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CLERK OF THE MCPHERSON COUNTY DISTRICT COURT
CASE NUMBER: 2015-CV-000067

IN THE DISTRICT COURT OF MCPHERSON COUNTY, KANSAS

CENTRAL KANSAS CONSERVANCY, INC Plaintiff, Vs. CLINTON L. SIDES, et al., Defendants.	)	Case No.: 15-CV-67

DECISION OF THE COURT

On September 19, 2016 the Court ruled on the Summary Judgment Motions filed by the parties. The Court adopts those Findings of Fact and Conclusions of Law except as modified in the Court's ruling dated July 10, 2017. The Court further adopts the Findings of Fact and Conclusions of Law made in its July 10, 2017 ruling.

On January 22 and 23 and February 12, 2018 Plaintiff's requests for mandatory and prohibitory injunctions and continuing order of restitution were tried to the Court. Highly summarized, Defendants argue against the Plaintiff's requested relief based upon the following: the request is premature as the Plaintiff is not prepared to build what Defendants refer to as a "legally compliant trail;" Plaintiff has a history of inequitable conduct and is therefore not entitled to an equitable remedy; and such remedy would contravene the public interest. Defendants further argue that Plaintiff is not entitled to the extraordinary remedy requested because Plaintiff cannot show that the matter is ripe nor that Plaintiff will suffer irreparable injury and that the Court must balance the interests of Defendants.

The history and character of this dispute were reflected in the arguments made to the Court by each party – they seemed to talk past each other instead of responding to each other. Neither side seemed to understand what the other was saying or truly comprehend the position of the other party. Even in closing arguments, neither party seemed clear about or responsive to the arguments of the other. Throughout the case there was seemingly little agreement even over the issues to be decided. This is not due to the lack of intelligence or skill of counsel for the parties. Both parties were represented by competent, prepared counsel. Each side, however, seemed entrenched in positions that were unmovable and each painted the other with a broad brush of disdain. Each side has its supporters and detractors and although the litigation involved only one plaintiff and two married defendant landowners, it was clear that many others in the community feel personally involved in the dispute and the litigation was clearly "us versus them" at many levels. Although the Defendants were apparently not personally involved in the late 1990s when some of the events discussed at trial took place, the Plaintiff and various community members which came to include Defendants have been at odds for more than twenty years. In that time, positions have been solidified and patterns of conduct and expectations have been created that will be difficult to move or change, no matter what the ruling of this Court or of higher courts might be. Both sides to this dispute have acted poorly in the past and, to some extent, continue to do so.

Turning to the issues to be resolved, in addition to the findings made previously by the Court, the Court makes additional Findings of Fact as follows:

1. The subject matter of this litigation is only the roughly .75 miles of right-of-way that transverses Defendants' property. That is the only land that is at issue in the Petition and Answer and Counterclaim filed herein, is the subject of competing claims of the parties

hereto and is within McPherson County. At least some portion and perhaps most of the nearly 45.6 miles of the trail easement which is the subject of this dispute and under Plaintiff's control is within Marion County.

2. Plaintiff has improved and maintained what is referred to by Plaintiff as the Meadowlark Trail in McPherson County from Moccasin to Pawnee. Another portion of the trail from the City of Lindsborg to Shawnee has also been improved and maintained in cooperation with Plaintiff and the City of Lindsborg. The easement over Defendants' land is part of what Plaintiff has referred to as "Phase III" of development and Phase III, undeveloped, consists of approximately five miles of the easement that sits between Pawnee and Shawnee. The combined total trail previously developed in Phases I and II is approximately 7.6 miles. The Meadowlark Trail covers approximately 12 miles of the easement under Plaintiff's control.
3. Defendants are adjacent landowners only to approximately .75 miles of right of way at issue in this litigation and are not adjacent landowners to any other portion of the trail easement claimed by Plaintiff.
4. The two portions of improved trail have been bladed to level the railroad ballast that remains, stirulent has been used on the ballast to inhibit weed growth; crushed limestone has been placed on top of the ballast for a smoother surface than ballast provides; former railroad bridges have been decked and railed if necessary; signs have been posted advising trail users to be respectful of adjoining landowners' property, to take out what is brought in, and advising that no motorized vehicles are allowed and no hunting is allowed on the trail; some portions of the trail have trash receptacles and perhaps a bench; volunteers provide clean-up, mowing and, sometimes, weed control. Plaintiff

also works with McPherson County officials for weed control on the improved portions of the trail, as well as at least some portions of the unimproved trail.

5. Very little has been done on unimproved portions of the trail, approximately 33 miles total, including the .75 miles at issue here.
6. Plaintiff demonstrated at trial that it is ready, willing, able and has financial resources to begin trail improvements on the Meadowlark Trail that transverses Defendants' property and intends to develop the trail to the same level as the other completed phases of the trail. In fact, Plaintiff would have begun development in at least August of last year had volunteers not been prevented from entering the property by Defendants and their supporters.
7. With regard to financial resources, the evidence was that Plaintiff has received every large grant for which it has applied and had approximately $50,000.00 in the bank at the time of trial. According to testimony of Michele Cullen, current President of the Board of Plaintiff, Plaintiff has spent approximately $43,000.00 per mile in trail development to date. Thus, even without receiving a grant, Plaintiff has funds to complete less than one mile of trail and, based upon history, it seems likely that Plaintiff will receive grant money for the project.
8. The evidence was clear that Plaintiff has developed the roughly seven miles of trail now completed by combination of volunteer labor and contracted labor. Their method was successful in prior development and there is no reason to believe it would not be successful in developing the trail that transverses Defendants' property.
9. Defendants urge the Court to make a finding that Plaintiff has failed to perform its duties under the Kansas Recreational Trails Act, K.S.A. 58-3211 *et seq.* (hereinafter, KRTA)

and, therefore, they should not be allowed to continue trail development. The Court cannot make that finding. First, only approximately .75 miles is at issue in this litigation and, as noted above, a large portion of the 45.6 miles of railbanked right of way is not located within the jurisdiction of this Court as it is located in Marion county, adjacent to McPherson County. Some of the testimony propounded by Defendants involved the condition of the easement in Marion County. The Court is appropriately reluctant to make findings regarding real estate in Marion County but will note the evidence that was presented by Defendants regarding the trail in portions of Marion County. Even the KRTA does not specify a level of development required for a railbanked trail. Therefore, the fact that a great portion of Plaintiff's trail remains undeveloped is not proof of failure to comply with KRTA. Furthermore, looking at the KRTA requirements discussed at trial and found at K.S.A. 58-3212, the Court finds that the Plaintiff is meeting its obligations, though certainly not perfectly or as thoroughly as possible, and will detail those findings below.

10. Plaintiff has given resources, time and attention to weed control, particularly noxious weeds, along the trail as required by K.S.A. 58-3212(a)(1). There was evidence of volunteers using readily available chemicals as well as paying for McPherson county personnel to spray for weeds as was the practice of the Union Pacific Railway when it had the right-of-way. The Court does not discount the testimony of witnesses for the defendants who testified to seeing noxious weeds along the trail; however, there is not a requirement that there never be a weed found on the trail. It appears to be possible for Plaintiff to be more attentive to these concerns, but there is no evidence that it has utterly failed in its duty. The Court also finds that the opposition to the trail, including Mr.

Sides, has attempted to intimidate Plaintiff off the right of way when they were attempting to perform their statutory duties. Defendants' complaints that Plaintiff is not performing its duties ring a bit hollow in light of that testimony.

11. There was no evidence from either party regarding Plaintiff's compliance with K.S.A. 58-3212(a)(2).

12. There was evidence that Plaintiff has posted trail-user education and signs regarding trespassing and safety, as required by K.S.A. 58-3212(a)(3), along the trail that exists within McPherson County. There was also evidence that signs placed by Plaintiff had been removed by landowners, including Mr. Sides and Mr. Presnell who testified to their own removal of signs, and other signs had been shot at or run over. (Photographs introduced at trial also showed those signs in locations in Marion County.)

13. There was evidence that Plaintiff provides for litter control as required by K.S.A. 58-3212(a)(4) by placing trash receptacles along developed portions of the trail, posting signs prohibiting littering and by asking volunteers to pick up any trash not so deposited.

14. The Court heard a great deal of evidence regarding Plaintiff's efforts or lack thereof in developing or maintaining the trail "in a condition that does not create a fire hazard." K.S.A. 58-3212(a)(5). While it is clear that on some portions of the trail the Plaintiff has apparently done little or nothing, i.e. mowing, to *prevent* fire hazard the evidence was not clear that the Plaintiff had *created* a fire hazard. By way of example, cedar trees are very common in Kansas and seem to be commonly found in railroad rights of way still in use. Therefore, the existence of cedar trees in the right of way, in and of itself, cannot be considered as creating a fire hazard. Chief Deal, Chief of the City of McPherson Fire Department testified it is not a violation of any fire code to have standing dry grass. The

only evidence of any fires along any portion of the trail, in McPherson County or in Marion County, was a fire that was apparently set to one of the railroad bridges not on Defendants' property and that Defendants' own controlled burn got out of control one time. Even in that instance, Defendants did not require the assistance of any fire department to extinguish the fire. Chief Deal testified in fact that he was not aware of any fire runs the department had made to the trail in McPherson County. He further testified that generally what the department sees in rural areas are controlled burns that get out of control. While the absence of a fire does not necessarily prove that a fire hazard does not exist, the Court cannot make a finding that the Plaintiff is maintaining the trail in a manner that creates a fire hazard. Defendants displayed pictures of cedar trees in the right of way over their property for which they attempt to claim damage if they were removed and yet they complain that those cedar trees and others like them along the right of way create a fire hazard. As is a pattern, Defendants' claims are inconsistent.

15. The Court finds that Plaintiff has designated the trail for non-motorized vehicles only, with statutory exceptions, as required by K.S.A. 58-3212(a)(6) and that no hunting or trapping is allowed on or from the trail according to K.S.A. 58-3212(a)(7). Signs to that effect were posted by Plaintiff along the roughly 46 miles and, again, some of those signs have been shot at, removed and/or damaged, presumably by trail opponents. While the Court can understand not wanting to use limited resources to replace vandalized or stolen signs, the Plaintiff could have been more diligent in ensuring signs remained in place or were replaced when vandalized or stolen. The Court also observes that the statute does not require Plaintiff to ensure or guarantee that no motorized vehicles ever use the trail.

16. The evidence at trial supports a finding that Plaintiff "provides" for law enforcement along the trail as required by K.S.A. 58-3212(a)(8) by notifying local law enforcement of the existence of the trail, providing a key to bollards to allow for law enforcement and emergency services to the trail, and cooperating with law enforcement as needed. Chief Deal testified that the fire department and EMS were able to respond to a medical emergency on the trail around the Pawnee area by accessing the trail and rendering aid to the patient. There was testimony from more than one witness about various calls to law enforcement for incidents along the trail when trail opponents confronted volunteers and board members of Plaintiff as they were attempting to complete their obligations under the KRTA or attempting to keep the trail safe by removing barbed wire fences erected by opponents across the open and developed portions of the trail. Ms. Cullen testified that she believed CKC has good relationships with the various law enforcement agencies involved and there was no evidence to the contrary. There was simply no evidence that law enforcement or other emergency service are not available along any portion of the trail.

17. The evidence at trial also supports a finding that Plaintiff grants easements to adjacent property owners to cross the trail as required by K.S.A. 58-3212(a)(9). Ms. Cullen testified that only one farmer was crossing the trail regularly and that owner had not requested an easement for crossing but was not doing any damage to the trail. Certainly, CKC did not formalize a crossing easement, but CKC is not objecting to a landowner regularly crossing when no damage is done to the trail. She also testified that another landowner, Mr. Ledell, apparently dug through the ballast before the trail was developed and created his own crossing. When CKC was developing that portion of the trail, they

asked the contractor to create a slope down and back up for purposes of the trail but also to make it wide enough and flat enough to allow the farmer to continue to use the crossing. Her testimony was that that action was taken prior to consultation with the landowner, but he confirmed with her later that the way the trail was developed still allowed for his crossing and "worked great." Again, it probably would have been a better course of conduct to discuss the work with the landowner prior to it being performed, but it seems to have worked well for both parties as it was completed.

18. The evidence regarding Plaintiff's compliance with its fencing obligations under K.S.A. 58-3212(a)(10) was more mixed. Certainly, under a strict reading of the statute, Plaintiff has not maintained any existing fencing since it received its easements in 1997 nor has it installed any fencing along the right-of-way; however, there was evidence that CKC surveyed landowners along the easement. In 1997 Plaintiff mailed 50 letters requesting response from landowners regarding their particular fencing needs. They received only 15 responses and of those, only 5 responses were properly requesting installation or maintenance of fencing. By way of example, some landowners requested a variety of fencing materials, "subject to change." The landowners wouldn't commit to the type of fence they were requesting. More than one landowner requested a cedar fence or redwood fence six feet to ten feet in height. The letters from landowners also make clear the landowners' opposition to the trail and the sense that their rights were ignored by the federal government and the railroad and the resulting resentment to CKC and its ability to develop a trail. It appeared at least some landowners were asking for the most expensive fence possible, assuming Plaintiff was fully responsible for the cost and seemingly did not understand that the KRTA only requires the responsible party to pay for one-half of

the cost of installation of fencing and the landowner is responsible for the other half. On the other hand, it appears that nothing was done by CKC regarding fencing after that survey. Ms. Cullen testified that it was her assumption that most landowners didn't want fencing and that some were farming even into the easement and that CKC didn't object to that because it didn't encroach greatly or at all upon the CKC use of the easement. Certainly one could find fault that Plaintiff hasn't done enough regarding fencing in that they have been very passive in that regard and have waited for someone to ask for maintenance or installation of a fence; however, there was no evidence that any landowner ever made a serious request for fencing that had been ignored by Plaintiff. Mr. Sides, for his part, testified repeatedly that he doesn't want Plaintiff on "his" property and that he "owned" the right of way or that he "had a deed" to the right of way. Again, a strict reading of the statute puts an affirmative duty upon CKC to maintain or install fencing; however, if no landowner is requesting maintenance or installation of fencing or will allow Plaintiff on the property to maintain or install fencing, it is hard to see how Plaintiff is failing in its duty. Put another way, if no landowner seems to want fencing along the right of way or is willing to pay half the cost of such fencing, how is it a breach of duty for Plaintiff not to provide fencing?

19. Likewise, the evidence was mixed regarding Plaintiff's obligation to "maintain all bridges, culverts, roadway intersections and crossings on the trail" pursuant to K.S.A. 58-3212(a)(11). The Plaintiff has done work on bridges and culverts on the developed portion of the trail, approximately 7 miles of the 45.6 miles of easement. The evidence was that nothing had been done to bridges or culverts on the remaining miles. The statute requires this maintenance "essential to the reasonable and prudent operation of the

trail" and there was no evidence that the lack of maintenance impeded trail operation. The statute also requires such maintenance "needed for drainage, flood control, or use of easements for crossing the trail. . . ." There was also no evidence of any harm to any landowner due to poor drainage or flood control or for trail crossing other than from Mr. Sides who, again, testified that he does not want Plaintiff on what he believes is his property, has posted No Trespassing signs at the entrance of the right of way from the road and has also installed barbed wire fence across the right of way. Further, when contacted by Ms. Cullen in 2013 to discuss trail development across his property, he made clear he did not believe Plaintiff had the right to develop the trail across his property. He stated at trial that he did not then (around the time of the 2013 meeting with Ms. Cullen and Kaci Morales) and does not now want CKC to develop the right-of-way. His complaint that they have not maintained the culvert on his property when he will not allow them on his property gives the appearance of a complaint for sake of complaining. Mr. Sides made clear in his testimony at trial that he continues to believe that he does in fact own the right-of-way, in spite of the Court's summary judgment ruling to the contrary, and that he does not want Plaintiff on what he believes is his property for any purpose. He further testified that he has benefitted from the Plaintiff not being on his property. This Court cannot find that Plaintiff has failed in its duty to maintain bridges and culverts in a manner that is essential to trail operation or as needed for drainage, flood control or use of crossing easements or that Mr. Sides should now be heard to complain about the Plaintiff not being active on the right-of-way across his property.

20. Finally, in the list of complaints of Plaintiff's failure under the KRTA, Defendants complained about the failure of Plaintiff to establish a suitable bond with each county where a portion of the recreational trail is or will be located as required by K.S.A. 58-3212(b). The Court heard that the Plaintiff has not established a bond with Marion County; however, this Court has no jurisdiction in Marion County and no entity or person from Marion County was made a party to these proceedings. The evidence was that Plaintiff did establish a bond with McPherson County in 2013. Defendants attempted to present evidence regarding the sufficiency of the bond but because the evidence shows that McPherson County Commissioners approved the amount of the bond and neither the County Commissioners nor McPherson County itself were parties to this litigation, the Court refused to hear testimony regarding the sufficiency of the amount of the bond agreed upon between Plaintiff and McPherson County. While it is true that Plaintiff did not fulfill this duty for fifteen years, it is currently fulfilling this duty and has done so for approximately five years.

21. While there was complaint that Plaintiff was not providing proof of insurance as required under K.S.A. 58-3212(c), it appears from the evidence that Plaintiff has consistently met that requirement.

22. The relief granted under KRTA is for the Court to order compliance. *See*, K.S.A. 58-3215. Defendants could have filed a counter-claim in this litigation to more fully litigate their allegations of Plaintiff's failure to comply with KRTA; however, Mr. Sides testified he does not want a court order for Plaintiff to comply with KRTA, the remedy provided by KRTA. Mr. Sides testified that he only wants a finding that Plaintiff has not complied with KRTA to take that finding to the Surface Transportation Board (STB) in the hope

that the agency will take action against Plaintiff and revoke its trail use agreement. It should also be noted that the Surface Transportation Board, in its decision in STB Docket No. AB-406 (Sub-No. 6X), stated that photographs of the trail, presumably in a completely undeveloped condition in 2001, were wrongly relied upon by landowners who seemed to incorrectly assume the Conservancy was under an affirmative duty to develop a trail for advanced recreational use and that the Surface Transportation Board would get involved in determining the type or level of trail for a specific right-of-way. The STB did state that "trail sponsors may not use a right-of-way in such a manner as to present a public nuisance under state and local laws, applied in a non-discriminatory manner." This Court cannot make the finding described by the Surface Transportation Board from the evidence presented herein.

23. There was testimony, mostly from Tracy Presnell who is not a party to this litigation, that Plaintiff did not pay property taxes for a period of time after obtaining the easement. Payment of taxes is one of few requirements by the National Trails Act upon a holder of an easement. (*See,* 16 U.S.C. 1247(d)). It is not a requirement under the KRTA. There was evidence that Mr. Presnell went so far as to personally intervene in proceedings at the Kansas Board of Tax Appeals involving Plaintiff's requests for exemption from property tax, arguing that no exemption should be granted. The first request for exemption was in fact denied but ultimately Plaintiff was granted an exemption from payment of property tax. The argument of Defendants seems to be that the failure to pay taxes while attempting to obtain an exemption was evidence of bad faith on the part of Plaintiff and that the first attempt at obtaining an exemption which was not statutorily supported was evidence of bad faith on the part of Plaintiff. The Court finds no

evidence of past bad faith on the part of Plaintiff regarding its obligation to pay taxes and finds that it is meeting its tax obligations currently in that it has been exempted from paying taxes.

24. Defendants appear to use the 1997 Trail Plan submitted by Plaintiff to McPherson County and other entities as evidence of representations made and not kept by Plaintiff pointing to, for example, the representations that the trail would be developed within two years and that professional engineers would inspect the bridges, among others. Another plan was distributed in 2000 that was quite similar to the 1997 plan. There was no evidence that either Defendant in this case was even aware of those plans or saw them prior to the litigation. There was certainly no evidence that the Defendants relied upon those plans as representations of Plaintiff or that reliance, if it existed, formed the basis of Defendants' beliefs and actions regarding the ownership of the Meadowlark Trail. In fact, Mr. Sides testified that he took down a No Trespassing sign posted by Plaintiff in 2000 or 2001 that indicated Plaintiff was the owner of the right-of-way. He further testified that when Plaintiff's board members contacted him in 2013 about developing the trail across his property he told them they would need court action to "take my rights away" and, again, that he has a deed to that property and owns the trail property. There is no evidence that the trail plans constituted representations by Plaintiff relied upon by Defendants to their detriment. Nor are those plans themselves evidence of bad faith or inequitable conduct on the part of Plaintiff.

25. The deeds for the subject property admitted into evidence belie the Sides' contentions of ownership of any interest in the right-of-way, including Mr. Sides' claim that he has "a

deed" to the right of way. The deeds clearly exclude the railroad right-of-way by their descriptions as well as noting that the grants are subject to "easements of record."

26. Mr. Sides further testified that he only "recently" became aware of his right to compensation with respect to the trail easement. He indicated he believed that he had "full control and full use" of the right-of-way property. He claimed, upon cross-examination by his attorney, that if CKC had entered his property in 2003 to do fire control or build fences or maintain fences he would have allowed it and, presumably, he would have then acted upon his right to compensation. That testimony, however, is not consistent with his other testimony that he took down a sign in 2000 or 2001 that Plaintiff posted claiming its ownership and control of the trail and that he took it down because he "did not agree with that." It was apparently somewhat widely known that other landowners sought and received compensation for the trail taking through litigation in federal court in Wichita, yet Mr. Sides puts the full blame that he did not take action upon Plaintiff and their failure to make known to him that they had control of the right-of-way. His continued persistence over the past 17 or more years that he owns the property, including his removal of a sign in 2000 or 2001 that informed him otherwise, is not consistent with his claim that had he only known of Plaintiff's claim of ownership prior to 2003, he would have requested compensation. The Court finds that Mr. Sides' contention that he relied upon the silence or representations of Plaintiff to his detriment is not credible as it is inconsistent with his own testimony. There was no evidence from Ms. Sides regarding any representations or any reliance upon them. Ms. Sides relied upon her husband's testimony in all regards and so there is likewise no evidence that she relied upon any representations of Plaintiff to her detriment.

27. It is clear from the Plaintiff's internal documents admitted into evidence and from the Meadowlark Trail Plans promulgated and distributed to the public that in 2000 Plaintiff was hoping to find one or more governmental partners to help or take over the process of development for the 45.6 miles of trail for which Plaintiff assumed responsibility in 1997. It should be noted that the KRTA was adopted between the time that other entities were part of negotiating with the railroad and the time that the deeds were actually transferred to Plaintiff. Thus, the Plaintiff's responsibilities as a trail sponsor increased in that time. Further, evidence at trial made obvious that Plaintiff has faced significant opposition since assuming the responsibility for the 45.6 miles of trail. These developments were likely daunting to a relatively small group of volunteers, no matter how committed they were to their cause. The Court cannot not find that any of this evidence equates to bad faith or inequitable conduct on the part of Plaintiff.

28. Evidence at trial showed plainly and quite clearly that Plaintiff has faced opposition at the local level and in various legal proceedings throughout the 21 years it has held the right of way. Landowners have removed signs posted; erected barbed wire fences across the trail on both developed and undeveloped portions of the trail; made complaints to the McPherson Board of County Commissioners, successfully urging them to complain to the Surface Transportation Board; some landowners involved themselves at the Kansas Board of Tax Appeals; and two separate actions were filed with the Surface Transportation Board seeking revocation of the right-of-way agreement. A Request to Re-open one of those proceedings was also filed by landowners. The landowners, specifically including Defendants in this case, simultaneously now complain of lack of action and complained and interfered in the past when Plaintiff attempted to fulfill its

statutory obligations, including weed control and others. Given the amount and types of opposition, it is no wonder that Plaintiff has clearly had difficulty meeting the letter of the law in KRTA. That is not equivalent, however, to finding that Plaintiff has failed to follow the KRTA nor that Plaintiff has used the right of way in a manner that presents a public nuisance. Certainly circumstances have changed since the STB last spoke on the issue on May 3, 2001. While it might have been possible for a state court to make a finding in 2001 or 2006 or even 2010 that Plaintiff was not in compliance with the KRTA, this Court cannot make that finding based upon evidence at this trial.

29. The Court does not lay all blame for Plaintiff's lack of progress at the feet of opposing landowners. It is clear that Plaintiff consists of a relatively small group of people, roughly 25 volunteers, including some board members, at any given period of time with understandably limited resources and energy. At trial Plaintiff showed little concern for its statutory duties under KRTA as reflected by the testimony of Ms. Cullen that the Board has no procedures or mechanisms in place to identify what laws it needs to comply with and then find a way to comply. Given the opposition Plaintiff has faced, it is shocking to see Plaintiff's lack of attention regarding its legal obligations.

30. Still, despite that expressed general lack of concern on the part of Plaintiff for compliance with the law, the Court cannot find Plaintiff is not complying with the KRTA or ignoring its obligations under the KRTA. The 1997 and 2000 Meadowlark Trail Plans promulgated by Plaintiff and previously discussed herein detail Plaintiff's plans to comply with its obligations under the KRTA even though the KRTA wasn't specifically mentioned. The Court has already outlined its findings regarding Plaintiff's compliance

with the KRTA. It has developed approximately half of the Meadowlark Trail in the past five years and that development included work on bridges and culverts.

31. As part of the Sides' claim of damage that would be done to them if Plaintiff is granted an injunction and/or an order of restitution, they claim the value of 224 trees, some of which have "grown up" in the fence line and in the right of way itself and some of which have been planted by them. They were not clear regarding how many trees had been planted by them and how many had simply grown up without being planted. The Sides have in the past used the right-of- way for pasture. There was evidence at trial that farmers generally don't allow large numbers of trees to grow in pastures. A view of the plentiful open pastures in this part of Kansas supports this testimony. Although the Sides claim to have planted at least some of these trees, they also complain that trees in the right of way constitute a fire hazard. The trees cannot be both a fire hazard that should be removed and the source of damages if removed. There is no evidence to suggest that the Defendants' belief that the right-of- way belonged to them is or was ever a reasonable belief. In short, Defendants' claims regarding damage that would be done to them by removal of trees in the right of way is not credible because, again, their claims are inconsistent.

32. There is evidence that the Sides will likely need one or more crossing easements to continue their farm operations or the operations of any tenants they may have, yet they refuse to request crossing rights, presumably because they don't want to compromise their position that they own the right of way. They did not ask the Court to grant any crossing rights.

33. Defendants urge a finding regarding Plaintiff's bylaws. Plaintiff's bylaws were not introduced into evidence and the Court could find no testimony regarding Plaintiff's bylaws. There is, therefore, no evidence that the bylaws of Plaintiff require it to maintain a record of its actions. There is evidence that Plaintiff is ready to proceed to develop the trail across Defendants' property if Plaintiff can get access to the property. As stated previously, the evidence in support of this finding is that Plaintiff has the funds to develop the trail, even if no grant is received; Plaintiff has volunteers ready to do the work needed; Plaintiff has attempted to determine what work in the one inspection and was prepared to begin work on the trail on August 5, 2017 but was prevented from even entering the property by Defendants and others who acted at request of Defendants. The fact that no document was produced showing an affirmative vote of the Plaintiff's members to move forward with trail development across Defendants' property is not sufficient for the Court to find that Plaintiff is not willing, ready and able to proceed with development across Defendants' property.

34. The evidence is that the trail across the Defendants' property would be developed similarly to the other phases of the developed trail. Although the actual trail would only be eight to ten feet in width, there is nothing in the law that limits Plaintiff to use of only that much of the right-of-way. Kansas case law does allow a servient land owner to make use of a railroad right-of-way in any way that is not inconsistent with the railroad's use; however, Defendants have declined to name any specific use they would make of the right-of-way not "needed" by Plaintiff. By way of example, all parties seem to agree that cattle should not be near the walking path or people so it would not be appropriate to allow Defendants to pasture cattle right up to the edge of a walking trail eight to ten feet

in width. Similarly, there is no evidence that there is tillable ground near the right of way so Defendants can't claim a need or desire to farm that particular ground. Because Defendants fail to identify any specific use they wish to make of the right-of-way that under the control of Plaintiff, there is no need to limit Plaintiff's use of the right-of-way which it has been granted through the Surface Transportation Board. The Court cannot find, based upon the evidence at trial, that Defendants are entitled to any use of the right-of-way.

35. It is also not appropriate to find that Plaintiff has "no plan to repair or maintain drainage structures" or "no plan for fencing" on the right-of-way crossing Defendants' property. The testimony of Ms. Cullen on those issues was that Plaintiff would "have to meet with Mr. Sides and decide what our strategy was going to be for fencing those cattle to stay off the trail." She further explained that they "could not make plans as to what we were going to do for fencing until we had a meeting with him and decided between himself and CKC what was needed. I'm not going to go in there and put up fencing and then have him tell me it wasn't what he wanted or vice versa." She also testified she was not personally aware that the culverts on the easement across Defendants' property were silted out and had not yet determined the cost to repair those culverts. Given that the access by Plaintiff to the right-of-way across Defendants' property has been extremely limited, due to action on the part of the Defendants, it is not a surprise that Plaintiff isn't aware of the condition of culverts and the lack of a plan cannot be blamed upon Plaintiff as Defendants seek to do.

36. There is no evidence that the bridges on the right-of-way across Defendants' property require inspection by a professional engineer. The clear intention of the KRTA, and of

the Plaintiff, is that no motorized vehicles will be on the bridges. Chief Deal testified that the fire department has vehicles that could traverse property without using bridges. The only mentions of a professional engineer inspecting bridges are in the 1997 and 2000 Trail Plans submitted by Plaintiff to various entities. As noted previously, those plans do not constitute a contract with any person or entity. The Court cannot find that because the bridges have not or will not be inspected by a professional engineer that Plaintiff is failing in any duty or requirement or that Plaintiff is not ready, willing and able to proceed with development of the trail across Defendants' property.

37. The evidence is that, had Plaintiff been able to access the trail across Defendants' property in August of 2017, they were prepared to install a cattle gate at the entrance of the trail to prevent cattle from leaving the property while Plaintiff began work on the property and they were prepared to begin mowing and take down a few trees and "do some general start up clearing." Ms. Cullen testified they had 25 to 28 volunteers that day, a comparatively large group, indicating a lot of interest in beginning work on that portion of the trail.

38. Defendants assert that the matter is not ripe. The Court cannot imagine that the matter could ever be more ripe. So long as Defendants believe and insist that they own the right-of-way and take actions to exclude Plaintiff from the right-of-way, Plaintiff cannot take any action to even begin to develop the right-of-way by mowing and clearing brush and trees. Plaintiff also cannot, as to the disputed land, comply with the requirements of the KRTA, such as for weed control, as long as Defendants threaten with trespass and provide barriers to the work, both in terms of an actual barrier to the right-of-way, i.e., the barbed wire fence across the entrance, and the equipment and implements parked

across the middle of the right-of-way preventing any actual work. Defendants have shown a complete unwillingness to work in any fashion with Plaintiff to allow it to complete its intended work. Because the Plaintiff is ready, willing and able to develop the trail and because Defendants' stated position is to deny the Plaintiff that opportunity, the matter is ripe.

39. The encroachments physically placed by the Defendants are not "minimal" as asserted by Defendants. Exhibits at trial showed farm equipment and implements and other obstructions parked across the middle of the right of way. These encroachments could not be moved without assistance of vehicles with a capacity to tow. In addition, a barrier in the form of a barbed wire fence has been placed at the entrance to the right of way with a "No Trespassing" sign attached. These are not "minimal" encroachments. Compensatory or nominal damages will not suffice to resolve the issues between these parties or provide a remedy to Plaintiff.

40. As stated previously, the evidence is clear that Plaintiff has shown it is ready, willing and able to begin development of the trail across Defendants' property and, additionally, Plaintiff has shown an irreparable injury. Plaintiff cannot proceed to do the work it is legally entitled and required to perform on the easement it has been granted because Defendants are insistent, wrongly, that they own the easement. They have made known to Plaintiff that Plaintiff is not to be on "their" property and have placed barriers to Plaintiff doing its work. Plaintiff has shown that it has the capacity to develop an additional .75 miles of trail but is prevented from doing so by the actions of the Defendants. Defendants even alluded to continuing their opposition to any work on the

trail while the matter is appealed. These facts scream for an injunction against Defendants.

41. The Court agrees with Defendants that public interest is served by requiring Plaintiff's compliance with the KRTA; however, Defendants have stated they actually do not want the Plaintiff to comply with the KRTA and specifically did not file an action to that end because the stated remedy in such an action is a compliance order. Plaintiff's requested injunction against the Defendants will actually allow the Plaintiff to comply with the KRTA as it relates to the easement over Defendants' land, free of interference by Defendants.

42. Defendants are correct that one seeking an injunction should act promptly. It is also correct that Plaintiff appears to have acted as promptly as possible in bringing this suit in 2015 after they were ready to actually begin development across Defendants' property and after being advised by Defendants that they would need a court order to do so. Plaintiff was apparently only ready to actually begin work across Defendants' property in late 2014 or early 2015. Because there was no time limit for development imposed by federal law and because, as the Court has ruled, the two-year time period established by the KRTA does not apply to this trail, the fact that it took 18 years for Plaintiff to be ready to develop across Defendants' property is irrelevant.

43. Granting to Plaintiff the requested relief in no way usurps the authority of the Surface Transportation Board, as urged by the Defendants. Defendants provided evidence that the Surface Transportation Board would consider certain findings from a state court on these issues. The fact that the Court is not making the findings requested by Defendants does not then mean that this Court is usurping the authority of that federal agency.

44. The KRTA does not require Plaintiff to bear the full cost of fencing along the right of way. KRTA requires Plaintiff to pay one-half of the cost of fencing. There were no arguments or evidence presented to the Court that any other fencing statutes apply to this case. If Defendants request fencing from Plaintiff, Defendants are obligated under the KRTA to pay one-half of the cost of that fencing.

CONCLUSIONS OF LAW

1. The Court adopts the Conclusions of Law previously made in its rulings October 12, 2016 and July 10, 2017.
2. The Defendants' estoppel argument fails. There is no evidence that any representations, silence or conduct of Plaintiff caused Defendants to believe any certain facts existed. While Plaintiff has clearly been slow to act and did little or nothing to develop any portion of the nearly 46 miles of trail between approximately 2000 or 2001 and approximately 2013, there were no acts, representations, admissions or silence when a duty to speak existed that reasonably induced Defendants to believe that Defendants and not Plaintiff owned the right of way.
3. Further, the Defendants' contentions at trial that they "owned" the right of way and had "a deed to" the right of way are inconsistent with the Court's prior rulings in this matter and are in no way supported by the evidence at trial, including Defendants' own evidence.
4. Defendants' estoppel-by-inaction argument presumes that Plaintiff had the duty under KRTA to complete the trail within two years or to bring the trail to a certain level of

development under federal law. The latter is not true, as discussed above and in previous rulings, and this Court has ruled that the so-called "two-years to develop" rule under KRTA does not apply to this trail.

5. The Court cannot conclude, as requested by Defendants, that there is doubt as to whether an injunction should be granted. It is clear from the evidence that Defendants will not allow Plaintiff to enter the right-of-way upon which Plaintiff is entitled to develop a trail without a court order. Although the Court did not enter direct orders as part of its ruling on the Summary Judgment motions, the Court made clear in its Findings and Conclusions that the Plaintiff had the right to develop the trail on the right of way that crosses Defendants' property and further that Defendants had no right to exclude Plaintiff from the property. In spite of these rulings, Defendants took action to exclude Plaintiff from the property on August 5, 2017 with Mr. Sides telling Ms. Cullen that he would not allow the group on "his" property to destroy trees and grass. He clarified that he was referring to the trail because he owns that property and has a deed to that property. Mr. Sides' testimony included repeated references to "his" property and that he would need a court order to allow Plaintiff to get on "his" property. He has posted a "No Trespassing" sign at the entrance to the right of way across his property and has built a barbed wire fence across the right of way. There is no doubt as to the need for an injunction in Plaintiff's favor.

6. Plaintiff is entitled to an Order of Restitution as against Mr. Sides and Ms. Sides. They are the only people who have claimed to control that portion of the right-of-way and are the only people who have made efforts themselves or requested others to assist them in blocking access to Plaintiff to the disputed portion of the right-of-way.

7. The Defendants have standing to oppose Plaintiff's requested relief. They are adjacent landowners and, as such, have rights under the KRTA and they are the only defendants named by Plaintiff. Standing, however, does not always translate into success on the merits and the Defendants have presented no evidence to support findings in their favor.
8. While Plaintiff has not acted perfectly in the past in its actions and inactions with regard to its easement, its conduct does not rise to the level of "inequitable" such that the Court should deny requested relief. The Plaintiff could have been more proactive in the past and could still now be more diligent in meeting its obligations under KRTA; however, nothing in the evidence supports a conclusion that Plaintiff has acted inequitably. It does not have a course of conduct in McPherson County that is out of compliance with Kansas statutes or federal law.
9. Public policy as set out by federal law is served by allowing the trail to be developed as provided under federal law. Public policy also set out by the National Trails Act previously cited herein is to preserve railroad rights-of-way in the event they need to be reactivated. Granting Plaintiff's request for injunctions and an order of restitution supports those public policies. Public policy also is supported by allowing law, not feelings or wishes or beliefs, to control the outcome of disputes.
10. Plaintiff has established a present need to completely exclude the Sides from the disputed property as there is no "middle ground" to be had in the parties' positions. They each claim the entirety of the right-of-way but only Plaintiff is legally vested with the right to use and control the right-of-way. Because Defendants cannot articulate a use they request to make of the right-of-way that is not inconsistent with Plaintiff's use, they have no right

of use. As counsel for Defendants noted in closing arguments, it is not up to this Court to fashion a resolution as it would in a child custody case.

11. The public is not harmed by allowing Plaintiff to develop the trail allowed for and provided for under federal law. Federal law defined the public policy interests as noted above and the injunction granted is in furtherance of those public policy interests. Trail development is also a furtherance of the public policy of productive use of land. A trail is clearly a different use than farm pasture but there is no public policy that one use is preferred or more "productive" than the other.

12. Defendants did not file a Motion to Reconsider or otherwise formally ask the Court to reconsider its prior ruling regarding the "two years to develop" rule under KRTA; however, in final arguments and in their proposed Conclusions of Law, Defendants claim that the court erred in its ruling that K.S.A. 58-3213 does not apply to this trail. The Court is not reconsidering its prior ruling because a plain reading of the statute shows that in subsection (d), the Kansas Legislature stated:

> The provisions of this section shall apply only to *recreational trails* for which approval to enter into negotiations for interim trail use is received from the appropriate federal agency on or after the date of this act. (emphasis added).

The Court rejects Defendants' argument that the section applies because Plaintiff is now the responsible party rather than the original responsible party who negotiated the Interim Trail Use Agreement. The application of that section of the KRTA is to the *trail*, not to the *responsible party* for the trail and the words "responsible party" are not even included in the language of that subsection.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

Defendants are hereby permanently enjoined from erecting, installing, placing or maintaining any barrier to Plaintiff and its volunteers, board members and/or contractors beginning work to develop that portion of the Meadowlark Trail that transverses Defendants' property. Defendants shall not request or permit any third parties to act on their behalf to prevent enforcement of this injunction against Defendants. Defendants are ordered to remove any and all equipment, machinery, trailer frames or any other personal property they have placed on the right-of-way and to do so within ten (10) days of the date of this ruling. Defendants are also ordered to cooperate with Plaintiff to remove the barbed wire fence at the south end of the right-of-way to allow Plaintiff to install a cattle gate to prevent Defendants' cattle from getting onto the road.

As a condition of this injunction, Plaintiff is ordered to secure the entrance to the right-of-way at the south end with a cattle gate to prevent any grazing cattle from getting out onto the road or otherwise escaping through the entrance to the right of way. Such gate shall be secured with a lock and only Plaintiff should have a key to the lock. The gate shall be placed within thirty (30) days of the date of this ruling.

As a further condition of this injunction, Plaintiff is ordered to contact Defendants within thirty (30) days of the date of this ruling to discuss an appropriate barbed wire fence along both sides of the right-of-way to keep cattle from escaping from Defendants' property. If Defendants require a survey to determine the placement of the fence, that survey shall be paid for by Defendants. Defendants shall further be required to pay their one-half of the cost of fencing prior to the beginning of the construction of the fence and the fence builder or appropriate volunteer fence builders shall be allowed reasonable

access to Defendants' property as necessary to install the appropriate fence. If Defendants so request, they shall be allowed one crossing with appropriate gates. Construction of the fence shall commence within thirty (30) days of any survey required by Defendants. Plaintiff is not required to hire a professional fence builder unless it so chooses.

No Journal Entry shall be required and this ruling shall be final upon filing with the Court Clerk.

Marilyn M. Wilder
District Court Judge