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

Re: STB Docket No. 853 (Sub-No. 1X) - South Kansas & Oklahoma Railroad
Petition to Reopen

Dear Ms. Brown,

In response to Mr. Coen's letter of June 4, 2019, on behalf of Sunflower Rails-Trails Conservancy, Inc., this issue has been fully litigated and proven contrary to Sunflower's current position. In *Farmers Co-op. Co. v. U.S.*, 98 Fed.Cl. 797 (2011), the Court expressly found that Sunflower's NITU expired without a rail banking agreement.

Plaintiffs own property under or adjacent to either of two rail line segments held by K & O running through these counties (respectively, the "CKP Corridor" and the "Hodgeman Corridor").⁴ Pls.' Proposed Findings of Uncontroverted Fact, ¶¶ 1, 17–74. Pls.' Ex. 6 (Bates no. 00101).

On August 7, 2003, K & O filed a Notice of Exemption with the STB proposing to "abandon" the two segments. *Id.* (Bates no. 00088). It advised of its intent, upon receipt of abandonment authority, "to remove the rail, track material, and crossties." *Id.* (Bates no. 00101). It further advised that "[t]he property underlying the rights-of-way is reversionary, which would affect the transfer of the property for other than rail or rail-banking purposes." *Id.* (Bates no. 00090).

On November 12, 2003, the American Trails Association ("ATA") submitted comments to the STB and requested that a NITU be issued to allow for the possibility of railbanking of the two rights-of-way. Def.'s Ex. 1 at 1. ATA filed the requisite statement of willingness. *Id.* at 2. Also, on the same date, K & O advised the STB of its willingness to negotiate with ATA for trail usage. Pls.' Ex. 7. Consequently, on November 25, 2003, the STB issued a NITU for both the CKP and Hodgeman corridors. Pls.' Ex. 8.

On April 1, 2004, K & O conveyed its interest in the two corridors to ATA via a quitclaim deed. Pls.' Ex. 9. As recorded in the land records of Pratt County on August 23, 2004, the deed conveyed to ATA "all of Grantor's interests, in lands and premises, right of way, bridges, culverts, easements, buildings, supporting structures, and other fixtures, improvements and appurtenances" in the counties of Comanche, Kiowa, Pratt, and Hodgeman in the state of Kansas. *Id.* (Bates no. 00405). On October 25, 2007, however, ATA filed a "Notice of Intent to Terminate Trail Use" with the STB asking that "it be relieved of its obligations under the Trails Act with respect to the rights-of-way in the CKP and Hodgeman corridors." Pls.' Ex. 10. In a decision dated November 9, 2007, the STB granted ATA's

request to vacate the NITU, effective November 5, 2007, and stated that “K & O may fully abandon the line segments ...” Pls.’ Ex. 11.

On January 18, 2008, ATA executed (and on February 25, 2008, recorded with the Pratt County Register of Deeds) a “Disclaimer and Release,” disclaiming any “right, title, or interest in or to” any of the property in the Pratt County portion of the CKP corridor. Pls.’ Ex. 13.⁵

The STB subsequently issued three further NITUs regarding the CKP or Hodgeman corridors. **Because no trail use agreement was reached in any of these three negotiations, all three of these NITUs expired 180 days after their issuance. Def.’s Resp. at 8–9.**

These NITUs were issued as follows:

On December 31, 2007, Sunflower Recreational Trails, Inc. (“Sunflower”) filed a request with the STB for the issuance of a NITU on the CKP corridor (and Statement of Willingness). Def.’s Ex. 2. On January *801 10, 2008, K & O informed the STB that it had not “consummated the abandonment of the line” and was willing to negotiate with Sunflower for interim trail usage. Def.’s Ex. 3.

On February 4, 2008, the STB issued a NITU on the CKP corridor. Pls.’ Ex. 12. *See also* Pls.’ Ex. 16 at 2 (Bates no. 00084), noting that **the negotiation period for this NITU expired on August 2, 2008.**

On February 14, 2008, Hodgeman County Economic Development (“HCED”) filed a petition, and accompanying Statement of Willingness, for the issuance of a NITU on the Hodgeman corridor. Def.’s Ex. 4. K & O informed the STB that it had not consummated the abandonment of that line and was willing to negotiate with HCED. Def.’s Ex. 5. The STB granted the request on March 7. As noted above, no agreement was reached and the NITU expired on September 3, 2008.

Sunflower then expressed interest in the Hodgeman corridor. It petitioned the STB on December 16, 2008, for a NITU on the Hodgeman corridor and filed the requisite Statement of Willingness. Def.’s Ex. 6. K & O advised the STB that it had not consummated abandonment and was willing to engage in negotiations. Def.’s Ex. 7. The STB granted the request for a NITU on the Hodgeman corridor with Sunflower, Pls.’ Ex. 16, but no agreement was reached and the NITU expired June 27, 2009. *Id.* at 2.

All of the NITUs, including the initial NITU issued in response to the request of ATA, provided that, if no trail use agreement was reached by the 180–day deadline, K & O “may fully abandon the line ...” Pls.’ Exs. 8 (Bates no. 00042–43), 12 (Bates no. 00061), 14 (Bates no. 00072), and 16 (Bates no. 00085).

As of the filings in this case, neither the CKP corridor nor the Hodgeman corridor was in use, or had ever been in use, as a recreational trail under the Trails Act.

Affirmed on Appeal in *Farmers Co-op Co. v. U.S.*, 100 Fed.Cl. 579 (2011).

Here, the taking extended from the issuance of the first NITU in 2003 through the stewardship of the corridors under the aegis of ATA and continued beyond the vacation of that trail use agreement when the **STB issued the various additional NITUs. Those NITUs, however, expired with no trail use agreements having been reached.**

This issue has been resolved since 2011 and it is far too late to resurrect it now.

In addition, the Bill of Sale and Quitclaim Deed are invalid under Kansas Law.

66-525. Railroad right-of-way; abandonment, when; requirements; release; notice; exception.

...

(f) Except where a railroad company conveys its right, title and interest in and to railroad right-of-way which it owns in fee simple, **any conveyance by a railroad company of any actual or purported right, title or interest in property acquired in strips for right-of-way to any party other than the owner of the servient estate shall be null and void**, unless such conveyance is made with a manifestation of intent that the railroad company's successor shall maintain railroad operations on such right-of-way.

Therefore, the lack of a railbanking agreement consummated within the 180 period is fatal to Mr. Coen's and Sunflower's argument.

Sincerely,

Marc Elster

cc:

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