



KNOBSTONE HIKING TRAIL ASSOCIATION

KHTA Board of Directors

July 28, 2023

Tom Rueschhoff, Rail Programs Office
Indiana Department of Transportation
100 N. Senate Avenue, N758-MM
Indianapolis, IN 46204

KHTA Board of Directors
P.O. Box 1814
Martinsville, IN 46151
khtassociation@gmail.com

Mr. Rueschhoff:

This document provides KHTA rebuttal to:

- INRD objections to the BC petition to (re)open DOT# 292 193F, and
- Issues raised by INRD at the INDOT-hosted site visit of Wednesday, June 28, 2020, held at crossing DOT# 292 193F.

Notwithstanding spurious objections raised by INRD, the merits informing Brown County's petition are compelling – in favor of reopening DOT# 292 193F.

Also provided, an argument that:

- INDOT is justified in [re]opening DOT# 292 193F per 105 IAC 5-10-1(16), due to extenuating circumstances [and adverse consequences therefrom], for relief of stakeholders and the general public in Brown County.

[Re]opening DOT# 292 193F would reestablish the original and safest route for hiking the Tecumseh Trail. The Tecumseh was built between 1997 and 2001 – the result of a collaboration between the Hoosier Hiker's Council (HHC) and the Indiana Department of Natural Resources - Division of Forestry. From its northern terminus near Morgan-Monroe State Forest (MM SF) headquarters, the trail extends southward for 42 miles, linking with the Knobstone Trail in the HNF. Through this linkage it is part of an otherwise continuous 75 mile forested hiking trail connecting MM SF with Clear Spring, IN. In turn, this 75 mile trail is part of the 160 mile Knobstone Trail, which is nearing completion. The Tecumseh has been closed, at the location where Indian Hill Road crosses the rail tracks in Trevlac, since May 6, 2020. Reopening crossing DOT# 292 193F is essential to completing the 160 mile long distance trail.

Sincerely,

KHTA Board of Directors

Rebuttal of INRD objections; [Re]opening per 105 IAC 5-10-1(16)

Executive Summary

An assessment is given of INRD objections to the recent **Brown County petition** [Docket No. DOT-RR-249, dated June 1, 2023] requesting that INDOT [re]open crossing DOT# 292 193F to allow traffic to pass [without restrictions set by INRD] along Indian Hill Road. INRD objections include those offered in the Verified Objection to Petition to Open Highway Crossing at Grade in Nashville, Brown County, IN. [INRD-VOP, dated June 20, 2023] and those raised at a site visit hosted by INDOT [June 28, 2023]. Objections 1-23 in INRD-VOP are readily rebutted by evidence from the public record. For instance, INRD claims speeds up to 49 mph – well beyond the INRD-declared maximum speed of 30 mph filed with the DOT# 292 193F FRA Inventory.

Beyond rebutting INRD objections to the BC petition with INDOT, an additional argument is advanced¹ – that pursuant to 105 IAC 5-10-1(16) INDOT is justified in opening the crossing due to extenuating circumstances arising from closure without prior notice to stakeholders [and adverse consequences therefrom].

Key dates-events re crossing DOT# 292 193F

1. **May 20, 2019:** INRD forwards 2019 INRD Petition to Close Crossing DOT# 292 193F to Brown County Commissioners.
2. **April 9, 2020:** INRD [Peter Ray, VP Engineering] signs, then forwards, Indian Hill Road Crossing Closure and Settlement Agreement [CC&SA].
3. **April 21, 2020:** BC Commissioners [Dave Anderson, Diana Biddle, Jerry Pittman] sign Indian Hill Road Crossing Closure and Settlement Agreement [CC&SA].
4. **May 6, 2020:** BC Commissioners vote to adopt Resolution No. 2020-5-6-000, to “... fulfill the intent of the CC&SA ...” to close crossing DOT# 292 193F.
5. **September 21, 2020:** BC submits request to Rail Programs Office for RRGCF funds pursuant to a crossing closure.
6. **April 12, 2021:** BC Commissioner Jerry Pittman signs RRGCF Crossing Closure Grant Agreement, EDS# A249-21-G210003, Grant # 21-GCF-LPA-02. The amount of grant is \$10,000.
7. **June 1, 2023:** BC submits DOT-RR-2494 Petition w Exhibits A-D to open crossing DOT# 292 193F along Indian Hill Road at highway grade.
8. **June 20, 2023:** INRD submits Verified Objection to Petition to Open Highway Crossing at Grade in Nashville, Brown County, IN.
9. **June 28, 2023:** INDOT hosts onsite meeting re INDOT Docket No.: DOT-RR-2494 [assigned June 14, 2023].
10. **July 5, 2023:** INDOT announces [per Brown County and INRD request] a 30-day extension/delay in INDOT Order Process re Docket No.: DOT-RR-2494.
11. **July 28, 2023:** Deadline for rebutting INRD-VOP.
12. **September 31, 2023:** Assuming no further delays, INDOT will have an order issued no later than September 31, 2023 re Docket No.: DOT-RR-2494.

¹With recourse to IC § IC 8-6-7.7-3.1(b)(9), IC § IC 8-6-7.7-3.2, and Indiana Administrative Rule 105 IAC 5-10-1(16).

Acronyms

- AADT Average Annual Daily Traffic.²
- BC: Brown County.
- CC&SA: Crossing Closure & Settlement Agreement.
- FRA: Federal Railway Administration.
- ICCTA: Interstate Commerce Commission Termination Act of 1995.
- IHR: Indian Hill Road.
- IHR-N: The northern section of IHR, between SR-45 and the INRD-RW.
- IHR-RW: Indian Hill Road Right-of-Way.
- INDOT: Indiana Department of Transportation.
- INRD: Indiana Railroad Company.
- INRD-RW: Indiana Railroad Company right-of-way.
- INRD-VOP: Verified Objection to Petition to Open Highway Crossing at Grade in Nashville, Brown County, IN.
- KHTA: Knobstone Hiking Trail Association.
- NSR: Northern Suffolk Railway.
- RRGCF: Railroad Grade Crossing Fund.
- SC: Starke County.
- SR-45: State Road 45.

²AADT takes in all vehicle trips on a segment of road or highway during a yearlong interval, in both directions, and then divides the total by 365 days to arrive at the average number of daily trips.

Contents

Cover Letter	1
Executive Summary	2
Key dates-events re crossing DOT# 292 193F	2
Acronyms	3
1 Introduction	5
1.1 Physical description of IHR-N	5
1.2 Sight-lines at the IHR crossing of INRD-RW	5
1.3 Video records of the approach to the INRD-RW	5
1.4 Guidance from Indiana code: railroad grade crossing speed v. sightlines	6
2 INRD objections to opening crossing DOT# 292 193F	7
2.1 Issues raised during June 28, 2023 onsite visit	7
2.2 Issues raised in INRD-VOP	8
3 Reopening crossing based on extenuating circumstances	11
3.1 Preliminaries – context of request per §105 IAC 5-10-1(16)	11
3.1.1 Understanding §105 IAC 5-10-1(16)	11
3.1.2 Definitions	12
3.1.3 Need for Normative Case	12
3.1.4 Guidance from 2018 Indiana Supreme Court decision	12
3.2 Norfolk Southern petition to close crossing in Starke County, Indiana	13
3.3 INRD petition to close crossing in Brown County, Indiana	14
3.3.1 Conclusion	15

1 Introduction



Figure 1: GIS plot of IHR crossing the INRD-RW; see Fig. 2 for names of roads.

1.1 Physical description of IHR-N

Fig. 1 shows INR in relation to SR-45 (to the north) and the INRD-RW. Starting at SR-45, IHR runs due south in a straight line for 634 feet, to a curve which directs the road in a south-westerly direction for another 133 feet before it intersects the INRD-RW, for a total road length of 767 feet between SR-45 and the INRD-RW.

For the initial 634 feet south of SR-45, the road passes along the common boundary between several properties, with each landowner owning to the center of the road. From 634 feet through 767 feet the road proceeds south west through a single property.

1.2 Sight-lines at the IHR crossing of INRD-RW

Viewing the intersection of IHR with the INRD-RW via Brown County GIS – as in Fig. 2 – shows the track running in a straight line through the crossing, with distant curves to the east and west. Using the measurement function provided in Brown County GIS, the distance from the crossing to the *beginning* of the track curving to the east of IHR is 3000 feet. Distance to the *beginning* of the track curving to the west of IHR is 3800 feet. See § 1.4 for statutory sight-line requirements.

1.3 Video records of the approach to the INRD-RW

Two videos of the approach to the crossing are linked herein, of [traffic approaching from the north \(video produced November 28, 2021\)](#), or [traffic approaching from the south \(video produced November 7, 2021\)](#). Each shows has excellent visibility to the distant curves. This excellent visibility was apparent during the onsite meeting on June 28, 2023.

A calculation based on observation of elapsed transit time – 70 seconds – over a known distance – 3000 feet to the curve in the east – yields a calculated speed of approximately 29 mph, a value entirely consistent with

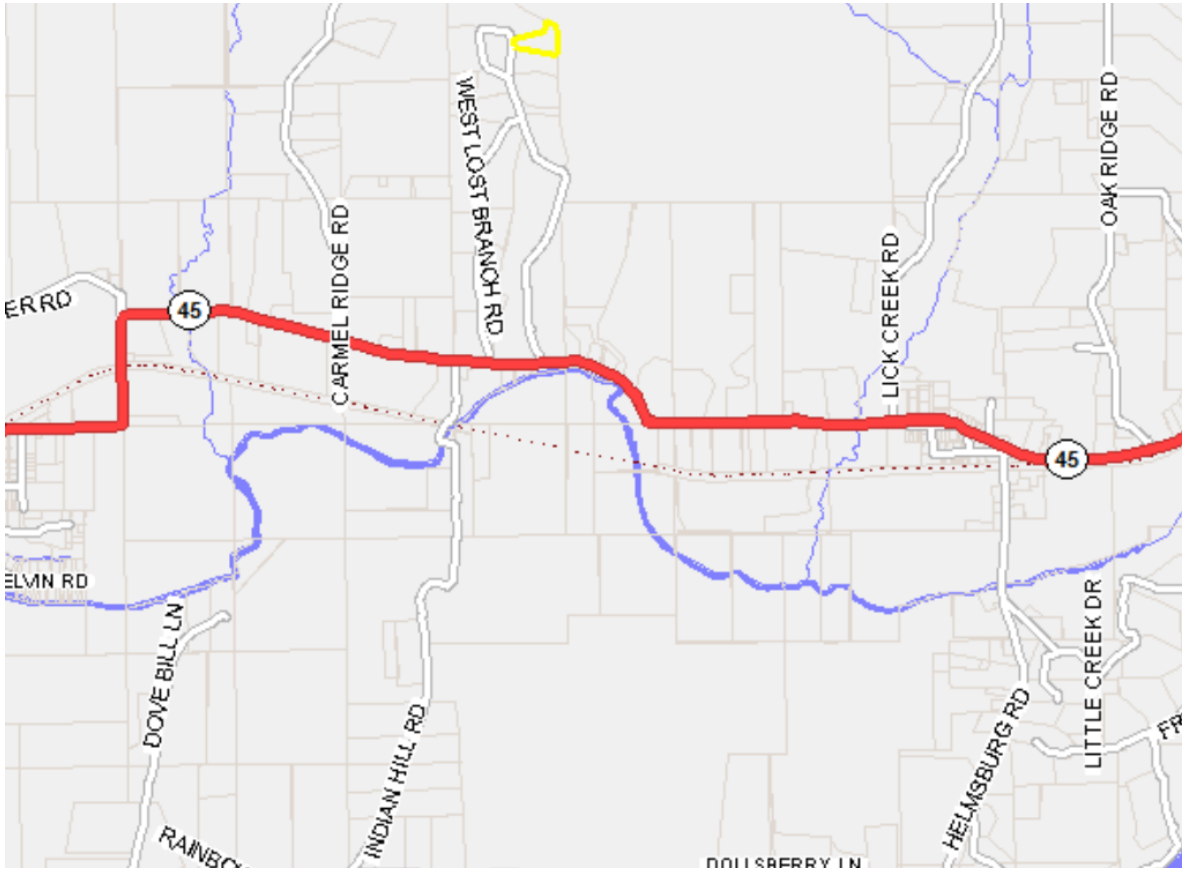


Figure 2: The IHR/INRD-RW crossing, with curves in the track at 3800' to the west, and 3000' to the east.

the maximum speed of 30 mph INRD declared in DOT# 292 193F FRA inventories.

1.4 Guidance from Indiana code: railroad grade crossing speed v. sightlines

Indiana Code § IC 8-6-7.6-4 provides guidance, on sufficient distance of unobstructed view versus train speed, for crossings equipped with passive warning devices:

- For tracks with a maximum authorized speed limit of **not more than thirty (30) miles per hour**, an unobstructed view of **three hundred fifty (350) feet**.
- For tracks with a maximum authorized speed limit of **more than thirty (30) miles per hour and not more than sixty (60) miles per hour**, an unobstructed view of **six hundred fifty (650) feet**.
- For tracks with a maximum authorized speed limit of **more than sixty (60) miles per hour**, an unobstructed view of **nine hundred (900) feet**.

Comparing these guidelines with the field of view and speed of passing trains approaching IHR, given in sections § 1.2 and § 1.3, shows that available unobstructed sightlines are eight (8) to nine (9) times the distance required for trains traveling no more than 30 mph – the maximum speed that INRD filed with the FRA.

2 INRD objections to opening crossing DOT# 292 193F

2.1 Issues raised during June 28, 2023 onsite visit

1. INRD claims the **speed of trains is higher than 30 mph** along the section of track including crossing DOT# 292 193F.
 - A maximum speed of 30 mph, for trains passing through DOT# 292 193F was filed in the **2021 FRA Inventory for DOT# 292 193F** – the same as the maximum speed declared in the **2019 INRD Petition to Close Crossing DOT# 292 193F**. **Closing the crossing did not lead to an increase in running speeds.**
 - The video record of a train passing through the crossing at 29 mph is provided in § 1.3.
2. Magnitude of sight lines available to persons – in vehicles or on foot – approaching the crossing.
 - **Straight line unobstructed distances (to the *beginning* of curves) determined from measurement via Brown County GIS are 3000 feet to the East and 3800 feet to the West.** Videos linked in § 1.3 show these sightlines obtain whether approaching the crossing from the north or south.
3. General considerations of risk/safety applying to passage through the crossing along Indian Hill Road. These include (1) the ***hypothesis of accident-via-earbuds*** (aka undue distractions), and (2) the ***hypothesis of near misses***.
 - The FRA supplies no information on earbuds, near misses, or otherwise spurious, manifestly *anecdotal and unquantifiable* factors. Rather, the FRA focuses on risk calculations correlating factors such as verified accidents and measurable crossing venue data. **Based on FRA calculations, crossing DOT# 292 193F is in the lowest risk category for RRGCF grants.**³
 - INRD was unable, or unprepared, to provide data pertaining to either the risk posed by earbuds, or the incidence of near-misses, at rural rail crossings. These criteria for objecting are entirely unsubstantiated and without merit, and should not be raised again.
 - Verified, **non-hypothetical quantities associated with risk at this crossing:** (1) the ***very long time (on the order of 100 years)*** during which (2) ***zero*** accidents have occurred.
4. INRD claimed that stakeholders and other interested parties to INRD initiatives at (1) **outreach** and (2) **constructive engagement** re DOT# 292 193F closure.
 - This claim is addressed in a **KHTA Tecumseh Trail closure outreach summary**, which provides details of an entire year – 2021 – in which outreach from KHTA, legislators, and other stakeholders went unanswered by INRD.
 - From Jennifer Ruff post, Friday, March 26, 2021 at 8:23 AM, in **BCM FB dialogue**: “... I am the resident that has probably been impacted the most by this decision, as I am the house at the bottom of the hill... Nobody notified my family. I saw that my road was closing when reading the Brown County Democrat. ***When contacting anyone (commissioners or the railroad) I either got no responses or irrelevant information.*** The only people that were straightforward were the people at INDOT. They told me that they stay out of these decisions, that they are made between the county and railroad ...”
5. The nature/appearance of Indian Hill Road as it approaches the crossing from the South.
 - The present condition of the approach to DOT# 292 193F is addressed in item 9 of § 2.2.

³This is readily apparent from the \$10,000 **RRGCF grant received by Brown County for closing DOT# 292 193F**. Referring to the schedule on page 5 of the **Railroad Crossing Closure Guidelines FY22, Railroad Grade Crossing Fund**, it is seen that this amount corresponds to crossings having lowest risk.

2.2 Issues raised in INRD-VOP

Issues raised in the **Verified Objection to Petition to Open Highway Crossing at Grade in Nashville, Brown County, IN**

The 23 numbered lines of the INRD-VOP form nine (9) groups:

1. [INRD-VOP lines 1–4] It is *suggested* that there is an alternate public crossing within 1 mile of DOT# 292 193F.
 - As advocates for restoring integrity to the Tecumseh Trail, and for safety in hiking Indiana trails, KHTA is aware that **the alternative crossing suggested in INRD-VOP [lines 1-4] is so unsafe for hikers that DNR, HHC, and INDOT caution hikers against using it.**

From **The HHC Tecumseh Trail Guide, page 2**: “... thanks to the generosity of the **Weddle Family** and the **Sycamore Land Trust**, a new alternate route was established ... unfortunately ... hikers should take caution and ... use it at your own risk. **INDOT also does not recommend this as a walking route because ... that lack of shoulder ... requires pedestrians to walk on the highway pavement.** To avoid this 1-mile walk on IN-45, as an alternative, you may arrange a ride or shuttle from East Lost Branch to the parking at Trevlac Bluffs (see the Trail Shuttles section below).”

 - **Vehicular traffic** originating on IHR close to the South side of DOT# 292 193F faces more than a mile on roads until the State Road 45 grade crossing [DOT# 292 192]. For vehicles facing an uphill route on wet/winter roads, the distance-as-the-crow-flies is largely irrelevant in comparison to the vastly preferable (based on safety or convenience) access available were DOT# 292 193F opened.
 - In particular, **Weddle family farm traffic** does not have a practical option of taking the shortest *on-road* route to the next rail crossing. Rather, farm vehicles seek to minimize the overall distance to Weddle family facilities *while also following a route which accommodates agricultural vehicles and equipment*. The practical consequence is that a much longer route – 11 miles at present versus 1.5 miles prior to crossing closure – is taken to reach Lanam Ridge Road, and thence Helmsburg Road [to the East of DOT# 292 193F], and on to SR-45.⁴ As is noted in § 1.1, distance from the entrance to the Weddle property (off Indian Hill Road) through the crossing to SR-45 is just over 800 feet due South.
2. [INRD-VOP lines 5–6] **The hypothesis is advanced** that opening crossing DOT# 292 193F could elevate the frequency of automobile passage to more than 500 cars per day through this rural crossing.
 - The AADT presently filed in the **2021 FRA Inventory for DOT# 292 193F** is the 2018 value of 250 transits per day,
 - However, the point of this objection – that an increase in AADT for this rural road/rail crossing is not desirable, **conflicts with the observation [see INRD-VOP, line 20] that the crossing was selected for closure because of the supposed infrequency of use.**
 - To **gauge the substance of this hypothesis**, consider the FRA report for a similar crossing just to the West of crossing DOT# 292 192Y, i.e. **crossing DOT# 292 191S**. The AADT traffic for this crossing given therein is 525 cars/day. **It is implausible** that the AADT for DOT# 292 193F could be elevated to that of DOT# 292 191S, since the latter carries traffic for a number of destinations including residential communities along the North shore of Lake Lemon, and recreational traffic for Morgan-Monroe State Forest.

⁴For further detail see Exhibit D, pgs. 8-9 (pages 26-27 in the INDOT concatenated pdf), in **DOT-RR-2494 Petition w Exhibits A-D to open crossing DOT# 292 193F along Indian Hill Road at highway grade.**

3. [INRD-VOP lines 7–8] Designated speed of trains approaching crossing is **far in excess of 30 mph.**
 - In the **2021 FRA Inventory for DOT# 292 193F.**, and in the **2019 INRD petition-to-close DOT# 292 193F**, the declared maximum speed is 30 mph.
 - See § 1.3, § 2.1, and § 1.4 for further discussion of train speeds, and of the relationship between minimum line-of-sight and maximum train speed through a crossing.
 - **A number of factors limit the speed of trains along the section of track including DOT# 292 193F to a maximum of 30mph**, including two curves separated by 6800 feet, and three major crossings – (West to East) SR-45, Helmsburg Road, and SR-45 again – within the relatively short distance of approximately 2 miles. It is because these factors obtain, despite closure of DOT# 292 193F, that INRD is unable to realize increased maximum speed through the crossing.
4. [INRD-VOP lines 9–10] It is *suggested* that lines of sight (to the East, and to the West) are of insufficient magnitude for *maximum* train speeds.
 - Required sight line distances corresponding to maximum train speeds are given provided in § IC 8-6-7.6-4 and reproduced in § 1.4 – that section of INDOT code providing guidance on sufficient fields of unobstructed view versus train speed, for crossings equipped with passive warning devices:

For tracks with a maximum authorized speed limit of not more than thirty (30) miles per hour, an unobstructed view of three hundred fifty (350) feet.
 - Per § 1.3, and line 1 in § 2.1, the maximum speed of trains approaching the crossing is 30 mph.
 - Per § 1.2, sightlines extend at least 3000 feet in either direction.
5. [INRD-VOP lines 10–11] ... **the time needed to approach the crossing, look for a train, and cross the track is substantially longer than it would be at a level crossing ... The increased time would put any motorist at the proposed at-grade crossing at risk ... given the prevailing train speeds.**
 - This is precisely what reflectorized crossbucks w/stop signs, and other *passive* signs appropriate for such a crossing, are intended to do – slow down vehicles to provide additional time for evaluation along sightlines.
6. [INRD-VOP lines 14–15] INRD disagrees with hypothesis of fewer than 10 train movements through crossing per day.
 - It is speculation on the part of INRD to suggest that the present [and long standing] passing of two trains per day will be elevated beyond 10 trains per day. With sight-lines being a factor of 8–9 in excess of FRA requirements, it is not clear [nor does INRD state as much] that the hazard from increased AADT is significant, given the very low risk associated with this crossing.

 In any case, KHTA encourages all *attempts* by INRD to elevate this objection, from *speculative* to *quantitative*, by providing FRA risk estimates for the crossing.
7. [INRD-VOP lines 16–17] INRD disagrees that opening crossing would improve emergency vehicle access and/or lower emergency response times.
 - **Per discussion with Helmsburg Fire Chief Glen Elmore, ambulances deployed by IU Emergency Services can pass over crossing DOT# 292 193F.**⁵

⁵This is also implicit in the letter from Brown County Sheriff Brad Stogsdill, included in Exhibit D of the **DOT-RR-2494 Petition w Exhibits A-D to open crossing DOT# 292 193F along Indian Hill Road at highway grade.**

8. [INRD-VOP lines 18–19] Objects to passage of school buses, and of vehicles carrying hazardous materials, through crossing, per [Indiana Administrative Rule 105 IAC 5-10-113](#).
- The type of vehicle allowed through a crossing is determined through administrative guidance/policy [originating from a County school corporation, in the case of school buses], or, for the case of emergency response vehicles such as ambulances, fire trucks, and police vehicles, through instructions to County emergency dispatch operators.
 - However, to reference a particular point raised in connection with DOT# 292 193F, it is unreasonable to argue that IHR residents – or farm workers, hikers, and drivers – depending on passage along IHR should have diminished access to ambulances simply because fire trucks fully loaded with water can not traverse the crossing. **These issues should never be conflated.**
9. [INRD-VOP lines 20 -23] Comments in these lines, bearing in some diffuse way on the “state” of the crossing, might be readily dismissed as being so vague and self-contradictory as to suggest no definite means of remedy.
- **Infrequency of use.** This phrase has no definite meaning without a number (such as AADT) and a standard for comparison. Traffic along the road is certainly reduced from that which obtained prior to closing DOT# 292 193F in May of 2020. Upon reopening the AADT could be expected to return to the 2018 level of 250 [see p.2 in [DOT# 292 193F FRA Inventory](#)].
 - Crossing appearance is also a reflection of the nature of traffic and assets along the road. Within a few hundred yards of the crossing, on the South side of the rail track, are access ways for the Weddle farm, the Sycamore Land Trust, and for Yellowwood State Forest – critical rural infrastructure. This is manifestly a rural road, and has the appearance of such.
 - Note that video records of the approach to the INRD-RW show that in 2021 the general appearance of the road adjacent to the rail track was much cleaner, reflecting the fact that it had been unmaintained for less time than the present appearance reflects. It is understandable that there is diminished incentive for maintaining to the very end of a closed crossing. This will be rectified once the crossing is reopened.
 - **Video records show unobstructed sight-lines**, *notwithstanding* claims that steel girders of a rail bridge obstruct eastward sight-lines of hikers as they approach the crossing.⁶

⁶“**At the April 15 Brown County Commissioners meeting**, Brown County Highway Superintendent Mike Magner said that Indiana Rail Road had been discussing the crossing and what to do with it for about two years. They have now formally requested that the county close the crossing.”

“You have to elevate from the floodplain over the tracks. It’s a blind hump for about 15 feet you cannot see across the tracks. To compound that, you’re right at the end of **a railroad bridge that is a steel girder where the sides of the structure actually block your line of sight up the tracks** to where you cannot see the trains coming,” Magner said.” In [BC Democrat \(June 10, 2020\)](#), article by Suzannah Couch titled “[Indian Hill railroad crossing to close for good](#).”

3 Reopening crossing based on extenuating circumstances

An argument is advanced, distinct from arguments brought to bear in § 1 and § 2, that INDOT is justified in [re]opening DOT# 292 193F pursuant to **Indiana Administrative Rule 105 IAC 5-10-1(16)**, with control of the crossing reverting completely to Brown County – as was the case prior to closing in May of 2020.

3.1 Preliminaries – context of request per §105 IAC 5-10-1(16)

3.1.1 Understanding §105 IAC 5-10-1(16)

To obtain relief for stakeholders facing adverse consequences from closure of Indian Hill Road at DOT# 292 193F, pursuant to §105 IAC 5-10-1(16),⁷, i.e.

“(16) While a new crossing may not satisfy the conditions listed in this section, if it can be shown by evidence that there are *extenuating circumstances* which, in the opinion of the department, a new crossing would still

⁷Excerpt from: **Criteria for opening a crossing**

Authority: IC 8-6-7.7-3.1; IC 8-23-2-6

Affected: IC 8-6-1-7; IC 8-6-7.7

Sec. 1. Subject to the provisions of IC 8-6-1-7 and IC 8-6-7.7, **the department may approve a petition to open a crossing after making findings and conclusions which reflect consideration of all the following factors, to the extent that same are relevant to the crossing decision under consideration:**

- (1) Passenger trains do not operate in excess of sixty (60) m.p.h. at the location of the proposed crossing (Class 3 FRA track classification or higher). In cases where passenger service does not operate, this criteria is not applicable.
- (2) An alternate public crossing is not located within one (1) mile of the proposed crossing.
- (3) No crossings within two (2) miles of the proposed crossing have had at least three (3) accidents in the preceding five (5) years, with the expected characteristics of the proposed crossing being similar to the nearby crossings. Characteristics for all crossings within two (2) miles of the proposed crossing must be submitted with the petition.
- (4) The proposed crossing will have expected average annual daily traffic (AADT) of five hundred (500) or greater in rural areas or one thousand (1,000) or greater in urbanized areas, where the traffic collection procedure is completed in accordance with the Federal Highway Administration’s (FHWA) Traffic Monitoring Guide, Third Edition, February 1995. This requirement shall not be applicable where a nonmotorized public grade crossing has been petitioned to the department for opening.
- (5) Consideration shall be given to the overall design speed of the roadway approaches involving the proposed grade crossing. This requirement shall not be applicable where a nonmotorized public grade crossing has been petitioned to the department for opening.
- (6) There are not more than ten (10) train movements per day at the proposed crossing.
- (7) Freight trains do not operate in excess of twenty-five (25) m.p.h. at the location of the proposed crossing (Class 2 FRA track classification or higher).
- (8) The proposed crossing has, at a minimum, standard crossbucks, pavement markings, and flashing lights. Any proposed crossing must also meet all standards for a rail-highway intersection as provided in the Indiana Manual on Uniform Traffic Control Devices, which is incorporated by reference at 105 IAC 9-2-1. The requirement for flashing lights may be waived if the petitioner can demonstrate that such devices are not essential for safety at the proposed crossing.
- (9) The proposed crossing is not within two hundred (200) feet of a roadway intersection. Adjustment of this criteria will consider the maximum queue expected for the design hour.
- (10) The proposed crossing does not have, at a minimum, an eighty (80) degree intersection alignment.
- (11) The proposed crossing will not provide access for trucks carrying hazardous materials unless the utilization of the crossing by such traffic is incidental.
- (12) The proposed crossing will not provide access for vehicles carrying passenger for hire unless the utilization of the crossing by such traffic is incidental.
- (13) The proposed crossing will not provide access for school buses unless the use of the crossing by the school bus traffic provides enhanced safety over other transportation routes, as documented by the highest school transportation official.
- (14) The proposed crossing will provide improved safety access for emergency vehicles. The department requires documentation from the highest emergency response official whose jurisdiction is located where the crossing is proposed for opening.
- (15) While a new crossing may satisfy the conditions listed in this section, if it can be shown by evidence that there are extenuating circumstances which, in the opinion of the department, a new crossing would still constitute a hazard, it would be denied.

(16) While a new crossing may not satisfy the conditions listed in this section, if it can be shown by evidence that there are extenuating circumstances which, in the opinion of the department, a new crossing would still be justified, it would be approved.

(Indiana Department of Transportation; 105 IAC 5-10-1; filed Jun 17, 1998, 9:00 a.m.: 21 IR 4190; readopted filed Nov 7, 2001, 3:20 p.m.: 25 IR 899; filed Aug 5, 2002, 1:05 p.m.: 25 IR 4051; readopted filed Jun 14, 2007, 2:45 p.m.: 20070627-IR-105070237RFA; readopted filed Oct 2, 2013, 11:39 a.m.: 20131030-IR-105130295RFA; readopted filed Oct 4, 2019, 9:49 a.m.: 20191030-IR-105190422RFA)

be justified, it would be approved,” evidence is required of factors which, either individually or in aggregate, lead to circumstances deemed “extenuating” by INDOT.

3.1.2 Definitions

In anticipation of case studies [provided in § 3.2 and § 3.3] designed to identify factors both (1) relevant to closure and reopening of DOT# 292 193F and (2) contributing towards circumstances deemed extenuating by INDOT, a working definition of *extenuating circumstances* is adapted from the **Legal Information Institute of Cornell Law School** – : “**Extenuating circumstances** – also called mitigating factors – are facts or details that are important for fully understanding a situation. With this understanding, the actions ... [taken] ... in that event might be viewed as *less severe*, or the culpability ... [intrinsic to] ... those actions *diminished*.”

3.1.3 Need for Normative Case

The working definition of extenuating, and of extenuating circumstances, incorporates the phrase “... actions ... [taken] ... in that event might be viewed as less severe, or the culpability ... [intrinsic to] ... those actions diminished.” To apply this definition in describing circumstances of the closed Indian Hill Road crossing, clarification is needed re:

1. *Less severe* in comparison with ... what?
2. *Diminished* in comparison with ... what?
3. Which parties to the closure are viewed as being *culpable*?

To answer questions 1 and 2, a standard of comparison (normative case) is needed. In the context of [and in contrast to] closure of DOT# 292 193F, a *normative case* is provided in § 3.2 – notable for exemplary circumstances and an *absence of adverse consequences*.

3.1.4 Guidance from 2018 Indiana Supreme Court decision

An Indiana Supreme Court Decision (2018), **the State v. Norfolk S. Ry. Co., Supreme Court Case No. 18S-IF-193**, provides clarification of two issues re closure and [re]opening of crossing DOT# 292 193F:⁸

1. That FRA aspirations re closing crossings are incorrectly, and frivolously, invoked in instances where material threat to railroad operations does not obtain. Since a *presumption of preemption* [of state and local laws by federal regulations (ICCTA and STB statutes)] does not in general obtain, navigating through and around arguments unnecessarily and spuriously conflated with FRA aspirations wastes Agency, Unit government, and public resources.
2. That a principle underlying *presumption against preemption* is **the State’s [and by extension Unit government’s] legitimate interest in protecting public use of grade crossings.**

⁸ The decision includes this passage:

“... **But the preemption provision also does not encompass all state actions affecting railroad crossings. In fact, while “substantial interference with railroad operations will be preempted; routine crossing disputes will not.”** Franks, 593 F.3d at 413. Routine crossing requirements that are often too tangential to “regulate” rail transportation include keeping crossings in service, *id.* at 409, closing private crossings, *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 105 (2d Cir. 2009), and paying for pedestrian crossings and sidewalks, *Adrian & Blissfield R.R. v. Village of Blissfield*, 550 F.3d 533, 541 (6th Cir. 2008).”

In addition, this opinion emphasizes one **a principal objective of Indiana State Law** (below, in bold face): “... State statutes ... are ordinarily covered by a *presumption against preemption*, see *Kennedy Tank*, 67 N.E.3d at 1028, but *Norfolk Southern* argues that the presumption does not apply here. We disagree with *Norfolk Southern* and find at the outset that the presumption applies, given **the State’s legitimate interest in protecting public use of grade crossings**. With that presumption on board, we then address the ICCTA’s express preemption provision. We conclude that because Indiana’s blocked-crossing statute provides a remedy that regulates rail transportation, the ICCTA expressly preempts it.”

For full text of decision see <https://case-law.vlex.com/vid/state-v-norfolk-s-887706995>

3.2 Norfolk Southern petition to close crossing in Starke County, Indiana

In preparation for evaluating closing of DOT# 292 193F in May, 2020, it is useful to review the response of commissioners in Starke County (SC), Indiana, to a request to close a crossing. In May of 2022, Northern Suffolk Railway (NSR) communicated an interest in closing a crossing to SC officials.⁹ Characteristics of the response by the Starke County leadership team include:

- Attorney Schramm advised Commissioners of Unit obligations per **IC § IC 8-6-7.7-3.2(a)-(d)**: to alert SC citizens re the petition; to schedule public discussion in upcoming Commissioner meetings.
- SC Commissioners heeded advice of Attorney Schramm – allocating time for (1) receiving public/stakeholder comment, and (2) discussion of the NSR petition, over the course of three public meetings.
- Following a thorough review of NSR’s offer, and review of public feedback, the Commissioners voted to deny the petition-to-close on July 18, 2022 – within 34 days of having received the petition and well within the mandated 60 day limit [per IC § 8-6-7.7-3.2(a)] for holding public hearings.

The response by SC leadership was organized (in accord with Indiana code, by Attorney Schramm), timely, transparent, and meticulous in serving the interests of the public in having access to, and benefitting from, public railroad crossings¹⁰ – everything Starke County citizens should expect from their leadership team.

⁹Actions taken by Starke County Commissioners [starting May 26, 2022; ending July 18, 2022] in denying NSR petition:

1. Initial contact occurred on May 26, 2022. An NSR representative placed a call to Starke County Highway Superintendent Dipert, to explain that NSR was interested in closing a rural crossing.
2. Pursuant to this discussion, a formal **NSR petition-to-close, dated 15 June 2022**, was forwarded to Superintendent Dipert.
3. Superintendent Dipert informs SC Commissioners of letter at the June 20, 2022, Commissioners meeting. **A news report of this meeting dated June 22, by Anita Goodan:**
“County Attorney Justin Schramm suggested waiting until the next meeting to discuss it more in order to get more information about why Norfolk Southern has identified this crossing as one to close. Additionally, Schramm advised the commissioners to gather comments from the property owners before making a decision and they agreed. Letters will be sent to the property owners in that area to attend the next meeting on July 5 or send correspondence concerning their opinions on the matter.”
4. From an article titled **“County Commissioners to Meet Tonight,” by Anita Goodan, 5 July, 2022:**
“During the commissioner’s last meeting [June 20], Starke County Highway Superintendent Dan Dipert brought the request from Norfolk Southern officials to the attention of the commissioners stating that the railroad and INDOT would pay the county money to close the crossing, which could cover the cost of the maintenance of those roads, if the commissioners agree to the closure.”
“It was a goal of the commissioners to explore the railroad company’s need to close the crossing, **as well as get input from residents in that area about the request.**” The Starke County Commissioners will hold more discussion on this topic when they meet tonight at 5 p.m. CT.
5. From the **minutes of Starke County Commissioners meeting, Jul 5, 2022**, Attorney Schramm advised that he had received email correspondence from an expert on railroad signals and communications who gave reasons for not accepting the NSR offer. Attorney Schramm read the email aloud. A news article on this meeting, i.e. **Starke County Commissioners Discuss Railroad Closure Proposal, July 7, 2022, by Anita Goodan**, notes that “With the majority of the residents voicing opposition to the railroad closure, the commissioners are leaning toward denying the request from Norfolk Southern officials.”
6. From the minutes of the **Starke County Commissioners meeting 18 July, 2022, at which the NSR petition is denied:**
“Commissioner Gourley asked if Superintendent Dipert has requested any new information about the railroad crossing request. Superintendent Dipert advised he did talk to him and the offer is still at \$60,000 plus the grant from INDOT. Commissioner Gourley advised given the feedback he will make a motion to reject the request to close the crossing on 225 S. Commissioner Cavender seconded the motion and the motion was approved with all ayes.”
7. In a subsequent news report by Mitch Columbe (July 19, 2022) titled **“Starke County Commissioners Reject Proposed Railroad Crossing Closure”**, the author states that
“The railroad closure proposal was part of the crossing elimination program ... for safety purposes, as reported by Highway Superintendent Dan Dipert in a previous meeting.”
“After hearing from the public and with majority of the residents voicing opposition to the railroad closure, the commissioners voted to deny the request from Norfolk Southern officials.”

¹⁰See Section 3.1.4, and footnote 8.

3.3 INRD petition to close crossing in Brown County, Indiana

A review is *attempted*, similar to that in § 3.2, of Brown County leadership team response re request by INRD to close crossing DOT# 292 193F.¹¹

Characteristics of response by Brown County Leadership team:

1. Discussions between BC and INRD re crossing closure began in 2018. INRD forwarded a petition to close DOT# 292 193F on May 20, 2019. Despite requirements per IC § 8-6-7.7-3.2(a), no hearings, or public discussion, ever obtained re the INRD petition, or prior to signing and adopting the CC&SA.
2. In the period between initial discussions (2018) and signing/adopting the CC&SA - April 2020 and May 2020, respectively – there is no evidence that BC attorneys attempted to marshal the Commissioners

¹¹Actions taken by Brown County Commissioners [starting 2018; ending May, 2020] in agreeing to INRD petition-to-close crossing DOT# 292 193F:

1. Discussion between BC and INRD re closing DOT# 292 193F began as early as 2018.
“At the April 15 Brown County Commissioners meeting, Brown County Highway Superintendent Mike Wagner said that Indiana Rail Road had been discussing the crossing and what to do with it for about two years.” Mike Wagner, BC Highway Superintendent, quoted in article titled “Indian Hill railroad crossing to close for good,” by Suzannah Couch, in *Staff Reports, Brown County Democrat*, June 10, 2020.
2. Following initial discussion in 2018, INRD filed the *Petition to Close Crossing DOT# 292 193F, dated May 20, 2019* with the Brown County Board of Commissioners.
3. The petition was not acted upon during the 11 months between May 20, 2019, and April 15, 2020, as is stated in the Recitals on p.1 of the *Indian Hill Road Crossing Closure and Settlement Agreement [CC&SA], dated April 9, 2020*:
“**Recitals**
1. On May 20, 2019, INRD petitioned the Board to close a railroad grade crossing located at Indian Hill Road, DOT# 292 193F, in Brown County, Indiana, pursuant to Indiana Code section 8-6-7.7-3.2.
2. **The Board has not held a public hearing to vote to grant or deny the petition.**” To this same point, in § 2.03 [of the CC&SA] INRD states that the 2019 petition-to-close will be withdrawn only after BC takes steps to satisfy terms given in § 2.01 [of the CC&SA] – meaning that the 2019 petition had not been withdrawn and was active for almost a year without being acted upon by BC.
4. First public disclosure of INRD request to close DOT# 292 193F came during April 15, 2020 Commissioners Meeting: “At the April 15 Brown County Commissioners meeting, Brown County Highway Superintendent Mike Wagner said that Indiana Rail Road had been discussing the crossing and what to do with it for about two years. They have now formally requested that the county close the crossing.” Excerpted from *COUNTY NEWS: “Railroad crossing closing; Liar’s Bench plans; bridge inspections,” Brown County Democrat Staff Reports-June 10, 2020***Note: The last part of this statement is not true, since the INRD petition filed with BC on May 20, 2019, is a formal, legally correct request to close the crossing.**”
5. At that same April 15, 2020 Commissioners Meeting, Superintendent Wagner stated “... Indiana Rail Road put together a proposal for the county to close the crossing with the commissioners’ approval. **“They can actually bypass us if we do not agree to it. They can petition to the state and close it anyways just for a public safety issue,” Wagner said. [1]** Note that this statement was made in *advance* of the subsequent vote, on May 6, 2020, to adopt *Resolution No. 2020-5-6-000*, to “... fulfill the intent of the **CC&SA** ...” to close crossing DOT# 292 193F. **[2]** This statement reflects misinformation re (1) the INDOT petition process as specified in *IC § 8-6-7.7-3.3*, and of (2) longstanding INDOT policy re deferring to local government in crossing disputes. **Note** that Counsel for the Board did not offer correction to these errors during the meeting, or subsequently. Rather, Counsel for the Board let similar statements, made during a June 17, 2020 Commissioners Meeting, remain unchallenged.
6. CC&SA is signed by INRD, and forwarded to BC, on April 9; signed by the Commissioners on April 21; at May 6, 2020 Commissioners meeting, BC Board unanimously adopts *Resolution No. 2020-5-6-000*, to “... fulfill the intent of the **CC&SA** ...” to close crossing DOT# 292 193F.
7. County officials did not notify residents or stakeholders in advance of adopting Resolution No. 2020-5-6-000 to close DOT# 292 193F, on May 6, 2020. Failure to notify residents/stakeholders is recorded in letters from Weddle Farms, Jennifer Ruff (Landowner), and other letters comprising Exhibit D of *DOT-RR-2494 Petition w Exhibits A-D to open crossing DOT# 292 193F along Indian Hill Road at highway grade*. Two additional essays from Jennifer Ruff were posted on March 26, 2021 to the Brown County Matters FB pages – addressed to BC Commissioner Jerry Pittman: “Nobody notified my family. I saw that my road was closing when reading the Brown County Democrat. When contacting anyone (commissioners or the railroad) I either got no responses or irrelevant information. The only people that were straightforward were the people at INDOT. They told me that they stay out of these decisions, that they are made between the county and railroad ...,” – from text of *March 26 – March 30 BCM dialogue*.

to allocate time for holding a hearing and receiving public/stakeholder comments re the 2019 petition, or (2) for receiving public/stakeholder comment and a holding a hearing re the 2020 CC&SA. As late as June 17, 2020, Commissioners and BC attorneys each state on the public record, repeatedly,¹² that (1) no prior notice was required for stakeholders, and (2) no hearings were required.

3.3.1 Conclusion

In the aftermath of the CC&SA being adopted with consequent closure of DOT# 292 193F, IHR stakeholders and BC citizens have expressed their thoughtful criticism of, and outrage regarding, not having had a voice in avoiding closure and sale of this resource – DOT# 292 193F. The voices of BC citizens did not have the expected protections of due process, transparent process, and processes in compliance with Indiana statutes.¹³

It is up to INDOT to compare § 3.3 with § 3.2, using **Indiana Administrative Rule 105 IAC 5-10-1(16) for its intended purpose, to enable these voices to have effect.**

¹²Listen to audio record of **BC Commissioners meeting, June 17, 2020 – between times 0:29:55 to 0:54:16**, or read transcript of **audio record for BC Commissioners meeting, June 17, 2020**.

¹³Read complete text of the **March 26 – March 30 BCM dialogue**; read transcript of **audio record for BC Commissioners meeting, June 17, 2020**; listen to audio record of **BC Commissioners meeting, June 17, 2020 – between times 0:29:55 to 0:54:16**.