

IN THE SUPREME COURT OF IOWA

**Supreme Court No. 24-0509
Floyd County No. EQCV031386**

**IOWA NORTHERN RAILWAY COMPANY,
Plaintiff-Appellee**

vs.

**FLOYD COUNTY BOARD OF SUPERVISORS, AND CERRO GORDO
COUNTY BAORD OF SUPERVISORS Acting as Trustees for JOINT
DRAINAGE DISTRICT NOS. 6 AND 56,
Defendants-Appellants.**

**APPEAL FROM THE DISTRICT COURT OF FLOYD COUNTY
HONORABLE JUDGE COLLEEN D. WEILAND**

**APPELLANTS' BRIEF
AND REQUEST FOR ORAL ARGUMENT**

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue I

The Trial Court Erred In Ruling That INRC's Obligation To Construct A Culvert Through Its Railroad Embankment By The Jack And Bore Method Is Preempted

ROUTING STATEMENT

This case should be retained by the Supreme Court because it presents the substantial issue of first impression on if and how preemption applies to railroads' statutory duty under Sections 468.109 to 468.113, Code of Iowa to rebuild and reconstruct the necessary culvert so as to not obstruct, impede, or interfere with the free flow of water.

NATURE OF THE CASE

Iowa Northern Railway Company's (INRC) track crosses the natural waterway and open ditch of Cerro Gordo County and Floyd County Joint Drainage District Number 6 and 56 (JDD6&56). D0167 Exhibit I (3-15-2024). Based on a petition of a landowner to repair or improve JDD6&56's drainage with its failing main tile, the Joint Board of JDD6&56 determined to replace the failing tile line on both sides of Iowa Northern Railway Company's (INRC's) railroad embankment across the natural waterway with new open ditches on both sides of the railroad embankment. D0159 Exhibit A (3-15-2024); D0160 Exhibit B (3-15-2024); D0161 Exhibit C (3-15-2024). The INRC presently has a 4-foot by 6-foot box culvert built in approximately 1918-1920 that will be 2.8 feet above the bottom of the new open

ditch on both sides of INRC's railroad embankment. JDD6&56's engineer determined to install a 66-inch (5.5 feet) diameter smooth steel pipe culvert southeast of the box culvert and leave the 4 x 6 feet box culvert in place. D0169 Exhibit K Sheet D.01 (3-15-2024).

Section 468.109, Code of Iowa, provides for railroads to "rebuild and reconstruct the necessary culvert or bridge where any ditch, drain, or watercourse crosses its right-of-way, so as not to obstruct, impede or interfere with the free flow of water therein."

JDD6&56's engineer's plans call for the installation of the new 5.5-foot diameter smooth steel pipe to be made by using the jack and bore method, which was pioneered by the company known as Miller The Driller in Pleasant Hill, Polk County, Iowa, to install culverts in embankments to not interfere with traffic on top of the embankment. The jack and bore method means that the culvert pipe is pushed through the railroad embankment with an auger inside the culvert pipe which augers out the fill in the embankment. The culvert pipe and auger proceed together with the auger not extending out in front of the culvert pipe. JDD6&56's expert witness, Scott Dullard, first began working for Miller The Driller and now has his own company, The Driller, LLC and another company. Mr. Dullard's companies have done approximately 6,500 jack and bore installations without any incident or problem. Mr. Dullard testified that the auger must be kept inside the steel pipe,

because if you get the auger out of and ahead of the steel pipe, then there can be a subsidence overhead of the embankment. Mr. Dullard testified that he is confident JDD6&56 can jack and bore its proposed 5.5-foot smooth steel pipe culvert through INRC's railroad embankment without interfering with the operation of the rail line.

The jack and bore installation is specifically designed and used for the successful and safe installation of culverts in embankments. D0191 Trans. Dullard, P. 105 l. 25 to P. 128 l. 3 (5-15-2024).

The INRC asserts that JDD6&56's authority under Section 468.109 et seq. is subject to federal preemption. D0001 Petition (05-21-2019). However, the Surface Transportation Board (STB) has held that preemption does not apply to drainage under railroad tracks. PP. 30-32 of this Brief. Also, there is a presumption against there being preemption. PP. 29-30 of this Brief. Furthermore, there would be federal preemption only if the jack and bore installation of the 5.5-foot diameter smooth steel pipe would prevent or unreasonably interfere with railroad transportation, and be so draconian that it prevents the railroad from carrying out its business. PP. 32-41 of this Brief.

Mr. Bannister, the General Counsel for INRC, testified that he relies on Murphy's Law that something may go wrong with JDD6&56's jack and bore installation of the new 5.5-foot diameter smooth steel pipe culvert in INRC's railroad embankment, and that he will shut down INRC's rail traffic operation if JDD6&56

proceeds with the jack and bore installation of the smooth steel pipe culvert. D0191 Trans. Bannister, P. 46 l. 6 to P. 48 l. 5; P. 53 l. 12 to P. 54 l. 22; P. 46 l. 20; P. 79 l. 15; P. 79 l. 24 to P. 80 l. 17 (5-5-2024).

The Trial Court erred in ruling that there is preemption of JDD6&56's jack and bore installation of the 5.5-foot diameter smooth steel pipe in the INRC's embankment and that it will prevent and unreasonably interfere with the INRC's operation of its rail line. D0128 Decree (3-13-2024). The jack and bore method has been used approximately 6,500 times by Mr. Dullard's companies without incident. Furthermore, the jack and bore operation is stopped when trains travel over the area, which ensures that there is no interruption of the use of the rail line. Also, if the track permanently moves $\frac{1}{4}$ of an inch, the jack and bore operation is stopped to ensure that there will be no interference nor disruption of the use of the rail line. D0169 Exhibit K Section 01-2210 – Page 5 of 6 (3-15-2024).

The Trial Court in effect is giving all railroad companies a carte blanche way to avoid their statutory duty under Sections 468.109 to 468.113, Code of Iowa, to build and construct or rebuild and reconstruct any necessary culvert or bridge if it claims Murphy's Law and says, I don't know what, but something may go wrong with the installation of the culvert.

The Trial Court's Ruling should be overruled and reversed.

STATEMENT OF FACTS

The railroad track of Iowa Northern Railway Company (INRC) runs on an embankment across the natural waterway of Cerro Gordo County and Floyd County Joint Drainage District Numbers 6 and 56 (JDD6&56). D0169 Exhibit K Sheet D.01 (3-15-2024). Under Section 468.109, Code of Iowa, railroads are required “to build and construct or rebuild and reconstruct the necessary culvert or bridge where any ditch, drain, or watercourse crosses its right of way, so as to not obstruct, impede, or interfere with the free flow of water therein ...”

On June 14, 2011, a property owner in JDD6&56 showed pictures to the Joint Boards of Supervisors of tile problems and stated that an open ditch would be his preferable solution. D0159 Exhibit A (03-15-2024). The Joint Boards thereupon in accord with Section 468.109, Code of Iowa, appointed an engineer to do a preliminary study. D0159 Exhibit A (03-15-2024).

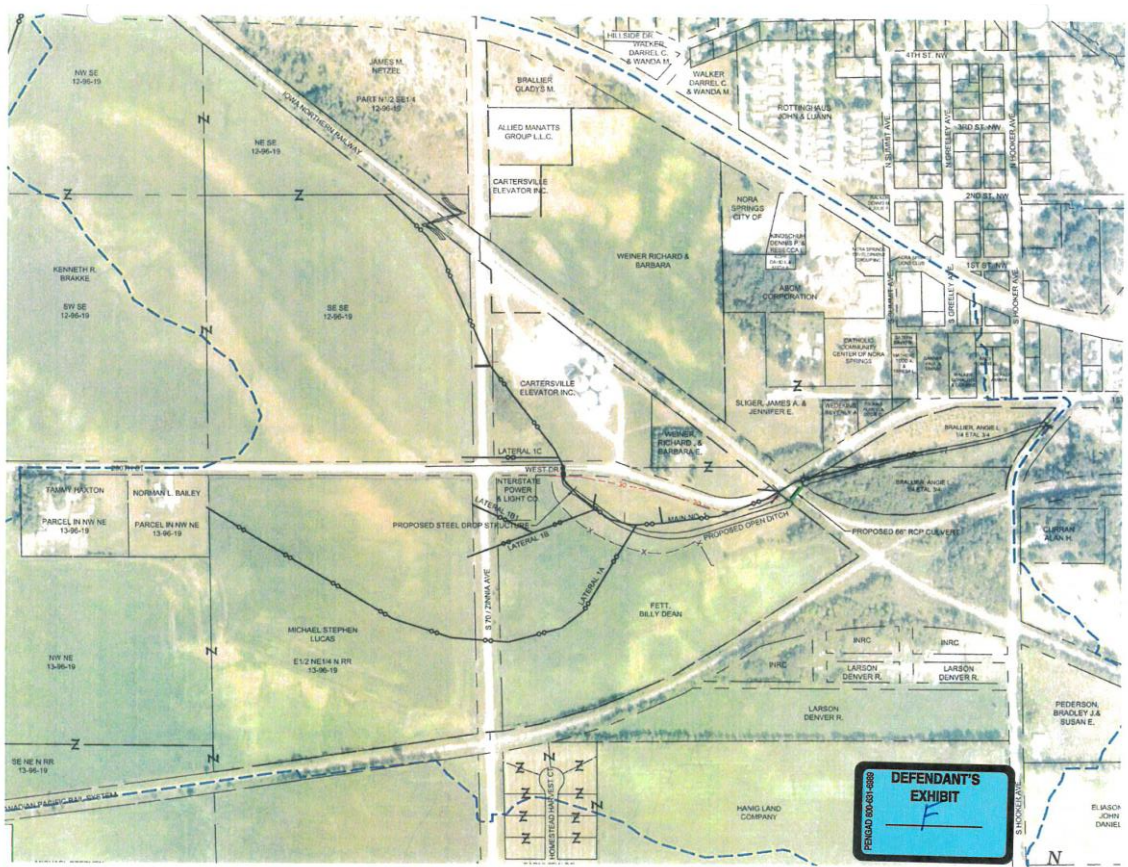
On August 27, 2013, the Joint Boards were advised that “the tile is in poor condition with numerous blowouts” and were also advised of the possibility of “jacking and boring new tile by the railroad” through the INRC’s embankment. The Joint Boards, pursuant to Section 468.109, Code of Iowa, requested an engineering report on this matter. D0160 Exhibit B (3-15-2024).

The Engineer’s Report dated February 25, 2014 was submitted to the Joint Boards. D0161 Exhibit C (3-15-2024). The Report has three options. The Engineer,

outlets into the open ditch. The tile, marked in red, goes under INRC's railroad and proceeds upstream to the northwest.

There was a public hearing held on April 8, 2014 to consider the Engineer's Report dated February 25, 2014. The hearing was continued to June 24, 2014. D0162 Exhibit D (3-15-2024).

At the June 24, 2024 hearing, the Joint Boards with public input unanimously selected Option 2. D0163 Exhibit E, P. 8 (3-15-2024). Option 2 has an open ditch on both sides of INRC's embankment, as shown in the below Exhibit F. D0164 Exhibit F (3-15-2024).



The engineer was instructed to prepare final plans and specifications for Option 2. D0163 Exhibit E (3-15-2024).

JDD6&56's Option 2 replaces the tile on both sides of INRC's railroad embankment with an open ditch, and a new larger main tile upstream from the new open ditch. D0164 Exhibit F (3-15-2024), D0191 Trans. Rode, P. 149 I. 23 to P. 150 I. 18; P. 151 II. 7-14 (5-5-2024).

The flow line of the box culvert is elevation 1045.00. D0161 Exhibit C Sheet D.04 (3-15-2024). The elevation of the new smooth steel culvert pipe is to be 1041.72 as shown in the below Sheet D.01 of Exhibit K. D0169 Exhibit K Sheet D.01 (3-15-2024).

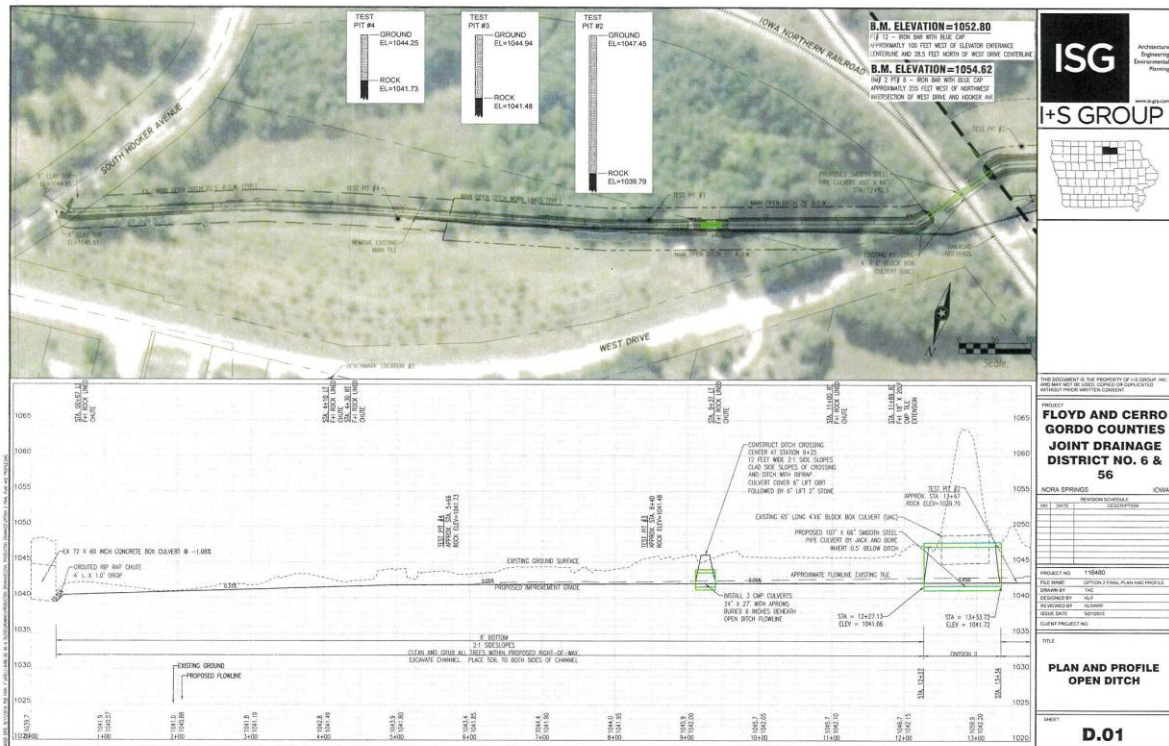
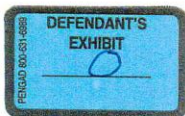
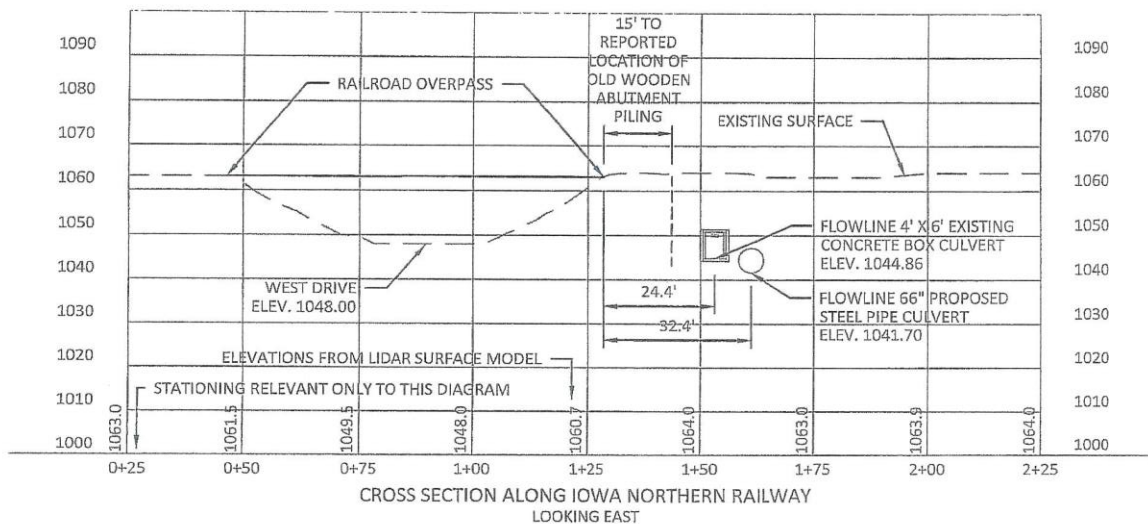


Exhibit K Sheet D.01.

JDD6&56's engineer, Kent Rode, decided to leave INRC's existing box culvert and installing a smaller 66-inch smooth steel pipe culvert with the jack and bore method through INRC's railroad embankment rather than installing a 96-inch smooth steel pipe culvert, to which INRC's engineer appeared to be agreeable. D0191 Trans. Rode, P. 169 l. 17 to P. 171 l. 22, P. 178 l. 11 to P. 179 l. 4 (5-5-2024).

There is a 3.16 feet difference shown in the flow line elevation of the box culvert and of the new smooth steel pipe culvert, as shown on the below Exhibit O. D0174 Exhibit O (3-15-2024).



The existing box culvert will serve as an overflow outlet for the proposed smooth steel pipe culvert. There is an advantage of dual culverts of different

elevations in case the lower culvert has sedimentation. D0191 Trans. Rode, P. 182
l. 8 to P. 184 l. 16 (5-5-2024).

The Project Manual for the construction of Option 2 includes INRC's own Standard Specification For Boring And Jacking And Casing Pipe. D0175 Exhibit P (3-15-2024). The Project Manual for the construction of Option 2, to ensure that the operation of the rail line is not interfered with, provides that the jack and bore operation will be stopped if the top of the rail permanently deflects more than ¼ inch vertical or horizontal. Below is a highlighted copy of Section 01 2210 - Page 5 of 6, of the Project Manual dated 8-23-2016. D0169 Exhibit K (3-15-2024).

19. **GEOTEXTILE FABRIC:**
- Measurement by square yard of specified material furnished and properly placed as shown on the drawings.
 - Includes all labor, tools, material and equipment required for placement of geotextile fabric on all earth surfaces under the erosion stone as shown on the drawings.
 - Payment: Unit price bid per square yard placed.
20. **CULVERT, CMP, 24" DIA.**
- Measure in lineal feet along centerline of newly furnished pipe. Fractions of feet disregarded.
 - Includes all labor, tools, material and equipment required to installation new pipe, backfilling, shaping and miscellaneous associated work as required to complete the work.
 - Includes necessary coupling bands and connections.
 - Payment: Unit price per linear foot installed.
22. **CULVERT, SMOOTH WALL STEEL PIPE, 7/8" WALL, JACKED AND BORED, 66" DIA.**
- Refer to Appendix for Iowa Northern Railway Company Standard Specifications for Boring and Jacking and Casing Pipe.
 - Measurement by lineal feet to the nearest foot along centerline of steel pipe installed under the Iowa Northern Railway.
 - Includes all labor, tools, equipment and material required to complete the work in compliance with the plans and construction notes.
 - Payment: Unit price bid per foot installed.
23. **RAILROAD PROTECTIVE LIABILITY INSURANCE**
- Refer to Appendix for Contractor's Insurance Requirements
 - Measured per completed job.
 - Includes all work required in obtaining Railroad Protective Liability Insurance for work within the Iowa Northern Railway Right-of-Way.
 - No work is anticipated within 25 feet of the main track centerline, therefore the use of flaggers is not anticipated.
 - Payment: Lump Sum
23. **TRACK MONITORING**
- Measured per completed job.
 - Includes all labor, tools, equipment and material required to complete the track monitoring.
 - The top of rail shall not permanently deflect more than ¼ inch vertical or horizontal.
 - Targets shall be placed on the rails to monitor track deflection. Track monitoring shall not require track access other than to place the track monitoring targets. Monitoring targets shall be placed that monitoring is possible when a train is present. However, monitoring during the passing of a train is not required as the train will temporarily deflect the track.
 - Adhesive backed reflective targets may be attached to the side of the rail temporarily. Targets should be removed once monitoring phase is complete.
 - If the top of rail does deflect more than ¼ inch, all operations shall stop until the matter is resolved. Provide established contingency plan, in the event of ground loss and/or the rail deviates ¼ inch vertical or horizontal.
 - Establish a bench mark in the vicinity of the construction. Establish locations for shooting elevations on the top of rail at each area of construction.
 - Example locations for shooting rail elevations would be at:
 - At the centerline of an under track crossing.
 - At outside edges of the crossing.
 - At multiple locations from the crossing/excavation edge but no less than 10, 20, 30, 40, and 50 feet from the crossing.

In July 2016, the JDD6&56's engineer appeared to have agreement with INRC's engineer, Daniel Tegtmeier, to have a new 66-inch smooth steel pipe culvert through INRC's embankment, and to keep the existing 4 x 6 feet box culvert as an overflow facility. D0165 Exhibit G (3-15-2024), and D0166 Exhibit H (3-15-2024).

On August 23, 2016, the Joint Boards approved the final plans for the JDD6&56 project. D0171 Exhibit L (3-15-2024).

INRC's expert witness, Peter Schierloh, objected to the jack and bore method although INRC has its own specifications for the use of the jack and bore method of installing culvert through its own railroad embankments. D0175 Exhibit P (3-15-2024). In Mr. Schierloh's deposition on April 19, 2022, he testified that JDD6&56's installation on the northwest side of INRC's existing box culvert could expect to encounter old bridge pilings. When Mr. Schierloh realized that JDD6&56's 5.5-foot diameter smooth steel pipe was to be installed on the southeast side, and not the northwest side of INRC's box culvert, he changed his objection to JDD6&56's smooth steel culvert possibly coming into contact with the existing box culvert. Mr. Schierloh thereupon said that a geotechnical survey should be done. D0172 Exhibit M, P. 34 l. 20 to P. 35 l. 16; P. 35 l. 17 to P. 45 l. 25; P. 60 l. 18 to P. 64 l. 18 (3-15-2024).

In response to Mr. Schierloh's insistence on having a geotechnical survey, JDD6&56 hired Chosen Valley Testing, Inc. to conduct a geotechnical survey for

JDD6&56's proposed 66-inch diameter smooth steel pipe culvert installation by the jack and bore method. D0177 Exhibit R (3-15-2024).

There were five borings made as shown on the below Exhibit R Sheet E-2. D0177 Exhibit R (3-15-2024).

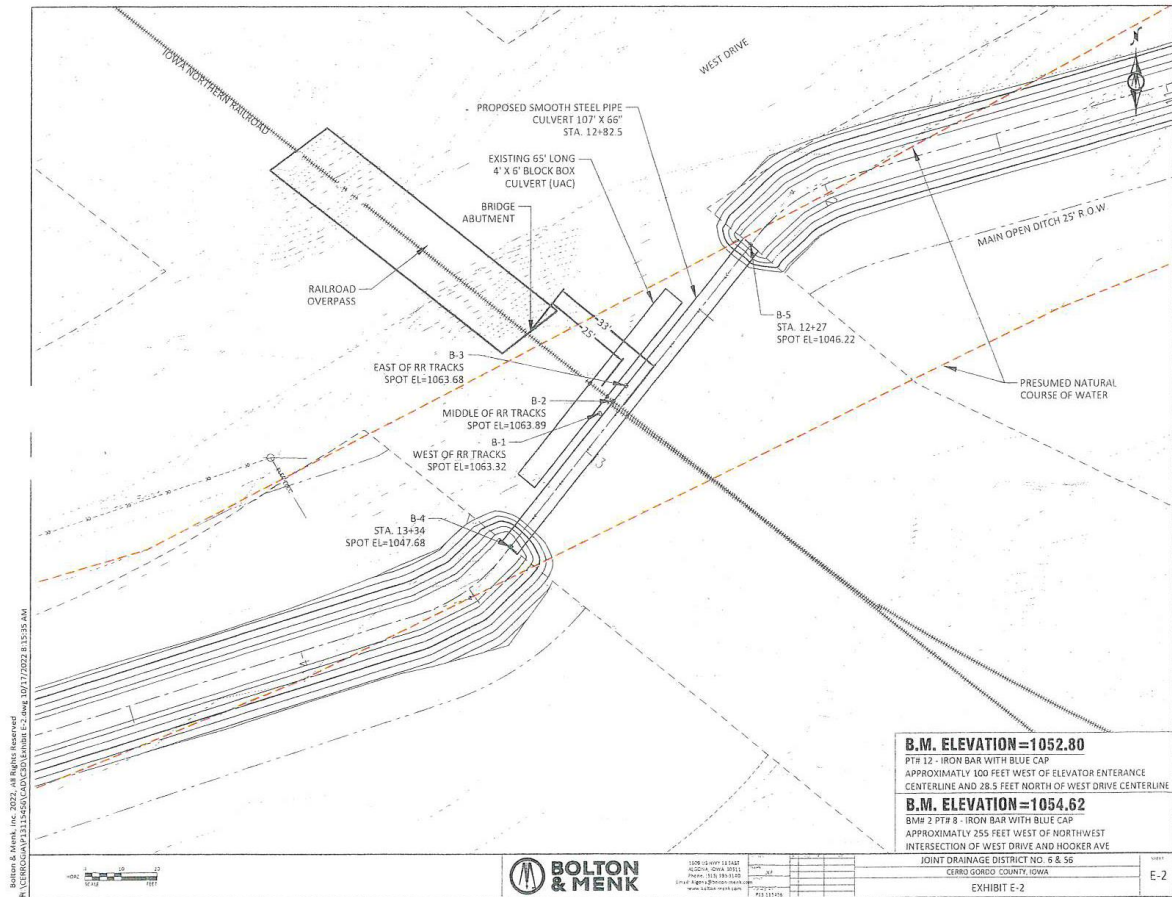


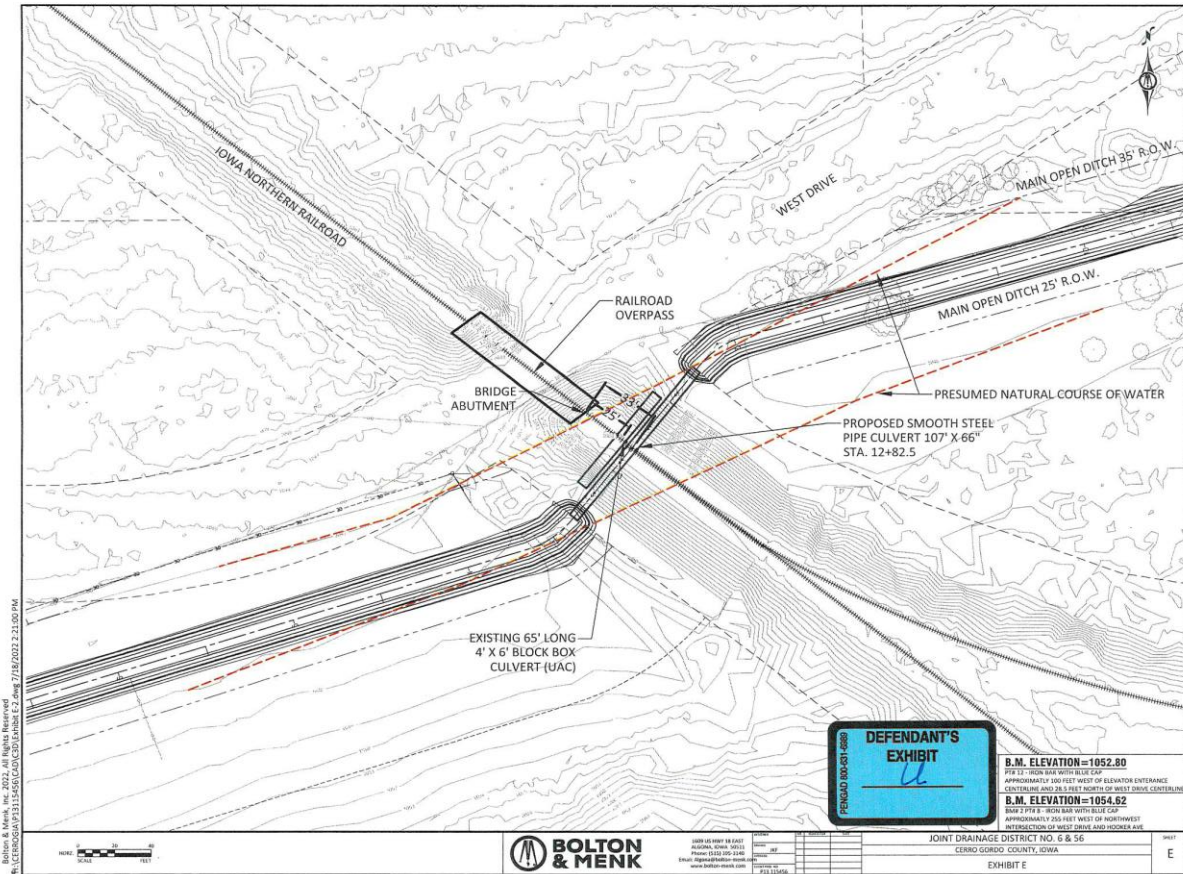
Exhibit R Sheet E-2.

Borings B-02 and B-03 were along the west side of the proposed location of the 66-inch smooth steel pipe culvert. Borings B-02, B-03, B-04, and B-05 went down to bedrock. Sheet 3 and Logs of Borings of B-02, B-03, B-04, and B-05 in Exhibit R. D0177 Exhibit R (3-15-2024).

Boring B-01 was moved one (1) foot further northwest, closer to the box culvert. Boring B-01 was determined to have come in contact with the box culvert as shown in Log of Boring 1. See Sheet 3 and Log of Boring B-01 of Exhibit R. D0177 Exhibit R (3-15-2024).

Mr. Rode worked with Mr. Schierloh, INRC's expert witness on the geotechnical survey. Mr. Rode asked for Boring B-01 to go closer to the existing box culvert to get information on the location of the box culvert and its distance from the proposed location of the new smooth steel pipe culvert. From the information gained from the geothermal survey, Mr. Rode determined to move the proposed new smooth steel pipe culvert 4 feet further southeast away from the existing box culvert for added safety measure. D0191 Trans. Rode, P. 185 l. 1 to P. 188 l. 24 (5-5-2024); D0193 Trans. Rode, P. 4 l. 12 to P. 6 l. 18 (5-5-2024).

As shown in the below Exhibit U, moving the proposed smooth steel pipe culvert 4 feet further southeast will still have the smooth steel pipe culvert to be within the natural course of water in accord with Section 468.111, Code of Iowa. D0180 Exhibit U (3-15-2024). D0193 Trans. Rode, P. 6 l. 19 to P. 8 l. 19 (5-5-2024).



See also Sheet E-2 of Exhibit R on page 17. D0177 Exhibit R (3-15-2024).

The revised location of the proposed new smooth steel pipe culvert will have the closest side of the culvert be five (5) feet away from the location of Boring B-01 which is presumed to be the edge of the box culvert. Even if it is assumed that the side of the box culvert is four (4) feet thick, the closest side of the culvert will be 3.25 feet from the edge of the box culvert.

The following measurements come from Sheet E-2 of Exhibit R, D0177 Exhibit R (3-15-2024), which are based on the distance from INRC’s bridge abutment:

Existing Measurements Before Relocating Culvert:

- 33 feet to middle of the proposed 5.5-foot diameter metal pipe culvert.
- 30.25 feet to northwest side of the proposed metal pipe culvert ($33 - \frac{1}{2} 5.5$ (2.75) = 30.25).
- 30.25 feet location of Borings B-02 and B-03.
- 29.25 feet location of Boring B-01.
- 25 feet to middle of 4-feet x 6-feet box culvert.
- 27 feet to inside southeast wall of box culvert.
- 29.25 feet to location of a Boring B-01 in contact with box culvert (indicates culvert wall is 2.25 feet thick).
- 31 feet to outside of southeast wall of box culvert if it is assumed the thickness of the wall is 4 feet.

Measurements After 4 Foot Relocation of Culvert:

- 34.25 feet is adjusted distance of northwest side of new metal pipe culvert moved 4 feet further southeast away from box culvert.

Distances from adjusted location of new steel pipe culvert from the box

culvert:

- $34.25 - 29.25$ (Boring B-01) = 5 feet.
- $34.25 - 31$ (assuming 4 feet thickness of box culvert) = 3.25 feet.

See also testimony of Mr. Schierloh. D0189 Trans. Schierloh, P. 187 l. 23 to P 190 l. 14 (4-19-2024).

The new smooth steel pipe culverts are on site to be installed through INRC's railroad embankment. D0193 Trans. Rode, P. 8 l. 20 to P. 10 l. 7 (5-5-2024).

Scott Bannister, the General Counsel for INRC, testified "bad things can happen". D0191 Trans. Bannister, P. 46 l20 (5-5-2024). Mr. Bannister relies on an incident in Plainfield, Illinois. D0191 Trans. Bannister, P. 47 l. 23 to P. 48 l. 13; P. 49 ll. 6-24; P. 75 l. 20 to P. 76 l. 6 (5-5-2024).

"This is an example of Murphy's Law." D0191 Trans. Bannister, P. 79 l. 15 (5-5-2024).

24 Q Would you agree that you have – if you have
25 competent people and they follow proper procedures, that the

1 jack and bore operations can be done without interference
2 with the use of the rail line?

3 A No."

D0191 Trans. Bannister, P. 79 l. 24 to P. 80 l. 3 (5-5-2024).

...

13 Q That the jack and bore operation to install a
14 5.5-foot diameter culvert can never be done safely or
15 successfully?

16 A At this point I don't have any confidence it
17 can be done successfully.

D0191 Trans. Bannister, P. 80 ll. 13-17 (5-5-2024).

Scott Dullard is the owner and manager of The Driller, LLC. He learned the drilling business from Gene Miller who owned and operated Miller The Driller, LLC, which pioneered the jack and bore method of installing pipe and culverts. The

jack and bore method pushes the culvert pipe through the embankment while an auger inside the pipe augers out the material in the culvert. The culvert and auger advance together, with the auger staying within the culvert and not going out in front of the culvert . A flagman will be on the job site for the railroad to have the jack and bore operation stop work while the trains pass through, and the excavator is turned from the track so there can be no interference of the use of the rail line. The size of the culvert does not make a difference. It is all the same process. D0191 Trans. Dullard, P. 105 l. 12 to P. 116 l. 1; P. 117 l. 1 to P. 118 l. 12 (5-5-2024).

Moving the 5.5-foot diameter smooth steel pipe culvert further southeast 4 feet can be done without a problem. D0191 Trans. Dullard, P. 119 ll. 14-17; P. 120 l. 6 to P. 121 l. 24 (5-5-2024).

Mr. Dullard’s companies have done approximately 6,500 jack and bore installations without any interference of the rail or road facilities involved. D0191 Trans. Dullard, P. 121 l. 25 to P. 123 l. 7 (5-5-2024).

The incident in Plainfield, Illinois, on which Mr. Bannister focuses, shows incompetence with the auger being 105 feet out in front of the pipe. The auger needs to be at the edge or inside the casing. D0191 Trans. Dullard, P. 123 l. 8 to P. 127 l. 17 (5-5-2024). D0181 Exhibit V, P. 14 l. 253 and P. 15 ll. 262-264 (3-15-2024).

24 They quite literally
25 could not have done anything more wrong in this
1 installation.”
D0191 Trans. Dullard, P. 124 l. 24 to P. 125 l. 1 (5-5-2024).

6 There's sticker's all over the side of your bore machine that
7 say no free boring allowed.
D0191 Trans. Dullard, P. 127 ll. 6-7 (5-5-2024).

Mr. Dullard is confident JDD6&56's jack and bore installation of the proposed smooth steel pipe culvert can be installed without interference with the operation of INRC's rail line. D0191 Trans. Dullard, P. 127 l. 18 to P. 128 l. 3; P. 121 ll. 13-24 (5-5-2024).

ARGUMENT

Issue I

The Trial Court Erred In Ruling That INRC's Obligation To Construct A Culvert Through Its Railroad Embankment By The Jack And Bore Method Is Preempted

A. Preservation of Error: The issue of preemption was raised by INRC in its Petition. D0001 Petition (5-21-2019). JDD6&56 denied that the installation of a smooth steel pipe culvert in INRC's railroad embankment by the jack and bore method is preempted. D0006 Answer (6-18-2019). The Trial Court entered Summary Judgment that the issue should be submitted to the Surface Transportation Board (STB). D0042 Order (1-3-2020). The STB remanded the matter back to the District Court to decide the preemption issue. D0043 Application, Exhibit A (1-11-2021). The preemption issue was involved in all the testimony and exhibits presented at trial. D0130 – D0141; D0159 – D0183; D0142 – D0158; D0184 (3-15-2024), and Transcripts D0189 (4-19-20024), and D0191 and D0193 (5-5-2024). The

Trial Court's Ruling on the issue of preemption was made in the Trial Ruling. D0128 Trial Ruling PP. 4-6 (3-13-2024).

B. Scope and Standard of Review: Since INRC's mandamus case was tried in equity, its review is de novo. Snyder v. Felton, No. 8-223/07-0617 (Iowa App. 4/9/2008), (No. 4/9/2008), No. 8-223-07-0617 (Iowa App. Apr. 09, 2008).

C. Argument. It is the duty of all railroads under Section 468.109, Code of Iowa, to not obstruct, impede, or interfere with the natural flow of water in a drainage district.

Section 468.2(1), Code of Iowa, states:

“The drainage of surface water from agricultural lands and all other lands, including state-owned lakes and wetlands, or the protection of such lands from overflow shall be presumed to be a public benefit and conducive to the public health, convenience, and welfare.”

The duty of a railroad under Section 468.109, Code of Iowa, to not obstruct, impede, or interfere with the natural flow of water is consistent with the duty all persons and entities have to not block the natural flow of water.

“The servient landowner may not interrupt or prevent the water's natural flow to the detriment of the dominant landowner.” Sojka v. Breck, 832 N.W.2d 384 (Iowa App. 2013), P. 3.

“The natural flow or passage of waters cannot be interrupted or prevented by the servient owner to the detriment or injury of the dominant proprietor.” Thome v. Retterath, 433 N.W.2d 51, 53 (Iowa App. 1988).

Section 468.618, Code of Iowa, states:

“Any person who shall dam up, obstruct in any way a ditch or drain so constructed shall be liable to pay the person owning or possessing the swamp,

marsh or other lowlands ... double the damages that shall be sustained by the owner...”

Section 314.7, Code of Iowa, imposes a duty on those undertaking a highway/road improvement to not interfere with or prevent the natural flow of surface water. Schneider v. State, 789 N.W.2d 138, 150 (Iowa 2010).

Statutory Duty

Section 468.109, Code of Iowa, provides that when a ditch, drain, or watercourse in a drainage district crosses the right of way of any railroad company, the engineer for the drainage district shall prepare plans, specifications, plat, and profile for the railroad company “to construct such improvement according to said plans and specifications at the place designated, across its right of way and to build and construct or rebuild and reconstruct the necessary culvert or bridge where any ditch, drain, or watercourse crosses its right of way, so as not to obstruct, impede, or interfere with the free flow of the water therein.” (Emphasis added.)

Under Section 468.112, Code of Iowa, if the railroad refuses to construct or rebuild or reconstruct the culvert or bridge, the Board of Supervisors “shall provide for the construction of the improvement under the supervision of the engineer in charge of the improvement.” (Emphasis added.)

This is a continuing duty of all railroad companies.

“The increased volume of water and the improvement to carry it away are but the results of better drainage of the tillable lands on either side of the track which the company was bound to anticipate. Of course, a railroad company

may not be required to widen or deepen a water course through its right of way at its own expense any more than this may be exacted of a landowner, but the public has the undoubted authority to widen and deepen such a course, even though this shall render necessary the rebuilding of the bridge or culvert, and when this is done, the expense is a proper one for the railway company [144 Iowa 14] to bear. The right of drainage through the natural water course is a natural easement appurtenant to the land of every individual through which it runs, and every other owner of the land along such water course is obliged to take notice of the easement by others along the same. In constructing its embankment or culverts or bridges through it, the company does so subject to the right of the state by appropriate agencies to provide for such use of the natural water course as subsequently may become necessary and proper for public interests. *Chicago, B. & Q.R. Co. v. People*, 200 U.S. 561, 562 (26 S. Ct. 341, 50 L.Ed. 596, s. c. 212 Ill. 103, 72 N.E. 219). The Illinois Supreme Court, after a review of the decisions, declared that ‘the great weight of authority is that where there is a natural way, or where a highway already exists and is crossed by the railroad company under its general license of building a railroad, and without any specific grant by the legislative authority to obstruct the highway or waterway, the railroad company is bound to make and keep its crossing and at its own expense in such condition as shall meet all the reasonable requirements of the public as changed conditions and increased use may demand.’ This was fully approved on appeal by the Supreme Court of the United States. See *Chicago Northwestern Railway Co. v. Drainage District No. 5*, 142 Iowa 607, 121 N.W. 193.” (Emphasis added.) *Mason City & Ft. D. R. Co. v. Board of Supervisors of Wright County*, 121 N.W. 39, 40 (Iowa 1909).

“As the court reads the statutory provisions, Iowa Code § 468.109 authorizes the board to notify a railroad company of necessary improvements for the drainage district that cross railroad rights-of-way, and to direct the railroad company to build such improvements. Iowa Code § 468.110 imposes upon railroads an affirmative duty to construct such improvements, and additionally, to build or rebuild the necessary culverts or bridges to carry the railroad’s roadbed over the improvement. If the railroad company refuses to fulfill its duty, the board may, under Iowa Code § 468.112, cause the work to be done, and then seek to recover the costs of the construction of the entire improvement, including the culvert or bridge, from the railroad in an action in Iowa district court.” (Emphasis added.) *CNW v. Webster County Bd. of Sup’rs*, 880 F.Supp. 1290, 1296 (N.D.Iowa, 1995).

“Our supreme court construed an early version of section 468.111 as obligating the railroad company to build a new culvert or bridge over a planned drainage ditch improvement at its own expense even when “‘at or near’ this place there was a wooden box four by five feet through the embankment for the purpose of letting the water through.” Mason City & Ft. Dodge Ry. Co. v. Bd. of Sup’rs, 144 Iowa 10, 12, 121 N.W. 39, 39-40 (1909). The Mason City case sets out the expectation that a railroad company’s responsibility for allowing the natural flow of water to cross its embankment is not a static one; it does not cease after an initial improvement is built. The railroad company bears an ongoing responsibility to respect the public interest in the water course as changed conditions and increased use demand.

The court reasoned: ‘The increased volume of water and the improvement to carry it away are but the results of better drainage of tillable lands on either side of the track which the company was bound to anticipate.’ *Id.* at 13, 121 N.W.2d at 40.

The court continued:

In constructing its embankment or culverts or bridges through it, the company does so subject to the right of the state by appropriate agencies to provide for such use of the natural water course as subsequently may become necessary and proper for public interests.

Id. at 14, 121 N.W.2d at 40 (citing Chi., Burlington & Quincy Ry. Co. v. Illinois, 200 U.S. 561, 26 S. Ct. 341, 50 L. Ed. 596 (1906)).” (Emphasis added.) Chicago Cent. & Pac. R.R. Co. v. Calhoun Cnty. Bd. of Supervisors, No. 0-637/10-0061 (Iowa App. Nov. 2010), PP. 14-15.

It is recognized that the case of Chi. Cent. & Pac. R.R. Co. v. Calhoun Cnty.

Bd. of Supervisors, 816 N.W.2d 367 (Iowa 2012) vacates the November 2010 case.

However, the quoted language in the November 2010 case is valid and applicable in our present case because it is reaffirmed in the 2012 case as follows:

“Drainage district improvements must necessarily cross railroad rights-of-way. Sections 468.109 to 468.113 address how the cost of these intersections will be allocated between the district and the railroad. Iowa Code §§ 468.109-.113; Chi. & Nw. Transp. Co. v. Webster Cnty. Bd. of Supervisors, 880 F.Supp. 1290, 1295-96 (N.D.Iowa), *aff’d*, 71 F.3d 265 (8th Cir. 1995). When a proposed improvement crosses a right-of-way, section 468.109 requires the board to serve notice on the railroad, indicating the nature and location of the

improvement and the plans for how the improvement will cross the right-of-way. Iowa Code § 468.109; *Chi. & Nw. Transp. Co.*, 880 F.Supp. at 1295. The railroad company is then directed to construct such improvement according to said plans and specifications at the place designated, across its right of way, and to build and construct or rebuild and reconstruct the necessary culvert or bridge where any ditch, drain, or watercourse crosses its right of way, so as not to obstruct, impede, or interfere with the free flow of the water therein, within thirty days from the time of the service of such notice upon it.

Iowa Code § 468.109.

Should the railroad fail to construct the culvert or bridge within thirty days, the board may construct the intersection itself and collect the costs, including any necessary attorney's fees, from the railroad in the appropriate district court. Id. § 468.112. If the culvert or bridge that is needed at the intersection is located at a natural waterway or a place provided by the railroad for the flow of water, then the cost of the bridge or culvert must be borne by the railroad without reimbursement from the drainage district. Id. § 468.111.” (Emphasis added.) *Chi. Cent. & Pac. R.R. Co. v. Calhoun Cnty. Bd. of Supervisors*, 816 N.W.2d 367, 372 (Iowa 2012).

“Drainage district improvements must necessarily cross railroad rights-of-way. Sections 469.109 to 468.112 address how [826 N.W.2d 511] the cost of these intersections will be allocated between the district and the railroad. See *Chi. & N.W. Transp. Co. v. Webster Cnty. Bd. of Supervisors*, 880 F.Supp. 1290, 1295 (N.D.Iowa), *aff'd*, 71 F.3d 265 (8th Cir. 1995). When a proposed improvement crosses a right-of-way, section 468.109 requires the county auditor to serve notice on the railroad, indicating both the location of the improvement and the plans for how the improvement will cross the right-of-way. Iowa Code § 468.109; *Chi. & N.W. Transp. Co.*, 880 F.Supp. at 1295. The railroad company is then directed to construct such improvement according to said plans and specifications at the place designated, across its right-of-way, and to build and construct or rebuild and reconstruct the necessary culvert or bridge where any ditch, drain, or watercourse crosses its right of way, so as not to obstruct, impede, or interfere with the free flow of the water therein, within thirty days from the time of the service of such notice upon it.

Iowa Code § 468.109. The construction must be done ‘according to the plans and specifications prepared by the engineer’ of the drainage district and must be done within the time specified. Id. § 468.110. Should the railroad fail to construct the culvert or bridge within thirty days, the board may construct the

intersection itself and collect the costs, including any necessary attorney's fees, from the railroad. *Id.* §§ 468.109, .112.” (Emphasis added.) Hardin Cnty Drainage Dist. 55, Div. 3, Lateral 10 v. Union Pac. R.R. Co., 826 N.W.2d 507, 510-511 (Iowa 2013).

The Trial Court's Trial Ruling and use of the preemption rule would have the effect of overruling and nullifying Sections 468.109 to 468.113 Code of Iowa, and the following cases:

- Mason City & Ft. D. R. Co. v. Board of Sup'rs of Wright County, 121 N.W. 39 (Iowa 1909).
- CNW v. Webster County Bd. of Sup'rs, 880 F.Supp. 1290 (N.D.Iowa, 1995)
- Chicago Cent. & Pac. R.R. Co. v. Calhoun Cnty. Bd. of Supervisors No. 0-637/10-0001 (Iowa App. Nov. 2010).
- Chi. Cent. & Pac. R.R. Co. v. Calhoun Cnty. Bd. of Supervisors, 816 N.W.2d 367 (Iowa 2012).
- Hardin Cnty. Drainage Dist. 55, Div. 3 Lateral 10 v. Union Pac. R.R. Co., 826 N.W.2d 507 (Iowa 2013).

Presumption Against Preemption

The Trial Court failed to recognize that there is a presumption against preemption.

“There is also a presumption that the ‘historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’ *Altria Group*, 129 S.Ct. at 543 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). The presumption is relevant even when there is an express preemption clause. That is because ‘when the text of a preemption clause is susceptible of more than one plausible reading, courts ordinarily “accept the reading that disfavors preemption.”’ *Id.* (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005)). Thus, the presumption operates both to prevent and to limit preemption.

This court has explained that the presumption against preemption is applicable to ‘areas of law traditionally reserved to the states, like police powers and property law ...’ *Davis v. Davis*, 170 F.3d 475, 481 (5th Cir. 1999) (en banc). More recently and topically, we discussed the presumption against preemption in another railroad crossing case. *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, (5th Cir. 2008). We found the no-preemption presumption to apply ‘with full force to this generally applicable state property law, even if applied to permit a private, at-grade railroad crossing.’ *Id.* at 334.” (Emphasis added.) *Franks Inv. Co. LLC v. Union Pacific R. Co.*, 593 F.3d 404, 407 (5th Cir. 2010).

“As one Circuit Court of Appeals has observed, ‘the presumption against preemption is applicable to “areas of law traditionally reserved to the states, like police powers and property law[.]”’ *Franks Inv. Co. v. Union Pac. R.R. Co.*, 593 F.3d 404, 407 (5th Cir. 2010) (en banc) (quoting *Davis v. Davis* (in re *Davis*), 170 F.3d 475, 481 (5th Cir. 1999) (en banc)); see also *Island Park*, 559 F.3d at 101 (“Indeed, when courts are called upon to address questions of express or implied preemption, the analysis always begins with the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”) (internal quotation marks and alterations omitted).” (Emphasis added.) *Gordon v. New England Cent. R.R., Inc.*, (D.Vt., 2017).

“The presumption against preemption applies with full force to this generally applicable state property law, even if applied to permit a private, at-grade railroad crossing. See *In re Davis*, 170 F.3d 475, 481 (5th Cir. 1999) (en banc) (“Deference to our federalism counsels a presumption that areas of law traditionally reserved to the states, like police powers or property law, are not to be disturbed absent the ‘clear and manifest purpose of Congress’”); *Lehigh Valley R. R. Co.*, 278 U.S. at 35, 49 S.Ct. 69 (“The care of grade crossings is peculiarly within the police power of the states”).” (Emphasis added.) *New Orleans & Gulf Coast Ry. v. Barrois*, 533 F.3d 321, 334 (5th Cir. 2008).

Preemption Is Not Applicable To Drainage Under A Railroad

The case of *Tubbs v. Surface Transp. Bd.*, 802 F.3d 1141 (8th Cir. 2015) is particularly pertinent and informative in our present case. The Surface Transportation Board’s (STB’s) Decision Docket No. FD 3597 was appealed to the

Federal Court. Attached to this Brief is a copy of the STB's Decision. The Tubbs case involved claims of (a) trespass, nuisance, negligence, inverse condemnation, and statutory trespass, and (b) failure to have adequate drainage under the railroad tracks.

The STB ruled that the claims for trespass, nuisance, negligence, inverse condemnation, and statutory trespass were preempted. However, the STB ruled that the claim for failure to have adequate drainage is not preempted.

The STB, on page 7 of its Decision, ruled in pertinent part as follows:

“Here, the FRSA regulations that Petitioners cite are applicable to the entire national rail system and do not directly conflict with the uniform federal regulation of railroads under the Interstate Commerce Act. Accordingly, § 10501(b) does not preempt the FRSA regulations on drainage under railroad tracks. Petitioners’ tort claims base on alleged violations by BNSF of these regulations are therefore also not preempted by § 10501(b).” (Emphasis added.)

The STB Decision on page 7, in footnote 11, states, “See 49 C.F.R. § 213.33 and 213.146(1).”

49 C.F.R. § 213.33 provides as follows:

“Each drainage or other water carrying facility under or immediately adjacent to the roadbed shall be maintained and kept free of obstruction, to accommodate expected water flow for the area concerned.”

49 C.F.R. § 213.103(c) provides as follows:

“Unless it is otherwise structurally supported, all track shall be supported by material which will –

...

(c) Provide adequate drainage for the track;”

The Court in the Tubbs case held as follows:

“Finally, the Board concluded that section ‘10501(b) does not preempt the FRSA regulations on drainage under railroad tracks. [The Tubbses’] tort claims based on alleged violations by BNSF of these regulations are therefore also not preempted by § 10501(b).” Id., 813 F.3d 1143.

The STB, on page 7 of its Decision, focused on 49 C.F.R. §§ 213.33 and 213.103(c) being “applicable to the entire national rail system”.

Likewise, Sections 468.109 to 468.113, Code of Iowa, apply uniformly to all railroads in the State of Iowa.

The STB in Maumee and Western Railroad Corporation And RMW Ventures LLC – Petition For Declaratory Order STB Finance Docket No. 34354 holds on page 2 as follows:

“To the contrary, state and local regulations is permissible where it does not interfere with interstate rail operations, and facilities retain certain police powers to protect public health and safety. ... Rather, routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc., are not preempted so long as they would not impede rail operations or pose undue safety risk.” D0043 Application Exhibit E, P. 2 (1-11-2021).

Whether The State Regulation Unreasonably Interferes With Rail Transportation

The fact-based test is whether the state regulation unreasonably burdens or interferes with rail transportation.

“Under this fact-based test, state law actions can be preempted as applied if they have the effect of unreasonably burdening or interfering with rail transportation. The district court did not reach the issue of implied preemption

because it found Franks’s state law claims to be expressly preempted.” Franks Inv. Co. LLC v. Union Pacific R. Co., 593 F.3d 404, 414 (5th Cir. 2010).

“As for the unreasonably burdensome prong, the most obvious component is that the substance of the regulation must not be so draconian that it prevents the railroad from carrying out its business in a sensible fashion.” (Emphasis added.) New York Susquehanna v. Jackson, 500 F.3d 238, 2007 WL 2472332 (3rd Cir. 2007).

“In considering whether Mississippi’s negligence law is impliedly preempted in the instant case, we must assess whether, as applied to the facts of this case, the law ‘would have the effect of *unreasonably* burdening or interfering with rail transportation.’ Franks, 593 F.3d at 414 (emphasis added.) (internal quotation marks and citation omitted); see also Elam, 635 F.3d at 813.” Guild v. Kan. City S.R. Co., (5th Cir. 2013), P. 8.

When the Surface Transportation Board (STB), on January 4, 2021, remanded the case back to the Iowa Floyd County District Court, it (1) stated that the STB and State District Courts have concurrent jurisdiction to decide preemption issues and (2) cited Ingredion Inc – Pet. for Declaratory Order FD 36014, slip op. at 3-5 (STB served Sept. 30, 2016) and Wichita Terminal Ass’n – Pet. for Declaratory Order, FD 35765 slip op. at 5-7 (STB served June 23, 2021) as guidance. D0043 Application Exhibit A (1-11-2021).

Ingredion Inc., on page 4, states:

“if they would have an effect of unreasonably burdening or interfering with rail transportation, which involves a fact-specific determination.”

Wichita Terminal Ass’n, on pages 6-7, states:

“The Board has explained that state courts typically can resolve disputes involving preemption of railroad/private road or sewer crossings and that ‘routine non-conflicting uses, such as non-exclusive easements for at-grade

road crossings ... are not preempted so long as they would not impede rail operations or pose undue safety risks.' Maumee & W. R.R. Corp. - Pet. for Declaratory Order (Maumee), FD 34354, slip op. at 2 (STB served March 3, 2004) (stating that preemption may shield a railroad from state eminent domain laws where the effect of those laws is unreasonable interference with railroad operations); see also E. Ala. Ry. – Pet. for Declaratory Order, FD 35583, slip op. at 4 (STB served Mar. 9 2012) (finding that an easement across a railroad's property for subterranean water and sewer pipes would not unreasonably interfere with rail operations). The right to proceed under state property law, however, is conditioned upon that action not unreasonably burdening or interfering with rail transportation. Compare Franks Inv. Co., 593 F.3d at 414 (rejecting railroad's preemption claim for four routine railroad crossings that did not unreasonably interfere with rail transportation)” (Emphasis added.) D0043 Application Exhibit C (1-11-2021).

If JDD6&56's plan had been to dig an open trench to install a new culvert, that obviously would have interfered with the operation of INRC's rail transportation. But, in this case, JDD6&56 utilizes the jack and bore method, which is included in INRC's own specifications. It is a method specifically designed to avoid interruption of the use of the rail line.

Mr. Dullard testified he has used the jack and bore method successfully without incident approximately 6,500 times. Also, the railroad tracks will be constantly surveyed. If the track permanently moves ¼ of an inch, the jack and bore operation will be stopped, which will allow the railroad line to continue to be used without interruption. Rail lines typically move more than ¼ inch simply with trains passing over them.

The Trial Court, on page 5 of its Trial Ruling, incorrectly states the following in regard to the jack and bore installation of the new smooth steel pipe culvert in INRC's railroad embankment:

“It would affect operation of trains on the track during construction. If the jack-and-bore contractor detected movement of the line, operation on the line would stop, as would construction.” D0128 Trial Ruling, P. 5 (3/13/2024).

To the contrary:

- A. The jack and bore operation ceases when the trains pass through to not interfere with the railroad transportation, and the excavator is faced away from the track to avoid any confusion. D0191 Trans. Dullard, P. 113 l. 9 to P. 115 l. 4 (5-5-2024).
- B. The jack and bore contractor has no authority over INRC to stop the operation of its trains. The Project Manual governs the work of the contractor and subcontractors on the project. D0169 Exhibit K Project Manual (3-15-2024). The attached Section 01 2210 - Page 5 of 6 of Exhibit K, on page 15, requires the contractor or subcontractor to perform Track Monitoring. If the top of a rail permanently deflects more than ¼ inch, all jack and bore operations shall stop until the matter is resolved. Paragraphs 23(c) and 23(f).

The elevation of each track is made at the center of the track and three points each side of the center point every ten feet. The shots may be monitored every hour.

D0191 Trans. Dullard, P. 112 ll. 12-22 (5-5-2024).

13 Q Would you feel entirely comfortable to jack and
14 bore this 5.5-foot-diameter culvert, moving it four feet
15 further away from the box culvert than presently proposed?

16 A I would – I would not – me personally, I would
17 not have any problem with that.

18 Q And would that be able to be done without
19 interruption of the use of the rail line?

20 A. Yes.

21 Q. And why do you say that?

22 A. We're just going to use best practices and then
23 abide by whatever the conditions of the permit are set
24 forth.

D0191 Trans. Dullard, P. 121 ll. 13-24 (5-5-2024).

The use of INRC's rail line will be able to continue uninterrupted rail transportation with JDD6&56's jack and bore installation of the new smooth steel pipe culvert in INRC's railroad embankment.

The Court, in New York Susquehanna v. Jackson, 500 F.3d 238 (3rd Cir. 2007), in ruling that the state "regulation must not be so draconian that it prevents the railroad from carrying out its business in a sensible fashion" (Id., P. 254) states as follows:

"Thus, according to the Board, state regulation is permissible if it passes a two-part test: (1) it is not unreasonably burdensome, and (2) it does not discriminate against railroads. *See Maumee & W. Ry. Corp.*, 2004 WL 395835, at *2 (S.T.B. 2004) (denying request for declaratory order)." Id., 500 F.3d 642.

Sections 468.109 to 468.113, Code of Iowa, are applied uniformly to all railroads in Iowa. Also, uniformly throughout the State of Iowa the natural flow of water is not to be impeded nor interfered with by any landowner whether the landowner is a person, a legal entity, a railroad, or a public road, as stated above on pages 24 and 25.

Iowa Northern Railway Company cannot ignore and defy its legal obligation and duty under Section 468.109, Code of Iowa, to not “obstruct, impede, or interfere with the free flow of water” in JDD6&56.

The Adrian & Blissfield R. Co. v. Village of Blissfield, 550 F.3d 533, 541 (6th Cir. 2008) states in pertinent part as follows:

“Regarding the unreasonable-burden prong, ‘the substance of the regulation must not be so draconian that it prevents the railroad from carrying out its business in a sensible fashion,’ and ‘the regulation must be settled and definite enough to avoid open-ended delays.’ Jackson, 500 F.3d at 254. To pass the non-discrimination prong, a state regulation ‘must address state concerns generally, without targeting the railroad industry.’”

“The fact that Mich. Comp. Laws § 462.309 applies specifically to railroads does not make it discriminatory. This is not an instance in which the state has chosen to require something of the Railroad that it does not require of similarly situated entities. The concerns that animated the Village’s sidewalk construction apply only to the Railroad because the railroad bisects the town and pedestrian walkways are needed for public safety. Further, unlike environmental permitting, there is no evidence that local bodies could target railroads with the statute at issue in order to cause indefinite delays for railroad operations. *See Green Mountain*, 404 F.3d at 643. Indeed, the Michigan statute gives the Railroad an opportunity to construct the sidewalks itself. Thus, because § 462.309(6) addresses a general state concern about the safety of pedestrians, it does not discriminate against the Railroad.” (Emphasis added.) *Id.*, 550 F.3d 541-542.

Again, no landowner can block, interrupt, nor interfere with the natural flow of water, Section 468.618, Code of Iowa. Thome v. Retterath, 433 N.W.2d 51, 53 (Iowa App. 1988), Sojka v. Breck, 832 N.W.2d 384 (Iowa App. 2013), P. 3; no highway authority can block, interrupt, nor interfere with the natural flow of water. Section 314.7, Code of Iowa, Schneider v. State, 789 N.W.2d 138, 150 (Iowa 2010); and railroads cannot block, interrupt, nor interfere with the natural flow of water, Sections 468.109 to 468.113, Code of Iowa.

The Trial Court's Trial Order on page 4 cites the case of Griffioen v. Cedar Rapids & Iowa City Railway Company, 914 N.W.2d 273 (Iowa 2018). D0128 (3-13-2024). The Griffioen case is distinguishable from our present case. The Griffioen case involves a "state law" tort claim which involved second guessing of the railroad's operation or management of its own rail lines. Id., 914 N.W.2d 278.

Our present case involves the railroad's INRC's statutory duty under Sections 468.109 to 468.113, Code of Iowa, which is a continuing duty to build and construct or rebuild and reconstruct a necessary culvert so as to not obstruct or impede or interfere with the free flow of water which is deemed to be a public benefit. See the Mason City, CNW, Chicago Central, and Hardin County cases, *supra*, on pages 25 to 29.

The Griffioen case holds that if the state regulation “requires second guessing of a railroad’s operation and its management of its own rail lines as opposed to other activities” then the state regulation is preempted.

Sections 468.109 to 468.113, Code of Iowa, do not involve second guessing of a railroad’s operation and management of its own rail lines. Section 468.109 to 468.113, Code of Iowa, are all railroads’ obligation and statutory requirement to not interfere with the natural flow of water in a drainage district. It is not a management decision whether to comply with the statutory duty and requirement of Sections 468.109 to 468.113, Code of Iowa.

The management of a rail line necessarily involves selecting options that are available to a railroad. A railroad does not have the option to ignore and deny its statutory duty and requirement under Sections 468.109 to 468.113, Code of Iowa, and 49 C.F.R. §§ 213.33 and 213.103(c) to not obstruct, interrupt, nor interfere with the natural flow of water under its railroad tracks.

The Trial Court’s Trial Order on page 5 cites Waubay Lake Farmers Ass’n v. BNSF Ry. Co., 2014 WL 4287086 (U.S.D.C, D. South Dakota, August 28, 2014) (unpublished). The Waubay Lake case is distinguishable from our present case. The Waubay Lake case involved removing an existing culvert beneath the track which would involve demolition and rebuilding of the track.

“This logically would require BNSF to halt use of its tracks to remove the existing culvert beneath the track and indeed beneath the current level of

water, which likely would mean some demolition and rebuilding of its railway and roadbed.” Waubay Lake Farmer’s Ass’n v. BNSF Ry. Co., CIV 12-4179-RAL (D. S.D. Aug 28, 2014), P. 11.

In our present case, the jack and bore method of installing the new 5.5-foot diameter smooth steel pipe culvert by the jack and bore method does not require removal of existing tracks that would interrupt the use of INRC’s line. The jack and bore method had been used by Mr. Dullard approximately 6,500 times without incident. Again, if the jack and bore method would cause the rail line to permanently move ¼ inch, the jack and bore operation will be halted to ensure the continued uninterrupted use of the rail line.

The jack and bore method of installing the 5.5-foot diameter smooth steel pipe culvert in INRC’s embankment will not impede its rail operations nor pose undue safety risks. The jack and bore method is specifically and expressly provided for in INRC’s own regulations. Scott Dullard’s companies have done approximately 6,500 jack and bore installations all without incident.

If preemption is considered, the issue is whether the railroad establishes that the state statute(s) will necessarily burden the movement of passengers or property by rail. Gordon v. New England Cent. R.R., Inc. (D. Vt. 2017), P. 12. The issue is whether the state statute(s) will necessarily have the effect of preventing or unreasonably interfering with railroad transportation. Franks Inv. Co. LLC v. Union Pacific R. Co., 593 F.3d 404, 414 (5th Cir., 2010), New York Susquehanna v.

Jackson, 500 F.3d 238, 253 (3rd Cir. 2007), Adrian & Blissfield R. Co. v. Village of Blissfield, 550 F.3d 533, 540 (6th Cir. 2008), New Orleans & Gulf Coast Ry. Co. v. Barrios, 533 F.3d 321, 333 (5th Cir. 2008).

The evidence in our present case shows that JDD6&56's plan for the installation of the 5.5-foot diameter smooth steel pipe culvert through INRC's railroad embankment will not necessarily interfere with INRC's rail transportation because:

- The fill material in INRC's railroad embankment is typical clay material which is not expected to present any issues. D0177 Exhibit R, Borings B-02, B-03, B-04, and B-05 (3-15-2024).
- To ensure that the jack and bore operation will not interfere with rail transportation, there will be a flagman to have the jack and bore operation stop while trains go through the area of the jack and bore operation. D0175 Exhibit P, P. 24 par. B (3-15-2024). D0191 Trans. Dullard , P. 113 l. 9 to P. 115 l. 8 (5-5-2024).

2 Q So the operation of the jack and bore method is
3 always shut down to allow the passage of the train?

4 A Any type of trenchless construction ends when –

5 Q Okay. How long does the jack and bore operation
6 stop for a typical train to pass?

7 A The flagman, when he comes down and warns that
8 there is a train coming, you know, whatever advance warning
9 he gets, he'll tell you. And they might tell you, hey, in
10 45 minutes I have a train coming through. And he'll come
11 again and, okay, you need to stop now. That might be 15

12 minutes that there's absolutely nothing happening. And then
13 when the train passes, as soon as the last car is gone, he
14 gives you the okay to continue.

D0191 Trans. Dullard, P. 114 ll. 2-14 (5-5-2024).

- The jack and bore operation will be pursuant to INRC's own Standard Specifications For Boring And Jacking And Casing Pipe. D0175 Exhibit P (3-15-2024). Also, on page 15, see Sheet Section 01 2210 - Page 5 of 6. D0169 Exhibit K (3-15-2024).
- The jack and bore operation will be surveyed, and all operations will stop to ensure no interruption of rail transportation of the rail top deflects more than ¼ inch. On page 15, see Sheet Section 01 2210 - Page 5 of 6. D0169 Exhibit K (3-15-2024).
- The company doing the jack and bore operation shall have Railroad Protective Liability Insurance. On page 15, see Sheet Section 01 2210 - Page 5 of 6. D0169 Exhibit K (3-15-2024).
- The jack and bore method of installing culverts in railroad and highway embankments was developed by Miller The Driller, LLC specifically to not interfere with rail and highway transportation. The jack and bore operation has a machine that pushes the tube/casing through the embankment while the auger inside the culvert pipe augers the dirt through and out of the culvert pipe. The auger is to be kept inside the culvert pipe. If the auger sticks out beyond the culvert pipe, subsidence

of soil above the auger can occur. Scott Dullard, who trained with Miller The Driller, LLC and who now has his own companies, has performed approximately 6,500 jack and bore operations without any interference with rail and highway transportation.

- Scott Dullard is aware of rare occasions when the operation is not performed correctly with the auger extending out beyond the culvert pipe, where subsidence of the soil occurred. D0191 Trans. Dullard, P. 124 l. 4 – P. 126 l. 6 (5-5-2024).
- Scott Bannister testified that he would stop INRC’s use of its rail line if JDD6&56 proceeded with the jack and bore installation of the new 5.5-foot diameter smooth steel pipe culvert through INRC’s railroad embankment, because something might happen, relying on Murphy’s Law. D0191 Trans. Bannister, P. 46 l. 20; P. 79 l. 15 (5-5-2024).
- Mr. Bannister relied on a 2019 problem in Illinois with a jack and bore operation, D0181 Exhibit V (3-15-2024), as the basis of his concern. In the 2019 Illinois matter, the man in charge of the operation “was inexperienced and poorly equipped to be in charge”, “they augered 105 feet past the end of the pipe ... with no protection above from the formation of a subsidence. This risked a cave-in”. D0181 Exhibit V, P. 14 l. 253 and P. 15 ll. 262-264 (3-15-2024).

- INRC has used the jack and bore method of installing culverts in its railroad embankments without interference of its rail transportation in the past. D0176 Exhibit Q (3-15-2024).
- Mr. Bannister did not cite any instance of the jack and bore method causing any interference with rail transportation when the auger remains inside the culvert pipe.

CONCLUSION

There is a presumption against preemption. The Surface Transportation Board holds that the issue of drainage under railroad tracks is not preempted. If preemption is applicable, the railroad must show that the jack and bore installation of the smooth steel pipe culvert will necessarily interfere with its rail transportation.

Railroads should not be able to avoid their responsibility under Sections 468.109 to 468.113, Code of Iowa, to build and construct or rebuild and reconstruct the necessary culvert so as to not obstruct impede, or interfere with the free flow of water by claiming Murphys's Law and saying "gotcha".

If a new box culvert were to be put in INRC's railroad embankment, that would require excavation from the top of the railroad embankment which would necessarily stop and interfere with railroad transportation. The jack and bore method allows for installation of culverts without interference of railroad transportation.

The question in this case, if preemption is applicable, is whether JDD6&56's jack and bore installation of the new smooth steel pipe culvert in INRC's railroad embankment will necessarily interfere with INRC's railroad transportation. The answer is that it will not. The jack and bore operation is shut down whenever a train passes through the area. A survey will monitor the rails and if a rail permanently deflects more than ¼ inch vertical or horizontal, the jack and bore operation is shut down. The jack and bore operation is to be done under INRC's own jack and bore Specifications. Scott Dullard's companies have done approximately 6,500 jack and bore installations of culverts, all without any interference with the traffic on top of the embankments.

No drainage district can absolutely guarantee that nothing adverse will ever happen. That is why Railroad Protective Liability Insurance is required in the amount, in this case, of \$5,000,000.00 per occurrence and an aggregate limit of at least \$10,000,000.00.

JDD6&56's jack and bore installation of the smooth steel pipe culvert in INRC's railroad embankment will not necessarily interfere with or prevent railroad transportation.

The Trial Court's Ruling that JDD6&56's jack and bore method of installing the smooth steel pipe culvert in INRC's railroad embankment is preempted should be overruled and reversed. JDD6&56's jack and bore method of installing the

smooth steel pipe culvert in INRC's railroad embankment is not preempted, as held by the STB in the Tubbs case, and it will not necessarily interfere with INRC's railroad transportation.

REQUEST FOR ORAL ARGUMENT

The Defendants-Appellants, Floyd County, requests oral argument in this matter.

Attachments:
Trial Ruling
STB Decision

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE
REQUIREMENTS**

1. This Appellants' Brief and Request For Oral Argument complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this Appellants' Brief and Request For Oral Argument contains 10,738 words, excluding the parts of the Brief and Request For Oral Argument exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Appellants' Brief and Request For Oral Argument complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Appellants' Brief and Request For Oral Argument has been prepared in a proportionally spaced typeface using Microsoft Word in Size 14 font.

Dated this 12th day of June, 2024.

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CERTIFICATE OF FILING AND SERVICE

I, Robert W. Goodwin, hereby certify that I electronically filed the foregoing Appellants' Brief and Request For Oral Argument with the Clerk of the Iowa Supreme Court, on June 12, 2024.

I, Robert W. Goodwin, hereby further certify that on June 12, 2024, I served the foregoing Appellants' Brief and Request For Oral Argument, by the electronic filing system, to the following attorneys of record:

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