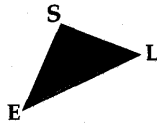


INFODEC

TO KEEP YOUR DECISION PRACTICAL

PERSONALIZED SUPPORT ON
ENVIRONMENTAL POLICY,
PERMITS, ENFORCEMENT,
AND COMPLIANCE MATTERS



JOHN R. WOOD
1011 HORNER AVENUE
BROOKINGS, SD 57006
TEL 605-692-2395
FAX 605-692-4144

December 5, 2000



ENTERED
Office of the Secretary

DEC 11 2000

Part of
Public Record

Office of the Secretary
Case Control Unit
STB Finance Docket No. 33407
Surface Transportation Board
1925 K Street NW
Washington, D. C. 20423-00001

Re: STB Finance Doc. 33407, ID No. 31225, National Environmental Policy Act (NEPA)
Draft Environmental Impact Statement: DAKOTA MINNESOTA & EASTERN
RAILROAD CORPORATION CONSTRUCTION INTO POWDER RIVER BASIN,
Environmental Review, 9/22/2000. STB request for comments on "Brookings
Alternatives-South Dakota," "Environmentally preferred alternative"-B-4, and
*the City of Brookings and Railco's proposed new taxpayer construction of an 8.5-mile
Brookings railroad rights-of way bypass in place of "B-4."*

Dear Ms. Kaiser:

The City of Brookings' City Council testified it and Railco arbitrarily demand DM&E construct and pay for a new taxpayer railroad bypass at Brookings, and unreasonably give the City and Railco operational control of all CM&E rights-of-way in and through the City. Such an alternative (including STB alternative B-4) is needless and outside the "nature" (underlying need) of the DM&E Powder River Basin Expansion Project. City of Brookings and Railco's (a private political economic corporation) "position" is arbitrary, capricious, and not in accordance with law and precedent. See enclosures 1 and 2 (official City of Brookings' position statements), National Environmental Policy Act (NEPA), and Staggers Rail Act of 1980.

The City unreasonably conditions its two printed "positions" with 11 unilateral demands, all in conflict with statute and precedent, an improper public purpose. In effect 'an out-and-out plan of extortion.' *Nollan v. CA Coastal Comm.*, U.S. No. 86-133, June 26, 1987. Whereby the in and through-City DM&E private historic rights-of-way would arbitrarily fall under full operational control of the City to cause private rail traffic to fall into desuetude, deny/deprive other City and County citizens their constitutional private rights and property in an already safe physical environment. 'It is the owner's loss, not

the taker's gain, which is the measure of the value of the property taken.' In other words, they offer "inverse condemnation." Nothing allows STB, at the behest of the City of Brookings and/or Railco, to require exercise of the power of eminent domain, i.e., regulatory taking of private property for a permit EIS alternative. *United States v. Causby*, 328 U. S. at 261, 42 U.S.C. 4331(c), *Staggers Rail Act of 1980*, *Consumers Power Co.*, 6 AEC 331, 352 (1973), *Metropolitan Edison Co. v. People Against Nuclear Energy*, 103 S. Ct. 1556 (1983), *Presidential Executive Order 12630*, March 15, 1988- "Governmental Actions and Interference With Constitutionally Protected Property Rights, and the Fourth and Fifth Amendments," and *Nollan v. CA Coastal Comm.*, U.S. No. 86-133.

The underlying need of the DM&E Powder River Basin Expansion Project is to urgently provide more timely integrated economic capacity for its railroad, in order to continue servicing its predominantly agricultural and in-City rights-of-way that currently do not provide sufficient revenue for competitive maintenance and operation, over long term. STB Decision Summary Docket No. FD 334070, 9/22/2000. Contrary-wise, with the City/Railco's Brookings speculative alternative 8.5-mile bypass, they seek politically and economically to place "Noxious Use" in a new physical environment such that they can cause exercise of eminent domain ("regulatory taking") in an already safe physical environment. Enclosures 1 and 2. An STB Brookings Alternative B-4 or a new taxpayer bypass is not an alternative necessary at Brookings to meet the Project's underlying need (above). *Presidential Executive Order 12630*, March 15, 1988, *Sylvester v. U. S. Army Corps of Engineers*, 884 F.2d 394 (9th Cir. 1989) and *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (C.A.D.C., June 14, 1991).

"The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." 42 U.S.C. 4331(c). The City and Railco's demands are non-contributory political and economic goals. Unilaterally, they seek to impose "Noxious Use" in an already safe green haven environment. They seek, for their political and economic purposes, to negatively impact many other national goals, "natural monuments," and violate NEPA "POLICY AND INTENT" of the Department of Transportation, DOT NEPA Regulations (POLICY AND INTENT-DOT 5610.2): *Staggers Rail Act of 1980*, Pub. L No. 96-448, as amended, the *National Environmental Policy Act (NEPA)* of 1969 and its regulations, the *federal Administrative Procedures Act (APA)*, and *Presidential Executive Order 12630*, March 15, 1988.

The City Council, at the pretext urging of purely economic and political interests, testified at the November 14, 2000 Brookings "Public Meeting" that the Council is "willing" to replace a 16-mile bypass (STB's Brookings Alternative B-4) with a tax payer "8.5-mile bypass reroute," i.e., 'noxious use.' See November 14, 2000 "Public Meeting" testimony by Brookings City Manager Michael Williams. This so-called 8.5-mile Brookings bypass is purely an unreasonable political/economic attempt to force the hand of DM&E to change the "nature" (underlying need) of its project, and usurp their historic private rights-of-way that were purchase/granted in 1888, i.e., 'regulatory taking.' They cannot discriminate by isolating themselves from the problem of alternatives by raising

barriers to the free flow of interstate trade. U.S.C.A. Const. Art. 1, s 8, cl. 3. 112 S. CT. 2009 (1992). Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine, Hippler, Thomas A., Boston College Environmental Affairs Law Review, Vol. 14:653, 1987 and RS20493: Property Rights: House Judiciary Committee Reports H. R. 2372, CRS, March 10, 2000.

The STB is limited to DM&E's original Powder River Basin Expansion Project underlying need rather than an extended environment examination of the unreasonable new taxpayer request for STB railroad rights-of-way construction permit. In *Metropolitan Edison*, the U. S. Supreme Court rejected out of hand an overly broad definition of 'adverse environmental effects' and determined that the NEPA mandate is limited to adverse effects on only the physical environment (STB's Brookings alternative B-2). For the City's "and Railco's position," STB must begin all over again its decision process. Because, the City's taxpayer case is "where a federal agency is not proposing this action, but is instead considering a proposal by a non federal party which requires federal approval." It is the first point at which an impact statement must be prepared. It is when a recognizable 'recommendation or report' for federal action (i.e., approval of alternative) appears. *Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Procedures (SCRAP)* No. 73-1966 (U. S. Sup. Ct. June 14, 1975) and *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 ELR 2051 (11983).

The STB Brookings Alternative B-4 and the 8.5-mile Brookings bypass proposal are discriminatory interstate trade barriers for speculative and unreasonable new governmental (taxpayer) rights-of-way construction. Therefore, are not NEPA "alternatives" permitted within this EIS. This new governmental railroad rights-of-way construction proposal requires City of Brookings and Railco to submit a permit request to the STB and for the STB to produce an EIS on that government and Railco project. Otherwise, the citizens of Brookings and surrounding County are being deprived of private rights and denied "honest services" by the Brookings City Council in economic and political league with Railco for purely political and economic purposes, 'noxious use.' This is a substantial lack of due process and an unreasonable interference with Brookings County citizen's private rights and private property, discriminatory regulatory taking. Presidential Executive Order 12630, March 15, 1988.

Councilman Samuel D. Artz, Brookings City Council and former City Commissioner, at the time of the Draft, states the former Brookings City Commission's only reason for supporting the proposed 16-mile railroad bypass was to stop purely economic "outcries" of some Brookings citizens. Op Ed-"Public has a chance to affect original by pass proposal." Brookings Register, page A4, November 6, 2000. Only a few City Brookings and County citizens have been heard on this so-called 8.5-mile bypass, because all significant discussions, disclosures, and decisions have been made behind the scenes with Railco and behind closed doors in Council executive sessions. Thereby unreasonably depriving all citizens of their private rights, property, and "honest services." Further, many if not most citizens were deliberately made unaware of the procedural

requirements of the NEPA and the STB, and cannot participate directly in this process, lack of due process.

The City of Brookings Council and Railco position fails to apply the traditional principles of NEPA EIS alternatives and the Staggers Rail Act of 1980, as amended, in particular. The so-called 8.5-mile bypass is lawfully, procedurally, and in practice significantly different permit-wise and environmentally wise than the STB 16-mile bypass alternative B-4 which STB itself implies is not within the constructs of the DM&E underlying need. DM&E is/has not in anyway "abandoning/abandoned" any in and through City railroad rights-of-way. Neither the STB, the State, City, or Railco has analyzed and brought forward specific railroad and conservation techniques that would be effective for Brookings Alternative B-4 or the proposed 8.5-mile bypass. They haven't provided information sufficient to permit reasoned choices. Consequently, STB should not consider STB alternative B-4 or the City's proposed bypass in the Final EIS. *Life of Land v. Brineger*, 485 F.2d 460, 471 (9th Cir. 1973), *NRDC v. Morton*, 458 F.2d 836 (D.C. Cir. 1972), and *Farmland Preservation Ass'n v. Goldschmidt*, 611 F.2d 233, 239 (8th Cir. 1979), and Presidential Executive Order 12630, March 15, 1998.

An STB permit request by the City for new railroad rights-of-way construction is wanting. Procedurally, if the City of Brookings and Railco want their new governmental railroad bypass both the City of Brookings and Railco must apply for a STB permit for their separate and governmentally financed railroad rights-of-way bypass construction. Then STB must produce separately the required 8.5-mile bypass Final EIS. The City and Railco's bypass political and economic interests are outside this DM&E proposal's underlying need for "Expansion" into the Powder River Basin. Because it uproots the DM&E rights-of-way, requiring discriminatory and arbitrary changes in midstream the "nature" of DM&E privately financed action, as a procedural, practical, and constitutional matter. (Fourth and Fifth Amendments) and Staggers Rail Act of 1980.

The City of Brookings and Railco provide no new information explaining why the Brookings Alternative B-2 is not reasonable, feasible, or prudent as the "Environmentally preferred alternative." Nor does the City and Railco address the substantial positive environmental attributes listed by the STB for B-2. Their proposal is nothing more than political not-in-my-backyard reasoning to shift their unsubstantiated DM&E risk perspectives onto others in an already safe physical and human environment. In *Metropolitan Edison* the Supreme Court advanced as the central purpose of NEPA the balancing of technological advances against the resulting alterations in the physical environment. The Court directed that agency resources be devoted to the assigned function of that agency and not to the consideration of the broader policy question regarding whether the achievement brought forth by DM&E's technological advances are worth the perceived risks, as implied by STB in its Brookings alternatives.

Their 8.5-mile bypass proposal does not in anyway respond directly to the STB's request for comment on Brookings Alternative B-4 (a disputable presumption). Nor do they practice STB's in-City negotiation suggestion. Instead they attempt to practice

extortion and demand unconstitutional loss of private rights and property of DM&E. Not only of DM&E but of many City and County citizens also, through the imposition of "Noxious Use" and eminent domain, for example. A social justice issue as to who must bear the burden of a STB alternative B-4, a "disputable presumption." There is a clear pattern of deception here by the City and Railco to deprived Brookings County persons of private rights and private property in an already safe physical and human environment. *Save Our Ten Acres v. Kreger* 472 F.2d 463 3 ELR 2004 (5th Cir. 1973).

The City of Brookings Council's and Railco's 8.5-mile railroad bypass construction request fails to meet NEPA requirements for private projects, because it is a taxpayer project. They show no material error on the part of DM&E, new evidence, or substantially changed circumstances by DM&E, and no "abandonment" application. The broad language of NEPA applies differently to privately financed projects than government (taxpayer) railroad rights-of-way projects, such as STB alternative B-4 and the 8.5-mile bypass. *Scientists' Inst. for Pub. Information Inc. v. AEC*, 481 F.2d 1079 (D. C. Cir. 1973).

The City and Railco's request for railroad rights-of-way construction of their so-called 8.5-mile bypass is an independent government (taxpayer) permit request to the STB, and they must obtain a STB permit and final EIS approval before going forward. For example, just as a major pipeline company must obtain rights-of-away permits prior to construction. Courts have characterized the granting of federal permits for government taxpayer funded projects as "major federal actions" that trigger NEPA requirements. See generally Mandelker, *NEPA Law and Litigation*, Sec. 8:16 (1984). Thus, granting them a federal permit for their taxpayer 8.5-mile rights-of-way bypass construction constitutes sufficient 'federal action' to trigger NEPA's EIS requirements for their taxpayer project. It is in fact a request for 'noxious use' in "green havens." *Sierra Club v. Morton*, 514 F.2d 856, 870-072 (D.C. Cir. 1975) and Hippler, Thomas, A., *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine*, Boston College Environmental Law Review, Vol. 14, p653-727, 1987.

In addition, necessary loan guarantees and/or direct federal assistance for STB alternative B-4 or to Railco and the City of Brookings sufficiently 'federalizes' this project so as to initiate NEPA obligations. Such as loans or guarantees from the Federal Highway Administration, the U. S. Department of Agriculture (USDA), or the Department of Transportation. According to DOT NEPA policy, STB alternative B-4 and the City's 8.5-mile railroad bypass position to alternative to B-4, affect many historic natural monument lands. Those many "green haven" lands (physical environments) are financed by the U.S. Department of Agriculture's Natural Resource Conservation Service and the Farm Service Administration, and the U. S. Fish and Wildlife Service are now named farms, wetlands, highly erodible soils, human developed parklands, recreational areas, and wildlife and waterfowl refuges.

Approval by STB of Brookings alternative B-4 and/or City of Brookings 8.5-mile railroad bypass constitutes interference with Congressional policy decisions already implemented in Brookings City and County by many other federal, state, and local

agencies with "green haven" property owners. NEPA cannot be used as a means of resolving private rights and private property decisions, regarding Congressional, policy under the guise of assessment of physical environmental impacts associated with DM&E's permit request. DOT NEPA policy, and Presidential Executive Order 12630, March 15, 1988.

DOT NEPA policy prevents STB alternative B-4 and the 8.5-mile bypass from being constructed, and "quotes the U. S. Supreme Court in the Overland Park case, as follows:

The very existence of the statute indicates that the protection of parklands was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or cost to community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to be given any meaning the Secretary cannot approve the destruction of parkland unless he finds the alternative presents unique problems."

Neither the STB, City of Brookings, or Railco have shown STB's Brookings alternative B-2 to be unusual, present any unique problems, or have particular cost of extraordinary magnitude to the City of Brookings resulting from approval of STB alternative B-2, as the environmentally preferred alternative. In other words, they show no "injury in fact."

Before becoming STB alternative B-4 or 8.5-mile bypass railroad operators, the City and Railco must assess the viability of their railroad bypass, establish division of rates with connecting carriers, obtain adequate financing, and "follow other good business practices." None these procedures have been followed. Nor have they dealt with regulatory issues of the Federal Railroad Administration (FRA) and the Railroad Retirement Board (RRB), or the Energy Policy and Conservation Act, and the National Historic Preservation Act.

City of Brookings and Railco's proposed 8.5-mile rail bypass construction has no relevance to DM&E's private practical decision for construction into the Powder River Basin. Who has made a costly economic commitment to implementing upgrading its railroad technology in and through Brookings in relation to the Powder River Basin Expansion Project. It is not reasonable for STB in reviewing DM&E's rights-of-way request in the Powder River Basin to insist that the company unreasonably "abandon" its historic Brookings B-2 railroad rights-of-way. Just because the City of Brookings and Railco prefer to build and operate independently, a new taxpayer 8.5-mile railroad bypass, purely for their economic, political, and unconstitutional purposes.

NEPA properly requires that federal officials include a cost-benefit analysis in City of Brookings and Railco's 8.5-mile bypass EIS so that federal officials can evaluate the cost of impacts to taxpayer-financed projects. The 8.5-mile bypass is a taxpayer-financed project. See "City Position." and NEPA Sec. 102(2)(B), 42 U.S.C. Sec. 4332(2)(B). Since DM&E has already committed itself to private financing of its entire project under NEPA, it is not required to demonstrate how its money will be spent before

STB grants its permit. As such, the City of Brookings and Railco taxpayer railroad bypass construction project permit requirements cannot be commingled with the DM&E's Powder River Basin Expansion rights-of-way permit EIS alternatives. Further, NEPA regulations do not condition permit issuance on consideration and implementation of off-site mitigation measures, such as STB alternative B-4. *Robertson v. Methow Valley Citizens Council* No. 87-1703 (U.S. May 1, 1989) and *Metropolitan Edison v. People against Nuclear Energy*, 400 U.S. 766, 13 ELR 20515 (1983).

To do so substantially changes reasonable circumstances. Thereby opening DM&E to abusive legal attacks by the State, City, Railco, and others. See "City Position." For example, using the cause of action provided by NEPA and the Administrative Procedures Act (APA), economic competitors, such as the City of Brookings, Railco, and others could use NEPA as a means to delay or scuttle the DM&E Powder River Basin project. They would erode DM&E's competitive position. The City of Brookings and Railco have shown they are more interested in discriminatory and abusive economic and legal impact the 8.5-mile bypass would have on the DM&E rights-of-way than on any Powder River Basin Expansion rights-of-way permit environmental impacts. See "City Position." The same holds true for STB alternative B-4. As the old saying goes, enough is enough. The DM&E provided to all a reasonable and sensible explanation for its permit request.

The City and Railco's position, if employed, makes DM&E's in and through City rights-of-way a manifestly marginal line. *Illinois Commerce Commission and Patrick W. Simmons, v. Association of American Railroads, Rails to Trails Conservancy, and Iowa Trails Council, et al*, 848 F.2d 1246, 270 (U.S. App. D.C. 1988). The City and Railco's position requires unreasonable unconstitutional irretrievable commitment of DM&E's private rights-of-way resources for conversion into common resource property, i.e., taxpayer property, without precedent. Instead of applying for a STB permit for the City, they require DM&E to file for in and through City railroad rights-of-way "abandonment" without factual predicate, a violation of law. It is well settled that regulatory "takings" may be effected by government appropriation or physical invasion of private property, but also by use restrictions. That is not negotiation, but extortion. Presidential Executive Order 12630 March 15, 1988-Governmental Actions and Interference With Constitutionally Protected Property Rights.

Mr. Dana L. Nelson, Office of the Governor, State of South Dakota, pushed for the City and Railco's 8.5-mile bypass position in his November 14, 2000 statement to the STB Brookings Hearing. Under these State/City proposed forced "abandonment" circumstances, states are clearly expected to initiate preservation of rail lines for 'highways, other forms of mass transportation, conservation, energy production or transmission, or recreation' under the 'Sale for Public Purposes' provisions that Congress enacted. 49 U.S.C. 10906 (1982). There is a formidable array of responsibilities for states to carry out that need to be addressed in any negotiations with the DM&E. Neither the State, City, or Railco have negotiated any aspect of these with DM&E. For example, rail "abandonment" in Brookings on local communities surrounding Brookings, mostly

rural in nature. Forced arbitrary negotiation ("regulatory taking") is no substitute for analysis that Congress expressly requires.

Based on analysis of NEPA's intended purpose, EIS's prepared for private projects are more limited in scope than those prepared for tax payer (City) projects. The 8.5-mile bypass project is a publicly (taxpayer) financed project. As such, it requires STB to tailor a new EIS to that taxpayer specific B-4 or 8.5-mile project and the special characteristics of public projects that require an environmental cost/benefits analysis based on appropriate qualitative amenities and values. 40 C.F.R. 1502.23. Also an extensive evaluation of tax payer alternative actions, including direct and indirect environmental effects, potential mitigation measures, and analysis of alternative actions and their environmental impacts, and an evaluation of the environmental 'costs' of the City's and Railco's proposed 8.5-mile bypass. STB should not stray from analysis of the alternative B-4 or City proposed 8.5-mile bypass environmental impacts into NEPA analysis of economics of DM&E's exclusive project. Commitment of private funds to the Powder River Basin project cannot be second-guessed by federal officials, under the auspices of NEPA.

DM&E is embarked on a technological expansion into the Powder River Basin, an extremely expensive project. It is in no position to uproot its project and change plans in mid-stream and be forced to adopt the City's and Railco's 'new railroad rights-of-way construction approach' involving requirements that change the nature (underlying need) of the project and are beyond DM&E's economic resources. *Lake Erie v. Army Corps of Engineers*, 526 F. Supp. at 1069. The goal of STB's DM&E EIS is simply to inform federal permitting authorities of the ramifications of the DM&E project, thereby, enabling the decision maker to go forward with full knowledge of potential physical environmental impacts. This procedure is consistent with the traditional understanding of alternative analysis required by the NEPA. *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972).

NEPA grants STB authority to consider the physical environmental effects of their proposed permitting action. However, it is well settled under NEPA that STB may not order a private action (DM&E's) to be postponed. To enable subsequent City of Brookings and Railco STB permit and NEPA compliance for their new taxpayer 8.5-mile railroad rights-of-way-construction project. Their tax payer construction project is outside the underlying need of the DM&E Powder River Basin Expansion project. 42 U.S.C. 4371(c)(2) and *Natural Resources Defense Council, Inc. v. EPA*, 822 F.2d 104, 128 (D.C. Cir. 1987). The City's and Railco's 8.5-mile new taxpayer rights-of-way construction will cause ("affect") irreversible changes in the physical environment, and irretrievably commit natural resources not within the DM&E permit project. *Hanley v. Kleindienst*, 471 F.2d 823, 836 (2nd Cir. 1972) and Presidential Executive Order 12630, March 15, 1988.

STB alternative B-4 and the City and Railco's 8.5-mile railroad bypass at Brookings effects unreasonably the safety, health, and welfare of Brookings County rural life and its commuters. The quality of rural and commuter life in Brookings County will

be unreasonably affected and is within NEPA's scope, because the physical environment effects interact with socio-economic effects in a rural and commuter setting. There is no bright line between effects of changes in the physical environment the quality of rural life and socio-economic effects. With the 8.5-mile or B-4 bypass there will be less safety, more noise, greater traffic congestion, increased hazards from least four road-rail crossings, open it to additional and new crime, damage flood plains and wetlands, loose historic short-stemmed grasslands, and cause unreasonable erosion of "highly erodable soils." It intrudes with a "noxious use" into already safe physical environment's natural monuments (green havens), wildlife and their habitat, expansion of urban areas and business site and offsite pollution, reduction of access to green havens, farms and ranches. *Waterbury Action to Conserve Our Heritage, Inc. v. Harris*, 603 F.2d 310, 327 (2nd Cir.) 444 U.S. 905 (1979), DOT 5610.1C, Attachment 2 page 6&7, and others.

The City and Railco's 8.5-mile railroad bypass permit action cannot be reasonably seen as a supplement to the DM&E EIS. First, the STB, City, and Railco's proposed bypass actions are significant and substantial changes outside the underlying need of the original DM&E Powder River Basin Expansion Project construction permit request and they bring no new information to the STB EIS. Instead it is a new taxpayer STB permitting project. Second, STB would be acting arbitrarily and capriciously by not requiring the City to obtain an STB permit, and STB subsequently prepare a separate EIS on the construction permit for the new tax payer 8.5-mile bypass proposed by the City of Brookings and Railco. *Aberdeen & Rockfish Railroad Co. v. Students Challenging Regulatory Agency Procedure (SCRAP II)*, 422 U.S. 5 ELR 20418 (1975), *Staggers Rail Act of 1980*, and 49 CFR 1105.

STB alternative B-4 and proposed 8.5-mile bypass are seriously different pictures of the environment impacts from that DM&E originally envisioned in order to require preparation of the STB/DM&E EIS. It creates imposition of a new railroad rights-of-way permit request on a local governmental entity using taxpayer money. DM&E, a private corporation, has not purchased, proposed, or previously been granted nor requested such new railroad rights-of-way. Thus, such a requirement by STB on DM&E is arbitrary and capricious. The burden is on the City of Brookings and Railco to request the rights-of-way construction permit for their new tax payer 8.5-mile bypass from the STB, and for STB to prepare a new EIS on this newly proposed taxpayer rights-of-way construction.

The City and Railco's 8.5-mile bypass does not qualify for an exemption from statutory and regulatory procedures, including those for interstate rail commerce. The City's position statements are not reasonable operational explanations for its demand that DM&E must arbitrarily "abandon" its private railroad rights-of-way in and through the City in favor of unlawful conversion to taxpayer common resource property. Such abandonment of private property and private rights is an abuse of limited governmental power, and in the case of Railco, an abuse of market power. Fifth Amendment's Taking Clause. See also RS20493 House Judiciary Committee Reports H.R. 2372, March 10, 2000, CRS. These trackage rights are being unlawfully sought/acquired by the City and Railco enabling them to raise or change rates on both the old route in-City and the new 8.5-mile bypass route, creating barriers to interstate trade. Thereby depriving DM&E of

its rightful place in the local marketplace. They have not considered the operational requirements of other Federal agencies, such as the Federal Railroad Administration or the Railroad Retirement Board.

Also, there is the issue of the lawful protection of railroad employee interest. 49 U.S.C. 10505(g) mandates the standard labor protections adopted by the federal government in those cases where railroad rights-of-way "abandonment" occurs, as in the City and Railco's demand for DM&E's "abandonment" of its in and through City rights-of-ways. Their newly proposed railroad bypass construction undermines the legitimate interests of both employee's and DM&E's private rights and property.

The Staggers Rail Act of 1980 (Staggers Act) together with the Interstate Commerce Commission (ICC), STB's predecessor, gives STB an increased role in the market place, the current regulatory scheme governing railroad abandonments, and acquisitions to balance these competing considerations. However, the DM&E has not filed for abandonment of its rights-of-way in and through the City of Brookings. As a result, the Brookings City Council and Railco November 14, 2000 position statements to the STB are misleading and deceptive. Both those entities would have us believe that they are negotiating in good faith. To the contrary, they apparently don't understand the definition of negotiation. "Negotiation is the process of submission and consideration of offers until acceptable offer is made and accepted." *Gainey v. Brotherhood of Ry. and Clerks, Freight Handlers, Exp. & Station Emp.*, D.C. Pa. 275 F. Supp. 292, 300—Black's Law Dictionary.

Along with that definition goes the performance requirements of good faith, accommodation, and adjustment. Unfortunately the Brookings City Council and Railco demand unreasonable concessions which DM&E cannot consent to, because it would require it to place itself in legal and economic jeopardy. Note that the "City of Brookings" November 14, 2000 statement to the STB contains significantly different negotiating positions than those actually discussed with DM&E. Only those City positions in Enclosure 1 have been actually discussed with DM&E. See Enclosures 1 and 2. Enclosure 2 was not seen by DM&E until 1500, November 15, 2000, after the State's, City's, and Railco's statements were made to the STB Hearing Officer, November 14, 2000.

While the State, City of Brookings, and Railco complain to STB about DM&E's lawful position, they continue to demand the DM&E place itself in legal and economic jeopardy. See both sets of City positions. They fail deliberately to recognize their own operational DOT, STB, and NEPA requirements. The need for a new STB taxpayer railroad rights-of-way construction permit and a STB EIS on that taxpayer project.

DM&E's "System Diagram Map" shows that it does not intend to abandon the rights-of-way of its alternative B-2 main line in and through the City of Brookings. It has not identified any rail line in the City for which it expects to file an abandonment application within the next three years, nor does it consider its in and through Brookings railroad to be potential candidates for abandonment. 49 U.S.C. 10903(c)(2) and 49 CFR

1152.10-13. DM&E has not filed a 'Notice of Intent' to abandon its alternative B-2 rights-of-way in and through the City of Brookings. It has not published any "abandonment" notice in general circulation newspapers in Brookings County. Nor has it sent to any shipper on the line, or to any State agency responsible for rail transportation planning, nor posted such a 'Notice' on any station or terminal on the DM&E line through Brookings. In addition, DM&E did not request any "exemption" from normal "abandonment" procedures.

The City and Railco's through its so-called negotiations unreasonably attempt to cause irretrievable and irreparable harm to DM&E, rural persons and their property, and prevail on the lack of merit. Their stated intentions demonstrate they are financially irresponsible in seeking to force DM&E to abandon its alternative B-2 rights-of-way to the City, and cannot meet the requirements of the Staggers Rail Act of 1980, as amended. Labor issues are a significant part of any permit request and must be crafted differently for a new taxpayer 8.5-mile railroad line. Even if a new taxpayer 8.5-mile bypass or STB alternative B-4 railroad line is permitted, DM&E is not obligated to use it.

It is well settled that regulatory "takings" may be effected not only by government appropriations or physical invasion of private property, but by use restrictions as well. Use restrictions, such as those proposed by STB and the City of Brookings, have a sufficiently severe impact on certain private property's economic use. If courts find that 'taking' has occurred the regulating government must pay compensation. "Taking" challenges to local government action may be brought in state or federal court. Given the content of this STB EIS and the City's position, STB must develop how, when, which private properties they intend to "take," and under what circumstances for both STB's Alternative B-4 and the 8.5-mile Brookings bypasses rights-of-way in the DM&E Powder River Basin Final EIS. "Tucker Act" and 28 U.S.C. 1500, and Presidential Executive Order 12630, March 15, 1988.

CONCLUSION: "The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." That said, STB Brookings Alternative B-2 is the environmentally preferred alternative, not B-4 or the City and Railco's substitute 8.5-mile Brookings railroad bypass, because physical environment-wise Brookings Alternative B-2 is the most feasible, prudent, and reasonable with the underlying need of DM&E's Powder River Basin Expansion Project.

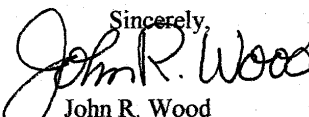
The underlying need of the DM&E Powder River Expansion Project is to provide more timely operationally integrated economic capacity for its railroad, in order to continue servicing its predominantly agricultural and in-City rights-of-way that do not provide sufficient long-term revenue for competitive maintenance and operation of the current railroad. Contrary-wise, with the City/Railco's speculative alternative 8.5-mile bypass, they seek politically and economically to place "Noxious Use" in a new physical environment such that they can exercise "regulatory taking" in an already safe physical environment.

The City of Brookings and Railco demand for a new taxpayer financed 8.5-mile bypass "alternative" in place of the STB's Brookings Alternative B-4 is an arbitrary and unreasonable proposal, outside the "nature" (underlying need) of the DM&E Powder River Expansion Project. In particular, the City and Railco's (a private political and economic corporation) demand arbitrary and capricious imposition of "inverse condemnation" of DM&E's private property as well property of others not in accordance with law and precedent. In other words, "regulatory taking."

The City unreasonably conditions its two printed "positions" with 11 unilateral demands, all in conflict with statute and precedent, an improper public purpose. In effect, "an out-and-out plan of extortion." Whereby, the in and through City DM&E private historic rights-of-way would arbitrarily fall under operational control of the City to cause private rail traffic to fall into desuetude and deny/deprive other City and County citizens their constitutional private rights and property already in a safe physical environment. As will STB's Brookings Alternative B-4.

The STB Brookings Alternative B-4 and the City of Brookings and Railco's proposed 8.5-mile "position" must be rejected out-of-hand as operationally, environmentally, unconstitutional, and unreasonable on their face. Operationally, they intend to permit "noxious use" and permit plundering in and of an already safe green haven environment in order to convert productive private property into common resource property without benefit of law. The most feasible, prudent, and reasonable Brookings alternative is STB's Brookings Alternative B-2 that minimizes harm to the Brookings physical environment and its protected areas.

Thank you very much.

Sincerely,

John R. Wood

Encl: 2

Rec. City Hall
0930 11/13/2006 JRW

Enclosure No. 1
Page 1-2

City of Brookings' position on the most recent proposal by the DM&E

Background

The City of Brookings was pleased to receive the Surface Transportation Board's Draft Environmental Impact Statement (DEIS). The City and Governor Janklow supported the Dakota, Minnesota & Eastern Railroad Corporation's (DM&E) original application. However, support was conditioned with a bypass proposal submitted to the STB after consideration of the negative impacts of coal trains passing through the city in comparison to an alternate route through a rural, less populated area. The DEIS agreed by ruling that a bypass was preferred (Alternative B-4). That bypass would serve all traffic except service to local industries.

The DEIS states that as an alternative to its unilaterally imposing mitigation measures on the DM&E that agreements should be negotiated. And, if the DM&E submits negotiated agreements the Board would require compliance with those agreements in the final decision approving the project. The agreements would supersede any conditions that the STB would impose. This allows local decisions and streamlines the process. This procedure is stressed in the DEIS. See excerpt attached.

Just prior to the DEIS publication, RailCo proposed an alternative bypass route that would reduce the impacts of B-4 on the rural, less populated area. At this time the Citizens Against a Brookings Bypass "reluctantly agrees" with the RailCo plan. The City sees benefit in the RailCo alignment. The DM&E desires to use the RailCo agreement to force the City of Brookings into removing its original bypass proposal from consideration by the STB.

The DM&E Latest Proposal

1. In exchange for the City's removal of the original bypass proposal before the STB and the City's statement that there was no basis for the bypass, the DM&E will approve:
 - a) A Community Partnership Agreement that outlines mitigation measures that will be completed by the DM&E for the in-city route. This offer is less than offered in 1999 and early 2000.
 - b) One year for the City to plan a bypass. During that year the City can take the offer of \$8.4 million from the DM&E for the construction of a bypass that is estimated to cost \$26 million. This bypass agreement requires construction and ownership of the bypass by a RR Authority, not the DM&E. It allows the DM&E to continue to utilize the in-city tracks with some restrictions.
2. The DM&E threatens that if the City does not enter into this latest agreement that mitigation offers will be withdrawn and the RailCo proposal will be dropped, leaving mitigation to be at the expense of the City.

The procedure and offer proposed by the DM&E is flawed. The City of Brookings desires to come to an agreement about a bypass and submit that agreement to the STB for

inclusion in the final order, just as the STB has requested. Mr. Schieffer stated that he will strongly oppose the 16-mile bypass and then presented the City with his proposal. The "negotiations" were limited to clarifying the documents. There were no real negotiations; there was a unilateral proposal that evades the STB's proposed process. The City of Brookings does not plan to depart from the process suggested by the STB believing it could lead to a viable bypass option, acceptable to all parties involved. If no agreement is reached with the DM&E, the City will make its case to the STB and ask that it impose mitigation measures (the RailCo alignment) on the DM&E.

The City Position

1. The recent proposal is new and the public must have a chance to review and make comment. The DM&E and the public are invited to make comments to the City Council on Monday, November 6, 2000 at 7:00 P.M.
2. The City of Brookings is unique in comparison to the many communities on the DM&E expansion route. The City applauds the DM&E's work with other communities and landowners during the project development the regulatory process, but we have not reached resolution in Brookings because it is unique and different mitigation methods are required.
3. The DM&E must have ownership and more financial responsibility for a bypass. This project is of benefit to the Railroad and mitigation of negative effects should not be a financial burden to the citizens of any one community.
4. The DM&E must give greater control of the in-city route to the City. If a bypass is constructed it should be used as much as possible. The bypass is to be created to reduce negative environmental impacts by moving rail traffic to a less populated area. The in-city route should be used for local shippers only - as the DEIS suggests. Cost savings for the DM&E could be realized by not having to upgrade the in-city line. The City proposed to take ownership of the in-city line and make arrangements for local industries to be served by the DM&E.
5. The City will not remove B-4 unless a different alignment is submitted to the STB by the City or a City/DM&E agreement.
6. The City desires to have further discussions with CABB about the RailCo route.
7. The City understands that it has some responsibility for a bypass. The City is prepared to provide \$4 million towards the funding of a bypass. The City expects \$4.3 million from the State. This totals to a local effort of \$8.3 million.
8. Because this expenditure could be blocked by a referendum, the City expects that the DM&E will provide for an alternative of in-city mitigation funded by the DM&E as proposed in 1999. A provision similar to this would be requested of the STB if no agreement can be reached with the DM&E.
9. While the City understands that there are STB hearings scheduled for November, it is also understood that the comment period in the STB process ends in January, not November, and a meaningful dialogue can be held until that time.
10. At this time the City is unsupportive of the November 1, 2000 DM&E proposal, but encourages public input at its meeting on November 6, 2000.
11. The City requests that the DM&E enter into true negotiations with the City, not the presentation of "bottom-line" proposals with unrealistic timeframes.

Enclosure No. 2
Page 1-5

The City of Brookings
Statement to the Surface Transportation Board (STB)
November 14, 2000
Michael Williams, City Manager

Good afternoon. My name is Michael Williams and I am the City Manager of the City of Brookings, South Dakota. Welcome to Brookings and thank you for the opportunity to be heard. My comments represent the City Council's position on the Dakota, Minnesota & Eastern Railroad Corporation's (DM&E) construction application (STB Finance Docket No. 33407). The Mayor and City Council are present. They are: Mayor Virgil Herriott and Councilpersons Bill Davidson, Nate Bibby, Tom Bozied, Keri Weems, Sam Artz, and Mike McClemons.

The DM&E expansion project is of huge concern to the Brookings community. The project has caused an uncomfortable and often heated debate. An uncomfortable and heated debate has occurred because the project is a good project in so many ways and the DM&E is one of our corporate citizens; but its proposed expansion will dramatically harm this community if it is allowed to proceed as requested in the DM&E's application.

I want to thank you for your process that allowed the submission of bypass proposals. This was an important step by the STB. The City and Governor Janklow supported the original DM&E application. However, support was conditioned upon a bypass proposal submitted to the STB after consideration of the negative impacts of coal trains passing through the city in comparison to an alternate route through a rural, less populated area. The City of Brookings was pleased to receive the Surface Transportation Board's Draft Environmental Impact Statement (DEIS). The DEIS agreed with the City by preferring a bypass (Alternative B-4) that would serve all traffic except service to local industries.

The DEIS properly stated that the use of the existing rail line through the City of Brookings would cause negative impacts from the construction and operation of the rebuilt railroad. A change from 3 slow moving trains a day to 37 high speed trains a day will have a dramatic effect on this City. Traffic delays, possibly emergency vehicle traffic, would certainly occur. The current right-of-way severs the City so that travel to nearby schools, medical facilities, commercial districts, and other public facilities will be difficult and less safe. Brookings has six at-grade crossings and the additional train traffic increases the probability of train/pedestrian and train/car collisions. In addition to the traffic delays and decreased safety, Brookings people would be subjected to decreased air quality and unacceptable levels of noise and vibration. The DM&E rail line runs through our commercial districts, a commercial historic district and a large residential area. There are 347 homes within 300 feet of the existing railroad right-of-way and many of these homes are directly adjacent to the right-of-way. Increasing the number of trains on the existing right-of-way simply harms too many people.

The 14.5-mile bypass suggested by the State of South Dakota and the City of Brookings mitigates the negative environmental impacts of the route through the residential and commercial areas of Brookings. The B-4 bypass route also causes some negative environmental impacts, but effects less residences, less people, less traffic, and less public areas. The City followed the STB's Notice of April 14, 1999, and demonstrated that the bypass proposal was "reasonable and

feasible” and did not “simply shift the potential environmental consequences of the applicant’s proposal to different communities and populations.” Further, the City demonstrated that the bypass did not add miles that would make it “unlikely to allow applicant to achieve its goal of providing efficient rail transportation.” Again, the DEIS agrees with that analysis.

However, the DEIS also states that as an alternative to its unilaterally imposing mitigation measures on the DM&E, that agreements should be negotiated. And, if the DM&E submits negotiated agreements the Board would require compliance with those agreements in the final decision approving the project. These agreements would supersede any conditions that the STB would impose. Specifically the DEIS states:

DEIS, Volume IV, Chapter 7, Section 7.4, Role of Communities in Developing Environmental Measures and Bypass Proposals

“Throughout the project, SEA worked closely with affected communities to understand their environmental concerns and facilitate their participation in the environmental review process. As discussed in Chapter 1 and Appendix C, “Scoping and Outreach Materials,” SEA’s outreach efforts were extensive. To respond to concerns raised by this effort, SEA conducted site visits to collect data, assess first-hand the potential environmental impacts the project would have on particular communities, conduct additional studies, and report back to the communities on the status of environmental review.

SEA’s list of recommended environmental mitigation measures reflect the communities’ inputs and concerns. As part of this dialogue, SEA encouraged communities to offer suggestions for mitigation and bypass proposals. Specifically, on January 6, 1999, the City of Rochester, Minnesota (Rochester), requested SEA consider a southern bypass corridor as an alternative to DM&E’s proposed plan to rehabilitate its existing rail line and operate additional rail traffic, primarily coal trains, through Rochester. SEA sought additional information to assist it in determining whether Rochester’s bypass proposal is a reasonable and feasible alternative designed to meet the purpose and need expressed in DM&E’s proposal before the Board. To provide the same opportunity to other interested communities, SEA issued an April 20, 1999 Notice to the Parties providing time frames in which bypass proposals could be submitted, as certain communities had requested. Three other communities (Owatonna, Minnesota and Pierre and Brookings, South Dakota) concerned about proposed traffic increases on DM&E’s existing system submitted alternative bypass proposals that would divert traffic from the communities. Subsequently, Owatonna withdrew its bypass proposal. In the Draft EIS, SEA has concluded that the Rochester and Brookings bypass proposals are reasonable and feasible alternatives, warranting detailed environmental analysis in this document. Upon close examination, SEA has concluded that the Pierre bypass does not appear to be reasonable and feasible.

SEA also encouraged DM&E to communicate with concerned residents and affected communities and use community input to develop voluntary mitigation and negotiated agreements to address community concerns. Often, negotiated agreements can result in more far-reaching mitigation for communities than mitigation the Board could unilaterally impose.”

DEIS, Volume IV, Chapter 7, Section 7.5, Negotiated Agreements

“As an alternative to the mitigation that the Board would unilaterally impose on DM&E (notwithstanding mitigation required by other Federal regulatory agencies that may have jurisdiction over potentially affected resources), SEA has encouraged DM&E to negotiate mutually acceptable agreements with affected communities and other governmental entities to address potential environmental impacts, including ways to share costs associated with project-related environmental mitigation measures. Negotiated Agreements could be with neighborhoods, communities, counties, cities, regional coalitions, states and other entities. If DM&E submits any negotiated agreements with communities or other entities to the Board, the Board would then

require compliance with the terms of any such agreements as environmental conditions in any final decision approving the proposed PRB Expansion Project. These negotiated agreements would supersede any environmental conditions for that particular community or other entity that the Board would otherwise impose.”

The City of Brookings believed that this process would allow local decisions, a streamlined process, and a better conclusion for everyone.

So, in an effort to compromise and continue to support the DM&E project the City of Brookings, with the assistance of the State of South Dakota and a committee of the State Chamber of Commerce (RailCo), negotiated with the DM&E and explored alternative routes for a bypass. The reason for this exploration was to design a bypass that effected even less people, even less land, and utilized public right-of-way and State and City owned lands as much as possible. This process was successful in identifying an alternative bypass route that is only 8 miles long and traverses adjacent to the Highway 14 Bypass, through State and City owned land, and through many less private property owners and road crossings than the bypass originally submitted. The shorter bypass is also less expensive to build and only slightly longer than the in-city route.

The DM&E had discussions with the Citizens Against a Brookings Bypass (CABB) and RailCo contacted property owners that would be crossed by the shorter bypass. CABB has stated that it “reluctantly agrees” with the RailCo plan, but still prefers the in-city route.

The shortened bypass is estimated to cost \$26 million. The DM&E was willing to contribute \$8.3 million towards the construction of the shortened bypass and then only if another entity submitted a separate application for construction and built and owned the new line itself. The DM&E offer left a huge gap in funding that the City is unable to fill. Also, the City of Brookings does not desire to depart from the process suggested by the STB believing it could lead to a viable bypass option, acceptable to all parties involved. The DM&E would not agree to this process or adequate funding of the bypass. So, no agreement that could be submitted to the STB for inclusion in the final order (as the STB suggested) has been reached. The City of Brookings will continue discussions with the DM&E in hopes of coming to an agreement. *However, at this time the City has no option but to petition the STB to impose mitigation on the DM&E in the form of a shortened bypass according to the most recent plan as described in attachment one.*

The City of Brookings is committed to engaging in negotiations with affected landowners and nearby landowners in an attempt to choose the route of least impact. The City is committed to cooperating in any environmental assessment that needs to be completed on the shortened bypass and asks for guidance from the STB in this regard. However, it is obvious that the shortened route has far less impact than the 14.5-mile bypass.

The shortened bypass proposal is a more “reasonable and feasible alternative” for the DM&E and causes less environmental consequences of both the in-city route and the 14.5-mile route. The long bypass proposal met the “reasonable and feasible” test, so the shortened version will certainly meet this test. While this shortened bypass proposal is a version of the B-3/B-4 alternative, the City is willing to conduct further analysis as required by the STB so that the

environmental review process moves forward without undue delay. The information could be the same as that ordered in the STB Notice that allowed the submission of bypass proposals.

30163 Service Date – April 20, 1999

“... any bypass proposal submitted by a community must, at a minimum, contain the following information: detailed maps showing where the route would be located; quantified impacts to wetlands; cut and fill requirements to permit design and operation of a railroad; roads that would be crossed and their average daily traffic levels; proximity of the bypass to sensitive structures (for example, schools, libraries, hospitals, residences, retirement communities, and nursing homes); and impacts to landowners and farmlands.

Also, in considering bypass proposals that may be submitted to the Board and determining whether they constitute reasonable, feasible alternatives, we will take into account the applicant's goal to create a more efficient route by which to transport coal. A circuitous route that bypasses numerous communities could add so many additional miles that it would be unlikely to allow applicant to achieve its goal of providing efficient rail transportation.”

The State is willing to fund the cost of right-of-way purchases adjacent to the Highway 14 bypass and to fund the Interstate 29 grade separation crossing. The State's contribution is estimated at \$4.5 million. The City of Brookings is willing to provide \$4 million to the project and anticipates utilizing these funds, in part, for right-of-way acquisitions because the City is committed to fairly compensating affected landowners and assisting the DM&E in acquisitions. The State and the City contributions equate to a local effort of \$8.5 million. This is a very large commitment from the City and illustrates its strong support and genuine belief that a bypass is absolutely necessary for mitigating the adverse impacts of the DM&E expansion project. However, in South Dakota any local government expenditure can be stopped by referendum. To cover the unlikely event of an unsuccessful referendum the City requests that the STB make a contingency order that would provide mitigation without the \$4 million City contribution. While undesirable and unlikely, an unsuccessful referendum would cause the Council to advocate for complete mitigation of the in-city route impacts. The City requests that this “back-up mitigation plan” be the same as offered by the DM&E to the City of Brookings in October/November of 2000 with the exception of complete funding of an overpass when traffic reaches 40 NMT.

Summary

The City Council has held many public hearings and public meetings and negotiations with the DM&E on the DM&E expansion project for the last two years. The DM&E and other engineers and architects have analyzed the bypass routes. These hearings, meetings, negotiations, and diligent study are the basis for the City of Brookings position on the DM&E expansion.

1. The City of Brookings remains supportive of the overall project with that support conditioned upon the construction of a bypass around the community thereby mitigating the many negative impacts to the residents, not only of the area immediately adjacent to the tracks, but the entire community.
2. The City of Brookings is unique in comparison to the many communities on the DM&E expansion route. The DM&E has reached agreement with other communities and landowners during the project development and the regulatory process, but we have not

reached resolution in Brookings because it is unique and different mitigation methods are required. The Surface Transportation Board's DEIS properly demonstrated a preference for a bypass around the City of Brookings.

3. The DM&E must have ownership and more financial responsibility for a bypass. This project is of benefit to the Railroad and mitigation of negative effects should not be an undue financial burden to the citizens of any one community. The DM&E asserts that it has made generous mitigation offers to communities, more than any railroad in history, and this philosophy should be carried through for the City of Brookings. It must be recognized that Brookings is in need of different mitigation methods because of the physical arrangement of the City and the DM&E should be responsible for most of the costs.
4. The DM&E should have limited use of the in-city route. The bypass should be used as much as possible. The bypass should be constructed to reduce negative environmental impacts by moving most rail traffic to a less populated area. The in-city route should be used for local shippers only - as the DEIS suggests.
5. The City will conduct further review of the proposed shortened bypass, but argues that the shortened bypass is clearly a "reasonable and feasible" route, clearly a more "reasonable and feasible" route than the long bypass and clearly a route that negatively affects far less people than both the in-city route and the long bypass. The City requests that the STB order the construction of the shortened bypass route as mitigation.
6. The City will engage in further dialogue with effected landowners and the CABB about the proposed shortened route.
7. The City offers up to \$4 million towards the funding of a bypass. This is a large amount for the City of Brookings. The City also expects approximately \$4.5 million from the State. This totals to a local effort of \$8.5 million.
8. Because the City expenditure could be blocked by a referendum, the City requests that the STB order a contingency plan of in-city mitigation funded by the DM&E as proposed by the DM&E in October/November of 2000. The difference in this plan and of that requested by the City is the full funding by the DM&E of an overpass upon reaching a traffic level of 40 NMT. A copy of this mitigation proposal is attached.
9. The City will continue to have a dialogue with the DM&E.
10. The City will further refine its position and submit a filing to the STB before the DEIS comment period expires. I request that the STB provide the City with some guidance in proceeding with this shortened bypass proposal. The City wants to follow proper procedures and provide the necessary information for the STB to properly consider the shortened bypass.

Again, thank you for your serious consideration of the necessity of a bypass for Brookings. It is critical mitigation. Thank you.