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Cynthia T. Brown
Chief, Section on Administration
U.S. Surface Transportation Board
395 E Street, NW
Washington, DC 20423-0001

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**Re: Joint Petition for Rulemaking to Consider Amendments to Regulations
Governing Interim Use of Rights-of-Way as Trails (49 C.F.R. Part 1152);
Petition of the U.S. Department of the Interior and the U.S. Department of
Justice’s Environment and Natural Resources Division (STB Ex Parte No. 777)**

Dear Ms. Brown:

We are writing on behalf of landowners who may be impacted if the proposed rule changes in STB Ex. Parte No. 777 (the “proposed changes”) sought by the United States Department of Justice (“DOJ”) and the United States Department of Interior (“DOI”) in their December 20, 2024 Petition (the “Proposal”) were to be considered. The DOJ/DOI claim their Proposal “provides a new pathway to railbanking” that would “eliminat[e] temporary takings for the benefit of landowners.” (Proposal at 22) (emphasis added). (*See also id.* at 2-4.) We disagree.

My colleague, Lindsay Brinton, and I have represented thousands of landowners impacted by the National Trails System Act Amendments of 1983 (16 U.S.C. §§ 1241 *et seq.*) (the “Trails Act”) in well over one hundred cases in the United States Court of Federal Claims over the past fifteen years. Based on our experience, we are confident the proposed changes will neither “eliminate temporary takings” nor “benefit landowners.” While none of our current or past clients stand to be affected by a change in the Board’s rules, landowners going forward might. We submit this letter to give these landowners a voice.

While the proposed changes provide a “new pathway to railbanking[.]” (Proposal at 14), they also create a new route to the courthouse, one that still leads to an uncompensated taking of private property. These proposed changes will not change the effect the Trails Act has on landowners; but, if implemented, the DOJ will almost assuredly seek – as it has for the last three decades – to frustrate landowners’ rights to be compensated for any property rights taken pursuant to the Trails Act. The well-established rules that govern the accrual and statute of limitations of such takings claim will likely be challenged by the DOJ, leading to years of litigation and the concomitant expense of these challenges in terms of attorneys’ fees and expenses ultimately paid by the United States’ taxpayers.

The Trails Act works. As other commenters will surely tout to the Board, thousands of miles of the nation's railroad infrastructure have been preserved by virtue of the Trails Act. Those miles have been put to an interim public use; and the courts have been left to administer the constitutionally mandated compensation to the individual owners who host these public thoroughfares through their backyards, businesses, and farms.

The landowners who make claims seek and receive, at most, the *fair-market value* of the property rights taken from them as a result of the Trails Act. This can range from tens-of-dollars to millions of dollars, depending on the circumstances of the case. Owners who take on the burden of suing the federal government to obtain their compensation are entitled to “*reasonable*” attorneys’ fees reimbursed by the federal government. Those fees must either be approved by the Attorney General or awarded by the court. To be sure, there are examples of the compensation awarded to landowners piling in comparison to the attorneys’ fees awarded. However, these results are the product of a decades-long litigation strategy of the DOJ trying to block landowners’ claims at every turn. That litigation strategy of devoting significant resources to frustrate landowners’ claims, even when the compensation sought is relatively low in terms of monetary value, will assuredly be perpetuated by the proposed changes, not cured.

I. Instead of eliminating the temporary taking of private property rights, the proposed changes only seek to remove landowners’ constitutional right to compensation.

As the Board is well-aware, the Trails Act was amended in 1983 (16 U.S.C. § 1247(d)). Prior to these amendments, the provisions attempting to convert railroad rights-of-way to public trails did not work. As the committee report associated with the Trails Act stated, “The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use.” H.R. Rep. No. 98-28, at 8-9 (1983), *as reprinted in* 1983 U.S.C.C.A.N. 112, 120, *available at* 1983 WL 25294.

It was necessary to add the provision providing, “if such interim [trail] use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.” 16 U.S.C. § 1247(d). This single sentence preempted any contrary state law that would hold public trail use to be outside the scope of the railroad’s property rights and, thus, cause an extinguishment of the railroad’s easement. The amendment worked. Rail-trail conversions as originally envisioned by the Trails Act began to materialize, but, not surprisingly, so did litigation over the property rights that were explicitly preempted by the law.

Following the amendment, a couple in Vermont, the Preseaults, promptly challenged the constitutionality of the Trails Act when it resulted in the conversion of a railway easement over their land to a public trail. The Supreme Court of the United States upheld the constitutionality of the Trails Act even when it resulted in the taking of private property for a public use, because the remedy for such an uncompensated taking was enshrined in the Fifth Amendment to the United States Constitution: just compensation. *Preseault v. I.C.C.*, 494 U.S. 1 (1990).

Following the Supreme Court's upholding of the Trails Act as constitutional in *Preseault* in 1990, the United States Courts of Appeals and the United States Court of Federal Claims have heard hundreds of cases brought by landowners seeking compensation for land that did not return to their use and enjoyment because of the Trails Act. After the Supreme Court's ruling in 1990, the landowners in *Preseault* brought a new case in the Court of Federal Claims, seeking recovery under the Tucker Act. The case was ultimately appealed to the Federal Circuit, and in an *en banc* ruling, the Federal Circuit stated unequivocally that a recreational trail does not fit within the scope of an easement for railroad purposes:

Although a public recreational trail could be described as a roadway for the transportation of persons, the nature of the usage is clearly different. In the one case, the grantee is a commercial enterprise using the easement in its business, the transport of goods and people for compensation. In the other, the easement belongs to the public, and is open for use for recreational purposes, which happens to involve people engaged in exercise or recreation on foot or on bicycles.

Preseault v. United States, 100 F.3d 1526, 1542-43 (Fed. Cir. 1996). Eight years later, in 2004, the Federal Circuit best summarized why the Trails Act causes a taking of private property in instances where the railroad possesses only an easement, stating:

And it appears beyond cavil that use of these easements for a recreational trail-for walking, hiking, biking, picnicking, frisbee playing, with newly-added tarmac pavement, park benches, occasional billboards, and fences to enclose the railway-is not the same use made by a railroad, involving tracks, depots, and the running of trains. The different uses create different burdens. . . .

Some might think it better to have people strolling on one's property than to have a freight train rumbling through. But that is not the point. The landowner's grant authorized one set of uses, not the other. Under the law, it is the landowner's intention as expressed in the grant that defines the burden to which the land will be subject. The Government does not dispute this proposition- the Government agrees that, consistent with the state's law, the landowner's grant defines the burden with which the land is burdened.

Toews v. United States, 376 F.3d 1371, 1376-77 (Fed. Cir. 2004).

Since *Preseault*, three-decades of precedent has resulted in well-established law governing when and under what circumstances the Trails Act causes a taking of private property for which compensation is due, including whether the taking is temporary or permanent.

The DOJ/DOI's proposed changes purport to upend this precedent, albeit in vain. To be sure, the proposed changes would have the same result -- in certain circumstances this Board's invocation of the Trails Act will still result in the taking of private property for public use. However, the change in nomenclature to the orders of this Board invoking the Trails Act (i.e. the proposed "Notice of Negotiations" and "Notice of Railbanking") will likely be fodder for the DOJ to dispute, once again, when (and likely, if) the resultant taking occurs.

Nothing about the proposed changes would eliminate the *effect* of the Board’s actions on these owners’ property. The DOJ/DOI states that the current Notice of Interim Trail Use or Abandonment (“NITU”) does not authorize trail use immediately or in the absence of an agreement, (Proposal at 8), but it does authorize the railroad to possess that right in the land – otherwise, the railroad would have nothing to negotiate with the trail sponsor in the first place. As the Federal Circuit recognized in *Caquelin v. United States*, 959 F.3d 1360, 1367 (Fed. Cir. 2020) (“*Caquelin I*”):

The NITU in this case, as in similar cases, was a government action that compelled continuation of an easement for a time; it did so intentionally and with specific identification of the land at issue; and it did so solely for the purpose of seeking to arrange, without the landowner's consent, to continue the easement for still longer, indeed indefinitely, by an actual trail conversion.

More recently, the Federal Circuit in *Memmer v. United States* observed that the NITU is a mandated continuation of the railroad’s easement to provide for someone other than the landowner to use the land:

Thus, once initiated, a NITU can effect a “mandated continuation” of an easement by the STB that “provid[es] a right of occupation by someone other than the landowner and ... bar[s] the landowner from using the ground burdened by the easement.” This “mandated” or “compelled” continuation of an easement can occur regardless of whether the NITU ultimately leads to a trail-use agreement or the railroad's abandonment is ultimately consummated.

50 F.4th 136, 145 (2022) (internal citations removed) (quoting *Caquelin II*, 959 F.3d at 1367; *Ladd v. United States*, 630 F.3d 1015, 1025 (Fed. Cir. 2010) and *Caldwell v. United States*, 391 F.3d 1226, 1234, 1236 (Fed. Cir. 2004)).

The NITU (and, thus, the Trails Act) is critical in ensuring that the railroad possesses the requisite property rights to transfer to the trail sponsor under federal law by eliminating the possibility that the railroad does not possess these rights under state law. The proposed changes, however, simply change the name of the Board action that would transfer these rights to the railroad to sell, donate, or otherwise negotiate away to a third party in exchange for value. The proposed changes to 49 C.F.R. § 1152.29(d)(2) provides that the “Notice of Negotiations”:

will indicate that interim trail use that results from the negotiations is subject to future restoration of rail service and to the sponsor’s continuing to meet its responsibilities described in paragraph (1)(2) of this section.

(Proposal at 27.) The Notice of Negotiations would also:

provide that, if interim trail use agreement is reached, the parties shall file the notice described in paragraph (h).

The Proposal would then modify Paragraph (h) to state in part:

When the parties negotiating for rail banking/interim trail use reach an agreement, the trail sponsor and railroad shall jointly notify the Board within 10 days that the agreement has been reached. . . . The Board will issue a Notice of Railbanking to acknowledge and document the parties' agreement.

The proposed changes thus make clear that the Notice of Negotiations is the government action invoking the Trails Act. Without the Trails Act, the railroad would not possess the requisite rights in the property to negotiate to a trail sponsor. While it appears the DOJ/DOI's Proposal seeks to establish the Notice of Railbanking as the trigger for any takings claim by an affected landowner, the Notice of Railbanking is simply an "acknowledgment" by this Board "documenting" that a trail-use agreement is in place and, thus, a third-party trail sponsor now possesses those rights the railroad was able to transfer and sell because of the Trails Act.¹

The DOJ/DOI claims that these proposed changes will:

benefit landowners by eliminating features of the existing regulations that courts (sometimes) have found to mandate or compel the continuation of a railroad's easement and thereby prevent reversion of private property rights and result in temporary takings of private property rights, before any interim trail use agreement has been reached."

(Proposal at 2-3.) But, the Notice of Negotiations functions to invoke the Trails Act in exactly the same way the Federal Circuit found to cause the taking in *Caquelin* and *Memmer*, thus simply giving a new name to the same effect.

The DOJ/DOI further claim that the proposed changes:

may further benefit landowner by reducing the period of time in which any uncertainty may arise related to the potential for preemption of any reversionary property interests they may own.

(Proposal at 25). Again, the uncertainty is still there – a Notice of Negotiations provides the same period of time for the railroad and trail sponsor to negotiate the transfer of property rights that belong only to the landowner under state law.

¹ The proposed changes provide for the Trails Act to be invoked when a railroad seeks to discontinue rather than abandon. See 47 C.F.R. § 1252.29(d) (as proposed). However, the proposed changes also provide that "In a discontinuance exemption proceeding, unless the Board orders otherwise, the railroad may salvage track and materials upon the Board's issuance of the Notice of Railbanking." *Id.* (as proposed). This provision seems to transmogrify discontinuance to abandonment, as removing the tracks seems to be an obvious relinquishment of rail use of the corridor. However, these comments focus on the effect of these changes on *landowners* rather than the railroads, shippers, and environmental advocacy groups and agencies that may be affected by this aspect of the proposed changes.

II. The DOJ has fought landowners' claims for compensation resulting from Trails Act takings for decades, driving up costs of the program, sometimes in multiples of the amount of property value at stake.

While the pathway to railbanking is streamlined and efficient at the Board, the pathway to compensation for landowners in the federal courts is not. Landowners have faced staunch opposition to their claims for compensation dating back to passage of the regulations relating to the Trails Act. *See National Wildlife Federation v. I.C.C.* 850 F.2d 694, 704-08 (D.C. Cir. 1988). The DOJ's efforts to prevent landowners from receiving their constitutionally mandated compensation over the past three decades has been consistent and expensive. In the early years after *Preseault*, the DOJ was successful in closing the courthouse doors to hundreds of landowners with otherwise meritorious claims because they had not filed their claims within the Tucker Act's six-year statute of limitations. *See Caldwell*, 391 F.3d at 1235; *Barclay v. United States*, 443 F.3d 1368, 1375-76 (Fed. Cir. 2006); *Illig v. United States*, 274 F.App'x 883, 884 (Fed. Cir. 2008). The courts in a series of cases established a "bright line rule" that any claim for compensation as a result of the Board's invocation of the Trails Act must be filed within six years of the *first* order of the Board invoking the Trails Act – a NITU in an abandonment exemption proceeding, or a Certificate of Interim Trail Use or Abandonment ("CITU") in an abandonment proceeding. *Id.*

Then, the DOJ sought to prevent landowners who followed the Court's guidance and filed their lawsuits within six-years of the NITU/CITU from receiving compensation when no trail-use agreement was reached, *see Ladd*, 630 F.3d at 1021, which the Federal Circuit rejected. *Id.* at 1024-25. Despite the United States Court of Appeals for the Federal Circuit ruling definitively on the issue, the DOJ has continued to advocate its position despite circuit precedent. *See, e.g., Caquelin v. United States*, 697 F. App'x 1016, 1019 (Fed. Cir. 2017) ("*Caquelin I*") (DOJ seeking to overturn at least *Ladd*, if not also *Barclay* and *Caldwell*); *Caquelin II*, 959 F.3d at 1366 (same), *Memmer*, 50 F.4th at 145-46 (rejecting another attempt by the DOJ to find no taking where a trail use agreement was not entered). *See also Banks v. United States*, 138 Fed. Cl. 141, 147-50 (Fed. Cl. 2018) (rejecting attempt by DOJ to deny compensation for temporary takings); *Balagna v. United States*, 138 Fed. Cl. 398, 402-03 (2018) (same). The resulting litigation has amounted to millions of dollars of taxpayer money being spent to litigate claims that could *and should* have settled for fair-market rental values that are typically in the hundreds or a few thousand dollars per claim. Instead, the DOJ has brought to bear the full resources of the agency to litigate these claims, often outspending the amount of compensation due to the owners a hundredfold through hiring experts, conducting discovery, briefing, and arguing its case to the courts. Those efforts have resulted in a string of losses, as the courts have chosen to follow decades of established precedent.

Yet, the DOJ persists. Viewed in the context of a now thirty-seven year fight (dating back to the ruling in *National Wildlife*), coupled with the statements made in the Proposal, it is clear that the proposed changes at issue here are yet another chapter in this decades-long attempt to thwart landowners' constitutional right to compensation.

It appears that the true driving force for these proposed changes is a desire to end landowners' claims for temporary takings resulting from the Board's invocation of the Trails Act, along with the commensurate attorneys' fees and litigation expenses that result from seeking compensation for the takings. As stated in the Proposal:

ENRD has explained in litigation that a large percentage of cases are initially brought as temporary taking claims, that “[a]ttorneys’ fees may amount to many times the compensation award in any case,” and that “the United States is required to expend significant resources defending against [the] claims.”

(Proposal at 12, n.4.) It is true that when a landowner brings a claim for an uncompensated taking against the federal government, Congress also intended that the Attorney General or the court would award the owner, in addition to just compensation and interest:

such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4654 (the “URA”). Importantly, the URA is only applicable when the owners’ claim is successful. Until that point, owners bear the burden of instating litigation and prevailing in that litigation before availing themselves of the URA. So, to begin with, the URA only awards *successful* claimants.

To the extent that the Justice Department has had to reimburse attorneys’ fees and litigation expenses in Trails Act cases, it is only because the landowners have carried their burden and shown an uncompensated taking has occurred. There are examples of attorneys’ fees and litigation expenses outweighing the amount ultimately awarded to the landowners, but this is a direct result of the amount of time the landowners’ attorneys had to invest in the case in order to prevail. In fact, the leading case to date, *Caquelin v. United States*, is one in which the parties agreed to a \$900 award of just compensation for Norma Caquelin, an Iowa landowner whose property was subject to a NITU allowing the railroad that controlled the easement over her land to attempt to sell it as a public park for six months. The railroad did not sell the land and ultimately abandoned the line, extinguishing the easement over Ms. Caquelin’s property. While the government’s liability to Ms. Caquelin was \$900, it nonetheless spent six-and-a-half years denying its liability, appealing to the United States Court of Appeals for the Federal Circuit twice, and losing both times. Needless to say, Ms. Caquelin’s legal fees for defending her meritorious claim far exceeded \$900. However, this was driven by the litigation strategy of the proponent of the proposed changes, the United States Department of Justice, who made the decision to litigate that case a way in which it required two appeals and a trial, losing at every stage.

One reason cited by the DOJ/DOI for its proposed changes is “reducing burdens on the public fisc.” (Proposal at 23). But the DOJ’s sentiments ignore the burden its litigation choices, as noted above, have placed on the public fisc. The consistent years-long commitment to a scorched-earth litigation strategy by the DOJ contributes greatly to the cost of the Trails Act. This litigation strategy is not unique to the *Caquelin* case. As Judge David Tapp of the United States Court of Federal Claims recently wrote in a published decision awarding landowners their legal fees under the URA:

[T]he purpose of URA fees is not solely to compensate for the monetary value of the property taken, but also to recognize the significant legal hurdles property owners may face when challenging government takings. These challenges often involve complex legal arguments, extensive research, and the need to overcome the government's significant resources. Moreover, the deprivation of property rights by the government against the will of the owner is not a little thing. Even in cases where the final award is modest, the legal effort required to secure that award can be substantial, justifying the recovery of higher fees. Accordingly, the Court will not diminish an attorney fee award solely on the United States' assessment of its proportionality to the recovery.

Hyatt v. United States, No. 23-499, --- Fed. Cl. ---, 2025 WL 98569, at *6 (Fed. Cl. Jan. 16, 2025).

Judge Tapp went on to explain that the fee-shifting provisions of the URA not only ensure owners' are able to vindicate important constitutional rights, but it also places an incentive on the government to efficiently resolve meritorious claims:

The spirit of the URA is intended to hold the United States accountable in takings cases by deterring unnecessary litigation. The prospect of paying substantial attorney's fees incentivizes the government to negotiate fairly, minimize delays, and avoid frivolous takings. Moreover, URA fees compensate property owners for the expenses incurred in defending their rights and securing just compensation. This helps level the playing field, as the government possesses significant resources. By requiring the government to pay reasonable attorney's fees, the URA helps enforce the Fifth Amendment's guarantee of just compensation and promotes transparency and accountability in government acquisition processes. The government's characterization of this litigation as "straightforward" is inapposite given its unwillingness to even respond to the Claim's Book process and insistence on contesting liability. (Def.'s Resp. at 16). In this case, Plaintiffs have shown that they are entitled to their requested fees.

Id. at *15. Stated another way, as the Supreme Court did forty years ago, and the Court of Appeals for the District of Columbia Circuit did five years earlier:

The government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response.

Id. at *10 (quoting *City of Riverside v. Rivera*, 477 U.S. 561, 580, n.11 (1986)) (quoting *Copeland v. Marshall*, 641 F.2d 890, 904 (D.C. Cir. 1980) (en banc)).

The examples above demonstrate that the URA obligations the United States has incurred have not been the result of this Board's actions, its rules and regulations, or its implementation of the Trails Act. Rather, the URA obligations incurred by the United States are largely a direct result of its litigation choices. Therefore, a change in the Board's rules will not affect the public fisc as the DOJ/DOI claims.

Conclusion

The DOJ/DOI's proposed changes when read in their totality are both a "new pathway to railbanking" and a direct route to protracted litigation over what is now settled law – how the Trails Act results in a taking of private property for public use, and when that taking occurs. The proposed changes do nothing to change that the implementation of the Trails Act must necessarily interfere and override state law in certain situations to be successful. That interference with property rights sometimes results in an uncompensated taking. And, sometimes an owner makes a claim for just compensation for that taking.

When that happens, the United States must pay. That payment is not a windfall. It is the fair-market value of what the United States has taken in order to carry out its goal of preserving thousands of miles of railroads in the United States for a new use and future transportation goals. For three decades, the Trails Act has functioned in a way that balances the government's interest in maintaining jurisdiction over land no longer used in interstate commerce with its sometimes necessary frustration of private property interests in accomplishing this goal. The evolution of inverse condemnation actions by affected landowners has resulted in the United States acquiring property rights in thousands of miles of corridor below market value – that is because not all landowners make a claim, many claims settle for less than market value, and the landowners who do bring their cases to trial have carried the significant burden of proving market value – no more or no less. The only way to make the Trails Act "cheaper" for the American public short of a direct payment would be to repeal the Fifth Amendment to the Constitution.

Respectfully submitted,



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