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**BEFORE THE KANSAS HOUSE  
COMMITTEE ON TRANSPORTATION**

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HEARING 1:30 P.M  
MONDAY, MARCH 5, 2012  
ROOM 783  
DOCKING STATE OFFICE BUILDING

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**HOUSE BILL 2735**

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WRITTEN SPEECHES OF PROPONENTS  
MARTY NORDHUS AND R. DERYL EDWARDS, JR. AND  
EXHIBITS 1 – 10

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3.		Text of Kansas Constitution, Art. 11, § 1
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5.	11/3/03	Nebraska Trails Foundation – Statement of Willingness to Pay Taxes on the Right-of-Way to the Surface Transportation Board
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**HOUSE BILL No. 2735**  
**By Committee on Transportation**  
**Amended by Kansas Farm Bureau**  
**2-10**

**AN ACT concerning property taxation; relating to valuation of federally railbanked rights-of-way.**

*Be it enacted by the Legislature of the State of Kansas:*

Section 1. It shall be the duty of the County, the district appraiser, or the director of property valuation to value all property within a federally railbanked right-of-way. The value of the land and improvements shall be entered on the assessment role in a single aggregate, except as hereinafter provided. All interest in and improvements upon the right-of-way shall be assessed taxes as owned by the trail operator from the date of issuance of a Notice of Interim Trail Use contemplated by 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29. The taxing authority shall promptly assess, levy and collect any and all right-of-way taxes, as determined by the Kansas Division of Property Valuation, directly from the trail operator during any Notice of Interim Trail Use (NITU) or Certificate of Interim Trail Use (CITU), extensions therefrom and subsequent to execution of a railbanking agreement between the railroad and the initial trail operator. The initial trail operator shall remain responsible for payment of all taxes after the transfer of its interest to another operator, unless the successor trail operator is authorized by the STB.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

First I would like to thank the members of this committee for allowing me to speak today. Also, I would like to thank Mike Irvin and Farm Bureau for all the help they have given me. They have helped get me where I am today. in accordance with the law

I'm a full time farmer in Marshall County, Kansas along with being a property owner and tax payer. I'm here on behalf of myself, the other 21 land owners on the railbanked right of way in Marshall County and the rest of the property owners in Kansas that have and or could be affected by railbanked right of ways. The Right of Ways were suppose to revert back to the adjacent landowners except for the trails act that was passed in 1983 which allows trail groups to take our ground. We have to file a claim to get compensated for the taking of our property.

There has been one problem after another, since 2003 when the right of way was railbanked by the Union Pacific Railroad. First a group from Nebraska acquired the right of way from the Union Pacific Railroad. They only acquire the right of way then try to find somebody to take it over for them. The Nebraska Trails Foundation didn't do anything with the right of way while they had possession of it. The Nebraska Trails Foundation protested the property taxes. During this case, I was told by are county attorney there wasn't anything I could do to get involved in the Kanza case. The Kanza case stated

that the trail groups didn't have to pay the taxes, because they didn't own the ground, they just had an easement. Since this was allowed the taxes where reverted to the land owners instead of the trail group.

They finally transferred the right of way to a local group, Marshall County Connection. They have worked on trying to develop a trail, but have only worked on the first few miles. They have never completely finished any of the trail segments they started. I have had trouble working with the trail group on drainage issues, fencing and people trespassing on my property. Finally, I found out the land owners where being taxed for the right of way the Railroad payed taxes on this prior to the railbanking of the right of way. These trail groups have managed to make the landowners pay the taxes instead of them. That is when we protested our taxes, the county reclassified the ground as waste land undeveloped and taxed the landowners 0 dollars. This is where it has gotten complicated, there is no statue that allows this valve of 0 dollars, and no guaranty the county won't decided to tax the landowner the higher rate on the property in the future. The court of tax appeal has been involved in this issue and said there isn't a statue that can answer the issue. That is why this bill came about. With this bill, it would resolve the problems of the right of way taxation for the landowners of Kansas.

49 CFR 1152.29

§ 1152.29 Prospective use of rights-of-way for interim trail use and rail banking.

(a) If any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line proposed to be abandoned for interim trail use and rail banking pursuant to 16 U.S.C. 1247(d), it must file a comment or otherwise include a request in its filing (in a regulated abandonment proceeding) or a petition (in an exemption proceeding) indicating that it would like to do so. The comment/request or petition must include:

(1) A map depicting, and an accurate description of, the right-of-way, or portion thereof (including mileposts), proposed to be acquired or used;

(2) A statement indicating the user's willingness to assume full responsibility: for managing the right-of-way; for any legal liability arising out of the use of the right-of-way (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability); and for the payment of all taxes assessed against the right-of-way; and

(3) An acknowledgment that interim trail use is subject to the user's continuing to meet its responsibilities described in paragraph (a)(2) of this section, and subject to possible future reconstruction and reactivation of the right-of-way for rail service. The statement must be in the following form:

Statement of Willingness To Assume Financial Responsibility

In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29, ----- (Interim Trail User) is willing to assume full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against the right-of-way owned by ----- (Railroad) and operated by ----- (Railroad). The property, known as ----- (Name of Branch Line), extends from railroad milepost ----- near ----- (Station Name), to railroad milepost -----, near ----- (Station name), a distance of ----- miles in [County(ies), (State(s))]. The right-of-way is part of a line of railroad proposed for abandonment in Docket No. STB AB----- (Sub-No. ---).

A map of the property depicting the right-of-way is attached.

--- (Interim Trail User) acknowledges that use of the right-of-way is subject to the user's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. A copy of this statement is being served on the railroad(s) on the same date it is being served on the Board.

(b)(1) In abandonment application proceedings under 49 U.S.C. 10903, interim trail use statements are due within the 45-day protest and comment period following the date the abandonment application is filed. See § 1152.25(c). The applicant carrier's response notifying the Board whether and with whom it intends to negotiate a trail use agreement is due within 15 days after the close of the protest and comment period (i.e., 60 days after the abandonment application is filed).

(i) In every proceeding where a Trails Act request is made, the Board will determine whether the Trails Act is applicable.

(ii) If the Trails Act is not applicable because of failure to comply with § 1152.29(a), or is applicable but the carrier either does not intend to negotiate an agreement, or does not timely notify the Board of its intention to negotiate, a decision on the merits will be issued and no Certificate of Interim Trail Use or Abandonment (CITU) will be issued. If the carrier is willing to negotiate an agreement, and the public convenience and necessity permit abandonment, the Board will issue a CITU.

(2) In exemption proceedings, a petition containing an interim trail use statement is due within 10 days after the date the notice of exemption is published in the Federal Register in the case of a class exemption and within 20 days after publication in the Federal Register of the notice of filing of a petition for exemption in the case of a petition for exemption. When an interim trail use comment(s) or petition(s) is filed in an exemption proceeding, the railroad's reply to the Board (indicating whether and with whom it intends to negotiate an agreement) is due within 10 days after the date a petition requesting interim trail use is filed.

(3) Late-filed trail use statements must be supported by a statement showing good cause for late filing.

(c) Regular and NERSA abandonment proceedings. (1) If continued rail service does not occur pursuant to 49 U.S.C. 10904 and § 1152.27, and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a CITU to the railroad and to the interim trail user for that portion of the right-of-way to be covered by the agreement. The CITU will: Permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and material consistent with interim trail use and rail banking, as long as it is consistent with any other Board order, 30 days after the date it is issued (10 days after issuance in NERSA proceedings); and permit the railroad to fully abandon the line if no trail use agreement is reached 180 days after it is issued, subject to appropriate conditions, including labor protection and environmental matters.

(2) The CITU will indicate that any interim trail use is subject to future restoration of rail service, and subject to the user continuing to meet the financial obligations for the right-of-way. The CITU will also provide that, if the user intends to terminate trail use, it must send the Board a copy of the CITU and request that it be vacated on a specified date. The Board will reopen the abandonment proceeding, vacate the CITU, and issue a decision

permitting immediate abandonment for the involved portion of the right-of-way. Copies of the decision will be sent to:

- (i) The abandonment applicant;
- (ii) The owner of the right-of-way; and
- (iii) The current trail user.

(3) If an application to construct and operate a rail line over the right-of-way is authorized under 49 U.S.C. 10901 and 49 CFR part 1150, or exempted under 49 U.S.C. 10502, then the CITU will be vacated accordingly.

(d) Exempt abandonment proceedings. (1) If continued rail service does not occur under 49 U.S.C. 10904 and § 1152.27 and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a Notice of Interim Trail Use or Abandonment (NITU) to the railroad and to the interim trail user for the portion of the right-of-way to be covered by the agreement. The NITU will: permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and materials, consistent with interim trail use and rail banking, as long as it is consistent with any other Board order, 30 days after the date it is issued; and permit the railroad to fully abandon the line if no agreement is reached 180 days after it is issued, subject to appropriate conditions, including labor protection and environmental matters.

(2) The NITU will indicate that interim trail use is subject to future restoration of rail service, and subject to the user continuing to meet the financial obligations for the right-of-way. The NITU will also provide that, if the user intends to terminate trail use, it must send the Board a copy of the NITU and request that it be vacated on a specific date. The Board will reopen the exemption proceeding, vacate the NITU, and issue a decision reinstating the exemption for that portion of the right-of-way. Copies of the decision will be sent to:

- (i) The abandonment exemption applicant;
- (ii) The owner of the right-of-way; and
- (iii) The current trail user.

(3) If an application to construct and operate a rail line over the right-of-way is authorized under 49 U.S.C. 10901 and 49 CFR part 1150, or exempted under 49 U.S.C. 10502, then the NITU will be vacated accordingly.

(e)(1) Where late-filed trail use statements are accepted, the Director (or designee) will telephone the railroad to determine whether abandonment has been consummated and, if not, whether the railroad is willing to negotiate an interim trail use agreement. The railroad shall confirm, in writing, its response, within 5 days. If abandonment has been



consummated, the trail use request will be dismissed. If abandonment has not been consummated but the railroad refuses to negotiate, then trail use will be denied. If abandonment has not been consummated and the railroad is willing to negotiate, the abandonment proceeding will be reopened, the abandonment decision granting an application, petition for exemption or notice of exemption will be vacated, and an appropriate CITU or NITU will be issued. The effective date of the CITU or NITU will be the same date as the vacated decision or notice.

(2) A railroad that receives authority from the Board to abandon a line (in a regulated abandonment proceeding under 49 U.S.C. 10903, or by individual or class exemption issued under 49 U.S.C. 10502) shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line (e.g., discontinued operations, salvaged the track, canceled tariffs, and intends that the property be removed from the interstate rail network). The notice shall provide the name of the STB proceeding and its docket number, a brief description of the line, and a statement that the railroad has consummated, or fully exercised, the abandonment authority on a certain date. The notice shall be filed within 1 year of the service date of the decision permitting the abandonment (assuming that the railroad intends to consummate the abandonment). Notices will be deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation (such as outstanding conditions, including Trails Act conditions). If, after 1 year from the date of service of a decision permitting abandonment, consummation has not been effected by the railroad's filing of a notice of consummation, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. In that event, a new proceeding would have to be instituted if the railroad wants to abandon the line. Copies of the railroad's notice of consummation shall be filed with the Chief, Section of Administration, Office of Proceedings. In addition, the notice of consummation shall be sent to the State Public Service Commission (or equivalent agency) of every state through which the line passes. If, however, any legal or regulatory barrier to consummation exists at the end of the 1-year time period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier. For good cause shown, a railroad may file a request for an extension of time to file a notice so long as it does so sufficiently in advance of the expiration of the deadline for notifying the Board of consummation to allow for timely processing.

(f)(1) When a trail user intends to terminate trail use and another person intends to become a trail user by assuming financial responsibility for the right-of-way, then the existing and future trail users shall file, jointly:

- (i) A copy of the extant CITU or NITU; and
- (ii) A Statement of Willingness to Assume Financial Responsibility by the new trail user.

(2) The parties shall indicate the date on which responsibility for the right-of-way is to transfer to the new trail user. The Board will reopen the abandonment or exemption proceeding, vacate the existing NITU or CITU; and issue an appropriate replacement

NITU or CITU to the new trail user.

(g) In proceedings where a timely trail use statement is filed, but due to either the railroad's indication of its unwillingness to negotiate interim trail use agreement, or its failure to timely notify the Board of its willingness to negotiate, a decision authorizing abandonment or an exemption notice or decision is issued instead of a CITU or NITU, and subsequently the railroad and trail use proponent nevertheless determine to negotiate an interim trail use agreement under the Trails Act, then the railroad and trail use proponent must file a joint pleading requesting that an appropriate CITU or NITU be issued. If the abandonment has not been consummated, the Board will reopen the proceeding, vacate the outstanding decision or notice (or portion thereof), and issue an appropriate CITU or NITU that will permit the parties to negotiate for a period agreed to by the parties in their joint filing, but not to exceed 180 days, at the end of which, the CITU or NITU will convert into a decision or notice permitting abandonment.

**HISTORY:**

[51 FR 16852, May 7, 1986, as amended at 52 FR 46774, Dec. 10, 1987; 61 FR 67876, 67894, Dec. 24, 1996; 62 FR 34669, 34670, June 27, 1997; 64 FR 53264, 53268, Oct. 1, 1999; 74 FR 52900, 52910, Oct. 15, 2009]

## § 1247. State and local area recreation and historic trails

(a) Secretary of the Interior to encourage States, political subdivisions, and private interests; financial assistance for State and local projects. The Secretary of the Interior is directed to encourage States to consider, in their comprehensive statewide outdoor recreation plans and proposals for financial assistance for State and local projects submitted pursuant to the Land and Water Conservation Fund Act, needs and opportunities for establishing park, forest, and other recreation and historic trails on lands owned or administered by States, and recreation and historic trails on lands in or near urban areas. The Secretary is also directed to encourage States to consider, in their comprehensive statewide historic preservation plans and proposals for financial assistance for State, local, and private projects submitted pursuant to the Act of October 15, 1966 (80 Stat. 915), as amended [16 USCS §§ 470 et seq.], needs and opportunities for establishing historic trails. He is further directed, in accordance with the authority contained in the Act of May 28, 1963 (77 Stat. 49) [16 USCS §§ 4601 et seq.], to encourage States, political subdivisions, and private interests, including nonprofit organizations, to establish such trails.

(b) Secretary of Housing and Urban Development to encourage metropolitan and other urban areas; administrative and financial assistance in connection with recreation and transportation planning; administration of urban open-space program. The Secretary of Housing and Urban Development is directed, in administering the program of comprehensive urban planning and assistance under section 701 of the Housing Act of 1954 to encourage the planning of recreation trails in connection with the recreation and transportation planning for metropolitan and other urban areas. He is further directed, in administering the urban open-space program under title VII of the Housing Act of 1961 [42 USCS §§ 1500 et seq.], to encourage such recreation trails.

(c) Secretary of Agriculture to encourage States, local agencies, and private interests. The Secretary of Agriculture is directed, in accordance with authority vested in him, to encourage States and local agencies and private interests to establish such trails.

(d) Interim use of railroad rights-of-way. The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976, shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with the National Trails System Act [16 USCS §§ 1241 et seq.], if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-

way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this Act [16 USCS §§ 1241 et seq.], and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

(e) Designation and marking of trails; approval of Secretary of the Interior. Such trails may be designated and suitably marked as parts of the nationwide system of trails by the States, their political subdivisions, or other appropriate administering agencies with the approval of the Secretary of the Interior.

**History:**

(Oct. 2, 1968, P.L. 90-543, § 8, 82 Stat. 925; Nov. 10, 1978, P.L. 95-625, Title V, Subtitle B, § 551(22), 92 Stat. 3516; March 28, 1983, P.L. 98-11, Title II, § 208, 97 Stat. 48; Dec. 29, 1995, P.L. 104-88, Title III, Subtitle B, § 317(1), 109 Stat. 949.)

1. System of taxation; classification; exemption.

(a) The provisions of this subsection shall govern the assessment and taxation of property on and after January 1, 1993, and each year thereafter. Except as otherwise hereinafter specifically provided, the legislature shall provide for a uniform and equal basis of valuation and rate of taxation of all property subject to taxation. The legislature may provide for the classification and the taxation uniformly as to class of recreational vehicles, as defined by the legislature, or may exempt such class from property taxation and impose taxes upon another basis in lieu thereof. The provisions of this subsection shall not be applicable to the taxation of motor vehicles, except as otherwise hereinafter specifically provided, mineral products, money, mortgages, notes and other evidence of debt and grain. Property shall be classified into the following classes for the purpose of assessment and assessed at the percentage of value prescribed therefor:

Class 1 shall consist of real property. Real property shall be further classified into seven subclasses. Such property shall be defined by law for the purpose of subclassification and assessed uniformly as to subclass at the following percentages of value:

(1) Real property used for residential purposes including multi-family residential real property and real property necessary to accommodate a residential community of mobile or manufactured homes including the real property upon which such homes are located 11 1/2%

(2) Land devoted to agricultural use which shall be valued upon the basis of its agricultural income or agricultural productivity pursuant to section 12 of article 11 of the constitution 30%

(3) Vacant lots 12%

(4) Real property which is owned and operated by a not-for-profit organization not subject to federal income taxation pursuant to section 501 of the federal internal revenue code, and which is included in this subclass by law 12%

(5) Public utility real property, except railroad real property which shall be assessed at the average rate that all other commercial and industrial property is assessed 33%

(6) Real property used for commercial and industrial purposes and buildings and other improvements located upon land devoted to agricultural use 25%

(7) All other urban and rural real property not otherwise specifically subclassified 30%

Class 2 shall consist of tangible personal property. Such tangible personal property shall be further classified into six subclasses, shall be defined by law for the purpose of subclassification and assessed uniformly as to subclass at the following percentages of

value:

(1) Mobile homes used for residential purposes 1 1/2%

(2) Mineral leasehold interests except oil leasehold interests the average daily production from which is five barrels or less, and natural gas leasehold interests the average daily production from which is 100 mcf or less, which shall be assessed at 25%:30%

(3) Public utility tangible personal property including inventories thereof, except railroad personal property including inventories thereof, which shall be assessed at the average rate all other commercial and industrial property is assessed 33%

(4) All categories of motor vehicles not defined and specifically valued and taxed pursuant to law enacted prior to January 1, 1985 30%

(5) Commercial and industrial machinery and equipment which, if its economic life is seven years or more, shall be valued at its retail cost when new less seven-year straight-line depreciation, or which, if its economic life is less than seven years, shall be valued at its retail cost when new less straight-line depreciation over its economic life, except that, the value so obtained for such property, notwithstanding its economic life and as long as such property is being used, shall not be less than 20% of the retail cost when new of such property 25%

(6) All other tangible personal property not otherwise specifically classified 30%

(b) All property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, farm machinery and equipment, merchants' and manufacturers' inventories, other than public utility inventories included in subclass (3) of class 2, livestock, and all household goods and personal effects not used for the production of income, shall be exempted from property taxation.

**History:**

Adopted by Convention, July 29, 1859; ratified by electors, Oct. 4, 1859; L. 1861, p. 62; L. 1923, ch. 255, § 1; L. 1963, ch. 459, § 1; L. 1974, ch. 460, § 1; L. 1985, ch. 364, § 1; L. 1992, ch. 342, § 1; Nov. 3, 1992.

K.S.A. § 66-525 (2011)

66-525 Railroad right-of-way; abandonment, when; requirements; release; notice; exception.

(a) For purposes of this section, a railroad right-of-way shall be considered abandoned when:

(1) The tracks, ties, and other components necessary for operation of the rail line are removed from the right-of-way following the issuance of an abandonment order by the appropriate federal or state authority;

(2) if, within two years after the exercise of such an order, removal of such components is not completed and railroad operating authority is not restored or reissued by an appropriate court or other federal or state authority; or

(3) if no rail line is placed on the right-of-way within 10 years after the right-of-way is acquired. A railroad right-of-way shall not be considered abandoned if the railroad company or any other entity continues to use the right-of-way for railroad purposes after abandonment authority has been issued.

(b) If the grantee or assignee of record of a recorded railroad right-of-way abandons such right-of-way, such grantee or assignee shall:

(1) Remove crossbucks and modify signal devices or install "exempt" signs at all locations within 90 days of abandonment; and

(2) file a release of all right, title and interest in the right-of-way with the register of deeds of the counties in which the property is located, within 180 days after being requested by any owner of property servient to the right-of-way.

(c) If a grantee or assignee of record of a railroad right-of-way refuses or neglects to file a release when required by subsection (b), the owner of the servient property may bring an action in a court of competent jurisdiction to recover from the grantee or assignee of record damages in the amount of \$ 500, together with costs and reasonable attorney fees for preparing and prosecuting the action. The owner may recover such additional damages as the evidence warrants, and may obtain injunctive relief to quiet the title and eject any unauthorized parties from the property.

(d) A grantee or assignee of railroad right-of-way, at any time, may file a general release of all right, title and interest in the right-of-way of one or more particular rail lines or portions thereof with the register of deeds of the county or counties in which such property is located. If such action has been taken, the grantee or assignee shall be relieved of any further obligation under this section to file individual releases of any right-of-way included in such a general release.

(e) Within 30 days after entering abandoned railroad right-of-way property upon the tax rolls pursuant to K.S.A. 79-401 et seq., and amendments thereto, the county clerk of each county in which such property is so entered shall forward to the most recent railroad company holder of such property for right-of-way purposes, a certified list of the names and addresses of all property owners so entered upon the tax rolls following abandonment.

Within 30 days after receipt of such certified list by the railroad company, it shall send a notice of abandonment by first-class mail to each landowner at the address provided. The grantee or assignee of record of a recorded railroad right-of-way who abandons such right-of-way and provides the notice of such abandonment required by this subsection shall incur no civil or criminal liability for failure to notify any person who claims, or may claim, ownership of property servient to the abandoned right-of-way, nor shall such grantee or assignee incur any civil or criminal liability for notifying any person who has no legal claim to ownership of property servient to the abandoned right-of-way. The notice required by this subsection shall not create any legal right, be construed as a warranty or guarantee, nor shall such notice impair or cloud any lawful claim, right, title or interest of any person.

(f) Except where a railroad company conveys its right, title and interest in and to railroad right-of-way which it owns in fee simple, any conveyance by a railroad company of any actual or purported right, title or interest in property acquired in strips for right-of-way to any party other than the owner of the servient estate shall be null and void, unless such conveyance is made with a manifestation of intent that the railroad company's successor shall maintain railroad operations on such right-of-way.

(g) As used in this section, "railroad company" has the meaning of such term as defined in K.S.A. 2010 Supp. 66-2,123, and amendments thereto.

**History:**

L. 1986, ch. 247, § 1; L. 1987, ch. 258, § 1; L. 1993, ch. 105, § 1; L. 2005, ch. 21, § 9; L. 2006, ch. 108, § 3; July 1.



209361



# Nebraska Trails Foundation, Inc.

1644 Woodsvew • Lincoln, NE • 68502-4649 • 402-420-5885

November 3, 2003

Vernon Williams, Secretary  
Surface Transportation Board  
1925 K Street NW  
Washington, DC 20423-0001



RE: Surface Transportation Board Docket No. AB-33 (Sub-No. 208X);  
Union Pacific Railroad Company - Abandonment Exemption in Marshall R  
County, Kansas (Marietta Industrial Lead) from M.P. 133.13 to M.P. 125.0.

Dear Secretary Williams:

I forgot to include the \$150 check for the above request. It is enclosed here.

If you have any questions, you may contact me at:  
3901 S 29<sup>th</sup> St., Unit 29  
Lincoln, NE 68502  
402-475-7712

**FILED**

Thank you.

NOV 10 2003

Yours truly,

*Ross Greathouse*

Surface  
TRANSPORTATION BOARD

Ross Greathouse  
For Nebraska Trails Foundation

ENTERED  
Office of Proceedings

NOV 10 2003

RG:cg  
Enclosure  
CC: John Angle, Pres. NE Trails Foundation

Part of  
Public Record

**FILE RECEIVED**

NOV 10 2003

SURFACE  
TRANSPORTATION BOARD



209361

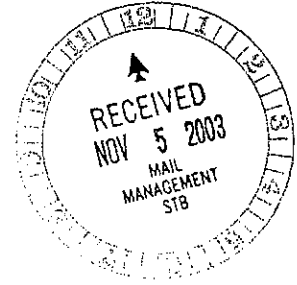


# Nebraska Trails Foundation, Inc.

1644 Woodview • Lincoln, NE • 68502-4649 • 402-420-5885

October 31, 2003

Vernon Williams, Secretary  
Surface Transportation Board  
1925 K Street, NW  
Washington, DC 20423-0001



**FILED**

NOV 10 2003

RE: Surface Transportation Board, Docket No. AB-33 (Sub-No 208X).  
Union Pacific Railroad Company – Abandonment Exemption in  
Marshall County, Kansas (Marietta Industrial Lead) from M. P. 133.13  
to M. P. 125.0.

SURFACE  
TRANSPORTATION BOARD

Dear Mr. Williams:

This comment should be treated as a protest or a petition for reconsideration in the above-captioned proceeding. This comment is filed on behalf of Nebraska Trails Foundation, Inc., a non-profit organization interested in promoting trail development, which is hereinafter referred to as "Commenter." Further support has been attained through the City of Marysville's "Quality of Life" advisory committee. The City of Marysville appointed this committee to define and implement quality of life elements.

**RECEIVED**

NOV 10 2003

SURFACE  
TRANSPORTATION BOARD

Commenter takes no position on the propriety of discontinuance of current rail service, but Commenter does request issuance of a Notice of Interim Trail Use rather than outright abandonment authorization. These comments pertain to the rail line of Union Pacific Railroad, with respect to that portion of the right-of-way in Marshall County, Kansas between Milepost 125 near Marietta, Kansas to Milepost 133.13 near Marysville, Kansas, a distance of approximately 8.13 miles. The right-of-way is part of a line proposed for abandonment in Docket AB-33 (Sub-No 208X.)

A map of the right-of-way is attached.

ENTERED  
Office of Proceedings

NOV 05 2003

Part of  
Public Record

A. Public Use Condition  
Commenter requests the Surface Transportation Board find that this property is suitable for other public use, specifically trail use, and to place the following condition on the abandonment:

1. Barring non-public disposition

Condition sought: an order prohibiting the carrier from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms.

Justification: This corridor offers an excellent addition to the recreational trails system of the state of Kansas which connect to major trails in the state of Nebraska. This property would allow us to provide hiking and bicycle routes paralleling the Big Blue River connecting Marysville, Kansas to Beatrice, Lincoln and Omaha, Nebraska. It would offer excellent wildlife viewing and recreational facilities for many small towns.

The time period sought is 180 days from the effective date of the abandonment authorization. Commenter needs this much time to coordinate efforts with local interest groups and to commence negotiations with the carrier.

2. Preserving trail-related structures

Condition sought: an order barring removal or destruction of trail-related structures such as bridges, culverts, ballast and rip/rap, but not removal of tracks, ties, and signal equipment.

Justification: Bridges, culverts, ballast and rip/rap have considerable value for, and would certainly facilitate, recreational trail purposes. On the other hand, such structures generally have negative salvage value for a railroad so their preservation poses no burden on interstate commerce.

The time-period requested is 180 days from the effective date of the abandonment authorization for the same reason indicated above.

B. Interim Trail Use

The railroad right-of-way in this proceeding is suitable for rail-banking, in addition to the public use conditions sought above, Commenter also requests rail-banking and interim trail use. Commenter accordingly makes the following statement:

STATEMENT OF WILLINGNESS TO ASSUME FINANCIAL  
RESPONSIBILITY

In order to establish interim trail use and rail-banking under Section 8(d) of the National Trails system Act, 16 U.S.C. 1247 (d), and 49 C.F.R. 1152.29, Nebraska Trails Foundation, Inc. and City of Marysville, Kansas Quality of Life Committee are willing to assume full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the use is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against the right-of-way owned by Union Pacific Railroad.

A map depicting right-of-way is attached.

Nebraska Trails Foundation, Inc. and City of Marysville, Kansas Quality of Life Committee acknowledge that use of the right-of-way is subject to the users continuing to meet its responsibilities described above, and subject to possible future reconstruction and reactivation of the right-of-way for rail service.

A copy of this statement is being served on the railroad on the same date it is being served on the commission.

By my signature below, I certify service upon Mack Shumate, Jr., Senior General Attorney, 101 N. Wacker Dr. Room 1920, Chicago, IL 60606.

Respectfully submitted,

*ROSS GREATHOUSE*

Ross Greathouse  
For Nebraska Trails Foundation, Inc.  
3901 South 27<sup>th</sup> Street, No. 29  
Lincoln, NE 68502

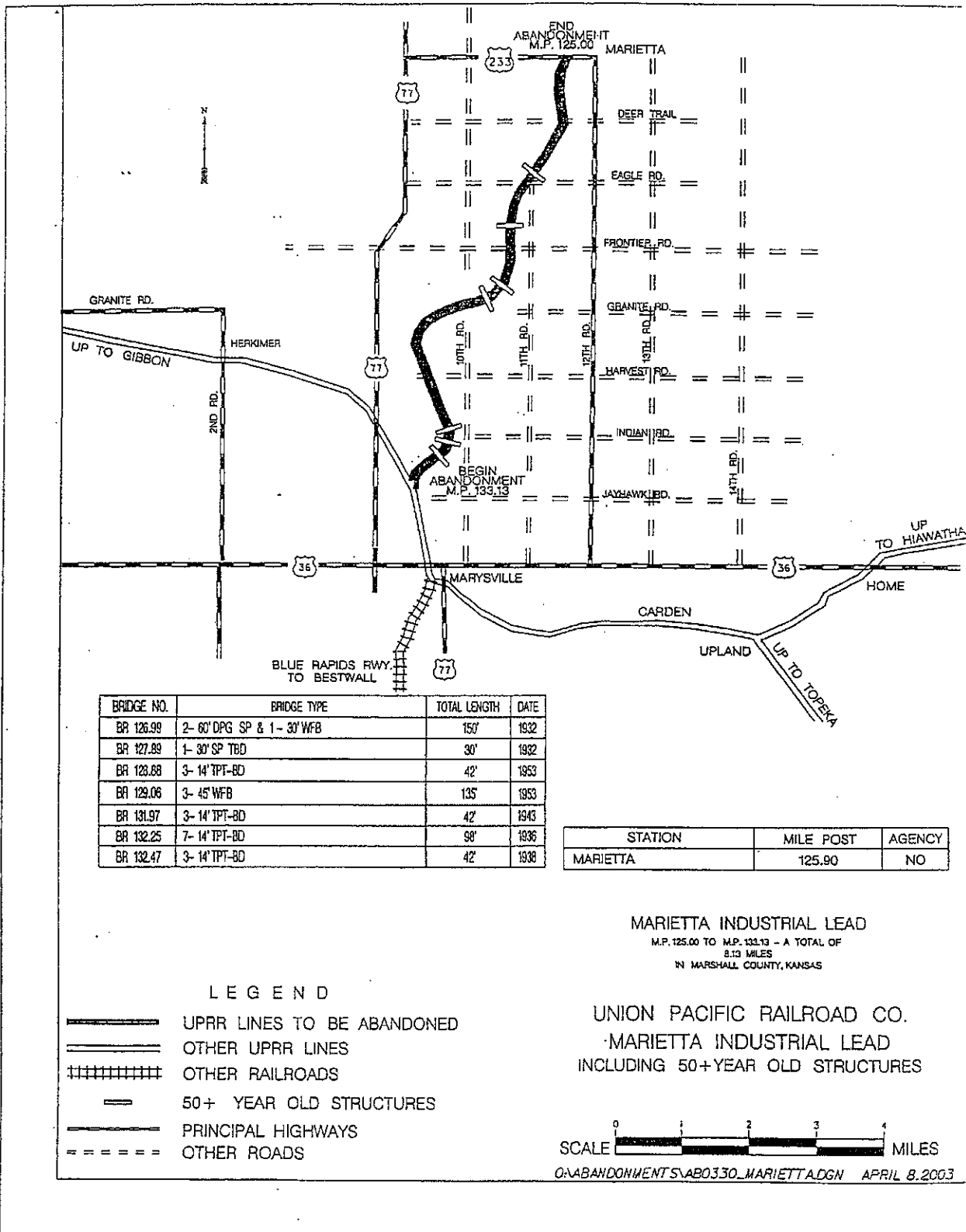
RG:cg

CC: Mack Shumate, Jr.,  
Senior General Attorney  
101 N Wacker Dr, Room 1920  
Chicago, IL 60606

John Angle, President  
Nebraska Trails Foundation, Inc  
3800 South 42 Street  
Lincoln, NE 68506

Don Abel  
Senior Mgr-Real Estate  
Union Pacific Railroad  
1800 Farnam Street  
Omaha, NE 68102

Steve O'Neal  
City of Marysville Quality of Life Committee  
406 N 18 Street  
Marysville, KS 66508



BRIDGE NO.	BRIDGE TYPE	TOTAL LENGTH	DATE
BR 126.99	2- 60' DPG SP & 1- 30' WFB	150'	1922
BR 127.89	1- 30' SP TBD	30'	1922
BR 128.68	3- 14' TPT-BD	42'	1953
BR 129.06	3- 45' WFB	135'	1953
BR 131.97	3- 14' TPT-BD	42'	1943
BR 132.25	7- 14' TPT-BD	98'	1936
BR 132.47	3- 14' TPT-BD	42'	1936

STATION	MILE POST	AGENCY
MARIETTA	125.90	NO

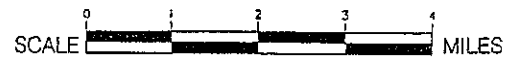
**MARIETTA INDUSTRIAL LEAD**

M.P. 125.00 TO M.P. 133.13 - A TOTAL OF  
8.13 MILES  
IN MARSHALL COUNTY, KANSAS

**LEGEND**

- UPRR LINES TO BE ABANDONED
- OTHER UPRR LINES
- OTHER RAILROADS
- 50+ YEAR OLD STRUCTURES
- PRINCIPAL HIGHWAYS
- OTHER ROADS

UNION PACIFIC RAILROAD CO.  
MARIETTA INDUSTRIAL LEAD  
INCLUDING 50+ YEAR OLD STRUCTURES



Q:\ABANDONMENT\5\ABO330\_MARIETTA.DGN APRIL 8, 2003

**SURFACE TRANSPORTATION BOARD DECISION DOCUMENT**

**Decision Information**

Docket Number: **AB\_33\_208\_X**

Case Title: **UNION PACIFIC RAILROAD COMPANY--ABANDONMENT  
EXEMPTION--IN MARSHALL COUNTY, KS**

Decision Type: **Decision**

Deciding Body: **Director Of Proceedings**

**Decision Summary**

Decision Notes: **(1) REOPENED THIS PROCEEDING; AND (2) MODIFIED THE  
NOTICE OF EXEMPTION SERVED AND PUBLISHED ON  
NOVEMBER 18, 2003 TO THE EXTENT NECESSARY TO  
IMPLEMENT INTERIM TRAIL USE/RAIL BANKING AND TO  
PERMIT PUBLIC USE NEGOTIATIONS FOR A PERIOD OF 180  
DAYS COMMENCING FROM THE DECEMBER 18, 2003 EFFECTIVE  
DATE OF THE EXEMPTION UNTIL JUNE 15, 2004, AND TO  
IMPOSE AN ENVIRONMENTAL CONDITION ON THE  
ABANDONMENT OF THE LINE.**

**Decision Attachments**

[34254.pdf](#)

28 KB

Approximate download time at 28.8 kb: **20**  
Seconds

**Note:**

If you do not have Acrobat Reader, or if you have problems reading our files with your current version of Acrobat Reader, the latest version of Acrobat Reader is available free at [www.adobe.com](http://www.adobe.com).

**Full Text of  
Decision**

34254  
DO

SERVICE DATE - DECEMBER 17, 2003

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN  
MARSHALL COUNTY, KS

Decided: December 15, 2003

Union Pacific Railroad Company (UP) filed a verified notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments and Discontinuances of Service and Trackage Rights to abandon an 8.13-mile line of railroad, from milepost 133.13 near Marysville to milepost 125.00 near Marietta, in Marshall County, KS. Notice of the exemption was served and published in the Federal Register on November 18, 2003 (68 FR 65114-15). The exemption is scheduled to become effective on December 18, 2003.

The Board's Section of Environmental Analysis (SEA) served an environmental assessment in this proceeding on November 21, 2003. Comments to the EA were due by December 8, 2003. No comments to the EA were received. In the EA, SEA stated that the National Geodetic Survey (NGS) advised that there are several geodetic station markers that have been identified that may be affected by the proposed abandonment. Therefore, SEA recommends that UP consult with NGS and provide NGS with 90 days' notice prior to disturbing or destroying any geodetic station markers in order to plan for the relocation of the markers.

On November 10, 2003, the Nebraska Trails Foundation Inc. (Commenter) filed a request for issuance of a notice of interim trail use (NITU) for the line under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for a public use condition under 49 U.S.C. 10905, to negotiate with UP for acquisition of the right-of-way for use as a recreational trail. Commenter requests that UP be prohibited from disposing of the corridor other than tracks, ties and signal equipment, except for public use on reasonable terms, and that UP be barred from removing or destroying any trail-related structures, such as bridges, culverts and rip/rap, for a 180-day period from the effective date of the abandonment exemption. Commenter indicates that the 180-day period is needed to coordinate efforts with local interest groups and to commence negotiations with UP.

Commenter also submitted a statement of willingness to assume financial responsibility for the management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for payment of any and all taxes that may be levied or assessed against, the right-of-way, as required at 49 CFR 1152.29, and acknowledged that the use of the right-of-way for trail purposes is subject to possible future reactivation for rail service. In a response submitted on December 4, 2003, UP indicated a willingness to negotiate with Commenter for interim trail use.

Because Commenter's request complies with the requirements of 49 CFR 1152.29 and UP is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement during the 180-day period prescribed below. If the parties reach a mutually acceptable final agreement, no further Board action is necessary. If no agreement is reached within 180



days, UP may fully abandon the line. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way As Trails, 2 I.C.C.2d 591, 609 (1986). Under section 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. See 49 CFR 1152.28(a)(2). Because Commenter has satisfied these requirements, a 180-day public use condition will be imposed, commencing from the December 18, 2003 effective date of the exemption.

When the need for interim trail use/rail banking and public use is shown, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. If a trail use agreement is reached on a portion of the right-of-way, UP must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, UP is not required to deal exclusively with Commenter, but may engage in negotiations with other interested persons.

As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. Upon reconsideration, the notice served and published in the Federal Register on November 18, 2003, exempting the abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking and to permit public use negotiations as set forth below, for a period of 180 days commencing from the December 18, 2003 effective date of the exemption (until June 15, 2004), and subject to condition that UP consult with the NGS and provide NGS with 90 days' notice prior to disturbing or destroying any geodetic station markers in order to plan for the relocation of the markers.
3. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, UP may discontinue service and salvage track and related materials. UP shall keep intact the right-of-way, including bridges, culverts, ballast, and rip/rap for a period of 180 days to enable any state or local government agency, or other interested person to negotiate

the acquisition of the line for public use. If an interim trail use/rail banking agreement is executed before June 15, 2004, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.

4. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

5. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

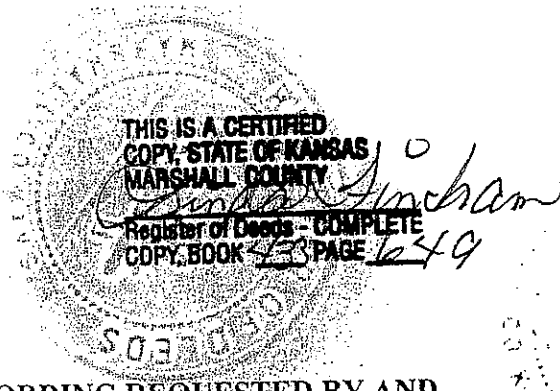
6. If interim trail use is implemented, and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

7. If an agreement for interim trail use/rail banking is reached by June 15, 2004, interim trail use may be implemented. If no agreement is reached by that time, UP may fully abandon the line, provided the conditions imposed in this proceeding are met.

8. This decision and notice is effective on its date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams  
Secretary



**ORIGINAL**

State of Kansas,  
Marshall County  
Linda Finchar  
Register of Deeds

Book: 433 Page: 649-652  
Receipt #: 6246 Total Fees: \$21.00  
Pages Recorded: 4  
Date Recorded: 12/20/2005 10:18:22 AM

**RECORDING REQUESTED BY AND  
WHEN RECORDED RETURN TO:**

Nebraska Trails Foundation, Inc.  
1644 Woodsvie  
Lincoln, Nebraska 68502

NUMBER  
ALPHA  
COPIED  
FILMED  
PROOF  
ORIG. COMP

(Space above for recorder's use only.)

2163-69

**QUITCLAIM DEED**

UNION PACIFIC RAILROAD COMPANY, a Delaware corporation, whose address is Real Estate Department, Mail Stop 1690, 1400 Douglas Street, Omaha, Nebraska 68179, Grantor, in consideration of the sum of Ten Dollars (\$10.00) and other good and valuable consideration to it duly paid, the receipt whereof is hereby acknowledged, has remised, released, donated and quitclaimed, and by these presents does REMISE, RELEASE, DONATE and forever QUITCLAIM unto NEBRASKA TRAILS FOUNDATION, a Nebraska corporation, whose address is set forth above, Grantee, its successors and assigns, forever, all of its right, title, interest, estate, claim and demand, both at law and in equity, of, in and to the real estate (the "Property") situate in Marshall County, State of Kansas, more particularly described in Exhibit A hereto attached and hereby made a part hereof.

IN WITNESS WHEREOF, Grantor has caused these presents to be signed by its duly authorized officers, and its corporate seal to be hereunto affixed the 6<sup>th</sup> day of December, 2005.

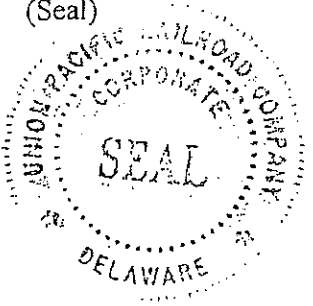
Attest:

**UNION PACIFIC RAILROAD COMPANY,  
a Delaware corporation**

C. J. Meyer  
Assistant Secretary

By Louise K. Love  
Title: GENERAL MANAGER REAL ESTATE

(Seal)



# In the United States Court of Federal Claims

No. 09-042L

(Filed: April 12, 2011)

\*\*\*\*\* \*

ANNA F. NORDHUS FAMILY TRUST, et al.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

National Trails System Act,  
16 U.S.C. § 1241 *et seq.*  
(2006); Fifth Amendment  
Taking Claim; Railroad's  
Abandonment of Easement;  
Federal Board's Notice of  
Interim Trails Use Blocked  
Reversion to Fee Simple  
Landowners Under Kansas  
Law.

\*\*\*\*\* \*

*R. Deryl Edwards, Jr.*, Law Offices of R. Deryl Edwards, Jr., Joplin, Missouri, for Plaintiffs.

*Mark S. Barron*, with whom was *Ignacia S. Moreno*, Assistant Attorney General, Environmental & Natural Resources Division, Natural Resources Section, United States Department of Justice, Washington, D.C., for Defendant.

## OPINION AND ORDER

WHEELER, Judge.

Plaintiffs in this rails-to-trails case are Kansas real property owners who claim to hold a fee simple interest in land subject to a railroad right-of-way. Their Fifth Amendment takings claims have been joined in one action for the resolution of common issues of federal and Kansas law. The case involves an 8.13-mile corridor of land just north of Marysville, Kansas in Marshall County, near the Nebraska border. Pending before the Court are the parties' cross-motions for summary judgment on liability. The Court has jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1) (2006).

The question presented is whether a December 15, 2003 Notice of Interim Trail Use (“NITU”) issued by the Federal Surface Transportation Board (“STB”) constituted a Fifth Amendment taking of Plaintiffs’ property interests. Subsidiary questions are whether the Union Pacific Railroad abandoned its rights in the easements it held, and whether the “railbanking” of otherwise abandoned railroad easements for possible future use constituted a railroad purpose under Kansas law. “Railbanking” is a procedure allowing for interim trail use of abandoned railroad corridors, permitted by Congress through 1983 Amendments to the National Trails System Act, 16 U.S.C. § 1241 *et seq.* (2006) (the “Trails Act”). See Neb. Trails Council v. Surface Transp. Bd., 120 F.3d 901, 903 n.1 (8th Cir. 1997) (the term railbanking refers to “the preservation of railroad corridor for future rail use.”); Caldwell v. United States, 57 Fed. Cl. 193, 194 (2003) (under the railbanking process, “[t]he right-of-way is ‘banked’ until such future time as railroad service is restored.”), *aff’d* 391 F.3d 1226 (Fed. Cir. 2004).

Guidance from the Federal Circuit in these cases is that a Fifth Amendment taking occurs if federal government action destroys state-defined property rights by converting a railroad easement to a recreational trail, if trail use is outside the scope of the railroad easement. Ladd v. United States, 630 F.3d 1015, 1019 (Fed. Cir. 2010); Ellamae Phillips Co. v. United States, 564 F.3d 1367, 1373 (Fed. Cir. 2009). Thus, in this case, the Court must look to Kansas law to determine the scope of the railroad easement, and then examine whether the federal action blocked Plaintiffs’ property rights.

For the reasons explained below, the Court concludes that the federal entity’s issuance of the NITU on December 15, 2003 prevented Plaintiffs from receiving their reversionary interest following the railroad’s abandonment of its easements. The current interim trail uses are not within the permissible scope of the railroad easements under Kansas law, and therefore a Fifth Amendment taking has occurred. Plaintiffs’ motion for partial summary judgment is GRANTED, and Defendant’s cross-motion for partial summary judgment is DENIED.

### Background<sup>1</sup>

In the mid-1800s, the Kansas legislature created a process to allow railroads to establish right-of-ways over private property. Kan. Gen. Stat. Ch. 23 § 47 (1868) provided in part:

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<sup>1</sup> The facts contained herein are taken from the parties’ proposed findings of uncontroverted fact and supporting exhibits, filed concurrently with the cross-motions for partial summary judgment. The Court finds that there are no genuine issues of any material facts.

Every railway corporation shall . . . have power . . . [t]o take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railway; but the real estate received by voluntary grant, shall be held and used for the purpose of such grant only . . . .

Kan. Gen. Stat. Ch. 23 § 81 (1868) provided in part:

Any duly chartered and organized railway corporation may apply to the board of county commissioners of any county through which such corporation proposes to construct its road, to lay off, along the line of such proposed railroad, as located by such company, a route for such proposed railroad, not exceeding one hundred feet in width . . . a right of way over adjacent lands sufficient to enable such company to construct and repair its roads and stations, and a right to conduct water by aqueducts, and the right of making proper drains.

Additionally, Kan. Gen. Stat. Ch. 23 § 84 (1868) provided in part:

If such company shall cause the copy of the report [of Commissioners], so certified, to be, within ten days after such certifying, filed and recorded in the office of the register of deeds for such county, it shall have the right to occupy the land so embraced within such route, for the purposes necessary to the construction and use of its road; and to such portions of the road over which a railroad shall be actually constructed within such time, the perpetual use of such lands shall vest in such company, its successors and assigns, for the use of the railroad, as soon as so much of such railroad shall have been constructed.

The Marysville & Blue Valley Railroad (“M&BVRR”) incorporated in the State of Kansas on July 5, 1879. The M&BVRR was the predecessor to the Union Pacific Railway Company (“Union Pacific”). In 1879, the M&BVRR initiated proceedings in the Marshall County, Kansas District Court (“District Court”) to condemn privately owned real property in Marshall County for a railroad right-of-way. On September 6, 1879, the M&BVRR filed one or more civil actions in the District Court seeking condemnation of private property for imposition of a railroad right-of-way. The M&BVRR petitioned the District Court, the Honorable Andrew Wilson presiding, in relevant part as follows:

Your Petitioner, the Marysville and Blue Valley Railroad Company, duly incorporated under and by virtue of the laws of the State of

Kansas respectfully represents that it is organized and incorporated as required by law and that it proposes to construct its railroad from the town of Marysville in Marshall County, Kansas northwardly through the township of Marysville to the State Line between Kansas and Nebraska and the said Marysville and Blue Valley Railroad respectfully petitions your Honor to appoint three Commissioners the same to be freeholders and residents of Marshall County Kansas to lay off along the line of said railroad located by said Company a route for said proposed Railroad Company in said County of Marshall not exceeding 100 feet in width . . . .

(M&BVRR Petition & Appointment of Commissioners, Sept. 6, 1879, Kan. Misc. Rec. No. 18, at 3-4.)

On September 8, 1879, the District Court entered an order, dated September 6, 1879, appropriating for the benefit of the M&BVRR a strip of land 100 feet wide over and through Plaintiffs' real property. The District Court's order stated:

Now Therefore, I, Andrew Wilson, Judge of such District Court aforesaid by authority of law in me vested do hereby appoint as such Commissioners . . . each being freeholders and a resident of said County of Marshall to perform each and every & all the duties aforesaid and to make due return of their proceedings in the manner prescribed by law . . . .

(Order, Sept. 6, 1879, filed Sept. 8, 1879, with J.B. Winkler, Register of Deeds.)

On October 4, 1879, the *Marshall County News* published the following notice:

Notice is hereby given that the commissioners appointed by the District Judge for Marshall county will proceed to lay off the railroad route for the Marysville & Blue Valley Railroad upon the 14th day of October, 1879 commencing at the town of Marysville and proceeding along the located line of said route to the county line, and will appraise, determine, and assess the damages done to the real estates over which the same will, pass according to law.

(*Marshall County News*, vol. viii, Marysville, Kan., Oct. 4, 1879, No. 2.)

On October 14, 1879, the three Commissioners appointed by the District Court to appraise the property taken for the M&BVRR railroad right-of-way, Daniel Clark, Francis Thompson, and F.J. Pierce, performed their appraisal, and

recorded their findings in a journal entry entitled "Description of land condemned for right-of-way for construction of RR – County Treasurer's Office Marshall County, Kansas." The Marshall County, Kansas Treasurer separately entered into its records the payments made to individual landowners for their damages occasioned by the M&BVRT. The payments were made over the next several years. The M&BVRT and each successive railroad company, including Union Pacific, thereafter obtained and possessed the right-of-way over Plaintiffs' property to use the 100-foot wide corridor for railroad purposes.

More than a century later, in 1986, the Kansas legislature sought to regulate railroad abandonment, and passed Kan. Stat. Ann. § 66-525, which provided in relevant part:

(a) For purposes of this section, a railroad right-of-way shall be considered abandoned when:

(1) The tracks, ties, and other components necessary for operation of the rail line are removed from the right-of-way following the issuance of an abandonment order by the appropriate federal or state authority . . . .

(f) Except where a railroad company conveys its right, title and interest in and to railroad right-of-way which it owns in fee simple, any conveyance by a railroad company of any actual or purported right, title or interest in property acquired in strips for right-of-way to any party other than the owner of the servient estate shall be null and void, unless such conveyance is made with a manifestation of intent that the railroad company's successor shall maintain railroad operations on such right-of-way.

The Plaintiffs who allege that they owned real property subject to the referenced railroad right-of-way as of December 15, 2003, and whose interests have been joined in one action for the resolution of common issues of federal and Kansas law, are as follows: Howard and Evelyn Baker, John and Lori Brackett, Gustoff Claeys, Ricky and Kandyce Cudney, Dam Holdings, LLC, Robert and Jean Dummermuth, Edna M. Gee Trust, Mark and Randy Goeckel, Allen and Marcia Hahn, William Jenkins, Wilbur and Loretta Jueneman, Dennis Kane, Kenneth and Carol Koch, Larry and Janice Koll, Ted and Collen Nemec, Anna F. Nordhus Family Trust, Francis A. Nordhus Family Trust, William and Millie Smith Family Trust, Smith Farm Ventures, L.P., Douglas E. and Phyllis I. Totten, and Robert L. and Mary Young.



Union Pacific was a successor to the M&BVRR railroad line. Union Pacific operated a railroad between mile post 133.13 near Marysville, Kansas through and including mile post 125.00 near Marietta, Kansas. On October 29, 2003, Union Pacific submitted a Notice of Exemption to the STB stating that it intended to abandon this railroad corridor. The Notice of Exemption stated:

There appears to be no reasonable alternative to the abandonment. There is no local or overhead traffic. The track has been out of service for over two years . . . . The property proposed for abandonment is not suitable for other public purposes, including roads or highways, other forms of mass transportation, conservation, energy production or transmission because the area is adequately served and access to the Property is limited . . . . The title to all of the operating right-of-way is reversionary in nature.

(Union Pacific Notice of Exemption, Oct. 29, 2003.)

On November 10, 2003, the Nebraska Trails Foundation, Inc. filed comments with the STB requesting the issuance of a NITU and the imposition of a public use condition pursuant to 49 C.F.R. 1152.28 and 49 U.S.C. § 10905 for the purpose of railbanking the public use of the existing railroad railbed. The comments included an express condition that the STB order Union Pacific not to remove any bridges, trestles, culverts, or “roadbed materials” or “rail-related structures” along the line. On the same date, the Nebraska Trails Foundation filed with the STB a “Statement of Willingness to Assume Financial Responsibility.” This document stated that the Nebraska Trails Foundation was “willing to assume full responsibility for management of, for any legal liability arising out of . . . and for the payment of any and all taxes that may be levied or assessed against, the right of way” as required by 49 C.F.R. 1152.29. See (STB Docket No. AB-33, Sub No. 208X.)

On November 18, 2003, Union Pacific’s Notice of Exemption was served and published in the Federal Register, and the exemption was scheduled to become effective on December 18, 2003. 68 Fed. Reg. 65,114-15 (Nov. 18, 2003). Also on November 18, 2003, the STB recorded that Union Pacific had filed a Notice of Exemption under 49 C.F.R. 1152 Subpart F to abandon the referenced railroad line. (STB Docket No. AB-33, Sub No. 208X.)

By letter dated December 4, 2003, Union Pacific indicated its willingness to negotiate with the Nebraska Trails Foundation for interim trail use. On December 15, 2003, the STB issued a decision that granted the Nebraska Trails Foundation’s request for issuance of a NITU and a public use condition.

Nearly two years later, on December 6, 2005, Union Pacific and the Nebraska Trails Foundation executed a quit claim deed, filed in the Marshall County, Kansas Recorder of Deeds Office, Book 433, pages 649-52. The quit claim deed stated in part that Union Pacific:

remised, released, donated and quitclaimed, and by these presents does REMISE, RELEASE, DONATE and forever QUITCLAIM unto NEBRASKA TRAILS FOUNDATION, a Nebraska corporation . . . its successors and assigns, forever, all of its right, title, interest, estate, claim and demand, both at law and equity, of, in and to the real estate (the "Property") situate in Marshall County, State of Kansas . . . .

(Union Pacific Quit Claim Deed, Dec. 6, 2005.)

On December 12, 2005, Union Pacific posted a letter to the STB advising that Union Pacific, as of December 6, 2005, had "discontinued service . . . between Milepost 133.3 to Milepost 125 . . . pursuant to the National Trails System Act."

On or about August 14, 2008, the Nebraska Trails Foundation executed a quit claim deed with the Marshall County Connection, Inc., conveying the Foundation's right, title and interest to any and all rights of way, reservations and easements of record to Marshall County Connection, Inc., recorded in Book 448, pages 336 and 339 in the Marshall County, Kansas Recorder of Deeds.

Plaintiffs filed their complaint in this Court on January 21, 2009, and moved for summary judgment regarding liability on September 15, 2009. Plaintiffs filed amended complaints on two occasions to join additional parties on Plaintiffs' side. Following a stay for more than a year to await a decision on another case involving Kansas law,<sup>2</sup> Defendant filed its response and cross-motion for summary judgment on liability on December 17, 2010. Plaintiffs filed a combined response and reply brief on January 16, 2011, and Defendant filed its reply brief on January 28, 2011. The Court heard oral argument on March 21, 2011.

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<sup>2</sup> By order dated February 27, 2009 in another rails-to-trails case, Judge Nancy B. Firestone of this Court certified three questions of Kansas state law to the Kansas Supreme Court. Biery v. United States, No. 07-675L (Fed. Cl. Order, Feb. 27, 2009). On September 23, 2010, the Kansas Supreme Court dismissed the Biery case, finding that it had no jurisdiction to accept certified questions from the Court of Federal Claims. Biery v. United States, No. 102,006 (Kan. Order to Dismiss, Sept. 23, 2010).

## Discussion

### A. Standard of Review

A Court should enter summary judgment if “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” RCFC 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). Summary judgment will not be granted if “the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party.” Liberty Lobby, 477 U.S. at 248. The party moving for summary judgment bears the initial burden of demonstrating the absence of genuine issues of material fact. Celotex, 477 U.S. at 323. In reviewing a motion for summary judgment, the Court examines the factual record and reasonable inferences drawn therefrom in the light most favorable to the party opposing the motion. Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Colvin Cattle Co., Inc. v. United States, 468 F.3d 803, 806 (Fed. Cir. 2006).

When cross-motions for summary judgment are presented, the Court evaluates each motion on its own merits and resolves all doubts and inferences against the party whose motion is being considered. Tenn. Valley Auth. v. United States, 60 Fed. Cl. 665, 670 (2004) (citing Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987)). The Court will deny both motions if, upon the required analysis, a genuine issue of material fact exists. Id.

### B. Applicable Law

Under Plaintiffs’ theory of the case, if Union Pacific were to abandon its railroad right-of-way, the easement would end and the property would revert to Plaintiffs as the fee simple owner. However, by operation of the Trails Act, the reversion to Plaintiffs is prevented. Plaintiffs describe the conversion of the railroad right-of-way to a recreational trail as a Congressional preemption of state property law. In determining the effects of federal action on real property, the Court must look to the law of the state where the property is located. Swisher v. United States, 176 F. Supp. 2d 1100, 1101-02 (D. Kan. 2001); Glosemeyer v. United States, 45 Fed. Cl. 771, 776 (2000) (citing Foster v. United States, 221 Ct. Cl. 412, 420-21, 607 F.2d 943 (1979)). Whether the Trails Act effects a taking depends “upon the nature of the state-created property interest that petitioners would have enjoyed absent the federal action and upon the extent that the federal action burdened that interest.” Preseault v. I.C.C., 494 U.S. 1, 24 (1990) (O’Connor, J., concurring). Accordingly, the Court must examine under Kansas law whether the railroad easement would have been extinguished if not for the

application of the Trails Act, and whether a new easement for recreational trails has been imposed. Glosemeyer, 45 Fed. Cl. at 776.

C. Plaintiffs' Property Interests

The Court will assume for purposes of the parties' cross-motions for summary judgment on liability that the named Plaintiffs each owns a fee simple interest in the real property that is the subject of this lawsuit. Each Plaintiff has presented to the Court a warranty or quit claim deed evidencing when and by what instrument he or she acquired ownership rights in the property. Each Plaintiff also provided evidence of real estate tax payments to Marshall County, Kansas during 2003, the year of the issuance of the NITU. The Plaintiffs furnished a Marshall County, Kansas appraiser's map outlining the Plaintiffs' property and its connection to the railroad right-of-way. While Defendant has reserved its right to challenge the standing of any individual landowner based upon information that may later be discovered, Defendant has not disputed that each named Plaintiff owns a fee simple interest.

Under Kansas law, it is clear that railroads exercising statutory powers of condemnation acquired easements in the right-of-way. As early as 1879, the Kansas Supreme Court detailed the permissible uses and scope of a railroad easement. The Kansas Court stated:

An easement merely gives to a railroad company a right of way in the land; that is, the right to use the land for its purposes. This includes the right to employ the land taken for the purposes of constructing, maintaining and operating a railroad thereon. . . . The former proprietor of the soil still retains the fee of the land and his right to the land for every purpose not incompatible with the rights of the railroad company. Upon the discontinuance or abandonment of the right of way, the entire and exclusive property and right of enjoyment revert in the proprietor of the soil.

Kan. Cent. Ry. Co. v. Allen, 22 Kan. 285, 293-94 (1879). In 1962, the Kansas Supreme Court reaffirmed its long-standing rule regarding railroad easements:

We have held that when land is devoted to railroad purposes it is immaterial whether the railway company acquired it by virtue of an easement, by condemnation, right-of-way deed, or other conveyance. *If or when it ceases to be used for railway purposes, the land concerned returns to its prior status as an integral part of the freehold to which it belonged prior to its subjection to use for railway purposes.* Fed. Farm Mortg. Corp. v. Smith, 149 Kan. 789, 792, 89

P.3d 838 [(1939)]. This court has uniformly held that railroads do not own fee titles to narrow strips taken as right-of-way, regardless of whether they are taken by condemnation or right-of-way deed.

Harvest Queen Mill & Elevator Co. v. Sanders, 370 P.2d 419, 423 (Kan. 1962) (emphasis added); see also Harvey v. Mo. Pac. R.R. Co., 207 P. 761, 762 (Kan. 1922) (explaining that a landowner “whose property is subjected to condemnation for railway or other public uses is none the less the owner of the fee and holder of the ultimate title”); Atchison, Topeka & Santa Fe Ry. Co. v. Humberg, 675 P.2d 375, 377 (Kan. Ct. App. 1984) (distinguishing cases involving an unequivocal intent to convey a fee interest in the conveyance of a fee instrument, and observing that “[r]egardless of how a railroad obtains a right-of-way, our courts have consistently held the railroad does not obtain fee simple title to the right-of-way”).

In this case, Defendant does not dispute that the M&BVRR acquired an easement through the 1879 statutory condemnation proceedings. Therefore, consistent with Kansas law, the Plaintiff landowners held a fee simple interest subject to the railroad easement.

#### D. Union Pacific’s Abandonment

Under the Trails Act, the conversion of the railroad’s right-of-way to trail use potentially blocks the reversion of the easement to the fee simple landowner. If not for the execution of a trail use agreement, “state property law would be revived and, possibly, trigger the extinguishment of rights-of-way and the vesting of reversionary interests.” Nat’l Ass’n of Reversionary Prop. Owners v. Surface Transp. Bd., 158 F.3d 135, 139 (D.C. Cir. 1998). In such circumstances, when a reversionary interest is blocked, the interim trail is deemed a taking. Preseault v. United States, 100 F.3d 1525, 1550-52 (Fed. Cir. 1996) (en banc) (“Preseault II”); Glosemeyer, 45 Fed. Cl. at 781-82. The holder of a reversionary interest that does not vest because of a trail use is entitled to compensation.

Kansas courts have addressed the issue of when a railroad has abandoned its right-of-way. See Gauger v. Kansas, 815 P.2d 501, 503 (Kan. 1991) (“To constitute abandonment of a railroad right-of-way there must be a uniting of intent to renounce all interest in the right-of-way with a clear and unmistakable intent to carry out that intent.”); Miller v. St. Louis, Sw. Ry. Co., 718 P.2d 610, 613 (Kan. 1986) (quoting Martell v. Stewart, 628 P.2d 1069, 1071 (Kan. Ct. App. 1981)) (the railroad’s intent must “be neither to use nor retake the property” and the act must “be clear and unmistakable” showing “a purpose to repudiate . . . ownership”).

Here, Union Pacific’s regulatory filings with the STB unequivocally expressed an intent to renounce the railroad’s interest in the right-of-way. In the

Notice of Exemption, Union Pacific stated that it “intends to abandon the Marietta Industrial Lead from milepost 133.13 near Marysville to milepost 125.00 near Marietta,” that “there appears to be no reasonable alternative to abandonment,” and that “[t]he property proposed for abandonment is not suitable for other public purposes.” (Union Pacific Notice of Exemption, Oct. 29, 2003, ¶¶ (a)(3), (e)(4).) These statements in Union Pacific’s application are clear evidence of the railroad’s intent to abandon its easements. Moreover, in its notice, Union Pacific was not considering a potential for railbanking, as it observed that the “title to all of the operating right-of-way is reversionary in nature.” *Id.* ¶ (e)(4).

As the Court observed in Glosemeyer, construing Missouri law:

In the case of railroads . . . an easement for a railroad right-of-way is extinguished when the railroad ceases to run trains over the land. The test for abandonment of an easement under Missouri law is therefore, non-user of the easement accompanied by conduct indicating an intention to abandon.

Glosemeyer, 45 Fed. Cl. at 777 (quoting Kansas City Area Transp. Auth. v. 4550 Main Assoc., Inc., 742 S.W. 2d 182, 189 (Mo. Ct. App. 1986)). The same outcome would be reached under Kansas law.

Union Pacific actually rid itself by conveyance of its entire legal interest in these easements. The Marshall County Connection, Inc., not Union Pacific, is now the owner of record of the easements, and it is modifying the former rail beds for use as recreational trails. Conveying an interest in land to another party is clear evidence of abandonment, particularly when the new use is for a different purpose. See Glosemeyer, 45 Fed. Cl. at 778. The Court finds it immaterial that the actions and conveyances completing the transactions may not have occurred until after the STB issued the December 15, 2003 NITU. The fact remains that the federal agency’s action blocked the reversion of the easement to the fee simple landowners following abandonment.

#### E. Trail Use

Defendant contends that the use of Union Pacific’s former railroad corridor as a recreational trail on an interim basis constitutes a permissible railroad purpose under Kansas law. However, the 1986 Kansas statute, Kan. Stat. Ann. § 66-525, is contrary to Defendant’s position. This law provides that any conveyance of the railroad’s right-of-way interest to another party “shall be null and void, unless such conveyance is made with a manifestation of intent that the railroad company’s successor shall maintain railroad operations on such right-of-way.” Kan. Stat. Ann. § 66-525(f).

As the Court has observed, railroad operations consist of installing and maintaining tracks, and running trains over those tracks. See Glosemeyer, 45 Fed. Cl. at 778. To state the obvious, removing tracks to establish recreational trails is not consistent with a railroad purpose, and cannot be regarded as incidental to the operation of trains. The Federal Circuit addressed this precise question in the following way:

[I]t appears beyond cavil that use of these easements for a recreational trail – for walking, hiking, biking, picnicking, frisbee playing, with newly-added tarmac pavement, park benches, occasional billboards, and fences to enclose the trailway – is not the same use made by a railroad, involving trucks, depots, and the running of trains.

Toews v. United States, 376 F.3d 1371, 1376 (Fed. Cir. 2004). Similarly, the Federal Circuit, interpreting Vermont law in Preseault II, observed that it could “find no support in Vermont law for the proposition . . . that the scope of an easement limited to railroad purposes should be read to include public recreational hiking and biking trails.” Preseault II, 100 F.3d at 1530.

Moreover, because the easement reverted to the fee simple landowners upon abandonment, the railroad’s interest ended at that point. The railroad’s consent to the new arrangement does not change anything because “the railroad cannot give what it does not have.” Toews, 376 F.3d at 1376.

#### F. Railbanking

A final question is whether a possible reactivation of the right-of-way corridor for rail service, even if remote and indefinite, could constitute a railroad purpose within the scope of the easement. Defendant contends that the effect of the December 15, 2003 NITU is not simply to create a recreational trail, but also to keep the corridor intact for possible future railroad use. Defendant views this railbanking feature as being within the railroad purpose of the original 1879 easements acquired by the M&BVRP. Defendant’s principal Kansas authority for this proposition is Atchison, Topeka & Santa Fe Railway Co. v. O’Leary, 100 P. 628 (Kan. 1909), where the Kansas Supreme Court held that a city’s pavement of a street located on the railroad’s right-of-way would not affect the railroad’s future use of its easement. The Kansas court held that “[i]f the [railroad] at any time has occasion to use this part of its right of way for railroad purposes, the presence of this pavement will not prevent it.” O’Leary, 100 P. at 629.

The Court, however, finds O'Leary to be readily distinguishable from the facts of this case. In O'Leary, the railroad was using its right-of-way for railroad purposes, and the controversy stemmed from the use of an easement portion as a city street. The holder of the easement was the railroad company, and the company was using the easement for railroad purposes. No abandonment of the easement had occurred. O'Leary, 100 P. at 628-29. Here, the facts are much different. Union Pacific had not used the right-of-way for rail purposes for more than two years prior to the STB's issuance of the NITU, and Union Pacific intentionally abandoned the rail corridor with the expectation that the land would revert to the fee simple landowners. The STB blocked the reversion to the landowners by issuing the NITU. The current owner is the Marshall County Connection, Inc., which has no intention of any future rail use for the corridor.

In the present case, there is no evidence of any plan to reactivate the rail service – simply a speculative assertion by Defendant that some resumed rail service could occur in the future. The transfer of the easement to entities completely unconnected with rail service, and the removal of all rail tracks on the corridor, lead the Court to conclude that any future rail use simply is unrealistic. See Glosemeyer, 45 Fed. Cl. at 780-81 (citing Kansas City Area Transp. Auth. v. 4550 Main Assoc., Inc., 742 S.W.2d 182, 190 (Mo. Ct. App. 1987); Boyles v. Missouri Friends of the Wabash Trace Nature Trail, Inc., 981 S.W.2d 644, 649 (Mo. Ct. App. 1998). As noted earlier, Glosemeyer involved the application of Missouri law, but the Court finds that the speculative and hypothetical assertions of possible future rail use would produce the same result under Kansas law. No basis exists to say that the mere mention of railbanking, without more, saves Defendant from the consequences of a Fifth Amendment taking.

#### Conclusion

Based upon the foregoing, the Court GRANTS Plaintiffs' motion for summary judgment on liability, and DENIES Defendant's cross-motion for summary judgment on liability. The Court will schedule a status conference with counsel of record within 20 days from this date to establish further proceedings in this case.

IT IS SO ORDERED.

s/Thomas C. Wheeler  
THOMAS C. WHEELER  
Judge



BEFORE THE COURT OF TAX APPEALS  
STATE OF KANSAS

IN THE MATTER OF THE PROTEST  
OF NORDHUS, FRANCIS - FAMILY  
TRUST FOR THE YEAR 2009 IN  
MARSHALL COUNTY, KANSAS

Docket No. 2010-1020-PR

AND

IN THE MATTER OF THE PROTEST  
OF CLAEYS, GUSTOFF - TRUST  
FOR THE YEAR 2009 IN  
MARSHALL COUNTY, KANSAS

Docket No. 2010-1025-PR

AFFIDAVIT OF FACTS AND CIRCUMSTANCES


I, Janet Duever, Marshall County Appraiser, being duly sworn on oath,

state and allege:

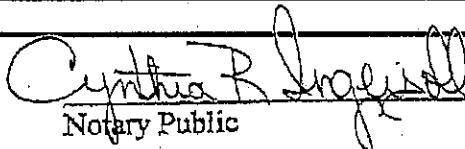
1. I appraised all the property associated with the parcel number the Taxpayers listed on their protest forms. A summary of my appraisals can be found in Taxpayers' "CONSOLIDATED EXHIBITS," Tab 18 (Claeys) and Tab 31 (Nordhus).
2. Although the Taxpayers listed parcels on their protest forms containing a variety of property, the Taxpayers have so far only disputed the estimated value of the railbed right-of-way on the parcels.
3. With respect to the rail banked right of way, I appraised the entire fee simple interest in the hands of the servient estate holder in accordance with COTA's decision in *In the Matter of the Protests of Kanza Rail-Trails Conservancy Inc.*, Docket No. 2007-723-PR through 2007-785-PR.

4. I estimated the value of the entire fee simple interest associated with the railbanked right of way property at \$0, after considering all the factors in K.S.A. 79-503a.
5. I gave weight to the factor in K.S.A. 79-503a which requires the appraiser to consider:
  - "...j) restrictions or requirements imposed upon the use of real estate by the state or federal government or local governing bodies...
4. The dominant estate places a burden upon the property. The burden appears to exist into perpetuity due to the National Trails System Act, 16 U.S.C. § 1241 *et seq.*
5. I further contacted other county appraisers with property associated with a railbanked right-of-way. I found that other county appraisers also consider the burden placed upon the property in a manner similar to what I have done in this instance.

Further your affiant saith not.

  
Janet Duever  
Marshall County Appraiser

Subscribed, acknowledged and sworn to before me on this 24<sup>th</sup> day  
of June 2011.

  
Cynthia R. Ingersoll  
Notary Public



**BEFORE THE COURT OF TAX APPEALS  
STATE OF KANSAS**

IN THE MATTER OF THE PROTEST  
OF NORDHUS, FRANCIS -FAMILY  
TRUST FOR THE YEAR 2009 IN  
MARSHALL COUNTY, KANSAS

Docket No. 2010-1020-PR

AND

IN THE MATTER OF THE PROTEST  
OF CLAEYS,GUSTOFF - TRUST FOR  
THE YEAR 2009 IN MARSHALL  
COUNTY, KANSAS

Docket No. 2010-1025-PR

**ORDER**

Now the above-captioned consolidated matters come on for consideration and decision by the Court of Tax Appeals of the State of Kansas.

The Court conducted a final evidentiary hearing on September 26, 2011. Marshall County appeared by its attorney of record, Laura Johnson-McNish. Taxpayers, the Francis Nordhus Family Trust and the Claeys Gustoff Trust, appeared jointly by their attorney of record, R. Deryl Edwards, Jr.

Witnesses presenting evidence at the hearing were Janet Duever, appearing on behalf of the county, and Martin Nordhus, appearing on behalf of Taxpayers. All exhibits offered by the parties were admitted in evidence and considered.

I.  
SUMMARY OF  
FACTUAL FINDINGS

1. This is a consolidated appeal from the county appraiser's 2009 valuations and assessments of two parcels of real property in Marshall County, Kansas. The state identification number for the Nordhus Trust parcel is 058-075-16-0-00-00-008.00-0. The state identification number for the Claeys Trust parcel is 058-072-09-0-00-00-004.00-0.

2. For the tax year at issue, the county valued the Nordhus Trust parcel and the Claeys Trust parcel at \$38,630 and \$112,300, respectively. The county utilized the same valuation methodology for both parcels.

3. Within the boundaries of both subject parcels runs a right of way extending approximately 8.13 miles along an inactive rail line north of Marysville, Kansas, near the Nebraska border. The right of way is a strip of land approximately 100 feet wide.

4. The right-of-way interest was appropriated for the benefit of the railroad in 1879 by means of a condemnation order entered by the Marshall County District Court.

5. In 2003, the right of way was "railbanked" by order of the federal Surface Transportation Board ("STB"), pursuant to the National Trails System Act, commonly known as the "Trails Act." The Trails Act is codified at 16 U.S.C. § 1241-1251.

6. Railbanking is a mechanism through which inactive rail lines are converted into public recreational trails for interim use. By operation of the Trails Act, the railroad is granted the right to re-enter railbanked rights of way in the event it should ever need to reactivate service on the line. *See, generally*, 16 U.S.C. § 1241 *et seq.* One purpose of the Trails Act, as amended in 1983, is to preserve railroad easements and corridors for future rail use.

7. Before its railbanking in 2003, the railroad easement within the right of way had been held continuously by the Union Pacific Railway Corp., or by one of its historical predecessors, for longer than a century.

8. The easement within the right of way has always been held subject to the reversionary rights of the owners of the underlying fee simple estate. At all times relevant to this case, Taxpayers have been the owners of the underlying fee simple estate.

9. During the railbanking process in 2003, the Nebraska Trails Foundation, Inc. ("NTF") filed comments with the STB requesting a Notice of Interim Trail Use and imposition of a public use condition pursuant to 49 C.F.R. 1152.28 and 49 U.S.C. 10905. According to the comments, use of the right of way was based on the express condition that the STB order Union Pacific not to remove any bridges, trestles, culverts, roadbed materials or trail-related structures.

10. The NTF filed with the STB a document titled "Statement of Willingness to Assume Financial Responsibility," which provided, among other things, that NTF was "willing to assume full responsibility for management of, for any legal liability arising out of, and for the payment of any and all taxes that may be levied or assessed against the right-of-way" in accordance with 49 C.F.R. 1152.29.

11. In December 2005, Union Pacific ceased rail operations along the right of way and executed a quitclaim deed demising its interest in and to the right-of-way property to the NTF as interim trail manager. In August 2008, the NTF executed a quitclaim deed conveying its rights, title and interest in and to the right-of-way property to Marshall County Connection, Inc. ("MCC").

12. The MCC has not petitioned the STB for use of the right of way. Nor has the MCC submitted a statement of willingness to assume financial responsibility for management of the right of way or for payment of taxes assessed against the right-of-way property. The STB has not vacated its December 15, 2003 Notice of Interim Trail Use.

13. Union Pacific has not paid *ad valorem* property taxes on the right-of-way property since it executed and conveyed the quitclaim deed to NTF in December 2005.

14. Beginning in 2009, the county added the right-of-way property to Taxpayers' assessments. Prior to 2009, Taxpayers had not been assessed *ad valorem* property taxes on any portion of the right-of-way property.

15. In December 2009, Taxpayers were advised by letter from the office of the Marshall County Attorney that assessments of property tax on the right-of-way property were being shifted from the railroad to the owners of the underlying fee. This measure was an attempt by the county to comply with certain orders issued by this court and its predecessor, the State Board of Tax Appeals (BOTA), voiding *ad valorem* property taxes assessed to trail operators of other railbanked rights of way.

16. The orders upon which the county appraiser relied in making its 2009 assessments were based, in part, on the erroneous conclusion that railbanked right-of-way property is not taxable because it is neither real property nor tangible personal property.

17. In the course of Taxpayers' protest of their 2009 assessments in this case, the county reclassified the right-of-way property as "undeveloped" land and assigned to that property a fair market value of zero dollars. The county's original 2009 classification of the right-of-way property was as agricultural "waste" land. During the period in question, the right-of-way property was not actually used as agricultural land.

18. In the past, while the right-of-way property was used as an active rail line, its value was included in the railroad company's unit assessment by the director of Property Valuation. In Kansas, state-level authorities value and assess utility property, including railroad property, as an integrated unit and apportion the unit assessment among the various local jurisdictions. See *K.S.A. 79-5a01 et seq.* and *Board of Meade Cty. Comm'rs v. State Director of Property Valuation*, 18 Kan. App. 2d 719,

Syl. ¶ 2, 861 P.2d 1348, *rev. denied* 253 Kan. 856 (1993). Utility property subject to state assessment is not subject to taxation by local authorities. *See Id.*

19. After active rail service ceased along the right of way, the right-of-way property was no longer valued and assessed as part of the railroad unit by state-level authorities. In consequence, local authorities assumed responsibility for valuing and assessing the right-of-way property.

20. For tax year 2009, the county split its final valuations of the subject parcels into two discrete parts, the "undeveloped" portion comprising the right-of-way acreage and the "agricultural use" portion comprising the surrounding farm land. Both parts were assessed to Taxpayers.

21. For the Nordhus Trust parcel, the county appraised the 8.0 acres of right-of-way property at a fair market value of \$0.00 and the 224.8 acres of surrounding farm land at an agricultural use value of \$38,630.

22. For the Claeys Trust parcel, the county appraised the 9.4 acres of right-of-way property at a fair market value of \$0.00 and the 252.9 acres of surrounding farm land at an agricultural use value of \$52,960. One-half acre of improved farmstead property also was included in the assessment at a fair market value of \$59,340.

23. On both parcels the right-of-way acreage has ongoing earning capacity as a utility corridor, as well as for other purposes. Some non-railroad based utilities use the right of way for transmission of utilities. A fiber-optic line was placed within the right of way by the now-bankrupt telecommunications company MCI without approval from Taxpayers.

24. Most of the acreage within the right of way can be farmed and has value and income producing capacity. If the fences extending along the right-of-way property were removed, the crop fields and pastures could be expanded right up to the existing ballast without significant investment or expense.

25. There is substantial acreage within the right of way that could be put to productive use if the right-of-way easement had not been railbanked under the Trails Act. The property within the right of way currently has a fair market value of anywhere from \$4,000 to \$6,000 per acre. In 2003, the right-of-way property was appraised at a value of \$1,275 per acre.

II.  
ANALYSIS

A. *Do Taxpayers have standing to contest the county's assessments of the right-of-way property?*

The county seeks dismissal of Taxpayers' appeal on the basis of standing. This court addressed the issue of Taxpayers' standing previously in this case. See *Order on Cross-Motions for Summary Judgment* (September 19, 2011), affirming certain sections of a previous order, *Order on Motions*, issued on January 28, 2011. In the *Order On Motions*, we held:

"The instant matters are protest applications filed pursuant to K.S.A. 2009 Supp. 79-2005. The Taxpayers have asserted that the easement land has been undervalued. An action disputing the County's valuation of a taxpayer's property is clearly allowed pursuant to the protest statutes. (Citation omitted.) Based thereon, the Court concludes the County's motion to dismiss for failure to state a claim for which relief can be granted is denied."

Nothing was presented at the final evidentiary hearing to warrant our reconsideration of previous orders entered on this subject matter. We affirm our prior determination that Taxpayers have standing to prosecute—and this court has jurisdiction to consider—the instant appeal, notwithstanding that Taxpayers are seeking to increase, rather than decrease, the taxable value of property included in their assessments.

B. *Does the federal Trails Act preempt Kansas laws governing valuation and assessment of real property for purposes of ad valorem property taxation?*

Taxpayers argue that this case presents a federal-state law conflict which must be resolved under a federal preemption analysis. More specifically, Taxpayers contend provisions of the federal Trails Act requiring trail managers to assume responsibility for paying taxes assessed on railbanked rights of way operate to prohibit the county from assessing such taxes to Taxpayers. We previously rejected Taxpayers' federal preemption argument in our *Order on Cross Motions for Summary Judgment*. We reaffirm that order here.

As explained in the previous order, while in the first instance it is doubtful federal preemption applies under the facts of this case, we question whether we have the authority even to pass upon the issue. The doctrine of federal preemption is a

question of constitutional law involving a facial review of statutory provisions. As a quasi-judicial administrative body, this court lacks authority to review the constitutional validity of a statute. *See Zarda v. State*, 250 Kan. 364, 370, 826 P.2d 1365, *cert denied*, 504 U.S. 973, 119 L. Ed. 2d 566, 112 S. Ct. 2941 (1992). When presented with administrative matters along with a challenge to statutory provisions, this court must presume the validity of the statutes and apply Kansas law as it is written. *See id.*

While Taxpayers might be able to bring a separate action in another forum seeking reimbursement of taxes paid, proceedings before this court shall be governed by the state property tax scheme as enacted by the Kansas Legislature pursuant to its constitutional mandate.

*C. Under Kansas law, does the right-of-way property constitute property subject to taxation on a uniform and equal basis?*

Notwithstanding anything to the contrary expressed in previous orders issued by this court or by its predecessor in other cases, we find the following legal framework governs the instant appeal:

In Kansas, all real and personal property is subject to taxation on a uniform and equal basis unless specifically exempted. KANSAS CONSTITUTION art. XI, §1(a); K.S.A. 79-101. The terms "real property," "real estate," and "land" are defined broadly. *See* K.S.A. 79-102. These terms include "not only the land itself, but all buildings, fixtures, improvements, mines, minerals, quarries, mineral springs and wells, rights and privileges appertaining thereto." *Id.* The term "personal property" is defined by exclusion as "every tangible thing which is the subject of ownership, not forming part or parcel of real property..." as well as "all 'property' owned, leased, used, occupied or employed by any railway or telegraph company or corporation within this state, situate on the right-of-way of any railway." *Id.*

In contrast to real property or tangible personal property, the term "intangible property" refers to a class of property which itself has no intrinsic value but derives its value from that which it represents. *See* 71 Am. Jur. 2d, State and Local Taxation, § 136. Examples of intangible property include intellectual property such as patents, trademarks and copyrights, as well as corporate stock, bonds, notes and goodwill.

The property under consideration in this case is improved ground within a right of way formerly used for railroad purposes. The term "right of way" may be used to describe an easement, which is an incorporeal interest in real property. The term also may be used in a more corporeal sense to describe an actual physical strip of land. *See Smith v. Missouri Pac. Ry.*, 90 Kan. 757, 760, 136 P. 253 (1913).



The right of way at issue here is a physical strip of land that comprises more than 17 acres extending across the two parcels in issue. It is agreed that the interest held by the railroad and its successors in connection with the right-of-way property is an easement, which is subject to reversion to the owners of the underlying fee simple estates. At all times relevant in this case, Taxpayers have been the owners of the underlying fee simple estates.

Based on the evidence presented, the property contained within the right of way must be considered real property, not intangible property. Real property is subject to taxation on a uniform and equal basis under Kansas law.

*D. Did the county improperly include the right-of-way property in its assessments of Taxpayers' servient estates?*

In Kansas, property taxes are generally assessed to the fee simple owner under the so-called "unitary assessment" rule, by which counties value and levy a single tax upon a tract of real estate instead of levying multiple separate assessments to the owners of each divided interest or component part of the unitary estate. *See In re Andrews*, 18 Kan. App. 2d 311, 323, 851 P.2d 1027 (1993); *State ex rel. Tomasic v. City of Kansas City*, 237 Kan. 572, 591, 701 P.2d 1314 (1985); *Board of Cty. Comm'rs of Johnson Cty. v. Greenhaw*, 241 Kan. 119, 123, 734 P.2d 1125 (1987). In other words, as a rule, the values attributable to the separate interests making up the whole are synthesized into a single assessment amount, regardless of how the property's ownership is divided in fact.

Accordingly, Kansas assessors generally may comply with the law by assessing taxes on property to the record owner. Absent statutory authority contemplating separate assessments of divided interests in a given case, the assessor may safely treat the owner of record as the taxable party.

As the parties correctly note here, separate assessments are clearly contemplated under various statutory provisions in Kansas, including provisions involving certain ground-lease property (K.S.A. 79-412), partitioned land (K.S.A. 79-419), mineral interests (K.S.A. 79-420), wireless communication towers (K.S.A. 79-430), and public utility property (K.S.A. 79-5a01). Taxpayers invite this court to extend, by analogy, these statutes to require the county to tax the value of the right-of-way acreage to the trail manager and to tax the value of the surrounding farm land to Taxpayers. In the absence of a statute clearly mandating separate assessments of the divided interests in this case, we hesitate to substitute our judgment in place of the county's.

Based on the record evidence and legal arguments presented, we find no violation of Kansas law in the county's inclusion of the right-of-way property in its assessments to Taxpayers. We emphasize, however, that this order should not be

expanded beyond the context of the facts and legal arguments presented. Here we are holding that Kansas law does not provide for mandatory separate assessments of the right-of-way acreage and the surrounding farm land. This order does not, however, address whether taxing officials have the discretionary authority to issue separate assessments under the circumstances.

*E. Did the County improperly assign a zero-dollar value to the right-of-way property?*

The county assigned a zero-dollar valuation to the right-of-way property extending across both parcels in question, which it asserts it did in order to comply with certain orders issued by this court and its predecessor in other cases involving railbanked rights of way. Again, we note that the orders upon which the county's values are based were clearly erroneous in that they incorrectly characterized railbanked rights of way as intangible property not subject to taxation. During the course of this appeal, the county seemingly recognized this erroneous characterization, yet maintained the position that its zero-dollar valuations were valid under Kansas law. We must disagree.

As noted, the subject right of way is a physical strip of land, and the interest held by the railroad and its successors in the right of way is an easement, not a freehold interest. An easement is a servitude imposed upon real estate, with the freehold (or fee) remaining in the owner of the underlying land. *See Spurling v. Kansas State Park and Resources Authority*, 6 Kan. App. 2d 803, 636 P.2d 182 (1981); *Hale v. Ziegler*, 180 Kan. 249, 303 P.2d 190 (1956); Restatement of Property, § 450 (1944) (An easement is an interest in land in the possession of another.)

For purposes of analysis, easements may be divided into two broad categories, appurtenant easements and easements in gross. An appurtenant easement grants rights and benefits in and to a parcel owned by another (the servient parcel) in connection with the use and enjoyment of a separate parcel (the dominant parcel). *See, generally, Allingham v. Nelson*, 6 Kan. App. 2d 294, 627 P.2d 1179 (1981). An appurtenant easement

“inheres in the land, concerns the premises, and is necessary to the enjoyment thereof. It is incapable of existence separate and apart from the particular message or land to which it is annexed, there being nothing for it to act on. It is in the nature of a covenant running with the land, attaches to the land to which it is appurtenant, and passes to the heirs or assigns of the owner of the land, such as by a conveyance or devise of the dominant estate, ...”

*Id.* at 296 (quoting *Smith v. Harris*, 181 Kan. 237, 311 P.2d 325 (1957)).

In contrast to appurtenant easements, easements in gross grant rights and benefits in and to a tract of land owned by another which are not connected to the use or enjoyment of a separate tract of land. *See* 6 Kan. App. 2d 294 at 296 (defining an easement in gross as a “personal interest” in another’s land unsupported by a dominant estate.)

An example of an appurtenant easement is an ingress/egress easement extending from one property across an adjacent property and providing access to a public thoroughfare. Examples of easements in gross include right-of-way easements held by utility companies and used to support infrastructure such as electrical grids, telecommunication networks, gas and water lines, railways, and other systems.

Proper characterization of the right-of-way easement extending across Taxpayers’ land is pivotal here. While it is clear that Taxpayers’ servient parcels are burdened by the right-way-easements, there is no evidence that a dominant parcel exists separate and apart from the right-of-way property itself. Thus, the valuable qualities of the right-of-way easement remain in the right-of-way property—which is part and parcel of Taxpayers’ taxable property—rather than attaching to and benefitting a separate, dominant parcel. Based on the record evidence, the easement in question should be characterized, and valued, as an easement in gross, not as an appurtenant easement.

The county’s defense of its zero-dollar valuation of the right-of-way property appears to be based, at least notionally, on an appraisal principle applied to properties impacted by appurtenant easements. This principle, sometimes referred to as the “principle of equivalency,” holds that when an appurtenant easement is carved out of one parcel for the benefit of another parcel, the value of the burdened parcel is diminished while the value of the benefitted parcel is enhanced. *See* 72 Am.Jur.2d, State and Local Taxation, § 684; *accord* The Appraisal of Real Estate (12<sup>th</sup> ed., 2001), 85-86. The rationale supporting application of this principle in property tax appraisals is that when the value of an appurtenant easement is added to the assessment of the benefitted tax parcel and deducted from the burdened tax parcel, double taxation is avoided and the base is conserved.

We must emphasize here again, however, that the right-of-way easement at issue in this case is held in gross, not as an appurtenance. There is no evidence of a separate, dominant tax parcel whose value is enhanced by virtue of the easement. The county therefore improperly applied an appraisal principle for parcels impacted by appurtenant easements in its valuation of the subject parcels, which are impacted by an easement in gross. The nature and consequences of this error are revealed upon close examination of the subject parcels’ assessment history.

During the time when the right-of-way easement was utilized for railroad purposes, the acreage within the right of way had been valued and taxed by state officials as part of the railroad company’s unit assessment. In 2003, when the right of

way was converted to recreational use under the Trails Act, state officials removed the railroad company from the tax rolls and turned over assessment of the right-of-way property to local officials. This shift in assessment responsibilities, which was administrative in nature, appears to have resulted in substantive consequences as well. Not only was the railroad company removed from the tax rolls, but so too was all taxable value attributable to the more than 17 acres of improved land within the right of way formerly held by the railroad. This court finds no basis in law or fact for such a result. Merely because the right-of-way property no longer is being valued and taxed by state officials does not mean that the property should cease being valued and taxed altogether.

All real and personal property is subject to taxation on a uniform and equal basis unless specifically exempted. KANSAS CONSTITUTION art. XI, §1(a); K.S.A. 79-101. The county's zero-dollar assessment of the right-of-way property in this case is tantamount to an exemption, which is improper because no specific statutory basis for exempting the property has been identified by either party.

Based on the weight of the evidence presented, we find the most reasonable estimate of fair market value for the property within the right of way is \$4,000 per acre. This unit value equates to an additional \$32,000 of taxable value attributable to the Nordhus Trust parcel and an additional \$37,600 of taxable value attributable to the Claey's Trust parcel. The findings herein are based on the limited valuation evidence contained in the record and should not be construed as this court's endorsement or rejection of any particular appraisal methodology under similar circumstances.

IT IS SO ORDERED

THE KANSAS COURT OF TAX APPEALS



  
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BRUCE F. LARKIN, CHIEF JUDGE

  
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J. FRED KUBIK, JUDGE

  
\_\_\_\_\_  
TREVOR C. WOHLFORD, JUDGE

  
\_\_\_\_\_  
JOELENE R. ALLEN, SECRETARY

CERTIFICATION

I, Joelene R. Allen, Secretary of the Court of Tax Appeals of the State of Kansas, do hereby certify that a true and correct copy of this order in Docket Nos. 2010-1020-PR and 2010-1025-PR, and any attachments thereto, was placed in the United States Mail, on this 3rd day of November, 2011, addressed to:

Martin Nordhus, Trustee  
967 10th Rd  
Marysville, KS 66508

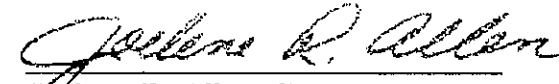
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IN TESTIMONY WHEREOF, I have hereunto subscribed my name at Topeka, Kansas.

  
Joelene R. Allen, Secretary