

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

CITY OF OZARK, a municipal corporation)

Plaintiff,)

vs.)

UNION PACIFIC RAILROAD COMPANY,)
ARKANSAS STATE HIGHWAY)
COMMISSION, as Governing Body of the)
ARKANSAS STATE HIGHWAY AND)
TRANSPORTATION DEPARTMENT,)

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

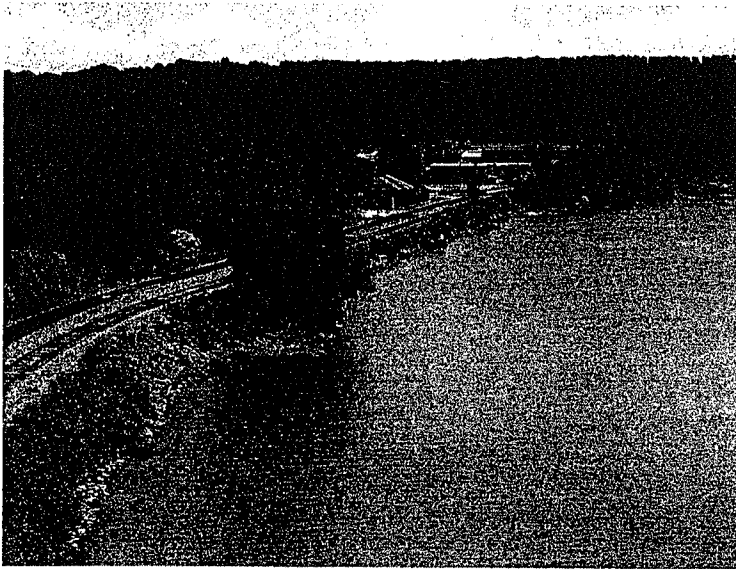
Defendants.

UNION PACIFIC RAILROAD COMPANY'S
MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

Ignoring established principles of waiver and estoppel, the City of Ozark ("City") seeks to compel the re-installation of a grade crossing that was removed at the insistence of its own Mayor in 2001. Even if the Complaint were not barred by timeliness issues, the present civil action is preempted by federal law. Neither the facts nor the law support the City's requested relief. Accordingly, the Complaint should be dismissed.

I. FACTUAL BACKGROUND.

The Arkansas River ("the river") winds its way adjacent to downtown Ozark, Arkansas. On the south side of the river, there is a recreational vehicle park. On the north side of the river, also winding its way between the river and downtown Ozark, is a mainline track and three side tracks of the Union Pacific Railroad Company ("Union Pacific"), as illustrated by the following photograph:



At this location, just east of a railroad depot donated to the City by Union Pacific, the City seeks the re-installation of a former grade crossing. *See* Map, attached to the Motion as Exhibit 1; Complaint. The following is a photograph from the proposed crossing site (looking east), to the best that Union Pacific can determine from the City's Complaint and previous requests:



Before the 1970s, the crossing would have allowed an automobile traveling south to cross the railroad tracks into a city neighborhood; however, that neighborhood was submerged by the river

when it was flooded for the navigation way by the McLellan-Kerr river project. Before 2000, the site was a private crossing used by a propane company to access propane tanks located on property it leased from the railroad. Affidavit of Charles Felkins, ¶4, attached to the motion as Exhibit 2. In approximately 2000, an Ozark resident called Union Pacific's Manager of Industry and Public Projects, Charlie Felkins, several times to complain, even angrily, about trains blowing whistles as they approached the crossing. Felkins Affidavit, ¶¶1-2. The resident asked Union Pacific to remove the crossing because "no one used" it. Felkins Affidavit, ¶2. Shortly after receiving those complaints, Felkins received another call, this time from the Mayor of the City. Felkins Affidavit, ¶3. The Mayor echoed the complaints Felkins had received from the resident. The Mayor requested that Union Pacific remove the crossing since it was no longer used. Felkins Affidavit, ¶3. On several subsequent occasions, the Mayor asked Felkins to have the crossing removed. Therefore, in 2001, Union Pacific removed the crossing at a cost of several thousand dollars. Felkins Affidavit, ¶5.

Thirteen years after requesting that the crossing be removed, the City has filed this lawsuit to have the crossing reinstalled. To be clear, there is nowhere for an automobile to go once it crosses the railroad tracks toward the river. There are no houses. There are no propane tanks. The only place an automobile could go is into the river. The reality is that the City does not need a crossing for automobiles; it wants the crossing for pedestrians to cross the railroad tracks, climb through the brush, and down onto a floating dock that the City wishes to build in the river.

For several reasons, Union Pacific cannot agree to this crossing. This situation is unique—the location is in close proximity to the river, is located in a curve, and would cut across Union Pacific's longest side/storage track from Little Rock to Van Buren. As described below, the proposed crossing would reduce Union Pacific's railcar storage capacity by 20%, would

reduce Union Pacific's ability to use the side track for train meets, would double the amount of time Union Pacific spends conducting switching operations, and would increase the risk of injury to the public, to Union Pacific employees, and to Union Pacific property. Huston Affidavit, attached to the Motion as Exhibit 3. In other words, the proposed crossing would unreasonably interfere with Union Pacific's operations and pose safety risks to the public and to Union Pacific's employees.¹

The Complaint should be dismissed. By waiting 13 years after the removal of the crossing to file this lawsuit, the City is barred by the doctrine of laches from now bringing these claims. Regardless, the City's request is preempted by federal law.

If the Court reaches the merits, dismissal remains warranted. The City's request that Union Pacific remove the crossing constitutes a waiver of any claim by the City. In addition, the City is estopped from now requesting that Union Pacific re-install the crossing. The condemnation action should be dismissed because the City lacks the authority to condemn the property at issue. Finally, the conversion claim should be dismissed because (1) the statute of limitations has expired; (2) Arkansas does not recognize a cause of action for conversion of real property; and (3) the City does not have an ownership interest in the real property. Accordingly, for these reasons, as explained below, the Complaint should be dismissed.

II. LEGAL STANDARD FOR A MOTION TO DISMISS.

In diversity suits such as this one, courts apply federal pleading standards to the state substantive law "to determine if a complaint makes out a claim under state law." *Dunbar v. Wells Fargo Bank, N.A.*, 709 F.3d 1254, 1257 (8th Cir. 2013). Federal Rule of Civil Procedure 8 requires that a complaint present "a short and plain statement of the claim showing that the

¹ Union Pacific is not being obstinate and has told the City it would have no objection to the City building a pedestrian bridge over the tracks, so long as the City meets the clearance requirements.

pleader is entitled to relief.” *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). To meet this standard and survive a motion to dismiss under Rule 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The plausibility standard requires a plaintiff to show at the pleading stage that success on the merits is more than a “sheer possibility.” *Id.* “A complaint states a plausible claim for relief if its ‘factual content . . . allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’” *Braden*, 588 F.3d at 594 quoting *Iqbal*, 129 S. Ct. at 1949.

Dismissal of claims is appropriate where, as here, the complaint does not allege any facts that would entitle the pleader to relief on the claims alleged. *Braden*, 588 F.3d at 594

III. THE DOCTRINE OF LACHES PRECLUDES THIS LAWSUIT.

The City brings 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 for delaying to file this lawsuit for 13 years. At the City’s insistence, Union Pacific spent thousands of dollars to remove the crossing and detrimentally changed its position. It is indeed 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, which has long since passed. Accordingly, this Court should conclude that this Complaint is barred by the doctrine of laches.

IV. THE CITY’S COMPLAINT IS PREEMPTED BY THE INTERSTATE COMMERCE COMMISSION TERMINATION ACT (“ICCTA”) AND SHOULD BE DISMISSED.

A. The ICCTA expressly preempts the City’s action.

Preemption is rooted in the "Supremacy Clause" of the United States Constitution, which provides that "the Laws of the United States ... shall be the supreme Law of the Land." U.S. Const. Art. VI, Cl. 2. Consequently, any state law or regulation that conflicts with a valid federal law is unenforceable. *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 (1993). Even where the state action does not come within the express preemption language of the ICCTA, it may be “impliedly” preempted. *Nordgren v. Burlington N.R. Co.*, 101 F.3d 1246, 1248 (8th Cir. 1996).

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. Further, the Committee intends that those States regulating intrastate rail transportation continue to be required to regulate only in a manner consistent with the ICA [Interstate Commerce Act]. 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 impact 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 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.²

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

² 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., 1st 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.").

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 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 of St. Paul sought to condemn a portion of the railroad’s right of way. The district court relied on these above definitions to conclude that the proposed condemnation of the right-of-way “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*, the City'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 action further 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 immediately 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 “passing” 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).

Here, the side track at issue falls under the ICCTA’s broad preemptive scope. This side track is the longest storage track on the Van Buren subdivision, which runs between Little Rock and Van Buren. Huston Affidavit, ¶5. The proposed crossing reduce the storage capacity of the side track by 20%. Huston Affidavit, ¶5. See *City of Lincoln v. STB*, 414 F.3d 858, 860-62 (8th Cir. 2005) (holding that a condemnation action was preempted where, by losing a 20 foot strip, the railroad would have “insufficient room for storage, loading, and unloading. . . .”); *Green Mtn. R.R. Corp. v. Vermont*, 404 F.3d 638, 642 (2d Cir. 2005) (“Certainly, the plain language grants the [STB] wide authority over . . . storage facilities undertaken by [the railroad].”).

Further, the crossing would compromise the ability to conduct train meets and tie up the main line facilities. Huston explained train meets and the impact as follows:

6. The second purpose of this side track is for train meets. In other words, it allows the mainline track to be open for

other rail travel, which enhances the movement of commerce on the track. The side track makes it possible for one train to move from the mainline to the side track so that another train can pass on the mainline.

7. When a train uses the side track for train meets, it is possible that the proposed crossing would be blocked for several hours. As previously described, blocking a crossing can increase the risk of personal injury and death to pedestrians. Because of this increased risk, the crew will often cut the train so that it is not blocking the crossing. However, such additional switching increases the risk of personal injury to the crew members as previously described. Additionally, where a crew needs to cut the train to unblock the crossing, the side track would not work for some train meets because, with 300 feet of clearance required on both sides of the crossing, some trains would no longer fit in the side track.

Huston Affidavit.³ Finally, the “additional switching movements required to break cars that are coupled together would double the time involved as compared to the time required for the current switching movements.” Huston Affidavit, ¶5. These impacts alone result in preemption. *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); *Maynard v. CSX Transp., Inc.*, 360 F.Supp.2d 836, 842 (E.D. Ky. 2004).

Because the City’s action negatively impacts the use of the side tracks and mainline facilities and negatively impacts switching operations, the 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.”).

³ *See Fort Bend Cty v. The Burlington Northern & Santa Fe Ry. Co.*, 237 S.W.3d 355, 359—60 (Tex. App. 2007), *review denied* (Tex. June 6, 2008) for a discussion of the impact on train operations from cutting a train, the additional time and switching activities required, and the shortening of the length of a passing track.

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 tracks and mainline facilities. The Court need not go further than this. However, 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).

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

Where an action would prevent or unreasonably interfere with railroad operations, that action is preempted by the ICCTA. That conclusion was made clear by the STB itself in *Maumee & Western R.R. Corp. & RMW Ventures, LLC, Petition for Declaratory Order*, STB Finance Docket No. 34354, 2004 WL 395835 (March 2, 2004). In that case, the question for the STB was whether an eminent domain action by the city to acquire an easement for a grade crossing was preempted by the ICCTA. The STB concluded 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 unduly 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 4, 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. Judge Dawson 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 5). There, the Highway Commission attempted to condemn railroad property to establish an at-grade crossing in an area where the Arkansas Midland Railroad and Union Pacific conducted interchange operations (defined as the transfer of railcars from one railroad to another). *Id.* at p.2. In a Report and Recommendation adopted by the District Court, the Magistrate Judge found:

[i]n this case the ICCTA controls and preempts state law because this case involves highway construction and not highway safety. The evidence shows that the construction of the proposed crossing would adversely impact railroad operations. Further, the only evidence presented in this case unequivocally shows that railroad operations would be burdened if the proposed condemnation were allowed to proceed.

Id. at p. 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 6. In that case, the city sought a permanent easement for a hiking and biking trail on land running underneath a railroad bridge owned by the Kansas City Southern Railway. *Id.* at 1. In considering the issue, the Court relied on the following:

1. [T]hose structural modifications—and the potential implications those structural modifications have on [the railroad's] ability to inspect and maintain the bridge—constitute more than an 'incidental effect' on the operation of the railroad. *Id.* at 6.
2. [T]he proposed trail easement would allow pedestrians and bicyclists to cross under the track while trains are passing overhead. Despite the proposed roofing structure, the Court believes that arrangement would still present the risks that some sort of debris—from passing trains or from the bridge itself—might fall and strike the trail users. Such risks expose not only the trail users, but also the railroad. *Id.*

The Court concluded that because the proposed trail easement would have more than an "incidental effect" on the railroad operations, the ICCTA preempted the city's action. *Id.* at 6-7.

The decisions from the Western District of Arkansas are in accord with those from the Eastern 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 7, 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.

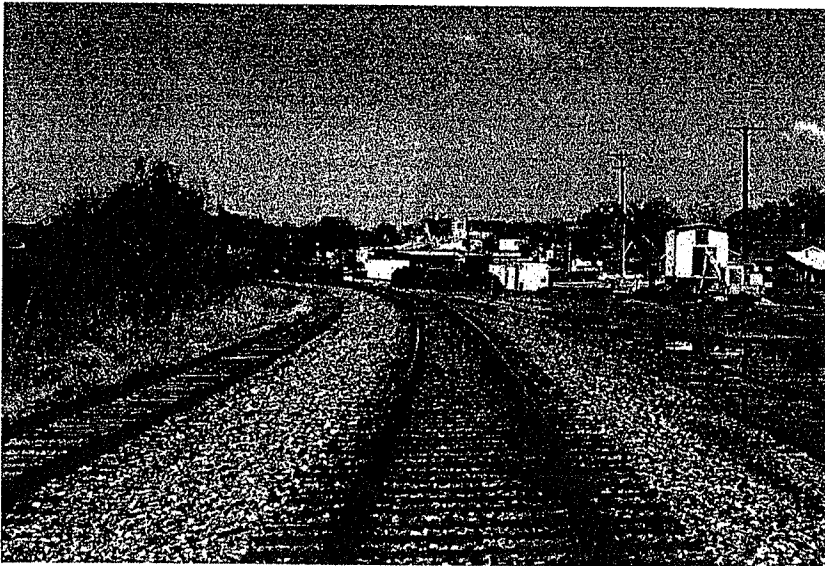
Id. at 3-4. "The evidence," concluded Judge Holmes, "demonstrates that the proposed easement *could* interfere with Midland's ability to operate its team track as well as its transloading and switching facilities and *could* interfere with efforts to address derailments." *Id.* at 4 (emphasis added).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

C. The Proposed Crossing Would Unreasonably Interfere with Union Pacific's Railroad Operations and Thus the City's Action is Preempted by the ICCTA.

Following the precedent outlined above, this Court should find that the ICCTA preempts the City's action. The City proposes to install a crossing over Union Pacific's mainline and side track. An at-grade crossing at this location not only would adversely impact railroad operations, but it would also jeopardize the safety of the public and Union Pacific's employees and property.

The mainline track at issue is maintained to Class 4 standards pursuant to the regulations promulgated by the Federal Railroad Administration. *Huston Affidavit*, ¶2. Thus, the speed limit

for freight trains is 60 miles per hour. 49 C.F.R. § 213.9(a). Next to the mainline track is a side track. Huston Affidavit, ¶2. This side track is the longest storage track on the Van Buren subdivision, which runs between Little Rock and Van Buren. Huston Affidavit, ¶9. A freight train approaching Ozark (and the proposed crossing) headed west on the mainline would come around a sweeping curve located next to the Arkansas River, as illustrated from the following:



As described previously, the side track is used for storage purposes and for train meets. However, the presence of the crossing will adversely affect its use for storage purposes on the side track by reducing capacity by 20%. Huston Affidavit, ¶5. Further, the presence of the crossing will unreasonably interfere with the ability to conduct train meets. To avoid blocking the crossing, the crew will often cut the train. Huston Affidavit, ¶7. The possibility that the train would no longer fit in the side track is increased because of the 300 feet clearance required on both sides of the crossing. Huston Affidavit, ¶7. This would divest the railroad of property to use for operations. *See 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).

Operations are further negatively impacted by the increased switching movements that would be required by the presence of the crossing. As Huston describes:

In addition, the proposed crossing would unreasonably interfere with railroad operations by requiring additional switching of railcars at the crossing and additional brake safety inspections. The additional switching movements required to break cars that are coupled together and put them back together would double the time involved as compared to the time required for current switching movements. The additional switching movements and brake inspections would increase the risk of personal injury to train crews by increasing the number of times they have to get on and off equipment, tie handbrakes, and walk the train. It would also increase the amount of time that trains are parked on or near the crossing. The longer a crossing is blocked, the greater the risk that people will attempt to crawl under or climb through the train. If a train begins to move while someone is attempting to crawl under or climb through it, that person can be seriously injured or killed.

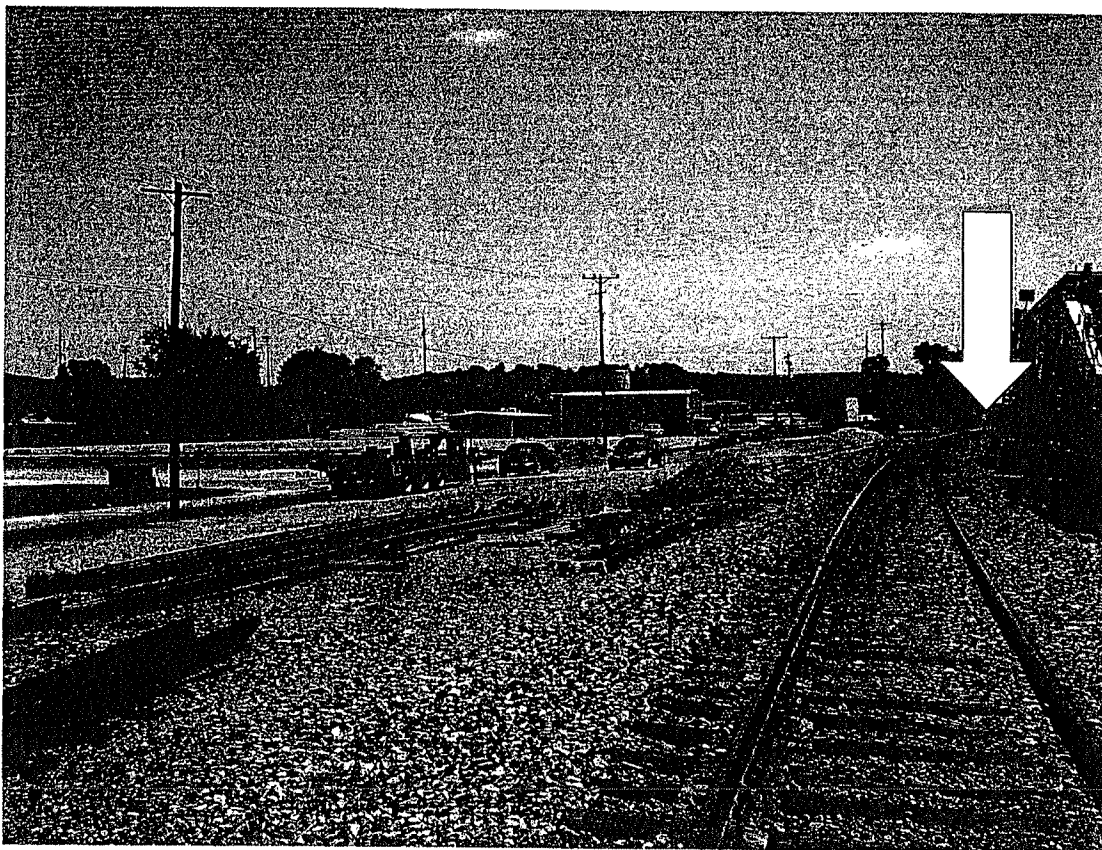
Huston Affidavit, ¶5.

It is not only railroad operations that would be adversely impacted by the proposed crossing. There are also undeniable risks to public safety. Again, Huston notes:

Allowing access to areas so close to UPRR mainline operations would also create security and safety issues affecting the railroad's interests as well as those of the public. For example, the area around the crossing would be accessible to the general public, which increases the risk of vandalism to UPRR property. If there is a pedestrian path placed along UPRR's right-of-way or just off the right-of-way, this would pose a safety risk because a pedestrian often takes the shortest path to his desired destination, which would be a straight line across the tracks. To prevent this, the City of Ozark would need to construct a fence on either side of the crossing for the length of the UPRR right-of-way. A fence, however, would restrict railroad personnel from accessing UPRR property for inspection, work, and needed repairs (including, if a derailment occurred).

Huston Affidavit, ¶8.

The safety issues are further illustrated by looking at the sight lines depicted in the next photograph. Union Pacific employee Rod Woods stood in the middle of the mainline where the proposed crossing would be located and took a photograph looking east.⁴ Affidavit of Rod Woods, ¶2, attached as Exhibit 8. Another Union Pacific employee, Tommy Wilkinson, was standing 468 feet away in a chartreuse vest. Woods Affidavit, ¶2. When Wilkinson continued farther down the track, he could no longer be seen because of the cars in the storage track. Woods Affidavit, ¶2. A train traveling 60 miles per hour covers this distance in about five seconds.



It is obvious that the curve impairs the ability of a person to look down the tracks and see an oncoming train. Huston Affidavit, ¶9. The limited sight distance is reduced even more when railcars are on stored on the side track. A grade crossing at this location would be dangerous

⁴ Felkins refers to this direction as South in his affidavit, as he is using railroad directions that refer to the track direction to Little Rock.

because a pedestrian may not see the train coming around the curve until it is too late. Likewise, the train engineer may not see the pedestrian. As discussed by Huston:

The proposed crossing endangers both the public and UPRR employees. A freight train coming into Ozark (and approaching the proposed crossing) headed west on the mainline comes around a sweeping curve located next to the Arkansas River. The curve makes it more difficult for a person to look down the tracks and see oncoming trains. If a locomotive engineer had to apply the train's emergency brakes to avoid striking a pedestrian or vehicle on the crossing, this could result in a derailment. The risk of a derailment is increased here because the proposed crossing is in a curve. Given the extremely close proximity of the tracks to the Arkansas River, a derailment at this location could cause severe environmental contamination in view of the hazardous materials that are transported on these tracks.

Huston Affidavit, ¶9. Further underscoring the risk of contamination is the fact that “[t]hese trains often carry hazardous materials such as petroleum, methyl bromide, yellow phosphorus, alcohol polyethoxylate, sodium hydrosulfide, and sodium hydroxide.” Huston Affidavit, ¶2. At various locations, the mainline is less than 15 feet from the edge of the river, and in some places, the Union Pacific right-of-way goes into the river. *See* Affidavit of Mathew Barr, attached to Motion as Exhibit 9. If a derailment occurred and a railcar carrying hazardous materials went into the river, the result could be disastrous.

In short, Union Pacific has shown that an at-grade crossing would adversely impact railroad operations by interfering with its ability to execute train meets, store railcars, and conduct switching operations. The safety risks to the public and to Union Pacific are real and substantial. They pose an insurmountable barrier to the City's request for a crossing. Indeed, the Arkansas Attorney General advised in 2012 that this very action would be preempted. Opinion No. 2012-134, 2012 Ark. AG LEXIS 137. For all of these reasons, the City's Complaint is preempted by the ICCTA and should be dismissed.

V. **THE CITY HAS WAIVED ITS RIGHT TO THE CROSSING AND IS ESTOPPED FROM DEMANDING THAT UNION PACIFIC REINSTALL IT.**⁵

A. **In 2000, the Mayor of Ozark Asked Union Pacific to Remove the Crossing.**

In approximately 2000, an Ozark resident called Union Pacific Manager of Industry and Public Projects, Charlie Felkins, several times to complain, even angrily, about trains blowing their whistles as they approached the crossing. Felkins Affidavit, ¶¶1-2. The resident asked Union Pacific to remove the crossing because “no one used” it. Felkins Affidavit, ¶2. Shortly after receiving those complaints, Felkins received another call, this time from the Mayor of the City. Felkins Affidavit, ¶3. The Mayor reiterated the complaints Felkins had received from the resident. Felkins Affidavit, ¶3. The Mayor requested that since no one used the crossing Union Pacific should remove it. Felkins Affidavit, ¶3. As a result, in approximately 2001, Union Pacific removed the crossing at a cost of several thousand dollars. Felkins Affidavit, ¶5.

B. **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,

⁵ By asserting this argument, Union Pacific is not conceding that the City has a right to the crossing. In fact, Union Pacific asserts that the City has no right to the crossing as discussed in Section VIII. However, to the extent that the City claims any right, that claim is subject to waiver and estoppel.

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, acting in his capacity as the chief executive officer of the City,⁶ specifically requested that the crossing be removed. Asking Union Pacific to remove the crossing is an act inconsistent with the intention to retain it. For that reason, the City’s attempt to reinstall the crossing should be barred by the doctrine of waiver.

C. 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.*,

⁶ 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).

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 Affidavit, ¶ 5. To allow the City to demand that it be re-installed would be 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 the substantial future costs. For these reasons, the City should be estopped from attempting to force Union Pacific to re-install the crossing.

VI. 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. “A municipality’s ability to act is derived only from those powers directly granted it by the state legislature or through the state constitution.” *Pfeifer v. City of Little Rock*, 346 Ark. 449, 463, 57 S.W.3d 714, 723 (2001). Condemnation statutes “should be strictly construed in favor of the landowner.” *Id.* at 459. The rationale is that municipalities are “creatures of the state to aid it in the regulation and administration of local affairs,” and thus they lack any inherent powers. *Id.*, at 463, 57 S.W.3d at 723.

The municipality's power to condemn is limited in three respects. First, there must be an established need to take the property for a public use or purpose. *Pfeifer*, 346 Ark. at 460, 57 S.W.3d at 721. Second, the "condemnation must be according to the law," meaning that it must be in compliance with the takings procedure. *Id.* Third, there must be no fraud, bad faith, or gross abuse of discretion in the legislative determination. *Id.* Because the City cannot establish (1) that there is an established need to take the property for public use and (2) that the condemnation is in accordance with the law, the condemnation action must be dismissed.

A. There is No Established Need for the Taking.

The City cannot show that there is an established need for this taking. Specifically, the City cannot show that it will be granted a permit by the Corps to place a boat dock in the river. Unless and until the City is granted that permit, there is no need for the crossing. Accordingly, because there is no established need, the City's condemnation action should be dismissed.

B. The Condemnation is Not in Accordance with the Law Because Land Already Devoted to Public Use Cannot be Condemned for Another Public Use.

The property at issue is already used for a public use. As the Eighth Circuit has stated:

in a larger sense, and in the true sense, every such railroad track is for the public use and for the public benefit, because it enables the public to exchange its commodities for those of the parties who conduct their business upon the track in a more facile and economical way. It reduces the prices of the articles carried to the consumers, and it increases commerce.

McPhee & McGinnity Co. v. Union Pac. R. Co. et al., 158 F. 5, 19 (8th Cir. 1907). Accordingly, this Court should adopt the "prior public use doctrine." To counsel's knowledge, this is a question of first impression in Arkansas. "The prior public use doctrine is a judicial rule . . . in which a condemnor endowed with a general grant of the power of eminent domain attempts to

use the power to take property already dedicated to a public use.” Mark S. Arena, *The Accommodation of “Occupation” and “Social Utility” in Prior Public Use Jurisprudence*, 137 U. Pa. L. Rev. 233, 234 (1988). See also Klein, *Power of Eminent Domain as Between State and Subdivision or Agency Thereof, or as Between Different Subdivisions or Agencies Themselves*, 35 A.L.R.3d 1293, *2a (2009) (describing the doctrine).

The Missouri Supreme Court has applied and explained the doctrine. *State of Mo. v. Hodge*, 878 S.W.3d 819 (Mo. 1994). In *Hodge*, the City of Mexico, Missouri determined that the rates of Missouri Cities, a privately-owned waterworks system, were too high and that the City could run the system at a lower cost to the residents. *Id.* at 820. After failing to purchase Missouri Cities, the City condemned the entire waterworks system. *Id.* On appeal, the Missouri Supreme Court concluded that the City lacked the authority to condemn for public use property which was already being utilized for the public; *i.e.*, only private property, which this was not, could be condemned for public use. *Id.*

The court analyzed the issue of when condemnation of public property may occur for a new and different public use. Citing C.J.S. on Eminent Domain, the court explained:

As a general rule, property already devoted to a public use cannot be taken for another public use which will totally destroy or materially impair or interfere with the former use, unless the intention of the legislature that it should be so taken has been manifested in express terms or by necessary implication. Mere general authority to exercise the power of eminent domain being in each case insufficient.

Id. at 821. Further,

The consistent thread of law running through [the case law] is that if an existing public use will not be harmed by a new and different public use, condemnation will be allowed under a general form of authority, both uses being “necessary” and not necessarily inconsistent or destructive. However, before allowing a

municipality or public service entity to take other public property that would destroy the previous “necessary” use, specific legislation delegation is required. The rationale being that the legislature, not the subsequent condemning authority, is the proper entity to decide between mutually conflicting or destructive uses of public property.

Id.

The Eighth Circuit Court of Appeals reached the same conclusion under Missouri law in *Union Center Redevelopment Corp. v. Nat’l R.R. Passenger Corp.*, 103 F.3d 62 (8th Cir. 1997). In that case, the Union Center Redevelopment Corporation brought a condemnation action against Amtrak to acquire property adjacent to Union Station in downtown St. Louis. *Id.* at 63. Union Center Redevelopment argued that Amtrak was not using the land for a public purpose (because the land was not currently in use) and that even if so, it had the authority under Missouri law to condemn the property. *Id.* at 66-67. The Eighth Circuit Court of Appeals, quoting from the *Hodge* case *supra*, held that the trial court did not err in concluding that Amtrak’s long term plans to build a passenger rail on the property constituted public use and that the statute did not authorize its condemnation. *Id.* at 67. Accordingly, the court affirmed summary judgment in favor of Amtrak.

It does not appear that Arkansas has directly confronted this issue;⁷ however, there is authority for the proposition that Arkansas would adopt the prior public use doctrine. *See Linwood & Auburn Levee Dist. v. State*, 121 Ark. 489, 181 S.W.2d 892 (1915). In *Linwood*, a levee district sought to condemn land owned by the state for a prison farm. The purpose of the district was to “construct and maintain a levee along the Arkansas River front to prevent inundation of lands in the district.” To that end, the district sought to condemn a portion of

⁷ A public to public condemnation has occurred in Arkansas, *City of Helena v. Arkansas Utilities Co.*, 208 Ark. 442, 443, 186 S.W.2d 783 (1945), but it does not appear that anyone raised, and the Court did not discuss, whether it was proper to condemn for public use land already serving a public purpose.

Cummins Farm for drainage. *Id.* at 492-93. According to the Supreme Court of Arkansas, the authority of the levee district to condemn property:

does not in express terms apply to condemnation of the State's property. The clear inference from the language of the Act is that it was intended to apply only to private ownership, and it is doubtful whether it could be construed to apply to condemnation of the State's property, even if the Legislature possessed the power to authorize such proceeding.

Id. at 496. Accordingly, because there was no authorization to make the State a defendant, the Arkansas Supreme Court held that the statute did not "authorize a proceeding against the State for condemnation of its property, and that the Legislature has no power to authorize such proceedings against the State which constitute civil actions." *Id.* at 497-98. Thus, where there is no specific grant to condemn public property, there is no authority for the taking. *See also Osceola v. Whistle*, 241 Ark. 604, 606, 410 S.W.2d 393 (1967) ("The rule of strict construction is especially applicable to statutes conferring the power of eminent domain, as the exercise of that power can entail harsh consequences to the landowner. 'The authority for the taking of private property for public use should be clearly expressed and the statute strictly construed.'")(citations omitted).

As further authority, three years before the *Linwood* decision, the Arkansas Supreme Court refused to allow one railroad to condemn property owned by another railroad. *St. Louis, Iron Mtn. & S. Ry. Co. v. Memphis, Dallas & Gulf R.R. Co.*, 102 Ark. 492, 143 S.W.107 (1912). The Court did not explicitly discuss the prior public use doctrine, but the holding that a condemnation could not occur because the first railroad "made an inchoate appropriation of the block of ground in question before the plaintiff filed its petition to condemn," *Id.* at 498, inherently means that a condemnor cannot condemn property already devoted to a public use.

There is no specific grant in Arkansas' condemnation legislation to allow the City to take property already being used for the public. Without that specific grant, the City lacks authority for this proposed taking. *See Osceola v. Whistle*, 241 Ark. 604, 606, 410 S.W.2d 393, 394 (1967). Further, the City's taking will "materially impair or interfere with" Union Pacific's public use of the land, as described in Section IV on preemption. *See State of Mo. v. Hodge*, 878 S.W.3d 819, 821 (Mo. 1994). As such, this Court should apply the prior public use doctrine and hold that the City does not have the authority for the proposed taking.

VII. THE CONVERSION CLAIM SHOULD BE DISMISSED BECAUSE IT IS BARRED BY THE STATUTE OF LIMITATIONS; IT IS NOT RECOGNIZED UNDER ARKANSAS LAW; AND THE CITY DOES NOT HAVE AN OWNERSHIP INTEREST.

Count II of the City's Complaint alleges that Union Pacific wrongfully converted the City's property when Union Pacific removed the crossing. This count should be dismissed for three reasons: 1) the City's claim is barred by the statute of limitations; 2) Arkansas does not recognize a cause of action for conversion of real property; and 3) the City cannot show an ownership interest in the property which is a required element of a conversion claim. For these reasons, the City's claim of conversion should be dismissed.

I. The City's claim is barred by the three year statute of limitations.

The statute of limitations for conversion actions is three years. *See Ark. Code Ann. § 16-56-105; Travis Lumber Co. v. Deichman*, 2009 Ark. 299 (holding that the three year statute of limitations applies to the tort of conversion). The statute of limitations for conversion begins to run on the date the defendant possesses and exercises control over the property, not at the time of the other party's demand for its return. *See Johnson v. Gilliland*, 320 Ark. 1 (1995). The City concedes that Union Pacific removed the crossing more than three years ago. *Supra* § VI of Union Pacific's Brief in Support of Motion to Dismiss. Thus, the City's claim of conversion is

barred by the three year statute of limitations.

II. Arkansas does not recognize a cause of action for conversion of real property.

Conversion is a common-law tort action for the wrongful possession or disposition of another's property. *See Buck v. Gillham*, 80 Ark. App. 375, 96 S.W.3d 750 (2003). The tort of conversion occurs when a party wrongfully commits a distinct act of dominion over the property of another that is inconsistent with the owner's rights. *Schmidt v. Stearman*, 2010 Ark. App. 274, 374 S.W.3d 254. The intent required is not conscious wrongdoing, but rather an intent to exercise dominion or control over the *goods* that is in fact inconsistent with the other party's rights. *Schmidt*, 374 S.W.3d at 256. A person can be held liable to the true owner of *stolen property* for conversion, notwithstanding that he or she acted in the utmost good faith and without knowledge of the true owner's title. *Schmidt*, 374 Ark. App. At 256.

As early as 1866, the Arkansas Supreme Court defined conversion as the taking of property and carrying it away. *See Trammell v. Bassett*, 24 Ark. 499 (1866). The fact that Arkansas Courts have defined conversion as exercising control over *goods* or *stolen property* shows that this cause of action applies only to personal property, not real property. Indeed, the Arkansas Model Instructions specifically state that the tort of conversion applies to personal property. *See* AMI 425. There is no AMI for conversion of real property.

Arkansas' rule that conversion does not apply to real property is consistent with other states. *See JCB, Inc. v. Union Planters Bank*, 539 S.3d 862, 870 (8th Cir. 2008) (holding that under Missouri law, conversion is the "unauthorized assumption of the right of ownership over personal property"); *Dorsett v. Buffington*, 2013 Ark. 345, 429 S.W.3d 225 (holding that under Louisiana law, conversion is the possession or transfer of a movable, i.e. personal property, of another). The Restatement (Second) of Torts confirms that the tort of conversion applies only to personal property. *See Restatement (Second) of Torts* §222 A (stating, "Conversion is an

intentional exercise of dominion or control over a *chattel* . . .”); *see also* BLACK’S LAW DICTIONARY 236 (6th ed. 1990) (defining chattel as a “thing personal and movable.”).

At issue in this case is a railroad crossing and the City’s alleged right to cross Union Pacific’s real property. The City has no cause of action for conversion because the property at issue is real property, not personal property. For this reason, the City’s conversion claim should be dismissed.

III. The City has no ownership interest in the real estate at issue.

To state a claim of conversion, the City must show that it owned the property allegedly converted. *Schmidt v. Stearman*, 2010 Ark. App. 274, 374 S.W.3d 254. It is undisputed that Union Pacific owned the land at issue in fee simple. *See* Paragraph 25 of City’s Complaint; *supra* section VIII of Union Pacific’s Brief in Support of Motion to Dismiss. The City has failed to state facts supporting a claim of ownership in the property allegedly converted. Therefore, it has failed to state facts upon which relief can be granted, and this claim must be dismissed.

VIII. CONCLUSION.

For the foregoing reasons, this Court should grant Union Pacific’s motion to dismiss. Thirteen years ago, the City asked Union Pacific to remove the crossing at issue. Now, these claims are barred by the doctrine of laches. Regardless, this action is preempted because railroad transportation, a side track, and mainline facilities would be negatively impacted. The City’s action would unreasonably interfere with railroad operations and would pose safety hazards to the public and to railroad employees. If the Court reaches the merits of this action, the doctrines of waiver and estoppel should be applied because the City requested the removal. No condemnation action exists because the City lacks the necessary authority. The conversion claim should be dismissed because the statute of limitations has expired, because Arkansas does not recognize a cause of action for conversion of real property, and because the City does not have

an ownership interest in the real property. For all of these, the City's Complaint should be dismissed.

Respectfully submitted,

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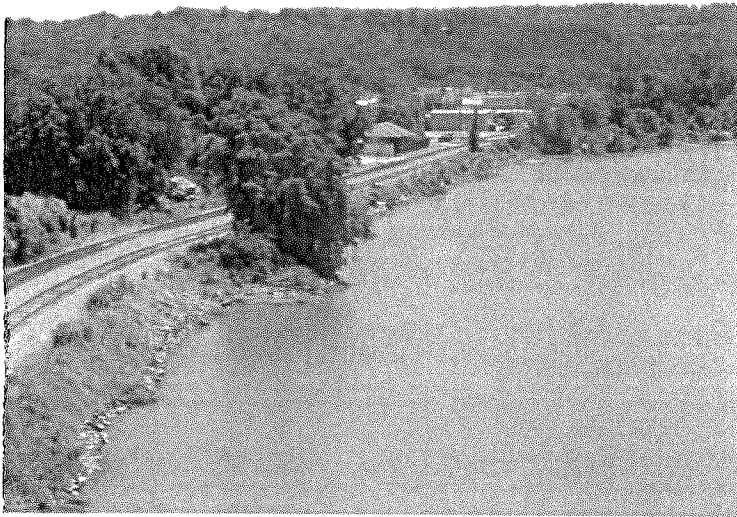
CERTIFICATE OF SERVICE

I, Jamie Huffman Jones, do hereby certify that a copy of the foregoing was mailed on this 24th day of September, 2014 via prepaid U.S. Mail delivery to:

Christopher D. Brockett
Sayre & Brockett
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Rita S. Looney
Maria L. Schenetzke
Arkansas State Highway and
Transportation Department
P. O. Box 2261
Little Rock, AR 72203

By: /s/ Jamie Huffman Jones
Jamie Huffman Jones



At this location, just east of a railroad depot donated to the City by Union Pacific, the City seeks the re-installation of a former grade crossing. *See* Map, attached to the Motion as Exhibit 1; Complaint. The following is a photograph from the proposed crossing site (looking east), to the best that Union Pacific can determine from the City's Complaint and previous requests:



Before the 1970s, the crossing would have allowed an automobile traveling south to cross the railroad tracks into a city neighborhood; however, that neighborhood was submerged by the river

for freight trains is 60 miles per hour. 49 C.F.R. § 213.9(a). Next to the mainline track is a side track. Huston Affidavit, ¶2. This side track is the longest storage track on the Van Buren subdivision, which runs between Little Rock and Van Buren. Huston Affidavit, ¶9. A freight train approaching Ozark (and the proposed crossing) headed west on the mainline would come around a sweeping curve located next to the Arkansas River, as illustrated from the following:



As described previously, the side track is used for storage purposes and for train meets. However, the presence of the crossing will adversely affect its use for storage purposes on the side track by reducing capacity by 20%. Huston Affidavit, ¶5. Further, the presence of the crossing will unreasonably interfere with the ability to conduct train meets. To avoid blocking the crossing, the crew will often cut the train. Huston Affidavit, ¶7. The possibility that the train would no longer fit in the side track is increased because of the 300 feet clearance required on both sides of the crossing. Huston Affidavit, ¶7. This would divest the railroad of property to use for operations. *See 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

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