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LAW OFFICES, P.C.

218607

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GLEN H. JOHNSON †*
GREGORY A. EIESLAND †*
KENNETH R. DEWELL †
AARON D. EIESLAND

HELPING INJURED PEOPLE AND THEIR FAMILIES

DENNYCE L. KORB
CERTIFIED PARALEGAL
BROOKE E. JACOBSON
PARALEGAL
JERRY A. THOVSON
PARALEGAL / INVESTIGATOR
T A PROFESSIONAL CORPORATION

*BOARD CERTIFIED CIVIL TRIAL SPECIALIST
BY THE NATIONAL BOARD OF TRIAL ADVOCACY

February 5, 2007

Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K. Street, N.W.
Washington, D.C. 20423-0001

FILED

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**SURFACE
TRANSPORTATION BOARD**

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Office of Proceedings

FEB 9 - 2007

**Part of
Public Record**

re: Black Hills Transportation, Inc.
STB Finance Docket No. 34924

Dear Secretary Williams:

Enclosed please find the original and ten (10) copies of our Petition under 49 U.S.C. §10502(d) to Revoke Modified Rail Certificate and Exemption under 49 C.F.R. 1150.21 and 49 C.F.R. 1180.2(d)(3) Granted to Black Hills Transportation, Inc. If there is any filing fee for this type of petition, please let my office know and I will promptly submitted that fee by return mail.

Our clients were not notified by Black Hills Transportation, Inc., or its attorney, when the original Notice for a Modified Certificate of Public Convenience was submitted or the Modified Rail Certificate issued. Both Black Hills Transportation, Inc., and its Assignor, the Northern Hills Regional Railroad Authority, were cognizant of the fact that our clients would be, and are, interested in the proceedings before the STB on this matter. As a professional courtesy, I am providing copies of these same documents to Attorneys Brady and Montange so that everyone is candidly aware of our respective clients' positions on this file.

I trust this submission is self-explanatory, but should you require anything further of either our clients, my co-counsel, or me at this juncture, please feel free to contact my office. Otherwise, we would like to thank you and your staff, in advance, for your prompt and professional attention to this matter.

Sincerely yours,

Kenneth R. Dewell

KRD: dab
Enc.

cc: Charles Brown (with enclosure)
Attorney Eric Strawn (with enclosure)
Attorney Thomas Brady (with enclosure)

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**SURFACE
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BEFORE SURFACE TRANSPORTATION BOARD
STB Finance Docket No. 34924
PETITION UNDER 49 U.S.C. §10502(d) TO REVOKE
MODIFIED RAIL CERTIFICATE AND EXEMPTION UNDER 49 C.F.R. 1150.21 and 49
C.F.R. 1180.2(d)(3) GRANTED TO
BLACK HILLS TRANSPORTATION, INC.

Charles Brown; James A. Swaby; Fred K. Ening Jr; William W. Miller and Laurel D. Miller Co-Trustees Under the William W. Miller Revocable Trust 50% interest And Laurel D. Miller and William W. Miller Co-Trustees of the Laurel D. Miller Revocable Trust 50% interest; Barbara J. Spector as Trustee of the Spector Living Trust and Muriel A. Hanna as Trustee under Declaration of Trust; Crook Mt Angus Ranch, Inc.; Albert R. and Lori A. Tetreault; Brian and Heidi Janz; John and Patricia Dvorak; Bobby A. and Cindy L. Lander; Randy G. and Lori A. Fryer; William R. and Teresa Fox; David J. Fandrick; Desperado Investments, LLC; Tracy L. and Kelly J. McDaniels; and Gerald and Edith Miles, ("Petitioners") hereby petition the Board to revoke the Modified Rail Certificate dated September 21, 2006 to Black Hills Transportation, Inc., ("BHT") ("Applicant") under 49 C.F.R. 1150.21 (the "Modification") and the Notice of Exemption (the "Exemption") under 49 C.F.R. 1180.2(d)(3) based on Applicant's false and/or misleading representations regarding the nature and status of the purported ownership and control of the Whitewood-to-Deadwood Right-of-Way ("ROW").

FACTS

1. Applicant openly admits that the Modification and Exemption are part of its plan to receive the right to conduct passenger train service acquired from Northern Hills Railroad Association ("NHRRA"). See Exhibit A.

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**SURFACE
TRANSPORTATION BOARD**

2. Applicant failed to disclose that the ROW is the subject matter of two lawsuits, namely:

(a) Charles Brown v. NHRRA, et al, SD Civ. No. 04-254; and

(b) James A. Swaby; et al. v. NHRRA, et al, SD Civ. No. 05-217.

3. In February 1970, the Chicago and Northwestern Railroad ("CNW") applied for the abandonment of the ROW and then publically announced its intention to abandon the ROW. On May 13, 1970, the ICC issued its Certificate and Order to abandon the ROW. On December 31, 1970, CNW submitted its accounting of the abandonment including the removal of the tracks. On May 30, 1972, CNW transferred by quitclaim deed whatever rights it had in the ROW to the State of South Dakota. Pursuant to the patents on the land and under the applicable federal law, there was nothing to transfer to the State of South Dakota as the ROW interest and easement had as a matter of law reverted to the landowners, a number of whom are Petitioners in this Petition.

4. Because Applicants have misrepresented that the State of South Dakota has an ownership right in the former ROW, the Exemption should be revoked, held in abeyance until the control issue is resolved in court, and/or rendered void ab initio.¹

¹The Board has indicated that an exemption that has already taken effect should be revoked, as opposed to rejected, if the notice of exemption contained false and misleading information. See, e.g., SF&L Railway, Inc. - Acquisition and Operation Exemption - Toledo. Peoria and Western Railway Corporation Between La Harpe and Peoria, IL, STB Finance Docket No. 33995 (STB served Oct. 17, 2002), slip op. at 10 (citing Save the Rock Island Committee, Inc. v. St. Louis Southwestern Railway Co., Docket No. AB-39 (Sub-No. 18X) (ICC served Apr. 1, 1994)).

ARGUMENT

5. At present, there are two lawsuits both dealing with abandonment of the ROW and a claim to the underlying real property.
6. Applicant has stated that the ROW had not been abandoned and that an entity of the State of South Dakota retains control over the entirety of the ROW. These statements are materially false, or at the very least misleading, in light of the actions taken by CNW and the land transfer documents associated with the real property upon which the former ROW easement crosses.
7. A right-of-way is an easement and once the easement has been terminated, the ROW is extinguished, therefore, no right can be transferred.
8. In an effort to mislead the STB, Applicant has withheld the fact that the existence of the ROW easement is in dispute, as is the question of the ownership of the ROW by the State of South Dakota.
9. Applicant further failed to acknowledge that the proposed usage of the rail line is solely for passenger service from Interstate 90 to the gaming halls in Deadwood, South Dakota, and not for freight. See Exhibit B.
10. Moreover, NHRRA has never referenced any usage of the proposed line for freight. Rather, the inclusion of a possible contract for hauling freight by a major shareholder in BHT is a clear indication of a material misrepresentation to the STB.
11. It is believed the sole reason for referencing the proposed freight contract is to give the STB jurisdiction on this line and to assert a federal law preemption, a fact confirmed by the actions of the NHRRA in the South Dakota Supreme Court action. See Exhibit C.

12. Accordingly, the underlying basis for the Exemption is a material misrepresentation that is illustrated both by the facts and the pending lawsuits that challenge the title to the ROW and the property allegedly burdened thereby.

13. The STB has no jurisdiction for a modified certificate if the ROW is not owned by the state. 49 C.F.R. § 1150.21. The outcome of the two lawsuits could void a ruling by the STB by denying it jurisdiction.

CONCLUSION

BHT and NHRRA have done their best to create a false impression and manipulate the STB in a veiled attempt to take land from the rightful owners. BHT has made misleading statements to STB based upon an ulterior motive of building an amusement passenger train ride for gamblers in the Black Hills of South Dakota. This deceptive conduct cannot stand and BHT petition for modification must be revoked.

Dated: February 5, 2007

Respectfully Submitted,

By: 
Kenneth R. Dewell
Aaron D. Eiesland
4020 Jackson Boulevard
P.O. Box 6900
Rapid City, SD 57709-6900
(605) 348-7300
(605) 348-4757 (Fax)
Attorneys for Petitioner Brown

By: 
Roger A. Tellinghuisen
Eric J. Strawn
132 E. Illinois Street
Spearfish, SD 57783
(605) 642-8080
(605) 642-1756
Attorneys for Petitioners Swaby, et al

CERTIFICATE OF SERVICE

The undersigned affirms and certifies that a copy of the foregoing was sent to the following counsel of record via first class mail this 5TH day of February, 2007:

Thomas E. Brady
Attorney at Law
135 E. Colorado Blvd.
Spearfish, SD 57783

Charles H. Montange
Attorney at Law
426 NW 162nd Street
Seattle, WA 98177

By: 
Kenneth R. Dewell

10/7/05
STATE OF SOUTH DAKOTA)
)SS.
COUNTY OF LAWRENCE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

CIV. #04-254

CHARLES W. BROWN,

Plaintiff,

vs.

NORTHERN HILLS REGIONAL
RAILROAD AUTHORITY; STATE
OF SOUTH DAKOTA; KARL E.
EISENBACHER; DOUGLAS R.
HAYES; KRISTI JO HAYES; JOHN
R. MILLER; JEAN MILLER;
STRAWBERRY HILL MINING
COMPANY; MAURICE HOFFMAN;
LAWRENCE COUNTY, a political
subdivision of the State of South
Dakota; and all persons unknown who
have or claim to have any interest or
estate in or encumbrance upon the
premises described in the Complaint,
or any part thereof,

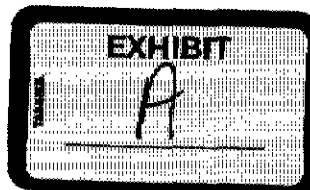
Defendants.

AFFIDAVIT OF RALPH J. JUSTEN

State of South Dakota)
) ss.
County of Lawrence)

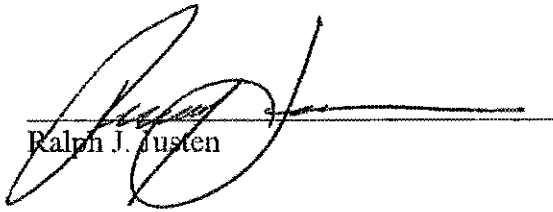
Ralph J. Justen, being first duly sworn upon his oath, deposes and states:

1. I am the President of Black Hills Transportation, Inc. which company is the agent of the Northern Hills Regional Railroad Authority in connection with the development of a passenger train line between Whitewood and Deadwood, South Dakota.
2. I have personally observed that portion of the former Chicago and Northwestern Railroad right-of-way at issue in this action which traverses the property owned by Charles Brown.



3. I observed that berms of dirt had been placed by dirt moving equipment across that right-of-way at the north and south ends of the railroad tunnel. The earthen berm placed across the south end of the tunnel is accurately depicted in the photograph attached hereto as Exhibit "A-1". The condition of the access to the south end of the tunnel prior to 1997 is accurately depicted in the photographs attached hereto as Exhibits "A-2" and "A-3".
4. I have also observed that wooden barricades, gates, fences and other obstructions and works have been constructed upon the right-of-way traversing the property owned by Charles Brown, including a gravel road and fences which run from the east side of Charles Brown's property to a point where Mr. Brown has built a road from the right-of-way to his residence. The road, fences and barricades on the right-of-way traversing the Brown property are accurately depicted by the photographs attached hereto as Exhibits "B-1" through "B-5".
5. Signs claiming private ownership of the right-of-way and no trespassing signs have been posted upon and/or near the right-of-way by or on behalf of Charles Brown as are accurately depicted by the photographs attached hereto as Exhibits "C-1" and "C-2".

Dated this 8TH day of February 2005.


Ralph J. Justen

Subscribed and sworn to before me by Ralph J. Justen this 8TH day of February 2005.


Notary Public

(SEAL)

My Commission Expires:

~~My Commission Expires~~
June 17, 2008

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of ~~February~~ October 2005, I sent by mail, postage prepaid at Spearfish, South Dakota, a copy of the foregoing Affidavit of Ralph J. Justen to the following-named persons, to-wit:

Kenneth R. Dewell
Johnson Eiesland Law Firm
P.O. Box 6900
Rapid City, SD 57709
Attorney for Charles W. Brown

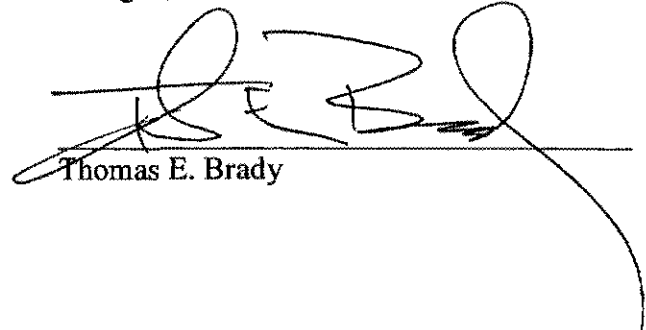
Dave R. Claggett
Attorney at Law
522 Main Street
Spearfish, SD 57783
Attorney for Karl E. Eisenbacher

John Fitzgerald
State's Attorney's Office
90 Sherman Street
Deadwood, SD 57732
Attorney for Lawrence County

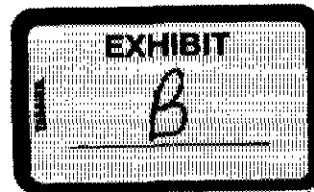
Strawberry Hills Mining Company
Attn: Delores Hoffman
Route #1, Box 34
St. Onge, SD 57779

Douglas R. Hayes & Kristi Jo Hayes
282 ½ Upper Valley Road
Spearfish, SD 57783

John R. Miller & Jean Miller
14935 Heartwell
Cologne, MN 55322



Thomas E. Brady



Dunrail project finds new life

[Print Page](#)

By Dan Daly, Journal Staff Writer

RAPID CITY -- The long-dormant plan to establish passenger rail service between Deadwood and Rapid City is apparently showing new signs of life.

Black Hills Transportation, the company that took over the project from Dunrail Inc. in 2003, announced this week that it is hiring two railroad industry veterans, Robert "Pat" Beaudette and Clinton Jones, to help get the project back on track.

Beaudette is the former railroad facilities manager for the South Dakota Division of Railroads. Jones has 40 years of experience with major railroads and several Midwestern short-line operations.

This week's announcement was one of the company's first public statements since the November 2004 death of Perry Kranz. Kranz worked for the last 10 years of his life to establish the new Northern Hills passenger rail line.

Originally proposed in 1992, the project was tied to actor Kevin Costner's Dunbar Resort near Deadwood. The Dunbar was never built. But Kranz pushed ahead with the idea of the railroad that would transport gamblers and serve as a tourist attraction.

Now, Ralph Justen, an affable former banker and Midwestern shortline railroad man, is president of Black Hills Transportation. His \$22 million proposal involves two trains. One would be a vintage streamliner that would carry passengers from Rapid City to Deadwood with stops in Piedmont and Sturgis. The other would be a steam-powered or vintage diesel excursion train hauling tourists between Sturgis and Deadwood.

But tough issues remain. Landowners along the proposed new route between Deadwood and Whitewood have always been adamantly opposed to the railroad. The company must negotiate trackage rights from Dakota, Minnesota & Eastern Railroad to run trains on existing DM&E track between Rapid City and Whitewood.

But the biggest hurdle has always been money. For a number of years, Dunrail Inc. was barely able to pay the legal expenses of the Northern Hills Rail Authority, a government entity created in 1994 to acquire land and secure financing.

Black Hills Transportation has an office in Deadwood, a handful of investors, including Kevin Costner, and money in the bank. It is also leasing a shop in Chadron, Neb., where major maintenance and restoration of rail cars will be done.

"Now, we're at the point — we're not 100 percent done — we've got a lot of the financing components are in place," Justen said.

He insisted Friday that the state of South Dakota's pending \$41 million windfall from a rail sale does not figure into the company's plan.

The state is selling its East River core line to Burlington Northern Santa Fe Railway. What happens to the \$41 million has been an open debate among lawmakers.

But in the past, the trust fund has been used for loans to private rail companies, Bruce Lindholm, program

director of the state Office of Air, Rail and Transit, said.

He confirmed that he has discussed the railroad trust fund with proponents of the Deadwood passenger trains but that no application has been filed.

The rail board and Gov. Mike Rounds would have the ultimate authority on whether to approve such a loan, Lindholm said.

Mark Johnston, spokesman for Rounds, said Friday afternoon that it is too soon to discuss what to do with money from the BN sale because the sale isn't completed, and the state does not yet have the money.

Justen said his plan involves private investment and the sale of bonds, not borrowing money from the state railroad trust fund.

"That is definitely not in the business plan ... but business plans change," he said.

After so many years of fits and starts, even rail authority board members are a little weary of being so many years on the verge of a big breakthrough — but not quite there.

ern Bills of Belle Fourche, chairman of the Northern Hills Rail Authority, said he remains both optimistic and skeptical that the rail line will be built.

"I've been cautiously optimistic for 14 years," Bills said with a chuckle. "I'm an optimistic guy; that's why I'm still here."

Contact Dan Daly at 394-8421 or dan.daly@rapidcityjournal.com

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Rapid City, SD

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

CHARLES W. BROWN,

Plaintiff and Appellant,

vs.

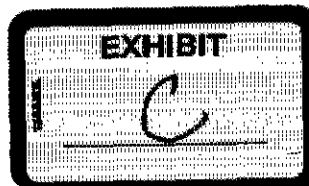
NORTHERN HILLS REGIONAL
RAILROAD AUTHORITY; SOUTH
DAKOTA DEPARTMENT OF
TRANSPORTATION; SOUTH DAKOTA
DEPARTMENT OF GAME, FISH AND
PARKS; KARL E. EISENBACHER;
DOUGLAS HAYES; KRISTI JO HAYES;
JOHN R. MILLER; JEAN MILLER;
STRAWBERRY HILL MINING
COMPANY; MAURICE HOFFMAN;
LAWRENCE COUNTY, a political
subdivision of the State of South Dakota;
and all persons unknown who have or claim
to have any interest or estate in or
encumbrance upon the premises described in
the Complaint, or any part thereof,

Defendants and Appellees.

#23989

**APPELLEES' MOTION
FOR LEAVE TO
SUPPLEMENT THE
RECORD**

Appellees above-named, by and through their counsel, hereby respectfully move the Court pursuant to SDCL §15-26A-73 for leave to present a late authority or other intervening matter that was not available in time to have been included in their brief in chief, to wit: the following documents and proceedings before the Surface Transportation Board in Washington, D.C.:



1. Decision of the Surface Transportation Board on the Notice for a Modified Certificate of Public Convenience and Necessity in STB Finance Docket No. 34924, Black Hills Transportation, Inc., d/b/a Deadwood, Black Hills & Western Railroad—Modified Rail Certificate, decided September 21, 2006 and served September 29, 2006; and,

2. Notice for a Modified Certificate of Public Convenience and Necessity filed by Black Hills Transportation, Inc. respecting approximately 9.01 miles of rail line extending from milepost 0.0 at Whitewood, to milepost 9.01, at Deadwood, in Lawrence County, South Dakota, with attachments A through H inclusive.

A certified copy of the Decision of the Surface Transportation Board, and a true and correct copy of the Notice for Modified Certificate of Public Convenience and Necessity, are submitted with the original of this Motion, tabbed 1 and 2 respectively.

Appellees respectfully submit that the above-described items are relevant to the issues presented by this appeal, and in particular the second issue raised in Appellant's Brief, which is stated by Appellant as follows:

If 43 U.S.C. §912 does apply, were all of the requirements met for abandonment in 1970-1971.
(Appellant's Brief p. 3)

Appellant argues in the second issue of his appeal that, if 43 U.S.C. §912 applies to this case, then this Court should determine as a matter of law that the railroad right-of-way involved in this case has been abandoned. The decision of the Surface Transportation Board operates to preclude and preempt any adjudication by a state court regarding the issue of abandonment under 43 U.S.C. §912. City of Lincoln v. Surface Transportation Board, 414 F.3rd 858 (8th Cir. 2005).

The fact of preemption is mandated by the 49 U.S.C. §10501(b)(2), which provides as follows:

The jurisdiction of the [Surface Transportation] Board over—

* * *

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state, is exclusive.

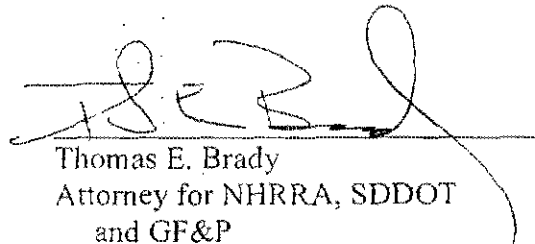
Accordingly, federal pre-emption operates to preclude the relief requested by Appellant on his second issue. Because the matters which are the subject of this motion are relevant to that issue, Appellee respectfully submits that they should be made part of the record considered by this Court in its determination of the issues in this case. See City of Sioux Falls v. Missouri Basin Municipal Power Agency, 2004 SD 14, ¶15 n.2, 675 N.W.2d 739, 741 (record in this Court supplemented by photographs of parking lot and parking lot access constructed after trial of condemnation action).

CONCLUSION

For the foregoing reasons, Appellee respectfully requests leave of Court pursuant to SDCL §15-26A-73 for leave to supplement the record in this Court with the items more fully described above, in the body of this Motion.

Respectfully submitted this 29th day of December, 2006

BRADY PLUIMER, P.C.



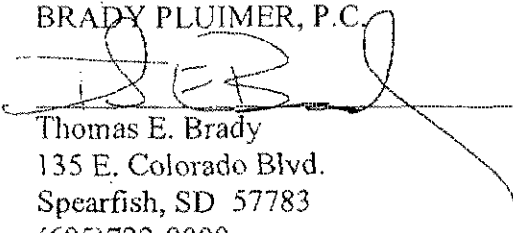
Thomas E. Brady
Attorney for NHRRA, SDDOT
and GF&P
135 E. Colorado Blvd.
Spearfish, SD 57783
(605)722-9000

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served two true and correct copies of the foregoing APPELLEES' MOTION FOR LEAVE TO SUPPLEMENT THE RECORD in the above-entitled matter upon the Appellant by mailing, by first class United States Mail with all postage thereupon prepaid, to his attorney of record on the 29th day of December, 2006, to wit:

Kenneth R. Dewell
Johnson Eiesland Law Offices, P.C.
4020 Jackson Boulevard
Rapid City, SD 57702

BRADY PLUIMER, P.C.



Thomas E. Brady
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