

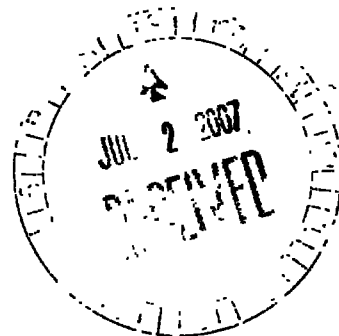
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219666



29 June 2007
by express

Hon. Vernon Williams
Secretary
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20024

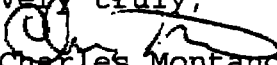
Re: YILA -- Adverse Abandonment Application --
Yakima County, WA, AB 600
for filing: Motion to Strike

Dear Mr. Williams:

On behalf of Yakima Interurban Lines Association ("YILA"), Yakima County, Yakima City, and Town of Naches, enclosed please find an original and ten copies of a motion to strike a "Declaration" which adverse applicant Kershaw Sunnyside Ranches filed in this proceeding on June 18, 2006.

Thank you for your assistance in this matter.

Very truly,


Charles Montange
for Yakima County and City,
YILA, and Town of Naches

ENTERED
Office of Recordings

Part of
Public Record

Encls.

cc. Counsel (per certificate of service)

BEFORE THE SURFACE TRANSPORTATION BOARD

Yakima Interurban Lines Association,)
-- Adverse Abandonment Application --) AB 600
in Yakima County, WA)

Motion to Strike

Yakima Interurban Lines Association (YILA), Yakima County (County), City of Yakima and Town of Naches move to strike the "Supplemental Declaration of Rob Conrad" and associated exhibits filed by Kershaw Sunnyside Ranches (KSR) in the above proceeding (AB 600) on June 18, 2007. The record in AB 600 is closed, there are no pending requests for relief, and the proceeding is now on judicial review in the Ninth Circuit. KSR's proposed pleading has no place in the record.

Argument

KSR's June 18 filing on its face seeks no relief. It is not responsive to any pending motion for relief filed by YILA, County, or any other party. It does not present itself as some kind of correction to an earlier mistake. Why KSR tendered it for filing is mysterious, for KSR provides no justification for its action. Moreover, KSR fails to seek leave to file the document. KSR's June 18 document accordingly should be stricken from the record.

Going a bit deeper, the pleading on its face appears to be some kind of belated supplemental reply to a reply. As such, it is clearly not permissible under 49 C.F.R. §1104.13(a) (replies must be filed in 20 days from the pleading to which they are directed) and § 1104.13(c) (replies to replies are not

permitted).

KSR's filing is particularly abusive in the circumstances here. This agency issued a final decision in this proceeding (AB 600) denying KSR's adverse abandonment application over three and a half years ago on November 19, 2004. KSR did not seek judicial review but instead sought administrative reconsideration, which was denied on September 15, 2005, over two and a half years ago.

KSR petitioned for judicial review in the United States Court of Appeals for the Ninth Circuit (C.A. 05-76384) off this agency's September 15, 2005, denial. That proceeding [essentially a frivolous appeal in that judicial review of the orders KSR seeks to question is clearly barred by ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270 (1987)] is now fully briefed. The record in an STB proceeding has to close at some point, and that point has surely been reached by the time of final briefs in a court of appeals. In this light, KSR's filing amounts to an unexcused and blatant attempt to "pad" the record with additional evidence or arguments. Allowing such tactics violates fundamental due process for it denies adverse parties as well as this agency a meaningful opportunity to respond. KSR obviously should not be permitted to engage in this kind of "padding" without providing a justification and without obtaining leave of the Board.

KSR cannot excuse itself on the ground that it has sought administrative reopening of this Board's AB 600 (Sub-no. 1 X)

proceeding. The AB 600 (Sub-no. 1X) proceeding is separate and distinct from the AB 600 proceeding. Documents filed in one are not filed in the other. Pieces of paper newly filed by KSR are irrelevant and not part of the record in AB 600 (Sub-no. 1X), and thus cannot be justified as filed in support of KSR's position there.

If KSR at some future time seeks to file the papers in AB 600 (Sub-no. 1X), the papers are subject to the same deficiencies barring their filing in AB 600 (Sub-no. 1X) as in AB 600. In other words, the Declaration and exhibits are both impermissibly late and replies to replies.

Moreover, if the Declaration is some sort of petition to reopen in AB 600 or AB 600 (Sub-no. 1X), then it clearly fails to meet the standards for reopening articulated in BNSF--Exemption -- between Klickitat and Goldendale, WA, AB 6 (Sub-no. 1X), served June 8, 2005. It shows no relevant new evidence, changed circumstance or material error. To the extent it makes claims that sound on those subjects, the claims are false.

The prejudice to YILA and the County from KSR's approach is compounded because Mr. Conrad's Declaration blatantly misrepresents the facts. Conrad claims at page 1, paragraph 2, that the "Naches Rail line has been severed from its connection to the main line by 40th Avenue...", citing "exhibit 1." Exhibit 1 as germane here involves a "Memorandum of Understanding" involving the actions of Washington State Department of Transportation (WSDOT) in connection with the 40th

Avenue crossing. The memorandum authorizes removal of a rail crossing for a road improvement but only (1) compatible with rail restoration and (2) at the expense of WSDOT if and when WSDOT receives notice that YILA or its successor wishes to reactivate service.

Rail lines cross highways all the time. Upgrades and changes in such crossings are common. WSDOT is hardly impecunious, and can be expected to keep its commitment to restore the crossing as soon as needed. Given that the improved crossing is compatible with rail and that WSDOT has committed to bear restoration costs, nothing in Conrad's Declaration or supporting exhibits supports Conrad's claim that there has been a severance.¹ In BNSF -- Exemption -- between Klickitat and Goldendale, supra, this Board rejected a severance claim where the evidence showed that a right of way continued to exist, and KSR's own purported evidence not only demonstrates that fact but that WSDOT will bear all restoration costs for any rail removed.

¹ Mr. Conrad's good faith in making this argument is questionable. On the one hand, he complains that WSDOT's removal of a highway crossing is a severance notwithstanding WSDOT's commitment to bear all costs to reconstruct the crossing when rail service is restored, yet at the very same time, Mr. Conrad is demanding that YILA and County permit his company (KSR) to remove an entire portion of the Naches Branch for a planned KSR building expansion when neither he nor KSR will commit to pay any restoration expenses in the event of rail reactivation. In short Conrad is insisting that YILA and Yakima County allow him to do something far more egregious to the Naches Branch than what he claims amounts to a severance of the Naches Branch. Mr. Conrad's own arguments demonstrate why YILA and the County cannot permit him to do what he wishes to do to the Naches Branch.

Conrad also cites deposition testimony to the effect that the County has "no plans for a trail." Conrad Dec. at p. 1, paragraph 4. To the extent consistent with STB authorizations, the County has acquired the Naches Branch from YILA pursuant to 16 U.S.C. § 1247(d), and intends, compatibly with this Board's authorizations, to develop rail, trail, or rail with trail on the property. While the County at this time has no specific plans such as engineering diagrams or concept sketches and so forth, the County anticipates that specific plans will be developed following public comment and input from WSDOT. The County intends to explore rail reactivation and rail with trail as well, also in consultation with WSDOT. Detailed plans cost money, and such expenditures are premature until acquisition is completed, particularly since WSDOT will not consider a rail rehabilitation or trail development grant application until that time. There is nothing unlawful about this process.

In any event, the applicable County planning documents have incorporated possible trail use on the Naches Branch for the past decade. See Hoge Declaration, attached, ¶ 1. That is all the trail planning needed at this point.

Mr. Conrad's Declaration at paragraphs 5 and 6 appears irrelevant or misleading. Mr. Conrad represents that he or his company (KSR) has been in discussions with the Yakima Greenway (a private non-party) to establish a trail, that he or his company have offered financial assistance to the Greenway, but that the County has failed to work with the Yakima Greenway.

So far as YILA and the County are aware, what has happened is that Mr. Conrad's company offered Yakima Greenway money to buy some adjoining properties if possible so as to locate a trail somewhere other than on KSR property. Even if Yakima Greenway could buy the adjoining parcels (a big "if"), and even if Yakima Greenway then would allow the route it acquired to be used for rail reactivation (another big "if"), and even if that re-route were environmentally acceptable (yet another big "if"), the cost to reconstruct the Naches Branch on that new route would be substantially greater than fixing it up on the existing right of way. County does not have funds for this purpose, KSR will not put up the funds, and WSDOT says it will not. Under the circumstances, doing the re-route that Mr. Conrad urges would presumably doom rail reactivation, and this in turn would presumably result in Conrad or other adjoining property owners urging that the unfunded relocation constitutes a severance. YILA and the County have avoided any severance so far, and neither are about to jeopardize the entire corridor in order to placate KSR.

In any event, the Yakima Greenway has not given up. See Hoge Declaration at ¶ 2. It is absurd for Mr. Conrad to suggest that the County is ignoring the Greenway: for one thing, a members of the County Board of Commissioners is also on the Greenway's board.

Mr. Conrad presumably knows all this; that is why so many of his statements seem to YILA and the County to be

intentionally misleading. The County, YILA, and probably all interested entities by now know full well that KSR does not want either a rail or trail on what it considers its property. But this "NIMBY" attitude is contrary to both rail use and to use under 16 U.S.C. § 1247(d). County and YILA believe that KSR by now must understand this. KSR nonetheless is persisting with administrative and legal actions in an attempt to bludgeon the County and YILA into submission. This is a mis-use of administrative and judicial processes by KSR.

The core problem, as YILA and Yakima County have explained at pages 36 to 38 of our intervenor brief dated April 10, 2007, in support of this agency in Kershaw Sunnyside Ranches v. STB, 9th Cir. No. 05-76384, is as follows:

"Given the futility of Kershaw's petition [for judicial review] and the relief it purports to seek, one is left wondering what is going on. Yakima County et al surmises that Kershaw is using state court litigation against YILA and certain other entities, as well as this petition for review and continued proceedings before the STB, to pressure the parties to re-route the line around Kershaw's property. This rail line has existed for approximately a century. The railroad's owner has no obligation to reroute it, and STB has no procedures to compel an "adverse reroute" such as Kershaw seeks here. There literally is no authority to grant a reroute remedy. A railroad line once constructed is entitled to exist in peace from harassment by adjoining landowners at

least until authorized for abandonment. But something more can be said. WSDOT actually looked at rerouting and explained as follows in its Declaration filed below:

If the mile were abandoned, the remainder of the Naches Branch would have to be abandoned. WSDOT has performed a rough estimate of the cost for reconstruction of approximately one mile of track if the line has to be re-routed around the area which Kershaw has proposed for abandonment. The calculations are found on the attached spreadsheet. WSDOT estimates the cost of reconstruction to be approximately \$974,480.00, assuming (without benefit of thorough investigation) no environmental impediments exist on the alternative property. That amount of money far exceeds the funds WSDOT expects to have available for rehabilitation of the Naches Branch...."

See Pet. Exc. at pp. 111.1-111.2. In short, there is no money for a re-route. There is only money to rehabilitate the existing route.

Even if funds were available to pay for a re-route, some government entity would have to use eminent domain to secure the necessary alternative right of way around the Kershaw property (if environmentally acceptable alternatives exist). However, it is not clear that it is fair to condemn one owner's private property in order to accommodate a neighboring private landowner's (Kershaw's) NIMBY attitude

apparently solely for the reason that the latter is litigious. The Fifth Amendment restricts eminent domain to use for a "public purpose." But condemnation of property from Kershaw's neighbors in order to accommodate Kershaw's private wishes is not serving a public purpose; it instead is accommodating a private purpose espoused by a litigious party in order to avoid a barrage of otherwise questionable suits. This arguably does not even pass a "blush" test for eminent domain. In any event, Yakima County does not know that an environmentally or historically acceptable alternative route exists.

The simple truth is that to date, neither WSDOT nor any other party in this proceeding, or any party outside this proceeding, has agreed to pay the substantial additional costs that would be incurred to restore rail on the Naches Branch either at its current location or on a new location should YILA or any successor to YILA consent to KSR's proposed use of the existing Naches Branch for its business expansion. Rather than engaging in continued vexatious judicial and administrative proceedings against YILA and Yakima County, KSR should consider revising its plans to eliminate their inconsistency with rail reactivation.

At the end of paragraphs 6 and 7 and in his peroration paragraph (number 9), Mr. Conrad asks that rail construction begin immediately if the County is "going to build a rail line." The world necessarily works in a somewhat different fashion. As

County has made clear (and as WSDOT has implicitly acknowledged), County currently intends to rely on WSDOT for financial assistance to complete rehabilitation of the rail line. WSDOT has made clear that it will consider such assistance only when the County acquires the line. As matters currently stand, the County has acquired most of the line, but cannot yet complete full acquisition until this Board removes a section 106 condition barring YILA from alienating certain parcels in the line. Once the County completes acquisition, then the County must follow state grant application procedures for funding, whether for rail, trail, or both purposes. It is quite likely that all this process could have been completed by now but for the fact that Mr. Conrad's company (KSR) has resisted preservation of the Naches Branch in state and federal forums for the past four years. In this sense, the conduct of KSR itself has likely done more to precipitate delays in construction of rail, trail, or rail with trail than any other single factor.

Although Mr. Conrad in his Supplemental Declaration at paragraph 8 professes "not to oppose" rail or trail, the single best thing he could do to facilitate either is to stop opposing rail and trail on the Naches Branch. If Mr. Conrad wishes speed, he should stop erecting speed bumps and attempted barricades. But he does not want speed. He wants severance of the Naches Branch.

In paragraph 8 of the Declaration, Mr. Conrad claims a

trail on the Naches Branch is unsafe because his company now operates forklifts and trucks on the Branch and uses the Branch for storage. Conrad asserts this renders the Branch unsafe for people. But if it is unsafe for people on a trail, it is also unsafe for rail workers and KSR's own workers in the event of active rail use. In such a situation, KSR must withdraw from the Naches Branch to avoid interference with lawful use, or otherwise modify KSR's behavior to ensure that the owner of the corridor may employ it for the uses authorized under federal law. In any event, KSR's incompatible uses by KSR are necessarily subject to the consent of the owner of the Naches Branch, which consent may be withdrawn. In other words, Mr. Conrad's purported argument in paragraph 8 is simply an incorrect assumption that his use has priority. Since the Naches Branch is not abandoned, KSR cannot claim priority. If the result were otherwise, railroad corridors would be randomly blocked by adjoining landowners, inactive corridors could not be preserved under 16 U.S.C. § 1247(d), and the rail system would quickly collapse.

Once the County acquires the Naches Branch, the County will certainly attempt to work with KSR to employ the Naches Branch in a fashion compatible with KSR's operations so long as those operations are themselves consistent with 16 U.S.C. § 1247(d) and rail reactivation, and otherwise do not threaten preservation of the line for the purposes permitted under 16 U.S.C. § 1247(d). Just as YILA (and the County) worked with

WSDOT to allow transportation uses in the Naches Branch compatible with rail or trail use, so the County would work with KSR.

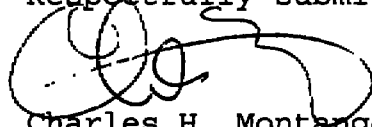
Conrad asserts that the Naches Branch is "abandoned," but this is not the case. See Hoge Dec. ¶ 3. Even more significantly, the County has acquired the line (save for parcels covered by a section 106 condition) pursuant to this Board's railbanking authorization issued in AB 600 (Sub-no. 1X). The relevant filing appears on the Board's website e-library under filings for June 28, and a copy is attached hereto. Pursuant to 16 U.S.C. § 1247(d), the line may not be deemed abandoned. All issues raised by KSR in AB 600 are now moot, and KSR's lawsuit against this Board arising out of AB 600 is likewise moot.

Conclusion

In the end, all of the "evidence" Mr. Conrad presents is either irrelevant or not "new" so as to justify some kind of reopening. It all appears to be belated reply to reply and otherwise impermissible. It has been filed without leave and without justification, in a proceeding which is now before the Ninth Circuit. On analysis, it contributes nothing to KSR's case, and instead in context implicitly vindicates the position of YILA and the County. While we are tempted to ask that it remain in the record solely for that limited purpose, the better approach in the circumstances is simply to strike it all. Since the Naches Branch is now railbanked pursuant to orders in AB 600

(Sub.-no. 1X), all issues in AB 600 sought to be raised by KSR are now moot, as is KSR's lawsuit against STB arising out of AB 600.

Respectfully submitted,



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(206)546-1936

Counsel for YILA, Yakima
County, City of Yakima, and
Town of Naches

cc. Paul Edmondson, Esq. (YILA)
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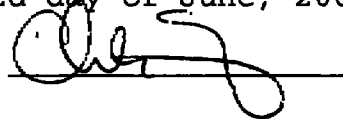
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Certificate of Service

I hereby certify service by US Mail, postage pre-paid first class, upon Kevan Montoya, Velikanje, Moore & Shore, P.O. Box 22550, Yakima, WA 98907 this 22d day of June, 2007.



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26 June 2007
by express

Hon. Vernon Williams
Secretary
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20024

Re: YILA -- Abandonment Exemption --
Yakima County, WA, AB 600 (Sub-no. 1X)
for filing: Notice of Railbanking

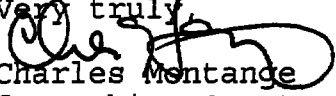
Dear Mr. Williams:

This letter is for filing formally to notify the Board that Yakima Interurban Lines Association ("YILA") has transferred the Naches Branch at issue in the above-captioned proceeding to Yakima County ("County") pursuant to 16 U.S.C. § 1247(d) and this Board's authorizations pursuant to 49 C.F.R. § 1152.29, except for the parcels covered by the section 106 condition imposed in this Board's decision in this proceeding served Feb. 17, 2006, at ordering paragraph 6(f). A deed covering the Branch (except for the parcels governed by the section 106 condition) was recorded earlier this week. The parcels governed by the section 106 condition will be similarly transferred when this Board removes the section 106 condition. YILA and County continue to seek removal of the section 106 condition.

After ascertaining that this Board's Section of Environmental Analysis had and foresaw no objection to this approach, YILA and County engaged in a two-step process (i.e., first closing on the line except for the section 106 parcels, and, once the Board removes the section 106 condition, committing to close on the remainder) in order to ensure that lienholders did not become dissatisfied due to delays, and thus that the line could be preserved. We are pleased to note that all lienholders, save Washington State Department of Transportation (WSDOT), have been satisfied, and WSDOT of course supports the County's acquisition of this line from YILA under 16 U.S.C. § 1247(d) as indicated in prior pleadings.

Yakima County and YILA understand that the Notice of Interim Trail Use (NITU) applicable to the Naches Branch in this proceeding now automatically extends indefinitely. If this understanding is in error, please advise me as soon as possible.

Thank you for your assistance in this matter.

Very truly,

Charles Montange
for Yakima County and YILA

cc. Counsel (per certificate of service)

Certificate of Service

By my signature below, I certify service of the foregoing by U.S. Mail, postage pre-paid first class this 26th day of June, 2007, upon the following counsel:

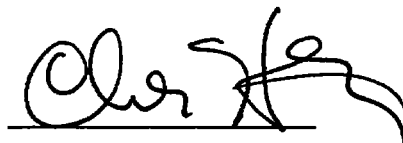
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A handwritten signature in black ink, appearing to read "Kevin T. Montoya", written over a horizontal line.