

SURFACE TRANSPORTATION BOARD

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**BUTLER COUNTY, KANSAS – ABANDONMENT
EXEMPTION – IN BUTLER COUNTY, KANSAS**

**REPLY OF INTERIM TRAIL MANAGER CITY OF
ANDOVER, KANSAS TO REPLY OF HMA PROPERTIES,
LLC TO JOINT PETITION FOR SUBSTITUTION OF
TRAIL MANAGER**

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Dated: April 4, 2022.

SURFACE TRANSPORTATION BOARD

STB Docket No. AB-870X

BUTLER COUNTY, KANSAS – ABANDONMENT EXEMPTION – IN BUTLER COUNTY, KANSAS

REPLY OF INTERIM TRAIL MANAGER CITY OF ANDOVER, KANSAS TO REPLY OF HMA PROPERTIES, LLC TO JOINT PETITION FOR SUBSTITUTION OF TRAIL MANAGER

Butler County, Kansas, owns 10.6 miles of railroad right-of-way from the county's western border at Andover, Kansas, (Milepost 494.22), through the county to Augusta, Kansas, (Milepost 483.62). Andover, Kansas, by STB decision and notice, is the Interim Trail Sponsor for 5.87 miles of the right-of-way from Milepost 494.22 to Milepost 488.35. Butler County Economic Development, a division of Butler County, Kansas, is Interim Trail Sponsor of the next 3.15 miles of the right-of-way between Mileposts 488.35 and 485.20. Augusta is the Interim Trail Sponsor for the remaining 1.58 miles between Mileposts 485.20 to 483.62.

On February 22, 2022, Butler County and Augusta filed a joint petition for substitution to substitute Augusta as Interim Trail Sponsor for Butler County Economic Development across the 3.15 miles between Mileposts 488.35 and 485.20. HMA Properties, LLC, who owns land adjoining the portion of the right-of-way operated by Andover as Interim Trail Sponsor, filed a reply to the joint petition on March 14, 2022, requesting the STB to consummate abandonment of the right-of-way. Andover submits this reply to respond to HMA Properties' reply in support of the joint petition, to address misstatements in HMA Properties' reply, and to oppose HMA Properties' request for the consummation of abandonment.

Butler County Economic Development and Augusta filed their application for substitution of trail user pursuant to 49 C.F.R. §1152.29(f). Section 1152.29, however, does not specify if the filing procedurally is a petition, comment, or request as it relates to substitutions of trail users. HMA Properties titled its response to the joint petition as a “reply” instead of a “comment” or a “protest” as is required in response to other requests for relief. Under these circumstances, Andover’s response to HMA Properties could be considered a prohibited “reply to a reply” under 49 C.F.R. §1104.13(c). Without getting bogged down in procedural semantics, Andover would request the Board’s indulgence in allowing this brief response, or reply, to HMA Properties so that Andover may address misstatements in HMA Properties’ “reply” and offer support to the pending joint petition because the right-of-way, as the “Redbud Trail” has become an integral part of Andover in its reach west to Wichita and its anticipated development west to Augusta.

I. The Statement of Willingness is Materially Accurate and Complete.

HMA Properties complains that Augusta’s Statement of Willingness to Assume Financial Responsibility for the right-of-way does not comply with the board’s regulations. The company’s complaint is that the statement fails to include (A) a reference to the original abandonment proceeding and (B) map depicting the right-of-way, citing 49 C.F.R. §1152.29(a)(3). Augusta has stated its willingness to assume full responsibility for the management of, legal liability on, and payment of taxes for the right-of-way which is the primary purpose of the statement of willingness. An omission of a reference to the original abandonment proceeding (which can be readily found in the docket in which the joint petition is filed, or a map of the right-of-way do not prejudice any party and can be readily remedied. *See* 49 C.F.R. §1104.10(b) (Board may “tentatively accept” a deficient document “for filing and advise the person tendering it of the deficiency and require that the deficiency be corrected.”) The Board should reject HMA Properties’ response on this point.

II. Butler County Economic Development is Butler County.

HMA Properties accuses Butler County of “material misrepresentations and errors” which, according to HMA Properties, “call into question the establishment of the original NITU and the proposed substitution.” The company argues that Butler County misrepresented that it had entered into an agreement with Butler County Economic Development for trail use/rail banking for the right-of-way in its June 3, 2005, notice that a trail use agreement had been reached. HMA Properties claims to have discovered that no such agreement was reached. HMA Properties’ position is overly dramatic and, to an extent, dishonest.

In its filing on May 2, 2005, Butler County filed a statement of willingness to assume financial responsibility for the railroad right-of-way for interim trail use. The County’s letterhead was “Butler County Economic Development” which is a department of the Butler County government. The statement of willingness – in clear and certain terms – informed the Board that “Butler County, Kansas, a governmental entity of the State of Kansas, pursuant to 49 C.F.R. 1152.29 expresses its interest in acquiring for interim trail use and rail banking under the National Trails System Act ... the right-of-way of Butler County authorized for abandonment in STB Docket No. 870X.” Thereafter, “Butler County” stated its willingness to assume full responsibility for management of, for any legal liability on, and taxes for the right-of-way. The statement was signed by Mike Wheeler, the Chairman of the Butler County Board of Commissioners, and approved by County Counsel Norman Manley. On June 3, 2005, Butler County, through counsel, submitted a brief letter stating that Butler County had entered into an agreement with Butler County Economic Development (essentially entering into an agreement with itself) for trail use/rail banking. Butler County, through its economic development department, sought status as interim trail sponsor for a portion of the right-of-way it owned. There was no misrepresentation or error.

The record is unclear as to how Butler County Economic Development became the named entity in place of Butler County. Perhaps it was something as simple as the letterhead on the May 2, 2005, statement of willingness which interjected the county department for the county itself. There is no evidence that Butler County or anyone associated with it sought to misrepresent the identity of the interim trail user to the Board or anyone else. Insofar as anyone may have been confused by the county department as the named interim trail user, their confusion could be cleared by simple reference to Butler County's statement of willingness. After all, it was Butler County and not just its economic development department that undertook responsibility for the trail. The Board should, for these reasons, dismiss HMA Properties' overexcited objection.

It should be further noted that HMA Properties has not been candid with the Board as to its position in relation to the railroad right-of-way. HMA Properties objects to the joint petition to substitute Augusta for Butler County as interim trail user between Mileposts 488.35 and 485.20. HMA Properties claims to have standing as an owner of property adjacent to the right-of-way between Mileposts 494.22 and 483.62 to encompass the 3.15 subject to the pending petition for substitution. HMA Properties, however, owns a lot adjacent to the right-of-way managed by Andover as interim trail sponsor and not the right-of-way which is the subject of the pending joint petition for substitution. The attached Journal Entry of Judgment of the Butler County District Court clearly states that HMA Properties owns property adjoining the right-of-way between Mileposts 494.22 and 488.35 "which is managed by Andover as Interim Trail Sponsor within Andover's corporate limits." See Journal Entry of Final Judgment (Ex. A) at 14, ¶35. It is questionable whether HMA Properties has standing to complain about the pending joint petition.

III. The Line may be “Severed” but the Right-of-Way Persists.

HMA Properties contends that the railroad right-of-way has been severed from the interstate rail net work and cannot be reactivated for rail service. It claims that, if the right-of-way is severed, then restoration of rail service is impossible, and the Board should revoke railbanking authority. Specifically, HMA Properties argues the line was severed because two rail bridges were removed, and a flood control levee was installed across the right-of-way.

HMA Properties, again, overstates its position. Andover does not deny that two dilapidated rail bridges were demolished and not replaced. There is also no doubt that the United States Army Corp of Engineers constructed a levee across a portion of the right-of-way between Augusta and the Walnut River to prevent flooding. However, interim trail users are not required to accept responsibility for and manage railroad infrastructure. Interim trail users undertake responsibility for the management of the right-of-way or easement to preserve it for the possibility that rail service may be reactivated. A railroad company which undertakes to reactivate rail service on this line must rebuild track, bridges, and other infrastructure. This ambitious railroad company, however, will have a complete and intact easement for its future use because the right-of-way remains even if some of the infrastructure has been removed or modified. The testimony of HMA Properties’ engineer confirms that the right-of-way remains intact. Transcript of Bench Trial – Volume 1 (Partial) (Ex. B) at 8:17-25 (testimony of Daniel B. Garber) and at 51:11-52:9 (right-of-way remains intact in Butler County). HMA Properties’ argument should be dismissed.

CONCLUSION

The Redbud Trail traverses the railroad right-of-way from downtown Wichita through Andover and on to Augusta. Over the last several years, Wichita, Andover, and Augusta have developed the trail into the type of recreational trail envisioned by the authors of the National Trail

Systems Act and maintained a railroad right-of-way for possible future reactivation if needed. HMA Properties has waged a war against Butler County, Andover, and Augusta in a never-ending effort to force the abandonment of the trail contrary to the interests of these local governments and their constituents. This latest filing is but one more flawed effort in its quest. The only deficiency identified by HMA Properties is the omission of information from Augusta's statement of willingness which this Board may tentatively accept and require the deficiency be corrected. Accordingly, this Board should grant the joint petition and overrule HMA Properties' objection.

Respectfully submitted,

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Court: Butler County District Court
Case Number: 2018-CV-000115
Case Title: HMA Properties LLC, et al. vs. Board of County Commissioners, Butler County, KS
Type: Journal Entry of Final Judgment

SO ORDERED.

A handwritten signature in black ink, reading "Charles M. Hart".

/s/ Honorable Charles Hart, District Court Judge

IN THE THIRTEENTH JUDICIAL DISTRICT
DISTRICT COURT, BUTLER COUNTY, KANSAS

HMA PROPERTIES, LLC, *et al.*,

Plaintiffs,

-vs-

BUTLER COUNTY, KANSAS, *et al.*,

Defendants.

Case No. 2018-CV-115

JOURNAL ENTRY OF FINAL JUDGMENT

On November 4, 2020, the Court called this action by video conference, as scheduled, for a bench trial.

The Plaintiffs HMA Properties, LLC; John W. Gilliland and Colleen K. Gilliland; Bonnie B. Ayers and Wilbur S. Ayers, as Co-Trustees of the Bonnie B. Ayers Living Trust; and George and Mitzi Pankratz, as successors in interest to Jerramy and Erin Pankratz appeared through their lawyers David M. Rapp and Eric W. Barth of HINKLE LAW FIRM, LLC. Mr. Frank Miller, a Member of Plaintiff HMA Properties, LLC, also appeared personally on behalf of Plaintiff HMA Properties, LLC. Defendant Butler County, Kansas, appeared through its lawyer Terrence L. Huelskamp of HUELSKAMP LAW, P.A. Defendant City of Andover, Kansas, appeared through City Administrator Jennifer McCausland and through its lawyer Derek S. Casey of TRIPLET WOOLF GARRETSON, LLC. There were no other appearances.

The Plaintiffs then presented their case-in-chief through the testimony of witnesses and the admission of exhibits into the record. Plaintiffs rested on November 4, 2020.

Defendants then moved for judgment as a matter of law pursuant to K.S.A. 60-250. The Court, after considering the arguments, took Defendants' motions under advisement.

Defendant City of Andover, Kansas, then presented its case-in-chief through the testimony of witnesses and the admission of exhibits into the record. Defendant City of Andover rested on November 5, 2020.

There was no rebuttal.

The Court ordered the parties to submit proposed findings of fact and conclusions of law for the Court's consideration by November 23, 2020. The Court then recessed the proceedings to December 3, 2020, for closing arguments.

On December 3, 2020, the Court called this action for closing arguments by video conference. The parties made their closing arguments and the Court recessed the matter for its deliberations and scheduled a hearing for January 20, 2021, to announce its opinion.

On January 20, 2021, the Court called this action for hearing for the announcement of the Court's findings of fact and conclusions of law pursuant to K.S.A. 60-252(a).

FINDINGS OF FACT

The Court made the following findings of fact:

(A) Subject Matter Jurisdiction.

1. The United States Surface Transportation Board or "STB" exercises jurisdiction over the railroad right-of-way, formerly operated by the BNSF Railway Company, passing through Butler County, Kansas. Stmt. of Stipulations, *filed* July 23, 2020, Stipulations ¶¶1-2; Uncontroverted Facts ¶¶15-19; Andover Exs. KK-LL; Plaintiffs' Exs. 23-25; Testimony of Frank Miller and Jennifer McCausland.

2. Defendant Butler County, Kansas, by STB decision and notice, is the Interim Trail Sponsor for 3.15 miles of the railroad right-of-way between Mileposts 488.35 and 485.20. Stmt. of Stipulations, *filed* July 23, 2020, Stipulations ¶2.

3. Defendant City of Andover, Kansas, by STB decision and notice, is the Interim Trail Sponsor for 5.87 miles of the railroad right-of-way between Mileposts 494.22 and 488.35. Stmt. of Stipulations, *filed* July 23, 2020, Stipulations ¶3.

4. As the Interim Trail Sponsors for their respective portions of the railroad right-of-way, Butler County and Andover have stated their willingness to the STB to assume full responsibility (a) for management of the right-of-way; (b) for any legal liability arising out of the transfer or use (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and (c) for the payment of any and all taxes that may be levied or assessed against the railroad right-of-way. Plaintiffs' Exs. 23-25; Stmt. of Stipulations, *filed* July 23, 2020, Uncontroverted Facts ¶18.

5. As the Interim Trail Sponsors for their respective portions of the railroad right-of-way, Butler County and Andover have each acknowledged to the STB that the right-of-way is subject to possible future reconstruction and reactivation of the right-of-way for rail service. Plaintiffs' Exs. 23-25; Stmt. of Stipulations, Uncontroverted Facts ¶19.

(B) Kansas Recreational Trails Act – Standing.

6. Plaintiff HMA Properties, LLC owns real property adjoining the railroad right-of-way between Mileposts 494.22 and 488.35, which is managed by Andover as Interim Trail Sponsor within Andover's corporate limits. Stmt. of Stipulations, Stipulated Fact ¶3.

7. Plaintiffs John W. Gilliland and Colleen K. Gilliland own real property adjoining the railroad right-of-way between Mileposts 494.22 and 488.35, managed by Andover as Interim Trail Sponsor beyond Andover's corporate limits. Stmt. of Stipulations, Stipulated Fact ¶5.

8. Plaintiffs Bonnie B. Ayers and Wilbur S. Ayers, as Co-Trustees of the Bonnie B. Ayers Living Trust, own real property adjoining the railroad right-of-way managed by Butler County as Interim Trail Sponsor. Stmt. of Stipulations, Stipulated Fact ¶4.

9. Plaintiffs George and Mitzi Pankratz, as successors in interest to Jerramy and Erin Pankratz, own real property adjoining the railroad right-of-way managed by Butler County as Interim Trail Sponsor. Stmt. of Stipulations, Stipulated Fact ¶6.

10. Frank Miller, Member of HMA Properties, testified that HMA Properties has been aggrieved by Andover's management of the railroad right-of-way because (a) the right-of-way has not reverted to HMA Properties' ownership following the termination of rail service; (b) Butler County has assessed property taxes against HMA Properties for the railroad right-of-way; and (c) trash has blown from the right-of-way onto HMA Properties' lot including trash blown by Andover employees with leaf blowers. Testimony of Plaintiff Frank Miller.

11. Railroad bridges, culverts, and stone boxes have been removed from the right-of-way. Testimony of Daniel E. Garber and Frank Miller.

12. Mr. and Mrs. Gilliland; Trustees Bonnie B. Ayers and Wilbur S. Ayers; and Mr. and Mrs. Pankratz did not appear for or testify at trial.

13. Trustees Mr. and Mrs. Ayers direct no allegations against Andover relating to Andover's operation and management of the railroad right-of-way as Interim Trail Sponsor. Andover Ex. CC, Verified Int. Response Nos. 1-5.

14. Mr. and Mrs. Pankratz direct no allegations against Andover relating to Andover's operation and management of the railroad right-of-way as Interim Trail Sponsor. Andover Ex. BB, Verified Int. Response Nos. 1-5.

(C) Compensation Paid for Recreational Trail on the Right-of-Way.

15. HMA Properties received \$95,000.00 plus interest of \$51,300.00 for the taking of the railroad right-of-way adjacent to its real property in Butler County, Kansas, for use as a recreational trail. Stmt. of Stipulated Facts, Stipulations ¶9; Andover Exs. DD.

16. Mr. and Mrs. Gilliland received \$5,800.00 plus interest of \$3,132.00 for the taking of the railroad right-of-way adjacent to their real property in Butler County, Kansas, for use as a recreational trail. Stmt. of Stipulated Facts, Stipulations ¶10; Andover Ex. EE.

(D) Property Taxes Assessed by Butler County.

17. Butler County has assigned Property Identification Number ("PID" or "CAMA") 3030704005001000 to HMA's lot adjoining the north boundary of the railroad right-of-way at 1627 North Andover Road, Andover, Kansas. Testimony of Les Mangus; Andover Ex. BB at 1-2; Plaintiffs' Ex. 6. For ease of reference, this property will be identified as "PID 1000."

18. Butler County has assigned Property Identification Number ("PID" or "CAMA") 3030704005003010 to the railroad right-of-way adjoining the south boundary of HMA's property located at 1627 North Andover Road, Andover, Kansas. Testimony of Les Mangus; Andover Ex. BB at 3-4; Plaintiffs' Ex. 7. For ease of reference, this property will be identified as "PID 3010."

19. In 2013, Butler County assessed property taxes in the amount of \$4,963.04 against HMA Properties for PID 1000. Andover Ex. PP at 1-2; Plaintiffs' Ex. 6 at 2.

20. In 2013, Butler County assessed property taxes in the amount of \$756.20 against HMA Properties for PID 3010. Andover Ex. PP at 3-4; Plaintiffs' Ex. 6 at 1.

21. The taxes assessed by Butler County against PID 1000 and PID 3010 for 2013 were paid by HMA Properties. Andover Ex. PP at 2, 4; Plaintiffs' Ex. 8 (showing payments for first half assessed in 2013); Testimony of Frank Miller.

22. There was no evidence submitted that HMA Properties appealed or protested the taxes assessed by Butler County against PID 1000 or PID 3001 for 2013.

23. In 2014, Butler County assessed property taxes in the amount of \$4,939.30 against HMA Properties for PID 1000. Andover Ex. PP at 1-2; Plaintiffs' Ex. 7 at 2.

24. In 2014, Butler County assessed property taxes in the amount of \$452.38 against HMA Properties for PID 3010. Andover Ex. PP at 3-4; Plaintiffs' Ex. 7 at 1.

25. The taxes assessed by Butler County against PID 1000 and PID 3010 for 2014 were paid by HMA Properties. Andover Ex. PP at 2, 4; Plaintiffs' Ex. 7; Testimony of Frank Miller.

26. There was no evidence submitted that HMA Properties appealed or protested the taxes assessed by Butler County, Kansas, against PID 1000 or PID 3001 for 2014.

27. In 2015, Butler County assessed taxes against PID 1000 based upon a valuation of \$125,690. Andover. Ex. JJ.

28. HMA Properties protested and appealed Butler County's assessment of property taxes against PID 1000 for 2015 to the Kansas Board of Tax Appeals. Andover Ex. JJ.

29. The Kansas Board of Tax Appeals reduced the valuation to \$120,850 because a portion of PID 1000 is burdened by the railroad right-of-way. Andover Ex. JJ.

30. In 2015, Butler County assessed taxes against PID 3010. Andover Ex. II.

31. HMA Properties protested and appealed Butler County's assessment of property taxes against PID 3010 for 2015 to the Kansas Board of Tax Appeals. Andover Ex. II.

32. The Kansas Board of Tax Appeals reduced the valuation of PID 3010 for HMA Properties to \$0 because "the easement continues to be railroad property and is included in the unit assessment of the railroad completed by the Property Valuation Division." Andover. Ex. II.

33. There was no evidence presented to show that Butler County had assessed taxes against HMA Properties for that portion of PID 1000 subject to the railroad right-of-way since the Kansas Board of Tax Appeals decision in 2016.

34. Butler County has not assessed taxes against HMA Properties for PID 3010 since the Kansas Board of Tax Appeals decision in 2016. Andover Ex. PP at 4.

(E) Trash Blowing onto HMA Properties' Lot.

35. Andover has installed and maintains trash receptacles along the railroad right-of-way. Testimony of Rick Lanzrath; Andover Ex. AA-2, 12.

36. Andover has installed trail-user education signs along the railroad right-of-way to inform trail users that littering is prohibited and that pet owners must pick up and properly dispose of pet's solid waste. Testimony of Rick Lanzrath; Andover Ex. AA-8, AA-9.

37. Andover periodically picks up and removes litter from the railroad right-of-way. Testimony of Rick Lanzrath.

38. The Andover-Augusta Rails-to-Trails Initiative is a volunteer group which has periodic clean up days to remove litter from the railroad right-of-way. Testimony of Jennifer McCausland and Rick Lanzrath.

(F) Andover City Ordinance.

39. Andover passed Ordinance No. 1575 on August 12, 2014.

40. Ordinance No. 1575 states, in relevant part, “The City of Andover, Kansas (the “City”) hereby elects to modify K.S.A. 58-3212 by making the provisions thereof inapplicable within the City limits.”

CONCLUSIONS OF LAW

The Court made the following conclusions of law:

(A) Plaintiffs’ Contentions and Remedies.

1. Plaintiffs contend that Butler County and Andover failed to develop and manage the railroad right-of-way as a recreational trail as required by the KANSAS RECREATIONAL TRAILS ACT, K.S.A. 58-3211 *et seq.* (“KRTA”) and their STB commitments. Pretrial Order at 5, ¶(a).

2. Plaintiffs further contend that Andover failed to pay taxes assessed against the railroad right-of-way in violation of Andover’s commitment to the STB. Pretrial Order at 6, ¶(b).

3. Plaintiffs further contend that Butler County and Andover have allowed the railroad right-of-way to be severed from the national rail system which disqualifies its use as a recreational trail and violates the KRTA. Pretrial Order at 6-7, ¶(c).

4. Plaintiffs seek the following as remedies to cure the alleged deficiencies stated in their contentions: (a) a permanent injunction requiring Butler County and Andover to fulfill their KRTA and STB duties as Interim Trail Sponsors or to terminate the recreational trail and consummate abandonment of the right-of-way and (b) an order of the Court (i) declaring that the railroad right-of-way has been severed from the national rail system or (ii) making findings

regarding the current state of the right-of-way, to be certified to the STB to revoke the recreational trail and consummate abandonment of the right-of-way.

(B) The District Court’s Subject Matter Jurisdiction.

5. The STB has exclusive and plenary jurisdiction over all matters relating to “the construction, acquisition, operation, abandonment, or discontinuance” of railroad facilities. 49 U.S.C. §10501(b)(2); *Fox v. Surface Transp. Bd.*, 379 Fed. Appx. 767, 770 (10th Cir. 2010); *Wichita Terminal. Ass’n v. FYG Investments*, 48 Kan. App. 2d 1071, 1079, 305 P.2d 13 (2013); *Chicago & North Western Transportation v. Kaloe Brick & Tile*, 450 U.S. 311, 320, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981).

6. The conversion of railroad right-of-ways into recreational trails, as process known as “railbanking,” is “clearly a part of that regulatory process” over which the federal government has exclusive control. *Miami Cty. Bd. of Comm’rs v. Kanza Rail-Trails Conservancy*, 292 Kan. 285, 297-98, 255 P.3d 1186 (2011) (“railbanked right of ways remain part of the national rail transportation system subject to the jurisdiction of the STB”).

7. This Court, accordingly, lacks subject matter jurisdiction to determine whether Butler County or Andover have met their STB commitments or allowed the railroad right-of-way to be severed from the national rail system because those are matters relating to the railbanking of the right-of-way which is within the exclusive and plenary jurisdiction of the STB.

8. This Court, furthermore, lacks subject matter jurisdiction to grant Plaintiffs’ request for a permanent injunction requiring Butler County or Andover to fulfill their STB duties as Interim Trail Sponsors or to terminate the recreational trail and consummate abandonment of the

right-of-way because these remedies relate to the railbanking of the right-of-way which is within the exclusive and plenary jurisdiction of the STB.

9. This Court, furthermore, lacks subject matter jurisdiction to grant Plaintiffs judgment declaring the railroad right-of-way has been severed from the national rail system or the current state of the railroad right-of-way to be certified to the STB to revoke the recreational trail and consummate abandonment of the right-of-way because these remedies relate to the railbanking of the railroad right-of-way and are within the STB's exclusive and plenary jurisdiction.

10. The STB has jurisdiction to consider these contentions and remedies. *See Bitner v. Watco Companies*, 43 Kan. App. 2d 495, 226 P.3d 563 (2010), *citing Thompson v. Texas Mexican R. Co.*, 328 U.S. 134, 145, 66 S.Ct. 937, 90 L.Ed. 1132 (1946); *Louisiana & Arkansas Ry. Co. v. Bickham*, 602 F. Supp. 383, 384-85 (M.D.La. 1985); 49 U.S.C. §10903.

11. This Court does have jurisdiction to consider Plaintiffs' KRTA claims insofar as those requirements are not so onerous as to conflict with federal law governing railroad rights-of-way and recreational trails. *Miami County v. Kanza Rail-Trails*, 292 Kan. at 305; *Central Kansas Railway*, STB Docket AB-406 (SUB 6X), *available at* 2001 WL 489991 (S.T.B. 2001) at *6, n. 9 (local regulations governing safety, land use and zoning may be applied to recreational trails "so long as they are not applied in a discriminatory manner or in such a manner to preclude the interim trail use or the ability to reactivate rail service in the future.")

12. The Court, accordingly, dismisses without prejudice Plaintiffs' contentions that Butler County and Andover (a) violated commitments to the STB in the management and operation of the railroad right-of-way as a recreational trail; (b) failed to accept responsibility for the payment of taxes levied or assess against the railroad right-of-way as required by the STB; (c) allowed the

right-of-way to be altered to preclude future reactivation of rail service; and (d) allowed the right-of-way to be severed from the national rail system.

13. The Court, furthermore, concludes that it lacks subject matter jurisdiction and authority (a) to order Butler County or Andover to fulfill their commitments to the STB or terminate the trail and abandon the right of way; (b) to declare that the right-of-way has been severed from the national rail system; or (c) to certify to the STB its findings to revoke the trail and abandon the railroad right-of-way.

(C) Plaintiffs' KRTA Standing.

14. The railroad right-of-way between Mileposts 485.20 and 494.22 is a “recreational trail” as defined by the KRTA. 16 U.S.C. §1247(d); K.S.A. 58-3211(b).

15. Butler County is the “responsible party” for the development, operation and maintenance of the recreational trail along the railroad right-of-way between Mileposts 488.35 and 485.20. K.S.A. 58-3211(c).

16. Andover is the “responsible party” for the development, operation and maintenance of the recreational trail along the railroad right-of-way between Mileposts 494.22 and 488.35. K.S.A. 58-3211(c).

17. Any adjacent property owner aggrieved by a responsible party’s failure to comply with the KRTA may bring an action in the district court to enforce its provisions. K.S.A. 58-3215.

18. If the Court finds that the responsible party has failed to comply with the KRTA, the Court may enter an order requiring the responsible party to comply with the KRTA. K.S.A. 58-3215. There is no other remedy available under the KRTA. *Central Kansas Conservancy v.*

Sides, 56 Kan. App. 2d 1099, 1125-26, 443 P.3d 337 (2019) (“only one remedy exists under the KRTA – an order to enforce the Act as stated under K.S.A. 2018 Supp. 58-3215”).

19. An “adjacent property owner” is one who owns property “on or adjacent to a recreational trail.” K.S.A. 58-3215. *See also* Black’s Law Dictionary at 38 (West Pub. Co., 5th ed. 1979) (“adjacent” commonly means “[l]ying near or close to; sometimes, contiguous; neighboring.”)

20. To be “aggrieved,” a plaintiff must have suffered loss or injury due to the trail sponsor’s KRTA violation. *Finstad v. Washburn Univ.*, 252 Kan. 465, 471-72, 845 P.2d 685 (1993). *See also* Black’s Law Dictionary at 60 (“aggrieved” commonly means “[h]aving suffered loss or injury; damnified; injured.”)

21. HMA Properties has standing to assert a KRTA claim against Andover because it owns property adjacent to the railroad right-of-way for which Andover is the responsible party and alleges that it has been aggrieved by Andover’s violation of K.S.A. 58-3212(a)(4) (litter control).

22. Mr. and Mrs. Gilliland own real property adjoining the railroad right-of-way for which Andover is the responsible party but have failed to submit evidence that they have been aggrieved by any alleged violation of the KRTA by Butler County or Andover to have standing to advance KRTA claims.

23. Mr. and Mrs. Ayers, as Trustees, own real property adjoining the railroad right-of-way for which Butler County is the responsible party but have failed to submit any evidence that they have been aggrieved by any violation of the KRTA by Butler County or Andover to have standing to advance KRTA claims.

24. Mr. and Mrs. Pankratz own real property adjoining the railroad right-of-way managed for which Butler County is the responsible party but have failed to submit any evidence that they have been aggrieved by any violation of the KRTA by Butler County or Andover to have standing to advance KRTA claims.

25. The Court, accordingly, concludes that the Gilliands, Ayers, and Pankratzs lack standing under the KRTA to advance claims against Butler County or Andover. Plaintiffs' claims are dismissed without prejudice.

(D) Andover's Alleged KRTA Violation.

26. The KRTA requires Andover, as the responsible party, to provide for litter control and the enforcement of laws prohibiting littering along the recreational trail, including but not limited to trail-user education and signs about laws prohibiting littering and the provision of trash receptacles and the cleanup of trash and litter. K.S.A. 58-3212(a)(4).

27. Andover has complied with K.S.A. 58-3212(a)(4) by providing for litter control and enforcement of laws prohibiting littering along the recreational trail with trail user education and signs about laws prohibiting littering.

28. Andover has complied with K.S.A. 58-3212(a)(4) by providing trash receptacles for trail users along the recreational trail.

29. Andover has complied with K.S.A. 58-3212(a)(4) by providing for the cleanup of trash and litter along the recreational trail.

30. HMA Properties failed to carry its burden to prove that Andover blew trash with leaf blowers onto its property from the recreational trail. Testimony of Frank Miller (Andover employees blew trash onto HMA Properties); Testimony of Rick Lanzrath (Andover does not use leaf blowers to blow trash onto adjoining properties).

31. The Court, accordingly, concludes that judgment should be granted to Andover and against HMA Properties on its contention that Andover has failed to comply with the KRTA in its management and operation of the recreational trail as the responsible party.

(E) Andover City Ordinance.

32. The facts and any conclusions that the Court may have as to the validity and applicability of Andover Ordinance No. 1575 are of no consequence to the Court's judgment. The Court has not ruled on the validity of the ordinance and its applicability to this case.

(F) Judgment of the Court.

33. This Court concludes that it lacks subject matter jurisdiction to consider Plaintiffs' contention that Defendants have failed to develop and manage the railroad right-of-way as required by Defendants' commitments to the STB. The Court, accordingly, dismisses Plaintiffs' contention without prejudice on this issue.

34. This Court further concludes that it lacks subject matter jurisdiction to consider HMA Properties' contention that Andover has failed to pay taxes assessed against the railroad right-of-way in violation of Andover's commitment to the STB. The Court, accordingly, dismisses these contentions without prejudice.

35. This Court further concludes that it lacks subject matter jurisdiction to consider Plaintiffs' contention that Defendants have allowed the railroad right-of-way to be severed from the national rail system. The Court, accordingly, dismisses these contentions without prejudice.

36. This Court further concludes that it lacks subject matter jurisdiction to grant Plaintiffs (a) a permanent injunction requiring Defendants to fulfill their STB commitments as Interim Trail Sponsors; (b) a permanent injunction terminating the recreational trail and consummating abandonment of the right-of-way; (c) a declaratory judgment that the railroad right-

of-way has been severed from the national rail system; or (d) an order certified to the STB to revoke the recreational trail and consummate abandonment of the right-of-way. The Court, accordingly, dismisses these contentions without prejudice.

37. The Court further concludes that HMA Properties is an adjacent property owner to the recreational trail which alleges to have been aggrieved by Andover's KRTA violations relating to litter control to have standing to advance its KRTA claims against Andover.

38. The Court further concludes that HMA Properties is not an adjacent property owner to Butler County and has failed to allege any grievance against Butler County, Kansas, for violating the KRTA to have standing to assert a KRTA claim against Butler County. The Court, accordingly, dismisses, without prejudice, HMA Properties' contentions that Butler County violated the KRTA.

39. The Court further concludes that Plaintiffs John W. Gilliland and Colleen K. Gilliland, Bonnie B. Ayers and Wilbur S. Ayers, as Co-Trustees of the Bonnie B. Ayers Living Trust, and George and Mitzi Pankratz, as successors in interest to Jerramy and Erin Pankratz, own real property adjacent to the recreational trail but have failed to present any evidence that they have been aggrieved by a violation of the KRTA by Butler County or Andover to have standing to advance KRTA claims against Butler County or Andover. The Court, accordingly, dismisses, without prejudice, Plaintiffs John W. Gilliland and Colleen K. Gilliland, Bonnie B. Ayers and Wilbur S. Ayers, as Co-Trustees of the Bonnie B. Ayers Living Trust, and George and Mitzi Pankratz, as successors in interest to Jerramy and Erin Pankratz, claims against Butler County or Andover.

40. The Court further concludes that Plaintiff HMA Properties, LLC, has failed to satisfy its burden of proof to establish that Andover violated the KRTA in providing for litter

control as required by K.S.A. 58-3212(a)(4). The Court, accordingly, grants JUDGMENT to Andover against HMA Properties.

FOR THESE REASONS the Court hereby enters final JUDGMENT pursuant to K.S.A. 60-258, in favor of Defendants and against Plaintiff HMA Properties, LLC, as to its contention that Andover violated the KRTA. The Court hereby dismisses, without prejudice, Plaintiffs' remaining claims against Defendants for lack of subject matter jurisdiction.

IT IS SO ORDERED effective as of the date and time shown on the electronic file stamp.

Submitted and Approved as to Form Only by:

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(TWG10795.150/806685.03)

CLERK OF THE BUTLER COUNTY DISTRICT COURT

IN THE THIRTEENTH JUDICIAL DISTRICT

CASE NUMBER 2018-CV-00115

DISTRICT COURT OF BUTLER COUNTY, KANSAS

HMA PROPERTIES, L.L.C., et al.,)

Plaintiffs,)

)

vs.

) Case No. 2018-CV-115

)

BUTLER COUNTY, KANSAS, and)

CITY OF ANDOVER, KANSAS,)

_____) Defendants.)

TRANSCRIPTOFBENCH TRIAL - VOLUME 1

(Reported from Electronic Zoom Hearing)

held, via Zoom, on the 4th day of November, 2020,
in the District Court of Butler County, Kansas,
Butler County Judicial Center, 201 West Pine,
Courtroom D, in the City of El Dorado, County of
Butler, and State of Kansas, before the Honorable
Charles Hart, District Judge.

APPEARANCES

The Plaintiffs, HMA PROPERTIES, L.L.C., et al., appear, via Zoom, by their counsel, Mr. David Rapp and Mr. Eric Barth, Hinkle Law Firm.

The Defendant, BUTLER COUNTY, KANSAS, appears, via Zoom, by its counsel, Mr. Terrence Huelskamp, Huelskamp Law, P.A.

The Defendant, CITY of ANDOVER, appears, via Zoom, by its counsel, Mr. Derek Casey, Triplett, Woolf, Garretson, L.L.C.

ADDITIONAL APPEARANCES:

Daniel Garber - Garber Surveying Service

Frank Miller - Owner, HMA Properties, L.L.C.

Jennifer McCausland - Andover City Administrator

Les Mangus - Director of Community Development

Rick Lanzrath - Director of Public Works & Utilities

1 objection to subject matter jurisdiction herein.

2 With all that being said, I think that the
3 Court is ready to proceed with the plaintiff calling
4 its first witness.

5 MR. BARTH: Thank you, Your Honor. Uh,
6 plaintiffs call Daniel Garber.

7 THE COURT: Thank you. (Administers an
8 oath to Witness Garber.)

9 WITNESS GARBER: I do.

10 THE COURT: And, Mr. Barth, please proceed.

11 MR. BARTH: Thank you, Your Honor.

12 DANIEL E. GARBER,

13 called as a witness on behalf of the Plaintiffs,
14 having been duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. BARTH:

17 Q. Uh, Mr. Garber, would you please state your full
18 name for the record.

19 A. Daniel Eugene Garber.

20 Q. And what do you do for a living, sir?

21 A. I'm a professional land surveyor.

22 Q. And were you asked by the plaintiffs in this case to
23 examine the condition of the former, uh, BNSF
24 railroad right-of-way that's at issue in this case?

25 A. Yes, I was.

1 BY MR. CASEY:

2 Q. Thank you, Mr. Garber, for your time today. I just
3 have a few follow-ups, um -- well, from Mr.
4 Huelskamp's question. Based upon your research --
5 (interrupted)

6 (THEREUPON, the court reporter
7 advises counsel his audio is
8 of poor quality and requests
9 he slow down and repeat the
10 question.)

11 Q. (BY MR. CASEY) Mr. Garber, based upon your research
12 and investigation into this railroad right-of-way,
13 would you agree with me that at least the easement
14 for this right-of-way continues to exist from
15 Wichita, through Andover, part of Butler County, and
16 into Augusta?

17 A. Through part of Wichita, yes. And then -- then on
18 the east, the right-of-way is still in existence.

19 Q. And if the federal government decided it wanted to
20 reactivate rail service along this right-of-way,
21 while some of the facilities may need to be
22 replaced, the right-of-way is still there for
23 reactivation of rail service?

24 A. Not the entire way.

25 Q. What part -- part is missing, sir?

1 A. Um, in -- in downtown Wichita from Wabash Street to
2 the west.

3 Q. All right. Let -- let me modify my question. If
4 the federal government decided it wanted to
5 reactivate rail service along this right-of-way
6 from Wabash Street in downtown Wichita to the east
7 to Augusta, the right-of-way or easement still
8 exists to reactivate that rail passage?

9 A. The right-of-way still exists.

10 Q. Sir, in your investigation and research in
11 photographing, um, various portions of this
12 right-of-way, have you made any determination as to
13 where the four plaintiffs' properties were located
14 in relation to the railroad right-of-way?

15 A. No, I have not.

16 Q. For example, can you tell me whether or not the
17 property owned by the Pankratzes adjoins the portion
18 of the right-of-way managed by the City of Andover
19 or Butler County as Interim Trail Sponsor?

20 A. I was not asked to study that. I was asked to
21 observe the right-of-way.

22 Q. Right. And that would be the same for all four
23 plaintiffs, then?

24 A. Yes.

25 Q. (Long pause.) I'd like to turn your attention to

C E R T I F I C A T E

STATE OF KANSAS)
)
COUNTY OF BUTLER)

I, RHONDA L. LANDSVERK, a Certified Court Reporter in and for the State of Kansas, duly commissioned as such by the Supreme Court of the State of Kansas, do hereby certify that I was present, via Zoom hearing, and reported the foregoing proceedings had at the aforementioned time and place; further, that the foregoing is a true and accurate transcript of my notes requested transcribed.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on May 11, 2021.

/s/ RHONDA L. LANDSVERK, CSR, CRI, CCR
CERTIFIED COURT REPORTER #1006

RHONDA L. LANDSVERK, CSR, CRI, CCR
Butler County Judicial Center
201 W. Pine, Suite D
El Dorado, Kansas 67042

SURFACE TRANSPORTATION BOARD

STB Docket No. AB-870X

BUTLER COUNTY, KANSAS – ABANDONMENT EXEMPTION – IN BUTLER COUNTY, KANSAS

CERTIFICATE OF SERVICE

REPLY OF INTERIM TRAIL MANAGER CITY OF ANDOVER KANSAS TO REPLY OF HMA PROPERTIES, LLC TO JOINT PETITION FOR SUBSTITUTION OF TRIAL MANAGER

I certify that service of the REPLY OF INTERIM TRAIL MANAGER CITY OF ANDOVER, KANSAS was accomplished through the notice of electronic filing for parties and attorneys who are filing users in this matter and by United States mail on April 5, 2022, to the following parties of record:

Non-Party: Kansas State Corporation Commission
1500 SW Arrowhead Road
Topeka, KS 66604
United States

Non-Party: Office Of Chief Of Forest Service U.S. Department Of Agriculture
1400 Independence Ave., SW
Washington, DC 20250-003
United States

Non-Party: Butler County Commissioners
205 West Central Street
El Dorado, KS 67042
United States

Party of Record: Eric Hocky
2001 Market Street, Suite 2620
Philadelphia, PA 19103
United States

Non-Party: Kansas Department Of Transportation
700 SW Harrison Street
Topeka, KS 66603-3754
United States

Non-Party: National Oceanic And Atmospheric Administration, N/Ngs12
1315 East-West Highway
Silver Spring, MD 20910-3282
United States

Non-Party: Kansas Department Of Health And Environment
1000 SW Jackson
Topeka, KS 66612-1367
United States

Non-Party: Governor Of Kansas
State Capitol Building
Topeka, KS 66612
United States

Party of Record: Terrence L. Huelskamp
550 N 159th St E
Ste 104
WICHITA, KS 67230-7521
United States

Party of Record: Mike Wheeler
121 S Gordy
El Dorado, KS 67042
United States

Non-Party: U.S. Army Corps Of Engineers
2710 N.E. Shady Creek Access Road
El Dorado, KS 67042
United States

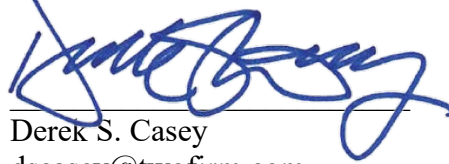
Non-Party: Kansas State Historical Society
6425 S W 6Th Avenue
Review & Compliance Coordinator
Topeka, KS 66615-1099
United States

Non-Party: U.S. Department Of Defense
720 Thimble Shoals Boulevard, Suite 130
Newport News, VA 23606-2574
United States

Party of Record: Andrew Marino
301 N. Main, Suite 1300
Wichita, KS 67202
United States

Respectfully submitted,

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