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KARL MORELL
Of COUNSEL

October 12, 2004

VIA HAND DELIVERY

ENTERED
Office of Proceedings

OCT 12 2004

Part of
Public Record

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Suite 715
Washington, DC 20423-0001

**RE: Docket No. AB-563 (Sub-No. 1X), Kansas Eastern Railroad,
Inc. – Abandonment Exemption – In Butler and Greenwood
Counties, Kansas**

Dear Secretary Williams:

Attached for filing are the original and ten copies of the Reply To Petition To Intervene,
Petition For Denial Of Trail Use Request, And Petition For Permission To Conduct Limited
Discovery Upon Butler County.

Please time and date stamp the extra copy of the Reply and return it with our messenger.

If you have any questions, please contact me.

Sincerely yours,

Karl Morell
Karl Morell

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. AB-563 (SUB-NO 1X)

KANSAS EASTERN RAILROAD, INC.
-- ABANDONMENT EXEMPTION --
IN BUTLER AND GREENWOOD COUNTIES, KANSAS



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REPLY OF BUTLER COUNTY TO PETITION TO INTERVENE, PETITION FOR
DENIAL OF TRAIL USE REQUEST, AND PETITION FOR PERMISSION TO CONDUCT
LIMITED DISCOVERY UPON BUTLER COUNTY

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Attorney for:
BUTLER COUNTY

Dated: October 12, 2004

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DOCKET NO. AB-563 (SUB-NO 1X)

KANSAS EASTERN RAILROAD, INC.
--ABANDONMENT EXEMPTION --
IN BUTLER AND GREENWOOD COUNTIES, KANSAS



REPLY OF BUTLER COUNTY TO PETITION TO INTERVENE, PETITION FOR
DENIAL OF TRAIL USE REQUEST, AND PETITION FOR PERMISSION TO CONDUCT
LIMITED DISCOVERY UPON BUTLER COUNTY

Butler County (the "County"), hereby replies in opposition to the Petition To Intervene, Petition For Denial Of Trail Use Request, and the Petition For Permission To Conduct Limited Discovery Upon Butler County (collectively, the "Petition") filed by David L. Murfin ("Petitioner").

Petitioner requests the Surface Transportation Board ("Board") to deny the County's request for the issuance of a decision and notice of interim trail use or abandonment ("NITU") arguing that the County's request is a sham and that the request is procedurally defective. As explained below, neither the County's request for a NITU nor its intended use of the rail corridor between Milepost 471.0, near Leon, KS, and Milepost 438.5, at Severy, KS (the "Line") is a sham. The County's request is also not procedurally defective.

Petitioner's contention that the County is proposing a sham trail is based on a misconception of the County's intended use of the Line. The County's fundamental objective is the preservation of

the Line and other adjacent rail corridors¹ for future reactivation of rail service. The County is aware of the requirements of the Trails Act and intends to fully comply with those requirements. The County currently does not have available the funding necessary to construct a trail along the entire length of the Line. The County has, therefore, decided to explore the option of leasing segments of the corridor to the adjacent land owners on an interim basis for agricultural use until such time as funding becomes available to develop a trail or the corridor is again needed for rail service, whichever comes first.

A copy of the Lease Agreement the County intends to offer to the adjacent land owners is attached as Exhibit 1. Section 12 of the Agreement expressly provides that “[t]his Lease shall be interpreted to conform to Section 8(d) of the National Trails Systems Act, 16 U.S.C. 1247(d), and the rules of the Surface Transportation Board related thereto” Although the term of the lease is specified as 99 years, Section 13 allows the County to terminate the lease on six months notice in order to develop a trail or permit the reactivation of rail service. The County intends to charge the Lessee a fee of \$25 for entering into the Agreement, which is the amount the County will be required to pay to record the Lease at the local courthouse. The Lessee would also be responsible for paying the assessed property taxes during the term of the Lease Agreement. In other words, the proposed interim lease arrangement would not generate any revenues for the County, it would only repay the County for its out-of-pocket costs.

¹ The County has rail banked the former Kansas Eastern Railroad, Inc. (“K&E”) line between Mileposts 471.0 and 476.4 and between mileposts 476.65 and 483.0. Also, in STB Docket No. AB-870X, *Butler County, Kansas – Abandonment Exemption – In Butler County, KS* (not printed), served September 14, 2004 (“*Butler County*”), the County has received authority to abandon its rail line between milepost 483.62, at Augusta, KS, and milepost 494.22, near Andover, KS, and has agreed to negotiate for trail use with Prairie Travelers, Inc. (“PTI”). If the County is not able to reach an agreement with PTI, the County itself will rail bank that line.

Moreover, no final decision has been made by the County on whether to proceed with the interim lease arrangement on the Line. Pursuant to Kansas State law, the Line will not be subject to property taxes as long as it is owned by the County. If the County, however, leases any segment of the Line, the entire corridor becomes subject to property taxes. Therefore, unless the vast majority of the adjacent land owners agree to the proposed arrangement, the County will not proceed with the interim leasing arrangement.

It is the County's current intention to work with the various communities, including Beaumont, Leon and Augusta, along the Line and the adjacent corridors to plan the development of trails commencing at the communities and extending outwards until the entire Line and adjacent corridors are converted to a trail. As the County reaches agreements with the individual communities and funding becomes available, the County, in combination with the local communities, will begin to construct a trail along the Line. By involving the local communities, the County will be able better to design and construct a trail that meets the desires and needs of the individuals that will actually be using the trail. The local communities also offer an additional source of funding for the trail.

Section 1247(d) imposes only two requirements on interim trail use: the right-of-way must be subject to future reactivation of rail service and the trail user must assume liability for the corridor's management and taxes. The County intends to comply with both of these conditions. The possible leasing of segments of the Line to adjacent land owner for interim agricultural use and the use of the corridor for utility purposes are not inconsistent with the requirements of the Trails Act. As the Board noted in STB Docket No. AB-55 (Sub-No. 514X), *CSX Transportation, Inc. – Abandonment Exemption – In Monroe and Owen Counties, IN* (not printed), served September 30, 1997, slip op. at 3 (“*CSX Transportation*”), quoting Docket No. AB-3 (Sub-No. 63), *Missouri Pacific R. Co. –*

Aband. In Okmulgee, Okfuggee, Hughes Pontotoc, Coal Atoka and Bryan Counties, OK (not printed), served January 4, 1991:

It is important to note that there is no requirement under section 1247(d) that the trail be “developed” in any particular way for recreational use. There can be differing types or levels of trail use, and we will not become involved in determining the type or level of trail use for a particular right-of-way. In addition, there is no time limit on how quickly a trail must be developed to its intended level of use.

Railroad corridors have historically been used for various utility purposes and the County’s plans to permit such use along or across the Line in the future is neither inconsistent with interim trail use nor the restoration of rail service on the Line. The Board and its predecessor have consistently found that dual use of a corridor is not inconsistent with trails use. *See e.g., CSX Transportation* (mixed public road and trail) and AB-335 (Sub-No. 2X), *KCT Railway Corporation – Abandonment Exemption – In Franklin, Anderson, and Allen Counties, KS* (not printed), served October 30, 1992 (mixed mass transit and trail).

Similarly, the interim use of the corridor by adjacent land owners will not impede the development of a trail nor will it impair the restoration of rail service. Indeed, Section 6 of the proposed Lease Agreement expressly provides that “Lessee agrees to utilize the premises only insofar as such usage does not interfere with Lessor’s plans to eventually put into operation a trail, railroad line or utilize the premises for a utility corridor.” Consequently, the interim use of segments of the corridor for agricultural purposes until a trail is developed is not inconsistent with rail banking or with interim trail use. *See Docket No. AB-381* (Sub-No. 1X), *T and P Railway – Abandonment Exemption – In Shawnee, Jefferson and Atchison Counties, KS* (not printed), served February 20, 1997.

If the County is able to reach a rail banking agreement with the railroad, it will not have an affirmative duty to develop a trail for advanced recreational use. There are differing levels and types

of trail use. In addition, neither the Trails Act nor the Board's rules impose a time limit for the development of a trail. STB Docket No. AB-406 (Sub-No. 6X), *Central Kansas Railway, Limited Liability Company – Abandonment Exemption – In Marion and McPherson Counties, KS* (not printed), served May 8, 2001; STB Docket No. AB-433 (Sub-No. 2X), *Idaho Northern & Pacific Railroad Company – Abandonment and Discontinuance Exemption – In Washington and Adams Counties, ID* (not printed), served April 1, 1998.

Citing 49 C.F.R. § 1152.25(c), Petitioner claims that the County's trail use request was filed late and, thus, is procedurally defective. Section 1152.25(c), however, governs, among other things, the filing of trail use requests in abandonment application proceedings and not Notices of Exemption filed pursuant to the class exemption at Section 1152.50, which are the procedures invoked by K&E in this proceeding. Moreover, Petitioner's argument ignores the fact that the Line was rail banked by American Trails Association, Inc., until July 31, 2004. Butler County filed its request for a NITU on September 7, 2004, or 38 days after the prior NITU was vacated.

The County is unaware of any time frames for the filing of a request for a NITU after a prior NITU has been vacated, other than the request must be filed before the railroad consummates the abandonment of the rail line at issue. Consequently, the County does not consider its request to be late filed as suggested by Petitioner. In any event, the Board and its predecessor have accepted late-filed trail use requests on innumerable occasions. See e.g., *Rail Abandonments – Supplemental Trails Act Procedures*, 4 I.C.C.2d 152, 157-58 (1987); Docket No. AB-31 (Sub-No. 23), *Grand Trunk Western R.R. Co., -- Abandonment – In Lapeer and Oakland Counties, MI* (not printed), served April 9, 1987; Docket No. AB-3 (Sub-No. 60X), *Missouri Pacific Railroad Company – Exemption – Abandonment In Shawnee And Osage Counties, KS* (not printed), served October 26, 1989; *T and P Railway*; STB Docket No. AB-406 (Sub-No. 6X), *Central Kansas Railway, Limited*

Liability Company – Abandonment Exemption – In Marion and McPherson Counties, KS (not printed), served April 12 1996; *Butler County*; and STB Docket No. AB-325 (Sub-No. 2X), *Florida Midland Railroad Company – Abandonment Exemption – In Sumter and Lake Counties, FL* (not printed), served June 19, 2002.

In its Petition, Petitioner seeks leave to serve discovery on the County. Even though the Board has not ruled on the request, Petitioner nevertheless has already served the Interrogatories, Document Requests and Admissions on the County. The County urges the Board to deny the request for discovery. Granting the request would establish bad precedent and encourage parties objecting to trails to harass potential trail managers through senseless and irrelevant discovery. In any event, County does not intend to respond to the individual discovery requests until the Board rules on the Petition.

In summary, the County respectfully requests the Board to deny the relief sought in the Petition and to issue a NITU in this proceeding.

Respectfully submitted,



Karl Morell
Of Counsel
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1455 F Street, N.W.
Suite 225
Washington, D.C. 20005
(202) 638-3307

Attorney for:
BUTLER COUNTY

Dated: October 12, 2004

EXHIBIT 1

LEASE

THIS LEASE AGREEMENT is entered into this ____ day of _____, 200__, by and between the Board of County Commissioners of Butler County, Kansas, hereinafter referred to as "Lessor", and _____
d/b/a _____, hereinafter referred to as "Lessee".

Lessor acquired ownership of certain real estate located within Butler County, Kansas for Interim Trail Usage pursuant to Section 1247(d) of the National Trails Systems Act, as amended; and Lessee is desirous of utilizing the same for agricultural business purposes on an interim basis; and it is the mutual desire of the parties to reduce their agreement to writing,

Now, it is agreed as follows:

1. **DESCRIPTION OF PREMISES:** Lessor hereby agrees to lease to Lessee _____ sq ft feet of railroad right of way, approximately ____ feet by ____ feet said tract of land located along the railroad right of way as shown on the attached map and upon which is located a utility easement and other county related structures.
2. **LEASE PAYMENT:** In consideration for the use of said premises Lessee hereby agrees to pay Lessor the sum of \$ _____ with the payment being due upon the execution of this agreement.
3. **TERM:** This lease shall be in effect upon the Filing Date of the lease as recorded at the Butler County Register of deeds and its initial term shall end at midnight of December 31, 2103. (Approximately 99 years)
4. **TITLE:** Lessor believes it has good title to the premises demised but makes no warranty as to the same nor will Lessor undertake to defend Lessee in any action brought by a third party claiming title to the premises. If the premises are subsequently found to be subject to a prior claim, this lease shall terminate immediately and Lessee accepts this lease subject to that possibility.
5. **TAXES AND INSURANCE:** Any real estate taxes subsequently assessed against the premises shall be the sole responsibility of Lessee. Upon receipt of notification of taxes due, Lessee agrees to promptly pay the same.

6. **CONDITION OF PREMISES:** It is understood that Lessee has inspected the premises and takes them "as is". Lessee may not construct any buildings or structures on or across the leased property, may not remove or change any watercourses, water drainage systems or railroad structures. Lessor is not obligated by this lease to make any changes, removals, or repairs of any kind nor to construct any fences. Lessee agrees to utilize the premises only insofar as such usage does not interfere with Lessor's plans to eventually put into operation a trail, railroad line or utilize the premises for a utility corridor. Lessee shall not permit the existence of any nuisance on the premises; shall keep the same in clean and safe condition and free of any explosive, flammable, combustible, or hazardous materials except such materials necessary to Lessee's business. Lessee shall not handle or store any potentially dangerous or toxic materials; and shall not permit the accumulation of junk, debris, or other unsightly materials. Lessee shall, at its sole expense, keep the premises and any improvements in good repair. Lessee shall comply with all federal, state, local, police requirements, regulations, ordinances, and laws respecting the premises and activities thereon.

7. **INDEMNIFICATION:** Lessee shall not create or permit any condition on the premises that could present a threat to human life, bodily injury, or to the environment. Lessee shall indemnify and hold Lessor harmless from any suit or claim growing out of any damages alleged to have been caused, in whole or in part, by an unhealthful, hazardous, or dangerous condition caused by, contributed to, permitted by, or aggravated by Lessee's presence on the premises. Lessee also agrees to indemnify and hold harmless Lessor from any loss, damage, injury or death arising from any act or omission of Lessee, Lessee's invitees, licensees, employees, or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation while on or near the premises.

8. **PROXIMITY TO RAILROAD:** It is understood by Lessee that the premises are in proximity to railroad tracks, equipment, bridges, trestles and other surface water corridors and that persons and property on the premises will be in danger of injury or death and property shall be in danger of damage or destruction incidental to the operation of a future railroad, including, without limitation, the risk of derailment, fire, or inadequate clearance (including site clearance or vision clearance problems at grade crossings on or adjacent to the premises), and Lessee accepts this lease subject to such dangers.

9. **ASSIGNMENT:** Lessee shall not assign this lease or any interest therein, or grant a security interest in any buildings, structures or improvements on the premises, or sublet, and no heir, executor, administrator, receiver, master, sheriff, trustee in bankruptcy, or other assignee by operation of law shall assign or sublet, without the express prior written consent of Lessor.

10. **MECHANIC'S LIEN:** If, because of any act or omission of Lessee, any mechanic's lien or other lien, charge or order for the payment of money shall be filed against the Lessor or any portion of the premises, Lessee shall, at its own expense, cause the same to be discharged of record within thirty (30) days after written notice from Lessor to Lessee of the filing thereof, and shall indemnify and save harmless Lessor against and from all costs, liabilities, penalties, and claims, including legal expenses, resulting there from. Nothing herein shall be construed to constitute an agency, which would permit Lessee to enter into a contract for improvements upon the premises, which might give rise to a mechanic's or, other form of lien.

11. **CONDEMNATION:** If all or any part of the leased premises is subjected to taking under eminent domain laws, this lease shall terminate from the time possession is taken by the condemning entity. Lessee agrees that it is not entitled to, and hereby disclaims any award made for such taking.

12. **INTERIM TRAILS USE:** This Lease shall be interpreted to conform to Section 8(d) of the National Trails Systems Act, 16 U.S.C. 1247(d), and the rules of the Surface Transportation Board related thereto, all as amended from time to time.

Public Law (16 U.S.C. 1247) (sec. 8) State and Metropolitan Area Trails

- The Secretary of Agriculture is directed, in accordance with authority vested in him, to encourage States and local agencies and private interests to establish such trails.
- (d) Interim use of railroad rights-of-way

The Secretary of Transportation, the Chairman of the Interstate Commerce Commission, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 801 et seq.), shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Commission shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

13. **TERMINATION:** Either party may cancel this lease at will on six (6) months advance written notice, in which event, Lessee shall remove all property or improvements not owned by Lessor (regardless of who made them), including without limitation fences within the six month time frame. If Lessee fails to remove said property or improvements within the above time limit, Lessee hereby grants Lessor the absolute right to keep, convey, destroy, or otherwise dispose of them in any manner Lessor chooses and in addition, Lessee agrees to pay any net costs incurred by Lessor in doing so, within thirty (30) days of receipt of Lessor's statement therefore.

14. **DEFAULT:** Should Lessee fail to make the initial lease payment as provided for herein or in the event Lessee shall not comply with any other provision within this lease, this lease will be deemed to be in default and, at the written request of Lessor, Lessee agrees to vacate the premises forthwith. In the event of termination by virtue of Lessee's default, Lessor shall have a lien upon all of Lessee's property or improvements located upon the leased premises which lien may be foreclosed upon in the same fashion as liens applicable to personal property.

15. **BINDING UPON HEIRS:** This lease shall inure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators, successors, and assigns.

IN WITNESS WHEREOF, the parties hereto have set their hands to this Lease on the date and year first above written.

"LESSOR"
BOARD OF COUNTY COMMISSIONERS
OF BUTLER COUNTY, KANSAS

By: _____
Chairman

"LESSEE"

By: _____

ATTEST:

County Clerk

By: _____

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2004, I have caused a copy of the foregoing
Reply To Petition To Intervene, Petition For Denial Of Trail Use Request, and Petition For
Permission To Conduct Limited Discovery to be served on Counsel for Petitioner.


Karl Morell