolf opines, “[t]he risk of derailment and environmental damage would be increased due to the possibility that emergency braking would be applied for situational risks at the crossing.” (*Id.* at 23). To understand the increased risk, one has to understand the impact of the curve, and the risk of initiating the emergency brake, all of which Wolf analyzed in reaching his conclusion:

[regarding the curve]

[T]he proposed position of the crossing is in a curve of the railroad track. The American Association of State Highway and Transportation Officials (AASHTO) states in its policy book entitled *A Policy on Geometric Design of Highways and Streets*; “To the extent practical, crossings should not be located on either highway or railroad curves. Railroad curvature may inhibit a driver’s view down the tracks from both a stopped position at the crossing and on the approach to the crossing.” Installing a crossing at the proposed site creates the possibility for a crossing accident which cannot possibly occur at the present time.<sup>8</sup>

[regarding the risk of placing the train in emergency]

Another potential safety hazard generated by installing a crossing is the risk that a train approaching the crossing might have to initiate emergency braking when confronted with a vehicle using or stuck on the crossing, or a pedestrian walking over or along the

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<sup>8</sup> *Id.* at 9.

track at the crossing. Emergency braking is the strongest and fastest acting brake that a train engineer can apply as a last resort to avoid an accident. Since emergency braking is stronger and quicker than normal service braking, there is the potential of developing adverse in-train forces as a mile long train is brought to a rapid stop. This is somewhat analogous to a driver slamming on the brakes and potentially going into an uncontrollable skid or swerve. In a train, severe dynamic forces from emergency braking can cause a derailment. The possibility of derailment is increased in a long curve such as exists at this proposed crossing location.

I performed an analysis to simulate the dynamic forces developed in a westbound train if it had to apply emergency braking for a potential situation at the proposed crossing. For purposes of analysis, a nominal 98 car train, with 9,886 trailing tons, 6,139 ft. long, and four locomotives was simulated. This would be consistent with QNLNP trains operating westbound over the Van Buren Sub. The exact grade and curve data for the track between MP 463 and MP 466 was entered into the analysis. As information, on approach to Ozark, part of the train would be on a +0.54% upgrade, and part of the train would be on a -0.30% downgrade. Also, the train would be stretched over two curves, one 3 degrees and one 2 degrees. The train was simulated moving at 45 MPH when it approached the proposed crossing location near MP 464.6 and a full emergency brake application was made. The analysis shows that the train would require approximately 2,240 feet to stop, and the maximum draft force during the stop would be 420,000 pounds, and the maximum buff run-in force would be -316,000 pounds. A draft force of 420,000 pounds (420 kips) would exceed the nominal knuckle strength of a Grade E knuckle and likely cause failure and train separation. A buff force of -316 kips would be considered excessive, and could likely cause wheel climb derailment to an empty car in the 3 degree curve. Any time that excessive buff compressive forces are applied to a train in a curve, the chance of derailment is much higher than if the same force was applied on straight track. A possible derailment in this curve presents a further risk if any cars derailed into the river alongside the south side of the track. At places, the distance from the track to the river is less than 25 feet, and any derailment would likely end up in the river.

A derailment at this location could be catastrophic. (McNutt Dep., 51:16—20). The river could be contaminated. (McNutt Dep., 53:3—21; McDaniel Dep., 38:1; Key Dep., 112:13). Contamination could linger in the air in this valley location. (Key Dep., 112:14—25). And a

derailment could result in injury or loss of life for those near the tracks and those on the train. (McDaniel Dep., 38:9—12).

**iii. The crossing would increase the risk of injury to railroad employees.**

The installation of the crossing would increase the amount of switching operations performed by Union Pacific employees, which increases their risk of injury. *See* Huston Original Affidavit. The FRA has found that “[t]he most common cause of fatalities to railroad employees is being crushed or run over in switching operations. According to the Switching Operations Fatality Analysis (SOFA) Working Group, there were 114 such fatalities in the period 1992-2002.” (FRA Report, June 2005, p. 13, attached to the Motion as Exhibit 30). Wolf explained the risk to employees, and pointed to Plaintiff’s expert Soliz’s admissions that switching operations would increase:

The installation of the proposed crossing would necessitate separating cars at the crossing (called “cutting” the crossing) for 300 feet either side, if the train was going to block the crossing for longer than 10 minutes. The method for cutting the cars would require the conductor or trainman to dismount the locomotive cab, walk roughly ½ mile back to the cars (see Exhibit 8 for this distance calculation) to be separated and perform the necessary maneuver. This action would place the trainman in jeopardy of injury as most railroad injuries occur during switching operations. Also, many railroad injuries such as slips, trips, and falls occur during walking on ballast. A conductor has more risk of injury when he is on the ground walking than sitting in a locomotive cab. If the risk of injury to the conductor is increased it can directly affect safety and/or train operations. This operation of cutting the crossing by definition would be classified as “switching” work.

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Mr. Soliz agrees that if the crossing is cut, the conductor has to get on the ground and walk back to make the separation (p.136/8). Mr. Soliz agrees that most employee injuries of trainmen are due to slips, trips and falls (p.136/21). Furthermore, Mr. Soliz agrees that slips, trips and falls happen to trainmen just by walking through the

ballast where there is no debris (p.137/5). Thus, even though Mr. Soliz opines in his affidavit that the installation of this crossing would not increase safety risk, he does agree in his sworn testimony that it would increase the risk of injury to a railroad worker having to cut the crossing.

(Wolf Aff., p. 14-15).

**iv. *The crossing increases the risk of injury to pedestrians crawling on or under standing equipment.***

There is a real risk of injury to pedestrians crawling on or under railroad equipment that is blocking the crossing. (*See* Huston Aff. 1). It is obvious that if a train or equipment moved while a person was crawling on or under it, the result could be catastrophic. Fencing does not alleviate that risk and also creates other dangers and operational impediments as described in the Original Huston Affidavit.

**v. *Conclusion: installation of this crossing would pose undue safety risks.***

The risk of a crossing accident or derailment under these circumstances (limited sight distance, curve, proximity to the river) cannot be deemed anything *but* an undue safety risk. The risk of injury to those visiting Ozark, or living in Ozark, and to the employees of Union Pacific cannot be deemed anything *but* an undue safety risk. As a former mayor, Carol Sneath has written, “[i]f there were to be such an [derailment] accident in this busy riverfront location, we could lose our entire historic district, not to mention the potential loss of life.” (Sneath 2011 Letter, attached to the Motion as Exhibit 31). These risks are surely much more of a danger than the possibility of something falling on a trail user walking under a railroad bridge, which was deemed an undue safety risk in *City of Siloam Springs*. Accordingly, the ICCTA preempts the City’s action.

**B. The City's lawsuit is barred by estoppel, laches, and waiver after its mayor asked Union Pacific to remove the crossing.**

The City's own Rule 30(b)(6) testimony undisputedly proves that Mayor Todd Timmerman received permission from the Council to speak with the Union Pacific; that Timmerman asked Union Pacific to remove the crossing; that Timmerman informed the Council, and no one made any objections to the removal. Thereafter, Union Pacific took out the crossing. *See Factual Background.*

The City should not be allowed to claim it did not know the crossing was being taken out, and that it did not acquiesce in its removal. The fact that Sandy Key, the Main Street Ozark Director, had a plan for the crossing— that apparently the City Council and the Mayor either did not know or did not consider in requesting Union Pacific to remove the crossing— does not allow the City to hide behind procedural irregularities. The whims of the political climate in Ozark should not override the fact that Union Pacific relied on the mayor's request to remove the crossing. Accordingly, laches, waiver, and estoppel bar the City's lawsuit.

***i. Laches and waiver may be properly applied against a city or municipality.***

As a threshold matter, laches and waiver can apply against a city or municipality. *See, e.g., Ark. Cnty. v. Desha Cnty.*, 351 Ark. 387, 390, 94 S.W.3d 888, 890-91 (2003) (finding that Arkansas County's claim to property in the possession of Desha County was barred by laches because of Arkansas County's "long acquiescence in Desha County's taxation and exercise of control over the site"). Union Pacific anticipates that the City will rely on a series of cases where the doctrines were not applied. The distinction between those cases and the present case is that there had been an express dedication of the disputed property, creating an exception to the

general rule. As discussed below, there was no express dedication of the property at issue. Accordingly, the doctrines of laches and estoppel can and should be applied to dismiss the City's action.

**ii. The doctrine of laches precludes this lawsuit.**

The City brought this lawsuit 13 years after the crossing was removed. It is untimely. Laches is an equitable doctrine, which applies where (1) the plaintiff unreasonably and inexcusably delayed filing the lawsuit; and (2) prejudice to the defendant resulted from the delay. *Brown-Mitchell, Kan. City Power & Light Co.*, 267 F.3d 825, 827 (8th Cir. 2001). Laches seeks to reach “a just result.” *Id.*; *see also Page v. Woodson*, 211 Ark. 289, 294, 200 S.W.2d 768, 771 (1947) (“[T]he general rule of the doctrine of laches is that equity may in exercise of its own inherent powers refuse relief where it is sought after undue and unexplained delay, and where injustice would be done in the particular case by granting the particular relief asked.”).

Whether a delay was unreasonable can be decided as a matter of law. *See N.Y. Life Ins. Co. v. Adams*, 151 Ark. 123, 235 S.W. 412 (1921) (“It is generally a question of fact for the determination of a jury whether or not a given time is unreasonable, but the circumstances may be such that the court should declare, as a matter of law, whether the delay is or is not unreasonable” and ultimately holding as a matter of law that the delay was unreasonable); *see also Walker-Lucas Hudson Oil Co. v. Hudson*, 168 Ark. 1098, 272 S.W. 836 (1925) (holding that a delay of two years was unreasonable). Here, the then-Mayor of Ozark requested the crossing's removal in 2000, and it was removed in 2001. There is no reasonable explanation in delaying 13 years to file this lawsuit. Indeed, even the current mayor and City's Rule 30(b)(6) designee testified that this was a frivolous lawsuit and that it should be dropped. McNutt, 50:9.

At the City's insistence, Union Pacific spent several thousand dollars to remove the crossing and detrimentally changed its position. (Felkins Aff. ¶5). It is unfair and prejudicial to require Union Pacific to expend additional money and resources to re-install the crossing. The time for the City to assert its claim was in 2001 or soon thereafter, which has long since passed. Accordingly, this Court should conclude that the Complaint is barred by the doctrine of laches.

**iii. The City of Ozark has Waived Any Claim to the Crossing.**

Waiver occurs “where one in possession of a right, whether conferred by law or contract, with full knowledge of the material facts, does or forbears to do something, the doing of which or the failure or forbearance to do which is inconsistent with the right or his intention to rely upon it.” *Sirmon v. Roberts*, 209 Ark. 586, 588, 191 S.W.2d 824, 825 (1946); *see also Kimbrell v. Standard Ins. Co.*, 207 F.3d 535, 538 (8th Cir. 2000) (holding that for a waiver to have occurred, the charged party needed to have “intentionally relinquished a known right”). Normally, whether a waiver has occurred is a question of fact, but not where, as here, reasonable minds could not differ that the waiver occurred. *See Jackson v. Swift-Eckrich*, 830 F.Supp. 486, 495 (W.D. Ark. 1993) (citing *Ward v. Russell*, 796 S.W.2d 588, 589 (Ark. Ct. App. 1990)); *cf. Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 1040, 479 S.W.2d 518, 521 (1972) (“[W]hen reasonable minds could not differ as to the inferences to be drawn from the conduct relied upon, a determination that there was or was not a waiver as a matter of law is proper.”).

In this instance, waiver is the only reasonable conclusion. The Mayor of Ozark, Todd Timmerman, acting in his capacity as the chief executive officer of the City,<sup>9</sup> specifically requested that the crossing be removed. Asking Union Pacific to remove the crossing is an act

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<sup>9</sup> The Mayor of Ozark is statutorily required to be that city's “chief executive officer and conservator of its peace.” Ark. Code Ann. § 14-43-504(a) (2012).

inconsistent with the intention to retain it. For that reason, the City's attempt to force Union Pacific to reinstall the crossing should be barred by the doctrine of waiver.

*iv. The City Should Be Estopped from Claiming a Right to the Crossing.*

In addition to waiver, the City should be estopped from asserting any right to the former crossing because Union Pacific expended labor and capital to remove it at the City's request. Estoppel occurs "where, by the fault of one party, another has been induced, ignorantly or innocently, to change his position for the worse in such a manner that it would operate as a virtual fraud upon him to allow the party by whom he has been misled to assert the right in controversy." *Bethel v. Bethel*, 268 Ark. 409, 421, 597 S.W.2d 576, 582 (1980). The reasoning behind the defense of estoppel is that when one person deliberately does or says a thing and another person relies upon that act or those words, it would be unjust to allow the former to repudiate the act or the words to the detriment of the latter. *See Baker-Matthews Lumber Co. v. Bank of Lepanto*, 170 Ark. 1146, 1152, 282 S.W. 995, 998 (1926) (citing *Trapnall v. Burton*, 24 Ark. 371, 400 (1866)).

As an initial point, the doctrine of estoppel can be applied against a city. *Miller v. Lake City*, 302 Ark. 267, 269, 789 S.W.2d 440, 442 (1990); *see Ft. Smith v. United States Rubber Co.*, 184 Ark. 588, 591, 42 S.W.2d 1004, 1005 (1931). In addition, a city can be estopped from denying the authorized acts of its officers. *Miller*, 789 S.W.2d at 442; *see generally Klinger v. Fayetteville*, 297 Ark. 385, 762 S.W.2d 388 (1988). Given that the Mayor was acting as the top agent of the City when he requested Union Pacific to remove the crossing, it was reasonable for Union Pacific to rely on his request as carrying the weight of the City's authorization. *See City of Marion v. Guar. Loan & Real Estate Co.*, 75 Ark. App. 427, 433, 58 S.W.3d 410, 413-14 (Ark. Ct. App. 2001) ("[A]cquiescence by the principal in [the] conduct of an agent whose

previously conferred authorization reasonably might include it, indicates that the conduct was authorized.”)

In the case at hand, the City asked that the crossing be removed. In reliance on that request, Union Pacific expended labor and financial resources to remove the crossing. (Felkins Aff., at ¶5). The City’s demand that it be re-installed is unjust. Moreover, Union Pacific would have to incur additional costs of materials and labor if it had to re-install the crossing, not to mention future maintenance costs. For these reasons, the City should be estopped from attempting to force Union Pacific to re-install the crossing.

**v.      *The City Council Authorized Mayor Timmerman to Negotiate the Crossing’s Closure.***

Mayor Timmerman had authority to negotiate the crossing’s closing with Union Pacific. (Timmerman Dep., 24:23; McNutt Dep., 76:22). The Arkansas Court of Appeals has explained:

[T]he general principle of interpretation of scope of authority is that an agent is authorized to do, and to do only, what is reasonable for him to infer that the principal desires him to do in the light of the principal’s manifestation and the facts as he knows or should know them at the time he acts.

*City of Marion v. Guar. Loan & Real Estate Co.*, 75 Ark. App. 427, 432–33, 58 S.W.3d 410, 413–14 (2001) (citing *Hot Stuff, Inc. v. Kinko’s Graphic Corp., Inc.*, 50 Ark. App. 56, 901 S.W.2d 854 (1995)). Additionally, “acquiescence by the principal in conduct of an agent whose previously conferred authorization reasonably might include it, indicates that the conduct was authorized.” *Id.* at 433, 58 S.W.3d at 414 (citing *Hot Stuff*, 50 Ark. App. at 59–60, 901 S.W.2d at 856). The rule of acquiescence stems from the Restatement (Second) of Agency § 43, which provides the following rationale for finding actual authority by acquiescence:

Persons ordinarily express dissent to acts done on their behalf which they have not authorized or of which they do not approve. If the agent has been previously authorized and the extent of his

authority is uncertain, the performance of acts by the agent which might reasonably be within the authorization and acquiescence therein by the principal indicates that the parties understood that such acts were authorized . . . .

Restatement (Second) of Agency § 43, cmt. a (1958).

Here, Mayor Timmerman believed that his authority to speak to Union Pacific about the train horns included the authority to request the crossing's closure. (Timmerman Dep., 24:20-23). When he later presented a letter to the City Council in which Union Pacific assented to closing the crossing to alleviate the noise, no council member dissented or indicated disapproval of the agreement. (Milam Dep., 26:13; Timmerman Dep., 23:2; McNutt Dep., 80:3—16; Edgin Dep., 20:14—16). Hence, the City acquiesced to the agreement to close the crossing. *See id.* § 43, cmt. a.

**a. Even if Mayor Timmerman Did Not Have Authority to Request the Crossing's Closure, the City Ratified the Agreement with Union Pacific to Close It.**

Assuming *arguendo* that Mayor Timmerman did not have authority to request the crossing's closing, the Ozark City Council subsequently ratified the closure. The doctrine of ratification "proceeds upon the assumption that there has been no prior authority and constitutes a substitute therefor; it is in the nature of a cure for authorization and is the equivalent to original, prior, or previous authority." *City of Marion v. Guar. Loan & Real Estate Co.*, 75 Ark. App. 427, 433, 58 S.W.3d 410, 414 (2001) (citing *Arnold v. All-Am. Assur. Co.*, 255 Ark. 275, 499 S.W.2d 861 (1973)); *see also* Restatement (Second) of Agency § 43, cmt. a (1958) ("If there was clearly no authorization to do the acts, the acquiescence by the principal indicates an affirmance which normally operates as ratification.").

Ratification applies to municipal corporations, such as the City of Ozark. Specifically, a municipality may ratify the unauthorized agreement made by its agent, thereby making it binding

on the municipality, “by affirmative action on its part, or *some negative action*, which of itself would amount to an approval of the contract.” *Ft. Smith v. Bates*, 260 Ark. 777, 781–82, 544 S.W.2d 525, 528 (1976) (emphasis added); *Day v. City of Malvern*, 195 Ark. 804, 807, 114 S.W.2d 459, 461 (1938); *City of Bryant v. Collins*, 2011 Ark. App. 713, 9, 386 S.W.3d 699, 704; *City of Marion v. Guar. Loan & Real Estate Co.*, 75 Ark. App. 427, 432–33, 58 S.W.3d 410, 413–14 (2001) (“A municipal corporation may ratify the unauthorized acts of its agents, or officers, which are within the scope of the corporate powers, but not otherwise.”). “Negative action” can take the form of silence. Arkansas courts have explained that “[w]hen a principal has knowledge of the unauthorized acts of his agent and remains silent, when he should speak . . . he cannot thereafter be heard to deny the agency and will be held to have ratified the unauthorized acts.” *Sterne, Agee & Leach, Inc. v. Way*, 101 Ark. App. 23, 31, 270 S.W.3d 369, 376 (2007) (citing *Arnold v. All-Am. Assur. Co.*, 255 Ark. 275, 499 S.W.2d 861 (1973)). Ratification may be inferred from the failure to repudiate an unauthorized transaction. *Arnold*, 255 Ark. at 282, 499 S.W.2d at 866.

Here, the Council authorized Mayor Timmerman to contact Union Pacific. Mayor Timmerman then spoke to Charlie Felkins at Union Pacific about the crossing. In so doing, he believed that he had authority to request, on the City’s behalf, that Union Pacific close the crossing to alleviate the noise problem. Acting on behalf of the City, Mayor Timmerman asked Charlie Felkins to close the crossing, and Felkins agreed. Mayor Timmerman told the Council that Union Pacific was going to remove the crossing. (Milam Dep., 26:13, McNutt Dep. 80:1—16; Edgin Dep. 20:14—16). Although there was no vote or subsequent ordinance on the issue, no council member objected to or voiced disapproval of the crossing’s removal. The lack of objection constituted “negative action, which of itself would amount to approval” of the

agreement to take out the crossing. *See Day*, 195 Ark. at 807, 114 S.W.2d at 461; *Bates*, 260 Ark. at 781–82, 544 S.W.2d at 528; *Collins*, 2011 Ark. App. at 9, 386 S.W.3d at 704. If the City did not want the crossing removed, the council members should have voiced their disapproval. Instead, their silence amounts to ratification of Mayor Timmerman’s actions. *See Arnold*, 255 Ark. at 282–83, 499 S.W.2d at 866. Because the Council ratified the agreement to close the crossing, thereby making it binding on the City, it should not now be heard to complain.

Furthermore, even assuming that the Council should have passed an ordinance to remove the crossing, this is inconsequential in the context of ratification. *See Benton v. Powers*, 269 Ark. 853, 860, 601 S.W.2d 260, 264 (1980) (“[T]he law recognizes that a city may ratify a contract that is within its powers to make, even though the contract in its inception may not have been entered into in strict keeping with statutory requirements.”). For example, in *Day v. Malvern*, 195 Ark. 804, 114 S.W.2d 459 (1938), the plaintiff brought suit against the City of Malvern on a contract allegedly entered into between the parties. The plaintiff argued that the Mayor of Malvern orally agreed on behalf of the City to perform certain work on his lot in exchange for the gravel located on the plaintiff’s lot. *Day*, 195 Ark. at 804–05, 114 S.W.2d at 460. The City thereafter performed the work but allegedly damaged the plaintiff’s property in the process, prompting him to file suit. *Id.*, 114 S.W.2d at 460. The City argued that the mayor lacked authority to enter into the agreement– thereby rendering it void– because no ordinance or resolution had been passed by the city council as required by statute *Id.* at 805, 114 S.W.2d at 460.

The trial court agreed with the City and dismissed the action, finding that the contract was void. *Id.* at 806, 114 S.W.2d at 460–61. On appeal, the Arkansas Supreme Court reversed. *Id.* at 806–07, 114 S.W.2d at 461. It reasoned that even though the city council did not follow the

statute and enact an ordinance authorizing the mayor to enter into the agreement, the city ratified it by hiring workers for the project, performing the work on the plaintiff's property, and removing the gravel as per the parties' understanding. *Id.* at 807, 114 S.W.2d at 461; *see also Ft. Smith v. Bates*, 260 Ark. 777, 781–82, 544 S.W.2d 525, 527–28 (1976) (city ratified agreement entered into by city planning officials although officials lacked authority); *Harrison v. Boone Cnty*, 238 Ark. 113, 114–15, 378 S.W.2d 665, 666–67 (1964) (city ratified agreement entered into by mayor and city recorder for lease of property although no resolution had been passed authorizing the lease); *L.C. Eddy, Inc. v. Arkadelphia*, 303 F.2d 473, 477 (8th Cir. 1962) (applying Arkansas law and holding that city ratified the contract entered into by airport commission even though no resolution or ordinance had been passed to authorize it).

Pursuant to the foregoing authorities, even if the Council should have formally authorized Mayor Timmerman to negotiate the removal of the crossing, or should have followed certain statutory procedures, the City subsequently ratified the agreement with Union Pacific by failing to voice any objection to the crossing's removal. As a result, Union Pacific expended significant money and resources to perform its part of the agreement and close the crossing, thereby benefitting the City by eliminating the noise from the trains' horns. To permit the City to now void the very agreement it sought and subsequently ratified to its benefit would be inequitable. Therefore, the Court should hold that the City is estopped from seeking to have the crossing re-installed.

**D. No dedicated or express easement exists; thus, there cannot be a bar against waiver or laches and there cannot be a tortious interference by Union Pacific.**

The City alleges in its Complaint that it is entitled to the former crossing because it has an easement over the tracks at that location. However, the City does not allege—nor can it prove—that it has an *express* easement over the property. As noted in the Factual Background,

the City has stipulated that there is no legal document whatsoever to show that the street or the crossing was ever public by agreeing that:

- there is no evidence of any funds expended by the City for the purpose of maintaining “Oliver Street” since 1975. (Attorney Brockett stipulation at Milam Dep., 11);
- there is no evidence of any ordinance accepting and recording a plat dedicating an “Oliver Street” for a public purpose. (Attorney Brockett stipulation at Milam Dep., 1);
- there is no documentation of any dedication of a street at this location by the City. (McNutt Dep., 114:8—12);
- there is no evidence of any recorded plat dedicated a street at this location to a public use. (McNutt Dep., 114:15; Key Dep., 128:25);
- there is no evidence of any City ordinance accepting a plat to dedicate a street at this location to public use. (McNutt Dep., 114:16—19; Key Dep., 129:4); and
- there is no evidence that the City condemned a street at this location for a public use. (McNutt Dep., 114:20—23).

Of course, regardless of how the City characterizes its claim, it remains preempted. *See e.g. Ouachita R.R., Inc. v. Circuit Court of Union Cty.*, 361 Ark. 333, 343, 206 S.W.3d 811, 816 (2005) (holding that a claim for abandonment and adverse possession of the railroad’s right of way was preempted by the ICCTA because “the STB’s jurisdiction over the abandonment of tracks is exclusive and preempts any remedies available under state law.”). Moreover, no such easement was included in the deed that Union Pacific’s predecessor in interest received from the Quailises; nor was such an easement included in Union Pacific’s deed. Instead, the City argues that it is entitled to the property through a prescriptive easement or as a statutory right-of-way. Neither theory has merit for the reasons below.

**1. The City Cannot Claim the Crossing Pursuant to a Prescriptive Easement Because Its Use Prior to 2001 Was Not Adverse, and Its Use Since 2001 Has Not Been Open and Notorious, Continuous, and Uninterrupted.**

In *Carson v. County of Drew*, 354 Ark. 621, 128 S.W.3d 423 (2003), the Arkansas Supreme Court discussed prescriptive easements:

A prescriptive easement may be gained by one not in fee possession of the land by operation of law in a manner similar to adverse possession. *Owners Assoc. of Foxcroft Woods[, Inc. v. Foxglen Assocs.]*, 346 Ark. 354, 57 S.W.3d 187 (2001)]; See Paul Jones Jr., Arkansas Titles to Real Property §§ 714, 1499, at 443, 906-09 (1935 & Supp. 1959); *Neyland v. Hunter*, 282 Ark. 323, 668 S.W.2d 530 (1984) (“Prescription is the acquisition of title to a property right which is neither tangible nor visible (incorporeal hereditament) by an adverse user as distinguished from the acquisition of title to the land itself (corporeal hereditament) by adverse possession.”). Like adverse possession, “prescriptive easements . . . are not favored in the law, since they necessarily work corresponding losses or forfeitures in the rights of other persons.” 25 Am. Jur. 2d Easements and Licenses § 45 (1996); *Potts v. Burnette*, 301 N.C. 663, 273 S.E.2d 285 (1981). In Arkansas, it is generally required that one asserting an easement by prescription show by a preponderance of the evidence that one's use has been adverse to the true owner and under a claim of right for the statutory period. *Manitowoc Remanufacturing, Inc. v. Vocque*, 307 Ark. 271, 819 S.W.2d 275 (1991); *Neyland v. Hunter*, *supra*; *Teague v. Raines*, 270 Ark. 412, 605 S.W.2d 485 (1980). This court has said that the statutory period of seven years for adverse possession applies to prescriptive easements. *Neyland v. Hunter*, *supra*; *Duty v. Vinson*, 228 Ark. 617, 309 S.W.2d 318 (1958); *Brundidge v. O'Neal*, 213 Ark. 213, 210 S.W.2d 305 (1948). That statutory period for adverse possession is set out in Ark. Code Ann. § 18-61-101 (1987).

*Id.* at 65, 128 S.W.3d at 425-26.

Contrary to the City's allegations, it does not have a prescriptive easement over the former crossing. The City's use of the crossing prior to 2001 was permissive—not adverse; until the crossing was removed in 2001, Union Pacific expressly recognized it. The City has not had a legitimate use for the crossing since the land south of the tracks went underwater in 1970. And,

to the extent any residents have used it from 1970-2001 (when it was removed and therefore no subsequent use occurred), their use has been sporadic at best. In addition, any such use has not been open, notorious, continuous, and uninterrupted.

**a. The City Did Not Obtain a Prescriptive Easement Over the Subject Crossing Prior to 2001 Because the City's Use of the Property Was Permissive.**

One asserting an easement by prescription must show by a preponderance of the evidence that his or her use has been **adverse to the true owner** and under a claim of right for 7 years. *Johnson v. Jones*, 64 Ark. App. 20, 977 S.W.2d 903 (1998). “The rule is well established that ‘permissive use cannot ripen into a legal right merely by lapse of time.’” *St. Louis S. R. Co. v. Wallace*, 217 Ark. 278, 280, 229 S.W.2d 659, 660 (1950) (quoting *McGill v. Miller*, 172 Ark. 390, 394, 288 S.W. 932, 934 (1926)). The Arkansas Supreme Court places the burden of proving adverse use on the party asserting the prescriptive easement. *Myers v. Yingling*, 372 Ark. 523, 531, 279 S.W.3d 83, 90 (2008) (quoting *Bobo v. Jones*, 364 Ark. 564, 222 S.W.3d 197 (2006)).

Some circumstance or act in addition to, or in connection with, the use which indicates that the use was not merely permissive is required to establish a right by prescription. Overt activity on the part of the user is necessary to make it clear to the owner of the property that an adverse use and claim are being exerted. Mere permissive use of an easement cannot ripen into an adverse claim without clear action placing the owner on notice.

*Id.* at 531-32, 279 S.W.3d at 90 (quoting *Bobo*, 364 Ark. 564, 222 S.W.3d 197). “[W]here the entry is permissive the statute will not begin to run against the legal owner until an adverse holding is declared, and notice of such change is brought to the knowledge of the owner.” *St. Louis S. R. Co.*, 217 Ark. at 280, 229 S.W.2d at 660 (quoting *Britt v. Berry*, 133 Ark. 589, 592, 202 S.W. 830, 831 (1918)) (holding that the trial court erred by instructing the jury that the town of Buckner had a legal right to the crossing when it was undisputed that the town “had never

dedicated any street over this crossing,” the town’s “use was not based upon any consideration,” and the town “did not claim any statutory right to its use”).

In *Myers v. Yingling*, 372 Ark. at 532, 279 S.W.3d at 90, the Arkansas Supreme Court found that the defendant was not entitled to amend the pleadings to add a counterclaim for a prescriptive easement. The court found “no proof presented that . . . [their] use of the road was adverse for the entire period.” *Id.* The Court explained:

Indeed, at the outset, after the [plaintiffs] put up their first gate in 1998 or 1999, they gave [the defendant] a key to the gate after he asked for one. Thus, there is no evidence of overt, adverse use for the statutory period. . . .

*Id.*

As in *Myers*, here there is no allegation or evidence to show that the City adversely used the crossing. Instead, the City alleges that continuously until 2001, Union Pacific *openly acknowledged* the crossing as a “public at-grade crossing.” Complaint Ex. 1 at pp. 12-13. Union Pacific does not admit that it was a “public” crossing at the time of removal, but the City’s own allegation shows that its use was not adverse. As discussed below, it is undisputed that the public use after the navigation way was flooded in the 1970s was sporadic at best. After that, the only purpose for the crossing was to reach propane tanks on Union Pacific’s property, which was subject to a private lease with Union Pacific. The City does not allege—and cannot establish—that the City’s use of the crossing was adverse to Union Pacific.

**b. Since 2001, the City Has Not Obtained a Prescriptive Easement Over the Property Because Any Use by Individual Residents Has Been Sporadic at Best.**

To the extent that the City argues it has obtained a prescriptive easement over the crossing since 2001, it has not because the City cannot demonstrate that either the City itself or the public has used the crossing continuously and uninterrupted since 2001. One need only look

at the testimony of the City's own "public use witnesses" to reach that conclusion. (See Exhibit 15, Chart). The Arkansas Supreme Court addressed a similar issue in *Johnston v. Verboon*, 269 Ark. 126, 598 S.W.2d 752 (1980), when it held that a public prescriptive easement had been abandoned by nonuse. In that case, the Court considered whether an old road that crossed the appellant's property and led to one old house on neighboring property was still considered a public easement by prescription. The Court held it was not:

Although in the early 1940's other families living in the area used the old road to reach their homes, the only family living in the area and regularly using the road in the early 1950's was the Robersons. When the Robersons moved away in 1952, there was virtually no use of the road until they returned in 1972. Although the Robersons occasionally returned during their 20 year absence for week-end visits, they usually reached their house by foot, since the old road was usually impassable by car. After the Robersons returned in 1972, they not only secured appellants' permission before they used the road, but made plans to build a new road to their place which did not cross appellants' land. Also, by constructing a new entrance off the old road where it runs parallel with appellants' property, and building a new road to intersect with the old road as it crosses their land, appellants evidenced an intention to re-establish any dominion and control over the old roadway previously forfeited to the public. Until this action was taken the record strongly indicates that the old road had practically deteriorated into a footpath. Surely, under this set of facts, the evidence preponderates in favor of abandonment.

*Id.* at 129, 598 S.W.2d at 754.

The "use" of the property alleged by the City here is similar to that alleged by the appellees in *Johnston*. The crossing was once used by the public to access homes and businesses on the south side of the railroad tracks. But, by 1970, when the Army Corps of Engineers purchased the property, any remaining homes and businesses relocated.<sup>10</sup> Complaint Ex. 1 at pp. 7, 22. In fact, most of the property on the south side of the track was flooded by the lock and

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<sup>10</sup> According to the City, all that remained on the south side of the tracks were several propane tanks, which were moved before 2001.

dam that was constructed in the early 1970s. *Id.* As a result, the old road on the south side of the track was not maintained and deteriorated. (McNutt Dep., 61:18—19). As the City has not consistently used the crossing since well before 2001, it has not established a prescriptive easement over the crossing at any time since 2001.

To the extent the City alleges that individuals have used the crossing to access the river itself, their use of the crossing has not been overt or continuous. *See Myers*, 372 Ark. at 531, 279 S.W.3d at 90 (stating that the adverse use must be overt). A prescriptive easement may be created only by the adverse use of privilege with the knowledge of the person against whom the easement is claimed, or by use so open, notorious, and uninterrupted that knowledge will be presumed, and the use must be exercised under a claim of right adverse to the owner and acquiesced in by him. *Kelley v. Westover*, 56 Ark. App. 56, 59, 938 S.W.2d 235, 236 (1997). There is no evidence that the City or the public has been using the crossing overtly or continuously for seven or more years. To the extent that any individuals have occasionally used the crossing, their use has not been overt or continuous.

Finally, any use of the crossing since 2001 has been interrupted periodically by Union Pacific. Under Arkansas law, “any unambiguous act of the owner of the land which evinces his intention to exclude others from the uninterrupted use of the right claimed breaks its continuity so as to prevent the acquisition of an easement therein by prescription.” *Kelley*, 56 Ark. App. at 60, 938 S.W.2d at 236-37. Since 2001, Union Pacific has taken several steps evidencing its intent to exclude the City and its residents from using the former crossing. In February 2001, it “removed the Oliver St. Crossing” by taking up the asphalt. First Am. Rest. Compl. ¶¶ 122, 163. In 2008, Union Pacific notified the Arkansas Highway and Transportation Department that the crossing was a closed, private crossing. *Id.* And since 2001, Union Pacific has repeatedly told

the City that it is not entitled to possess or use the former crossing. *See e.g.*, First Am. Rest. Compl. ¶ 154.

**2. The City Does Not Have a Statutory Right to the Crossing Because the Crossing Was Never Dedicated to the City by Union Pacific or Its Predecessors in Interest.**

Arkansas law provides that a property owner may dedicate property to public use, and upon acceptance and confirmation of the dedication by city ordinance, the dedication may not be revoked. *See* Ark. Code Ann. § 14-301-102 (“No street . . . which shall be dedicated to public use by the proprietor of ground in any city shall be deemed to be a public street . . . unless the dedication shall be accepted and confirmed by an ordinance specially passed for that purpose.”). “A dedication has been defined as the donation of land or the creation of an easement for public use.” *City of Cabot v. Brians*, 93 Ark. App. 77, 80, 216 S.W.3d 627, 629 (2005) (citing Black’s Law Dictionary 442 (8th ed. 2004)).

A dedication may be accomplished by express written instrument . . . or often by maps or plats. Plats or instruments by which dedications are made are construed as any other writing to *ascertain and give effect to the intention of the dedicator*. Plats should be construed fairly and reasonably, and unambiguous language should be given its manifest meaning.

*Id.* at 80-81, 216 S.W.3d at 629 (emphasis added) (citations omitted).

The City alleges in its Complaint that Union Pacific dedicated the crossing for public use, and that its dedication is irrevocable. (*See* First Am. Rest. Compl. ¶189). But the City’s factual allegations do not support that contention. The Complaint alleges that Little Rock & Fort Smith Railway originally acquired the property on which the track was constructed in 1876. The property was subsequently purchased by the Missouri Pacific Railroad, and in the 1980s or 1990s, it was obtained through merger by Union Pacific. The City has not established that at any point the property owned by the Railroad, including the street crossing, was sold to a subsequent

purchaser with reference to a map or plat that irrevocably dedicated the street crossing for public use.

Instead, the City relies on a 1942 blueprint, not a plat, from Missouri Pacific Railroad that shows a “road” crossing the tracks at the street crossing. First Am. Rest. Compl. ¶¶ 53-54, 172 and Ex. J. The blueprint says nothing with respect to the property ownership of the crossing. It is not filed as a matter of public record. In fact, the blueprint has nothing to do with ownership interests of the property; it is simply a design for an industrial rail that the Missouri Pacific Railroad sought to lay. *Id.* It is inconsequential then, that the City adopted an Ordinance in 1942 incorporating that blueprint by reference. *Id.* “[M]erely laying out grounds, or merely platting and surveying them without actually throwing them open to use or actually selling lots with reference to the plat, will not as a general rule show a dedication.” *Balmat v. Argenta*, 123 Ark. 175, 178, 184 S.W. 445, 446 (1916) (quotations and citation omitted).

The only other plats or maps to which the City refers in its Complaint are Union Pacific’s maps, which show that the street crossing was maintained as a crossing until 2001. First Am. Rest. Compl. Exs. M-1 to M-4. These maps, however, are not evidence of any intent by Union Pacific to convey the crossing to the City of Ozark or “irrevocably dedicate the [crossing] to public use.” *Id.* at 179, 184 S.W. at 446 (finding that a plat with streets and alleys, which dedicated the streets to public use, but stated that the alleys could be closed at any time, were not evidence of an intent to irrevocably dedicate the alleys to public use). In 2001, Union Pacific removed the crossing, First Am. Rest. Compl. ¶ 83(k) and it never irrevocably dedicated or conveyed the crossing to the City.

**E. The City lacks the authority to condemn railroad property.**

The City does not have the power to condemn the property at issue because it lacks an established need for the taking and because the land is already devoted to public use. This argument was previously briefed by the parties, and accordingly, Union Pacific incorporates herein and adopts its Section VI of the original Memorandum of Law in Support of Motion to Dismiss [Docket 11].

**V. CONCLUSION.**

The designated Rule 30(b)(6) testimony of the City is that it authorized then-mayor Todd Timmerman to ask the Railroad to take the crossing out. Years later, it regrets that decision. Regret is not a legally valid theory on which to bring a lawsuit. Instead, the lawsuit should be barred by estoppel, laches, and waiver. Further, the proposed crossing would unreasonably interfere with railroad operations by reducing rail line capacity, reducing siding storage capacity, eliminating train meets, increasing switching operations, increasing labor costs, and increasing transit times. The proposed crossing would also create undue safety risks, including the risk of death, injury, and contamination of the Arkansas River. Accordingly, it is preempted by the ICCTA. For the reasons explained herein, Union Pacific is entitled to summary judgment.

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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:

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