244415
244417

LAW OFFICE
THOMAS F. McFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1666
CHICAGO, ILLINOIS 60604-1228
TELEPHONE (312) 236-0204
*mcfarland@aol.com*

THOMAS F. McFARLAND

ENTERED
Office of Proceedings
September 26, 2017
Part of
Public Record

September 26, 2017

**VIA E-FILING**

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: AB-1106X, *ABE Fairmont, LLC -- Abandonment Exemption -- in Fillmore County, NE*

AB-6 (Sub-No. 488X), *BNSF Railway Company -- Discontinuance of Service Exemption -- in Fillmore County, NE*

**Supplement To The July 7, 2014 Joint Petition For Exemption**

Dear Ms. Brown:

Enclosed is ABE Fairmont, LLC and BNSF Railway Company's Supplement To The July 7, 2014 Joint Petition For Exemption. If there are any questions concerning this matter, please contact me directly, either by telephone (312) 236-0204 or by e-mail at mcfarland@aol.com.

Very truly yours,

Thomas F. McFarland

Thomas F. McFarland
Attorney for ABE Fairmont, LLC

*TMcF:kl:enc:1562-C\ef\STB3*

cc: Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

| | | |
|---|---|---|
| ABE FAIRMONT, LLC<br>– ABANDONMENT EXEMPTION –<br>IN FILLMORE COUNTY, NEB. | )<br>)<br>) | AB-1106X |
| BNSF RAILWAY COMPANY<br>– DISCONTINUANCE OF SERVICE<br>EXEMPTION –<br>IN FILLMORE COUNTY, NEB. | )<br>)<br>)<br>) | AB-6 (Sub-No. 488X) |

**SUPPLEMENT TO THE JULY 7, 2014 JOINT PETITION FOR EXEMPTION**


BNSF RAILWAY COMPANY
2650 Lou Menk Drive
P.O. Box 961039
Fort Worth, TX 76161-0039

KARL MORELL,
KARL MORELL & ASSOCIATES
Suite 225
655 Fifteenth St., N.W.
Washington, DC 20005.
E-mail: karlm@karlmorell.com

Attorney for BNSF Railway Company

ABE FAIRMONT, LLC
1214 County Road G
Fairmont, NE 68354

THOMAS F. MCFARLAND
THOMAS F. MCFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
Tel: (312) 236-0204
Fax: (312) 201-9695
E-mail: mcfarland@aol.com

Attorney for ABE Fairmont, LLC


September 26, 2017

BEFORE THE
SURFACE TRANSPORTATION BOARD

| | | |
|---|---|---|
| ABE FAIRMONT, LLC<br>– ABANDONMENT EXEMPTION –<br>IN FILLMORE COUNTY, NEB. | )<br>)<br>) | AB-1106X |
| BNSF RAILWAY COMPANY<br>– DISCONTINUANCE OF SERVICE<br>EXEMPTION –<br>IN FILLMORE COUNTY, NEB. | )<br>)<br>)<br>) | AB-6 (Sub-No. 488X) |

**SUPPLEMENT TO THE JULY 7, 2014 JOINT PETITION FOR EXEMPTION**

**SUMMARY OF ARGUMENT**

On August 17, 2017, the Board served a decision ("Aug. 17th Decision") lifting an abeyance that was requested by Abe Fairmont, LLC ("ABE") and BNSF Railway Company ("BNSF") (jointly referred to herein as "Petitioners") and imposed by Board in the above captioned proceedings on July 24, 2014.[1] While the Board granted the Petitioners' request to reactivate the proceedings, the Aug. 17th Decision also identified three issues that the Petitioners

[1] In July 2014, the Petitioners filed a joint petition for exemption ("Joint Petition") requesting exemptions under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 to permit ABE to abandon operations over approximately 2.77 miles of rail line and BNSF to discontinue common carrier operations over approximately 0.77 miles of rail line (the "ABE Line"). On July 23, 2014, Petitioners requested that the proceedings be held in abeyance pending discussions between the Petitioners, Flint Hill Resources – Fairmont ("FHR-Fairmont"), and The Andersons, Inc. d/b/a O'Malley Grain Company ("The Andersons"), shippers who receive service over a portion of the Line. On June 16, 2017, Petitioners notified the Board that the matters that originally caused the Petitioners to request an abeyance had been resolved. As a result, Petitioners requested that the Board lift the abeyance. That request led to issuance of the Aug. 17th Decision.

must clarify prior to the Board beginning its merits review of the abandonment and discontinuance request.

The Aug. 17th Decision seeks information concerning (1) the continued validity of information provided in ABE's 2012 Environmental & Historic Report ("DEHR"); (2) whether granting the Joint Petition would result in a stranded segment of track; and (3) whether the Joint Petition is consistent with the principles articulated in Energy Solutions,[2] a case decided while the Joint Petition was held in abeyance. Petitioners hereby submit this Supplement To The July 7, 2014 Joint Petition For Exemption ("Supplement").[3]

With respect to updating the environmental analysis, after engaging in discussions with the Board's Office of Environmental Analysis ("OEA"), on August 30, 2017, ABE redistributed an updated DEHR to confirm that the information submitted during the initial environmental review in 2012 remains current. As of this date, no additional comments have been received that would change the 2012 analysis. What comments have been received indicate no environmental impacts from converting the line from common carrier status to private rail track.

With respect to the stranded segment issue, technically, yes, granting the Joint Petition could result in a stranded segment; however, the Board should not put form over substance. Except for the failure to file the requisite consummation notice, the line was fully abandoned. There has not been any track on that segment for over a decade, and the previous owner, Fillmore Western Railway Company ("FWRY"), sold its real property interests to the existing property owners on the basis that railroad operations had been abandoned. In fact, FWRY

---

[2] Energy Solutions, LLC – Abandonment Exemption – In Anderson & Roane Counties, Tenn., AB-1128X (STB served Oct. 13, 2015) ("Energy Solutions").

[3] While original responses were due September 6, 2017, at Petitioners request, the Board extended the Petitioners' deadline for submitting its supplemental response to September 26, 2017 in a decision served by the Board on August 29, 2017.

doesn't even exist as a company anymore. Furthermore, although they have been notified about this proceeding, no current landowner expressed a desire for rail service over the former right-of-way and all believe that the former FWRY line was abandoned a long time ago. To resolve any stranded segment concerns and alleviate landowners concerns, the Board should grant a retroactive waiver of the requirement that a consummation notice was required for milepost 3.70 to milepost 10.0 and consider that portion of the former FWRY rail line to be abandoned.

Finally, the concerns raised by the Board in Energy Solutions are not present in these proceedings. All active shippers support abandonment and discontinuance. All of the involved parties have carefully crafted various Industry Track Agreements ("ITAs") that provide extensive remedies and safeguards for service failures and/or the failure of FHR-Fairmont, who will become the owner of the ABE Line, to maintain the track. No public purpose would be served by continuing Board jurisdiction over a line of railroad where no party desires that jurisdiction to continue.

## BACKGROUND[4]

In 1996, a predecessor of BNSF sold an approximately 8.3-mile rail line to FWRY.[5] BNSF's predecessor retained ownership of an approximately 0.77-mile segment of the rail line that it sold.[6] This segment provided the FWRY Line with a connection to BNSF (at milepost

[4] The background contained in the Board's Aug. 17th Decision was an excellent summary of the history of this proceeding; however, the information came from the 2014 Joint Petition. Since that time, Petitioners have gained additional information not contained in the Joint Petition. As such, Petitioners believe it is important to restate the history of the proceedings incorporating the updated information regarding the timelines and land ownership of the underlying former FWRY right-of-way.

[5] The rail line purchased by FWRY extended from milepost 1.7 to milepost 10.0 (near Geneva, NE) (referred to herein as "FWRY Line"). See Fillmore W. Ry.—Acquis. & Operation Exemption—Burlington N. R.R., FD 33299 (STB served Dec. 12, 1996).

[6] BNSF retained the line segment from milepost 0.93 to milepost 1.70 ("Northern Segment").

1.7). BNSF (and its predecessor) have used the Northern Segment to provide rail service to the O'Malley Grain facility owned by The Andersons. In 2001, FWRY obtained an exemption from the Board that authorized abandonment of the FWRY Line.[7] After being granted abandonment authority, FWRY took all the normal steps necessary to consummate the authorized abandonment, including removing tracks from milepost 3.70 to milepost 10.0, canceling tariffs, and discontinuing service.[8] It eventually sold all of the underlying real estate that had once constituted the entire FWRY Line to adjoining landowners and to ABE, who eventually sold its portion to FHR-Fairmont.[9] Although it believed it had taken all necessary steps to consummate its abandonment, FWRY did not, however, file a notice of consummation with the Board within the required regulatory timeframe. Despite this failure, it is important to note that FWRY, the landowners, BNSF, and the communities of Fairmont and Geneva all considered the common carrier obligation on the FWRY Line to be extinguished.

At the time FWRY salvaged the track from milepost 3.70 to milepost 10.0, it did not salvage the segment of the FWRY Line from milepost 1.70 to milepost 3.70 ("Southern Segment"). FWRY retained this segment in order to preserve a connection with BNSF's Northern Segment and to facilitate the construction of a new ethanol plant to be located adjacent to that portion of the former FWRY Line. Having obtained and exercised its abandonment

---

[7] Fillmore Western Railway Company – Abandonment Exemption – In Fillmore County, NE, AB-492 (Sub-No. 2X) (STB served November 20, 2001).

[8] The portion of the FWRY Line from milepost 3.70 to 10.0 where the track has been removed and the underlying right-of-way sold to various landowners will be referred to herein as the "FWRY Abandoned Segment."

[9] According to Tax Parcels & Deed records filed at the Fillmore County Register of Deeds, deeds for 18 parcels of land legally described as "Abandoned RR ROW" were recorded in the Fillmore County land records between 2006 and 2014. Another 10 parcels of land legally described as "RR ROW" were also recorded between 2006 and 2016. Collectively, these land records are for the real estate that once comprised the entirety of the FWRY Line. Examples of the deeds and tax records are attached as Exhibit 1.

authority, FWRY believed that this Southern Segment was being left in place as private rail track in order to connect with BNSF so that BNSF could serve the new ethanol plant. In 2006, ABE purchased the underlying real property from FWRY and the Southern Segment and began construction of the new ethanol plant. At the time, both ABE and FWRY believed that the Southern Segment was private industry track. As such, ABE did not obtain STB authority to acquire the Southern Segment. ABE then completed construction of its Fairmont ethanol plant adjacent to that track.[10]

FHR-Fairmont purchased the ethanol plant from ABE in 2012, but not wanting to become a common carrier, it did not purchase the ABE Line.[11] Instead, FHR-Fairmont entered into an agreement to buy the ABE Line, but only upon ABE obtaining abandonment authority and BNSF obtaining discontinuance authority so as to allow FHR-Fairmont to buy the ABE Line as private industry track. The Joint Petition was filed and then held in abeyance after concerns were expressed by The Andersons over the impact of the proposed transaction to its rail service from BNSF. Subsequently, BNSF, FHR-Fairmont, and The Andersons have all entered into a series of agreements to ensure continued service to FHR-Fairmont and The Andersons once the

---

[10] In 2012, due to concerns raised in the course of selling the ABE ethanol plant to FHR-Fairmont over whether the FWRY Line was not properly abandoned and that the Southern Segment may in fact still be common carrier track, ABE sought and obtained STB authority to acquire the Southern Segment. ABE Fairmont, LLC—Acquis. & Operation Exemption—Fillmore W. Ry., FD 35673 (STB served Sept. 21, 2012). Concurrently, ABE exercised an option to acquire the Northern Segment from BNSF, with BNSF retaining authority to operate over the Northern Segment via trackage rights. The BNSF trackage rights were necessary so as to continue to serve The Andersons d/b/a. O'Malley Grain Company and FHR-Fairmont upon FHR-Fairmont's purchase of the ethanol plant. ABE Fairmont, LLC—Acquis. & Operation Exemption—BNSF Ry., FD 35683 (STB served Oct. 31, 2012, updated July 19, 2013)(collectively, the Northern and Southern Segments constitute the "ABE Line.")

[11] It was FHR-Fairmont's due diligence that discovered FWRY's failure to file the consummation notice. This raised the possibility that the FWRY Line may not have been properly abandoned, an issue it raised with ABE during the due diligence phase and that led to ABE seeking authority to buy the Southern Segment.

common carrier obligation was removed from the ABE Line and the segments sold to FHR-Fairmont as private industrial track.[12]

To allow FHR-Fairmont to acquire the ABE Line as a private line of railroad, ABE to rid itself of a common carrier obligation that it never desired to hold in the first place (nor thought it had originally acquired), and for BNSF to continue to serve FHR-Fairmont and The Andersons via the various voluntarily negotiated contractual agreements, the Board should grant the Joint Petition. In addition, to remove any stranded segment issues or concerns regarding the status of the FWRY Abandoned Segment, the Board should grant a retroactive waiver of FWRY's requirement to file a consummation notice. In doing so, the Board should confirm that the FWRY Abandoned Segment has been abandoned. Such actions by the Board will allow the parties to achieve what has been negotiated in the marketplace. It will also have the added benefit of removing any cloud on the titles of the landowners who own property underlying the FWRY Abandoned Segment and who neither thought nor knew they might be acquiring non-abandoned right-of-way at the time they acquired their property.

## ARGUMENT

### I. THE ENVIRONMENTAL ANALYSIS FOR THE PROCEEDING REMAINS UNCHANGED

In the Aug. 17th Decision, the Board expressed concern that the initial DEHR prepared nearly five years ago and the supplement to the DEHR prepared nearly four years ago may be outdated. As such, the Board directed the Petitioners to consult with OEA on how to proceed with the environmental review. A representative of the Petitioners contacted a representative of

[12] As explained herein, FHR-Fairmont, The Andersons, ABE, and BNSF have spent nearly three years working to ensure that the proposed abandonment and discontinuance adequately protects FHR-Fairmont, BNSF, and The Andersons' common interest in continued safe and operationally efficient rail service for both shippers.

OEA on August 19, 2017 regarding the DEHR and the potential need to file and circulate a revised DEHR.

While Petitioners had no reason to believe that the environmental analysis provided in 2012 had changed, after engaging in discussions with OEA, ABE prepared and redistributed a revised and updated DEHR to confirm that the previously submitted information remained current and had not changed. The revised DEHR was redistributed nearly four weeks ago, on August 30, 2017. Both the revised DEHR and the cover letter succinctly explained the purpose and activities proposed in the Joint Petition, including explaining that the Joint Petition was different from typical abandonments because rail service would continue and as such there would be less of an environmental footprint. Regardless of the likely de minimis impact, the cover letter specifically requested that the agencies submit any information that the consulted agencies believed OEA should consider in completing its environmental analysis for the proceeding. Most importantly, the cover letter explained that applicable statutes and regulations imposed stringent deadlines; and, as such a response would be appreciated within three weeks.

To date, ABE has received two responses: State of Nebraska, State Historical Society and from United States Department of Agriculture, Natural Resources Conversation Services. Neither expressed any concerns over the abandonment. A copy of the revised DEHR is attached as Exhibit 2. A copy of the responses to the revised DEHR is attached as Exhibit 3. The lack of responses confirms ABE's conclusion that the environmental analysis performed in 2012 remains unchanged. The Northern and Southern Segments will remain in place. As such, there will be no changes in how operations are conducted today and no environmental impact from granting the Joint Petition.

## II. THE PUBLIC INTEREST SUPPORTS THE BOARD GRANTING A RETROACTIVE WAIVER OF FWRY'S OBLIGATION TO FILE A CONSUMMATION NOTICE AND CONSIDER THE FWRY LINE ABANDONED, WHICH WILL ELIMINATE THE STRANDED SEGMENT ISSUE

It is established precedent that where there is a common carrier obligation attached to a segment of track, the Board will not allow that segment to become isolated from the rail system as a result of the abandonment of an adjoining segment.[13] It is also long established precedent that to "consummate" an abandonment, a railroad must manifest a clear intent to abandon a rail line through its statements and actions, including discontinuing operations, salvaging the rail line (removing rails and other materials from the property), and since 1997, filing a notice of consummation within one year after any barriers to consummation are removed.[14] In this case, if the Board were to remove the common carrier status of the ABE Line, the FWRY Abandoned Segment, if it still has a common carrier status and was not considered abandoned, would become a stranded Segment. But the Board should consider the FWRY Abandoned Segment as abandoned. FWRY took all but the last procedural step to consummate the authorized abandonment for the FWRY Abandoned Segment – the potential stranded segment. FWRY removed the tracks, canceled tariffs, discontinued service,[15] and even sold the real estate

---

[13] See Cent. Or. & Pac. R.R.—Aban. & Discontinuance of Serv.—in Coos, Douglas, & Lane Ctys., Or., AB-515 (Sub-No. 2), slip op. at 12 (STB served Oct. 31, 2008)("Central Oregon").

[14] Prior to the consummation notice requirement set forth at 49 CFR 1152.29(e)(2) being established, there was no rigid formula for determining whether a railroad intended to exercise its permissive abandonment authority. Rather, whether consummation had occurred was an issue the Board and the courts decided on a case-by-case basis based on the circumstances. See Birt v. STB, 90 F.3d 580, 585-586 (D.C. Cir. 1996) ("Birt"); see also Black v. ICC, 762 F.2d 106, 112-13 (D.C. Cir. 1985) ("Black"). In effect, here, Petitioners are requesting a waiver of the consummation notice requirement and application of the principles set forth in Birt and Black to find that the FWRY Abandoned Segment was in fact been legally abandoned.

[15] The rail line has been removed for many years. There are no active or prospective shippers on the FWRY Abandoned Segment. The right-of-way is not intact.

underlying the FWRY Abandoned Segment. The only step FWRY failed to take was to file a consummation notice.

In the unique factual circumstances of this case, the Board should not find that the failure to file a consummation notice requirement under 49 CFR 1152.29(e)(2) negated the intent and actions of the parties so that the FWRY Abandoned Segment remained a rail line within the Board's jurisdiction and thus would become a stranded segment in the event the Joint Petition was granted. Instead, the Board should exercise its powers to grant, on its own motion, a retroactive waiver of that regulatory requirement and hold that the FWRY Abandoned Segment was indeed abandoned. The Board often grants waivers from its regulations when doing so is consistent with the public interest, and even has done so retroactively.[16] It should do so here as well.

Strictly applying the requirements of 49 CFR 1152.29(e)(2) would place form over substance for no public purpose. In fact, here, strictly applying that requirement here would be contrary to the very purposes for which the consummation notice requirement was adopted in the first place. The primary purpose for adopting the consummation notice requirement was to

[16] See Portland Terminal Company – Abandonment Exemption – In Cumberland County, ME, AB-268 (Sub-No. 10X) (STB served Oct. 25, 2000) (granting an extension of time to file a consummation notice due to unique factual circumstances); see also, Horsehead Corp.--Petition for Acquis. & Operation Exemption--Chestnut Ridge Ry., FD 34481 (STB served Mar. 12, 2004) (granting retroactive acquisition and operation authority); R.J. Corman Railroad Property, LLC – Acquisition Exemption – NC Railroad, Inc.; R.J. Corman Railroad Company/Bardstown Line – Lease And Operation Exemption – R.J. Corman Railroad Property, LLC, FD 35363; FD 35364 (STB served June 29, 2011) (granting retroactive approval and waiver of both the statute and the regulation); and Burlington Northern Railroad Company – Connector Track Construction – Near Waltonville In Jefferson County, IL, FD 31599 (Sub-No. 2) (ICC decided Apr. 23, 1990) (granting retroactive construction authority and retroactive waiver from environmental regulations).

provide certainty and reduce litigation.[17] In this situation, finding that the FWRY Abandoned Segment was never abandoned simply because FWRY failed to file a consummation notice would actually create uncertainty and increase litigation, not reduce it.

As noted, FWRY took all necessary steps to consummate its abandonment. It salvaged all tracks and track materials, cancelled tariffs, terminated various agreements, and eventually sold all of its real property interests in the right-of-way to various landowners. As shown in Exhibit 1, these landowners bought that property on the basis that it was "Abandoned RR ROW." They have been paying the tax bill for the parcels on that basis. To the extent the parcels were farmland, which the vast majority are, those parcels have been incorporated into the farming operations. For the Board to now hold that the FWRY Abandoned Segment was never truly abandoned will sow confusion and bewilderment, not eliminate it. Such a holding doesn't add certainty, but creates uncertainty. It puts a cloud on the landowners' titles; likely resulting in litigation between buyer and seller over the quality of the landowners title. It would mean that, in theory, a party could lay down track in the middle of what had been assumed to be abandoned right-of-way and begin railroad operations anew. Imagine the litigation and uncertainty created by such a scenario? Such uncertainty and potential for more litigation is precisely the opposite effect of the purpose of the consummation notice requirement.

Finding that the abandonment was never consummated so that the FRWY Abandoned Segment would become a stranded segment if the Joint Petition were granted serves absolutely no public purpose. There are no landowners or parties who want rail service to be restored. Indeed, the local manager of the FHR-Fairmont plant contacted the current landowners of the

[17] See Consummation of Rail Line Abandonments that are Subject to Historic Preservation and Other Environmental Conditions, EP 678, slip op. at 3 (April 23, 2008).

FWRY Abandoned Segment to inform them of this proceeding. See Exhibit 4. None expressed a desire for renewed rail service.

Furthermore, if the Board were to find that there remains a common carrier obligation over the FWRY Abandoned Segment, not only would there be litigation over the landowner's title issues, but removing that common carrier obligation so as to avoid the stranded segment issue would require further STB proceedings. There are only two ways to remove the common carrier obligation: having FWRY file another abandonment request; or undertaking an adverse abandonment. Both of these options only create more litigation, more expense, delay, and uncertainty.

Having FWRY file another abandonment request is likely impossible. FWRY no longer appears to exist. FWRY ceased to be a corporate/business entity when it was administratively dissolved by the State of Nebraska for failure to file required corporate/business documents and failure to submit an Occupation Tax Report on April 16, 2010. See Exhibit 5. According to a representative of the Nebraska Secretary of State, prior to being administratively dissolved, FWRY failed to respond to delinquency notices. As such, the Nebraska Secretary of State was forced to take action. Finally, the principle former owner of FWRY also appears to be deceased.

Likewise, requiring any of the third parties here or the underlying property owners to file an adverse abandonment so as to remove the common carrier obligation is very expensive and time consuming. It would also further delay the processing of this Joint Petition so as to avoid the stranded segment issue. Even then, assuming the Board granted such an adverse abandonment, the property owners would still have to file quiet title actions to clear any cloud on their titles. There is no public purpose served by requiring an adverse abandonment petition when there is a simple solution to resolve the stranded segment issue. That solution is to grant

FWRY a retroactive waiver of the requirement to file a consummation notice and find that FWRY did indeed consummate its abandonment.[18]

## III. THE CONCERNS RAISED BY THE BOARD IN ENERGY SOLUTIONS ARE ADEQUATELY ADDRESSED BY ITAS.

The ITAs signed by the parties involved, ABE, FHR-Fairmont, The Andersons, and BNSF, have thoroughly contemplated and adequately addressed the issues raised by the Board in Energy Solutions concerning the loss of regulatory remedies for shippers along a rail line that is converted from common carrier track to private track. The Board expressed concerns in Energy Solutions that once the common carrier obligation went away and the line became private track that the shippers located on the rail line would not be adequately protected. As the Board stated:

---

[18] Alternatively, the Board could rule that in the unique circumstances of this case, the Board will not apply its stranded segment precedent, which, if strictly applied and absent the waiver approach, would prevent the Board from granting the Joint Petition until such time as the common carrier obligation was removed from the FWRY Abandoned Segment. The Board, under unique circumstances, does not always apply its precedents strictly. See Arizona Electric Power Cooperative, Inc. v. BNSF Railway Company And Union Pacific Railroad Company, NOR 42113 (STB served May 14, 2015)(Board did not follow, in part, normal rate methodology process); E.I. DuPont de Nemours & Co. v. Norfolk S. Ry., NOR 42125 (STB served Mar. 24, 2014) (not following the traditional approach to valuations); Rio Grande Industries, Inc., et al. – Purchase And Trackage Rights – Chicago, Missouri & Western Railway Company Line Between St. Louis, MO and Chicago, IL, 1989 ICC LEXIS 284, 5 I.C.C. 2d 952 (1989)(making modifications to standard labor protective conditions); New England Central Railroad, Inc. – Acquisition And Operation Exemption – Lines Between East Alburgh, VT and New London, CT, FD 32432 (ICC served Dec. 30, 1994)(explaining why normal labor protection precedent was not applied); and Chillicothe-Brunswick Rail Maintenance Authority – Discontinuance Exemption – In Livingston, Linn, and Chariton Counties, MO; Motive Rail, Inc. d/b/a Missouri North Central Railroad – Discontinuance Exemption – In Livingston, Linn, and Chariton Counties MO, AB-993X (STB served Jan. 15, 2008)(noting that Trails Act normally does not apply to discontinuance proceedings but nonetheless applying it under the unique circumstances of that proceeding). Of course not applying the Central Oregon precedent so as to grant the Joint Petition notwithstanding that it would make the FWRY Abandoned Segment a stranded segment would not remove the common carrier obligation over the FWRY Abandoned Segment, necessitating further STB proceedings and litigation. In contrast, a retroactive grant of the consummation notice requirement would remove both the stranded segment issue and the common carrier obligation.

> ES could end service on the Line at any time without Board authorization, and these shippers would lose their regulatory remedies for service failures or inadequacies. Accordingly, the Board cannot conclude that, in these circumstances, removing the Line from the national rail system would ensure the continuation of a sound rail transportation system to meet the needs of the public. 49 U.S.C. § 10101(4).

Energy Solutions, slip op. at 3.

The concerns expressed by the Board in Energy Solutions are not present in these proceedings. First, unlike in Energy Solutions where the Board had the first hand views of only one of the shippers, and a minority shipper at that, all of the shippers here affirmatively support a grant of the Joint Petition. Attached as Exhibit 6 are letters from The Andersons and FHR-Fairmont, the only two shippers on the ABE Line. These letters unequivocally support granting the Joint Petition.[19] Second, as noted in those letters of support, the ITAs more than mitigate any loss of regulatory remedies associated with the removal of the common carrier obligation over the ABE Line.[20] Third, unlike in Energy Solutions, the majority user of the ABE Line, FHR-Fairmont, who represents over 88% of the carloads over the ABE Line, will be the owner of the ABE Line.[21] Finally, FHR-Fairmont, as the eventual owner of the ABE Line, has given the non-owning shipper of the Line, The Andersons, a perpetual right to receive service over the ABE

---

[19] In Energy Solutions, the other effected shippers did not file letters of support and there was no direct evidence that the shippers supported the conversion of the line to a private line of railroad. That is in marked contrast to the facts of this case.

[20] Under those ITAs, as long as FHR and The Andersons desire rail service, BNSF has the contractual right to operate over the ABE Line to provide that service, and if BNSF no longer desires to operate over the ABE Line, FHR-Fairmont and The Andersons have a right to use a switching carrier to bring cars to/from the BNSF mainline so as to provide a continued interchange with BNSF. The ITAs also provide extensive remedies for service failures and/or FHR's failure to properly maintain the ABE Line and give BNSF the right to serve any future shippers that may locate on the ABE Line, so long as such future service does not interfere with the provision of service to FHR and/or The Andersons.

[21] In Energy Solutions, the owner and operator of the line represented less than 7% of the traffic over the line.

Line as long as the O'Malley Grain facility and any additions to it are operating and require railroad service and as long as FHR-Fairmont receives service. In the event FHR-Fairmont no longer desires rail service, The Andersons has the right to purchase the segment of the ABE Line serving the O'Malley facility in order to continue to receive rail service from BNSF.[22] In this proceeding, there is simply no party that needs the protections associated with common carrier track and the Board's jurisdiction.[23]

ABE, FHR-Fairmont, BNSF, and The Andersons have spent nearly three years working to ensure that the proposed abandonment and discontinuance adequately protects FHR-Fairmont's and The Andersons' common interest in continued safe and operationally efficient rail service for both shippers. FHR-Fairmont, BNSF, and The Andersons have ensured that the ITAs more than mitigate any loss of regulatory remedies associated with the removal of the common carrier obligation over the Line. For the Board to deny the Joint Petition when it is supported by all of the interested parties and there is no corresponding public interest weighing in favor of denying the Joint Petition would be an egregious use of regulatory powers. It would substitute regulatory action for that of the marketplace. This the Board should not do.

---

[22] While not a permanent easement, the protections The Andersons are receiving are similar in nature to the mitigating conditions found in Union Pacific Railroad—Abandonment Exemption—in Pottawattamie County, Iowa, AB-33 (Sub-No. 300X), et al. (STB served Jan. 20, 2012)(approving conversion of the line to a private line where one shipper purchased the line and the other shipper received a permanent access easement). The Andersons' protections are much more extensive than those in Missouri Pacific Railroad—Abandonment in Harris County, Texas, AB-3 (Sub-No. 105X) (ICC served Dec. 22, 1992)(granting the request convert a common carrier line to a private line of railroad).

[23] As such, this proceeding is similar to CSX Transp., Inc. – Aban. Exemption – In Grant Cty., W.Va., AB-55 (Sub-No. 746X), slip op. at 2-3, n.6 (STB served Feb. 19, 2016). This was a post-Energy Solutions case that allowed the common carrier obligation to be removed from a section of track because it was supported by both the carrier and the shipper, the shipper would continue to have access to service by the carrier, and the shipper would also be the owner of the line.

## CONCLUSION

In conclusion, ABE, BNSF, FHR-Fairmont, and The Andersons, all desire to move forward with the abandonment and discontinuance in order to convert the ABE Line to private industry track. There are no environmental issues associated with converting the line to private track. The stranded segment issue can be resolved through granting a retroactive waiver from the consummation notice requirement and finding that the FWRY Abandoned Segment was indeed abandoned. Finally, the Energy Solutions precedent should not apply in these circumstances. The Parties have carefully crafted the ITAs to provide protective measures that more than mitigate any loss of regulatory remedies associated with the removal of the common carrier obligation over the Line. As such, ABE respectfully requests that the Board grant the Joint Petition, and in addition, grant on its own motion a retroactive waiver of the consummation notice requirement and hold that the FWRY Abandoned Segment was indeed abandoned.

Respectfully submitted,

BNSF RAILWAY COMPANY
2650 Lou Menk Drive
P.O. Box 961039
Fort Worth, TX 76161-0039

Karl Morell /tm

KARL MORELL
KARL MORELL & ASSOCIATES
Suite 225
655 Fifteenth St., N.W.
Washington, DC 20005
E-mail: karlm@karlmorell.com

Attorney for BNSF Railway Company

ABE FAIRMONT, LLC
1214 County Road G
Fairmont, NE 68354

Thomas F. McFarland

THOMAS F. MCFARLAND
THOMAS F. MCFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
Tel: (312) 236-0204
Fax: (312) 201-9695
E-mail: mcfarland@aol.com

Attorney for ABE Fairmont, LLC

September 26, 2017

BEFORE THE
SURFACE TRANSPORTATION BOARD

| | | |
|---|---|---|
| ABE FAIRMONT, LLC<br>– ABANDONMENT EXEMPTION –<br>IN FILLMORE COUNTY, NEB. | )<br>)<br>) | AB-1106X |
| BNSF RAILWAY COMPANY<br>– DISCONTINUANCE OF SERVICE<br>EXEMPTION –<br>IN FILLMORE COUNTY, NEB. | )<br>)<br>)<br>) | AB-6 (Sub-No. 488X) |

**SUPPLEMENT TO THE JULY 7, 2014 JOINT PETITION FOR EXEMPTION**

**EXHIBIT 1**

# QUIT CLAIM DEED

KNOW ALL MEN BY THESE PRESENTS that **PHEASANT'S FOREVER RAINWATER BASIN CHAPTER**, (herein designated as "Grantor") and pursuant to every other power and authority to it pertaining, in consideration of the sum of Ten Dollars ($10.00) and other good valuable and sufficient consideration, the receipt of which is hereby acknowledged, does hereby QUITCLAIM and CONVEY, subject to the reservation and exceptions hereinafter set forth, unto **ASPEGREN FARMS, INC.,** a Corporation organized and existing under the laws of the State of Nebraska, (hereinafter designated as "Grantee") all of the Grantor's right, title and interest, estate, claim and demand, if any, in a parcel of land situated in the County of Fillmore, State of Nebraska which is legally described as (hereafter the "Property"):

> South ½ of the old abandoned Railroad Right Of Way laying across and through Section Twenty-Four (24), Township Seven (7) North, Range Three (3) West of the 6th P.M., Fillmore County, Nebraska, containing approximately six (6) acres.

TOGETHER with all and singular the hereditaments and appurtenances belonging thereto; to HAVE AND TO HOLD the property, subject to the following exceptions and reservations, unto Grantee, its successors and assigns, forever.

The Grantor reserves to itself, its designated agents or lessees, predecessors or successors in interest, grantees and assigns, the right and privilege for the continued maintenance, operation, and use of all existing driveways, roads, conduits, sewers, water mains, gas lines, electric power lines, wires and other utilities and easements of any kind whatsoever, whether or not of record, or which may be disclosed by the survey of the property.

Notwithstanding any other provision of this instrument, the Grantor shall in no event incur liability to the Grantee for failure of or defect in the title or estate of the Grantor in and to the Property.

IN WITNESS WHEREOF, this Quit Claim Deed is executed by the Grantor this 10 day of April, 2009.

Pheasant's Forever Rainwater Basin Chapter

by: Roger Miller
Roger Miller, President

NEBRASKA DOCUMENTARY STAMP TAX
Date May 7, 2009
$ 4.50 PD By DV

RE Cards____
C. Map____
MF____
Xerox____
Paged____

STATE OF NEBRASKA :
: ss
COUNTY OF CLAY :

On this 10th day of April, 2009, came before me, the undersigned, a Notary Public in and for said County, in said State, Personally appeared before me, Roger Miller, to me personally known, who being by me personally sworn, acknowledged the voluntary execution of said instrument.

April A. Lemkau
Notary Public

APRIL A. LEMKAU
MY COMMISSION EXPIRES
June 25, 2009

STATE OF NEBRASKA )
) ss
County of Fillmore)

My Commission Expires: 6-25-09

Filed for record and entered in Numerical Index on May 7, 2009 at 3:35 o'clock P M., and recorded in Deed Record 89, Page 566

Aspegren Farms Inc
1060 N 1st St
Geneva NE 68361
PD: $5.50
Rev: $4.50 PD

By: Darlene Vodicka
~~County or~~ Deputy County Clerk
~~Register of Deeds or~~ Deputy Register of Deeds

566




Aspegren Farms, Inc. QCD, Deed Rec 89 Page 566, filed 5/7/2009.

Cline, Williams, Wright
Johnson & Oldfather LLP
1900 US Bank Building
233 South 13th St
Lincoln NE 68508-2095
$9.50 Paid Rev Exempt

NEBRASKA DOCUMENTARY
STAMP TAX
Date July 1, 2011
$ #4 Exempt By NC

RE Cards_____
C. Map_____
MF_____
Xerox_____
Paged_____

STATE OF NEBRASKA/FILLMORE COUNTY
Recorded this 1st day of July, 2011
at 2 o'clock P M., and duly recorded in
Book 91 of Deeds on page 175 as
Instrument No. 2011-00879. By: NC
County Clerk

**CORRECTIVE**
**QUITCLAIM DEED**

Aurora Cooperative, GRANTOR, in consideration of One Dollar and other valuable consideration, received from GRANTEE, Aurora Cooperative Elevator Company, a Nebraska corporation, quitclaims to GRANTEE, the following described real estate (as defined in Neb. Rev. Stat. § 76-201):

Parcel 1:
All of that portion of the abandoned FWRY railroad right of way located in Lots 59 and 60, of Block 6 of James H. Bigelow's 1st Addition and the land located North of said Lots 59 and 60 and West of J. Yates 2nd Addition, Geneva, Fillmore County, Nebraska.

Parcel 2:
All of that portion of the abandoned FWRY railroad right of way located in and identified as Lots 10, 11, 12 and 23 and parts of Lots 13 and 22 in Block 2 and part of vacated alley and part of vacated street all in James H. Bigelow's 1st Addition, Geneva, Fillmore County, Nebraska.

Parcel 3:
All of that portion of the abandoned FWRY railroad right of way located on the East 240 feet of Block 3 in James H. Bigelow's 1st Addition, Geneva, Fillmore County, Nebraska.

The Corrective Quitclaim Deed is intended to clarify and correct a prior Quit Claim Deed recorded in the records of the Fillmore County Register of Deeds on February 18, 2003, in Book 85 on Page 207. This Corrective Quitclaim Deed clarifies that the name of the Grantee is Aurora Cooperative Elevator Company, a Nebraska corporation.

EXECUTED on this 30th day of June, 2011.

GRANTOR

AURORA COOPERATIVE ELEVATOR COMPANY, a Nebraska corporation a/k/a AURORA COOPERATIVE

By: Robert Brown, CFO
Robert Brown, Chief Financial Officer

STATE OF NEBRASKA )
) ss
COUNTY OF HAMILTON )

The foregoing instrument was acknowledged before me on June 30 2011 by Robert Brown, Chief Financial Officer of Aurora Cooperative Elevator Company, a Nebraska corporation, on behalf of the corporation.

[SEAL]

GENERAL NOTARY-State of Nebraska
THERESA L. BRAMMIER
My Comm. Exp. Feb. 3, 2015

Notary Public

175

{1245219.1}

Aurora Cooperative
Chad Carlson
605 12th St
Aurora NE 68818
$38.50 Ck
Rev Exempt

RE Cards____
C. Map____
MF____
Xerox____
Paged____

STATE OF NEBRASKA/FILLMORE COUNTY
Recorded this 27 day of June, 2011
at 3:30 o'clock P.M., and duly recorded in
Book 91 of Deeds on page 169 as
Instrument No. 2011-00856 By: JC
Amy Nelson County Clerk

NEBRASKA DOCUMENTARY STAMP TAX
Date June 27, 2011
Date
$ #4 Exempt By NC

**CORRECTIVE QUITCLAIM DEED**

Aurora Cooperative Elevator Company, Aurora, Nebraska GRANTOR, in consideration of One Dollar and other valuable consideration, received from GRANTEE, Aurora Cooperative Elevator Company, a Nebraska corporation, quitclaims to GRANTEE, the following described real estate (as defined in Neb. Rev. Stat. § 76-201):

See Attached Exhibit "A"

The Corrective Quitclaim Deed is intended to clarify and correct a prior Deed dated October 1, 1996, and recorded in the records of the Fillmore County Register of Deeds on July 9, 1997, in Book 80 on Page 418. This Corrective Quitclaim Deed clarifies that the name of the Grantee is Aurora Cooperative Elevator Company, a Nebraska corporation.

EXECUTED on this 27th day of June, 2011.

GRANTOR

AURORA COOPERATIVE ELEVATOR COMPANY, a Nebraska corporation a/k/a AURORA COOPERATIVE ELEVATOR COMPANY, Aurora, Nebraska

By: _____
Robert Brown, Chief Financial Officer

STATE OF NEBRASKA )
) ss
COUNTY OF HAMILTON )

The foregoing instrument was acknowledged before me on June 27, 2011 by Robert Brown, Chief Financial Officer of Aurora Cooperative Elevator Company, a Nebraska corporation, on behalf of the corporation.

[SEAL] GENERAL NOTARY-State of Nebraska TRENT R. SIDDERS My Comm. Exp. Sept. 30, 2012

_____
Notary Public

169

(1245219.1)

1/5

EXHIBIT "A"

Parcel 1:
Lots 24 and 25, Block 2, James H. Bigelow's First Addition, Geneva, Fillmore County, Nebraska

Parcel 2:
Lot 58, Block 6, James H. Bigelow's First Addition and Lot 70, W. J. Yates Second Addition and the vacated street and alley lying between Lot 58, Block 6, James H. Bigelow's Addition and Lot 70, W. J. Yates Second Addition, all in Geneva, Fillmore County, Nebraska.

Parcel 3:
Lots 39, 40, 41, 42, 43 and 44, Block 3, James H. Bigelow's First Addition, vacated alley and 10 foot strip North of Lots 42, 43 and 44; except the South 120 feet of Lots 39, 40 and 41, all in Geneva, Fillmore County, Nebraska

Parcel 4:
A tract of land located in Knowler's Block, Austin Knowler's First Addition, Geneva, Fillmore County, Nebraska, more particularly described as follows:

Beginning at a point 420 feet South of the Northwest corner of said Knowler's Block;

Thence continuing Southerly, a distance of 185 feet measured along and upon the West line of said Knowler's Block;

Thence Easterly, with an interior angle of 90 degrees, a distance of 40 feet;

Thence Northeasterly, a distance of 194.49 feet to a point;

Thence Westerly a distance of 100 feet to the POINT OF BEGINNING

AND

All that part of Lots 46, 47, 48, 49 and 50, inclusive, Knowler's First Addition to Geneva, Fillmore County, Nebraska, together with all right, title and interest to that part of the alley adjacent to said Lost AND that part of the Northwest Quarter Section 1, Township 6 North, Range 3 West of the 6th Principal Meridian, Fillmore County, Nebraska, bounded and described as follows:

Beginning at a point on the North line of Adams Street, also known as "D" Street, 50 feet West of, as measured at right angles from the center line of the main track of the Chicago and North Western Railway Company, as now located and established;

Thence North along a line parallel with the center line of said main track to a point 9 feet Westerly of, as measured radially from the center line of the curved segment of Spur Track I.C.C. No. 22 of said Railway Company, as now located and established;

Thence Northerly along a line parallel with the center line of the curved segment of said Spur Track I.C.C. No. 22 to a point 8.5 feet West of, as measured at right angles from the Southerly extension of the center line of the tangent segment of said Spur Track I.C.C. No. 22;

Thence North along a line parallel with the center line of the tangent segment of said spur track and Southerly extension thereof to a point 430 feet North of, as measured at right angles from the North line of said Adams Street;

Thence West along a line parallel with the North line of said Adams Street to a point 8.5 feet Easterly of, as measured at right angles from the center line of the tangent segment of Spur Track I.C.C. No. 25 of said Railway Company, as now located and established;

Thence Southerly along a line parallel with the center line of the tangent segment of said spur track, a distance of 370 feet;

Thence Easterly along a line at right angles to the last described course, a distance of 0.50 feet;

Thence Southerly along a line parallel with the center line of said Spur Track I.C.C. No. 25 to the North line of said Adams Street;

Thence East along the North line of said Adams Street to the POINT OF BEGINNING and that part of the Northeast Quarter Northwest Quarter of Section 1, Township 6 North, Range 3 West of the 6th Principal Meridian, Fillmore County, Nebraska (as transferred from the Great Plains Railway Company to L. B. Foster Company recorded in Book 62 Page 455; and as transferred from L. B. Foster Company to Central Land Company, Ltd., a partnership, recorded in Book 63 Page 227), bounded and described an follows:

Commencing at the intersection of the South line of "F" Street (formerly Park Street) and the East line of 7th Street (formerly Garfield Street);

Thence Southerly along said East line of 7th Street a distance of 420 feet to THE POINT OF BEGINNING of the parcel of land herein described;

Thence Easterly at right angles to the last described course to a point distant 8.5 feet Northwesterly, measured at right angles from the center line of the Great Plains Railway Company Spur Track I.C.C. No. 25, as said spur track was originally located and established;

Thence Northeasterly parallel with said original spur track center line to a point of curve;

Thence Northwesterly at right angles to the last described course a distance of 0.5 feet;

Thence Northeasterly parallel with (the curved segment of) said original spur track center line to a point distant 9 feet Westerly, measured at right angles, from the center line of Great Plains Railway Company Spur Track I.C.C. No. 22, as said spur track was originally located and established:

Thence Easterly, at right angles to said last described (I.C.C. No. 22) original spur track center line said last described (I.C.C. No. 22) original spur track center line a distance of 0.5 feet;

Thence Northerly parallel with said last described (I.C.C. No. 22) original spur track center line to A POINT ON THE SOUTH LINE OF SAID "F" STREET;

Thence Easterly along said South line of "F" Street A POINT ON THE EAST LINE OF THE NORTHWEST QUARTER of said Section 1;

Thence Southerly along said East line of the Northwest Quarter to A POINT ON THE NORTH LIINE OF "D" STREET (formerly Adams Street);

Thence Westerly along said North line of "D" Street to a point distant 50 feet Westerly, measured at right angles, from the center line of the main track of

the Great Plains Railway Company, as said main track was originally located and established;

Thence Northerly parallel with said original main track center line to a point distant 9 feet Westerly, measured at right angles, from the original center line of said spur track I.C.C. No. 22;

Thence Northerly parallel with said original spur tract (I.C.C. No. 22) center line to a point distant 8.5 feet Westerly, measured at right angles, from the Southerly extension of the tangent segment of said original spur track (I.C.C. No. 22) center line;

Thence Northerly parallel with said last described original spur track center line, and the Southerly extension thereof, to a point distant 430 feet Northerly, measured at right angles, from the North line of said "D" Street;

Thence Westerly parallel with said North line of "D" Street to a point distant 8.5 feet Southeasterly, measured at right angles, from the original center line of said spur track I.C.C. No. 25;

Thence Southwesterly parallel with said last described original spur track center line to a point of curve;

Thence Southeasterly at right angles to the last described course a distance of 0.5 feet:

Thence Southwesterly parallel with the original center line of a curved segment of said spur track I.C.C. No. 25 to A POINT ON THE NORTH LINE OF SAID "D" STREET;

Thence Westerly along said North line of "D" Street to A POINT ON THE EAST LINE OF SAID 7TH STREET:

Thence Northerly along said East line of 7th Street to the POINT OF BEGINNING.

EXCEPT a tract of land described as follows:

Commencing at the intersection of the South line of "F" Street (formally Park Street) and a point distant 8.5 feet Westerly measured at right angles from the center line of the Great Plains Railway Company Spur Track I.C.C. No. 22, as said spur track was originally located and established;

Thence Easterly a distance of 75 feet along the South line of "F" Street;

Thence Southerly a distance of 150 feet parallel to the East line of the Northwest Quarter of said Section 1;

Thence Westerly parallel to the South line of "F" Street to a point distant 9 feet Westerly measured at right angles form the center line of the Great Plains Railway Company Spur Track I.C.C. no. 22, as said spur track was originally located and established;

Thence Northeasterly parallel with (the curved segment of) said original I.C.C. No. 22 spur track center line to a point distant 9 feet Westerly, measured at right angles from the center line of said original I.C.C. No. 22 spur track (that being at the end of the curved segment);

Thence Easterly at right angles to the last described (I.C.C. No. 22) original spur track center line a distance of 0.5 feet;

Thence Northerly parallel with said last described (I.C.C. No. 22) original spur track center line to the point of beginning located on the South line of said "F" Street.

Parcel 5:
All that part of Block 1 together with all right, title and interest to all that part of the alleys within said Block 1, lying West of a line drawn parallel with a distance of 8.5 feet West of, measured at right angles from the center line of Spur Track I.C.C. No. 22 of the Chicago and North Western Railway Company, as now located and established, all in Bigelow's First Addition, Geneva, Fillmore County, Nebraska and a strip of land on each side of the center line of the former main track of the Fremont Elkhorn and Missouri Valley Railroad Company (as transferred from the Great Plains Railway Company to L. B. Foster Company, recorded in Book 62, Page 455; and as transferred from L. B. Foster Company to Central Land Company, Ltd., a partnership, recorded in Book 63, Page 227) as the main track center line was originally located and established over and across that part of the Southeast Quarter of the Southwest Quarter of Section 36, Township 7 North, Range 3 West of the 6th Principal Meridian, Fillmore County Nebraska; more particularly described as follows:

Part of the Southeast Quarter Southwest Quarter of said Section 36, lying Southerly of the South line of "G" Street (formerly Court Street), lying Northerly of the North line of "F" Street (formerly Park Street), and lying Easterly of a line parallel with and distant 8.5 feet Westerly, measured at right angles, from the center line of the Great Plains Railway Company Spur Track I. C. C. No. 22, as said spur track was originally located and established and lying Westerly of a line parallel with and distant 20 feet Westerly measured at right angles from the West line of the Southwest Quarter of said Section 36.

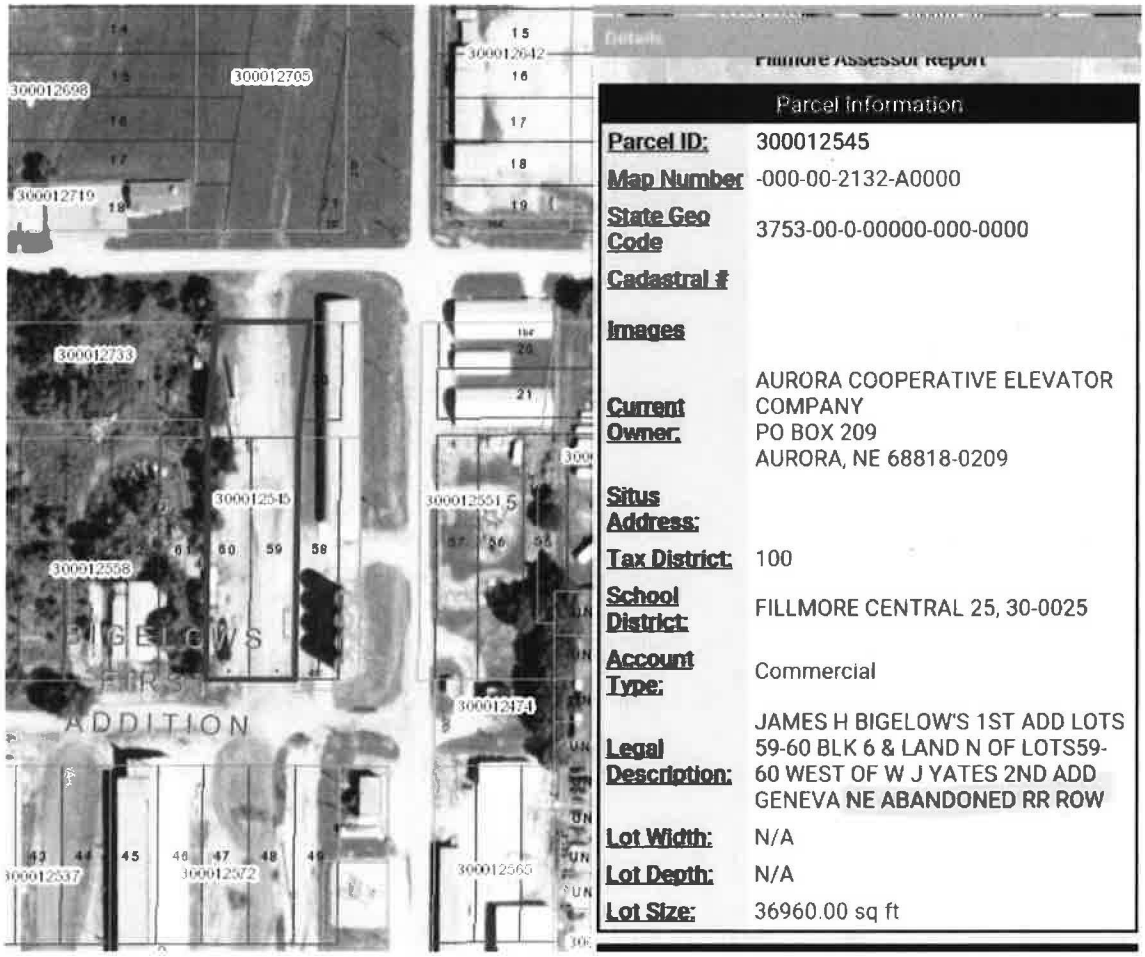
Parcel 6:
Abandoned Railroad right of way located on Lots 59 and 60, James H. Bigelow's 1st Addition and the land located North of said Lots 59 and 60 and West of J. Yates 2nd Addition, Geneva, Fillmore County, Nebraska.

Parcel 7:
Abandoned Railroad right of way located on Lots 10, 11, 12 and 23 and parts of Lots 13 and 22, Block 2 and part of vacated alley and part of vacated street all in James H. Bigelow's 1st Addition, Geneva, Fillmore County, Nebraska.

Parcel 8:
Abandoned Railroad right of way located on the East 240 feet of Block 3, James H. Bigelow's 1st Addition, Geneva, Fillmore County, Nebraska.

EXCEPT a tract of land described as the East 15.00 feet of the South 290.80 feet of said Block 3.

AND EXCEPT the West 50.00 feet of the South 290.80 feet of vacated 7th Street, the West line of said West 50 feet being coincident with the East line of Block 3, Bigelow's 1st Addition, Geneva, Fillmore County, Nebraska.




Aurora Cooperative Elevator Corr. QCD, Book 91, Page 175, Doc #2011-00879 filed 7/1/2011 and Corr. QCD Book 91, Page 169, Doc #2011-00856 filed 6/27/2011.

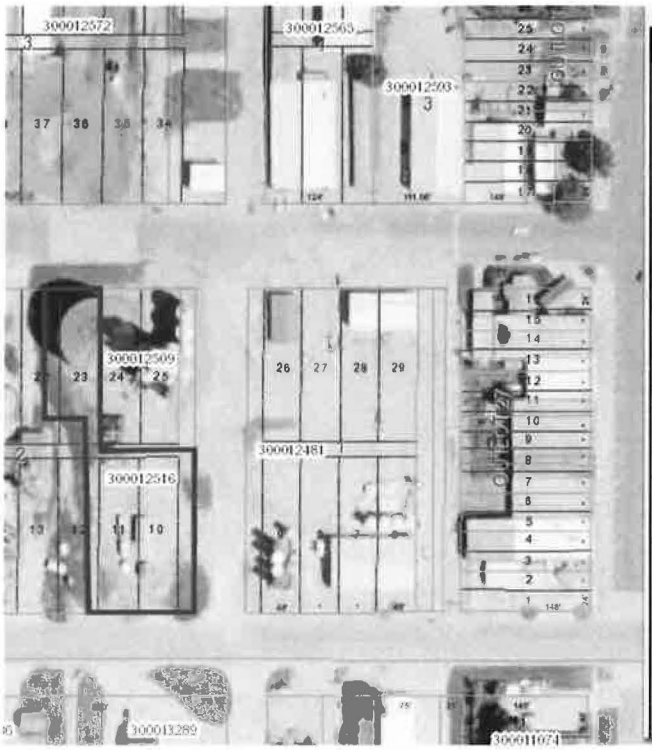



I Want to...

Fillmore Assessor Report

| Parcel Information | |
|---|---|
| Parcel ID: | 300012572 |
| Map Number | -000-00-2135-A0000 |
| State Geo Code | 3753-00-0-00000-000-0000 |
| Cadastral # | |
| Images | Photo #1 |
| Current Owner: | AURORA COOPERATIVE ELEVATOR COMPANY<br>PO BOX 209<br>AURORA, NE 68818-0209 |
| Situs Address: | |
| Tax District: | 100 |
| School District: | FILLMORE CENTRAL 25, 30-0025 |
| Account Type: | Commercial |
| Legal Description: | JAMES H BIGELOW'S FIRST ADD E 240' BLK 3EX E 15' OF S 290.8' ABANDONED RR ROW GENEVA NE |
| Lot Width: | N/A |
| Lot Depth: | N/A |
| Lot Size: | 87798.00 sq ft |

Aurora Cooperative Elevator Corr. QCD, Book 91, Page 175, Doc #2011-00879 filed 7/1/2011 and Corr. QCD Book 91, Page 169, Doc #2011-00856 filed 6/27/2011.




Fillmore Assessor Report

| Parcel Information | |
|---|---|
| Parcel ID: | 300012516 |
| Map Number | -000-00-2129-A0000 |
| State Geo Code | 3753-00-0-00000-000-0000 |
| Cadastral # | |
| Images | Photo #1 |
| Current Owner: | AURORA COOPERATIVE ELEVATOR COMPANY<br>PO BOX 209<br>AURORA, NE 68818-0209 |
| Situs Address: | 6-7TH G ST |
| Tax District: | 100 |
| School District: | FILLMORE CENTRAL 25, 30-0025 |
| Account Type: | Commercial |
| Legal Description: | JAMES H BIGELOW'S 1ST ADD LOTS 10-11 & PT OF LOTS 12,22 & 23 & PT OF VAC ALLEY & PT OF VAC ST BLK 2 GENEVA NE ABANDONED RR ROW |
| Lot Width: | N/A |
| Lot Depth: | N/A |

Aurora Cooperative Elevator Corr. QCD, Book 91, Page 175, Doc #2011-00879 filed 7/1/2011 and Corr. QCD Book 91, Page 169, Doc #2011-00856 filed 6/27/2011.

NEBRASKA DOCUMENTARY STAMP TAX
Date March 30, 2012
s.#5b Exempt By NC

$10.50 Ck
Rev Exempt

RE Cards
C. Map
MF
Xerox
Paged

STATE OF NEBRASKA/FILLMORE COUNTY
Recorded this 30 day of March, 2012
at 8:00 o'clock A M., and duly recorded in
Book 91 of DEEDS on page 557 as
Instrument No. 2012-00416. By:
County Clerk

After recording, please return to:

Robert J. Kirby, Esq.
Croker, Huck, Kasher, DeWitt,
Anderson & Gonderinger, L.L.C.
2120 So. 72nd St., Suite 1200
Omaha, NE 68124

## QUITCLAIM DEED

**DANIEL P. CLATANOFF and ROXANE K. CLATANOFF**, husband and wife, as joint tenants with right of survivorship, and not as tenants in common, GRANTORS, in consideration of One Dollar ($1.00) and other good and valuable consideration, quitclaims to **ROXANE K. CLATANOFF, Trustee of the ROXANE K. CLATANOFF LIVING TRUST under Agreement dated March 23, 2012**, GRANTEE, the following described real estate (as defined in Neb. Rev. Stat. § 76-201):

See Exhibit "A" attached hereto.

GRANTORS covenant with GRANTEE that GRANTORS:

(1) are lawfully seized of such real estate and that it is free from encumbrances, except covenants, easements, reservations, and restrictions of record;

(2) have legal power and lawful authority to convey the same; and

(3) warrant and will defend title to the real estate against the lawful claims of all persons.

Executed: March 23, 2012.

DANIEL P. CLATANOFF, Grantor

ROXANE K. CLATANOFF, Grantor

STATE OF NEBRASKA )
) ss.
COUNTY OF DOUGLAS )

The foregoing instrument was acknowledged before me on this 23rd day of March, 2012, by Daniel P. Clatanoff and Roxane K. Clatanoff.

GENERAL NOTARY - State of Nebraska
ROBERT J. KIRBY
My Comm. Exp. Aug. 21, 2014

Notary Public

00472867.DOC

557

1/2

**EXHIBIT "A"**

That part of the West Half (W1/2) of the Southeast Quarter (SE1/4), lying East of the Fillmore Western Railway Company, formerly Burlington Northern Railroad Company right-of-way in Section Twelve (12), Township Seven (7) North, Range Three (3) West of the 6th P.M., Fillmore County, Nebraska,

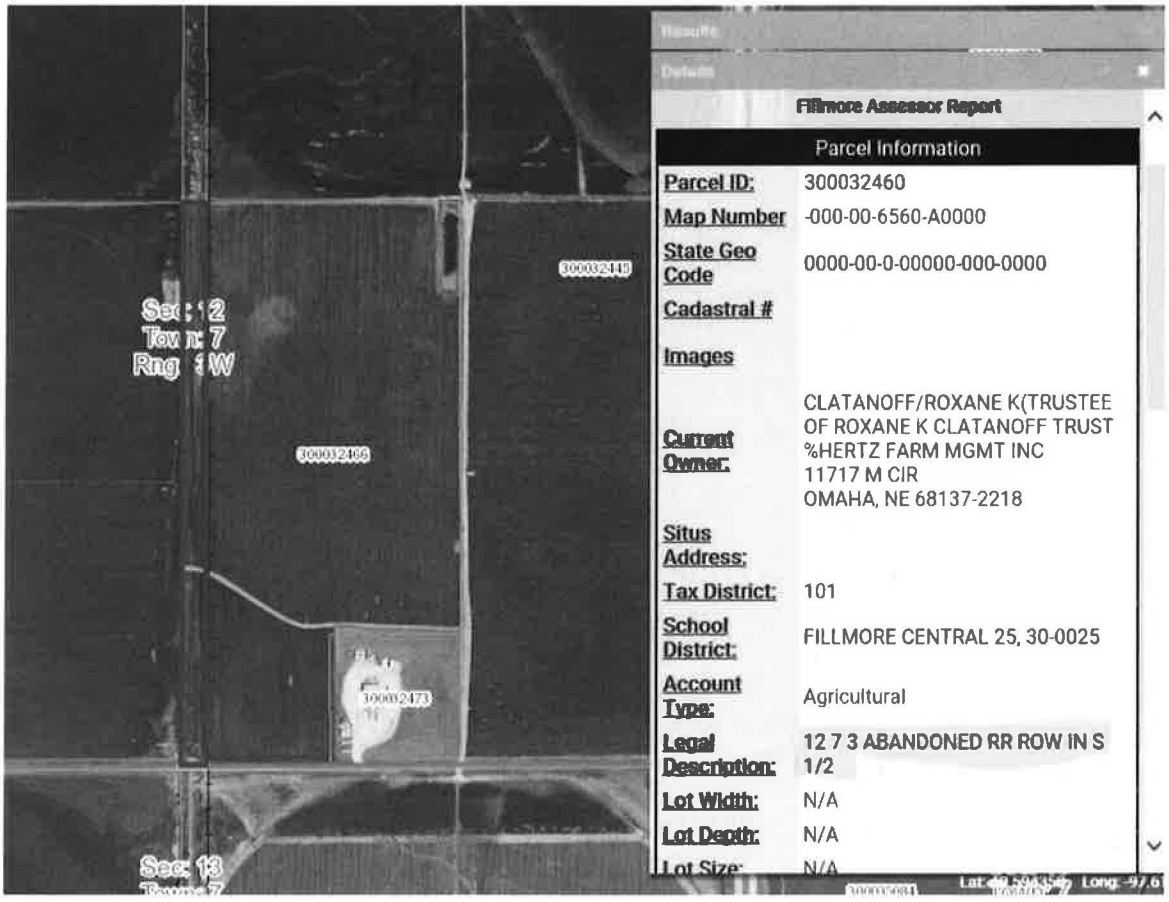
EXCEPT a tract of land described as beginning at the Southeast corner of the West Half (W1/2) of the Southeast Quarter (SE1/4) of Section Twelve (12); thence northerly along and upon the East line of said West Half (W1/2), a distance of 33 feet to an iron pipe; thence continuing northerly 619.12 feet to an iron pipe; thence westerly and parallel to the South line of said West Half (W1/2), a distance of 601.35 feet to an iron pipe; thence southerly and parallel to the East line of said West Half (W1/2) , a distance of 619.12 feet to an iron pipe; thence continuing southerly, a distance of 33 feet to the South line of said West Half (W1/2) of the Southeast Quarter (SE1/4) of Section Twelve (12); thence easterly along and upon the South line of said Southeast Quarter (SE1/4), a distance of 601.35 feet to the point of the beginning.

AND

The former abandoned Railroad Right of Way laying across and through the South ½ of Section Twelve (12), Township Seven (7) North, Range Three (3) West of the 6th P.M., Fillmore County, Nebraska, containing approximately 6 acres.

00472887.DOC

557 - 2/2




Roxane Clatanoff, QCD, Doc 2012-00416 filed 3/30/2012.

# QUIT CLAIM DEED

KNOW ALL MEN BY THESE PRESENTS that **PHEASANT'S FOREVER RAINWATER BASIN CHAPTER**, (herein designated as "Grantor") and pursuant to every other power and authority to it pertaining, in consideration of the sum of Ten Dollars ($10.00) and other good valuable and sufficient consideration, the receipt of which is hereby acknowledged, does hereby QUITCLAIM and CONVEY, subject to the reservation and exceptions hereinafter set forth, unto **RICHARD L. and CAROL J. SIEBER,** husband & wife, as joint tenants (hereinafter designated as "Grantee") all of the Grantor's right, title and interest, estate, claim and demand, if any, in a parcel of land situated in the County of Fillmore, State of Nebraska which is legally described as (hereafter the "Property"):

> North ½ of the old abandoned Railroad Right Of Way laying across and through Section Twenty-Four (24), Township Seven (7) North, Range Three (3) West of the 6th P.M., Fillmore County, Nebraska, containing approximately six (6) acres.

TOGETHER with all and singular the hereditaments and appurtenances belonging thereto; to HAVE AND TO HOLD the property, subject to the following exceptions and reservations, unto Grantee, its successors and assigns, forever.

The Grantor reserves to itself, its designated agents or lessees, predecessors or successors in interest, grantees and assigns, the right and privilege for the continued maintenance, operation, and use of all existing driveways, roads, conduits, sewers, water mains, gas lines, electric power lines, wires and other utilities and easements of any kind whatsoever, whether or not of record, or which may be disclosed by the survey of the property.

Notwithstanding any other provision of this instrument, the Grantor shall in no event incur liability to the Grantee for failure of or defect in the title or estate of the Grantor in and to the Property.

IN WITNESS WHEREOF, this Quit Claim Deed is executed by the Grantor this 10 day of April, 2009.

Pheasant's Forever Rainwater Basin Chapter

by: Roger Miller
Roger Miller, President

NEBRASKA DOCUMENTARY STAMP TAX
Date April 20, 2009
$ 4.50 PD By DV

STATE OF NEBRASKA :
: ss
COUNTY OF CLAY :

On this 10th day of April, 2009, came before me, the undersigned, a Notary Public in and for said County, in said State, Personally appeared before me, Roger Miller, to me personally known, who being by me personally sworn, acknowledged the voluntary execution of said instrument.

April A. Lemkau
Notary Public

APRIL A LEMKAU
MY COMMISSION EXPIRES
June 25 2009

My Commission Expires: 6-25-09

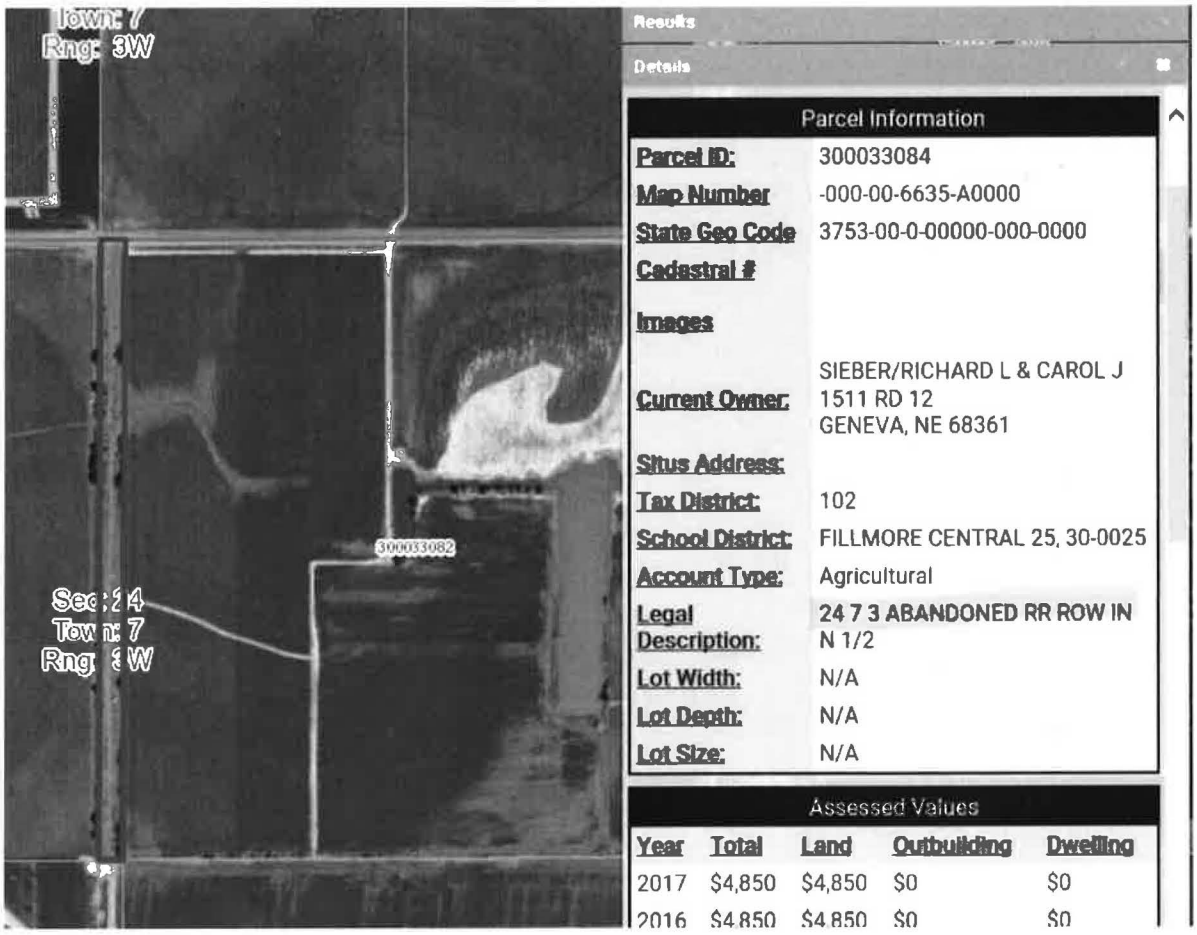
STATE OF NEBRASKA - County of Fillmore : ss.
Filed for record and entered in Numerical Index on April 20, 2009 at 8:00 o'clock A M., and recorded in Deed Record 89, Page 541

Richard Sieber
1511 Road 12
Geneva NE 68361
PD: $5.50 Rev: $4.50 PD

RE Cards
C. Map
MF
Xerox
Paged

By: Darlene Vodicka
~~County or~~ Deputy County Clerk
~~Register of Deeds or~~ Deputy Register of Deeds

541




Richard L and Carol J Sieber QCD, Deed Rec 89, Page 541, filed 4/20/2009.

# QUIT CLAIM DEED

KNOW ALL MEN BY THESE PRESENTS that **PHEASANT'S FOREVER RAINWATER BASIN CHAPTER,** (herein designated as "Grantor") and pursuant to every other power and authority to it pertaining, in consideration of the sum of Ten Dollars ($10.00) and other good valuable and sufficient consideration, the receipt of which is hereby acknowledged, does hereby QUITCLAIM and CONVEY, subject to the reservation and exceptions hereinafter set forth, unto **JON C. and LISA J. STOFER,** husband & wife, as joint tenants (hereinafter designated as "Grantee") all of the Grantor's right, title and interest, estate, claim and demand, if any, in a parcel of land situated in the County of Fillmore, State of Nebraska which is legally described as (hereafter the "Property"):

The West ½ of the North ½ of the former abandoned Railroad Right of Way laying across and through the Section Thirteen (13), Township Seven (7) North, Range Three (3) West of the 6th P.M., Fillmore County, Nebraska, containing approximately 3 acres

TOGETHER with all and singular the hereditaments and appurtenances belonging thereto; to HAVE AND TO HOLD the property, subject to the following exceptions and reservations, unto Grantee, its successors and assigns, forever.

The Grantor reserves to itself, its designated agents or lessees, predecessors or successors in interest, grantees and assigns, the right and privilege for the continued maintenance, operation, and use of all existing driveways, roads, conduits, sewers, water mains, gas lines, electric power lines, wires and other utilities and easements of any kind whatsoever, whether or not of record, or which may be disclosed by the survey of the property.

Notwithstanding any other provision of this instrument, the Grantor shall in no event incur liability to the Grantee for failure of or defect in the title or estate of the Grantor in and to the Property.

IN WITNESS WHEREOF, this Quit Claim Deed is executed by the Grantor this 26 day of March, 2010.

Pheasant's Forever Rainwater Basin Chapter

NEBRASKA DOCUMENTARY STAMP TAX
Date April 7, 2010
$ 2.25 PD By DV

by: Roger Miller
Roger Miller, President

RE Cards____
C. Map____
MF____
Xerox____
Paged____

STATE OF NEBRASKA :
: ss
COUNTY OF Clay :

On this 26 day of March, 2010, came before me, the undersigned, a Notary Public in and for said County, in said State, Personally appeared before me, Roger Miller, to me personally known, who being by me personally sworn, acknowledged the voluntary execution of said instrument.

Lisa K. Griess
Notary Public

GENERAL NOTARY-State of Nebraska
LISA K. GRIESS
My Comm. Exp. April 19, 2013

My Commission Expires: April 19, 13

STATE OF NEBRASKA )
County of Fillmore ) ss.

Filed for record and entered in Numerical Index on April 7, 2010 at 10:45 o'clock A M., and recorded in Deed Record 90, Page 255

Jon & Lisa Stofer
912 L Street
Geneva NE 68361
PD: $5.50
Rev: $2.25 PD

By: Darlene Vodicka
~~County or~~ Deputy County Clerk
~~Register of Deeds or~~ Deputy Register of Deeds

255




Fillmore Assessor Report

| Parcel Information | |
|---|---|
| Parcel ID: | 300032482 |
| Map Number | -000-00-6563-A0000 |
| State Geo Code | 3753-00-0-00000-000-0000 |
| Cadastral # | |
| Images | |
| Current Owner: | STOFER/JON C & LISA J<br>912 L ST<br>GENEVA, NE 68361 |
| Situs Address: | |
| Tax District: | 101 |
| School District: | FILLMORE CENTRAL 25, 30-0025 |
| Account Type: | Agricultural |
| Legal Description: | 13 7 3 W 1/2 ABANDONED RR ROW IN N 1/2 |
| Lot Width: | N/A |
| Lot Depth: | N/A |
| Lot Size: | N/A |

| Assessed Values | | | | |
|---|---|---|---|---|
| Year | Total | Land | Outbuilding | Dwelling |
| 2017 | $2,425 | $2,425 | $0 | $0 |

Jon C & Lisa J Stofer QCD, Deed Rec 90 Page 255, filed 4/7/2010.

BEFORE THE
SURFACE TRANSPORTATION BOARD

| | | |
|---|---|---|
| ABE FAIRMONT, LLC<br>– ABANDONMENT EXEMPTION –<br>IN FILLMORE COUNTY, NEB. | )<br>)<br>) | AB-1106X |
| BNSF RAILWAY COMPANY<br>– DISCONTINUANCE OF SERVICE<br>EXEMPTION –<br>IN FILLMORE COUNTY, NEB. | )<br>)<br>)<br>) | AB-6 (Sub-No. 488X) |

**SUPPLEMENT TO THE JULY 7, 2014 JOINT PETITION FOR EXEMPTION**

**EXHIBIT 2**

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1666
CHICAGO, ILLINOIS 60604-1228
TELEPHONE (312) 236-0204
*mcfarland@aol.com*

THOMAS F. MCFARLAND

August 30, 2017

Via First Class Mail

Consulting Agencies per 49 C.F.R. § 1105.7(b)
(See attached Environmental & Historic Report Service List)

Re: AB-1106X, ABE Fairmont, LLC – Abandonment Exemption – In Fillmore County, NE

AB-6 (Sub-No. 488X), BNSF Railway Company – Discontinuance of Service Exemption – In Fillmore County, NE

**Revised Environmental & Historic Report**

Dear Agency or Government Representative:

On July 7, 2014, ABE Fairmont, LLC ("ABE") and BNSF Railway Company ("BNSF") (collectively "Petitioners") jointly-filed a Petition for Exemption ("Petition") permitting ABE to abandon operations over approximately 2.77 miles of rail line extending from milepost 0.93 to milepost 3.70 and BNSF to discontinue trackage rights/common carrier operations over approximately 0.77 miles of line extending from milepost 0.93 to milepost 1.70 in Fillmore County, NE (the 'Line").[1] As indicated in the Petition, the Petitioners are seeking abandonment authority to reclassify the Line from a Board-regulated line of railroad to private shipper-owned industry track. Approximately three weeks after filing the Petition (July 23, 2014), the Petitioners requested that the Board hold the proceeding in abeyance to allow the Petitioners and the Line's only shippers[2] to resolve issues concerning continued operations post-abandonment. On June 16, 2017, the Petitioners notified the Board that the matters that caused the proceeding to be held in abeyance have been resolved and requested the Board to lift the abeyance and reinstate the proceeding on the Board's active docket.

[1] Prior to filing the Petition, ABE prepared and submitted an Environmental & Historic Report ("E&HR") for agency consultation for this proceeding on two prior occasions: the original E&HR was distributed on October 23, 2012 and ABE supplemented the original E&HR on September 23, 2013.

[2] The Line only serves two shippers, Flint Hill Resources Fairmont, LLC and The Andersons, Inc. d/b/a O'Malley Grain Company.

On August 17, 2017, the Board served a decision removing the proceedings from abeyance and directing the Petitioners to contact the Board's Office of Environmental Analysis ("OEA") to determine how to proceed with environmental review of the abandonment, given the lengthy delays in the proceeding ("Aug. 17th Decision").[3] ABE has since consulted with OEA concerning the environmental review and OEA has instructed ABE that it would need to revise, supplement, and redistribute the E&HR. Accordingly, please find attached a Revised E&HR for the aforementioned proceedings.

Note, the railroad does not anticipate adverse environmental impacts because traffic will continue to move over the Line upon abandonment in the same manner as it did prior to abandonment. The only difference is that post-abandonment, the traffic will move over private industrial track rather than common carrier track. However, this E&HR is being provided so that you may submit information that will form the basis for the STB's independent environmental analysis of the proceeding. If you have any questions about the Board's Environmental Review process, please contact OEA by telephone at (202) 245-0245 or by mail to: Surface Transportation Board, 395 E Street, S.W., Room 1106, Washington, DC 20423-0001.

Please refer to Docket Nos. AB-1106X and AB-6 (Sub-No. 488X) when contacting the STB. Applicable statutes and regulations impose stringent deadlines for processing this action. For this reason your written comments in regard to the content of the Report that is within your jurisdiction (with a copy to us) would be appreciated within three weeks.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for ABE Fairmont, LLC

Enclosures
cc: (*by-email*)
Thomas Wilcox, Esq., twilcox@gkglaw.com
William Mullins, Esq., wmullins@bakerandmiller.com
Karl Morell, Esq., karlm@karlmorell.com
Tyler White, Esq., tyler.white2@bnsf.com
Kim Boatright, Esq., kim.boatright@fhr.com
Mr. Richard Peterson, richard.peterson@advancedbioenergy.com
Mr. Matt Lenhard, matt_lenhard@andersonsinc.com

[3] The Aug. 17th Decision also requested additional information from the parties and asked the parties to address various legal precedent.

BEFORE THE
SURFACE TRANSPORTATION BOARD

| | | |
|---|---|---|
| ABE FAIRMONT, LLC | ) | |
| – ABANDONMENT EXEMPTION – | ) | AB-1106X |
| FILLMORE COUNTY, NE | ) | |

# REVISED DRAFT ENVIRONMENTAL AND HISTORIC REPORT

ABE FAIRMONT, LLC
1214 County Road G
Fairmont, NE 68354
Applicant

THOMAS F. MCFARLAND
THOMAS F. MCFARLAND, P.C.
208 South LaSalle Street, Suite 1890
Chicago, IL 60604-1112
312 236-0204
312 201-9695 fax
mcfarland@aol.com

Attorney for Applicant

Date Revised and Redistributed: August 30, 2017

BEFORE THE
SURFACE TRANSPORTATION BOARD

| | | |
|---|---|---|
| ABE FAIRMONT, LLC<br>ABANDONMENT EXEMPTION --<br>FILLMORE COUNTY, NE | )<br>)<br>) | AB-1106X |

**REVISED DRAFT ENVIRONMENTAL AND HISTORIC REPORT**

**NATURE OF THIS DRAFT REPORT**

Regulations of the Surface Transportation Board ("STB") at 49 C.F.R. § 1105.7 and 49 C.F.R. § 1105.8 require that a rail carrier who intends to abandon all or part of its rail lines must first submit a Draft Environmental and Historic Report ("E&HR") concerning the effects of such an abandonment on environmental and historic properties in the area of the proposed rail line abandonment. This Revised E&HR is to be sent to specified potentially-interested governmental agencies for review and comment in accordance with the applicable regulations. [1]

I. DRAFT ENVIRONMENTAL REPORT

ABE hereby submits the following information required by the regulations pursuant to 49 C.F.R. § 1105.7(e) and 49 C.F.R. § 1105.8(d).

[1] ABE Fairmont, LLC ("ABE") submitted an E&HR for agency consultation for this proceeding on two prior occasions: the original E&HR was distributed on October 23, 2012 and ABE supplemented the original E&HR on September 23, 2013. The Board's August 17, 2017 decision directed ABE to contact the Board's Office of Environmental Analysis ("OEA") to determine how to proceed with environmental review of the abandonment, given the lengthy delays in the proceeding. OEA has since informed ABE that it would need to supplement and redistribute its E&HR.

**49 CFR 1105.7(e)(1) – Proposed Action and Alternatives**

*Describe the proposed action, including commodities transported, the planned disposition (if any) of any rail line and other structures that may be involved, and any possible changes in current operations or maintenance practices. Also describe any reasonable alternatives to the proposed action. Include a readable, detailed map and drawings clearly delineating the project.*

The proposed action is abandonment as common carrier trackage of a rail line that extends between milepost 0.93 and milepost 3.70, a distance of approximately 2.77 miles at or near Fairmont, Fillmore County, Nebraska (the "Line"). A map of the Line is attached to this E&HR as Appendix 1. The trackage comprising the Line will not be removed if the STB authorizes the proposed abandonment. Instead, the Line would be kept in place as private industrial track and BNSF would continue to operate pursuant to an Industrial Track Agreement with ABE. While BNSF operates over the Line as a common carrier at present, upon abandonment BNSF would operate over the Line pursuant to a contract. The fact that the trackage comprising the Line would not be removed upon abandonment substantially lessens any probable environmental effect from the proposed abandonment.

The commodities transported over the Line are ethanol and dried distillers grain [ABE] and grain [O'Malley Grain, Inc.].[2] As noted, there would be no disposition of the Line in the event the Board authorizes the proposed abandonment. Thus, authorization of the proposed abandonment would be unlikely to result in changes in current rail operations or track maintenance practices. There is no reasonable alternative to the proposed abandonment because the Line's only shippers, ABE and BNSF, desire that the Line be operated as private industrial track rather than as common carrier track. As such, any other alternative would simply not be reasonable.

[2] O'Malley Grain, Inc. is a subsidiary of The Andersons, Inc (referred to herein as "The Andersons").

**49 C.F.R. § 1105.7(e)(2) – Transportation system.**

*Describe the effects of the proposed action on regional or local transportation systems and patterns. Estimate the amount of traffic (passenger or freight) that will be diverted to other transportation systems or modes as a result of the proposed action.*

The proposed abandonment should not affect regional or local transportation systems and patterns because traffic will continue to move over the Line upon abandonment in the same manner as it did prior to abandonment. The only difference is that post-abandonment, the traffic will move over private industrial track rather than common carrier track. As a result, the proposed abandonment will not result in diversion of rail traffic to other modes of transportation.

**49 C.F.R. § 1105.7(e)(3) – Land Use**

*(i) Based on consultation with local and/or regional planning agencies and/or a review of the official planning documents prepared by such agencies, state whether the proposed action is consistent with existing land use plans. Describe any inconsistencies.*

The proposed abandonment appears consistent with existing land use plans in the local area. However, ABE is consulting with land use planning agencies for Fillmore County and the Town of Fairmont, NE. See Appendix 2.

*(ii) Based on consultation with the U.S. Soil Conservation Service, state the effect of the proposed action on any prime agricultural land.*

The proposed abandonment will have no effect on prime agricultural land in the local area. However, ABE is consulting with the Natural Resources Conservation Service ("NRCS") to solicit NRCS's input. See Appendix 2.

*(iii) If the action affects land or water uses within a designated coastal zone, include the coastal zone information required by §1105.9.*

The proposed abandonment will not affect land or water use in a designated coastal area.

*(iv) If the proposed action is an abandonment, state whether or not the right-of-way is suitable for alternative public use under 49 US.C. 10905 and explain why.*

The right-of-way of the Line is not suitable for alternative public use because there are adequate public highways in the area of the Line, and the Line is not particularly scenic as to be desirable for use as a recreational trail. Additionally, the Line's only two shippers plan to continue to operate and use the Line as private industry track, rather than common carrier trackage.

**49 C.F.R. § 1105.7(e)(4) – Energy**

*(i) Describe the effect of the proposed action on transportation of energy resources.*

The proposed abandonment will have no effect on transportation of energy resources.

*(ii) Describe the effect of the proposed action on recyclable commodities.*

The proposed abandonment will have no effect on recyclable commodities.

*(iii) State whether the proposed action will result in an increase or decrease in overall energy efficiency and explain why.*

The proposed abandonment will not result in a change in overall energy efficiency.

*(iv) If the proposed action will cause diversions from rail to motor carriage of more than: (A) 1,000 rail carloads a year; or (B) An average of 50 rail carloads per mile per year for any part of the affected line, quantify the resulting net change in energy consumption and show the data and methodology used to arrive at the figure given. To minimize the production of repetitive data, the information on overall energy efficiency in §1105.7(e)(iii) need not be supplied if the more detailed information in §1105.7(e)(4)(iv) is required.*

Not applicable as no diversions will occur.

**49 C.F.R. § 1105.7(e)(5) – Air**

*(i) If the proposed action will result in either: (A) An increase in rail traffic of at least 100 percent (measured in gross ton miles annually) or an increase of at least eight trains a day on any segment of rail line affected by the proposal, or (B) An increase in rail yard activity of at least 100 percent (measured by carload activity), or (C) An average increase in truck traffic of more than 10 percent of the average daily traffic or 50 vehicles a day on any affected road segment, quantify the anticipated effect on air emissions. For a proposal under 49 U.S.C. 10901*

*(or 10502) to construct a new line or reinstitute service over a previously abandoned line, only the eight train a day provision in subsection (5)(i)(A) will apply.*

Not applicable as no such increases will occur.

*(ii) If the proposed action affects a class I or nonattainment area under the Clean Air Act, and will result in either: (A) An increase in rail traffic of at least 50 percent (measured in gross ton miles annually) or an increase of at least three trains a day on any segment of rail line, (B) An increase in rail yard activity of at least 20 percent (measured by carload activity), or (C) An average increase in truck traffic of more than 10 percent of the average daily traffic or 50 vehicles a day on a given road segment, then state whether any expected increased emissions are within the parameters established by the State Implementation Plan. However, for a rail construction under 49 US.C. 10901 (or 49 U.S.C. 10502) or a case involving the reinstitution of service over a previously abandoned line, only the three train a day threshold in this item shall apply.*

Not applicable as no such increases will occur.

*(iii) If transportation of ozone depleting materials (such as nitrogen oxide and freon) is contemplated, identify: the materials and quantity; the frequency of service; safety practices (including any speed restrictions); the applicant's safety record (to the extent available) on derailments, accidents and spills; contingency plans to deal with accidental spills; and the likelihood of an accidental release of ozone depleting materials in the event of a collision or derailment.*

Not applicable as no such transportation will occur.

**49 C.F.R. § 1105.7(e)(6) – Noise**

*If any of the thresholds identified in item (5)(i) of this section are surpassed, state whether the proposed action will cause: (i) An incremental increase in noise levels of three decibels Ldn or more; or (ii) An increase to a noise level of 65 decibels Ldn or greater. If so, identify sensitive receptors (e.g., schools, libraries, hospitals, residences, retirement communities, and nursing homes) in the project area, and quantify the noise increase for these receptors if the thresholds are surpassed.*

Not applicable as no such thresholds will be surpassed.

**49 C.F.R. § 1105.7(e)(7) – Safety**

*(i) Describe any effects of the proposed action on public health and safety (including vehicle delay time at railroad grade crossings).*

The proposed abandonment will have no effect on public safety.

*(ii) If hazardous materials are expected to be transported, identify the materials and quantity; the frequency of service; whether chemicals are being transported that, if mixed, could react to form more hazardous compounds; safety practices (including any speed restrictions);the applicant's safety record (to the extent available) on derailments, accidents and hazardous spills; the contingency plans to deal with accidental spills; and the likelihood of an accidental release of hazardous materials.*

Not applicable - no hazardous materials will be transported.

*(iii) If there are any known hazardous waste sites or sites where there have been known hazardous materials spills on the right-of-way, identify the location of those sites and the types of hazardous materials involved.*

The railroad has no knowledge of hazardous waste sites or sites where there have been known hazardous material spills on the right-of-way or in adjacent areas.

**49 C.F.R. § 1105.7(e)(8) – Biological Resources**

*(i) Based on consultation with the U.S. Fish and Wildlife Service, state whether the proposed action is likely to adversely affect endangered or threatened species or areas designated as a critical habitat, and if so, describe the effects.*

The proposed abandonment will not affect endangered or threatened species or areas designated as critical habitat because rail service will continue without material changes. However, ABE is soliciting input from the U.S. Fish and Wildlife Service. See Appendix 2.

*(ii) State whether wildlife sanctuaries or refuges, National or State parks or forests will be affected, and describe any effects.*

Abandonment of the Line will not affect wildlife sanctuaries or refuges, nor National or State Parks or Forests.

**49 C.F.R. § 1105.7(e)(9) – Water**

*(i) Based on consultation with State water quality officials, state whether the proposed action is consistent with applicable Federal, State or local water quality standards. Describe any inconsistencies.*

Abandonment of the Line should be consistent with applicable Federal, State or local water quality standards. However, ABE is soliciting input from local water quality officials. See Appendix 2.

*(ii) Based on consultation with the US. Army Corps of Engineers, state whether permits under section 404 of the Clean Water Act (33 U.S.C. 1344) are required for the proposed action and whether any designated wetlands or 100-yearflood plains will be affected. Describe the effects.*

It is unlikely that the proposed abandonment would affect any designated wetlands or 100-year flood plains, so as to necessitate acquiring a permit under Section 404 of the Clean Water Act. However, ABE is soliciting input from the U.S. Army Corps of Engineers. See Appendix 2.

*(iii) State whether permits under section 402 of the Clean Water Act (33 U.S.C. 1342) are required for the proposed action. (Applicants should contact the U.S. Environmental Protection Agency or the state environmental protection or equivalent agency if they are unsure whether such permits are required.)*

It is unlikely that proposed abandonment would require a permit under Section 402 of the Clean Water Act. However, ABE is soliciting input from the U.S. Environmental Protection Agency. See Appendix 2.

**49 CFR 1105.7(e)(10) Proposed Mitigation**

*Describe any actions that are proposed to mitigate adverse environmental impacts, indicating why the proposed mitigation is appropriate.*

There would be no adverse environmental impacts that would require mitigation.

II. DRAFT HISTORIC REPORT

ABE hereby submits the following information required by 49 C.F.R. § 1105.8(d):

(1) *A U.S.G.S. topographic map (or an alternate map drawn to scale and sufficiently detailed to show buildings and other structures in the vicinity of the proposed action) showing the location of the proposed action, and the locations and approximate dimensions of railroad structures that are 50 years old or older and are part of the proposed action;*

The required topographic map is attached to this E&HR as Appendix 3. However, please note that contractual rail service will continue and as such the sole structure on the Line will not be removed because of the proposed action.

*(2) A written description of the right-of-way (including approximate widths, to the extent known), and the topography and urban and/or rural characteristics of the surrounding area;*

The right-of-way of the Line is generally 100 feet wide. The area surrounding the segment is generally rural.

*(3) Good quality photographs (actual photographic prints, not photocopies) of railroad structures on the property that are 50 years old or older and of the immediately surrounding area;*

A photograph of the sole bridge on the Line is attached to this E&HR as Appendix 4.

*(4) The date(s) of construction of the structure(s), and the date(s) and extent of any major alterations, to the extent such information is known;*

Not known.

*(5) A brief narrative history of carrier operations in the area, and an explanation of what, if any, changes are contemplated as a result of the proposed action;*

The Line was constructed in 1886 by a predecessor of BNSF as part of a cluster of branch lines extending in a generally southerly direction from what is now BNSF's east-west main line at Fairmont, NE. In 1996, a predecessor of BNSF sold an approximately 8.3 mile rail line to Fillmore Western Railway Company ("FWRY").[3] BNSF's predecessor retained ownership of an approximately 0.77 mile northern segment of a rail line that connected the rail line FWRY purchased to BNSF's main line.[4] In 2001, FWRY obtained an exemption from the STB that authorized abandonment from milepost 1.70 to milepost 10.0. While FWRY failed to file a consummation notice to notify the STB that it consummated the authorized abandonment from milepost 3.70 to milepost 10.0, FWRY did take actions to signify its intent to abandon the line, including removing the tracks and discontinuing service over the rail lines. Note, FWRY left the tracks from milepost 1.70 to milepost 3.70 intact and they remained operational. In 2006, ABE

[3] The rail line purchased by FWRY extended from milepost 1.7 to milepost 10.0 (near Geneva, NE).

[4] BNSF retained a line segment from milepost 0.93 to milepost 1.70 ("Northern Segment").

purchased the southern segment from FWRY from milepost 1.70 to milepost 3.70 ("Southern Segment") under the mistaken belief that it was abandoned.[5] ABE did not obtain Board acquisition or operating authority as it believed that FWRY had abandoned the line segment and that it could be operated as private industrial track outside the Board's jurisdiction. Even the tax deeds recorded in the Tax Parcels & Deed records filed at the Fillmore County Register of Deeds describe the trackage from milepost 3.70 to milepost 10.0 as abandoned railroad right-of-way in real estate property deeds.

Approximately five years later, ABE sought to sell its ethanol plant located adjacent to the Southern Segment to Flint Hill Resources, Fairmont, LLC ("FHR-Fairmont"). During due diligence in connection with sale of the ethanol plant and negotiations with BNSF for renewal of the Northern Segment connecting the Line to BNSF's east-west main line at Fairmont, NE, ABE became aware that the Fairmont-Geneva Line abandonment (including the Southern Segment that ABE had purchased from FWRY) had not been formally consummated and that ABE had in fact acquired a regulated line of railroad at the time of its 2001 purchase from FWRY.[6] Accordingly, ABE sought post-transaction Board authority to acquire the Southern Segment from FWRY. At the same time, ABE also sought authority to acquire the Northern Segment from BNSF. ABE obtained the requisite Board authority to acquire and operate over the

[5] In the same year, ABE entered into a 5-year lease of the 1-mile segment with an option to purchase that segment at the conclusion of that lease following BNSF's abandonment of that segment.

[6] As the lease of the 0.77-mile BNSF segment was nearing expiration, ABE learned from BNSF for the first time that abandonment authority for the 2-mile segment of line from milepost 1.70 to milepost 3.70 had lapsed, with the result that ABE became an STB-regulated rail carrier upon its acquisition of that segment in 2006.

Southern and Northern Segments in 2012.[7] As part of that transaction, BNSF retained trackage rights over the Northern Segment to provide rail service to a grain loading facility owned by The Andersons and located on a spur line connected to the Northern Segment.

In July 2014, ABE and BNSF jointly ("Petitioners") filed a petition for exemption requesting exemptions under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 to permit ABE to abandon operations over Northern Segment and the Southern Segment (approximately 2.77 miles of rail line) and BNSF to discontinue common carrier operations over the Northern Segment.

On July 23, 2014, Petitioners requested that the proceedings be held in abeyance pending discussions between Petitioners and The Andersons. On June 16, 2017, Petitioners notified the Board that the matters that caused Petitioners to request abeyance had been resolved. At this juncture, the Petitioners and The Andersons desire to move forward with abandonment so the Line's only two shippers can use the Line as private industry track, rather than common carrier trackage.

*(6) A brief summary of documents in the carrier's possession, such as engineering drawings, that might be useful in documenting a structure that is found to be historic;*

None available.

*(7) An opinion (based on readily available information in the railroad's possession) as to whether the site and/or structures meet the criteria for listing on the National Register of Historic Places (36 CFR 60.4), and whether there is a likelihood of archeological resources or any other previously unknown historic properties in the project area, and the basis for these opinions (including any consultations with the State Historic Preservation Office, local historical societies or universities);*

The Line is not thought to meet the criteria for listing in the National Register of

[7] See ABE Fairmont, LLC—Acquis. & Operation Exemption—Fillmore W. Ry., FD 35673 (STB served Sept. 21, 2012); ABE Fairmont, LLC— Acquis. & Operation Exemption—BNSF Ry., FD 35683 (STB served Oct. 31, 2012, updated July 19, 2013).

Historic Places. It is unlikely that there are archeological resources or previously unknown historic properties in the project area. In accordance with this regulation, ABE is consulting by letter with the Nebraska Historical Preservation Office. See Appendix 2.

*(8) A description (based on readily available information in the railroad's possession) of any known prior subsurface ground disturbance or fill, environmental conditions (naturally occurring or manmade) that might affect the archeological recovery of resources (such as swampy conditions or the presence of toxic wastes), and the surrounding terrain.*

ABE has no knowledge of any prior subsurface ground disturbance or fill, or environmental conditions that might affect the recovery of resources and the surrounding terrain.

*(9) Follow-Up Information.*

Additional information will be provided as appropriate.

Respectfully submitted on behalf of
ABE FAIRMONT, LLC
1214 County Road G
Fairmont, NE 68354

Applicant

Thomas F. McFarland

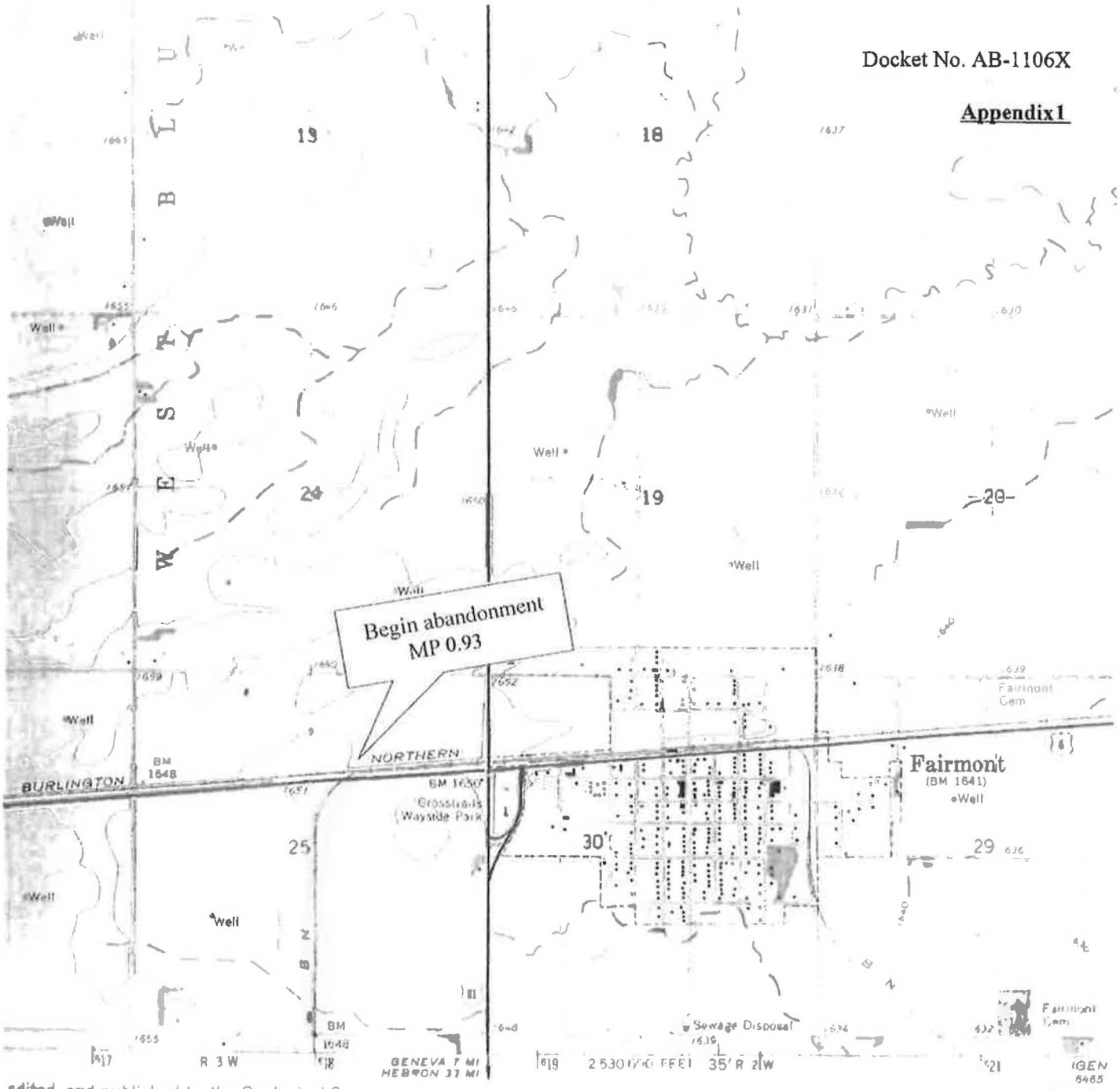
THOMAS F. MCFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street, Suite 1666
Chicago, IL 60604-1228
(312) 236-0204
mcfarland@aol.com

Attorney for Applicant

August 30, 2017

Docket No. AB-1106X

**Appendix 1**




edited, and published by the Geological Survey
of the Department of the Interior program
evelopment of the Missouri River Basin

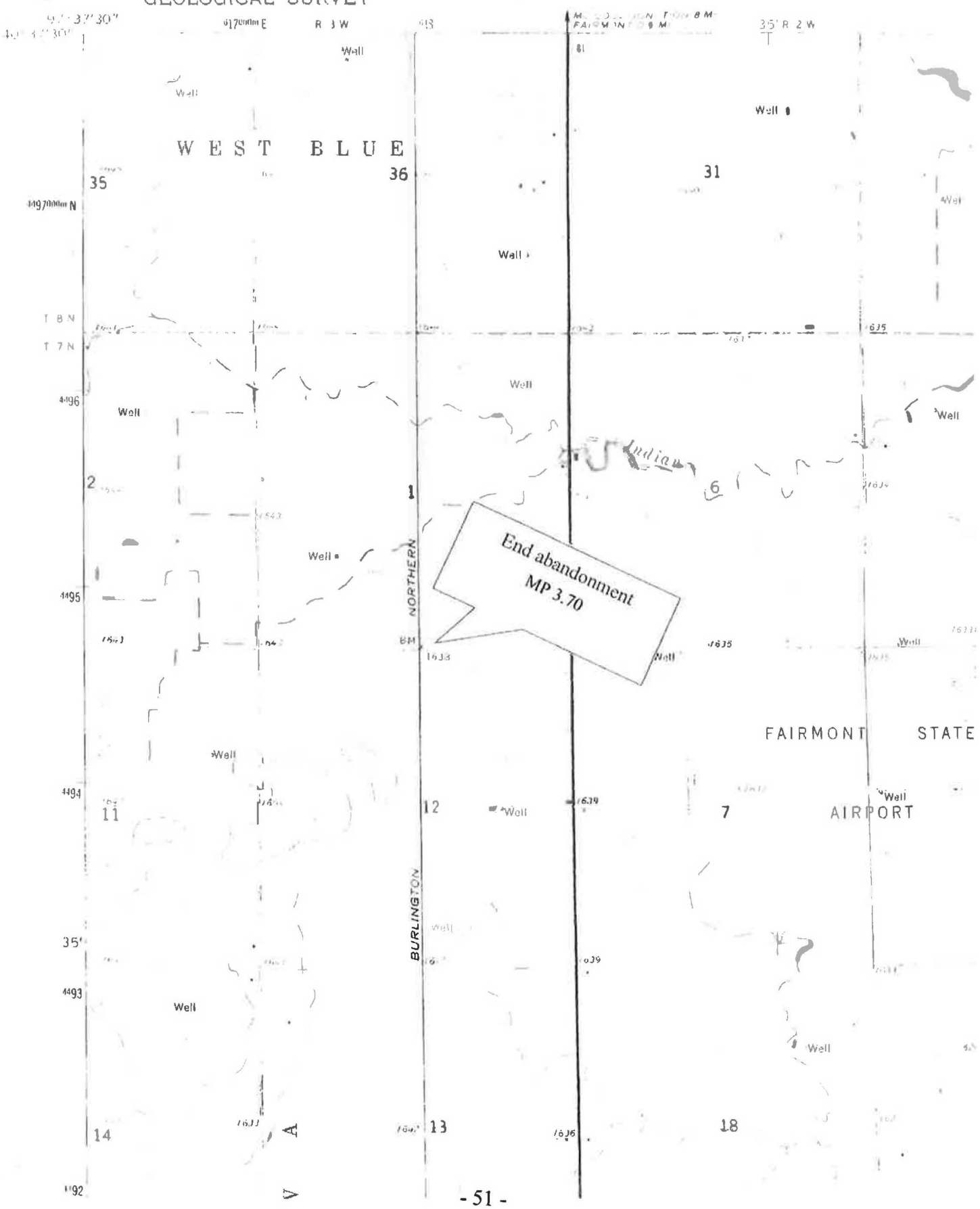
y USGS and USC&GS

hy by photogrammetric methods from aerial
hd taken 1967 Field checked 1969

projection 1927 North American datum
bt grid based on Nebraska coordinate system, south zone
ter Universal Transverse Mercator grid ticks
shown in blue

fashed lines indicate selected fence and field lines where
visible on aerial photographs This information is unchecked

IM GRID AND 1969 MAGNETIC NORTH
DECLINATION AT CENTER OF SHEET


UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
WEST BLUE
NORTHERN
BURLINGTON
End abandonment
MP 3.70
FAIRMONT
STATE
AIRPORT
Well
35
36
31
1
2
6
11
12
7
13
18
14

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1666
CHICAGO, ILLINOIS 60604-1228
TELEPHONE (312) 236-0204
*mcfarland@aol.com*

THOMAS F. MCFARLAND

August 30, 2017

Via First Class Mail

Consulting Agencies per 49 C.F.R. § 1105.7(b)
(See attached Environmental & Historic Report Service List)

Re: AB-1106X, ABE Fairmont, LLC – Abandonment Exemption – In Fillmore County, NE

AB-6 (Sub-No. 488X), BNSF Railway Company – Discontinuance of Service Exemption – In Fillmore County, NE

**Revised Environmental & Historic Report**

Dear Agency or Government Representative:

On July 7, 2014, ABE Fairmont, LLC ("ABE") and BNSF Railway Company ("BNSF") (collectively "Petitioners") jointly-filed a Petition for Exemption ("Petition") permitting ABE to abandon operations over approximately 2.77 miles of rail line extending from milepost 0.93 to milepost 3.70 and BNSF to discontinue trackage rights/common carrier operations over approximately 0.77 miles of line extending from milepost 0.93 to milepost 1.70 in Fillmore County, NE (the 'Line").[1] As indicated in the Petition, the Petitioners are seeking abandonment authority to reclassify the Line from a Board-regulated line of railroad to private shipper-owned industry track. Approximately three weeks after filing the Petition (July 23, 2014), the Petitioners requested that the Board hold the proceeding in abeyance to allow the Petitioners and the Line's only shippers[2] to resolve issues concerning continued operations post-abandonment. On June 16, 2017, the Petitioners notified the Board that the matters that caused the proceeding to be held in abeyance have been resolved and requested the Board to lift the abeyance and reinstate the proceeding on the Board's active docket.

[1] Prior to filing the Petition, ABE prepared and submitted an Environmental & Historic Report ("E&HR") for agency consultation for this proceeding on two prior occasions: the original E&HR was distributed on October 23, 2012 and ABE supplemented the original E&HR on September 23, 2013.

[2] The Line only serves two shippers, Flint Hill Resources Fairmont, LLC and The Andersons, Inc. d/b/a O'Malley Grain Company.

THOMAS F. MCFARLAND

On August 17, 2017, the Board served a decision removing the proceedings from abeyance and directing the Petitioners to contact the Board's Office of Environmental Analysis ("OEA") to determine how to proceed with environmental review of the abandonment, given the lengthy delays in the proceeding ("Aug. 17th Decision").[3] ABE has since consulted with OEA concerning the environmental review and OEA has instructed ABE that it would need to revise, supplement, and redistribute the E&HR. Accordingly, please find attached a Revised E&HR for the aforementioned proceedings.

Note, the railroad does not anticipate adverse environmental impacts because traffic will continue to move over the Line upon abandonment in the same manner as it did prior to abandonment. The only difference is that post-abandonment, the traffic will move over private industrial track rather than common carrier track. However, this E&HR is being provided so that you may submit information that will form the basis for the STB's independent environmental analysis of the proceeding. If you have any questions about the Board's Environmental Review process, please contact OEA by telephone at (202) 245-0245 or by mail to: Surface Transportation Board, 395 E Street, S.W., Room 1106, Washington, DC 20423-0001.

Please refer to Docket Nos. AB-1106X and AB-6 (Sub-No. 488X) when contacting the STB. Applicable statutes and regulations impose stringent deadlines for processing this action. For this reason your written comments in regard to the content of the Report that is within your jurisdiction (with a copy to us) would be appreciated within three weeks.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for ABE Fairmont, LLC

Enclosures
cc: *(by-email)*
Thomas Wilcox, Esq., twilcox@gkglaw.com
William Mullins, Esq., wmullins@bakerandmiller.com
Karl Morell, Esq., karlm@karlmorell.com
Tyler White, Esq., tyler.white2@bnsf.com
Kim Boatright, Esq., kim.boatright@fhr.com
Mr. Richard Peterson, richard.peterson@advancedbioenergy.com
Mr. Matt Lenhard, matt_lenhard@andersonsinc.com

[3] The Aug. 17th Decision also requested additional information from the parties and asked the parties to address various legal precedent.

**AB-1106X - Revised Draft Environmental and Historic Report Service List**
**Consulting Agencies per 49 C.F.R. § 1105.7(b)**

**State Clearinghouse:**
Nebraska Public Service Commission
Jamie Reyes, Director of Transportation and Rail Safety Department
1200 N Street, Suite 300
Lincoln, NE 68528

**State Environmental Protection Agency**:
Nebraska Dept. of Environmental Quality
1200 N Street, Suite 400,
PO Box 98922
Lincoln, NE 68509

**County Commissioners:**
Fillmore County Commissioners
Jeff Neiman, Chairman
745 5th Avenue,
Fairmont, NE 68354

**Environmental Protection Agency (Regional Office):**
Environmental Protection Agency - Region 7
11201 Renner Boulevard,
Lenexa, KS 66219

**U.S. Army Corps of Engineers**:
U.S. Army Corps of Engineers
Omaha District
1616 Capitol Ave, Suite 9000
Omaha, NE 68102

**National Oceanic & Atmospheric Admin:**
NGS Information Services, NOAA, N/NGS12
National Geodetic Survey SSMC-3, #9292
1315 East-West Highway,
Silver Spring, MD 20910

**Nebraska Historic Preservation Office:**
Nebraska State Historical Society
P.O. Box 82554
1500 R Street,
Lincoln, NE 68501

**City Planner:**
Village of Fairmont, Nebraska
635 6th Avenue,
Fairmont, NE 68354

**U.S. Fish & Wildlife Service:**
U.S. Fish & Wildlife Service - Region 6
Denver Federal Center
P.O. Box 25486
Denver, CO 80225

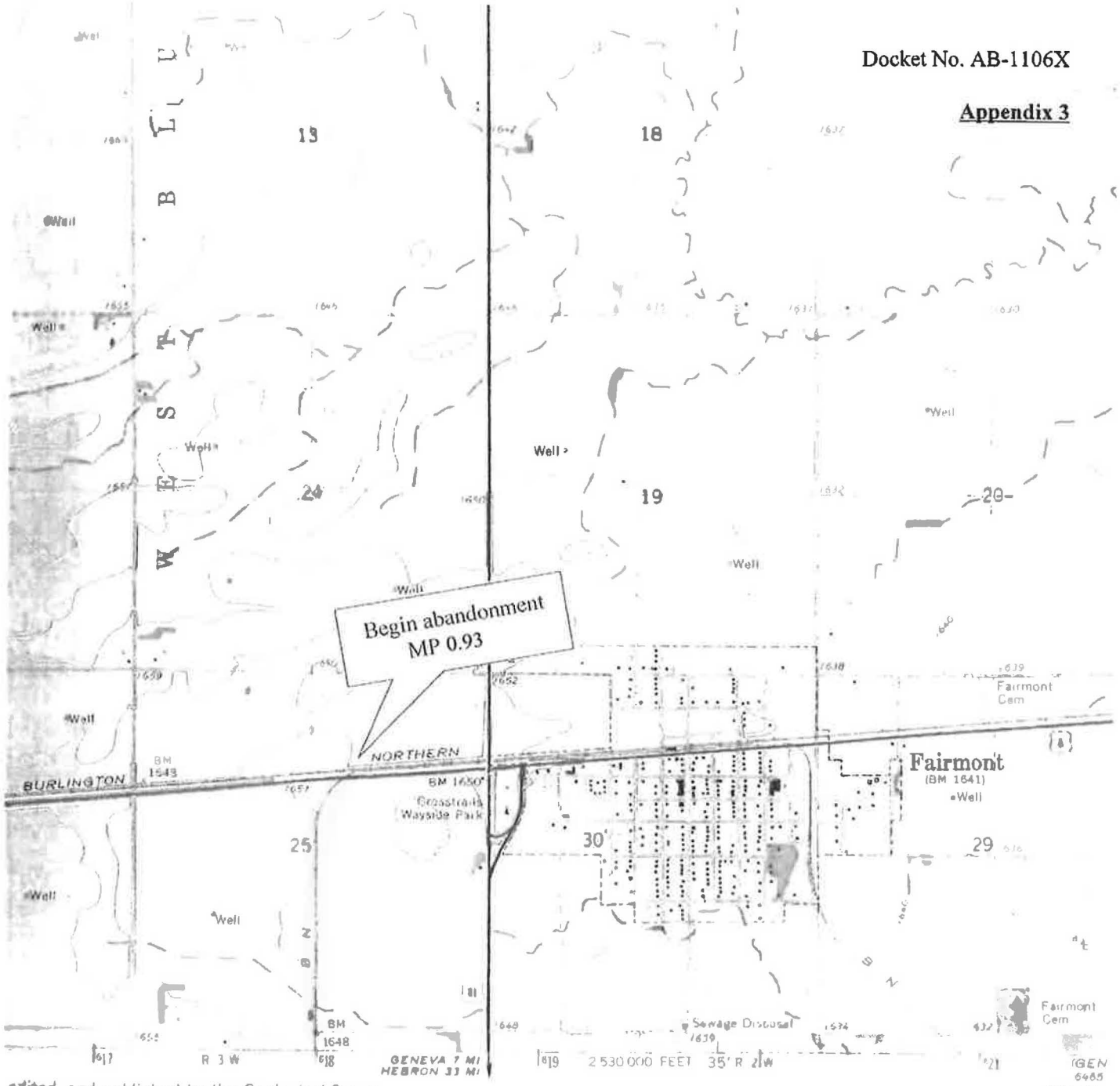
**Natural Resources Conservation Service:**
Natural Resources Conversation Service
USDA - Nebraska State Office
Craig Derickson
100 Centennial Mall N, Suite 152
Lincoln, NE 65808

**National Park Service:**
Planning and Compliance Office
National Park Service - Midwest Region
601 Riverfront Drive,
Omaha, NE 68102

**The National Park Service, Recreation Resources Assistance Division:**
Stephan Nofield
National Park Service
Rivers & Trails Conservation Program
1201 Eye Street, NW, 9th Floor (Org. Code 2220)
Washington, D.C. 20005

Docket No. AB-1106X

**Appendix 3**




edited, and published by the Geological Survey
of the Department of the Interior program
evelopment of the Missouri River Basin

y USGS and USC&GS

hy by photogrammetric methods from aerial
hoto taken 1967 Field checked 1969

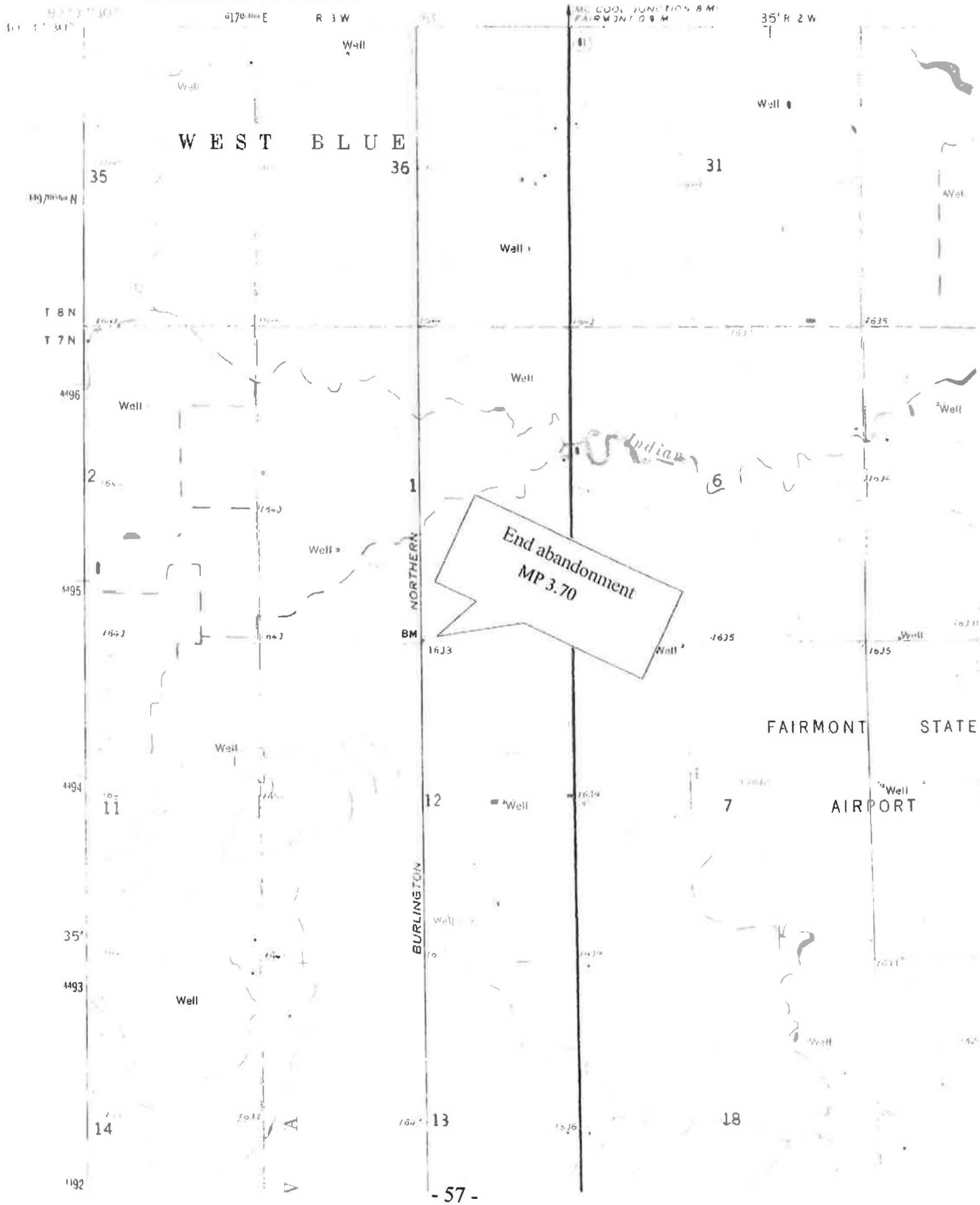
projection 1927 North American datum
ot grid based on Nebraska coordinate system, south zone
er Universal Transverse Mercator grid ticks
shown in blue

lashed lines indicate selected fence and field lines where
visible on aerial photographs This information is unchecked

SCALE

M GRID AND 1969 MAGNETIC NORTH
DECLINATION AT CENTER OF SHEET

THIS MAP COMPLIES WITH NATIC
FOR SALE BY U. S. GEOLOGICAL SURVEY, DENVE
A FOLDER DESCRIBING TOPOGRAPHIC MAPS


UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
R 3 W
35' R 2 W
WEST BLUE
35
36
31
T 8 N
T 7 N
2
1
6
11
12
7
14
13
18
NORTHERN
BURLINGTON
BM
1643
1635
Well
End abandonment
MP 3.70
FAIRMONT STATE
AIRPORT



Bridge over Indian Creek in south half of rail line looking SSW

BEFORE THE
SURFACE TRANSPORTATION BOARD

| | | |
|---|---|---|
| ABE FAIRMONT, LLC<br>– ABANDONMENT EXEMPTION –<br>IN FILLMORE COUNTY, NEB. | )<br>)<br>) | AB-1106X |
| BNSF RAILWAY COMPANY<br>– DISCONTINUANCE OF SERVICE<br>EXEMPTION –<br>IN FILLMORE COUNTY, NEB. | )<br>)<br>)<br>) | AB-6 (Sub-No. 488X) |

**SUPPLEMENT TO THE JULY 7, 2014 JOINT PETITION FOR EXEMPTION**

**EXHIBIT 3**

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1666
CHICAGO, ILLINOIS 60604-1228
TELEPHONE (312) 236-0204
*mcfarland@aol.com*

THOMAS F. MCFARLAND

September 6, 2017

*By e-mail to vicki.rutsonv@stb.gov*

Ms. Victoria Rutson, Director
Director, Office of Environmental Analysis
and Federal Preservation Officer
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: Docket No. AB-1106X, *ABE Fairmont, LLC -- Abandonment Exemption -- in Fillmore County, NE*

Docket No. AB-6 (Sub-No. 488X), *BNSF Railway Company -- Discontinuance of Service Exemption -- in Fillmore County, NE*

Dear Ms. Rutson:

Hereby forwarded is a copy of an environmental comment in the above proceeding in behalf of USDA-NRCS, i.e., proposed project is cleared of Farmland Protection Policy Act concerns.

Very truly yours,

Tom McFarland

Thomas F. McFarland
*Attorney for ABE Fairmont, LLC*

*TMcF:kl\1562-C\ltrVR1*

cc: *(by e-mail)*
Thomas Wilcox, Esq., *twilcox@gkglaw.com*
William Mullins, Esq., *wmullins@bakerandmiller.com*
Karl Morell, Esq., *karlm@karlmorell.com*
Courtney Estes, Esq., *courtney.estes@bnsf.com*
Kim Boatright, Esq., *kim.boatright@fhr.com*

**From:** Vanek, Wayne - NRCS, Lincoln, NE, Lincoln, NE <Wayne.Vanek@ne.usda.gov>

**To:** mcfarland <mcfarland@aol.com>

**Subject:** AB-1106X, ABE Fairmont, LLC - Abandonment Exemption - Fillmore County, NE AB-6 (Sub-No. 488X), BNSF Railway Company - Discontinuance of Service Exemption - Fillmore County, NE

**Date:** Wed, Sep 6, 2017 10:56 am

---

**United States Department of Agriculture**

NRCS Natural Resources Conservation Service

**Date: 09/06/2017**

**ATTENTION: Mr. Thomas F. McFarland, P.C. – Attorney at Law**

I am responsible for the Farmland Protection Policy Act (FPPA) concerns and have reviewed the information you sent regarding the project for which you requested review of impacts. This review only covers FPPA concerns and does not include any other environmental concerns such as wetlands or endangered species. For general conservation concerns or questions relating to wetlands under the jurisdiction of the Food Security Act, contact your local county Natural Resources Conservation Service office.

It has been determined that a Farmland Conversion Impact Rating For Corridor Type Projects form (NRCS-CPA-106) will not be needed on this project since the project, occupies already established right-of-ways (ROW), "traffic will continue to move over the Line upon abandonment", and no additional cropland will be taken out of production, thus, **NRCS has determined that your project was found to be cleared of FPPA significant concerns.** We encourage you to continue to be aware of prime and important farmlands in general and the role they play in current and future projects.

Wayne Vanek
*USDA-NRCS*
*Fed. Bldg. Rm. 152*
*100 Centennial Mall North*
*Lincoln, NE. 68508-3866*
*402.437.4125*
*wayne.vanek@ne.usda.gov*

LAW OFFICE
THOMAS F. MCFARLAND, P.C.
208 SOUTH LASALLE STREET - SUITE 1666
CHICAGO, ILLINOIS 60604-1228
TELEPHONE (312) 236-0204
*mcfarland@aol.com*

THOMAS F. MCFARLAND

September 11, 2017

*By e-mail to vicki.rutsonv@stb.gov*

Ms. Victoria Rutson, Director
Director, Office of Environmental Analysis
and Federal Preservation Officer
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: Docket No. AB-1106X, *ABE Fairmont, LLC -- Abandonment Exemption -- in Fillmore County, NE*

Docket No. AB-6 (Sub-No. 488X), *BNSF Railway Company -- Discontinuance of Service Exemption -- in Fillmore County, NE*

Dear Ms. Rutson:

Hereby forwarded is a copy of an environmental comment in the above proceeding from the Nebraska State Historical Society, i.e. "no historic properties affected".

Very truly yours,

Tom McFarland

Thomas F. McFarland
*Attorney for ABE Fairmont, LLC*

*TMcF:mg\1562-C\ltrVR2*

cc: *(by e-mail)*
Thomas Wilcox, Esq., *twilcox@gkglaw.com*
William Mullins, Esq., *wmullins@bakerandmiller.com*
Karl Morell, Esq., *karlm@karlmorell.com*
Tyler White, Esq., *Tyler.White2@BNSF.com*
Jill Rugema, Esq., *Jill.Rugema@BNSF.com*
Kim Boatright, Esq., *kim.boatright@fhr.com*

Nebraska
STATE HISTORICAL SOCIETY

September 6, 2017

Mr. Thomas F. McFarland
Law Office
208 South LaSalle Street, Suite 1666
Chicago, IL 60604-1228

RE: HP# 1709-015-01 Abandonment of less than four miles of RR track in Fillmore County, NE

Dear Mr. McFarland,

Thank you for submitting the referenced project proposal for our review and comment. Our comment on this project and its potential to affect historic properties is required by Section 106 of the National Historic Preservation Act of 1966, as amended, and implementing regulations 36 CFR Part 800.

According to the information you have provided, there will be **no historic properties affected** by this project as planned. Should any changes in the project be made or in the type of funding or assistance provided through federal or state agencies, please notify this office of the changes before further project planning continues.

Please retain this correspondence and your documented finding in order to show compliance with Section 106 of the National Historic Preservation Act, as amended. If you have any questions, please contact me at 402-471-4773.

Sincerely,

Jill E. Dolberg
Deputy State Historic Preservation Officer
Nebraska State Historical Society

1500 R Street
PO Box 82554
Lincoln, NE 68501-2554
p: (800) 833-6747
(402) 471-3270
f: (402) 471-3100
www.nebraskahistory.org

BEFORE THE
SURFACE TRANSPORTATION BOARD

| | | |
|---|---|---|
| ABE FAIRMONT, LLC<br>– ABANDONMENT EXEMPTION –<br>IN FILLMORE COUNTY, NEB. | )<br>)<br>) | AB-1106X |
| BNSF RAILWAY COMPANY<br>– DISCONTINUANCE OF SERVICE<br>EXEMPTION –<br>IN FILLMORE COUNTY, NEB. | )<br>)<br>)<br>) | AB-6 (Sub-No. 488X) |

**SUPPLEMENT TO THE JULY 7, 2014 JOINT PETITION FOR EXEMPTION**

**EXHIBIT 4**

FLINT HILLS
resources

19 September 2017

Karl K. Brinkman
401 Main St.
Strang, NE 68444

Dear Mr. Brinkman,

Because you are our neighbor and an affected landowner, we wanted to let you know about steps we are taking to correct an oversight that failed to remove a railroad right-of-way that runs through your property and ours. The actions we are taking will finally remove all of our property from the jurisdiction of the Surface Transportation Board. Although this process of "abandonment" was begun by previous owners of the rail line in 2001, the final filing with the Surface Transportation Board was never made by that railway.

Due to this technicality, the abandonment procedure was never completed. Until abandonment is declared and the right-of-way withdrawn from the jurisdiction of the Surface Transportation Board, under federal law, a railroad has the right to relay track and operate over your property without your consent.

The segment of rail line we are seeking to declare abandoned runs from just south of Geneva to north of the Flint Hills Resources ethanol plant in Fairmont. Much of the southern part of the line no longer exists, while the northern part still services the ethanol plant and O'Malley Grain (The Andersons). We, along with O'Malley Grain and ABE, the previous owners of the plant, are working together to have the rail line formally declared abandoned and the railroad right-of-way removed from the jurisdiction of the Surface Transportation Board.

Removal of the right-of-way will allow ABE to complete the sale of the remaining part of the northern track to our company. We intend to use the track to service our plant and O'Malley Grain. For you as a landowner, once this declaration is made, you will no longer be obligated to allow a railroad to operate on your property.

No action or response to this letter is required on your part. The decision by the Surface Transportation Board will only affect you in so far as removing any remaining claims to your property.

Should you have questions or concerns regarding this matter, please feel free to stop by our offices or contact us directly.

Flint Hills Resources Fairmont
1214 Road G
Fairmont, NE 68354
Phone: 402-268-7905

Respectfully,

Kevin Karasiuk
Plant Manager
Flint Hills Resources Fairmont

BEFORE THE
SURFACE TRANSPORTATION BOARD

| | | |
|---|---|---|
| ABE FAIRMONT, LLC<br>– ABANDONMENT EXEMPTION –<br>IN FILLMORE COUNTY, NEB. | )<br>)<br>) | AB-1106X |
| BNSF RAILWAY COMPANY<br>– DISCONTINUANCE OF SERVICE<br>EXEMPTION –<br>IN FILLMORE COUNTY, NEB. | )<br>)<br>)<br>) | AB-6 (Sub-No. 488X) |

**SUPPLEMENT TO THE JULY 7, 2014 JOINT PETITION FOR EXEMPTION**

**EXHIBIT 5**

## FILLMORE WESTERN RAILWAY COMPANY

Fri Sep 8 14:00:55 2017

**SOS Account Number**
1502474
**Status**
Inactive

**Principal Office Address**
8202 F ST
OMAHA, NE 681270000
**Registered Agent and Office Address**
GREG WEBER
2022 EAST 7TH STREET
FREMONT, NE 680250000

**Nature of Business**
RAILROAD
**Entity Type**
Domestic Corp
**Date Filed**
Nov 14 1996

| Corporation Position | Name | Address |
|---|---|---|
| President | GREG WEBER | 2022 EAST 7TH ST<br>FREMONT, NE 680250000 |
| Secretary | T S BANNISTER | 1300 DES MOINES BLDG<br>DES MOINES, IA 503090000 |
| Treasurer | TERRY PETERSON | 4093 S. 84TH<br>OMAHA, NE 681270000 |
| Director | T S BANNISTER | 1300 DES MOINES BLDG<br>DES MOINES, IA 503090000 |
| Director | TERRY PETERSON | 4093 S 84TH ST<br>OMAHA, NE 681270000 |
| Director | GARY L KERLEY | 9001 I 45 S STE 510<br>COVROE, TX 773850000 |
| Director | GREG WEBER | 2022 EAST 7TH ST<br>FREMONT, NE 680250000 |

### Filed Documents

To purchase copies of filed documents check the box to the left of the document code. If no checkbox appears, contact the Secretary of State's office to request the document(s).

| | Code | Document | Date Filed | Price |
|---|---|---|---|---|
| ☐ | AP | Articles Perpetual | Nov 14 1996 | $1.80 = 4 page(s) @ $0.45 per page |
| | NP | Non Payment of Taxes | Apr 16 1998 | |
| ☐ | CR | Certificate of Revival | May 18 1998 | $0.45 = 1 page(s) @ $0.45 per page |
| | NP | Non Payment of Taxes | Apr 16 1999 | |
| ☐ | CR | Certificate of Revival | Jul 15 1999 | $0.45 = 1 page(s) @ $0.45 per page |
| ☐ | TR | Tax Return | Jul 15 1999 | $0.90 = 2 page(s) @ $0.45 per page |
| ☐ | TR | Tax Return | Feb 01 2000 | $0.90 = 2 page(s) @ $0.45 per page |
| ☐ | TR | Tax Return | Jan 18 2001 | $0.90 = 2 page(s) @ $0.45 per page |
| ☐ | TR | Tax Return | Mar 21 2002 | $0.90 = 2 page(s) @ $0.45 per page |
| ☐ | TR | Tax Return | Feb 21 2003 | $0.90 = 2 page(s) @ $0.45 per page |
| ☐ | TR | Tax Return | Jan 13 2004 | $0.90 = 2 page(s) @ $0.45 per page |
| ☐ | TR | Tax Return | Feb 10 2006 | $0.90 = 2 page(s) @ $0.45 per page |
| ☑ | TR | Tax Return | Mar 27 2008 | $0.90 = 2 page(s) @ $0.45 per page |
| | NP | Non Payment of Taxes | Apr 16 2010 | |

### Good Standing Documents

To purchase documents attesting to the entity's good standing check the box next to the document title.

- If you need your Certificate of Good Standing Apostilled or Authenticated for use in another country, you must contact the Nebraska Secretary of State's office directly for information and instructions. Documents obtained from this site cannot be Apostilled or Authenticated.

**Online Certificate of Good Standing with Electronic Validation**

This certificate is currently not available. Please contact the Nebraska Secretary of State's office by email at sos.corp@nebraska.gov or by calling (402) 471-4079 for information and instructions.

**Certificate of Good Standing - USPS Mail Delivery**

This certificate is currently not available. Please contact the Nebraska Secretary of State's office by email at sos.corp@nebraska.gov or by calling (402) 471-4079 for information and instructions.

Select All | Select None

Back to Top

BEFORE THE
SURFACE TRANSPORTATION BOARD

| | | |
|---|---|---|
| ABE FAIRMONT, LLC<br>– ABANDONMENT EXEMPTION –<br>IN FILLMORE COUNTY, NEB. | )<br>)<br>) | AB-1106X |
| BNSF RAILWAY COMPANY<br>– DISCONTINUANCE OF SERVICE<br>EXEMPTION –<br>IN FILLMORE COUNTY, NEB. | )<br>)<br>)<br>) | AB-6 (Sub-No. 488X) |

**SUPPLEMENT TO THE JULY 7, 2014 JOINT PETITION FOR EXEMPTION**

**EXHIBIT 6**

FLINT HILLS
resources

September 21, 2017

Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: AB-1106X, ABE Fairmont, LLC – Abandonment Exemption – In Fillmore County, NE

AB-6 (Sub-No. 488X), BNSF Railway Company – Discontinuance of Service Exemption – In Fillmore County, NE

Dear Ms. Brown:

Flint Hill Resources Fairmont, LLC ("FHR") is submitting this letter in support of ABE Fairmont, LLC's ("ABE") request to abandon its common carrier obligation over approximately 2.77 miles of rail line extending from milepost 0.93 to milepost 3.70 (the "Line"). FHR also supports the request of BNSF Railway Company's ("BNSF") to discontinue its trackage rights over approximately 0.77 miles of the Line extending from milepost 0.93 to milepost 1.70 in Fillmore County, NE. These actions are necessary in order to allow FHR to acquire the Line as a private line of railroad, for ABE to rid itself of a common carrier obligation that it never desired to hold in the first place, and for BNSF to continue to serve FHR and The Andersons, Inc. d/b/a O'Malley Grain Company ("The Andersons")[1] via various contractual agreements.

The Board's August 17, 2017 decision has adequately explained the background and history of this proceeding. Suffice it to say that ABE, as the prior owner of the Fairmont ethanol plant, never desired to be a carrier, nor does FHR.[2] Indeed, at the time FHR bought the Fairmont

[1] FHR ships over 88 % of the carloads over the Line. The Andersons are the only other shipper on the Line.

[2] Like ABE, FHR has no desire to be in the rail business. As such, when FHR bought the Fairmont plant, it purposely did not acquire ABE's latent common carrier obligation. Instead, it entered into various agreements, including an agreement to purchase the Line once ABE's common carrier obligation was removed. Thus, as of this time, the only remaining "asset" held by ABE with respect to its former Fairmont plant is the Line ownership itself and the corresponding common carrier obligation.

- 4111 East 37th Street North - Wichita, Kansas 67220 - P.O. Box 2917 - Wichita, Kansas 67201-2917 -

plant, ABE informed FHR that from their perspective they had acquired a private line of railroad and had taken assignment of various industry track agreements providing BNSF with access to serve that plant when they purchased the Fairmont plant. According to ABE, at the time it purchased the plant, ABE neither knew it had acquired a common carrier line of railroad nor desired to hold or acquire a common carrier obligation. It was only when FHR conducted due diligence for its purchase of the Fairmont ethanol plant that the parties discovered the history of the Line.

Since that time, the various parties involved, ABE, FHR, The Andersons, and BNSF, reached numerous agreements to facilitate the removal of ABE's common carrier obligation, FHR's purchase of the Line, conversion of the track to private track, but nonetheless still maintain rail service to The Andersons and FHR. While FHR understands the Board's concerns set forth in the August 17 decision with respect to converting regulated lines of track to private track, FHR can unequivocally state that its interests and those of The Andersons and BNSF are more than fully protected through the various private agreements. These various agreements more than mitigate any loss of regulatory remedies associated with the removal of the common carrier obligation over the Line.[3] The Board should not use government technicalities and regulations to impose a continued common carrier obligation on a party that does not want it and never desired it in the first place. This is especially the case when the parties directly involved have reached satisfactory marketplace solutions that protect everyone's interest in continued rail service.

At this juncture, FHR, The Andersons, ABE, and BNSF all desire to move forward with the abandonment and conversion of the line to private industry track. The Parties have carefully crafted the ITAs to provide protective measures for all. As such, FHR respectfully requests that the Board grant ABE's abandonment and BNSF's discontinuance as requested.

Sincerely,

Kevin Karasiuk, Plant Manager
Flint Hill Resources Fairmont, LLC

[3] The parties have entered into various Industry Track Agreements ("ITAs"). Under those ITAs, as long as FHR and The Andersons desire rail service, BNSF has the contractual right to operate over the Line to provide that service. The ITAs provide extensive remedies for service failures and/or FHR's failure to properly maintain the Line and give BNSF the right to serve any future shippers that may locate on the Line, so long as such future service does not interfere with the provision of service to FHR and/or The Andersons. The agreements also give The Andersons the right to purchase the Line so as to continue to receive service from BNSF in the event that FHR no longer desires rail service.

GKG LAW
a professional corporation

THE FOUNDRY BUILDING

1055 THOMAS JEFFERSON STREET NW SUITE 500 WASHINGTON, DC 20007
TELEPHONE: 202/342-5200 FACSIMILE: 202/342-5219

RICHARD BAR
BRENDAN COLLINS
STEVEN JOHN FELLMAN
EDWARD D. GREENBERG
MATTHEW T. JOURNY
KATHARINE FOSTER MEYER
DAVID K. MONROE
TROY A. ROLF
DAVID P. STREET
KEITH G. SWIRSKY
THOMAS W. WILCOX
CHRISTOPHER B. YOUNGER

OLIVER KRISCHNICK

MINNESOTA OFFICE:
114 FIRST STREET SOUTH
BUFFALO, MN 55313
(T) 763/682-6620 (F) 763/682-6261

WRITER'S DIRECT E-MAIL ADDRESS
TWILCOX@GKGLAW.COM

WRITER'S DIRECT DIAL NUMBER
202-342-5248

September 26, 2017

**By E-Filing**

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

Re: AB-1106X, *ABE Fairmont, LLC – Abandonment Exemption – In Fillmore County, NE*

AB-6 (Sub-No. 488X), *BNSF Railway Company – Discontinuance of Service Exemption – In Fillmore County, NE*

Dear Ms. Brown:

This letter is submitted on behalf of The Andersons, Inc., which owns and operates a grain handling facility located along a segment of the railroad lines that are the subject of the captioned proceedings (the O'Malley Grain Facility). More specifically, the industry tracks of the O'Malley Grain Facility are connected to the segment of track extending from the point of connection to the BNSF Railway ("BNSF") main line at Milepost .93, to Milepost 1.7. The Joint Petitioners have referred to this segment as the "Northern Segment" of the tracks at issue. To

date, BNSF has provided rail service to the O'Malley Grain Facility pursuant to trackage rights it retained over the Northern Segment when it sold this segment to ABE Fairmont, LLC in 2012.

These proceedings were held in abeyance in July of 2014 in reaction to the concerns on the part of The Andersons that the proposed transactions could adversely affect rail service by BNSF to the O'Malley Grain Facility on a going forward basis. Subsequently, the Joint Petitioners, The Andersons and other involved parties engaged in lengthy negotiations that culminated in a series of agreements that in pertinent part (1) preserve the current levels of rail service provided by BNSF to the O'Malley Grain Facility, and (2) provide adequate protections to The Andersons that the same or comparable service levels will be maintained for the facility and future additions to the facility as long as it is operating and requires rail service.

In light of the presence of the final executed agreements, The Andersons supported the Joint Petitioners' request to reinstate these proceedings to the Board's active dockets filed on June 16, 2017. The Andersons also supports the Board's timely consideration of the Supplement to the July 7, 2014 Joint Petition submitted by Joint Petitioners in response to the Board's decision served August 17, 2017. It also supports the Board's ultimate approval of the relief sought by the Joint Petition.

Sincerely,

Thomas W. Wilcox

Thomas W. Wilcox
*Attorney for The Andersons, Inc.*

**CERTIFICATE OF SERVICE**

I do hereby certify that on this 26th day of September, 2017, I have served a copy of the foregoing letter on all parties on the official service lists for the referenced dockets.

Thomas W. Wilcox