

206465

RICHARD R. WILSON, P.C.

Attorney at Law

A Professional Corporation

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Of Counsel to:

Vuono & Gray LLC

2310 Grant Building

Pittsburgh, PA 15219

(412) 471-1800

(412) 471-4477 FAX

October 16, 2002

Vernon A. Williams, Secretary

Surface Transportation Board

1925 K Street, N.W.

Washington, DC 20423-0001



FD 34271

Re: Emergency Petition of Maumee & Western Railroad Corporation and RMW Ventures, LLC for Declaratory Order - Condemnation of Main Line Tracks By the City of Napoleon, Ohio

Dear Mr. Williams:

Enclosed for filing please find the original and ten copies of a Emergency Petition for Declaratory Order filed on behalf of Maumee & Western Railroad Corporation and RMW Ventures, LLC seeking a determination that the attempt by the City of Napoleon, Ohio to condemn railroad property owned by RMW Ventures, LLC for a public grade crossing and to impose costs associated there on Maumee's common carrier rail operations is preempted pursuant to the provisions of 49 U.S.C. §10501(b). Also enclosed please find a check for the filing fee in the amount of \$1,400.00.

Respectfully submitted,

RICHARD R. WILSON, P.C.

Richard R. Wilson

FEE RECEIVED

OCT 21 2002

**SURFACE
TRANSPORTATION BOARD**

RRW/klh

Enclosures

xc: All Parties of Record

FILED

OCT 21 2002

**SURFACE
TRANSPORTATION BOARD**

ENTERED
Office of Proceedings

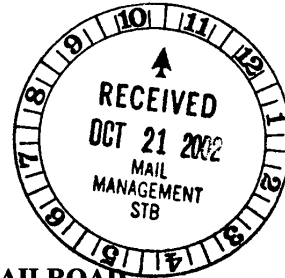
OCT 21 2002

**Part of
Public Record**

206465

Before the
SURFACE TRANSPORTATION BOARD

FD 34271



**EMERGENCY PETITION OF MAUMEE & WESTERN RAILROAD
CORPORATION AND RMW VENTURES, L.L.C. FOR
DECLARATORY ORDER - CONDEMNATION OF
MAIN LINE RAILROAD PROPERTY BY THE CITY OF NAPOLEON, OHIO**

FILED
OCT 21 2002
SURFACE
TRANSPORTATION BOARD

Filed on Behalf of Maumee & Western
Railroad Corporation and RMW Ventures,
L.L.C.

By: Richard R. Wilson, Esq.
P.A. ID #25661
127 Lexington Avenue, Suite 100
Altoona, PA 16601
(814) 944-5302
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FEE RECEIVED
OCT 21 2002
SURFACE
TRANSPORTATION BOARD

Date: October 16, 2002

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Before the
SURFACE TRANSPORTATION BOARD



**EMERGENCY PETITION OF MAUMEE & WESTERN RAILROAD
CORPORATION AND RMW VENTURES, L.L.C. FOR
DECLARATORY ORDER - CONDEMNATION OF
MAIN LINE RAILROAD PROPERTY BY THE CITY OF NAPOLEON, OHIO**

I. INTRODUCTION

Maumee & Western Railroad Corporation ("Maumee") and RMW Ventures, L.L.C. ("RMW") file this Emergency Petition for Declaratory Order with the Surface Transportation Board ("STB") seeking an expedited determination of whether condemnation powers to be exercised by the City of Napoleon, OH ("Napoleon") pursuant to City Resolution #121-02 dated September 19, 2002 (attached hereto as Exhibit A) are preempted pursuant to the provisions of 49 U.S.C. §10501(b). The City of Napoleon seeks to acquire an 8,000 square foot parcel of the mainline right of way owned by RMW and operated by Maumee pursuant to orders of the STB as hereinafter set forth. Napoleon seeks to condemn said parcel for the purpose of constructing a new at grade crossing over the main line tracks of Maumee for a proposed Commerce Drive (as depicted on Exhibits B1, B2 and B3) and to provide a public street right of way in order to legitimize the prior unauthorized installation of gas and water lines under Maumee's track without its knowledge or consent.

Petitioners have sought to negotiate a private and/or public grade crossing agreement with Napoleon, but these efforts have been rejected by the City which intends to proceed with this crossing project utilizing state law condemnation powers. Petitioners therefore request that the

STB promptly initiate this Declaratory Order proceeding in order to avoid costly litigation and to permit the parties to develop appropriate consensual crossing arrangements which will address rail operational and safety issues pertaining to Petitioner's ownership and operation of this rail line for common carrier rail service.

II. BACKGROUND

1. On October 31, 1997, the STB approved the acquisition and operation of the subject rail line by Maumee & Western, LLC. See Maumee & Western, L.L.C. - Acquisition and Operation Exemption - Norfolk & Western Railway Company; Docket No: FD 33478. Thereafter, on January 16, 1998, the STB approved the acquisition of operating rights for this line by Maumee & Western Railroad Corporation from Maumee & Western, L.L.C. See Maumee & Western Railroad Corporation - Operation Exemption - Maumee & Western, L.L.C.; STB Docket No: FD 33535. Subsequently, on March 10, 1998, the Board granted a control exemption and corporation family transaction exemption which resulted in the merger of Maumee & Western, L.L.C. and other related companies into RMW. See RMW Ventures, L.L.C. - Corporate Family Exemption - C&NC, L.L.C., Maumee & Western, L.L.C. and Wabash Central, L.L.C., STB Docket No: FD 33541 and RMW Ventures, L.L.C. - Control Exemption - C&NC, L.L.C., Maumee & Western, L.L.C. and Wabash Central, L.L.C. STB Docket No: FD 33565. Pursuant to these orders, Maumee operates and RMW owns the Maumee line consisting of approximately 51 miles of rail line from Liberty Center, Ohio (M.P. TN-28.0) to Woodburn, IN (M.P. 79.0) subject to the exclusive regulatory jurisdiction of the STB.

2. Over the last several months, Petitioners have attempted to negotiate with Napoleon appropriate arrangements for the proposed construction of Commerce Drive crossing over the tracks and right of way of the Maumee line depicted in Exhibits B1, B2 and B3. Attached as Exhibit C is a letter dated September 19, 2002 from the undersigned counsel to the

Law Director of Napoleon advising the City of the immediate requirement to address unauthorized occupancies of the Maumee/RMW right of way by various utilities without the permission or consent of the Petitioners. The letter presented Napoleon with Petitioners safety and operational concerns and requested cooperation from Napoleon in connection with the proposed Commerce Drive crossing.

3. Despite Petitioners' attempts to resolve these matters, the following day they were served with the City's Resolution No: 121.02. It authorizes the use of state condemnation powers to take RMW's property and to construct a new public at grade crossing over Maumee's track at a location which is already adequately served by an existing public at grade crossing less than a quarter mile away at Industrial Drive.¹ Moreover, the creation of multiple public crossings in such close proximity to each other pose serious operating problems for the switching of shipper sidings, one of which is depicted on Exhibit B3. Construction of this new crossing also impedes Maumee's efforts under Federal Railroad Administration safety guidelines to reduce multiple at grade crossings along its rail lines for public safety purposes.

4. Napoleon's condemnation of Petitioner's rail facilities is undertaken pursuant to Ohio Revised Code §719.01(A) which explicitly authorizes "appropriation of the right of way across railway tracks and lands held by railway companies where such appropriation will not unnecessarily interfere with the reasonable use of such property." Under Ohio condemnation statutes, Ohio Revised Code §163.01 to §163.22 and §4955.16, proceedings to determine unnecessary interference are conducted by county common pleas courts and in such a

¹ Maumee also anticipates that the proximity of Commerce Drive to Industrial Drive will double the number of crossings over its line because motor vehicles leaving the industrial park by Commerce Drive will cross over the Maumee line to Riverview Avenue and proceed east to Industrial Drive, and again cross the Maumee line as they proceed north to reach U.S. Route 6/24. (At present, Independence Drive is a crushed stone, unsurfaced local road not suitable for heavy truck traffic.)

proceeding, the City may also seek the apportionment to the railroad of the cost of all crossing improvements under Ohio Revised Code §4955.20.

5. These statutory provisions directly involve the common pleas courts of Ohio in the regulation and control of the acquisition, construction, and operation of common carrier railroad facilities and property which is reserved exclusively to the STB under 49 U.S.C. §10501(b). These Ohio statutes require county court judges to determine what constitutes "unnecessary interference" with common carrier rail service, property and facilities as well as what constitutes "reasonable use" of common carrier rail property and facilities. By means of these statutory provisions, municipalities in Ohio impose the cost of crossing improvements necessitated by public highway construction projects and the cost of maintaining those crossing improvements on common carrier railroads. These unanticipated capital costs and maintenance expenses for highway crossing facilities impose substantial financial burdens on small Class III railroads such as Maumee and divert funds from essential railroad capital investment programs and track maintenance budgets. These diversions directly degrade interstate rail service and operations as well as impede carrier compliance with Federal Railroad Administration rail safety standards and regulations.

6. Federal courts have addressed condemnation of rail facilities used in common carrier rail service in Hayfield Northern Railroad Company, Inc. vs. Chicago & Northwestern Transportation Company, 467 U.S. 622, 104 S.Ct. 2610 (1984); Wisconsin Central LTD. v. City of Marshfield, 160 F.Supp 2d 1009 (2000); and Columbiana County Port Authority v. Boardman Township Park District, 154 F.Supp 2nd, 1165 (2001). In each of these decisions, federal courts have determined that state or local governments may not condemn rail facilities so as to preclude or interfere with the provision of common carrier rail service. Nor may states in the exercise of traditional police powers engage in de facto economic regulation of common carrier railroads.

City of Auburn v. U.S., 145 F3d 1025, 1031 (9th Cir. 1998). This Petition therefore presents for the Board's determination the question of whether the exercise of state condemnation and crossing cost allocation authority over railroad property and facilities under Ohio law is preempted by the provisions of 49 U.S.C. §10501(b).

III. CONCLUSION

Petitioners request expedited consideration of this Emergency Petition for Declaratory Order so that the rights and interests of the parties can be promptly determined in order to facilitate the negotiation of mutually agreeable terms regarding the proposed crossing of Commerce Drive over Petitioner's right of way. In addition, a prompt determination of this issue will encourage the parties to address the possible elimination of existing at grade crossings based on the availability of the new crossing proposed for Commerce Drive.

WHEREFORE, Petitioners request that the STB issue a Declaratory Order determining that Napoleon's attempt to condemn a public crossing and impose costs associated therewith on Petitioner's common carrier rail operations under Ohio law is preempted by the provisions of 49 U.S.C. §10501(b).

Respectfully submitted,

RICHARD R. WILSON, P.C.

By: 

Richard R. Wilson
Attorney for Maumee & Western
Railroad Corporation and
RMW Ventures, L.L.C.

RESOLUTION NO. 121-02**A RESOLUTION OF INTENT TO APPROPRIATE CERTAIN REAL ESTATE [MAUMEE AND WESTERN RAILROAD CROSSING AT COMMERCE DRIVE]; AND DECLARING AN EMERGENCY**

WHEREAS, the Council deems it necessary to appropriate the hereinafter described real estate for the purposes as hereinafter set forth;

BE IT RESOLVED BY THE COUNCIL OF THE CITY OF NAPOLEON, OHIO:

Section 1. That, this Council hereby declares the necessity and intent to appropriate a fee simple interest and/or right-of-way in the real estate described in the legal description marked as "Appendix A", attached hereto and incorporated into this Resolution in order to promote the public health, public safety, public convenience, and public welfare of the City, as authorized by the Charter of the City of Napoleon, the Ohio Revised Code, and the Ohio Constitution. The purpose of the appropriation is as follows: (a) to open and/or extend streets; (b) to allow for construction and maintaining of sewers and drains; (c) to allow for the placement and maintenance of public utilities, including natural and/or artificial gas lines, electric lines and lighting and for supplying the product thereof; (d) to allow for the protection of public buildings and their environs and the usefulness of public grounds occupied by public buildings; (e) to allow for the providing of a water supply for the City and its inhabitants by the construction and/or maintaining of water pipes, and for the protection thereof; and, (f) to the extent permitted by law, to promote economic development and/or to allow for the placement and maintenance of other public utilities not specifically named in (c) above.

Section 2. That, in the event that a scrivener error should exist in the attached legal description as reference in §1 of this Resolution, said error may be freely corrected by the Clerk of Council without necessity of further legislation. Further, in the event that one or more of the reasons for the taking of the property is found invalid by a court of competent jurisdiction, such reason(s) shall become null and void in this Resolution; however, all other reasons shall remain valid.

Section 3. That, the Mayor of the City be and is hereby authorized and directed to cause notice of the adoption of this Resolution to be given immediately to the known owners of, or persons having an interest of record in, the above described real estate, and said notice shall be served by such person as the Mayor may designate, and such person shall make return of the service of notice in the manner provided by law. Where such owner, person, or agent thereof cannot be found, the Mayor or his designee is authorized and directed to give notice by publication once a week for three (3) consecutive weeks in a newspaper of general circulation in the City of Napoleon.

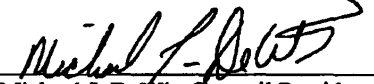
Section 4. That, the City Manager be and is hereby authorized and directed to take such action as is necessary and proper, directly or through agents, to determine the value of the above described real estate in any reasonable manner, including without limitation appraisal by a professional independent appraiser, and to negotiate with the owners of said real estate, if any can be found, to purchase said real estate based upon said valuation.

Section 5. That, it is found and determined that all formal actions of this City Council concerning and relating to the adoption of this Resolution were adopted in open meetings of this City Council, and that all deliberations of this City Council and any of its committees that resulted in such formal actions were in compliance with all legal requirements, including Section 121.22 of the Ohio Revised Code and the Codified Ordinances of Napoleon, Ohio.

Section 6. That, if any other prior Ordinance or Resolution is found to be in conflict with this Resolution, then the provisions of this Resolution shall prevail. Further, if any portion of this Resolution is found to be invalid for any reason, such decision shall not affect the validity of the remaining portions of this Resolution or any part thereof.

Section 7. That, this Resolution is declared to be an emergency measure necessary for the immediate preservation of the public peace, health or safety of the City and its inhabitants, and for the further reason that this legislation must be in effect at the earliest possible time to allow for the eminent domain action to proceed expeditiously so that streets and utilities may properly be created and/or continue to exist, a process deemed by this Council essential; therefore, provided it receives the required number of votes for passage as emergency legislation, it shall be in full force and effect immediately upon its passage; otherwise, it shall be in full force and effect at the earliest time permitted by law.

Passed: Sept. 16, 2002


Michael J. DeWit, Council President

Approved: 16 SEPT 02


J. Andrew Small, Mayor

VOTE ON PASSAGE 7 Yea 0 Nay 0 Abstain

Attest:

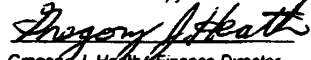

Gregory J. Heath, Clerk/Finance Director

I, Gregory J. Heath, Clerk/Finance Director of the City of Napoleon, do hereby certify that the foregoing Resolution No. 121-02 was duly published in the Northwest Signal, a newspaper of general circulation in said City, on the _____ day of _____, _____; & I further certify the compliance with rules established in Chapter 103 of the Codified Ordinances Of Napoleon Ohio and the laws of the State of Ohio pertaining to Public Meetings.

Gregory J. Heath, Clerk/Finance Director

CERTIFICATION

I, Gregory J. Heath, Finance Director of the City of Napoleon, Ohio, do hereby certify that the attached Resolution No. 121-01 is a true and accurate copy of Resolution No. 121-01 of the City of Napoleon, Ohio.

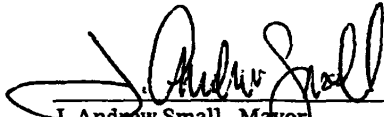

Gregory J. Heath, Finance Director

9/19/2002
Date

NOTICE

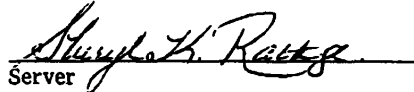
TO: Maumee and Western Railroad Corporation
c/o Spencer Wendelin CEC
205 N. Capital Avenue
Corydon, Ind. 47112

You are hereby given notice of adoption of City Resolution No. 121-02, being a Resolution of intent to appropriate a fee simple and/or right-of-way interest in certain real estate that you either own or have an interest of record in. Resolution No. 121-02 is attached hereto.


J. Andrew Small, Mayor
in and for the City of Napoleon, Ohio

RETURN OF SERVICE

The undersign certifies that a copy of this Notice was served on the above named person by (☒) Certified Mail (☐) Personal Service this 2nd day of Sept, 2002.


Server

Appendix "A"

Res. 121-02

RAILROAD CROSSING - LEGAL DESCRIPTION

A parcel of land being part of the West one-half (1/2) of Section seven (7), Township five (5) North, Range seven (7) East, Liberty Township, City of Napoleon, Henry County, Ohio and being more particularly described as follows:

Commencing at a 1/2" x 30" iron pin set on the Southerly right-of-way line of the Maumee & Western Railroad, said iron pin being located South forty-eight (48) degrees, twenty-nine (29) minutes, and forty-eight (48) seconds West, a distance of one thousand, six hundred two and fifty-three hundredths (1,602.53) feet from the intersection of the said Southerly right-of-way line with the East line of the West one-half (1/2) of Section seven (7), said iron pin also being the **TRUE POINT OF BEGINNING**;

Thence Southerly along the Southerly right-of-way line of the Maumee & Western Railroad, having a bearing of South forty-eight (48) degrees, twenty-nine (29) minutes, and forty-eight (48) seconds West, a distance of eighty and zero hundredths (80.00) feet to a 1/2" x 30" iron pin set;

Thence Northwesterly along a line having a bearing of North forty-one (41) degrees, twenty-three (23) minutes, and fifty-two (52) seconds West, a distance of one hundred and zero hundredths (100.00) feet to a 1/2" x 30" iron pin set;

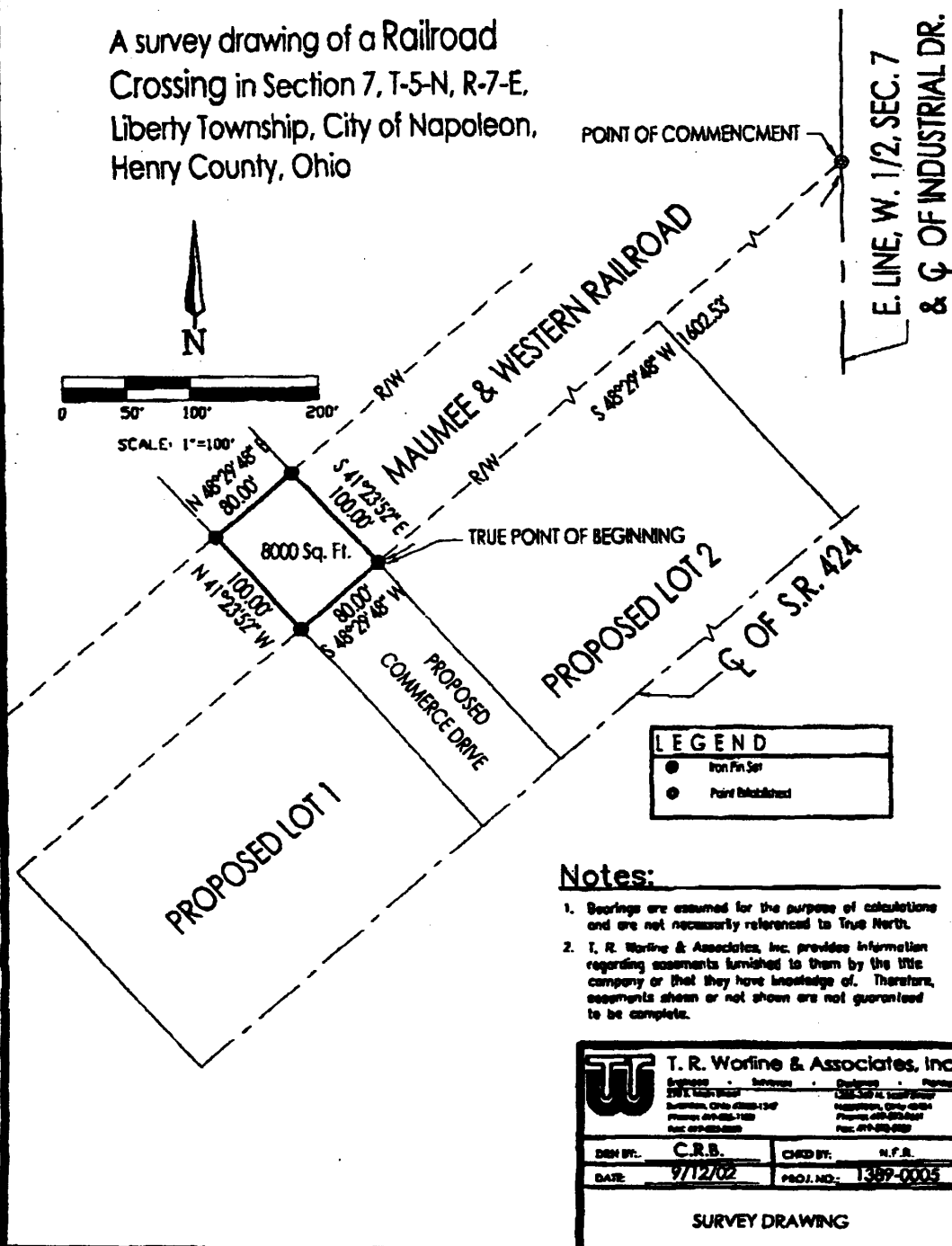
Thence Northeasterly along the Northerly right-of-way line of the Maumee & Western Railroad, having a bearing of North forty-eight (48) degrees, twenty-nine (29) minutes, and forty-eight (48) seconds East, a distance of eighty and zero hundredths (80.00) feet to a 1/2" x 30" iron pin set;

Thence Southeasterly along a line having a bearing of South forty-one (41) degrees, twenty-three (23) minutes, and fifty-two (52) seconds East, a distance of one hundred and zero hundredths (100.00) feet to the **TRUE POINT OF BEGINNING**.

Containing 8,000 square feet, which is equal to zero and one hundred eighty-four thousandths (0.184) acres of land, more or less. Subject, however, to all legal highways and easements of record.

This legal description dated September 11, 2002 was prepared by Nicholas F. Ronau, Ohio registered Surveyor No. 6735, from a survey performed by T. R. Worline & Associates, Inc., under his direction in June of 2002.

A survey drawing of a Railroad
Crossing in Section 7, T-5-N, R-7-E,
Liberty Township, City of Napoleon,
Henry County, Ohio



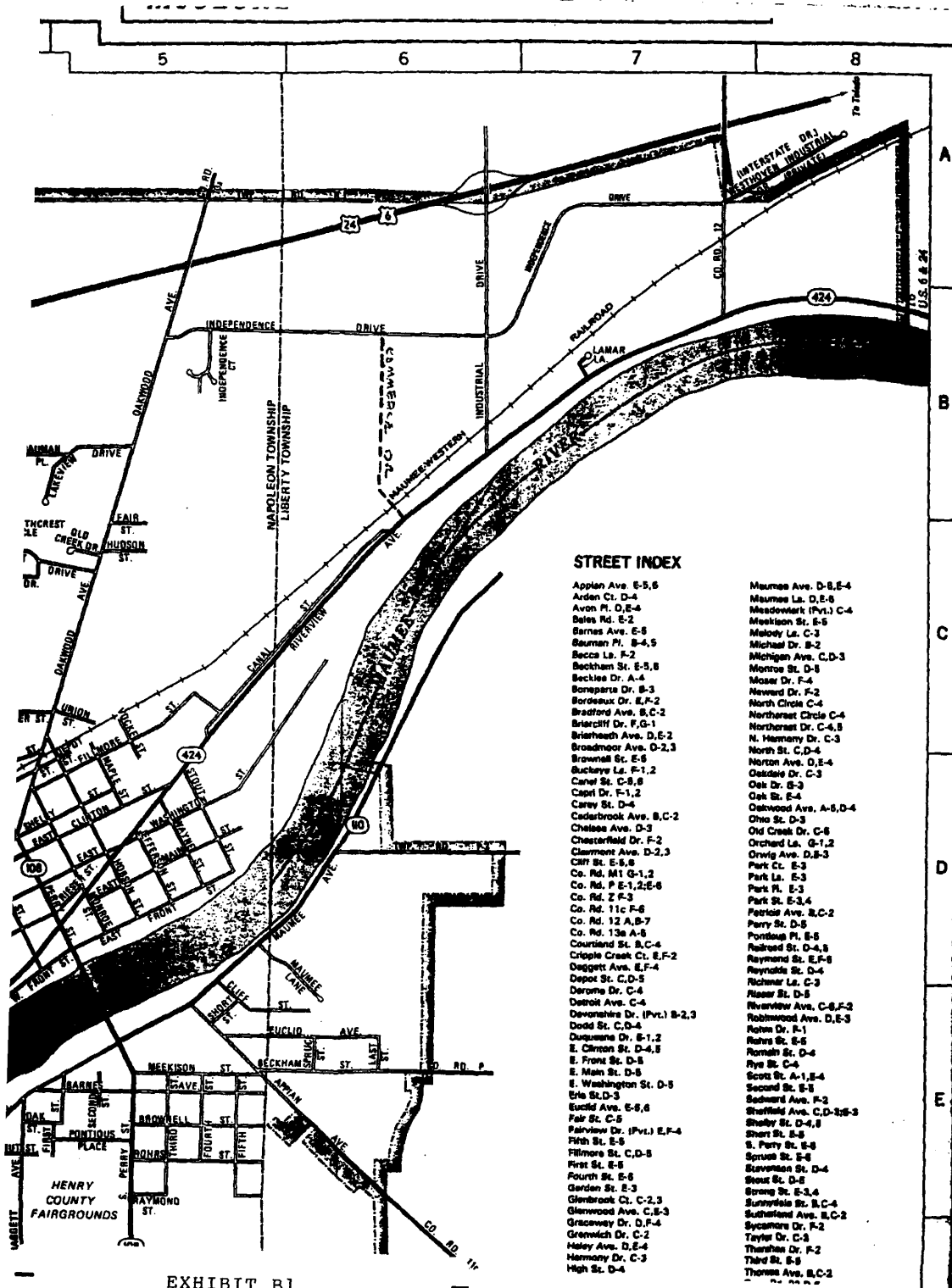


EXHIBIT B1

Send To Printer Back To TerraServer
USGS 3 km NE of Napoleon, Ohio, United States 01 Apr 1994

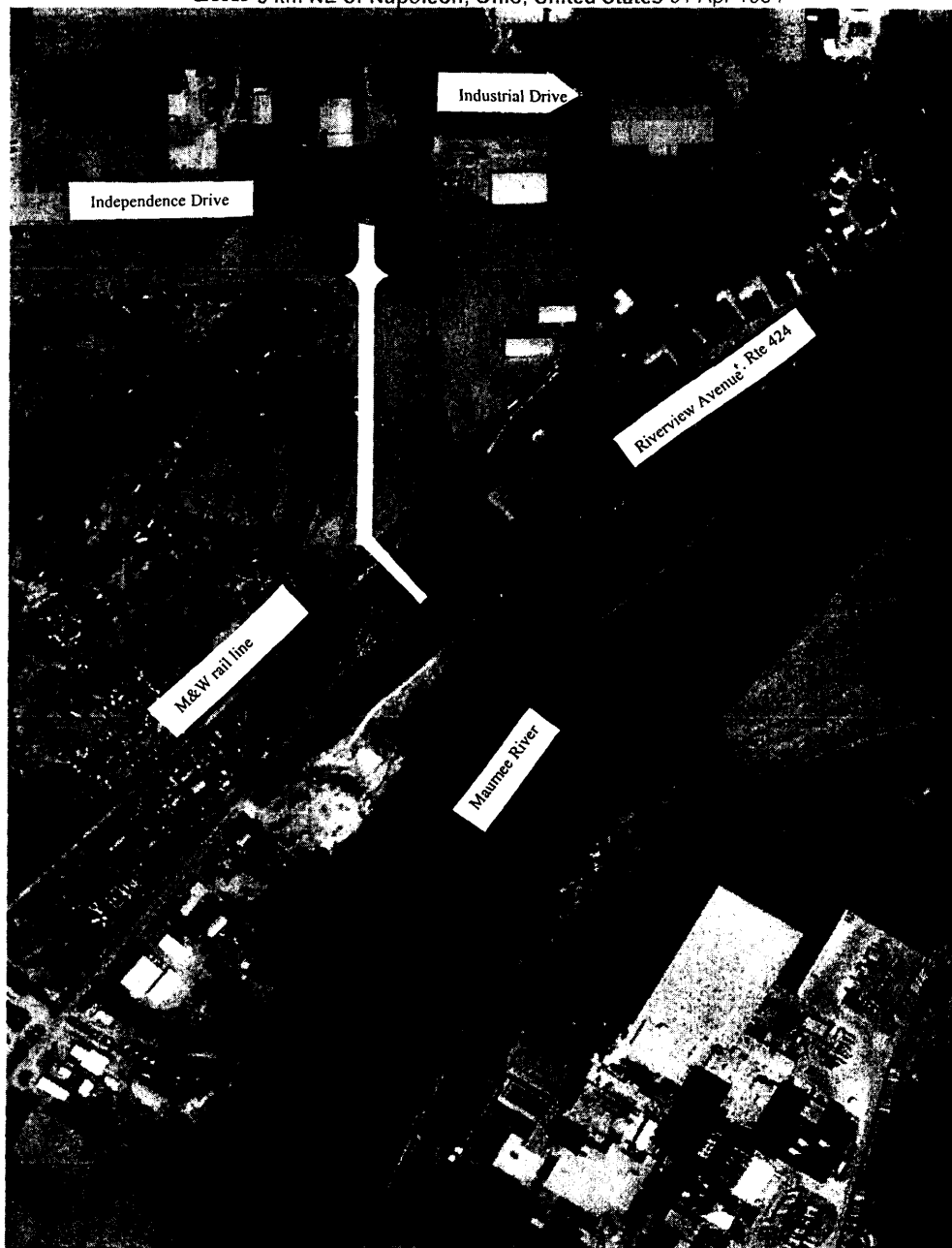


Image courtesy of the U.S. Geological Survey

More Useful Everyday

Send To Printer Back To TerraServer
USGS 4 km NE of Napoleon, Ohio, United States 01 Apr 1994

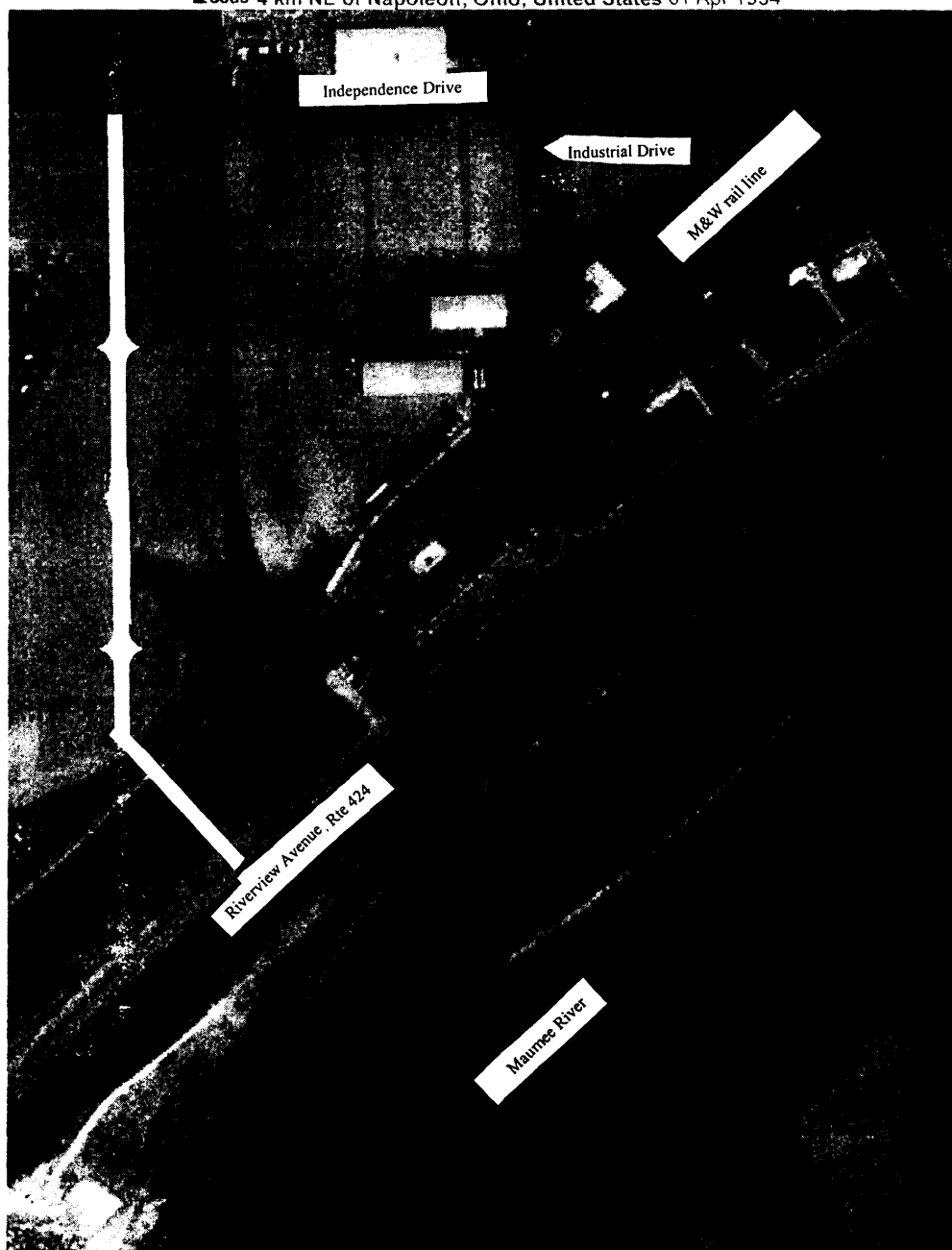


Image courtesy of the U.S. Geological Survey

More Useful Everyday

RICHARD R. WILSON, P.C.

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September 19, 2002

VIA FAX: (419) 599-8393

Mr. David Grahn
Law Director
City of Napoleon
P.O. Box 151
Napoleon, OH 43545

Re: Unauthorized crossings of the Maumee & Western Railroad Right of Way

Dear Mr. Grahn:

I represent the Maumee & Western Railroad Company and I have been asked by the real estate department of my client to contact you regarding unauthorized crossings of the railroad right of way. I am advised that the community improvement corporation of the City has requested my client to provide it with a private crossing agreement in order to construct an access road into a new industrial development site which has been constructed by the City or a related industrial development corporation. I have also been advised that in connection with this project, a water line and the gas line have been installed underneath my client's rail line without permission and without an access permit.

While my client wishes to cooperate with the City and facilitate its development projects, you should be aware that active railroad rights of way are subject to the exclusive jurisdiction of the federal Surface Transportation Board and all state law including state condemnation law is preempted to the extent that it interferes with or precludes the provision by my client of safe and efficient common carrier rail service. See 49 U.S.C. §10501(b). As I am sure you realize, my client as a railroad, has a paramount interest in the subsurface support and occupancies beneath its rail line. This includes the right to specify engineering and safety standards required of other parties who wish to install longitudinal or perpendicular occupations beneath the rail lines. These standards address depth of the installation, containment facilities and materials, rights of inspection, notification of the presence of both the facilities and crews constructing the occupation or subsequently maintaining it. Railroads are inherently dangerous instrumentalities and as a private land owner my client has the right to insist that third parties comply with its safety regulations and provide appropriate advance notice of any entry onto its property. Nor may anyone occupy property without its consent. Furthermore, such entry and occupation can be legitimately refused by a railroad for reasons of operational safety and convenience.

— EXHIBIT C —

Mr. David Grahn
Page Two
September 19, 2002

Given the fact that these rights have apparently been totally ignored in connection with the installation of two pipelines beneath my client's track, we are not inclined to grant any request by the City for a private road crossing agreement until and unless appropriate license arrangements, satisfactory to my client, have been executed by the agencies or utilities responsible for the aforesaid pipelines, or until those illegal crossings are removed from my client's property.

Furthermore, we understand that the request for a private road crossing is perhaps merely a temporary measure and that the City may seek in the near future to convert this private crossing to a public crossing. In that connection, we note that there is another public grade crossing less than ¼ mile away from the proposed location of this new crossing and that road provides adequate access to the site to be developed for which the new private crossing is being sought. We are under a mandate from the Federal Railroad Administration to eliminate multiple at grade crossings along the rail lines whenever possible as a matter of public safety. It is therefore very important that the City of Napoleon coordinate closely with my client to determine whether or not this new crossing is necessary for access to the industrial development site or whether alternative access is available via the existing public grade crossing. Generally, before a railroad grants a new private or public crossing, it is also appropriate to examine the existence of other crossings in the vicinity thereof to determine whether or not any of those crossings can be eliminated.

My client would welcome the opportunity to sit down with the City Manager and pursue these matters further. We thank you for your attention in this regard.

Very truly yours,

RICHARD R. WILSON, P.C.

A handwritten signature in dark ink, appearing to read 'Richard R. Wilson', with a long horizontal flourish extending to the right.

Richard R. Wilson

RRW/klh

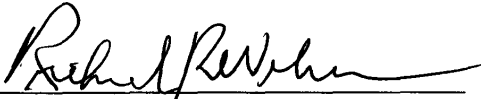
xc: Mr. David Wellman

CERTIFICATE OF SERVICE

Richard R. Wilson hereby certifies that on this 16th day of October, 2002 he did a serve a true and correct copy of the foregoing Emergency Petition for Declaratory Order - Condemnation of Maumee of Western Railroad Corporation Mainline Tracks by the City of Napoleon, OH.

Upon the following by first class mail, postage prepaid at the address set forth below:

Mr. David Grahon
Law Director
City of Napoleon
P.O. Box 151
Napoleon, OH 43545


Richard R. Wilson