



Gabe S. Meyer
Assistant General Attorney

March 16, 2009

Via Electronic Filing

The Honorable Anne Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D. C. 20423

**RE: STB Docket No. AB-102 (Sub-No. 13)—Missouri-Kansas-Texas
Railroad Co.—Abandonment—In St. Charles, Warren, Montgomery,
Callaway, Boone, Howard, and Pettis Counties, MO**

Dear Secretary Quinlan:

Attached is Union Pacific Railroad Company's Reply to the Missouri Attorney General's Petition, and the Great Rivers Environmental Law Center's Comments in the above-referenced matter.

Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Gabriel S. Meyer".

Gabriel S. Meyer

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Docket No. AB-102 (Sub-No 13)

**MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
-- ABANDONMENT --
IN ST. CHARLES, WARREN, MONTGOMERY, CALLAWAY
BOONE, HOWARD, COOPER AND PETTIS COUNTIES, MO**

**REPLY OF UNION PACIFIC RAILROAD COMPANY
TO PETITION FOR DECLARATORY ORDER**

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Dated and Filed: March 16, 2009

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Docket No. AB-102 (Sub-No. 13)

**MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
-- ABANDONMENT --
IN ST. CHARLES, WARREN, MONTGOMERY, CALLAWAY
BOONE, HOWARD, COOPER AND PETTIS COUNTIES, MO**

**REPLY OF UNION PACIFIC RAILROAD COMPANY
TO PETITION FOR DECLARATORY ORDER**

Union Pacific Railroad Company ("UP") submits this Reply in response to the Petition for Declaratory Order ("Petition") filed by the Office of the Missouri Attorney General ("AG") and supporting comments ("Comments") filed by Great Rivers Environmental Law Center ("Great Rivers") in STB Docket No. AB-102 (Sub-No. 13) on February 12, 2009. The AG and Great Rivers (collectively "Petitioners") ask the Board to declare that a May 25, 2005 Notice of Consummation, which UP filed for abandonment of a lift bridge known as the Boonville Bridge (the "Bridge") in Boonville, MO, is invalid, thereby resolving an "uncertainty" as to the abandonment status of the Bridge. Additionally, Great Lakes asks the Board to review the Section 106 historic review and Nation Environmental Policy Act ("NEPA") review processes associated with abandonment of the Bridge.

As discussed below, the Petition and Comments are untimely. UP filed and properly served its Notice of Consummation, and consummated the abandonment of the

Bridge, nearly four years ago. Second, there is no "uncertainty" as to the Bridge's abandonment status or the validity of UP's Notice of Consummation. Third, there are no legitimate historic or environmental review issues. UP has repeatedly acknowledged that these reviews must be completed before the Bridge can be removed. (See, e.g., *UP Notice of Consummation*, p. 3.) The Coast Guard is currently conducting a Section 106 historic review and NEPA analysis, and the Army Corps of Engineers is conducting a Section 404 environmental review and a NEPA analysis, as part of the permitting process for demolition of the Bridge. Neither the AG or Great Rivers show that the Coast Guard is failing to fulfill its historic and environmental review obligations. Finally, any issues that Great Lakes or any other party has as to the Coast Guard's procedures should be raised with the Coast Guard, not the Board, which does not exercise oversight of Coast Guard activities. Accordingly, the Board should deny the Petition.¹

I. HISTORY AND BACKGROUND²

A. The Abandonment and the Interim Trail Use Agreement

UP's Boonville Lift Bridge was originally a part of a rail line owned and operated by Missouri-Kansas-Texas Railroad Co. ("MKT"), extending from Parsons, KS to St. Louis,

¹ On March 12, 2009, the Rails to Trails Conservancy, the Save the Katy Bridge Coalition, Inc., and the Missouri Parks Association jointly filed a "Motion to Provide and to Enforce Compliance with Section 106" in this matter. In their filing, the commenters argue that the STB must assume responsibility for completing the Section 106 historic review process. UP will reply to this Motion by April 1, 2009 (20 days after filing). As noted above, however, removal of the Bridge is subject to the authority of the United States Coast Guard, which is conducting an ongoing historic review. See 33 C.F.R. §116.01; *Mar. 18, 2008 Coast Guard Letter* (Exhibit 1).

² UP's Notice of Consummation contains a complete history of the proceeding up to its May 25, 2005 filing date, together with relevant documentation.

MO. MKT filed an application to abandon a 200-mile portion of the Line in September 1986, which the Interstate Commerce Commission granted on March 6, 1987. The ICC's approval was subject to various conditions, including trail use and a Section 106 historic condition as to the Bridge. On April 22, 1987, the ICC served a "Certificate of Interim Trail Use or Abandonment " ("CITU"), establishing conditions for possible trail use—which expressly required that the Missouri Department of Natural Resources ("MDNR") assume full responsibility and liability for any trail use property—or alternatively, abandonment.

MKT and the MDNR reached an Interim Trail Use Agreement in June 1987, under which MDNR acquired most of the right-of-way associated with the line, excluding the Bridge. In November 1987, MKT executed a quitclaim deed for conveyance of the line to MDNR, which, again, expressly excluded the Bridge.

In the years that followed, MDNR developed much of the line into a recreational trail known as the Katy Trail. Most of the trail utilized the former MKT line's right-of-way. The Bridge, however, was never used as part of the trail. Instead, the trail as constructed leaves the MKT right-of-way in the Boonville area to cross the Missouri River on a parallel highway bridge, which was built with space reserved for the trail.³

B. Litigation Subsequent to UP's Notice of Consummation

Curiously, neither the AG's Petition nor Great Rivers' Comments disclose the litigation which followed UP's Notice of Consummation. The day after UP filed its Notice, the AG filed suit against MDNR, contending that MDNR lacked the right under state law to

³ The highway bridge is constructed at a height sufficient for water traffic to pass underneath without the need for a bridge opening. The Boonville Bridge sits at a lower level, requiring a lift span, which is now locked in the "up" position.

relinquish its option to use the Bridge.⁴ UP was subsequently added as a defendant in this case. A separate suit was also filed by various private organizations and individuals including Pat Jones, one of parties that Great Rivers now claims to represent.⁵ UP was also named as a defendant in this case. These two legal actions resulted in a series of decisions from the Missouri Circuit Court, Court of Appeals, and Supreme Court, all of which were adverse to the AG and the other plaintiffs. Petitioners fail to disclose any of them in their recent filings with the Board. UP has attached these decisions as Exhibit 2.

C. The Coast Guard's Demands for Bridge Removal

The Coast Guard has repeatedly demanded that UP remove the Bridge since 1991. (See Exhibit 3.) Partly in response to these demands, UP developed a plan to remove the Bridge. UP has also made plans to adaptively reuse the Bridge's approach spans to build a bridge for a second track across the Osage River on its Kansas City to St. Louis corridor, removing a major bottleneck on the line, which is used by both UP freight and Amtrak passenger trains. Because the Coast Guard demanded removal of the Bridge, and would have to approve any demolition plans before removal, UP has worked with the Coast Guard to comply with Section 106 historic requirements. The Coast Guard prepared a Memorandum of Agreement ("MOA"), outlining conditions for removal of the Bridge in 2005. UP and the State Historic Preservation Officer executed the MOA. However, due to the legal actions which followed, the Coast Guard deferred execution. Following the

⁴ *State ex rel. Nixon v. Childers*, NO. 05AC-CC00673 (Mo.Cir. Apr. 25, 2006) (trial order); *aff'd State ex rel. Nixon v. Childers*, 243 S.W.3d 403 (Mo.App. W.D., 2007); *review denied State ex rel. Nixon v. Childers* (Mo. Feb. 19, 2008). Copies of these decisions are attached as part of Exhibit 2.

⁵ *Midkiff et al. v. Childers*, Case no. 05 AC-CC 101098 (Mo. Cir. July 26, 2006) (trial order), *aff'd Midkiff et al. v. Childers*, 228 S.W.3d 623 (Mo.App. W.D., 2006). Copies of these decisions are attached as part of Exhibit 2.

conclusion of litigation, the Coast Guard proposed a new MOA to which UP has responded. UP is now awaiting a final version of the MOA for execution. In developing each of the two MOA's the Coast Guard solicited input from interested parties and the public, in accordance with Section 106 requirements.

II. RESPONSE TO THE ATTORNEY GENERAL

The AG argues that UP's 2005 Notice of Consummation is invalid because: 1) the Board did not modify the 1987 CITU to permit MDNR "to terminate its use of the Boonville Lift Bridge for trail purposes," and 2) the Board did not authorize UP to abandon the Bridge. (*Petition*, pp. 2-3, pars. 7-10.) UP addresses these arguments below. However, UP first addresses the untimeliness of the AG's Petition.

A. The Petition is Untimely

As discussed above, UP filed its Notice of Consummation on May 25, 2005 and served it on the AG's office the same day.⁶ (See *UP Notice of Consummation Certificate of Service*, attached as Exhibit 4.) The Notice of Consummation was not a boilerplate notice. Rather, it was a comprehensive document with multiple exhibits intended to give the Board the background of the abandonment, the legal basis for the consummation, and UP's plans to satisfy the historic and environmental conditions through the Coast Guard and the Army Corps of Engineers. Clearly, if the AG or anyone else intended to challenge the validity of the Notice, or dispute any of the claims made in it, they should have done so within 20 days, as required by Board regulations (49 C.F.R. §1104.13(a)), or requested an

⁶ Specifically, the Notice was served on "William Bryan, Esq., Deputy Chief Counsel" in the AG's office. Mr. Bryan was the attorney handling the Boonville Bridge issue for the AG at the time. Note that he is also listed as a "cc" on the letter from Stephen Mahfood attached as Exhibit B to the AG's Petition in this proceeding.

extension of time with supporting reasons for it.⁷ The AG has not offered any justification in its Petition for its delayed response of nearly four years. It appears that the AG made a conscious decision in 2005 to take its dispute to court rather than the Board, and now seeks Board intervention because it is dissatisfied with the courts' decisions.

B. No Modification of the CITU was Needed Prior to Abandonment

The AG argues that MDNR needed to request modification of the 1987 CITU in order to "terminate its use" of the Bridge, citing a number of past cases in which trail users have filed such requests. (*Petition*, pp. 2-3, par. 7.)

What the AG fails to recognize is that MDNR never had use of the Bridge as a trail.⁸ As discussed above, the Bridge and its approaches were expressly excluded from the property conveyed pursuant to the 1987 Interim Trail Use Agreement. Furthermore, MDNR never assumed responsibility or liability for the Bridge under the 1987 agreement or afterwards, which is not only a statutory requirement, but an express requirement of the CITU in this proceeding. (See *UP Notice of Consummation*, p. 2 and Exhibits 1, 2, attached thereto.) In short, as far as the Bridge was concerned, there was no trail use to terminate, as there was never any trail use in the first place. There is no requirement that a CITU be modified or vacated if a trail use agreement is never made.

⁷ See, e.g., *Delaware and Hudson Railway Company, Inc.--Discontinuance of Trackage Rights Exemption--in Susquehanna County, PA, and Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie, and Genesee Counties, NY*, STB Docket No. AB-156 (Sub-No. 25X), STB served Nov. 10, 2004; *The L.D. Kichler C. D/B/A Kichler Lighting--Petition for Declaratory Order*, STB Finance Docket No. 41859, STB served Nov. 6, 1997.

⁸ In fact, the Missouri courts expressly recognized this. See *State ex rel. Nixon v. Childers*, 243 S.W.3d 403, 407 (Mo.App. W.D., 2007).

C. UP had Authority to Abandon the Bridge

The AG's claim that the Board did not authorize UP to abandon the Bridge (*Petition*, p. 3, par. 9) requires little response. The 1987 CITU expressly authorized MKT (now UP) to abandon if no trail use agreement was reached during the 180-day negotiating period (*CITU*, p. 2, Ordering Paragraph 5, attached as Exhibit 1 to *UP Notice of Consummation*). As discussed above, a trail use agreement was never made as to the Bridge. While the 1987 trail use agreement contained provisions addressing the Bridge, the MDNR did not meet the statutory requirements that the trail user assume full responsibility and liability, and the agreement did not even allow MDNR to use the Bridge without a further agreement, which was never made. In effect, the 1987 agreement carved the Bridge out of the trail use transaction.

III. RESPONSE TO GREAT RIVERS

Great Rivers "joins in the reasons set forth in the State's Petition for Declaratory Order," and then goes on to raise additional issues relating to the Section 106 historic and environmental review processes. Since UP has already addressed the untimeliness and lack of merit in the AG's Petition, we limit our discussion in this section to the issues that Great Rivers has raised.

At the outset, however, the Board should understand that UP is not attempting to avoid the historic review process. UP recognizes that it must complete the process before removing the Bridge, and UP is working with the Coast Guard and the Army Corps of Engineers to do so, consistent with the representations that UP made in its Notice of Consummation (p. 3, par. 8). Furthermore, there is nothing in the ICC decision in this

proceeding which prevents the Section 106 process from being conducted by the Coast Guard. It is, after all, the Coast Guard which has been demanding removal of the Bridge for over a decade, and it is the Coast Guard which must approve demolition plans.⁹ With that overview, we turn to the specific arguments raised by Great Rivers.

A. UP was not Obligated to Begin the Historic Review Process before Abandonment Consummation

Great Rivers argues that UP's Notice of Consummation was a "nullity" because there was an outstanding historic condition that had not yet been satisfied. But the principle that all conditions must be met before consummation comes from the Board's 1997 abandonment rules revisions, which are not retroactive.¹⁰ When MKT filed its abandonment application in this matter in 1986, it was common practice for railroads to "consummate" abandonments on the date the railroad cancelled tariffs and cancelled service. The salvage of a line, and any ICC conditions imposed on salvage (including historic conditions) were treated as post-consummation activities. This was the practice of UP and its predecessor roads, and UP is unaware of any instance in which the ICC took exception to it.

In fact, the Section 106 condition imposed in these proceedings is consistent with this practice. It states, "If abandonment is **effected** under the CITU, MKT must (a) comply

⁹ The effect of the ICC decisions in the abandonment case was to remove a barrier to demolition of the Bridge. But only the Coast Guard can authorize actual demolition.

¹⁰ *Abandonment and Discontinuance of Rail Lines and Rail Transportation under 49 U.S.C. 10903*, Ex Parte 537, STB served June 27, 1997, at 5.

with the procedures in section 106 of the [National Historic Preservation Act]”¹¹ This language clearly contemplates that the historical conditions would be met after the “abandonment is effected.”

B. The Coast Guard’s Historic and Environmental Review Processes

As previously described, the Coast Guard is conducting ongoing Section 106 historic and environmental review processes for the Bridge. UP is fully cooperating in this effort, and Great Rivers itself admits that it is participating in the historic review process itself, as a “consulting” party. Nonetheless, Great Rivers claims that the Board should disregard the Coast Guard’s Section 106 review and conduct its own separate review. That request is unwarranted. The Board is not the proper body to address claims regarding the adequacy of the Coast Guard’s historic review process, as the Coast Guard, not the Board, has assumed the lead agency role for purposes of the historic review process. The Coast Guard also has considerable experience reviewing the historical aspects of waterway-spanning bridges. Even if the Coast Guard’s historic review process was flawed, it would not cast any “uncertainty” upon the Bridge’s abandonment status, which is well settled. As previously discussed, UP was free to consummate abandonment of the Bridge, and address the historic review process afterwards.

Beyond this, there is no merit to Great Rivers’ claims that the Coast Guard’s NEPA review is “unlawful.” First, Great Rivers’ central argument is that the Coast Guard has improperly “segmented” the environmental review process by not considering the Bridge

¹¹ Missouri-Kansas-Texas—Abandonment—In St. Charles, Warren, Montgomery, Callaway, Boone, Howard, Cooper and Pettis Counties, MO, ICC Docket No. AB 102 (Sub-No. 13), ICC served Mar. 6, 1987, at 9 (emphasis added).

removal in issuing a permit for construction of the new Osage River bridge.¹² However, “segmentation” is only an issue if it is used to limit the scope of an agency’s environmental review.¹³ The Coast Guard is not limiting the scope of its environmental review. It is conducting a full review of the Bridge as part of the demolition process. The review is no different than it would be if it were it conducted as part of the Osage proceeding. Attached as Exhibit 5 is an August 8, 2008 letter from UP to Missouri Senator Claire McCaskill responding to a similar issue.¹⁴ Of further note, the Army Corps of Engineers is conducting its own NEPA analysis, in addition to its Section 404 analysis under the Clean Water Act. The Army Corps of Engineers has chosen to consider the Boonville and Osage projects together. As a result, even though the projects have independent utility and do not need to be reviewed together, the Army Corps of Engineers’ NEPA analysis will identify the joint impact of the Boonville Bridge and Osage River projects.

Second, Great Rivers claims that the Coast Guard has improperly authorized “anticipatory demolition” of the Bridge. While Great Rivers does not provide any details, UP believes that it may be referring to the removal of a short approach span of the Bridge, which passed over a former Missouri Pacific Railroad Line (now UP) that parallels the Missouri River. This span was removed in the early 1990s to increase the vertical

¹² As previously discussed, UP intends to adaptively reuse the approach spans from the Boonville Bridge to construct this bridge.

¹³ See, e.g., *Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 68-70 (D.C. Cir. 1987).

¹⁴ The removal of the Boonville Bridge is properly treated as a separate project because it will occur regardless of whether or not the new Osage River bridge is built. It is clear from Coast Guard’s prior demands for removal of the Boonville Bridge, which date back to 1991—long before the Osage River bridge project was approved—that the Coast Guard sought removal of the Bridge because it is no longer used, not because of the possible reuse of its materials at Osage or anywhere else. This is consistent with the Coast Guard’s long-standing policy which provides, “All bridges are obstructions to navigation and are tolerated only as long as they serve needs of land transportation” 33 C.F.R. §116.01(a).

clearance for trains using the Missouri Pacific line, and to allow the Missouri Pacific line's roadbed to be raised in order to mitigate flooding from the river. The removal did not require Coast Guard authorization (it was over land, not water), and had nothing to do with current plans to remove the Bridge.

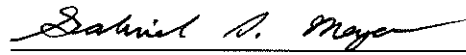
IV. CONCLUSION

The Boonville Bridge has not been used in more than 20 years. The Coast Guard is demanding its removal, and UP intends to adaptively reuse to use materials from the Bridge to build a new bridge that will alleviate a bottleneck on its heavily-trafficked Kansas City to St. Louis route, which is used by both UP and Amtrak. The AG's Petition and Great Rivers' supporting Comments are simply another attempt to delay UP's adaptive reuse of its property.

There is no reason for the Board to institute a proceeding at this late stage, particularly since Petitioners have waited nearly four years before asking the Board to revisit this matter. There is no "uncertainty" to resolve—UP's 2005 Notice of Consummation was permissible pursuant the ICC's decisions in this abandonment matter and applicable rules. Furthermore, the Section 106 historic condition does not justify an STB proceeding in this matter. The Coast Guard is currently conducting a Section 106 review, which will satisfy the historic condition that the ICC imposed in this abandonment. Accordingly, UP respectfully requests that the Board deny the AG's Petition.

Respectfully submitted,

UNION PACIFIC RAILROAD COMPANY



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Attorneys for Union Pacific Railroad Co.

CERTIFICATE OF SERVICE

I, Gabriel S. Meyer, hereby certify that on this 16th day of March, 2009, I caused a copy of the above Request for Extension of Time in STB Docket No. AB-102 (Sub-No. 13) to be served upon the following parties via first class U.S. mail:

Mr. Fritz R. Kahn
Frit R. Kahn, P.C.
1920 N Street, NW
Eight Floor
Washington, DC 20036

James R. Layton
State Solicitor
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, MO 65102

Bruce A. Morrison
Great Rivers Environmental Law Center
705 Olive Street, Suite 614
St. Louis, MO 63101-2208

Mr. Roger K. Wiebusch
Bridge Administrator
1222 Spruce Street
St. Louis, MO 63103-2832

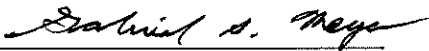

Gabriel S. Meyer

EXHIBIT 1

U.S. Department of
Homeland Security

United States
Coast Guard



Commander
Eighth Coast Guard District

1222 Spruce Street
St. Louis, MO 63103-2832
Staff Symbol: dwb
Phone: (314) 269-2382
Fax: (314) 269-2737
Email: david.a.orzechowski@uscg.mil

16591.1/197.1 MOR
March 18, 2008

Ms. Judith Deel
Missouri Department of Natural Resources
State Historic Preservation Office
P. O. Box 176
Jefferson City, MO 65102

Subj: M-K-T RAILROAD DRAWBRIDGE, MILE 197.1, MISSOURI RIVER

Dear Ms. Deel:

The Union Pacific Railroad (UPRR) is expected to propose removal of the subject bridge at Boonville, MO. It is my understanding that the bridge is eligible for inclusion in the National Register of Historic Places. As the lead federal agency for this project, it is our responsibility to satisfy the requirements of the National Historic Preservation Act. Attached is a "Draft" Memorandum of Agreement concerning demolition of the bridge for your review and comment.

Should you have any questions, please call Mr. David Orzechowski at the above listed number.

Sincerely,

ROGER K. WIEBUSCH
Bridge Administrator
By direction of the District Commander

Enclosure: Draft Memorandum of Agreement

removed

EXHIBIT 2

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

State of Missouri, ex rel. Jeremiah W. (Jay))
Nixon, Attorney General,)

Petitioner,)

vs.)

Case No: 05AC-CC00673

Doyle Childers, Director, Missouri Department)
of Natural Resources, the Missouri Department)
of Natural Resources, and Union Pacific)
Railroad Co.,)

Respondents.)

ORDER AND FINAL JUDGMENT

Petitioner, the Missouri Attorney General, brings its Second Amended Petition in seven counts against the Respondents, the Missouri Department of Natural Resources ("Department"), Director Doyle Childers of the Department ("Director") and Union Pacific Railroad Company ("Union Pacific"). The case comes before the Court on the Petitioner's Motion for Partial Summary Judgment and the Respondents' Cross-Motions for Summary Judgment. For the reasons stated below, the Petitioner's motion is denied. The Department's, Director's and Union Pacific's motions are granted.

"Summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Stanley v. City of Independence*, 995 S.W.2d 485, 486 (Mo. 1999). "Summary judgment is not precluded if the 'facts' alleged to be in dispute are actually differing opinions of the parties of the legal effect of documents or actions which determine their respective rights." *Roberts Fertilizer, Inc. v. Steinmeier*, 748 S.W.2d 883, 887 (Mo. App. W.D. 1998).

The predicate to each count of the Second Amended Petition is that the State of Missouri possessed, via the 1987 Interim Trail Use Agreement ("Agreement"), some presently existing

interest, be it a property interest or a contract right, which prevents Union Pacific from removing the Boonville Bridge from its current location and reusing it for rail purposes across the Osage River. As a matter of law, the Court finds that no such interest or right exists absent satisfaction of the Agreement's conditions precedent to the State's use of the Bridge.

There are no disputes of material fact. The parties agree that the disputes arise solely in the interpretation and legal effect of certain documents, the admissibility of which are uncontested. Although the Court interprets the Agreement and related documents as a whole, harmonizing and giving effect to all provisions, the primary provision at issue is in the "Excepting and Excluding" portion of paragraph six of the Agreement:

MKT's Boonville lift bridge, being MKT's Bridge No. 191.1 across the Missouri River at Boonville, Missouri. MKT agrees that said bridge shall be kept available for transportation purposes in accordance with ICC decision ex parte No. 274 (Sub-No. 13) and that MDNR upon execution of waivers of liability acceptable to MKT may utilize the bridge for trail purposes; provided, however, that MKT reserves the right to modify the bridge structure as may be required to improve rail transportation, so long as MDNR's right to utilize the premises for interim trail use is not adversely affected thereby.

References to "MKT" are to the Missouri-Kansas-Texas Railroad Company, all of whose interest has been acquired by Union Pacific.

The Court finds the following undisputed facts and makes these legal conclusions with respect to the issues presented:

1. Jeremiah W. (Jay) Nixon is the duly elected Attorney General of the State of Missouri
2. Director Childers is the Director of the Missouri Department of Natural Resources.
3. The Missouri Department of Natural Resources is an executive department, created by Missouri Constitution, Article IV, § 12.

4. In September 1986, the Missouri-Kansas-Texas Railroad Company filed an application with the Interstate Commerce Commission ("ICC") to abandon the right-of-way it possessed in St. Charles, Warren, Montgomery, Callaway, Boone, Howard, Cooper, and Pettis Counties of Missouri (the "MKT right-of-way"), including the Boonville Lift Bridge.

5. In March 1987 the ICC approved discontinuance of rail service on the MKT right-of-way and authorized issuance of a Certificate of Interim Trail Use ("CITU") pursuant to the National Rails-to-Trails Act.

6. On June 25, 1987, the Department and MKT entered into the Agreement. The Agreement and subsequent quitclaim deed conveyed 197.67 miles of the MKT right-of-way to the Department for interim trail use, excepting the Boonville Bridge.

7. Both the Agreement and the quitclaim deed made it clear that MKT was retaining all of its interest in the Boonville Bridge. It did, however, provide in paragraph six that "MKT agrees that said bridge shall be kept available for transportation purposes in accordance with ICC decision ex parte upon No. 274 (Sub.-No. 13) and that MDNR upon execution of waivers of liability acceptable to MKT may utilize the bridge for trail purposes. . ."

8. The language quoted above from the Agreement creates conditions precedent which must be satisfied prior to the Department (or the State generally) acquiring any present rights in the Boonville Bridge. The conditions precedent require that the Department execute waivers of liability acceptable to MKT, or in this case Union Pacific, consistent with the requirements of the applicable portion of the National Rails-to-Trails Act, 16 U.S.C. § 1247(d). The "waivers of liability" in this case must include a complete indemnification of Union Pacific for any liability arising out of the bridge.

9. The Department declined to assume liability for the Bridge in 1987, or to indemnify the railroad for its use. Neither the Department nor any agency or department of the State of Missouri has ever assumed any liability for the Bridge, nor provided a waiver of liability that was acceptable to Union Pacific.

10. Consequently, the Boonville Bridge has never been incorporated in or used by the general public as part of the Katy Trail. It is not currently even usable for bicycle and pedestrian traffic without a substantial expenditure of state funds.

11. The conditions precedent have never been met. The December 23, 2004 letter from former Department Director Stephen Mahfood to Union Pacific is not a binding indemnification, but is at best an offer to negotiate which Union Pacific would have had to accept before any rights accrued to the Department. No such acceptance occurred.

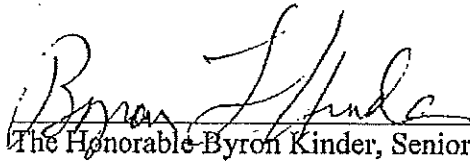
12. Since the conditions precedent have never been satisfied, the Department has no property interest in or presently exercisable contract rights in the Boonville bridge. Petitioner concedes that the Director has the authority to decline to acquire property under Section 253.040 RSMo.

13. Since no such rights exist, the Director could not have acted improperly in choosing not to assume liability for the Bridge or indemnify Union Pacific in exchange for the right to use the bridge for trail purposes.

Because the above conclusions are dispositive of the issues on summary judgment, the Court need not address the other contentions of the parties including the effect, if any, of Union Pacific's purported abandonment of the bridge in May of 2005. Petitioner cannot establish the universal element in each of the counts of the Second Amended Petition, namely that the State held a property interest or contractual right by virtue of the 1987 Agreement

Accordingly, **IT IS HEREBY ORDERED AND ADJUDGED** that Petitioner's Motion for Partial Summary Judgment is DENIED; Respondents Director's, Department's and Union Pacific's Motion for Summary Judgment are GRANTED. Therefore, it is further Ordered and Adjudged that judgment be entered on behalf of all Respondents on all Counts of the Second Amended Petition.

The Court's prior docket entry regarding Union Pacific's motion is hereby modified from "granted in part" to "granted." Any other outstanding motions are hereby overruled.


The Honorable Byron Kinder, Senior Judge

4-25-06
Date

Westlaw

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 (Cite as: 243 S.W.3d 403)

Page 1

H

Missouri Court of Appeals,
 Western District.

STATE of Missouri, ex rel. Jeremiah W. (Jay)
 NIXON, Attorney General, Appellant-Respondent,
 v.

Doyle CHILDERS, Director of Missouri Department of Natural Resources, The Missouri Department of Natural Resources, Respondent-Appellant,
 Union Pacific Railroad Co., Respondent,
 City of Boonville, Missouri, Amicus Curiae,
 Raye Reynolds, Frederick Brunner, Pat Jones, G. Tracy Mehan, III, Steve Mahfood, Amicus Curiae.
 Nos. WD 66892, WD 67051.

Oct. 23, 2007.

Motion for Rehearing and/or Transfer to
 Supreme Court Denied Dec. 18, 2007.

Application for Transfer Denied
 Feb. 19, 2008.

Background: State brought action against state Department of Natural Resources (DNR) and railroad, seeking declaration that agreement between DNR and railroad created property interests for state in railroad bridge and that DNR director had no authority to release, convey, or surrender those interests. The Circuit Court, Cole County, Byron L. Kinder, J., entered summary judgment against state, and state appealed.

Holding: The Court of Appeals, Hardwick, J., held that agreement between DNR and railroad did not give DNR or state an existing property right in railroad bridge.

Affirmed.

West Headnotes

[1] Judgment 228 ⚡ 181(19)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(19) k. Contract Cases in General. Most Cited Cases

In a contract case, summary judgment is appropriate when the meaning of the contract at issue is so apparent that it may be determined from the four corners of the document.

[2] Contracts 95 ⚡ 147(2)

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k147 Intention of Parties

95k147(2) k. Language of Contract. Most Cited Cases

Contracts 95 ⚡ 147(3)

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k147 Intention of Parties

95k147(3) k. Construing Whole Contract Together. Most Cited Cases

The court must determine the intention of the parties from the language of the contract and in light of its full context.

[3] Covenants 108 ⚡ 49

108 Covenants

108II Construction and Operation

108II(C) Covenants as to Use of Real Property

108k49 k. Nature and Operation in General. Most Cited Cases

When the language of a contract is clear and unambiguous as to restrictions on the use of property, its meaning must be given effect.

[4] Railroads 320 ⚡ 82(5)

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320 Railroads

320V Right of Way and Other Interests in Land

320k82 Abandonment and Forfeiture of Land or Rights

320k82(5) k. Rights of Parties or Privies on Abandonment. Most Cited Cases

Agreement between railroad and state Department of Natural Resources (DNR) to convey certain rights-of-way to DNR for use as trails did not give DNR or state an existing property right in railroad bridge, where agreement had expressly identified bridge as one of the structures excluded from the conveyance and merely restricted railroad's rights with regard to modifications, and DNR and railroad had also executed a quitclaim deed which excluded bridge from the conveyance.

*403 Mark A. Mattingly, Esq., St. Louis, for Union Pacific.

Karen K. Mitchell, Esq., Jefferson City, for State of Missouri.

James K. Lowry, Esq., for respondent-appellants.

Dale Reesman, Esq., Boonville, MO, for City of Boonville.

Bruce A. Morrison, Esq., St. Louis, MO, for Amicus Curiae.

*404 Before: LOWENSTEIN, P.J., ELLIS and HARDWICK, JJ.

HARDWICK, Judge.

This appeal arises from a summary judgment ruling that the State of Missouri ("State") has no property rights in a railroad lift bridge ("Boonville bridge"), which crosses the Missouri River at Boonville, Missouri. The State contends the circuit court erred in determining that it did not acquire such rights under the terms of a contractual agreement between the Missouri Department of Natural Resources ("DNR") and the Missouri-Kansas-Texas Railroad Company ("MKT"). For reasons explained herein,

we affirm the summary judgment.

FACTUAL AND PROCEDURAL HISTORY

In September 1986, MKT filed an application with the Interstate Commerce Commission ("ICC") to abandon its right-of-way for railway lines in the counties of St. Charles, Warren, Montgomery, Callaway, Boone, Howard, Pettis, and Cooper, including the Boonville bridge. The ICC approved the application and authorized the right-of-way for interim trail use, pursuant to the National Trails System Act, 16 U.S.C. § 1247(d) (1983).

On June 25, 1987, MKT entered into an "Interim Trail Use Agreement" with DNR. The Agreement and a subsequent quitclaim deed conveyed 197.67 miles of the MKT right-of-way to DNR for development of the Katy Trail State Park. The Agreement provided that MKT was conveying all of its interest in the right-of-way except for the Boonville lift bridge. In that regard, paragraph six of the Agreement states in relevant part:

The property to be conveyed by MKT to MDNR consists of all of MKT's right, title, and interest in and to the following described real property and premises ... save and except those certain exceptions and exclusions set-forth in this paragraph six ...

Excepting and excluding from the said conveyance all of MKT's interest in the following described parcels of land and/or structures:

...

MKT's Boonville lift bridge, being MKT's Bridge No. 191.1 across the Missouri River at Boonville, Missouri. MKT agrees that said bridge shall be kept available for transportation purposes in accordance with ICC decision ex parte No. 274 (Sub.-No.13) and that MDNR upon execution of waivers of liability acceptable to MKT may utilize the bridge for trail purposes; provided, however, that MKT reserves the right to modify

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the bridge structure as may be required to improve rail transportation, so long as MDNR's right to utilize the premises for interim trail use is not adversely affected thereby.

Following the quitclaim conveyance, Union Pacific Railroad (UP) acquired MKT's interest in the Agreement and the Boonville bridge. During 2004, Stephen Mahfood, the Director of DNR, learned that UP intended to remove the Boonville bridge from its current location. DNR had never sought to utilize the bridge for trail purposes, but Director Mahfood wanted to preserve its future option to do so.

On October 12, 2004, Director Mahfood sent a letter notifying UP that DNR intended to preserve its rights to use the bridge, as set forth in the 1987 Agreement. UP responded that the Coast Guard had recommended removal of the bridge because it had not been used for transportation purposes for the past seventeen years. UP also stated that the bridge was expressly excluded from the right-of-way conveyance in the 1987 Agreement and *405 that the conditions for waiver of liability had not been met.

On December 23, 2004, Director Mahfood sent a letter offering UP a full waiver of liability for the bridge. However, in January 2005, Mr. Mahfood was replaced by Doyle Childers as Director of DNR. Director Childers subsequently executed an amendment to the 1987 Agreement, which allowed UP to remove the Boonville bridge. In a follow-up letter dated May 24, 2005, Director Childers informed UP that DNR was "releasing" and "permanently waiving" its rights, under paragraph six of the 1987 Agreement, to use the bridge for trail purposes.

On May 26, 2005, the State, by and through the Attorney General Jay Nixon, filed a lawsuit against Director Childers and DNR, seeking a declaration that the 1987 Agreement created property interests for the State in the Boonville bridge, and that the DNR Director had no authority to release, convey, or surrender those interests. The State later filed a

Second Amended Petition, adding UP as a defendant.

The parties filed cross-motions for summary judgment. On April 25, 2006, the circuit court entered summary judgment against the State and in favor of the Director Childers, DNR, and UP on all counts of the petition. The court determined that UP never accepted DNR's offer to waive liability, and, thus, the condition precedent was not met under the 1987 Agreement for the State to acquire a property interest in the Boonville bridge. The court further concluded that the Director of DNR had authority to decline to acquire property rights to the bridge under Section 253.040, R.S.Mo.2000. The State appeals.

ANALYSIS

The State contends summary judgment was improper because the circuit court erroneously determined that the State did not have a property right in the Boonville bridge. Based on the language of the 1987 Agreement, the State argues that it obtained: (1) negative easement rights to preclude MKT from taking adverse action with regard to the bridge, and (2) a future interest in the bridge by way of an affirmative easement that would "spring" into use once the waivers of liability were executed. The State further asserts that the easements constituted presently existing property rights, which the Director of DNR had no authority to release.

We review a grant of summary judgment *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is appropriate only where "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law[.]" Rule 74.04(c)(6). Where, as here, the essential facts are not in question, disputes arising from the interpretation and application of a contract are matters of law for the court. *Care Ctr. of Kansas City v. Horton*, 173 S.W.3d 353, 355 (Mo.App.2005).

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[1][2][3] In a contract case, summary judgment is appropriate when the meaning of the contract at issue is so apparent that it may be determined from the four corners of the document. *Dubinsky Realty, Inc. v. Vactec, Inc.*, 637 S.W.2d 190, 192 (Mo.App.1982). We must determine the intention of the parties from the language of the contract and in light of its full context. *Country Club Dist. Homes Ass'n v. Country Club Christian Church*, 118 S.W.3d 185, 189 (Mo.App.2003). When the language of the contract is clear and unambiguous as to restrictions on the use of property, its meaning must be given effect. *Id.*

*406 [4] The State's arguments concerning the existence of negative and affirmative easements focuses exclusively on the description of MKT's interest in the bridge, as set forth in a sub-paragraph of paragraph six of the 1987 Agreement. The State asserts that, for purposes of discussion, the description can be divided into three clauses, as follows:

[1] MKT agrees that said bridge shall be kept available for transportation purposes in accordance with ICC decision ex parte No. 274 (Sub.-No.13) and [2] that MDNR upon execution of waivers of liability acceptable to MKT may utilize the bridge for trail purposes; [3] provided, however, that MKT reserves the right to modify the bridge structure as may be required to improve rail transportation, so long as MDNR's right to utilize the premises for interim trail use is not adversely affected thereby.

Based on this tripartite division, the State argues the first and third clauses created negative easements in its favor, which precluded MKT or UP from taking adverse action to remove the bridge. The State argues the second clause is independent from the remainder of the paragraph and, therefore, does not modify or apply to the first and third clauses. The State asserts the second clause creates a future interest in an affirmative easement that would allow the State to use the bridge for trail purposes upon execution of appropriate waivers of liability.

We disagree with the State's interpretation of the 1987 Agreement because it excludes any consideration of the introductory language in paragraph six. The first sub-paragraph of paragraph six clearly states that MKT is conveying to DNR all of its interest in the right-of-way "save and except those certain exceptions and exclusions set-forth in this paragraph six." In a later sub-paragraph entitled "Excepting and Excluding," the Agreement states "Excepting and excluding from the said conveyance all of MKT's interest in the following described parcels of land and/or structure." The Boonville bridge is thereafter expressly identified as one of the structures excluded from the conveyance of property.

Read as a whole, paragraph six indicates that MKT retains all property rights in the Boonville bridge but is restricted with regard to modifications. MKT must maintain the bridge in accordance with ICC requirements and must not make modifications that adversely affect DNR's rights of interim trail use on the adjacent property. Paragraph six also describes how DNR *can* obtain rights to use the bridge for trail purposes *if* waivers of liability are accepted by MKT. The availability of this option neither alters the exclusion of the bridge from the conveyance nor grants any presently existing property rights to DNR or the State. The language of paragraph six merely creates a condition precedent by which DNR could obtain such rights upon MKT's consent.

In addition to the 1987 Agreement, the parties also executed a quitclaim deed conveying MKT's interest in the right-of-way to DNR. The 1987 Agreement is attached to the quitclaim deed as Exhibit 1 and is incorporated by reference. Consistent with the Agreement, the quitclaim deed also clearly exempts the **Boonville bridge** from the conveyance. The deed describes the property transferred to DNR and then states:

Save and except, however, the following: ...

(2) Grantor's Boonville lift bridge, being Bridge No. 191.1 across the Missouri River at Boonville,

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Missouri, together with all piers, abutments, approaches and appurtenances thereto, and the land thereunder.

*407 It being Grantor's intention to convey hereby all of its remaining St. Louis and Sedalia Subdivision right-of-way in Howard County, Missouri save and except Grantor's New Franklin station grounds and its Boonville lift bridge, as afore- said.

The deed leaves no doubt about the parties' intention to exclude the Boonville bridge from the property conveyed to the DNR for purposes of interim trail use. Based on the language of the 1987 Agreement and the quitclaim deed, the circuit court correctly determined that neither DNR nor the State has an existing property interest in the **Boonville bridge**.

CONCLUSION

The summary judgment is affirmed.^{FN1}

FN1. In light of our affirmance, we need not address the cross-appeal by Mr. Childers and DNR, which alleges the circuit court erred in denying their Motion to Disqualify the Attorney General's Office from representing the State of Missouri in this matter.

All concur.
 Mo.App. W.D.,2007.
 State ex rel. Nixon v. Childers
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END OF DOCUMENT

In the Supreme Court of Missouri

SC89040

WD66892 consolidated with WD67051

January Session, 2008

State of Missouri ex rel.
Jeremiah W. (Jay) Nixon,
Attorney General,
Appellant-Respondent,
vs. (TRANSFER)

Doyle Childers, Director of Missouri
Department of Natural Resources, the
Missouri Department of Natural Resources,
Respondents-Appellants,
Union Pacific Railroad Co.,
Respondent.

Now at this day, on consideration of the appellant-respondent's application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session, 2008, and on the 19th day of February, 2008, in the above-entitled cause.

Given under my hand and seal of
said Court, at the City of Jefferson,
this 19th day of February, 2008.



Clerk

D.C.

028

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
19TH JUDICIAL CIRCUIT
DIVISION NO. _____

MIDKIFF et al Petitioners

vs.

CHILDERS, MO DNR + Union Pacific

05 AC-CC
No. 01098

Date of Proceeding: _____
Nature of Proceeding: _____

APPEARANCES:

Bruce Morrison

ATTORNEY FOR:

~~Plaintiff~~ Petitioners

Mary Bonacorsi

UP

- Respondent

Scott Jensen, J. Kent Lowrey

Children + DNR

Respondent

☐ DOCKET SHEET ENTRY ☒ ORDER ☒ JUDGMENT ☐ STIPULATION ☐ OTHER

☐ AS FOLLOWS ☐ ATTACHED HERETO

☐ AGREED TO BY

Respondent's
Defendants' Children + DNR Motion to Dismiss
and Respondent's
Defendant Union Pacific's Amended Motion to Dismiss
called + heard. Over ~~petitioners~~ objections Motion
to Dismiss of ~~Resp~~ Children + DNR and ~~Resp~~ Union
Pacific, SUSTAINED. Case Dismissed.

☒ SUBMITTED BY:

J. Kent Lowrey

ATTORNEY FOR:

Al

children + DNR

SO ORDERED this 27th day of July, 20 06

[Signature]
JUDGE

Westlaw.

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(Cite as: 228 S.W.3d 623)

Page 1

H

Missouri Court of Appeals,
Western District.
Ken MIDKIFF et al., Appellants,
v.

Midkiff v. Childers
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END OF DOCUMENT

Doyle CHILDERS and Missouri Department of
Natural Resources; Union Pacific Railroad, Re-
spondents.

No. WD 67371.

July 24, 2007.

Appeal from the Circuit Court of Cole County,
Missouri, Byron L. Kinder, Judge.
Bruce A. Morrison, Kathleen G. Henry, and Henry
B. Robertson, St. Louis, for Appellants.

James K. Lowry, Scott T. Jansen, Jefferson City,
for Childers and Missouri Department of Natural
Resources.

Mary C. Bonacorsi, Mark A. Mattingly, St. Louis,
for Union Pacific Railroad.

Before THOMAS H. NEWTON, P.J., HAROLD L.
LOWENSTEIN, and RONALD R. HOLLIGER, JJ.

Prior report: 2006 WL 4606508.

ORDER

PER CURIAM.

Appellants, Ken Midkiff, James J. Wilson, and Pat
Jones, appeal the decision of the trial court dismiss-
ing their lawsuit against Doyle Childers, the Mis-
souri Department of Natural Resources, and Union
Pacific Railroad Company.

*624 For reasons stated in the memorandum
provided to the parties, we affirm. Rule 84.16(b).

Mo.App. W.D.,2007.

EXHIBIT 3

U.S. Department
of Transportation

United States
Coast Guard



Commander
Eighth Coast Guard District

1222 Spruce Street
St. Louis, MO 63103-2832
Staff Symbol: ocr
Phone: (314)539-3900x2379
FAX: (314)539-3755

16241.10/197.1 MOR
July 30, 2002

Mr. Bill Stapp
Union Pacific Railroad
Room 430
1416 Dodge Street
Omaha, NE 68179-0430

Subj: BOONVILLE RAILROAD DRAWBRIDGE, MILE 197.1, MISSOURI RIVER

Dear Mr. Stapp:

The subject bridge has not been used for transportation for many years. We have been lenient with the railroad to provide you the opportunity for reuse of the bridge.

The following is a synopsis of actions to date:

- a. On November 20, 1991, we notified your firm that the subject bridge no longer serves a transportation purpose and must be removed from the river (Enclosure 1). We also requested that we be provided with a copy of your demolition plan within 30 days. The demolition plan was never received.
- b. On December 13, 1991, the General Attorney for the railroad replied to our 11/20/91 letter (Enclosure 2). He stated that the structure was being maintained with the lift span raised and requested information supporting our position that the structure must be removed.
- c. On March 26, 1992, we sent a letter to your General Attorney explaining why the structure must be removed and again requesting that the railroad submit a demolition plan to us for approval (Enclosure 3). Again, this office has received no demolition plan.
- d. On February 22, 2002, we once again sent a letter to your company explaining why the structure must be removed and requesting that you respond in writing your intentions concerning its removal (Enclosure 4).
- e. On March 8, 2002, you replied to our previous letter stating that there was the possibility of selling the structure (Enclosure 5). You further stated that you did not want to demolish the structure as long as someone else was interested assuming ownership.
- f. On March 26, 2002, we replied to your most recent letter stating that no more delays would be accepted and requested that you submit a demolition plan for our approval (Enclosure 6). We still have not received your plan.

16241.10/197.1 MOR
July 30, 2002

Subj: BOONVILLE RAILROAD DRAWBRIDGE, MILE 197.1, MISSOURI RIVER

This letter serves to notify you that we are now prepared to open civil penalty action against your company for violation of Title 33 USC 525(b), Failure to remove bridge when no longer used for transportation purposes. To avoid this action, the Union Pacific Railroad must submit a demolition plan to this office and initiate positive action for removal as soon as we approve the plan.

If no response is received by August 30, 2002, it will be assumed you have nothing to submit in your defense and we will forward the case to a Coast Guard Hearing Officer for suitable action.

Sincerely,



ROGER K. WIEBUSCH
Bridge Administrator
By direction of the District Commander

Encl: (1) CCDG2(ob) ltr dtd 11/20/91
(2) UPRR ltr dtd 12/13/91
(3) CCGD2(ob) ltr dtd 3/26/92
(4) CCGD8(ob) ltr dtd 2/22/2002
(5) UPRR ltr dtd 3/8/02
(6) CCGD8(ob) ltr dtd 3/26/02

} not included

EXHIBIT 4

CERTIFICATE OF SERVICE

I certify that I have this date served a copy of the foregoing document on the persons listed below by First Class, United States Mail:

Doyle Childers, Director
State of Missouri
Department of Natural Resources
P. O. Box 176
Jefferson City, MO 65101

Roger K. Wiebusch
Bridge Administrator
United States Coast Guard
1222 Spruce Street
St. Louis, MO 63103-2832

William Bryan, Esq.
Deputy Chief Counsel
State of Missouri
Office of Attorney General
221 West High Street, 8th Floor
Jefferson City, MO 65101

Dated at Omaha, NE this 25th day of May, 2005.

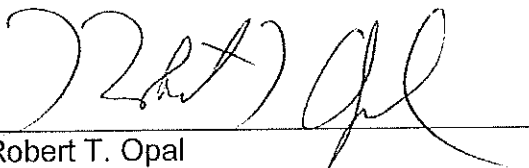

Robert T. Opal

EXHIBIT 5

August 7, 2008



Jim Young
Chairman

The Honorable Claire McCaskill
Unites States Senate
717 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator McCaskill:

I am writing in response to your letter of August 1, 2008, in which you expressed concern about a perceived discrepancy regarding our Coast Guard application to build a bridge at Osage and what we discussed in your office. Specifically, your concern has to do with our permit application to the Coast Guard for the bridge at Osage and how it might relate to the use of the Boonville Bridge spans as part of the project.

There is no discrepancy. Union Pacific has always openly acknowledged the link between the construction of the new Osage Bridge and the demolition of the existing Boonville Bridge. Union Pacific is required to obtain, and is in the process of obtaining, numerous federal and state permits for different aspects of the project. The Section 106 Historic Preservation review is included in its appropriate place in this multifaceted process. However, as set out below, the federal permitting system for the two major aspects of the overall project, Osage and Boonville, is very different and distinct. The Coast Guard's new bridge permit for the proposed bridge at Osage, issued January 31, 2008, involved a very narrow process. Conversely, the Corps of Engineer's permit to demolish the existing bridge at Boonville, still under consideration, involves a much broader process, including the Coast Guard led Section 106 Historic Preservation review.

In 2004, Union Pacific applied for both the Coast Guard new bridge permit for Osage and the Corps of Engineers' Clean Water Act permit for demolition and reuse of parts of the bridge at Boonville. The scope of a Coast Guard bridge permit is very narrow – does the proposed bridge have safe clearances for navigation? Union Pacific's initial application to the Coast Guard for the new bridge at Osage referenced, for informational purposes only, the fact that the spans were from the bridge at Boonville. On June 30, 2005, the Coast Guard advised us that it could not act on the application in that form as we would have to resolve the litigation regarding ownership of the Boonville Bridge and obtain the permits necessary to deconstruct it. However, the Coast Guard also noted that the source of materials for the proposed new bridge was not relevant to its review of the safe navigation clearances for permit authorization purposes, and if UP submitted a new application without referring to the source of materials, it could progress the application in that form – so long as the Boonville demolition issues were dealt with in their own proper permitting process.

We understood the Coast Guard to mean that it interpreted our reference to the use of the Boonville Bridge spans as an implicit request for authority to proceed with that

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demolition, which was not our intent as that part of the permitting process was being managed by the Army Corps under a separate permitting process. However, the Coast Guard apparently wanted to emphasize that we should not seek its authority for demolition of the Boonville Bridge in our Osage new bridge application, and that any such demolition approval needed to be submitted through the appropriate permitting process rather than the Osage application.

Accordingly, in August of 2005, Union Pacific submitted a new application to the Coast Guard for a bridge permit at Osage, which provided the design aspects and site specific information only. That new application was not a reflection of any change in plans, but merely a reflection of what was the proper issue to be placed before the Coast Guard in the context of the specific requirements of a new bridge permit. That application was granted on January 31, 2008, and it only authorizes UP to build a new bridge at Osage according to the design submitted. It does not authorize the use of spans from or demolition of the bridge at Boonville – those issues are still under review by the Corps of Engineers.

Union Pacific's request for authority to dismantle and reuse parts of the Boonville Bridge is part of the application currently under consideration by the Corps of Engineers under Section 404 of the Federal Clean Water Act. All required reviews of the impacts of the bridge demolition are being included in this process. This includes a Section 106 historical review, for which the Coast Guard is the lead agency.

The change in our application to the Coast Guard for the new bridge permit at Osage was in no way an effort to conceal or change the plan to use the spans from Boonville. The use of those spans has always been a well-publicized part of our proposal. The application was changed in response to the Coast Guard's letter in an effort to ensure that the proper issues were presented to the proper Federal agency for review and action in the proper forum. While the two sites are, and have always been, linked in our proposal, they are permitted in a separate manner. The review of the demolition of the bridge at Boonville is properly being handled as part of the Corps of Engineer's process, and was not appropriate for the Coast Guard to handle as part of its new bridge permit review. The federal action that mandates the historical and other reviews of the impact of the removal of the Boonville Bridge is the approval Union Pacific is seeking to remove the Boonville Bridge, not the approval of the design for the new bridge at Osage.

Union Pacific has a long history in Missouri. We have always strived to be a good corporate citizen, and this situation is no different. We have been open with the community and all the various stakeholders about our plans to remove the Boonville Bridge spans and use them to build a new bridge at Osage. Our rationale for wanting to do this is simple. We have been ordered by the Coast Guard to remove the unused Boonville Bridge since 1991, and given the high price of steel, we can now use the material from the Boonville Bridge to build a new bridge at Osage. The bridge at Osage is a one-track bridge, and it is the main bottleneck on this line. By building a new, double-tracked bridge at Osage, we will not only be able to improve Amtrak's performance in the state, but also better serve our customers. However, recognizing that

the Boonville Bridge has significance to the Boonville community, we have been willing to tender the Bridge to the community, provided we are adequately compensated for our loss. We even suspended the permitting process relating to demolition to give the community more time to come up with a feasible plan. To date, no entity has stepped forward with the financial ability to compensate us and take over responsibility for the bridge.

Our current plans are to move forward to obtain the appropriate permits to complete this project. Further delay in the permitting will only cause more delay in our ability to address the bottleneck at Osage. We do plan, as we have consistently stated in the past, to use the Boonville Bridge spans for the new Osage Bridge. We will not at this time further amend our application for the new Osage Bridge permit issued by the Coast Guard this January, but we will not be taking significant action on that permit until the Boonville issues are resolved. However, we will continue to work with the Corps of Engineers and Coast Guard to obtain the remaining necessary permits that cover environmental and historic preservation issues surrounding both bridges.

Senator, I hope this response allays any concerns you might have about this situation. Please do not hesitate to contact me if you have further questions.

Sincerely,

A handwritten signature in dark ink, appearing to be the name "Jim". The signature is stylized with a large, sweeping initial "J" followed by the letters "im".

United States Senate
WASHINGTON, DC 20510

COMMITTEES:
ARMED SERVICES
COMMERCE, SCIENCE AND
TRANSPORTATION
HOMELAND SECURITY
AND GOVERNMENT AFFAIRS
INDIAN AFFAIRS
SPECIAL COMMITTEE ON AGING
PERMANENT SUBCOMMITTEE
ON INVESTIGATIONS

August 1, 2008

James R. Young
President and Chief Executive Officer
Union Pacific Railroad
1400 Douglas Street
Omaha, NE 68179

Dear Mr. Young:

I am writing to express my concern about the discrepancy between Union Pacific's application to build a new Osage River bridge in Missouri and what you conveyed to me personally and my staff on numerous occasions about this construction.

My interest in the new Osage River bridge project is that it has been linked to the historic Boonville Bridge, outside of Boonville, Missouri. The Boonville Bridge has been the subject of great controversy. After an extensive legal battle over ownership of the bridge, in which Union Pacific prevailed, the community has sought to work with Union Pacific to take ownership of the bridge and prevent its removal. Meanwhile, Union Pacific has continued to move forward with the bridge's removal. I have stressed to all federal agencies involved, as well as Union Pacific, that appropriate public comment and transparency is of utmost concern to me.

In that vein, I seek clarification about Union Pacific's intention to use the Boonville Bridge spans at the Osage River bridge project. In an April 16, 2008, meeting in my office, you stated Union Pacific's intent to use the spans from the historic Boonville Bridge for construction of the Osage bridge. In fact, I was told that that Union Pacific did not wish to wait in taking down the Boonville Bridge because they want to resolve an Amtrak chokepoint at the Osage River. Recently, I was troubled to learn that on January 31, 2008, the Coast Guard approved a permit to build a new Osage River bridge that did not acknowledge the use of the Boonville Bridge spans, contrary to your statements to me and in the press.

To that end, I would appreciate a response to the following questions:

Why did Union Pacific submit a revised application that does not mention use of the Boonville Bridge? Was this decision made to avoid a Section 106 Agreement, which in a 2005 e-mail to Union Pacific, the Coast Guard seems to acknowledge is necessary if the Boonville Bridge span use was included?

040

Did Union Pacific submit any information with the new application to indicate that you were no longer going to use the Boonville Bridge to construct the new Osage Bridge?

How does Union Pacific reconcile the Osage Bridge permit with public comments you have made in the press, and to me personally, that you intend to use the Boonville Bridge to construct the new Osage Bridge?

Do you intend to use the Boonville Bridge to build the new Osage bridge? If yes, will you submit a revised permit application to the Coast Guard? If no, where do you intend to get the materials needed to complete construction of the Osage Bridge?

Thank you for your consideration, and I look forward to your timely response.

Sincerely,

A handwritten signature in dark ink, appearing to read "Claire McCaskill". The signature is fluid and cursive, with the first name "Claire" written in a larger, more prominent script than the last name "McCaskill".

CLAIRE MCCASKILL
United States Senator