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November 13, 2018
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November 13, 2018

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: STB Finance Docket No. 35982, *Jackson County, Missouri – Acquisition and Operation Exemption – Union Pacific Railroad Company*

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding is Jackson County's Reply in Opposition to the Petition for Revocation filed by Deborah S. Groh et al., in this proceeding.

If you have any questions about the enclosed, please contact me.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Justin J. Marks', written over a horizontal line.

Justin J. Marks
Counsel for Jackson County

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35982

**JACKSON COUNTY, MISSOURI
-- ACQUISITION AND OPERATION EXEMPTION--
UNION PACIFIC RAILROAD COMPANY**

**VERIFIED NOTICE OF EXEMPTION
Pursuant to 49 C.F.R. § 1150.31**

**JACKSON COUNTY'S
REPLY IN OPPOSITION TO PETITION FOR REVOCATION**

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Dated: November 13, 2018

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35982

**JACKSON COUNTY, MISSOURI
-- ACQUISITION AND OPERATION EXEMPTION--
UNION PACIFIC RAILROAD COMPANY**

**VERIFIED NOTICE OF EXEMPTION
Pursuant to 49 C.F.R. § 1150.31**

**JACKSON COUNTY'S REPLY
IN OPPOSITION TO PETITION FOR REVOCATION**

Jackson County, Missouri ("Jackson County") through undersigned counsel hereby replies in opposition to the Petition for Revocation filed in this proceeding on October 22, 2018 by Deborah S. Groh, DJJHS Enterprises, LLC, JHB & MEB Enterprises, LLC, David W. Wells, Dawn R. Wells, Current Properties Investments, LLC, and Nephrite Fund 1, LLC (together "Petitioners").

On December 23, 2015, Jackson County filed a Verified Notice of Exemption pursuant to 49 C.F.R. § 1150.31 (the "Notice") to obtain authority to acquire from the Union Pacific Railroad Company ("UPRR") and operate approximately 17.7 miles of rail line located in Jackson County (the "Corridor"). On January 15, 2016, CenturyLink Communications, LLC ("CenturyLink") requested a housekeeping stay to obtain more information as to whether the proposed transaction had been properly filed under the Notice of Exemption process. Jackson County responded in opposition to CenturyLink's request on January 19, 2016. In a decision served February 4, 2016, the Board denied the requested housekeeping stay and ordered the

Notice to become effective immediately.¹ On April 28, 2016, Jackson County and UPRR consummated the proposed transaction pursuant to the Notice.

Now, nearly three years after Jackson County filed the Notice and more than 2 years after it became effective and ownership of the Corridor was transferred from UPRR to Jackson County, Petitioners seek revocation and assert that the Notice is void because of Jackson County's development of a trail on a portion of the Corridor adjacent to the rail line.² However, the Board already rejected a similar argument in its previous decision denying the housekeeping stay and concluded that Jackson County had the requisite intent at the time of its acquisition to provide common carrier rail service on the line through a contractor if any shipper required such service. Petitioners fail to submit any new information into the record to demonstrate that the Notice was false or misleading, and since the acquisition Jackson County has taken steps to preserve the integrity of the Corridor in the event that a future freight rail customer requires common carrier service on the line. Therefore, the Petition for Revocation should be denied.

BACKGROUND

On December 23, 2015, Jackson County filed the Notice to obtain Board authority to acquire from UPRR and operate approximately 17.7 miles of rail line between milepost 288.3 and milepost 270.6 in Jackson County, Missouri (the "Corridor"). In the Notice, Jackson County certified that substantially the entire Corridor is out of service, that there are no active freight rail customers on the line, but that if a customer requires common carrier freight rail service in the future, Jackson County would provide such service through a contractor. Notice at 3.

¹ *Jackson County, Mo. – Acquisition and Operation Exemption – Union Pac. R.R. Co.*, Finance Docket No. 35982, slip op. at 3 (STB served Feb. 4, 2016).

² On October 24, 2018, the National Association of Reversionary Property Owners ("NARPO") also submitted a letter claiming the Notice to be a "sham" but did not provide any relevant evidence to support its assertion.

Prior to the effective date of the Notice, CenturyLink requested a housekeeping stay to determine if the transaction had been properly filed under the Notice of Exemption process. In response, Jackson County explained that UPRR had not provided service on the line for over 20 years.³ Jackson County Reply to CenturyLink at 8. Jackson County also explained that it planned to establish a recreational trail on a portion of the Corridor adjacent to the track,⁴ that its future vision for the Corridor also included potential commuter rail service, and that neither of these uses would be inconsistent with its freight service obligation. Jackson County reiterated that if a freight customer required common carrier rail service over the line in the future, Jackson County would engage a contract operator to satisfy any common carrier obligation it would have to provide such service. *Id.*

The Board denied CenturyLink's request for a housekeeping stay, concluding that use of the Corridor as a trail and for potential commuter rail service is not inconsistent with Jackson County's obligation to provide freight service in the event that a freight customer required such service in the future.⁵

While admitting to its desire to use the right-of-way as a trail and potentially for commuter rail service, Jackson County accurately describes its obligations as a common carrier and commits to reestablishing rail service through a contract operator if a freight customer requires such service. In addition, the record does not support CenturyLink's argument that the planned uses of the Line are inconsistent with the freight service obligation Jackson County will assume. Thus, the Line will remain part of the national rail network and available for freight rail service.⁶

³ UPRR acquired the Corridor through its merger with Southern Pacific Transportation Company in 1996. Prior to the merger, the St. Louis Southwestern Railway Company, a subsidiary of Southern Pacific, acquired the Corridor in 1979 and then embargoed it. *Missouri Central Railroad Co. – Acquisition and Operation Exemption – Lines of Union Pacific Railroad Co.*, STB Finance Docket No. 33508, slip op at 8-9 (STB served Apr. 30, 1998).

⁴ Sections of the recreational trail will lie on the rail bed with the understanding that such sections of the trail will be relocated (to the extent necessary) in the event that a customer requires rail service on the relevant portion of the Corridor.

⁵ *Jackson County, Mo. – Acquisition and Operation Exemption – Union Pac. R.R. Co.*, Finance Docket No. 35982, slip op. at 3 (STB served Feb. 4, 2016).

⁶ *Id.* (Internal Citations Omitted).

Jackson County created the Rock Island Rail Corridor Authority to work in conjunction with the Kansas City Area Transportation Authority to develop future transportation plans for the Corridor after Jackson County's acquisition of the Corridor from UPRR. Throughout the Corridor planning process, Jackson County has informed the public that the Corridor remains available for common carrier freight service as part of the national rail network.⁷ Further, in managing its ownership, development and use of the Corridor, Jackson County has acted to ensure that the integrity of the Corridor is preserved and remains available for common carrier freight rail service in the event that a future customer requires such service.⁸ In furtherance of those objectives, Jackson County is designing a Shared Use Path Alignment for the Corridor "to accommodate future transit plans and preserve the national rail network."⁹

On October 22, 2018, Petitioners filed their Petition to revoke the Notice on behalf of certain landowners who purport to own fee title in land adjacent to and underlying the Corridor subject to a railroad easement. Petition at 2. Petitioners assert that "based on the fact that no trains have traversed the tracks for over 30 years and, since Jackson County publicly states that there will never be any trains in the future and Jackson County is utilizing the rail line for a trail, Jackson County's assertions to the STB are a total sham." Petition at 3 (emphasis in original). Petitioners also argue that "[a]lthough Jackson County acquired an easement for railroad purposes from UPRR, the utilization of the right-of-way as a recreational trail exceeds the scope

⁷ "Corridor planning and design will focus on preservation of the national rail network corridor's integrity, most notably the railroad corridor's unencumbered continuity, and on multi-modal transportation options as the corridor remains available for freight service." See Rock Island Rail Corridor Authority, available at <http://www.jacksongov.org/776/Rock-Island-Rail-Corridor-Authority> "

⁸ See Exhibit A at Section 1.2 and Exhibit A attached thereto, Rock Island Maintenance and Management Program Agreement (Feb. 22, 2017)(Agreement between Jackson County and the Kansas City Area Transportation Authority for the rehabilitation of the Corridor, which reflects that Jackson County is a common carrier subject to Board jurisdiction and prioritizes Jackson County's common carrier obligations and any future freight rail service requirements over other uses of the Corridor during implementation of the shared-use recreational trail).

⁹ Rock Island Corridor Open House Boards at 5 *available at* <http://www.jacksongov.org/DocumentCenter/View/3595/Rock-Island-Corridor-Open-House-Boards?bidId=>

of railroad purposes easement in violation of the landowners' fee ownership of their land under Missouri law." *Id.* at 2. Petitioners' assertion that Jackson County acquired an "easement for railroad purposes" and that Petitioners own the "underlying fee ownership" of the property is not supported by any evidence and is a matter that must be decided by Missouri state law. The issue of whether or not Jackson County acquired fee ownership to substantially all of the properties that make up the Corridor, including those properties alleged to be owned by Petitioners, has yet to be decided under Missouri state law. For purposes of this proceeding, that issue does not impact the validity of the Notice filed by Jackson County or of Jackson County's obligation and commitment to provide common carrier freight service if a customer requires such service.

Petitioners filed the Petition for Revocation only after the Court of Federal Claims cast doubt on Petitioners' Fifth Amendment takings claim against the federal government in Deborah S. Groh et al. v. United States of America. According to oral argument transcripts in that proceeding, Petitioners are seeking compensation from the federal government pursuant to 28 U.S.C. §1491(a)(1) (the "Tucker Act") based on their claim that a Fifth Amendment taking occurred when the Board issued its February 2016 decision declaring the effectiveness of the Notice and denying the CenturyLink request for a housekeeping stay. During oral argument, the judge in the Court of Federal Claims questioned whether the Court has jurisdiction over the Tucker Act claim and advised Petitioners to seek redress from the STB through an adverse abandonment filing or through a Petition for Revocation. Petitioners advised the judge that adverse abandonments are rare and therefore they are not interested in pursuing it as a remedy.¹⁰

¹⁰ See Exhibit B, Transcript of Oral Argument at 42, *Deborah S. Groh, et al. v. The United States of America*, Case No. 17-1066L (Apr. 16, 2018)(United States Court of Federal Claims): "Let me address [government counsel's] talk about the filing an abandonment – forced abandonment in front of the STB. It costs like \$25,000 for landowners to file that, and for those landowners to file that, and for those abandonment – adverse abandonments to really go through, it's very, very rare that they STB forces a railroad to abandon it because the STB wants to keep the network as much as they can under --- you know, in the interstate rail system. So that's not really an option for our landowners." Statement by Elizabeth McCulley, Counsel to Petitioners.

The judge then suggests remedies under the Administrative Procedures Act to attack the Notice of Exemption filed by Jackson County because the Petitioners have not exhausted their administrative remedies. Petitioners asked the Court of Federal Claims to stay the Tucker Act claim while Petitioners “go to the STB and do go the administrative remedy route and just see what they say.”¹¹

Petitioners have submitted no relevant evidence to the Board showing that the Notice filed by Jackson County in December 2015 is false, misleading or otherwise should be revoked in the interest of the Board’s rail transportation policies. Moreover, throughout the process of acquiring and redeveloping the Corridor, Jackson County has taken concrete steps to ensure that the integrity of the Corridor is preserved so that Jackson County will be in a position to satisfy any common carrier obligation for rail service it may have to provide (through a contractor) to any customer that requires such service in the future.

ARGUMENT

1. Petitioners Have Submitted No Relevant Evidence to Demonstrate that the Notice Is False, Misleading or Contrary to the Rail Transportation Policy

Under 49 U.S.C. § 10502(d), the Board has authority to revoke an exception if it finds that regulation is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101. *Sea Lion Railroad – Abandonment Exemption- in King County, WA*, STB Docket No. AB-544X, et al., slip op. at 5 (STB served Aug. 11, 1998)(“*Sea Lion Railroad*”). If a notice of exemption contains false or misleading information, it is void ab initio. *Id.* The petitioner requesting to revoke an exemption carries the burden of proof “by articulating reasonable, specific concerns to satisfy the revocation criteria.” *Id.*

¹¹ See Exhibit C, Transcript of Oral Argument at 26, *Deborah S. Groh, et al. v. The United States of America*, Case No. 17-1066L (July 10, 2018)(United States Court of Federal Claims).

The basis for Petitioners' request to revoke the Notice is similar to the argument made by CenturyLink that the Board rejected in February 2016. CenturyLink asserted that Jackson County was not a bona fide common carrier because Jackson County had publicly stated its intention to use a portion of the Corridor for the development of a recreational trail and also had expressed interest in using the Corridor for potential commuter rail service.¹² The Board considered the CenturyLink argument and concluded that Jackson County's Notice was valid because it "accurately describes its obligations as a common carrier and commits to reestablishing rail service through a contract operator if a freight customer requires such service."¹³

Here, Petitioners explain that their Petition is "based on the fact that no trains have traversed the tracks for over 30 years and, since Jackson County publicly states that there will never be any trains in the future and Jackson County is utilizing the rail line for a trail, Jackson County's assertions to the STB are a total sham." Petition at 3 (emphasis in original). Like CenturyLink, Petitioners' cite to a local newspaper article which claims that the former County Executive publicly told residents that UPRR freight trains would not run through their neighborhoods anymore as a result of Jackson County's acquisition of the Corridor. This alleged statement by the former County Executive does not support Petitioners' claim that the Notice is false or misleading because it is specific to UPRR trains and therefore factually accurate.

The Board should reject the Petition for Revocation because the Petitioners failed to meet their burden of proving that the Notice is false or misleading. In both the Notice and in response to the CenturyLink filing, Jackson County has been transparent in acknowledging that the rail line is and has been out of service for many years, that there are no active customers on the line,

¹² *Jackson County, Mo. – Acquisition and Operation Exemption – Union Pac. R.R. Co.*, Finance Docket, 35982, slip op. at 3 (STB served Feb. 4, 2016).

¹³ *Id.*

and that if any customer required common carrier freight rail service in the future then Jackson County would provide such service through a contract operator. Further, Jackson County has been transparent that it plans to use a portion of the Corridor for the development of a recreational trail and for possible future commuter rail service. In response to the CenturyLink filing, Jackson County explained that its planned trail use and possible future use of the Corridor for commuter rail service are not inconsistent with the provision of common carrier freight rail service and that numerous recreational trails run adjacent to active rail lines. Jackson County Reply to CenturyLink at 8. Petitioners do not submit any evidence into the record to refute Jackson County's prior explanations. On the contrary, Jackson County has publicly stated and taken steps since its acquisition to ensure that the integrity of the Corridor will be maintained so that it remains available for any common carrier freight service that Jackson County may be required to provide (through a contractor) in the future.¹⁴

Petitioners repeatedly assert that Jackson County is not a rail carrier to support their argument that Jackson County's Notice contained false or misleading information. Petition at 3, 6. Petitioners misunderstand the role often played by state and local governments in the U.S. railroad industry. State and local government agencies across the United States own rail lines. In some instances the government retains the common carrier obligation¹⁵ and in others it does not.¹⁶ Petitioners' assertion that Jackson County is not a common carrier is unavailing and does not demonstrate that the Notice contained false or misleading information.

¹⁴ Rock Island Rail Corridor Authority Background Information, *available at* <http://www.jacksongov.org/776/Rock-Island-Rail-Corridor-Authority>

¹⁵ See *South Carolina Division of Public Railways D/B/A Palmetto Railways – Acquisition Exemption – Hampton & Branchville R.R. Co.*, Finance Docket No. 35995 (STB served June 6, 2016).

¹⁶ See *Santa Cruz County Regional Transp. Comm'n. – Petition for Declaratory Order*, Finance Docket No. 36213 (STB served Oct. 24, 2018).

Petitioners offer as additional authority the Board’s decision in *The Land Conservancy of Seattle and King County – Acquisition and Operation Exemption – The Burlington Northern and Santa Fe Railway Co.*, Finance Docket No. 33389 (STB served May 13, 1998)(“*Seattle Land Conservancy*”). In that case, the Board revoked an earlier exemption that had been obtained by The Land Conservancy (“TLC”) because the Board concluded that TLC never had any intention to provide common carrier service on the rail line that it had acquired pursuant to the exemption process. The Board noted in that case that TLC applied for abandonment within days after consummating the acquisition of the line.¹⁷ The Board explained that the “policy underlying the governing acquisition exemption procedures is to support the continued operation of rail lines in lieu of abandoning them.”¹⁸ The Board further explained that “when an acquiring noncarrier initiates abandonment proceedings within days after consummating the acquisition of the line, and there are no extenuating circumstances, our processes are being abused.” For those reasons, the Board concluded that “the facts [in *Seattle Land Conservancy*] support the conclusion that TLC never had any intention of reinstituting rail service on the line.”¹⁹

Petitioners cannot rely on the *Seattle Land Conservancy* case in support of their Petition for Revocation. In its Notice, Jackson County explicitly stated that it would be acquiring the common carrier obligation from UPRR, that the rail line had no active freight customers, and that if a customer required common carrier freight rail service in the future Jackson County would provide such service through a contract operator. Since its acquisition of the Corridor pursuant to the Notice, Jackson County has taken steps to preserve the integrity of the Corridor

¹⁷ *The Land Conservancy of Seattle and King County – Acquisition and Operation Exemption – The Burlington Northern and Santa Fe Railway Co.*, Finance Docket No. 33389, slip op. at 3 (STB served Sept. 26, 1997).

¹⁸ *Id.*

¹⁹ *Id.*

and has publicly stated that the Corridor remains available for freight rail service.²⁰ Nearly three years after the acquisition, as Jackson County implements its shared-use development of a recreational trail on a portion of the Corridor adjacent to the rail line, it does so with the understanding that the integrity of the Corridor must be maintained for possible future common carrier rail service.²¹

The rail transportation policy reflected in 49 U.S.C. § 10101 lists fifteen (15) separate policy goals of the United States Government relating to the regulation of the U.S. railroad industry. Petitioners do not cite a single policy goal which supports their Petition for Revocation despite claiming that it has been filed under 49 U.S.C. § 10502(d) (which authorizes revocation if required to advance the rail transportation policy goals). Therefore, Petitioners do not cite a reasonable specific concern for revocation under section 10502(d) and have not met the required burden of proof.

2. Petitioners’ Assertions Regarding Jackson County’s Alleged Use of the Corridor In Violation of Purported State Law Easement Rights Does Not Implicate the Board’s Jurisdiction

Petitioners claim that Jackson County’s use of a portion of the Corridor as a recreational trail exceeds the scope of the railroad easement that Jackson County allegedly acquired from UPRR. The Board generally does not interpret the scope of property rights under state law,

²⁰ In *Sea Lion Railroad*, the Board recognized the difference between the facts in *Seattle Land Conservancy* and a situation where an entity acquires a rail line with the intent to allow for common carrier rail service. The Board explained in *Sea Lion Railroad* as follows: “While we remain committed to preserving the integrity of our processes, we do believe that the situation here substantially differs from the situation in *Land Conservancy*, where an entity acquired an active rail line and almost immediately sought to abandon it for conversion to nonrail use.” *Sea Lion Railroad*, slip op. at 5.

²¹ Jackson County nevertheless reserves the right to consider filing for Board authority to abandon its common carrier obligation on the Corridor. Until that time as Jackson County initiates any such abandonment process with the Board, Jackson County recognizes that the integrity of the Corridor must be preserved and made available for common carrier freight rail service in the event that a future customer requires such service.

leaving such real property issues to be resolved by state courts.²² Citing Missouri case law, Petitioners argue that “the utilization of the right-of-way as a recreational trail exceeds the scope of a railroad purposes easement in violation of the landowners’ fee ownership of their land under Missouri law.” Petition at 2. It is Jackson County’s understanding, to the best of its knowledge, that substantially all of the parcels on the Corridor were originally acquired for railroad use through individual transactions. There were a few parcels that were acquired by condemnation proceedings. Whether or not the original railroad that acquired each individual Petitioner’s parcel did so through a fee simple transaction or an easement is a question of Missouri law that should be decided by a Missouri court. Petitioners’ complaint about Jackson County’s use of railroad easement rights does not implicate the jurisdiction of the Board as the scope of any such easement under state law is a matter outside of the Board’s purview and is not relevant to whether the Board should revoke an exemption notice that became effective nearly three years ago.

CONCLUSION

For the foregoing reasons, Jackson County respectfully requests that the Board deny the Petition for Revocation because it fails to meet its burden of proving that the Notice was false or misleading or otherwise should be revoked in the interest of the Board’s rail transportation policies. In addition, to the extent that Petitioners’ assert state law claims, those claims do not implicate the Board’s jurisdiction and provide no basis for revoking the Notice.

²² *City of Sammamish, Wash. – Petition for Declaratory Order*, Finance Docket No. 36161, slip op. at 4 (STB served Mar. 26, 2018).

Respectfully submitted,

A handwritten signature in blue ink, reading "Justin J. Marks", is written over a horizontal line.

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415 East 12th Street
Kansas City, MO 64106
(816) 881-3355

Counsel for Jackson County, Missouri

Dated: November 13, 2018

VERIFICATION

I, Donald Matthew Davis, declare under penalty of perjury that I have read the foregoing Reply to the Petition for Revocation, that I know the facts asserted therein, and that the same are true as stated.

Executed on November 13, 2018



Donald Mathew Davis
Project Coordinator
Rock Island Rail Corridor Authority/ Jackson County, MO

EXHIBIT A

ROCK ISLAND
MAINTENANCE AND MANAGEMENT PROGRAM AGREEMENT

THIS MAINTENANCE AND MANAGEMENT PROGRAM AGREEMENT (the "**Agreement**") is made as of the 22nd day of February, 2017, (the "**Effective Date**") by and between Jackson County, Missouri, a political subdivision of the State of Missouri (the "**County**") and the Kansas City Area Transportation Authority, a bi-state agency created under a compact between the States of Missouri and Kansas, and approved by the United States Congress (the "**KCATA**").

Recitals

WHEREAS, the KCATA was created by Mo. Rev. Stat. 238.010 as a public agency and political subdivision of the State of Missouri to plan, own, operate, and manage public transportation systems and facilities in the Kansas City Transportation District, which includes the Missouri counties of Cass, Clay, Jackson and Platte;

WHEREAS, the County and the Union Pacific Railroad ("UP") signed an agreement for the acquisition by the County of approximately 17.7 miles of the former Rock Island Railroad Corridor in Jackson County, Missouri (the "**Railroad Corridor**");

WHEREAS, the County and KCATA entered into the Cooperative Agreement for Right-of-Way Acquisition for Construction of a Trail System and Future Rail Line for Commuter Service and Other Public Transportation Systems in Kansas City and Jackson County, Missouri dated January 5, 2016 (the "**Cooperative Agreement**");

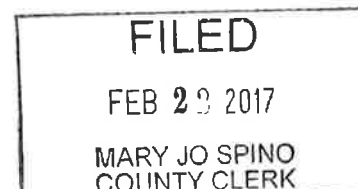
WHEREAS, through the Cooperative Agreement, County and KCATA formed a regional partnership to enhance the condition, viability and use of the Railroad Corridor and promote an historic regional transit opportunity while advancing the County's vision and KCATA's transit options;

WHEREAS, the County acquired the Railroad Corridor from UP on May 2, 2016;

WHEREAS, the County is the fee owner of the Railroad Corridor and a "common carrier" under 49 U.S.C. 11101 subject to the jurisdiction of the Surface Transportation Board;

WHEREAS, the County will undertake the removal of debris, brush, hazards and other environmental conditions from the Railroad Corridor and construct a multi-use bicycle and pedestrian shared use path (the "**Shared Use Path Project**");

WHEREAS, the County has agreed to preserve and maintain the Railroad Corridor in accordance with the hierarchy pyramid attached hereto as Exhibit A and KCATA may develop a future shared commuter rail system, alternative commuter-based transit system and other public transportation systems and uses (the "**Multi-Modal Project**");



WHEREAS, the planning and design of the Railroad Corridor will focus on preservation of the national rail network corridor's integrity while developing multi-modal transportation options including the Shared Use Path Project and Multi-Modal Project.

WHEREAS, in order to fund the acquisition of the Railroad Corridor and related initial projects, the County issued its special purpose obligation bonds in an aggregate principal amount of \$51,950,000 (the "**County Bonds**");

WHEREAS, the KCATA has agreed to reimburse the County for KCATA's fifty-percent (50%) share of the principal of and interest on the County Bonds paid by the County;

WHEREAS, the County anticipates constructing the Shared Use Path Project through a variety of sources and the KCATA does not have an obligation to fund the Shared Use Path Project;

WHEREAS, the County and KCATA desire to operate both the Shared Use Path Project and Multi-Modal Project in a self-sustaining manner;

WHEREAS, the Cooperative Agreement provides that the KCATA shall have the primary role in undertaking efforts involving the planning and management of future construction and use of the Railroad Corridor for the Multi-Modal Project;

WHEREAS, under Section 6.2 of the Cooperative Agreement, the County and KCATA agreed to cooperate reasonably and in good faith to establish a commuter route connecting the termination point of the Railroad Corridor to Downtown Kansas City, Missouri, which may include a connection to the River Market area of Kansas City;

WHEREAS, under Section 2.3 of the Cooperative Agreement, the County and the KCATA agreed to reasonably cooperate to pursue and develop economic opportunities as part of the Shared Use Path Project and to enhance future transit, rail and other public transportation infrastructure as part of the Multi-Modal Project;

WHEREAS, under Section 3.3 of the Cooperative Agreement, the County and the KCATA agreed to execute this Maintenance and Management Agreement and develop an interim business plan to fund the management, maintenance and operation of the Shared Use Path Project and the Multi-Modal Project;

WHEREAS, the County has created the Rock Island Rail Corridor Authority ("**RIRCA**") as a department of the County to administer the day-to-day servicing, maintenance and management of the Shared Use Path Project and Railroad Corridor;

WHEREAS, RIRCA may be established as a separate and distinct entity after the execution of this Agreement with the mutual agreement of the parties;

WHEREAS, the parties wish to set forth in this Agreement the respective rights and obligations of the County and the KCATA with respect to the management, maintenance and operation of the Shared Use Path Project and the Multi-Modal Project;

NOW THEREFORE, in consideration of the mutual covenants and agreements hereinafter expressed and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

AGREEMENT

ARTICLE I

BASIC TERMS

1.1. Incorporation of Recitals

The above recitals are true and correct and are hereby incorporated and made a part of this Agreement as if fully set forth.

1.2 Purpose

The purpose of this Agreement is to provide for: (i) the operation, servicing, management and maintenance of the Shared Use Path Project and Railroad Corridor by the County; and (ii) the management, maintenance and operation of the Multi-Modal Project by KCATA. A hierarchy pyramid showing the priority and implementation of (i) freight; (ii) transit; and (iii) the Shared Use Path is attached hereto as Exhibit A. An outline showing the responsibilities of each of the parties is attached hereto as Exhibit B.

1.3. Railroad Corridor Management

The County and KCATA hereby agree that the County will be the manager for the servicing, management, operation and maintenance of the Shared Use Path Project and Railroad Corridor, and that the County shall preserve and maintain the Railroad Corridor in accordance with the hierarchy pyramid attached hereto as Exhibit A. The parties hereby appoint KCATA as the manager for the planning, design, development, operation, management and maintenance of the Multi-Modal Project. The Shared Use Path Project and the Multi-Modal Project are collectively referred to as the "**Projects**". The County and KCATA shall be such managers as of the Commencement Date, as hereinafter defined, for the Term of this Agreement. The County hereby authorizes the KCATA to exercise such powers and take such actions with respect to the Multi-Modal Project and the Railroad Corridor as may be necessary for the performance of its obligations under this Agreement. KCATA hereby accepts its appointment on the terms and conditions hereinafter set forth.

The parties hereby acknowledge and agree that the County shall be responsible for the costs of management, security and maintenance of the Railroad Corridor for the five (5) years following the Commencement Date of this Agreement (the "**Initial Period**"). Upon the start of

construction of the Multi-Modal Project or any phase thereof, KCATA will be responsible for the management, security and maintenance of that length of the Railroad Corridor used by the Multi-Modal Project or applicable phase. The County will remain responsible for the management, maintenance and security of freight railroad activities that are independent of the Multi-Modal Project and the management, maintenance and security of the Shared Use Path, including portions of the Shared Use Path within the area of the Railroad Corridor used by the Multi-Modal Project. Similarly, if KCATA implements a transit oriented development project using portions of the Railroad Corridor, KCATA will be responsible for the management, maintenance and security of those portions of the Railroad Corridor that are impacted by the transit oriented development project.

In furtherance of the ultimate vision and intent of the parties that the Railroad Corridor be operated in a self-sustaining manner, during such Initial Period the parties shall: (i) review and analyze the costs and expenses associated with the ongoing management, security and maintenance of the Railroad Corridor; (ii) develop and pursue revenue generation through leases, licenses, easements and other agreements related to the property located over, on, across or adjacent to the Railroad Corridor, as further described in Section 4.3 herein; (iii) pursue and solicit potential cost-sharing, in-kind contributions and other involvement from local jurisdictions around the Railroad Corridor; (iv) develop and pursue revenue generation through transit oriented development projects, as will be further agreed to by the parties pursuant to Section 1.8; and (v) pursue value capture mechanisms as described in Section 3.4.

Three (3) years after the Commencement Date of this Agreement, the parties agree to meet in order to review the costs and expenses associated with the management, security and maintenance of the Railroad Corridor. At the end of the Initial Period, if funding from items (i)-(v) above does not generate sufficient funds to cover the costs of management, security and maintenance of the Railroad Corridor, the parties agree to set forth in an amendment to this Agreement or a separate agreement to be reasonably and in good faith negotiated and executed, an alternative funding plan and the method and manner by which the costs and expenses associated with the management, security and maintenance of the Railroad Corridor will be divided between the parties.

1.4 Term

The term of this Agreement shall commence on January 1, 2017 (the "**Commencement Date**") and, unless earlier terminated as provided in Section 8.3 herein, shall continue for the longer of (i) the term of the County Bonds; or (ii) twenty-five (25) years (the "**Term**").

1.5 Party Liaison; Joint Rock Island Committee

Each of the County and KCATA shall appoint a representative to be the party's contact for decisions relating to the services to be performed under this Agreement. Initially, County's representative shall be _____, and KCATA's representative shall be _____. Any party may change its representative by providing notice to the other parties, as provided in Section 9.5 of this Agreement. The two (2) respective liaisons shall constitute the "**Joint Rock Island Committee**." In the event that RIRCA is formed as a separate

entity, RIRCA shall also appoint a representative, resulting in three (3) liaisons constituting the Joint Rock Island Committee. The Joint Rock Island Committee shall be a governing committee and information sharing body, designed to coordinate the long term vision for the Projects and the Railroad Corridor, review plans and specifications to ensure that construction of the Shared Use Path positively impacts future transit and transportation goals, coordinate grants and to address other goals on a collaborative basis for the period prior to the establishment of RIRCA as a separate entity. The Joint Rock Island Committee shall abide by the guiding principle of focusing on the County's common carrier status and the integrity of the Railroad Corridor to protect the investment being made by the County and the KCATA.

1.6 RIRCA Governing Structure

The County and KCATA hereby acknowledge and agree that RIRCA is a department of the County. In order for RIRCA to be formed as a separate and distinct entity, both the County and KCATA must affirmatively agree, in writing, to such formation. The parties acknowledge and agree that an amendment to this Agreement or a separate agreement may be necessary upon the establishment of RIRCA as a separate entity in order to transition certain rights and obligations to RIRCA, and the parties agree to negotiate and execute such agreement or amendment reasonably and in good faith as soon as reasonably possible after the establishment of RIRCA as a separate entity.

Once established as a separate and distinct entity, RIRCA shall be governed by a seven (7) member Board of Directors, with three (3) such directors appointed by the County and three (3) such directors appointed by the KCATA. Only the six (6) members appointed by the County and the KCATA shall vote. In the event of a tie, the seventh (7th) member shall cast the tie-breaking vote. The appointment of the seventh director shall rotate between the County and KCATA every three (3) years. For example, the first such appointment shall be made by the County, and the second such appointment shall be made by the KCATA.

1.7 Construction and Operation of Shared Use Path Project

(a) Construction of Shared Use Path Project:

The County shall be solely responsible for the development and construction of the Shared Use Path Project. Pursuant to Section 3.1 of the Cooperative Agreement, KCATA shall have no obligation to reimburse or repay the County for any costs related to the construction of the Shared Use Path Project. The County shall provide KCATA with plans and specifications for the construction of the Shared Use Path Project prior to initiating construction of any portion of the Shared Use Path Project. KCATA shall in good faith review such plans and specifications in accordance with the County's Shared Use Path Project schedule to determine if the current plans interfere with or impede long term transit and transportation goals of KCATA for the Railroad Corridor. Within thirty (30) days of being provided such plans and specifications, KCATA shall either approve such plans and specifications, in writing, or shall advise the County of the necessary changes to the plans and specifications to accommodate long term transit and transportation goals. Within thirty (30) days after being provided the necessary changes, the County shall submit revised plans and specifications to KCATA. Such process shall continue

until the parties agree on the plans and specifications for construction of the Shared Use Path Project.

(b) Operation of the Shared Use Pathway Project:

The ongoing operation and security of the Shared Use Path Project shall be conducted by the County.

1.8 Transit Oriented Development Agreement

In an agreement to be reasonably and in good faith negotiated and executed as soon as reasonably possible subsequent to the date of the execution of this Agreement (the “**TOD Agreement**”), the County and KCATA will develop a business plan for the development and construction of both development projects and transit oriented development projects on or adjacent to the Railroad Corridor.

ARTICLE II

SHARED USE PATH PROJECT

2.1 General Duties and Services

The County shall use diligent efforts to manage, maintain and operate the Shared Use Path Project and Railroad Corridor consistent with the County Work Plan and Rock Island Budget, as such terms are hereinafter defined, and subject to the reasonable oversight and input of the Joint Rock Island Committee. General duties and services shall include, but not be limited to, (i) the procurement of goods for the servicing, management and maintenance of the Shared Use Path and Railroad Corridor; (ii) the negotiation and execution of contracts with vendors for the management, repair, servicing and maintenance of the Shared Use Path Project and Railroad Corridor; and (iii) the purchase of supplies and materials reasonably necessary or desirable for the servicing, management and maintenance of the Shared Use Path Project and Railroad Corridor.

2.2 Maintenance and Repairs

The responsibility for the ordinary maintenance, repairs, alterations, replacements and installations and purchase of supplies necessary for the operation of the Shared Use Path Project and the upkeep of the Railroad Corridor shall be with the County. All repairs, alterations and replacements shall be of at least equal quality and workmanship to the original work.

2.3 Technology Management; Security

The County will assume primary support and maintenance for software or technology used for the Shared Use Path Project. Security systems and security staffing, including video surveillance, security officers, and Railroad Corridor access, will be paid for and managed by the

County. The Joint Rock Island Committee will provide input to the County on security levels and access.

2.4 Other Responsibilities

As reflected in Section 2.2 of the Cooperative Agreement, the County agrees to use its reasonable best efforts to protect and defend against challenges to the title of the Railroad Corridor. In the event of unanticipated litigation challenging County's title to the Railroad Corridor, environmental claims, environmental remediation or other unanticipated lawsuits or third party expenses, County, as the fee owner of the Railroad Corridor, would remain responsible for the payment of these expenses.

2.5 Insurance

Regarding only that portion of the Railroad Corridor dedicated to the Shared Use Path Project, the County shall carry and maintain in force for the duration of this Agreement insurance coverage, underwritten by insurer(s) lawfully authorized to write insurance in the State of Missouri, of the minimum types and limits set forth below. At its option, the County may choose to satisfy any claims or judgments for which it is liable out of the County's Self-Insurance Fund, established under section 526 of the County Code.

(a) Commercial General Liability. \$2,000,000 combined single limit, for bodily injury, personal injury and property damage liability per occurrence and \$2,000,000 general aggregate.

(b) Workers' Compensation and Employer's Liability. Worker's compensation as required by statute, including Employer's Liability with limits of \$100,000 each accident, \$500,000 disease-policy limit, and \$100,000 disease each employee.

(c) Commercial Automobile Liability. \$2,000,000 per occurrence, covering owned, hired, and non-owned automobiles. Coverage provided shall be on an "any auto" basis and written on an "occurrence" basis. This insurance will be written on a Commercial Business Auto form or acceptable equivalent and will protect against claims arising out of the operation of motor vehicles.

Regarding all other portions of the Railroad Corridor, the County shall also have this same obligation regarding insurance for the Initial Period. Upon the start of construction of the Multi-Modal Project or any phase thereof, KCATA will be responsible for carrying insurance on that length of the Railroad Corridor used by the Multi-Modal Project or applicable phase. At the end of the Initial period, the parties agree to set forth in an amendment to this Agreement or a separate agreement to be reasonably and in good faith negotiated and executed, a plan and the method and manner by which the costs and expenses associated with insuring the Railroad Corridor will be divided between the parties. Such plan may take into consideration the fact that both County and KCATA may be required to maintain insurance for certain portions of the Railroad Corridor.

The party with the obligation to provide insurance or self-insurance pursuant to this section shall ensure that the other party is listed as a named insured on any applicable policies of insurance or, in the event self-insurance is substituted, will defend, indemnify, and hold harmless the other party and its agents, agencies, officers, and employees from any claims arising out of the ownership, occupancy, and/or operation of the Railroad Corridor, with the exception of claims arising out of the negligence of the indemnified party or its agents, agencies, officers, or employees.

2.6 Funding

The County shall be responsible for the costs and expenses relating to the construction, servicing, management and maintenance of the Shared Use Path Project and Railroad Corridor and may seek funding from other sources including but not limited to grants, partnerships, value capture, right-of-way area income and in-kind contributions.

ARTICLE III

MULTI-MODAL PROJECT

3.1 General Duties and Services

The KCATA shall use diligent efforts to plan, design, develop, manage, maintain and operate the Multi-Modal Project, consistent with the KCATA Work Plan and KCATA Budget (as hereinafter defined). General duties and services shall include, but not be limited to, (i) the procurement of goods relating to the planning, development and day-to-day operations of the Multi-Modal Project and any transit or transportation systems; (ii) negotiation and execution of contracts with third party vendors for the planning, development, design, operation, repair, maintenance and servicing of the Multi-Modal Project and any transit or transportation systems; (iii) the purchase of equipment and materials necessary or desirable for the planning, design, development, management and maintenance of the Multi-Modal Project and any transit or transportation systems; and (iv); security of the transit system(s). The KCATA shall provide the County with plans and specifications for construction of the Multi-Modal Project prior to initiating construction of any portion of the Multi-Modal Project. The County shall in good faith review such plans and specifications in accordance with the KCATA's Multi-Modal Project schedule to determine the plans' compatibility with the Shared Use Path Project and or the integrity of the Railroad Corridor.

3.2 Maintenance and Repairs

Subject to the KCATA Budget, KCATA shall perform, or cause to be performed, all ordinary maintenance, repairs, alterations, replacements and installations and purchase all supplies necessary for the planning, design, development and operation of the Multi-Modal Project and any transit or transportation systems installed on the Railroad Corridor.

3.3 Technology Management

The KCATA will be responsible for support and maintenance of transit specific software systems that are used by KCATA or third-party contractors for transit and transportation aspects of the Multi-Modal Project.

3.4 Transit Oriented Development; Value Capture

The KCATA shall take the lead in transit oriented development projects and the establishment of a value capture strategy for the Railroad Corridor, and the County agrees to cooperate with the KCATA, as further described in Section 7.2(b).

ARTICLE IV

SHARED RESPONSIBILITIES

4.1 Marketing and Outreach

The County, with the input of the Joint Rock Island Committee, shall develop and fund a marketing and communication plan, and shall implement and conduct all marketing for the Shared Use Path Project and Railroad Corridor. County is responsible for the coordination and administration of all marketing and advertising contracts for the Shared Use Path Project and Railroad Corridor and associated revenue.

The KCATA, with the input of the Joint Rock Island Committee, shall develop and fund a marketing and communication plan, and shall implement and conduct all marketing for the Multi-Modal Project. KCATA is responsible for the coordination and administration of all marketing and advertising contracts for the Multi-Modal Project and associated revenue.

4.2 Customer Service

The Joint Rock Island Committee shall establish a central telephone number to answer and direct all customer service inquiries. The County shall answer and distribute calls, and shall provide general information to all customers regarding the Shared Use Path Project and Railroad Corridor. The KCATA shall answer and distribute calls, and shall provide general information to all customers regarding the Multi-Modal Project.

4.3 Negotiation of Leases, Licenses, Easements and Other Agreements

(a) Responsibility. Subject to any further agreements contained in the TOD Agreement, the County shall be primarily responsible for the negotiation and execution of all leases, licenses, easements and other agreements related to property located over, on, across or adjacent to the Railroad Corridor. All such leases, licenses, easements and other agreements shall be executed by the County.

(b) Sharing of Income. Pursuant to Section 3.3 of the Cooperative Agreement, all income from the lease, license, easement and right-of-way area use and development (as may be modified in the TOD Agreement) shall be shared equally between the County and KCATA. The County shall be responsible for the invoicing of all tenants, licensees, users and other occupants of the Railroad Corridor and the accounting of all revenues. Income from the lease, license, easement and right-of-way area use shall first be credited to the operating budget for the management, security and maintenance of the Railroad Corridor which is initially the County's responsibility as outlined in Section 1.3. Thereafter, excess revenues shall be shared equally by the County and KCATA.

(c) Enforcement of Agreements. The County shall use commercially reasonable efforts to enforce the terms of all leases, licenses, easements and other agreement that it manages with respect to the Railroad Corridor.

(d) Designation of KCATA. The County and KCATA representatives designated in Section 1.5 of this Agreement may agree, in writing, that KCATA shall take the lead on certain leases, licenses, easements and other agreements related to property located over, on, across or adjacent to the Railroad Corridor.

4.4 Encroachments

The County, with the advice and input of the KCATA and the Joint Rock Island Committee, shall take the lead in addressing and/or removing the encroachments currently identified on the Railroad Corridor. In the event the County wishes KCATA to take actions to address and/or remove the encroachments or a specific encroachment, then the County may designate the KCATA to handle such encroachment(s) with the written approval of both the County and KCATA representatives designated in Section 1.5 of this Agreement.

4.5 Decisions Affecting Entirety of Railroad Corridor

Any decision or agreement which affects the entirety of the Railroad Corridor, for example the selection of a master developer or a marketing/advertiser for the entire Railroad Corridor, may only be made after the receipt of written approval from both the County and the KCATA. The guiding principle of such decisions shall focus on the County's common carrier status and the integrity of the Railroad Corridor to protect the investment being made by the County and the KCATA.

ARTICLE V

SECURING AND MANAGING GRANTS

5.1 Shared Use Path Grants

The County will undertake the clean-up of the Railroad Corridor as necessary for the development of the Projects and construction of the Shared Use Path Project. Exhibit C to the Cooperative Agreement estimates the total cost of the Shared Use Path Project to be

approximately \$16,000,000. This budgeted amount includes the local match to be provided by the County. In Exhibit D to the Cooperative Agreement, the source of this financing is described as "Local Match, Surface Transportation Program Funds and Other Funds." The County will undertake the lead between the parties to obtain additional grants from local, state and federal governments. The KCATA agrees to take all cooperative actions requested by the County in support of any administrative application and/or legislative initiatives.

5.2 Transit Grants

KCATA will undertake the planning and development of future construction, operation and use of the Railroad Corridor for the Multi-Modal Project and the establishment of a public transportation system. The KCATA shall take the lead, and the County will cooperate with KCATA, in seeking Surface Transportation Program Funds, any other funds, any incentives available from the cities that are serviced by the Railroad Corridor and in seeking state and federal grants for transit oriented development.

5.3 Cooperation

If requested by the County and agreed to by the parties, KCATA may seek, process and oversee existing and future federal and state grant applications applicable to the Projects and confirm that all grant conditions and requirements are met. KCATA will prepare grant applications for the Projects and monitor and implement FTA requirements for approved grants. The KCATA agrees to comply with all applicable federal, state and local laws, rules and regulations applicable to grants or other federal or state funding. The County agrees to do nothing that would cause the KCATA to violate any applicable law, rule or regulation and nothing in this Agreement shall be interpreted to require the KCATA to violate any such law, rule or regulation. The County and the KCATA each agrees to make its regulatory documents and records available to the other for inspection upon request.

ARTICLE VI

WORK PLAN AND BUDGETING

6.1 County Work Plan

The County shall annually prepare a work plan that will describe the desired repairs, maintenance projects, capital expenditures, problems and solutions, and proposed projects for the Shared Use Path Project and the Railroad Corridor for the upcoming calendar year (the "**County Work Plan.**") The action items described in the County Work Plan shall be funded by the County. The County Work Plan will be submitted to KCATA for its review prior to the submittal of the County Work Plan to the Jackson County Legislature. KCATA shall review the County Work Plan to determine if the proposed projects interfere with or impede long term transit and transportation goals of the KCATA for the Railroad Corridor.

6.2 Shared Use Path and Railroad Corridor Budget

(a) Formation: The County shall annually prepare and submit to the Joint Rock Island Committee for review, input and comments a proposed operating and capital budget (the “**Rock Island Budget**”) for the repair, servicing, management and maintenance of the Shared Use Path Project and Railroad Corridor described in the County Work Plan prior to the submittal of the Rock Island Budget to the Jackson County Legislature.

(b) Independent Cost Center. The County shall establish an independent cost center to administer appropriations authorized pursuant to the Rock Island Budget.

(c) Implementation: The County shall implement the Rock Island Budget and use commercially reasonable efforts to confirm that the cost of maintaining, managing and operating the Shared Use Path Project and Railroad Corridor shall not exceed the Rock Island Budget.

6.3 KCATA Work Plan

The KCATA shall annually prepare a work plan that will describe: (i) the proposed activities, projects, capital expenditures and transit infrastructure to be undertaken in furtherance of the development and initiation of the Multi-Modal Project; (ii) activities, projects, and capital expenditures to be undertaken to further transit oriented development and other transit related developments within or adjacent to the Railroad Corridor; and (iii) proposed activities, projects and capital expenditures to be undertaken in furtherance of the leasing, licensing and associated uses of the Railroad Corridor (the “**KCATA Work Plan**”). The action items described in the KCATA Work Plan shall be funded through the KCATA Budget.

6.4 KCATA Budget

(a) Formation. In connection with its annual County budget process, the KCATA shall cooperate with the County to develop a budget for: the planning, design, development, operation, management and maintenance of the Multi-Modal Project for the upcoming calendar year and the planning, design, development of any transit oriented development projects (collectively, the “**Budgeted Items**”). The KCATA shall annually prepare and submit an operating and capital budget (the “**KCATA Budget**”) which corresponds with the KCATA Work Plan to the Joint Rock Island Committee for its review, input and comments.

(b) Funding. The KCATA shall fund the Budgeted Items. As Section 1.8 states, funding for transit oriented development projects will be further defined in a TOD Agreement.

(c) Independent Cost Center. The KCATA shall establish an independent cost center to administer appropriations authorized pursuant to the KCATA Budget.

(d) Implementation. KCATA shall implement the KCATA Budget and use commercially reasonable efforts to ensure that the costs of the Budgeted Items shall not exceed the KCATA Budget. The KCATA Budget shall constitute an authorization for KCATA to

expend necessary monies in order to effectuate the Budgeted Items in accordance with the KCATA Budget and subject to the provisions of this Agreement.

6.6 Audit

The Projects, and the independent cost centers of both the County and KCATA established to administer the funding of such projects, shall be audited once every twenty-four (24) months by an independent, unaffiliated Certified Public Accountant (CPA) properly licensed in Missouri. The Audit shall be equally funded by the County and the KCATA, not to exceed Fifteen Thousand Dollars (\$15,000) for each party.

ARTICLE VII

COOPERATION OF THE PARTIES

7.1 Continued Cooperation of the Parties

Each of the County and KCATA agree, upon the request of the other party, to take such actions, including the execution and delivery of such documents, instruments, petitions and certifications and provide such other information as may be reasonably requested, necessary or appropriate to carry out the provisions, terms, covenants and intent of this Agreement, and to aid and assist the other party in carrying out said provisions, terms, covenants, and intent of this Agreement and to give full force and effect to the provisions, terms and covenants and intent of this Agreement.

7.2 Cooperation on Specific Aspects of the Projects

(a) UP Use Restrictions. Pursuant to the Line Sale Agreement dated December 31, 2015 and the Quitclaim Deed transferring the Railroad Corridor from UP to the County, UP imposed restrictions on the future use of the Railroad Corridor. Under Section 7(d)(ii) of the Line Sale Agreement, the County may perform remediation of the Railroad Corridor to qualify for one or more of the restricted uses. After completion of the remediation, the County may request that UP release or partially release the restriction on use covenant. The County agrees to cooperate with KCATA to remediate the Railroad Corridor, or portions thereof, and to work with KCATA to release the use restrictions from the Railroad Corridor, or portions thereof, so that the parties may fully exercise their rights to conduct transit oriented development on or adjacent to the Railroad Corridor, as will be detailed in the TOD Agreement.

(b) Value Capture Opportunity. In accordance with Section 2.2 of the Cooperative Agreement, KCATA, in cooperation with the County, may form a Transportation Development District ("TDD") under the authority of Section 238.200, et seq., a Community Improvement District under the authority of Section 67.1401 et seq. RSMo, or other incentive district. Following the Effective Date of this Agreement, KCATA may file a petition in accordance with RSMo Section 238.207 or RSMo Section 67.1421. The TDD, CID or other incentive district may be formed as a political subdivision, with all statutory powers, including, but not limited to, the ability to tax and levy assessments. The County and KCATA agree to take such actions,

including the execution and delivery of such documents, instruments, petitions and certifications necessary to implement the TDD, CID or other incentive district and to provide that such district shall fund the Multi-Modal Project.

Given the County's and the KCATA's sustainable approach to developing the Railroad Corridor, the same Value Capture Opportunity or a new Value Capture Opportunity may also offset Railroad Corridor, Shared Use Path and Multi-Modal Project maintenance and security costs that are not covered by grants, lease, license, easement and right-of-way area use income, in-kind contributions, partnerships or other funding opportunities.

ARTICLE VII

DEFAULT AND TERMINATION

8.1 Event of Default.

- (a) A party to this Agreement shall be in default of this Agreement (the "Defaulting Party") upon the happening of any of the following events (each an "Event of Default"):
 - i. Failure to comply with any obligations of such Defaulting Party under Articles II through VI of this Agreement;
 - ii. Taking any actions (or permitting any actions to be taken by others) that are contrary to the obligations set forth in Articles II through VI of this Agreement;
 - iii. Suspension or revocation of any act, power, license, permit or authority that has the effect of preventing and stopping either party from performing its obligations under this Agreement;
 - iv. Failure of any other obligation under this Agreement, which failure could jeopardize the purposes for which this Agreement has been entered into from being realized.
- (b) The Defaulting Party shall have the opportunity to cure the Event of Default within thirty (30) days of having received written notice of the Event of Default from the other party to this Agreement (the "Non-Defaulting Party").
- (c) In the event that the Defaulting Party does not cure the Event of Default within the 30-day period described in subsection (b) (or commenced such cure and be diligently pursuing the same if such cure would reasonably take longer than 30 days to cure), the Non-Defaulting Party may take one or more of the steps set forth in Section 8.2.

8.2 Breach; Compliance

Upon an Event of Default by the Defaulting Party and the failure to cure within the requisite period described in Section 8.1(b), the Non-Defaulting Party may take one or more of the following actions:

- (a) At its discretion, extend the period of cure described in Section 8.1(b) to afford the Defaulting Party more time in which to cure the Event of Default;
- (b) Perform the obligation the Defaulting Party failed to perform that constitutes the Event of Default and obtain reimbursement from the Defaulting Party for any expenses, including without limitation reasonable attorney's fees, which the Non-Defaulting Party may incur in performing the obligation under the Agreement; or
- (c) Initiate an action for damages.

8.3 Termination.

This Agreement shall terminate on the occurrence of any of the following:

- (a) Expiration of the Term, as defined in Section 1.4;
- (b) Exercise by the KCATA of the KCATA Purchase Option Right under Section 8 of the Cooperative Agreement; and .

ARTICLE IX

MISCELLANEOUS

9.1 Assignment

No party to this Agreement may transfer or assign this Agreement, except with the written consent of the other party, in its sole discretion.

9.2 Modification

The terms, conditions and provisions of this Agreement cannot be modified, amended or eliminated, except by the signed written agreement of the County and the KCATA.

9.3 Choice of Law

This Agreement is made in the State of Missouri under the Constitution and laws of such State and is to be construed, interpreted and governed by the laws of the State of Missouri.

9.4 Severability

Should any part, term, portion or provision of this Agreement be decided by the courts to be illegal or in conflict with any law of the State, or otherwise be rendered unenforceable or ineffectual, the validity of the remaining parts, terms, portions or provisions shall be deemed severable and shall not be affected thereby, provided such remaining portions or provisions can be construed in substance to continue to constitute substantially the agreement that the parties intended to enter into in the first instance.

9.5 Notice.

Notices hereunder shall be sufficient if delivered to:

(a) County:

County Counselor
Office of the County Counselor
Jackson County Courthouse
415 E. 12th Street, Suite 200
Kansas City, Mo 64106

With a copy to:

Executive Director
Rock Island Rail Corridor Authority
22501 Woods Chapel Road
Blue Springs, MO 64015

(b) KCATA:

Kansas City Area Transportation Authority
Attention: Chief Executive Officer
1200 E. 18th Street
Kansas City, MO 64108

With a copy to:

Jerry Riffel, Esq.
Lathrop & Gage LLP
2345 Grand Blvd., Suite 2400
Kansas City, MO 64108

9.6 Approval by Governing Bodies; Binding Effect; Entirety

(a) Approval by Governing Bodies. This Agreement is subject to approval by the KCATA Board of Commissioners and the Legislature of Jackson County.

(b) Binding Effect. Upon the approval of all necessary governing bodies, this Agreement shall be binding upon the parties hereto and upon their assigns, transferees and successors in interest, provided no party may assign this Agreement or the rights or obligations hereunder without the express written consent of the other party.

(c) Entirety. This Agreement sets forth the complete understanding of the County and KCATA, and supersedes all previous negotiations and representations between them and their agents.

9.7. Multiple Counterparts

This Agreement may be executed in multiple counterpart copies, each of which will be considered an original and each of which shall constitute but one and the same instrument, binding on the parties hereto, even though both parties are not a signatory to the same counterpart. Any counterpart of this Agreement which has attached to it separate signature pages which together contain the signatures of both parties hereto shall be deemed for all purposes a fully executed original.

9.8 Agreement Runs With the Land

This Agreement shall run with the land and inure to the benefit of all future owners of the Railroad Corridor.

[Reminder of Page Intentionally Left Blank]

IN WITNESS WHEREOF, the parties have hereunto set their respective hands as of the day and year first above written.

JACKSON COUNTY, MISSOURI

2-21-2017
Date

By:

[Signature]
Frank White, Jr.
County Executive

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

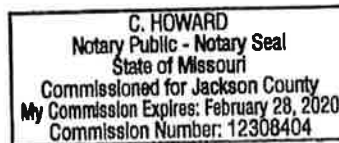
On this 21st day of February in the year 2017, before me, C. Howard, a Notary Public in and for said state, personally appeared Frank White, Jr., the County Executive of Jackson County, Missouri, a political subdivision of the State of Missouri, known to me to be the person who executed the foregoing Agreement on behalf of the County and acknowledged to me that (a) he is the County Executive of Jackson County, Missouri, a political subdivision of the state of Missouri, (b) the foregoing Agreement was signed in behalf of said authority by him as its County Executive, and (c) that the execution of the foregoing Agreement was the free act and deed of him as the County Executive of Jackson County, Missouri and that he executed the same for the purposes therein stated.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in Kansas City, Missouri, on the day and year last above written.

C. Howard
Notary Public

My Commission Expires:

2/28/2020



Approved As To Form:

W. Stephen Reed
County Counselor

Attest:

Mary Jo Spino
Mary Jo Spino, Clerk of the Legislature

EXHIBIT A
Hierarchy Pyramid



EXHIBIT B

Rock Island Management and Maintenance Agreement

Responsibilities of the Parties

Rock Island Rail Corridor Authority as Department of Jackson County

Jackson County	KCATA
• Construction of Shared Use Path • Servicing, management, maintenance and operation of Shared Use Path • Funds clean-up, maintenance and operation of the Railroad Corridor during Initial Period • Marketing for Shared Use Path and Railroad Corridor; customer service calls etc. • Leasing and licensing of Railroad Corridor	• Design and planning for the Multi-Modal Project and development of transit options • Management, maintenance and operation of transit components upon construction of multi-modal components • Takes the lead on transit oriented development projects

EXHIBIT B

1 IN THE UNITED STATES COURT OF FEDERAL CLAIMS
2
3
4
5 DEBORAH S. GROH, et al.,)
6 Plaintiffs,) Case No.
7 vs.) 17-1066L
8 THE UNITED STATES OF AMERICA,)
9 Defendant.)

10
11
12
13 Courtroom 6
14 Howard T. Markey National Courts Building
15 717 Madison Place, N.W.
16 Washington, D.C.
17 April 16, 2018
18 2:00 p.m.
19 Hearing

20
21
22 BEFORE: THE HONORABLE MARY ELLEN COSTER WILLIAMS
23
24
25 Reported by: Jennifer Metcalf Razzino, CER

Deborah S. Groh, et al. v. USA

2
4/16/2018

1 APPEARANCES:

2 ON BEHALF OF THE PLAINTIFFS:

3 THOMAS S. STEWART, ESQ.

4 ELIZABETH GEPFORD MCCULLEY, ESQ.

5 Stewart Wald & McCulley LLC

6 2100 Central

7 Suite 22

8 Kansas City, Missouri 64108

9 (816) 303-1500

10 (816) 527-8068 (fax)

11 stewart@swm.legal

12

13

14

15 ON BEHALF OF THE DEFENDANT:

16 KRISTINE S. TARDIFF, ESQ.

17 U.S. Department of Justice, ENRD Division

18 Natural Resources Division

19 53 Pleasant Street, 4th Floor

20 Concord, New Hampshire 03301

21 (603) 230-2583

22 (603) 225-1577 (fax)

23 kristine.tardiff@usdoj.gov

24

25

Deborah S. Groh, et al. v. USA

4/16/2018

1 P R O C E E D I N G S

2 - - - - -

3 (Proceedings called to order at 2:07 p.m.)

4 THE COURT: This is a hearing on the
5 Defendant's motion to dismiss in the matter of Groh, et
6 al. v. United States, Number 17-1066L. I'm Judge
7 Williams. Let me ask counsel to please identify
8 themselves for the record. For the Plaintiffs?

9 MS. MCCULLEY: Yes, Your Honor. I'm Liz
10 McCulley, and along with my partner, Tom Stewart, for
11 Plaintiffs.

12 THE COURT: Welcome.

13 MS. MCCULLEY: Thank you.

14 THE COURT: And for the Defendant?

15 MS. TARDIFF: Yes, good afternoon, Your Honor.
16 Kris Tardiff for the United States. And I have with me
17 Evelyn Kitay, who is an attorney with the Surface
18 Transportation Board, and Ted Hunt, who is associate
19 general counsel for the Surface Transportation Board.

20 THE COURT: Oh, very well.

21 MS. TARDIFF: And they may be leaving before we
22 finish up today.

23 THE COURT: Okay.

24 MS. TARDIFF: So they're in the back, but I
25 wanted to introduce them.

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1 THE COURT: Very well. Well, thank you. I'm
2 glad they're here. Welcome, everyone.

3 MS. TARDIFF, you may proceed.

4 MS. TARDIFF: Thank you, Your Honor.

5 THE COURT: This is a strange one, isn't it?

6 MS. TARDIFF: It is indeed.

7 THE COURT: Are they -- the Government planning
8 on doing this again? It's going to be a repetitive
9 conduct here?

10 MS. TARDIFF: Well, there are rail line
11 acquisitions that happen on a regular basis, so we shall
12 see, but the reason that we had filed a motion to dismiss
13 is indeed this is an unusual case. The Court of Federal
14 Claims has two decades of experience now with Trails Act
15 takings cases, and this is not one of those cases,
16 despite Plaintiffs' attempt to frame it as such. And
17 that is the basis for our motion to dismiss. What we
18 have --

19 THE COURT: But they really haven't, though.
20 They really haven't invoked the Trails Act.

21 MS. TARDIFF: They have not. They have not.
22 And, so, it's, I think, in assessing -- well, let me back
23 up. So in order to state a claim under the Trails Act,
24 as a threshold matter, as a starting point, there has to
25 be some government action under the Trails Act and that

1 invokes the provisions of the Trails Act.

2 And as this Court is aware, there is a
3 structure to that process. The STB has promulgated
4 regulations for implementing the Trails Act in that
5 provision, and I think if we do a short comparison of
6 that process with what we have here, it becomes clear
7 that the STB has not taken any action under the Trails
8 Act and, in fact, wasn't asked to take any action under
9 the Trails Act, which is important.

10 So the process under the Trails Act begins with
11 a railroad coming in with a request to -- for
12 authorization to abandon a rail line which is within the
13 STB's regulatory jurisdiction. That process may begin
14 with an application to abandon, which is a longer process
15 or a petition for an exemption petition, which is a more
16 streamlined process. Most of the cases that this Court
17 sees occur under that exemption petition process.

18 Once the railroad files that exemption
19 petition, and I'll stick with that part of the process,
20 since that's the more common one, the next step is if a
21 third party, oftentimes a state agency, a municipal
22 government, maybe a nonprofit organization, will come in
23 pursuant to the Trails Act regulations and say we would
24 like to assume responsibility for this corridor, we'd
25 like to use it as a trail, we will agree to maintain the

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1 corridor and make it available for future restoration and
2 future rail use, which is the rail banking process.

3 Now, the STB still doesn't act at that point.
4 The railroad has to consent to negotiate with that entity
5 that has filed that request for the issuance of a notice
6 of interim trail use, what we call a NITU. If the
7 railroad consents to negotiate, because it's a voluntary
8 process, the STB does not compel those negotiations. If
9 the railroad consents, then the STB will issue an order
10 that includes a notice of interim trail use. That NITU
11 provides a 180-day period for the railroad and the third
12 party that's come in to negotiate a trail use agreement.

13 And if that trail use agreement is reached,
14 either at the end of that 180-day period or if the NITU
15 is extended perhaps a longer period of time. If -- if
16 that agreement is reached, then the provisions of the
17 Trails Act, which preclude the operation of state law,
18 are effective. And, so, you do have with the NITU and
19 the trail use agreement, you do have the STB has been
20 deemed to authorize trail use under those conditions. So
21 that's our standard process.

22 None of those steps happened here.

23 THE COURT: Could a trail -- right. Could a
24 trail be implemented, say by Jackson County, using a
25 different path?

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1 MS. TARDIFF: Possibly, and the key is whether
2 there is some government act -- federal government action
3 that can be said to authorize that and trigger the Trails
4 Act or authorize it in some manner. And that's the
5 distinction. So if we could take a look at the process
6 here, I think that might be the easiest way to answer
7 that question.

8 THE COURT: Sure. Of course.

9 MS. TARDIFF: So the process here occurred
10 under a different regulatory structure. It is not
11 unusual for rail lines to transfer from one owner to the
12 other, and the STB has a process for that. The
13 regulations are 49 CFR Part 1150. Like the abandonment
14 process, there is kind of two avenues. There is an
15 application process, which is a longer process, but the
16 STB has also promulgated regulations that have a more
17 streamlined process that begins with an exemption
18 petition. So, you know, similar framework to what we
19 have with an abandonment process.

20 The petition here was an exemption petition,
21 and, so, Jackson County was coming in with that petition
22 and saying we would like to acquire this rail line from
23 Union Pacific. We agree to assume the common carrier
24 obligation on this line, meaning that if any customer
25 wants to use this line or wants service on this line, we

1 will provide it. It may be through a third-party entity
2 that they've created a railroad authority, but they have
3 committed to maintain that common carrier obligation and
4 keep this line available for rail use if customers want
5 it.

6 After that petition was filed, we had
7 CenturyLink Communications, LLC come in with a motion to
8 stay. They filed that motion to stay because they were
9 concerned because they had a contract with Union Pacific
10 that allowed it to use that corridor for fiber-optics.

11 THE COURT: Hmm.

12 MS. TARDIFF: And, so, the question before the
13 STB was is it -- they were concerned that their
14 contractual rights would be interfered with by this
15 agreement.

16 THE COURT: So were there fiber-optic cables
17 under the rail line, under the tracks?

18 MS. TARDIFF: I think they are subsurface.
19 That's my understanding.

20 THE COURT: Okay.

21 MS. TARDIFF: I'm not sure the record --

22 THE COURT: It didn't say in the -- as I -- I
23 didn't see it.

24 MS. TARDIFF: Yeah, it may be -- that may be in
25 the deed from Union Pacific to Jackson County. It may

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1 specify that, which is Exhibit C, I think, to the
2 complaint. So I can take a look at that, but I think
3 they're subsurface.

4 The STB ended up denying that motion to stay,
5 and when it did so, it found that the issue surrounding
6 the use of the corridor for fiber-optics and
7 CenturyLink's contract rights were not issues that would
8 interfere with rail service, and therefore not within the
9 STB's regulatory jurisdiction. So you have there an
10 example of a use of a corridor, of a railroad corridor,
11 that is not regulated by the STB, that is not authorized
12 by the STB. It's occurring there, in that instance,
13 under a contract between Union Pacific and CenturyLink
14 Communication.

15 THE COURT: So is the decision on staying it
16 appealable?

17 MS. TARDIFF: It probably was at one point. I
18 think the period to appeal that is probably past, and
19 that -- any challenge to the STB's action, the Courts of
20 Appeal have jurisdiction over that if you're going to set
21 aside an STB order or revoke it in any manner.

22 But the STB's decision there to deny the stay
23 in the context of this rail line acquisition illustrates
24 an important point that gets back to your question about
25 rail use, and that's that the STB doesn't regulate or

1 authorize all uses that might occur within the railroad
2 line that is otherwise within its regulatory
3 jurisdiction. So -- and railroads make incidental use of
4 railroad corridors all the time. You know, I think
5 telephone lines are probably the most common example. If
6 you're driving around, it's not unusual to see telephone
7 or utility lines within a railroad corridor. But we have
8 the fiber-optic lines here, CenturyLink's fiber-optic
9 lines as an example.

10 The other example that's in the record in the
11 quick claim deed from Union Pacific to Jackson County,
12 Union Pacific accepted and reserved the right to maintain
13 two existing signboards, which are billboards, that were
14 within the railroad corridor. So there's another use,
15 maybe an incidental use, that's being made, but, again,
16 that -- that's not something that's regulated by the STB.
17 The STB didn't authorize that use. That's a matter
18 between, in that case, Union Pacific and the owner of
19 those boards or whoever they're leasing those billboards
20 to.

21 THE COURT: So telephone lines, fiber-optic
22 cables, billboards, if that use of the property were
23 alleged to be a taking, they don't come to federal court.

24 MS. TARDIFF: They don't come to federal court
25 with a claim against the United States. So if the

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1 adjacent landowners in that situation believe that the
2 railroad or whoever owns that corridor holds the rights
3 to those corridor is making a use that exceeds the
4 railroad's rights -- let's call it the railroad -- that's
5 a matter for state court and could be filed in state
6 court.

7 So, here, to the extent Jackson County is
8 contemplating maybe putting a trail in within this
9 corridor, while still maintaining its common carrier
10 obligations, but maybe they put a trail in as well,
11 they've talked about, I think, commuter rail in this
12 corridor as well.

13 To the extent that they as a county elect to
14 make such use, as long as those uses don't interfere with
15 rail service that the STB regulates, then the STB has
16 nothing to say about it. They wouldn't regulate it.
17 They don't authorize it. So the only time it might come
18 before the STB is if someone came in and said, hey, you
19 know, the County has implemented this other use and as a
20 result it can no longer use this corridor for a rail. It
21 is interfering with the opportunity for someone to
22 provide service to someone.

23 And that hasn't happened yet. It could.

24 THE COURT: Let's be blunt. Let's be very
25 direct here because I don't -- this is getting confused.

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1 MS. TARDIFF: Okay.

2 THE COURT: All right. So we have the STB has
3 approved something -- the sale, the deed, the quick claim
4 deed -- from the Union Pacific Railroad to Jackson
5 County?

6 MS. TARDIFF: It hasn't even done that. The
7 deed itself doesn't get filed with the STB. All that has
8 happened as a matter of the process, the exemption is
9 effective, meaning that Jackson County could acquire the
10 line from Union Pacific. That's happened by way of the
11 quick claim deed that's in the record.

12 THE COURT: So there was an acquisition.

13 MS. TARDIFF: There was an acquisition.

14 THE COURT: That the STB approved.

15 MS. TARDIFF: Through the regulatory process.
16 There's no formal order approving it. The exemption
17 process is such as that if all the requirements are met,
18 once the exemption notice is published, and if there's no
19 stay, which is what CenturyLink was saying, the exemption
20 is effective automatically and then, yeah, the
21 acquisition can go through. So in that respect, yes,
22 there's an approval of the acquisition.

23 THE COURT: So if we had to isolate the United
24 States governmental action in this case that was alleged
25 to be the taking, it was the exemption notice.

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1 MS. TARDIFF: I would say that that's -- yeah,
2 that that would be the issue, that would be the action.
3 I think Plaintiffs have looked to the STB's order denying
4 CenturyLink's motion to stay as the government action.

5 THE COURT: Well, that's just a procedural,
6 interlocutory nothing burger in this case, right?

7 MS. TARDIFF: We would agree, but let me
8 address why they've pointed to that action and just
9 explain why we don't agree that that is -- is the
10 appropriate government action. Plaintiffs have looked to
11 that government action or that order, which is the order
12 of February 4th.

13 THE COURT: Hold on.

14 MS. TARDIFF: Yep.

15 THE COURT: Thank you. I want you to repeat it
16 because I was distracted for just a moment.

17 MS. TARDIFF: Absolutely. So, yes, Plaintiffs
18 have pointed not to just the exemption process and what
19 has, in effect, been the approval for the rail line
20 acquisition. They are pointing to the STB's decision
21 denying CenturyLink's motion to stay. That's Exhibit B
22 to their complaint and also to their opposition brief.

23 THE COURT: Well, what's their thinking on
24 that?

25 MS. TARDIFF: Mr. Stewart will probably have

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1 more to say about that, but the way it's framed in their
2 brief is that they view that order as essentially
3 authorizing Jackson County's trail use. The reason
4 that's incorrect, and if we look at the order, and I have
5 copies if you'd like to look at a copy, Your Honor.

6 THE COURT: Well, don't I have it as an exhibit
7 to the complaint?

8 MS. TARDIFF: You should, yes. It's Exhibit B.

9 THE COURT: Yeah, I have it.

10 MS. TARDIFF: The ECF number is --

11 THE COURT: Maybe my clerk would like one,
12 though. I have mine here.

13 MS. TARDIFF: -- it's document --

14 THE COURT: I'm right with you on that.

15 MS. TARDIFF: Okay. So it's Exhibit B. This
16 is the order of February 4th, 2016, which is the only
17 written decision by the STB in this process. If you --
18 so the decision is structured here much like a court
19 decision, so you have kind of an explanation at the
20 beginning as to what's before the Court. At the bottom
21 of -- so the second paragraph, the STB proceeds to
22 describe CenturyLink's motion and the basis for their
23 motion to stay.

24 If you go over to page 2 of the order, this is
25 still that same paragraph, the STB describes that

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1 CenturyLink also suggests that Jackson County may not be
2 a bona fide railroad because of reports that it intends
3 to use the line for trail purposes. So that is STB's
4 description of what CenturyLink has said.

5 And then in the next paragraph, the STB
6 proceeds to describe Jackson County's reply. And the STB
7 indicates that Jackson County also argues that although
8 plans to use the line for a recreational trail and
9 possibly commuter rail service, neither of those uses is
10 inconsistent with its freight service obligation.

11 So after describing the parties' respective
12 positions, the STB goes on to rule on the motion. And it
13 just finds that CenturyLink's -- the basis for the motion
14 that there's nothing -- nothing happening here that is
15 necessarily going to interfere with the contract rights.
16 The STB doesn't have jurisdiction over those contract
17 rights. If there happens to be an issue with those
18 contract rights over fiber-optics down the road, that's a
19 matter that can be addressed in state court between those
20 parties. So --

21 THE COURT: Okay, let's ask this question.

22 MS. TARDIFF: Mm-hmm.

23 THE COURT: What if they're right? What if
24 Jackson County has every intention to use this line that
25 it has now acquired with the STB's blessing for trail

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1 purposes, but it didn't go through the normal Rails to
2 Trail Act, it went the wrong way? Is that what happened?

3 MS. TARDIFF: Well, so there's two responses to
4 that. If, in fact, Jackson County went the wrong way, if
5 that's the allegation, then that's essentially a
6 challenge to the STB's order here and to the process.
7 And that's not the type of challenge that plaintiffs can
8 bring in this court in the context of a takings claim.

9 The second point would be that -- again, the
10 STB --

11 THE COURT: Well, wait a minute. If they had
12 to do a Rails to Trail and they didn't, and it would be
13 compensable as a taking under the Rails to Trail and they
14 sidestepped it by a procedural error, wouldn't we have
15 jurisdiction over the ultimate taking?

16 MS. TARDIFF: Well, if -- if Jackson County
17 comes back in -- so Jackson County acknowledges that it
18 is -- I mean, it's acquiring the rail line, it is
19 assuming the common carrier obligation. So at this
20 point, this line is not treated as an abandoned and
21 railbank line. It's treated as an active line. And
22 Jackson County has acknowledged that they -- they have
23 assumed the common carrier obligation. If somebody comes
24 in and wants service on the line, they are obligated to
25 provide it.

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1 Now, they also recognize that if down the road
2 nobody's looking for service and they decide they want to
3 abandon and get rid of that common carrier obligation so
4 they don't have to provide service that they would have
5 to come back to the STB, file an application or a
6 petition for exemption to abandon. And that would be the
7 first step in the process that could lead to an STB
8 decision authorizing trail use. But the critical point
9 here is that that's never happened.

10 THE COURT: I understand that from your
11 perspective.

12 MS. TARDIFF: It could.

13 THE COURT: But why are we here if that's never
14 happened and that's what gives rise to a Fifth Amendment
15 taking under the Rails to Trail Act?

16 MS. TARDIFF: I would say we are here because
17 Plaintiffs have tried to frame this as a Fifth Amendment
18 -- as a Trails Act takings claim and, in fact, there's no
19 government action.

20 THE COURT: Well, but you understand that
21 Plaintiffs' lawyers have to be careful.

22 MS. TARDIFF: Mm-hmm.

23 THE COURT: They can't miss the statute of
24 limitations. They can't miss a deadline. They've got
25 clients that are eager here. If this piece of land, this

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1 strip of land that's a railroad corridor is going to be a
2 trail, they're worried about that.

3 MS. TARDIFF: Mm-hmm.

4 THE COURT: But I think what you're telling me
5 is if that strip of railroad corridor is going to be a
6 trail, that Jackson County must -- absolutely must -- is
7 required to go to the STB and go through the normal Rails
8 to Trails procedure that would then give rise to a NITU,
9 which would then give rise to a taking. So they're just
10 premature.

11 MS. TARDIFF: So partially yes. To the extent
12 that they are looking to -- Plaintiffs are looking to
13 bring a claim against the United States --

14 THE COURT: That's all I care about.

15 MS. TARDIFF: -- it's premature because --

16 THE COURT: That's all I care about.

17 MS. TARDIFF: -- yeah, yeah.

18 THE COURT: You can rest assured that if
19 Jackson County wants to sue the State of Missouri or the
20 Union Pacific or anybody else, I don't care.

21 MS. TARDIFF: Right. This Court --

22 THE COURT: That's not in my bailiwick.

23 MS. TARDIFF: No, it is not.

24 THE COURT: Okay.

25 MS. TARDIFF: So that's -- but in terms of what

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1 their options are, I mean, there are options in state
2 court. If the County wants to put a trail in while not
3 giving -- not relinquishing this line, that would be a
4 matter of state law and it's state law interest, and the
5 STB's not going to regulate that or weigh in. It hasn't
6 been asked to authorize it. So that's a matter of state
7 law.

8 So Jackson County could do that in theory. It
9 may interfere with the rights of the adjacent property
10 owners, and we haven't looked at those rights yet, but it
11 would be strictly a matter of state law because there's
12 no federal government action through the STB that has
13 authorized that or triggers the application of the Trails
14 Act. So, yeah, premature with respect to any claims
15 against the United States. But I just want to be clear
16 that, you know, Jackson County might do that in the
17 future. It's just --

18 THE COURT: They might do something.

19 MS. TARDIFF: -- unless they do it through the
20 abandonment process, then the STB hasn't acted to
21 authorize that or approve it or anything else.

22 THE COURT: So I didn't realize that, these
23 railroads have a choice. If they want to make a trail or
24 if they want to allow and negotiate for a trail on their
25 railroad property, they don't have to go through the

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1 Federal Government?

2 MS. TARDIFF: If --

3 THE COURT: Under the Rails to Trail Act?

4 MS. TARDIFF: If they --

5 THE COURT: Are we sure about this?

6 MS. TARDIFF: Well, so let me -- let me clarify
7 that. The Trails Act and its implementing regulations
8 are triggered when a railroad comes in and is looking to
9 abandon the line. And if it -- if it proceeded with that
10 abandonment, it is no longer obligated to provide
11 service. If it gets that approval, if it, in fact,
12 abandons and then it -- the line is no longer part of the
13 STB's jurisdiction, if all that happens.

14 So the railbanking interim trail use provisions
15 provide an alternative to abandonment, but it starts with
16 that application to abandon. So railbanking and interim
17 trail use as it gets approved through this process, there
18 is a structure to that. If a railroad that is
19 maintaining a line or in this case the County coming in
20 and saying, you know, we will maintain this line, we will
21 provide service if it is requested of us, if they look at
22 the land that they have and decide they want to make
23 another incidental use of it, whether it's at trail,
24 whether it's fiber-optics, whether it's billboards,
25 whether it's telephone lines, crossings --

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1 THE COURT: Another. The key word there is
2 "another."

3 MS. TARDIFF: Another.

4 THE COURT: They have to keep active railroad
5 operations.

6 MS. TARDIFF: Yes. Yes.

7 THE COURT: In order not to go the other way,
8 i.e., abandon. So they're not abandoning, we're keeping
9 some kind of railroad operations, even though they might
10 be pretty slim, and we're doing other things.

11 MS. TARDIFF: Then it's strictly a matter of
12 state law, as long as what they're doing doesn't
13 interfere with their ability to provide rail service to
14 meet that common carrier obligation, then it's strictly a
15 matter of state law, and that's not something the STB's
16 going to get involved in.

17 THE COURT: So let's play out what the
18 Plaintiffs fear here, based on this -- these stay papers.
19 They've got railroad tracks still down there, but they're
20 going to make it into a trail anyway. So not only do
21 they have the nuisance of an ongoing railroad, which
22 hasn't been abandoned, but they have what they view as a
23 diminution in the value of their property due to a trail
24 with people stomping around over the railroad tracks.
25 That's their worst nightmare, right?

1 MS. TARDIFF: I think that's probably right.

2 THE COURT: And if that's their worst
3 nightmare, they can't sue the United States because the
4 property, the rail corridor, has not been abandoned.

5 MS. TARDIFF: Right, or there's no -- the
6 Trails Act isn't implemented -- I mean, there's been no
7 approval of that by the Government, no authorization, and
8 so the provisions of the Trails Act that kind of would
9 step in and put a hold on state law abandonment aren't
10 even triggered. So, yeah, that becomes strictly a matter
11 of property rights as between the adjacent landowners,
12 the entity that holds the railroad's rights, and a
13 question of state law at that point.

14 THE COURT: But there's no federal action
15 whatsoever because it's still an active railroad line.

16 MS. TARDIFF: That's correct, Your Honor.
17 That's correct.

18 THE COURT: And that's basically where we are
19 now.

20 MS. TARDIFF: That's where we are now. So I
21 would add to that that, you know, if in the future -- and
22 I don't think Jackson County's taken affirmative action
23 yet to construct a trail. There's -- from the record, it
24 sounds like it's been talked about. Same with commuter
25 rail within this corridor. But certainly if Jackson

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1 County takes some action, say they go ahead and pull the
2 rail lines out without notifying the STB and they start
3 laying down a trail instead. You know, at that point,
4 Plaintiffs may be able to come back and say, well, wait a
5 minute, they've actually abandoned. You know, maybe they
6 haven't told the STB, but that's what's going on on the
7 ground.

8 So at that point, the landowners could come in
9 in what's called an adverse abandonment action and say to
10 the STB, we think the railroad's abandoned, and we think
11 the County's abandoned this line, and we want it declared
12 abandoned, and then, you know, trigger these other
13 processes. So that's an option --

14 THE COURT: So the Plaintiffs would have the
15 standing to come into the STB?

16 MS. TARDIFF: As adjacent landowners, if they
17 submit so. And we have two examples of that from
18 Rail/Trail cases in this Court. The original Preseault
19 case was an adverse abandonment proceeding. That's how
20 it was initiated. The second one I'm aware of is the
21 Highline case --

22 THE COURT: Right.

23 MS. TARDIFF: -- as West Chelsea Buildings, so
24 that was -- the action was filed by adjacent landowners
25 looking to force the abandonment and regain that land

1 back. So those are two examples where that happens.
2 That's -- it can be a lengthy process. That's not an
3 exemption proceeding. It's an abandonment application,
4 which involves briefing and a hearing in a little more
5 detail. But, you know, that's an option if -- if it gets
6 to the point where the landowners believe that it has
7 been abandoned and they want to push that point with the
8 STB.

9 But, again, that hasn't happened yet. And, so,
10 here we have a situation where there's just no action by
11 the STB under the Trails Act that authorizes trail use
12 that may or may not happen in the future by Jackson
13 County. So that's the basis for our motion to dismiss
14 the 12(b)(6) aspect of it. There are some ripeness
15 issues in there as well.

16 Our other alternative point that I'll just hit
17 on very quickly, our other 12(b)(1) issues, that to the
18 extent that the Plaintiffs are arguing that the STB
19 should have done something different or even that Jackson
20 County should have sought an abandonment authorization
21 and didn't, I mean, that's really a challenge to the
22 government action, and this Court doesn't have
23 jurisdiction over that as well. That's something that
24 should have been brought up with the Court of Appeals
25 under the Hobbs Act. So those are our issues.

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1 THE COURT: That's their local Court of Appeals
2 under the statute?

3 MS. TARDIFF: That would be their local -- yes,
4 not the Federal Circuit. It's the local Court of
5 Appeals. So I think here would be 8th Circuit, I think.
6 I didn't look at my map, but I think that's right.

7 All right, unless the Court has any further
8 questions, I think that covers all the points we wanted
9 to talk about today.

10 THE COURT: I understand your position. Thank
11 you, Ms. Tardiff.

12 MS. TARDIFF: Okay, thank you.

13 THE COURT: Is it going to be Mr. Stewart or
14 Ms. McCulley?

15 MS. MCCULLEY: Me, Your Honor.

16 THE COURT: Come on up.

17 MS. MCCULLEY: Thank you.

18 THE COURT: So if I were to dismiss this case
19 now, I would, of course, dismiss it without prejudice,
20 and I could even waive the refiling fee if they decide to
21 go through the STB challenges or they -- you wanted to
22 allege an inverse.

23 MS. MCCULLEY: And I don't think that this is
24 the right stage to dismiss this case. I think if you're
25 inclined to -- because we think that we've got, you know,

1 a whole different take on it than the Government does,
2 but we don't think it would be appropriate at this time,
3 that maybe we should have a period of discovery so we
4 can look into the sweetheart deal, Jackson County and
5 Union Pacific, you know, entered into long ago, and then
6 they -- and they told the STB all about it, too.

7 I mean, in their filings, in their papers,
8 Jackson County said, we're going to use this as a
9 recreational trail, we may end up doing commuter rail,
10 but that's speculation. That's like Toews, you know, the
11 case of Toews where the Court said that's just
12 speculation to say we may use it. It's not an active
13 rail line right now, we believe under Missouri law.

14 I mean, the Federal Government is preventing
15 that line from reverting back to the landowners, just
16 like it would under the Trails Act. And, so, you know,
17 the government act -- and they're actually in their
18 decision, dated February 4, 2016, and this is about
19 CenturyLink, but if you look at the very last page, the
20 exemption is -- it was effective immediately, so they
21 absolutely authorized this line to be transferred to
22 Jackson County to be used as a recreational trail.

23 THE COURT: Well, they authorized the transfer,
24 but they didn't have to approve the use, did they, under
25 this particular narrow regulation of the STB? They

1 weren't under an abandonment. They weren't under a trail
2 use. They just -- they just wanted to have an
3 acquisition, pure and simple.

4 MS. MCCULLEY: Right.

5 THE COURT: Corporate acquisition.

6 MS. MCCULLEY: So --

7 THE COURT: County acquisition.

8 MS. MCCULLEY: -- and I guess --

9 THE COURT: Right? So --

10 MS. MCCULLEY: Yeah.

11 THE COURT: -- forget about the trail use
12 there. So you have some indications here that we might
13 do this, but the problem with your position is we also
14 have over-representations in the record that this is an
15 ongoing railroad. That's where we are.

16 MS. MCCULLEY: Well, to that point, Your Honor,
17 for one, Jackson County is not a carrier. They're not a
18 carrier, and they would have to -- if anybody ever wants
19 to come back and run trains -- freight trains or whatever
20 -- they would have to contract it out. Well, how is that
21 any different than railbanking? Basically the STB is
22 holding jurisdiction over this rail line saying, well, if
23 you ever want to reactivate railroads, you'll have to go
24 figure it out and, you know, get a contractor or, you
25 know, a viable carrier to come back in. But that's pure

1 speculation as well. So we view that as just as the
2 railbanking.

3 So we think all of the elements here have been
4 met. You've got a government act that is the Government
5 acknowledging that the STB -- or I mean the STB
6 acknowledging that Jackson County and Union Pacific had
7 come into this agreement and Jackson County is going to
8 use it for a recreational trail. We have --

9 THE COURT: Wait a second. We've got to back
10 up. I'm a federal court, kind of a unique one, and every
11 case in my Court, the United States of America is always
12 the defendant and it is the only defendant. So what I
13 have to have in order for my jurisdiction to attach is
14 conduct by the United States of America or one of its
15 entities. Now, the approval of the acquisition of this
16 corridor by Jackson County from Union Pacific Railroad is
17 not a Trails Act taking. You agree with that, right?

18 MS. MCCULLEY: Yes, Your Honor, but I think
19 it's very similar. I think all they've done is they've
20 just circumvented the Trails Act, but everything that
21 would happen normally under the Trails Act has happened
22 here. It's the same thing, only we just didn't -- they
23 just didn't implicate and ask for a NITU; they got
24 another order saying you can transfer it to Jackson
25 County. So we think that that's basically -- we've got

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1 all the elements of a Trails Act takings here. They just
2 didn't implement the Trails Act.

3 THE COURT: But you don't have an abandonment.

4 MS. MCCULLEY: Well, under the Trails Act you
5 don't have abandonment either because they forestall it.

6 THE COURT: Right.

7 MS. MCCULLEY: So, here, Jackson --

8 THE COURT: But you don't even have an intent
9 to abandon because you're still using the track for the
10 railroad purposes. That's the representation.

11 MS. MCCULLEY: They're not using it for the
12 railroad. Jackson County is not using the tracks for the
13 railroad. There is no railroads running on this line
14 right now. They don't have any carriers. The don't see
15 any future need for carriers, but they said -- they did
16 present to the STB, if anybody ever wants to come back
17 in, then, you know, we'll get a contract carrier or
18 whatever. That's the same as railbanking. STB maintains
19 jurisdiction over it, and then, you know, if you ever
20 want to reactivate, you've got to agree that you'll
21 reactivate it if you're a trail user.

22 THE COURT: All right. Another -- so let's be
23 very precise.

24 MS. MCCULLEY: Mm-hmm.

25 THE COURT: And I don't want you to keep

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1 telling me this like a NITU. Forget about the NITU.

2 MS. MCCULLEY: Okay.

3 THE COURT: You're claiming a Fifth Amendment
4 taking of property. The remedy that you're seeking is
5 just compensation for your clients. So what's the
6 taking?

7 MS. MCCULLEY: The taking is the authorization
8 for the transfer of the land to Jackson County to be used
9 as a recreational trail while maintaining federal
10 jurisdiction over that line.

11 THE COURT: So who's maintaining federal
12 jurisdiction?

13 MS. MCCULLEY: The STB.

14 THE COURT: And in what capacity and how?

15 MS. MCCULLEY: It's still part of the
16 interstate rail line, and they've prevented that land
17 from reverting back to the landowners, even though under
18 Missouri law there's no trains running and they should --
19 those landowners should have gotten their land back.
20 And, instead, the STB has allowed the transfer to Jackson
21 County to build a trail.

22 THE COURT: And what is the effective date of
23 the taking in this case?

24 MS. MCCULLEY: Well, the order is 2/4 of 2016,
25 so that would be what we would say -- that would be the

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1 date that the taking starts.

2 THE COURT: Now, how has the acquisition of
3 this corridor by Jackson County affected the use of the
4 property by the adjacent landowners?

5 MS. MCCULLEY: Well, again, because the STB
6 maintains jurisdiction, the landowners don't have the
7 right to go in and use that land. As far as incidental
8 uses, that doctrine, we would disagree that the
9 incidental uses of fiber-optic and things like that are
10 okay, that a railroad -- railroads grant things they
11 don't -- you know, rights they don't own or have the
12 right to grant -- to all kinds of utility entities all
13 across the country.

14 So, you know, incidental use -- the incidental
15 uses doctrine -- here, we've got a railroad that acquired
16 its interest through condemnation. And under condemn --
17 or under Missouri law, condemnation is very specific.
18 It's an easement for railroad purposes, so it's a very
19 limited use. So that's why STB authorizing something
20 different, the transfer and acquisition, and everybody
21 has told the STB they're going to use it for recreational
22 trail use, and so authorizing that transfer, we think, is
23 a taking. They should have gotten their land back.

24 THE COURT: What kind of discovery would you do
25 if I were to allow you 60 days to do it?

1 MS. MCCULLEY: I would want to look at the
2 railroad's documents, and I'd like to look at Jackson
3 County's documents and the documents that they had.
4 Maybe we would want to take the deposition of one of the
5 Jackson County entity -- you know, one of the people that
6 are involved in the trail --

7 THE COURT: And what would you look for in the
8 documents, and what would you ask them at the deposition?

9 MS. MCCULLEY: Standing here today, I'd have to
10 think about it, but, I mean, I'd ask them, you know, what
11 their plans were and who they talked to and what
12 documents did they file, what documents went back and
13 forth, did everybody know that this was going to be a
14 trail, things like that, and what -- you know, what
15 capacity would they -- with the STB, what did they, you
16 know, tell the STB or file with the STB or things like
17 that.

18 And, Your Honor, we do have some documents
19 that, I mean, it's very, very clear that Jackson County
20 would have had these. And I'd be happy to let everybody
21 see them if you'd want. They're in the STB documents,
22 but --

23 THE COURT: No, no, no. The way to do that --
24 it has to be publicly docketed, on the public docket. It
25 has to be filed. Attach whatever you want us to see to a

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1 notice of filing.

2 MS. MCCULLEY: Okay.

3 THE COURT: And file it.

4 MS. MCCULLEY: Okay. Like I said, they are in
5 the STB documents, too.

6 THE COURT: Now, are they in my record?

7 MS. MCCULLEY: I'm not sure if these are in
8 your record. These were attached to the CenturyLink's
9 motion for stay, so you probably don't have these
10 documents.

11 THE COURT: All right, well, you can figure
12 that out --

13 MS. MCCULLEY: Yeah.

14 THE COURT: -- whether they've been filed, but
15 I have a lot of paper from you all.

16 MS. MCCULLEY: Okay.

17 THE COURT: So just feel free to supplement
18 this record on the motion to dismiss with anything you
19 like. But I want to make sure I understand your
20 position. So your position is basically that there was
21 some kind of misfeasance here, that this whole notion of
22 the -- and the STB was front and center, the U.S.
23 Government ought to be the defendant here.

24 I'm just trying to paraphrase what I hear you
25 saying, and that therefore we need to at least -- the

1 Court needs to at least let me probe what the bona fides
2 of this transaction were, limited discovery of third
3 parties and the STB, because the whole thing was a sham.
4 They did this to avoid the NITU process.

5 MS. MCCULLEY: And, Your Honor, I think that
6 that's just not right. You can't just circumvent the
7 Trails Act and then have everything take effect that
8 would have taken effect if you would have used the Trails
9 Act. I mean, that's just not right. The Government
10 can't absolve their liability just by having everybody do
11 something else and not having a NITU issued.

12 THE COURT: Well, I think what the Federal
13 Government is saying here is that it's out of the realm
14 of the NITU issue because it goes back to the state
15 courts; it doesn't go to the federal courts. You may
16 have a taking, but the STB wasn't the primary actor here.
17 Yeah, the STB has to approve an acquisition, but then the
18 railroad, along with Jackson County, once Jackson County
19 has -- gets hold of it, and they're running railroad,
20 they're running commuter lines, or they're doing this
21 incidental operation, it's still a railroad.

22 The STB takes their representations in their
23 proceeding at face value. If you're going to run a
24 railroad, run a railroad. I'll approve the acquisition.
25 They have no reason to dig beneath that, and they say

1 they may do a trail later, but that doesn't necessarily
2 foreclose the STB process. It just delays it. In other
3 words, if you go ahead with this trail and you involve
4 the STB, well, you darn well better comply with the
5 Trails Act. And they haven't done that yet, and if they
6 get the STB approval to do it federally, they've got to
7 go through that channel.

8 That's why the Government is saying this case
9 is unripe. It's not -- everything that had to happen in
10 order for there to be a cause of action and a concrete
11 injury hasn't happened yet with the Federal Government as
12 the actor.

13 MS. MCCULLEY: Well, Your Honor, I do think
14 that the Federal Government as the actor -- again,
15 Jackson County, all over their paper's filing, and the
16 recreational trail use is the premier reason they were
17 acquiring it.

18 THE COURT: Well, that's -- then now you're
19 asking me to cut -- slice things pretty narrowly, because
20 how are they -- how am I supposed to discern from these
21 filings what the primary purpose is here? Nothing's
22 happened. There's no trail. There's no railroad either,
23 I guess, on this corridor, 17-mile corridor.

24 MS. MCCULLEY: Well, there's an agreement for a
25 trail, though. I mean, Union Pacific and Jackson County,

1 they agreed to transfer it to Jackson County so they
2 could use it as a trail. And, so --

3 THE COURT: There's no agreement. Don't --
4 don't -- don't say that. Where's the agreement for the
5 trail?

6 MS. MCCULLEY: Well, in the STB documents, I
7 mean, they've --

8 THE COURT: Well, you know what, that's the
9 front-and-center piece of evidence that you should have
10 filed with this Court already. Where is it?

11 MS. MCCULLEY: That's this document here, and
12 it's actually attached as the February 4, 2016. Your
13 Honor, this --

14 THE COURT: Well, no, I'm looking at that.

15 MS. MCCULLEY: Okay.

16 THE COURT: And I want to know -- all that is
17 the Surface Transportation Board decision denying an
18 interlocutory motion to stay -- to stay.

19 MS. MCCULLEY: But it also says the exemption
20 is effective immediately. That's Jackson County's
21 exemption for their acquisition. So they did authorize
22 that for Jackson County to --

23 THE COURT: Well, I think now we're arguing
24 over the legal import of a decision on a motion, denying
25 a motion to stay. If I deny a motion to stay, that just

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1 means my case goes on, my decision becomes effective.
2 But the only decision that became effective here was the
3 decision blessing the acquisition. It has nothing to do
4 with the authorization of a federal trail under the Rails
5 to Trail Act. It has to do with the acquisition between
6 Union Pacific Railroad and Jackson County, as I
7 understand it, under a different section of the STB
8 regulations than would be invoked if we were doing an
9 actual trail.

10 MS. MCCULLEY: Your Honor, another thing I
11 wanted to --

12 THE COURT: But I don't -- and I don't see
13 where the trail is here. We have a possibility that
14 there might be a trail somewhere down the road, while
15 there is ongoing rail service. That's where we are here
16 because the representations to the STB were, hey, we're
17 keeping this as a railroad. We're not removing the
18 tracks. We're going to move freight. We're going to
19 transport whatever you want us to transport.

20 So they've -- that's under a different branch
21 of the STB's jurisdiction than the trail. There's
22 nothing sinister about it that I can see from the
23 documents that have been provided to me to date. And I
24 want to understand why the Plaintiffs think that this is
25 some sort of a misfeasance here.

1 MS. MCCULLEY: Well, again -- and, so,
2 discovery, we could do discovery on abandonment and
3 discontinuance and things like that because we really do
4 think the railroad is -- I mean, the railroad purposes
5 easement, they're not running trains, and they're not
6 going to run trains for right now. They don't have any
7 carriers. They don't have anybody who wants to run
8 trains on the tracks. So all they've got is this
9 assertion, if anybody wants to come back in, we'll do it,
10 but right now, we're going to use this as a recreational
11 trail.

12 And they're advertising that everywhere.
13 They've said it to the STB. The STB, again, authorized
14 the transfer. So we believe that, you know, this --
15 everything that would have happened under the Trails Act
16 has happened here, and it's been blessed by the STB.

17 THE COURT: Okay, so the only sentence -- two
18 sentences in my record --

19 MS. MCCULLEY: Yes, ma'am.

20 THE COURT: -- suggesting that this corridor is
21 going to be used as a trail is in this February 4th, 2016
22 decision denying the motion to stay, right?

23 MS. MCCULLEY: And there's also another STB
24 decision that's actually January 21st that talks about it
25 as well.

1 THE COURT: Okay. I think I might -- that
2 might be in my record. What was that decision?

3 MS. MCCULLEY: That was the exemption -- oh,
4 here, I've got it right here.

5 THE COURT: Is that attached to your complaint
6 in this case?

7 MS. MCCULLEY: I'm not sure, Your Honor.
8 Probably not because this January 21st was -- it's
9 acquisition and operation exemption, so it was their
10 order initially on the exemption, and then CenturyLink
11 came in and filed after that. And, so, then -- and asked
12 for a stay.

13 THE COURT: All right, well, I don't have that
14 in my record, and I can't rely on something that I
15 haven't even seen.

16 MS. MCCULLEY: Okay, I will file that as well,
17 Your Honor.

18 LAW CLERK: Is it Exhibit A?

19 THE COURT: No, Exhibit A is the -- it looks
20 like it's December 23rd.

21 MS. TARDIFF: If I may, Your Honor, Exhibit A
22 is the -- it's a copy of the verified notice of
23 exemption.

24 THE COURT: Okay.

25 MS. TARDIFF: Page -- Document ECF 10-1, page 3

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1 of 12, is a one-page exemption notice. That would have
2 been the notice that was subsequently published in the
3 Federal Register, the entity seeking to acquire the line
4 has to provide a copy of what that notice would say. So
5 that may be what was -- what Ms. McCulley is referring to
6 as having been issued or published in January.

7 THE COURT: Okay. So my date on this is
8 December of 2015, and I guess that's where the confusion
9 is.

10 MS. TARDIFF: Yeah, and that's -- that's when
11 Jackson County filed this with the Surface Transportation
12 Board. Once the exemption petition was filed under the
13 regulations, the Surface Transportation Board then has 30
14 days to publish that notice in the Federal Register.
15 Once it's published, we've got that 30 days, seven days
16 after publication the exemption becomes automatically
17 effective unless there's a motion to stay or a motion to
18 void the petition.

19 THE COURT: Okay. So this is -- this is the
20 document. I do have it. It just has a different date on
21 it, so it's confusing. So this document that I have is
22 Exhibit A to your complaint. It's dated December 23rd,
23 2015. So based on the representations of Ms. Tardiff, I
24 take it this went into effect on January 23rd, 2016? Is
25 that right, Ms. Tardiff?

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1 MS. TARDIFF: I believe that's probably when it
2 was -- the exemption notice was published. I don't
3 actually have the published copy in my pile here today.

4 THE COURT: All right.

5 MS. TARDIFF: But I think that's correct.

6 THE COURT: All right, well, the Plaintiffs'
7 counsel -- Ms. McCulley, you're going to file the formal
8 published version that was reproduced in the Federal
9 Register.

10 MS. MCCULLEY: Yes, Your Honor.

11 THE COURT: Okay. So I think given that you
12 can still come back, you know, you can file this case
13 when you have more information as to what's happening
14 here, as to whether or not there's going to be -- it's
15 really a trail. And this whole acquisition, maybe there
16 wasn't misfeasance. Maybe it was just the way they went
17 about it. You're saying that they wanted a trail. You
18 know they --

19 MS. MCCULLEY: They wanted a trail, and they
20 didn't want to go through the NITU. I don't know why. I
21 don't know -- I can't speculate about that.

22 THE COURT: And who's the "they"?

23 MS. MCCULLEY: Jackson County and Union
24 Pacific. And Union -- well, we deal with Union Pacific
25 all the time and they know how to, you know, implement

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1 the Trails Act. And for some reason, they just didn't do
2 it here.

3 THE COURT: But that's neither here nor there
4 as far as I'm concerned because the only person I care --
5 entity I care about is the STB.

6 MS. MCCULLEY: I understand.

7 THE COURT: And if they were lied to or
8 misrepresentations were made to them, then their
9 proceedings were a sham, or there was fraud upon the
10 tribunal. It happens very rarely. Then their decision,
11 perhaps, could be voided. And there's an avenue to
12 pursue that, and it's not through me. That's why I asked
13 whether there was an appeal process still in effect for
14 that. That's why I asked that question.

15 MS. MCCULLEY: Let me address Ms. Tardiff's
16 talk about the filing an abandonment -- forced
17 abandonment in front of the STB. It costs like \$25,000
18 for landowners to file that, and for those abandonment --
19 adverse abandonments to really go through, it's very,
20 very rare that they STB forces a railroad to abandon it
21 because the STB wants to keep the network as much as they
22 can under -- you know, in the interstate rail system. So
23 that's not really an option for our landowners.

24 It's really to just say it looks like a Trails
25 Act case; it smells like a Trails Act case; they just

1 didn't get a NITU, but they got other authorization. And
2 that's -- you know, like I said, we -- under Preseault,
3 everything under Preseault has been met. And we do -- in
4 our opinion, we do have a governmental act. We have the
5 Government filing their decisions, allowing the transfer.
6 So we do believe that we've got a cause of action that's
7 ripe.

8 THE COURT: Well, in order for me to rule in
9 your favor, I would have to find that the representation
10 to the STB, that there was going to be active trail/rail
11 use -- excuse me -- active rail use, was a
12 misrepresentation, right?

13 MS. MCCULLEY: Well, I don't think they say
14 that they're going to do active rail use. They say
15 they're going to -- if anybody wants to use it for rail
16 in the future, they would contract someone else to do it.
17 They're not saying we're going to do rail now, they're
18 not. They're -- there's no carriers or they're not
19 looking for any carriers, and it's just the trail use is
20 all that they said we'll hold it out in case anybody ever
21 wants to come back in, and that sound like railbanking to
22 me.

23 THE COURT: Well, I'm going to let you file all
24 these other documents that you want to show us --

25 MS. MCCULLEY: Okay.

1 THE COURT: -- under a notice of filing, and
2 the other thing that I need from you is -- because I'm
3 not going to rule on the motion to dismiss until I
4 consider this other evidence from you. I also want a
5 proffer from you, just a very descriptive one, about if I
6 were to authorize the discovery you have requested what
7 you would ask for, what documents, and what the subject
8 matter -- narrowly tailored -- of any deposition would
9 be. Okay?

10 MS. MCCULLEY: Yes, ma'am.

11 THE COURT: And then we'll take it from there.
12 So you'll file that forthwith.

13 MS. MCCULLEY: Yes, Your Honor.

14 THE COURT: Ms. Tardiff, anything further from
15 the Government?

16 MS. TARDIFF: Very briefly.

17 THE COURT: Well, I want you to respond to this
18 notion of I'm allowing -- I'm not ruling that she can
19 have the discovery; I'm telling her to tell me what it
20 would be.

21 MS. TARDIFF: And what I heard Ms. McCulley say
22 is that they'd be interested in doing third-party
23 discovery, Jackson County, maybe Union Pacific. I didn't
24 hear her say that there was anything they were looking to
25 get from the STB necessarily.

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1 THE COURT: Oh, she did.

2 MS. TARDIFF: Okay.

3 THE COURT: You're in there, too.

4 MS. TARDIFF: Okay, so but for the STB's part,
5 then, I mean, the Court has perhaps with the addition of
6 whatever Plaintiffs want to file that they haven't filed
7 so far from the STB records, the STB records are -- I
8 mean, they're a matter of public records. Plaintiffs
9 have those documents.

10 To the extent the STB has taken some action,
11 they've pointed to the February 6th decision denying the
12 motion to stay. There is the exemption, the
13 authorization to acquire the line that's occurred as a
14 part of that process, but that process occurred under a
15 set of regulations that are laws that the Court has
16 available to it. So there's no other -- nothing else to
17 look for with respect to the STB's action.

18 And to the extent that Plaintiffs are looking
19 to conduct discovery with Jackson County and Union
20 Pacific to delve into, you know, what's going on between
21 those two parties, it sounds like they're looking again
22 to kind of challenge the STB's order in some regard.

23 And, again, that's -- to the extent Plaintiffs
24 are looking to challenge that, what the STB did in this
25 case, and maybe undo that or argue that something else

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1 should have happened, again, that's not a claim that's
2 within this Court's jurisdiction. That would be a claim
3 to kind of undo that order or revoke that order or
4 something else. And that's specifically under 28 USC
5 Section 2342, that's a matter that Congress has given
6 jurisdiction to the Courts of Appeal to essentially
7 conduct judicial review of an order or a decision of the
8 STB.

9 So I don't know that there's a legitimate
10 purpose to allowing discovery in this case.

11 THE COURT: Well, that's why I want to know
12 what the Plaintiffs want.

13 MS. TARDIFF: Yeah. And that's fine. And as
14 long as we have an opportunity to kind of respond to that
15 and put it in the context of the case, that we can have
16 that discussion.

17 THE COURT: All right. Well, let's be specific
18 then. Ms. McCulley, when are you going to file these
19 additional documents and your requested discovery? What
20 date?

21 MS. MCCULLEY: How about one week after we get
22 the transcript from today, Your Honor?

23 THE COURT: Are you going to expedite the
24 transcript from today?

25 MS. MCCULLEY: We can do that.

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1 THE COURT: All right. When -- Madam Court
2 Reporter?

3 THE REPORTER: I would have to check with my
4 office.

5 THE COURT: Okay. All right. Well, why don't
6 you -- I don't want to delay you any more. Figure out a
7 schedule and just file a joint proposed schedule for
8 briefing -- further briefing on the motion to dismiss.
9 File the documents, file the requested discovery, when
10 the Plaintiff can file, and then why don't we do at least
11 this much, Ms. Tardiff. Once the Plaintiff files, how
12 long would you like to respond?

13 MS. TARDIFF: It probably depends on timing,
14 although we'll probably work out a schedule because we
15 have a trial together at the end of May we've been
16 working around.

17 THE COURT: Okay.

18 MS. TARDIFF: But I imagine I can respond
19 within a week.

20 THE COURT: Very well. Okay, that will be just
21 fine. Anything further today?

22 MS. TARDIFF: Nothing further, Your Honor.
23 Thank you.

24 THE COURT: Very well. The ruling on the
25 motion to dismiss is deferred pending further development

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1 of the record. Thank you all.

2 MS. MCCULLEY: Thank you, Your Honor.

3 THE COURT: This hearing is concluded.

4 (Whereupon, at 3:04 p.m., the hearing was
5 adjourned.)

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1 CERTIFICATE OF TRANSCRIBER

2

3 I, Sara J. Vance, court-approved transcriber,
4 certify that the foregoing is a correct transcript from
5 the official electronic sound recording of the
6 proceedings in the above-titled matter.

7

8

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10 DATE: 4/30/2018

s/Sara J. Vance

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SARA J. VANCE, CERT

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EXHIBIT C

1 IN THE UNITED STATES COURT OF FEDERAL CLAIMS

2

3

4 DEBORAH S. GROH, et al.,)
5 Plaintiff,) Case No.
6 vs.) 17-1066L
7 THE UNITED STATES OF AMERICA,)
8 Defendant.)

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Suite 612

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United States Court of Federal Claims

14

717 Madison Place, N.W.

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Washington, D.C.

16

Tuesday, July 10, 2018

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3:00 p.m.

18

Telephonic Status Conference

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21 BEFORE: THE HONORABLE MARY ELLEN COSTER WILLIAMS

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25 Transcribed by: Matthew P. Tate, CERT

Deborah S. Groh, et al. v. USA

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7/10/2018

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1 P R O C E E D I N G S

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3 (Proceedings called to order, 3:04 p.m.)

4 THE COURT: All right. This is a hearing in
5 the matter of Groh, et al. vs. United States; number 17-
6 1066L. I'm Judge Williams. Let me ask counsel to please
7 identify themselves for the record.

8 For the Plaintiffs?

9 MS. McCULLEY: Your Honor, this is Liz McCulley
10 for Plaintiffs.

11 THE COURT: Anyone with you?

12 MS. McCULLEY: No.

13 THE COURT: Okay. And for the Defendant?

14 MS. TARDIFF: Yes, Kris Tardiff for the United
15 States. And I also do not have anyone with me.

16 THE COURT: All right. Very well.

17 Well, we've received your supplemental
18 briefing. Thank you very much. And I understand that
19 the Plaintiffs are requesting some limited discovery --
20 limited targeted discovery primarily directed at third
21 parties before the Court resolves this motion to dismiss.
22 And I understand the Government does not think that's
23 necessary.

24 But, Ms. McCulley, why don't you go through
25 that for the record. Tell us exactly what you need and

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1 why and why the current record is inadequate.

2 MS. McCULLEY: Yes, Your Honor. Thank you. I
3 believe that the current record is inadequate because it
4 doesn't -- or doesn't fairly represent what's really
5 going on here in Jackson County.

6 And so this rail line has been advertised for,
7 gosh, almost 10 years. It's going to hook into the Katy
8 Trail, if you're familiar with --

9 THE COURT: Okay. You have to slow down a
10 little bit for the record and for my old ears.

11 MS. McCULLEY: Sorry. I talk like Judge
12 Firestone.

13 So okay. So I just don't think that the record
14 adequately reflects what's really going on here and
15 what's really going on between the railroad, the STB, and
16 the Jackson County trail user, which they've done --
17 they've kind of set this offshoot of doing business as
18 the Rock Island Rail Corridor, but that's not a qualified
19 carrier either.

20 THE COURT: All right. You're speeding up
21 again. You're speeding up again. Just slow down.

22 MS. McCULLEY: Sorry. So Rock Island, the
23 separate entity that Jackson County has set up, is not a
24 qualified carrier either. And so if they -- you know, if
25 any rail use in the future were ever to be needed, they

1 would have to contract with a different carrier.

2 However, with all of the advertisements in
3 Jackson County for almost a decade, they've said trains
4 will never run on this rail line again. And these are
5 Jackson County executives that are part of the group that
6 are the trail users that came up with this idea. And I
7 won't go through all the boring details to you, but it's
8 a big deal to Jackson County. Some people (inaudible)
9 that they just want to hook our stadiums together.

10 And so -- but I think --

11 THE COURT: What do they want to hook the
12 stadiums together with?

13 MS. McCULLEY: They want -- with the rail line.
14 They're going to -- so the Katy Trail goes from St. Louis
15 all the way almost to here. And so this segment --

16 THE COURT: You better identify "here" for the
17 record.

18 MS. McCULLEY: Okay. It -- the Katy Trail goes
19 from St. Louis to basically almost Kansas City. And this
20 segment, they're hoping to hook in with the Katy Trail,
21 where it will go through the Chiefs' and Royals' athletic
22 stadiums, where those are extremely popular in Kansas
23 City. They're sold out usually, except for right now
24 with the Royals I might say.

25 But, anyway, so, you know, that's kind of their

1 goal and they've been protecting it to the community.
2 And that's all fine and dandy. I think the community --
3 it would be good for the community, but these landowners,
4 just as, you know, not in my backyard, it -- the trail is
5 good for the neighborhood, but not good for right behind
6 my house, that's how these people feel. They don't want
7 people trampling all through -- it's the exact same as a
8 Trails Act taking.

9 However, here, we have where the railroad and
10 the Jackson County did not go through the traditional
11 Trails Act and request a Notice of Interim Trail Use.
12 We've been trying to figure out why. We've asked Jackson
13 County; they're silent on the whole thing. That's what
14 discovery would look into. Why did -- you know, why
15 wouldn't you do this the proper way? Why --

16 THE COURT: Okay. Let's take that. That seems
17 to me something -- I know that this Court doesn't have
18 jurisdiction over whether or not it was proper for them
19 to do it this way, but -- and this is going really to
20 you, Ms. Tardiff. We do need to understand what the heck
21 is going on here and whether or not there's going to be a
22 trail; whether they did it right or wrong. And I know
23 that this still may be premature, but if there is a de
24 facto trail, I'd like to know that, in terms of
25 addressing the motion to dismiss on a thorough record.

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1 So, Ms. Tardiff, talk to me about that.

2 MS. TARDIFF: Absolutely, Your Honor. So I
3 think where we have a concern there is that, even if
4 Jackson County is planning to put in a trail -- they've
5 also talked about commuter rail on this corridor --
6 there's still no action by the STB that is authorizing
7 that particular use of this corridor.

8 So the only request that was ever made to the
9 STB was for this exemption that allowed the County to
10 acquire this line from Union Pacific and assume the
11 common carrier obligation on this line, which means, if
12 somebody requests service, they are obligated to provide
13 it.

14 So this question of, you know, why didn't the
15 County do it the proper way under the Trails Act -- I
16 mean, that's still an option if the County wants to come
17 in and now railbank the corridor under the Trails Acts --
18 if they really don't want to have this common carrier
19 obligation, but that's -- that claim's not ripe yet.
20 There's -- so there's no need to go conduct discovery
21 under the umbrella of this case as to why the County did
22 this exemption acquisition proceeding instead of coming
23 in under the Trails Act and getting authorization to
24 railbank and put in an interim trail here, which they did
25 not do. Nobody has asked for that. The STB has not

1 authorized any trail use under any proceeding before it.

2 So, you know, what we try to lay out in our
3 response is, if Plaintiffs here -- if their concern is
4 that, you know, maybe the County hasn't done the correct
5 thing -- if they believe the County has misrepresented,
6 even to the STB, what is going on on the ground, there
7 are options to them to come back to the STB and to seek
8 to revoke that exemption or seek reconsideration, but
9 that's not something, again, this Court -- limited
10 jurisdiction doesn't relate to that at all. I mean,
11 that's a separate process Plaintiffs would have to
12 undertake.

13 And then if, through that process, the County
14 decides to come in under the Trails Act and ask for the
15 STB's authorization to railbank the line and get rid of
16 their common carrier obligation, then maybe at that point
17 we have a ripe claim under the Trails Act that falls
18 within this court's jurisdiction, but we don't have this
19 now, and there's no need to conduct discovery to get at
20 whatever's going on out there for the purposes of this
21 claim.

22 THE COURT: Well, has the STB been back to the
23 County?

24 MS. TARDIFF: The STB, to my knowledge, has not
25 been back to the County. I think they would -- if they

1 received a request from these Plaintiffs to either revoke
2 the exemption petition or reconsider its decision, I
3 mean, that would be the mechanism by which it would, I
4 think, go back to the County and have the County come in
5 and explain what's going on, but that's the process.
6 They have not unilaterally done that.

7 THE COURT: So that's an administrative
8 proceeding that the Plaintiffs could initiate.

9 MS. TARDIFF: It is. And unlike the adverse
10 abandonment proceeding that we had discussed when we had
11 the oral argument some time ago, a petition to revoke the
12 exemption or to ask the Surface Transportation Board to
13 reconsider, there's a \$300 fee to initiate that
14 administrative proceeding. So it's not as expensive as
15 an adverse abandonment application.

16 THE COURT: Okay. And is there any -- I guess
17 I'm taking it -- I'm inferring from what you're saying,
18 Ms. Tardiff, that there's no obligation on the part of
19 the STB to do anything at this point. They've given the
20 exemption; the County has this common carrier obligation
21 that they're supposed to fulfill.

22 Does the STB have oversight over this -- the
23 County's conduct with respect to this?

24 MS. TARDIFF: I think only if it becomes
25 apparent through some filing that the County is not

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1 operating in a manner that would allow it to fulfill its
2 common carrier obligation, then that would be a
3 regulatory matter, as I understand it, that the STB would
4 speak to.

5 But, you know, again, generally, I think that
6 that inquiry happens -- is usually prompted by the filing
7 of some party that says there's a problem here. Either,
8 you know, someone who comes in and actually asks for
9 service, and the County says, oh, you know, we can't
10 provide it, or, you know, in a situation like this, maybe
11 a petition from adjacent landowners who are concerned
12 about the exemption and whether it was proper.

13 THE COURT: And would these adjacent landowners
14 have standing to go to the STB, with respect --

15 MS. TARDIFF: My understanding is that they
16 would.

17 THE COURT: Okay, all right.

18 Let's go back then to Ms. McCulley and see if,
19 perhaps, the \$300 petition to revoke the exemption or
20 seek reconsideration might be a route you want to pursue
21 instead of expensive discovery, subpoenaing records
22 through me, when it's a bit tenuous to the state of your
23 claim as it now is anyway.

24 I understand you say you don't know what's
25 happening; you have this suspicion that what's happening

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1 on the ground is different than what's happening on the
2 papers in front of the STB, but isn't the best way to
3 challenge that to go back to the STB and say, hey, what
4 are you doing here?

5 MS. McCULLEY: Your Honor, I believe that, with
6 all due respect, the STB is so skewed to the railroads,
7 and as long as it's not interfering with rail use, which,
8 you know --

9 THE COURT: Wait a minute, wait a minute. I
10 didn't hear you. The STB is what?

11 MS. McCULLEY: Is skewed towards the rail -- I
12 mean, they're -- the railroads are their interest -- to
13 try to preserve that network of railroad rights-of-way
14 the best they can, which is why the Trails Act came into
15 being in the first place.

16 THE COURT: All right. So you think the STB is
17 biased.

18 MS. McCULLEY: Well, I think they're very
19 biased, and that's fine. And we're not challenging the
20 STB decision, per se. We're not challenging that they
21 have the right to make decisions. We're challenging that
22 the decision that they made is a governmental act that is
23 preventing these landowners from getting their land back.
24 Because it was abandoned under state law and now the STB
25 is maintaining jurisdiction over it and they're

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1 categorically blocking these landowners' rights to their
2 land. And so --

3 THE COURT: Well, why isn't what the STB has
4 done, which all they have done is issue this exemption,
5 which designates the County as a common carrier -- they
6 haven't done anything that's within my jurisdiction. Why
7 isn't that simply subject to challenge in the district
8 court under the Administrative Procedure Act?

9 MS. McCULLEY: Well, I believe that you do have
10 jurisdiction because what they've done -- the STB has not
11 just granted an exemption. They've acknowledged that it
12 -- Jackson County's going to use it for a trail. And,
13 actually, we can say "going to use it;" they've already
14 built -- they're already building the trail. So it's not
15 even -- they've broken ground long time ago. They've
16 started a the contracting a long time ago. They've been
17 building this trail. And so this is plowing forward.

18 THE COURT: Well, you know, I'm struggling, Ms.
19 McCulley. I don't want to get reversed for taking
20 jurisdiction greedily on some matter that I don't have
21 jurisdiction over. Okay?

22 We have to be very, very careful in this Court.
23 Suits against the Government -- the fundamental predicate
24 is there -- has there been a waiver of sovereign immunity
25 for this particular action -- for this particular

1 challenge? That's our fundamental precept here.

2 And I'm not sure that there has. You are
3 asking this Court to assume -- for purposes of allowing
4 you additional discovery, but to assume that there has
5 been a waiver of sovereign immunity by virtue of an
6 errant act by the Government, an act that goes beyond the
7 jurisdiction of the STB itself; that they have acted
8 ultra vires, and that they are in cahoots with this
9 County group, and they're going to have a trail, even
10 though they've said -- and even though they are charged
11 with, via documentary evidence, simply overseeing this
12 common carrier and making sure that they follow the rules
13 with respect to the common carrier obligation, which is a
14 very different role from supervising the trail process,
15 from engaging in the trails process, from issuing a NITU.

16 So, you know, the problem here is you haven't
17 -- you don't have a NITU, you don't have the kind of act
18 by the STB that gives my Court a hook for jurisdiction.
19 That's a problem for me. And I don't know that this
20 discovery -- suppose you find out that you're right; the
21 STB is acting ultra vires. But isn't that the --
22 something that needs to be corrected via a declaratory
23 judgment by a district court instead of my jumping the
24 gun here at the Court of Federal Claims and awarding just
25 compensation, when the predicate for my jurisdiction

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1 hasn't even been established?

2 That's the problem. And that's a big problem.

3 So I want to hear you on that.

4 MS. McCULLEY: All right. Well, Your Honor, I
5 just -- and, I mean, I know this is -- and this is, you
6 know, new for us because -- you know, we've been having a
7 lot of trails cases, and I know you do, too. But for --
8 you know, it's shocking that they can just -- the STB can
9 just say, okay, sure. You can transfer the line. I know
10 you're going to use it for a recreational trail. We're
11 not going to issue a Notice of Interim Trail Use. You
12 don't -- you're not required to request a Notice of
13 Interim Trail Use, but we're just going to go ahead and
14 let you use it for a trail. And, by the way, we know you
15 don't have any carrier obligations right now -- or not
16 obligations, but any -- you don't have any trains
17 running, and there's no customers because you told us,
18 Jackson County and railroad.

19 And so I just don't see how this is okay or
20 this is right that they can just go, okay, the Trails Act
21 is there for a reason. We're going to do everything that
22 the Trails Act was authorized, only we're just not going
23 to asking for a NITU. And that's exactly what happened
24 here. And -- but the STB is involved.

25 And so the STB is acting, saying, yes, you can

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1 do that. Yes, you can transfer it. And, yeah, we know
2 what you're going to use it for, and we know there's no
3 train. And so I think at least discovery to, you know,
4 the STB, saying, what is going on here? How can -- I
5 mean, I don't think that they have the authorization to
6 allow a recreational trail unless you go through the NITU
7 process because they don't have the authorization to
8 allow all kinds of other uses besides railroad use.

9 They regulate railroads. Not utility lines;
10 not trail users; not those kinds of things. The trail
11 users under the NITU -- that's ministerial. As long as
12 they meet the criteria, they're good; they don't monitor
13 them.

14 And so, here, I just don't see how there's any
15 difference, and I would like to explore the discovery
16 with this (inaudible) --

17 THE COURT: All right. So stop with the
18 discovery already. Stop with the discovery. You still
19 haven't persuaded me that I have jurisdiction.

20 What you have just described as this ultra
21 vires, improper conduct by the STB failing to issue a
22 NITU when they should have issued a NITU, why isn't that
23 a quintessential agency decision, subject to challenge as
24 being arbitrary, capricious, and contrary to law under
25 the Administrative Procedure Act, which is within the

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1 jurisdiction of your district court and not the United
2 States Court of Federal Claims?

3 Before I issue any discovery in this case, I
4 would issue to you a show cause order to that effect.

5 MS. McCULLEY: Okay, Your Honor.

6 THE COURT: Because I don't think we're there
7 yet. And you haven't really exhausted your
8 administrative remedies, which is a sidebar issue, in
9 terms of going back to the STB, asking them to revoke the
10 exemption or seeking reconsideration of this exemption
11 decision. You have other options here.

12 And I don't know whether I have jurisdiction.

13 MS. McCULLEY: All right. Well, Your Honor, if
14 you would issue -- I mean, if you want to give us a show
15 cause order, then we will respond. And then, you know, I
16 would just -- if we end up -- if you really believe that
17 discovery is premature, I would just ask that you stay
18 the case while we do go to the STB and do go the
19 administrative remedy route and just see what they say.

20 Because we're getting roadblocked everywhere we
21 go on this. Everybody is passing the buck. And so
22 they're saying, you've got to go to the Court of Federal
23 Claims; no, you've got to go to District Court.

24 THE COURT: I understand that. And we don't
25 want to be an impediment to justice. That's not the goal

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1 here.

2 Okay. So I think you've given some middle
3 ground to the Government here, which is you're going to
4 go to the STB; you're going to seek whichever one of
5 these, revocation or reconsideration or both. And you're
6 asking me to stay my case while you do that.

7 How long do you think that will take, Ms.
8 McCulley?

9 MS. McCULLEY: Well, now, I have to giggle
10 because we filed an adverse abandonment before the
11 STB with kind of the same situation -- not really the
12 same situation, but in an odd situation in our Colorado
13 case -- one of our Colorado cases. And they sat on this
14 for a year and didn't even acknowledge it or whatever,
15 and we ended up -- with Judge Horn, we ended up working
16 it out between Defendants and I (inaudible). So then
17 when I went to tell the STB never mind, like, they didn't
18 even know about it. They couldn't find it -- you know,
19 where we filed.

20 So I don't know how long it will take. I'm not
21 -- I have not -- I don't have a lot of experience filing
22 in front of the STB to gauge how long it would take.
23 Kris might know more about that than I would.

24 THE COURT: But, again, isn't that kind of a
25 problem exactly what the APA was designed to cure?

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1 Agency inaction as much as agency action. And I don't
2 know what the APA law, off the top of my head, would tell
3 you on that, but I don't think that the agencies are
4 permitted to simply do nothing in the face of these
5 procedural motions that are authorized by their rules.
6 So you have remedies, but they're not before me on that
7 front.

8 MS. McCULLEY: And I'm not that familiar with
9 those either. So, Your Honor, if the APA -- if they
10 didn't do anything, then where's my recourse? Where do I
11 go if they just sit on it?

12 THE COURT: Well, you're a lawyer. Look it up.

13 MS. McCULLEY: Okay.

14 THE COURT: I mean, I'm not going to give you
15 legal advice under the APA.

16 MS. McCULLEY: Okay.

17 THE COURT: Except to say that that -- their
18 jurisdiction in the district courts is different -- they
19 have APA jurisdiction, and I don't.

20 MS. McCULLEY: Right.

21 THE COURT: They have the ability to do
22 declaratory relief and injunctive relief in a case like
23 this, and I don't. I don't have that authority and I
24 don't have that jurisdiction.

25 So -- but I think we've made some progress

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1 here. If you're going to go to the STB, I wouldn't think
2 it would take more than a couple of months, based on my
3 practice in the administrative arena, but you can look up
4 their regs and see what it says.

5 Ms. Tardiff, do you know how long this process
6 takes?

7 MS. TARDIFF: No, Your Honor, I actually don't
8 know how long it would take, but certainly if it's a
9 process the Plaintiffs are looking to engage in, you
10 know, I would contact the STB's Office of General Counsel
11 and let them know so that they're aware this is coming in
12 and, hopefully, that moves that process.

13 THE COURT: Well, thank you for that, Ms.
14 Tardiff. That is very courteous of you to do, and I
15 think it will help us get our present motion resolved
16 once we figure out what exactly is going on here.

17 So I think where we are is this Court is
18 inclined to stay the case to allow Plaintiffs the
19 opportunity to pursue their administrative remedies
20 before the STB and, you know, explain to the STB their
21 position that they think a NITU should have been issued
22 when de facto the conduct that's ongoing is equivalent to
23 the invocation of the Rails to Trails Act.

24 All right. So --

25 MS. McCULLEY: Thank you, Your Honor. I

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1 appreciate that.

2 THE COURT: I'm going to stay the case for 120
3 days and ask you to give me a status report, Ms.
4 McCulley. So that will bring us to November. Is that
5 about right?

6 LAW CLERK: Mm-hmm.

7 THE COURT: Yeah.

8 MS. McCULLEY: Okay.

9 THE COURT: Yeah. So November -- I'm looking
10 at the Veterans Day holiday, which is November 12th. Why
11 don't you file with me a status report, Ms. McCulley, on
12 November 13th. That's a Tuesday.

13 MS. McCULLEY: That will work, Your Honor.

14 THE COURT: And just let us know, you know,
15 what you've filed, what the progress is. I'm sure Ms.
16 Tardiff will help you. She's going to call the General
17 Counsel's Office and tell her the Department of Justice
18 is interested in this and that this court case is still
19 going to be pending and -- along with the case being
20 stayed, of course, all pending motions are stayed.

21 All right. Anything further at this time?

22 MS. McCULLEY: Not for the Plaintiffs, Your
23 Honor.

24 MS. TARDIFF: And nothing for the United
25 States. Thank you, Your Honor.

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1 THE COURT: All right. Thank you, all. We'll
2 issue a brief order requesting the Plaintiffs' status
3 report. Thank you, all.

4 MS. McCULLEY: Thank you, Your Honor.

5 MS. TARDIFF: Thank you.

6 THE COURT: Bye-bye.

7 (Whereupon, at 3:28 p.m., the hearing was
8 adjourned.)

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1 CERTIFICATION OF TRANSCRIBER

2

3 I, Matthew P. Tate, court-approved transcriber,
4 certify that the foregoing is a correct transcript from
5 the official electronic sound recording of the
6 proceedings in the above-titled matter.

7

8

9

10 DATE: 7/23/2018

S/Matthew P. Tate

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MATTHEW P. TATE, CERT

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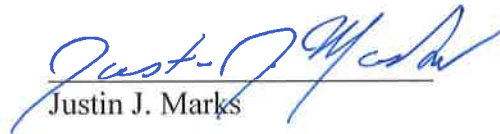
CERTIFICATE OF SERVICE

I certify that on November 13, 2018, a true copy of the foregoing Jackson County Reply was served via email upon the following parties of record:

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