

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**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**

I. INTRODUCTION

The U.S. Department of the Interior and the U.S. Department of Justice’s Environment and Natural Resources Division respectfully file this petition under 49 C.F.R. § 1110.2(b) to request that the Surface Transportation Board (“the Board”) open a rulemaking proceeding to consider potential amendments to the Board’s regulations implementing section 208 of the National Trails System Act Amendments of 1983 (“the Trails Act Amendments”).

The Trails Act Amendments facilitate the preservation of rail corridors by allowing “railbanking,” a voluntary process where a railroad negotiates an agreement with a trail sponsor that allows public recreational trail use of the corridor on an interim basis, while preserving the corridor for potential reactivation of active rail service in the future. *See* Pub. L. No. 98-11, § 208, 97 Stat. 42, 48 (1983) (codified at 16 U.S.C. § 1247(d)); H.R. Rep. No. 98-28, at 8 (1983). Consistent with the text and purpose of the statute, this petition recommends specific amendments to the Board’s regulations that would allow a railroad to railbank a line without first seeking and obtaining authority to abandon the line. Three Board Members suggested an openness to this approach in a matter in which a protracted dispute over whether a railroad

should be granted authority to abandon a particular line could have been avoided if the Board's regulations had allowed interim trail use without prior authorization of abandonment. *See R.J. Corman Railroad Property, LLC—Abandonment Exemption—in Scott, Campbell, and Anderson Counties, Tenn.*, AB 1296X, slip op. at 6-8 (STB Served Nov. 17, 2022) (Board Member Fuchs joined by Board Member Schultz concurring and Board Member Hedlund concurring) (“*R.J. Corman*”).

The recommended amendments would implement the revised approach to railbanking in two ways. First, the amendments would allow railroads to pursue railbanking by initiating an exemption proceeding for the purpose of obtaining authority to discontinue service over a line, rather than to abandon the line. Second, the amendments would leave in place existing provisions that allow railbanking to occur incident to an abandonment proceeding, while clarifying that the abandonment and railbanking processes are distinct and modifying terminology to more accurately describe the administrative railbanking process.

The amendments would have numerous benefits for railroads, the Board, trail sponsors, landowners, and other stakeholders. Among other things, the amendments would help promote additional interim trail use and railbanking, consistent with the express purposes of the Trails Act Amendments. The amendments would serve to reduce burdens on railroads and the Board, such as by sidestepping, in some instances, potential disputes over whether a railroad should have authority to abandon (and thus railbank) a line. In addition, the discontinuance pathway to railbanking has the potential to alleviate other burdens on railroads, the Board, potential trail sponsors, and entities involved in environmental and historic reviews. The amendments should 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.

II. IDENTITY AND INTERESTS OF THE PETITIONERS

Each of the Petitioners has a substantial interest in the matters addressed by this petition. The Department of the Interior has important historical connections to the Trails Act Amendments and the Board's implementing regulations. *See Preseault v. I.C.C.*, 494 U.S. 1, 5-6 (1990); *Rail Abandonments—Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591, 593 (1986) (“1986 Board Decision”). The Department of the Interior's National Park Service has responsibilities related to trails under the Trails Act, and its core mission under its Organic Act and related authorities (54 U.S.C. § 100101 et seq.) broadly overlaps with the goals of the Trails Act (16 U.S.C. §§ 1241-1251) and the Trails Act Amendments, which “provide for the ever-increasing outdoor recreation needs of an expanding population and . . . promote the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation.” 16 U.S.C. § 1241(a). In addition, the Trails Act directs the National Park Service to encourage establishment of trails when carrying out its duties under the Land and Water Conservation Fund Act (54 U.S.C. chapter 2003), and the creation of interim trails under the Trails Act Amendments supports this goal. *See* 16 U.S.C. § 1247(a). The Department of the Interior's Bureau of Land Management shares an interest in the preservation of open space and the recreation and transit opportunities provided by interim trails, and some interim trails cross federal land managed by the Bureau. The Department of the Interior accordingly has an interest in the efficient and effective administration of the Trails Act Amendments and the Board's implementing regulations, and in facilitating additional trail use pursuant to those provisions.

The Department of Justice’s Environment and Natural Resources Division (ENRD) defends a large number of cases filed by landowners seeking just compensation for alleged takings of property arising in connection with implementation of the Trails Act Amendments. *See, e.g., Memmer v. United States*, 50 F.4th 136 (Fed. Cir. 2022); *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004). ENRD is therefore familiar with the operation of many of the Board’s programs and implementing regulations, and supports their efficient operation in accordance with congressional intent. ENRD is also familiar with features of the administrative process under the Board’s existing regulations implementing the Trails Act Amendments that may burden private property rights in ways that give rise to compensable “temporary physical takings” of property. ENRD supports and seeks to further Executive Branch policies related to constitutionally protected private property rights. *See* Exec. Order No. 12630 at § 1(b), 53 Fed. Reg. 8859 (Mar. 15, 1988).

In advance of this filing, the Petitioners also coordinated with the Department of Transportation, which has important historical connections to the Trails Act Amendments and the Board’s regulations. *See Preseault*, 494 U.S. at 5-6; *1986 Board Decision*, 2 I.C.C.2d at 593. Petitioners note that the Department of Transportation’s Federal Highway Administration and Federal Railroad Administration provided technical assistance to Petitioners and did not identify any concerns with Petitioners filing this petition.

III. BACKGROUND

A. The Trails Act Amendments

The Trails Act Amendments of 1983 reflected “the culmination of congressional efforts to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails.” *Preseault*, 494 U.S. at 5. Congress previously had included in the Railroad Revitalization and Regulatory Reform Act of 1976 several provisions focused on promoting the conversion of

abandoned rail lines to trails. Recognizing that these measures were unsuccessful, Congress enacted the Trails Act Amendments to authorize the Board's predecessor, the Interstate Commerce Commission, "to preserve for possible future railroad use rights-of-way not currently in service and to allow interim use of the land as recreational trails." *Id.* at 7; *see* H.R. Rep. No. 98-28, at 8.¹

The Trails Act Amendments added the following new subsection to Section 208 of the National Trails System Act:

. . . . Consistent with the purposes of [the Railroad Revitalization and Regulatory Reform Act of 1976], and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with [the Trails Act], if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with [the Trails Act], and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

16 U.S.C. § 1247(d).

Review of the legislative history of this provision confirms that Congress intended to preserve rail corridors, when possible, by providing opportunities for trail use on an interim basis when rail lines are "not immediately necessary for active service." H.R. Rep. No. 98-28, at 8. The legislative history states that "[t]he key finding of this amendment is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad

¹ From this point forward, the petition does not distinguish between the Board and its predecessor, the Interstate Commerce Commission.

purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes.” *Id.* It also explains that “[t]his amendment would ensure that potential interim trail use will be considered prior to abandonment” and that “[i]f interim use of an established railroad right-of-way consistent with the [Trails Act] is feasible, and if a State, political subdivision, or qualified private organization is prepared to assume full responsibility for the management of such right-of-way, for any legal liability, and for the payment of any and all taxes that may be levied or assessed against such right-of-way—that is, to save and hold the railroad harmless from all of these duties and responsibilities—then the route will not be ordered abandoned.” *Id.* at 9. Accordingly, there is no indication in the legislative history that: (1) Congress intended to require an authorization of abandonment as a precondition of railbanking; or (2) Congress intended to allow railroads to pursue railbanking only by initiating abandonment proceedings.

B. The Board’s Implementing Regulations

When the Board promulgated regulations in 1986 to implement the Trails Act Amendments, it interpreted the Amendments as providing “only for voluntary transfers of rights-of-way from railroads to trail operators” and thus “contemplat[ing] only voluntary arrangements between railroads and would-be trail operators.” *Nat’l Wildlife Fed’n v. I.C.C.*, 850 F.2d 694, 696, 698 (D.C. Cir. 1988); *1986 Board Decision*, 2 I.C.C.2d at 598. Consistent with this interpretation, the Board decided to minimize the regulatory burdens on railroads and trail sponsors. *1986 Board Decision*, 2 I.C.C.2d at 605. The Board also concluded that it had only a ministerial role in the railbanking process. *See Goos v. I.C.C.*, 911 F.2d 1283, 1295 (8th Cir.

1990) (affirming that the Board’s role “is essentially a ministerial one”); *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1152 (D.C. Cir. 2001) (same).

Since the original rulemaking in 1986, the Board’s railbanking procedures have been integrated into its procedures for evaluating proposed abandonments of rail lines. Railroads usually seek authority to abandon rail lines by filing a notice of exemption under 49 C.F.R. § 1152.50 or a petition for exemption under 49 C.F.R. § 1152.60.² The railroad prepares environmental and historic reports and serves them on designated entities, while also publishing notice of proposed abandonments in newspapers. 49 C.F.R. §§ 1105.7, 1105.8. The railroad also provides notice of the exemption proceeding to the entities designated in 49 C.F.R. § 1152.50(d). The railroad additionally provides the Board with a draft notice that the Board publishes in the Federal Register to inform stakeholders and the public of the proposed abandonment and, *inter alia*, the opportunity for potential trail sponsors to express interest in negotiating an interim trail use agreement with the railroad. 49 C.F.R. §§ 1152.50(d)(3), 1152.60(c).

Following publication of the notice in the Federal Register, a potential trail sponsor has a short period of time (10 days when a notice of exemption is filed and 20 days when a petition for exemption is filed) to file a petition in the abandonment proceeding that contains a statement indicating that it is interested in acquiring or using the right-of-way for interim trail use. 49

² Railroads less frequently seek authority to abandon by filing applications under 49 U.S.C. § 10903 and 49 C.F.R. § 1152.20. These proceedings are referred to as regulated abandonment proceedings. The more summary exemption proceedings initiated under 49 C.F.R. § 1152.50 or 49 C.F.R. § 1152.60 are authorized by 49 U.S.C. § 10502, which provides that that the Board may exempt a transaction or service from regulation when it finds that regulation “is not necessary to carry out the transportation policy” of 49 U.S.C. § 10101 and that either “the transaction or service is of limited scope” or regulation “is not needed to protect shippers from the abuse of market power.”

C.F.R. § 1152.29(a), (b)(2).³ The statement must indicate that the interim trail sponsor is willing to assume full responsibility for managing the right-of-way, for any legal liability arising out of the transfer or use of the right-of-way, and for the payment of any taxes that may be assessed against the right-of-way. 49 C.F.R. § 1152.29(a)(3). The railroad must submit a reply within 10 days informing the Board whether it has voluntarily decided to negotiate an interim trail use agreement. 49 C.F.R. § 1152.29(b)(2).

If the railroad decides to negotiate with the potential trail sponsor, the Board issues a Notice of Interim Trail Use and Abandonment (NITU) that initially allows one year for negotiations, with potential extensions. 49 C.F.R. § 1152.29(d)(1)(i)-(ii). The NITU permits the railroad to discontinue service, cancel any applicable tariffs, and salvage track and materials, consistent with interim trail use and any other Board orders. 49 C.F.R. § 1152.29(d)(1)(i). The NITU does not authorize trail use immediately or in the absence of an agreement. In the event that no agreement is reached, the NITU authorizes the railroad to abandon the line by filing a notice of consummation of abandonment. 49 C.F.R. § 1152.29(d)(1)(i). In the event an agreement is reached, the railroad and trail sponsor file a joint notice to so inform the Board. 49 C.F.R. § 1152.29(h). The NITU indicates that interim trail use is subject to future restoration of active rail service and the trail sponsor continuing to fulfill the requisite legal and financial responsibilities. 49 C.F.R. § 1152.29(d)(2).

³ If no statement of interest is filed (and in the absence of other objections or comments that may require Board attention), an exemption sought by notice of exemption becomes effective (i.e., providing authority for the railroad to abandon the line) on the date that is 30 days after the date of the Federal Register publication. 49 C.F.R. § 1152.50(d)(3). For a petition for exemption, the exemption becomes effective when the Board grants the petition. In either case, the line is not actually abandoned and removed from the Board's jurisdiction unless the railroad files a timely notice of consummation of abandonment. *See* 49 C.F.R. § 1152.29(e)(2).

The Board’s existing regulations do not allow a railroad to pursue railbanking by initiating an exemption proceeding for the purpose of receiving authority to discontinue service over a line, even though discontinuance of service (unlike abandonment) is an inherent part of railbanking because railroads discontinue active rail service when lines are railbanked (by contrast, railbanking avoids potential abandonment of rail lines and does not involve or equate to abandonment). *See Preseault*, 494 U.S. at 5 n.3 (discussing the distinction between discontinuance and abandonment); *id.* at 8 (noting that Congress deemed interim trail use “to be like discontinuance rather than abandonment”). The procedures for seeking authority to discontinue service by filing a notice of exemption under 49 C.F.R. § 1152.50 or a petition for exemption under 49 C.F.R. § 1152.60 are largely the same as the procedures for seeking authority to abandon under these same regulations.

Under the Board’s existing regulations, many railroads elect to railbank their lines, rather than abandon them. For example, in fiscal year 2017, the Board authorized abandonment in 34 exemption proceedings, while allowing 15 requests for railbanking. *See* Surface Transp. Bd., *FY 2017 Annual Report* 19, 21 (2018), <https://www.stb.gov/wp-content/uploads/files/docs/annualReports/Annual%20Report%202017.pdf>. Similarly, the Rails to Trails Conservancy’s database indicates that of 718 railbanking negotiations between 1987 and 2018, “at least 393 corridors—representing 5,895.53 miles of right-of-way—were successfully railbanked.” Limiting Extensions of Trail Use Negotiating Periods; Rails to Trails Conservancy—Petition for Rulemaking, 84 Fed. Reg. 66320, 66321 (Dec. 4, 2019) (“2019 Final Rule”). Yet, while the rails-to-trails program has been popular and often results in the preservation of railroad corridors through railbanking, the data also indicate that there are missed opportunities for interim trail use

and avoiding abandonments of rail lines, because a substantial number of lines continue to be abandoned notwithstanding the rails-to-trails program.

C. *R.J. Corman* Decision and Concurring Expression

In 2022, the Board issued a decision in *R.J. Corman* to place conditions on a previously authorized abandonment of a rail line that had not yet been consummated. *See R.J. Corman*, AB 1296X, slip op. at 1-6. Potential trail sponsors had expressed an interest in negotiating an interim trail use agreement with the railroad. *Id.* at 1 n.3. If an agreement had been reached, that would have resulted in the line being railbanked, not abandoned. *See id.* However, issues were raised concerning whether the railroad should have authority to abandon the line, and this generated substantial burdens and delays. *See id.* at 2-3. In its November 2022 decision, the Board concluded that the possibility that any abandonment would strand certain other rail lines meant that the railroad had to initiate additional proceedings to abandon those other lines. *See id.* at 3-6.

A concurring expression by Board Member Fuchs (joined by Board Member Schultz) observed that “the burden on [the railroad] has been excessive.” *Id.* at 6. The expression recommended that the Board consider a regulatory change that could avoid such additional proceedings and the associated burdens on railroads. *Id.* at 7. The expression reasoned that the railroad was interested in executing an interim trail use agreement and that “[t]he Trails Act . . . does not require abandonment authority as a prerequisite” to interim trail use and railbanking. *Id.* The expression thus observed that a regulatory change could “reduce burden and better protect rail transportation corridors generally” and that the statutory restoration and reconstruction rights included in the rail-to-trail process, 16 U.S.C. § 1247(d), could “reduce would-be stranded line conflicts by maintaining connectivity.” *Id.* Board Member Hedlund wrote a separate concurring expression that agreed that the burdens associated with the proceeding had been excessive and

expressed appreciation for the thoughtful concurrence suggesting ways the Board might refine the relevant processes. *Id.* at 8.

D. Takings Litigation

In *Preseault*, the Supreme Court rejected challenges to the constitutionality of the Trails Act Amendments, holding in relevant part that the Amendments do not violate the Fifth Amendment Takings Clause. The Court recognized that the Amendments allow interim trail use and railbanking notwithstanding the possibility that the owners of land adjacent to the right-of-way might hold reversionary interests in the right-of-way. The Court upheld the Amendments because “even if the rails-to-trails statute gives rise to a taking, compensation is available to petitioners under the Tucker Act . . . and the requirements of the Fifth Amendment are satisfied.” 494 U.S. at 4-5. The Federal Circuit subsequently held “that a Fifth Amendment taking occurs when, pursuant to the Trails Act, state law reversionary interests are effectively eliminated in connection with a conversion of a railroad right-of-way to trail use.” *Caldwell*, 391 F.3d at 1228 (citing *Preseault v. United States*, 100 F.3d 1525, 1543 (Fed. Cir. 1996) (en banc)).

In 2004, the Federal Circuit concluded that this kind of Fifth Amendment takings claim may accrue when the Board issues a NITU. The court reasoned that “[t]he issuance of the NITU is the only *government* action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way” and that “[a]fter a final trail use agreement is reached, the NITU remains in effect indefinitely and abandonment cannot be accomplished under the NITU until trail use terminates (without restoration of rail service).” *Id.* at 1233-34 (cleaned up). The court held that any compensable taking of property may begin as early as the date on which the Board issues a NITU. *Id.* at 1236.

In subsequent decisions, the court held that a landowner may recover for a “temporary physical taking” if no trail use agreement is reached (even if the railroad decides not to abandon its rail line after the NITU expires), as long as the court finds that, if not for the NITU, the railroad would have abandoned the line (i.e., “relinquished its rights to the rail right-of-way”) during the NITU period. *See, e.g., Memmer*, 50 F.4th at 145; *Caquelin v. United States*, 959 F.3d 1360, 1371-72 (Fed. Cir. 2020). The underpinning of these “temporary takings” cases is that courts have viewed the NITU as a “‘mandated’ or ‘compelled’ continuation of” the railroad’s easement. *See, e.g., Memmer*, 50 F.4th at 145.⁴

In such cases, landowners have stated that “[g]overnment action confiscating an owner’s property or practically ousting an owner from possession of his property is perhaps the most serious form of invasion of an owner’s property interests, depriving the owner of the rights to possess, use and dispose of the property for which the government has a categorical duty to pay the owner.” Br. for National Association of Reversionary Property Owners, *Memmer v. United States*, 50 F.4th 136 (Fed. Cir. 2022) (Nos. 2021-2133, 2021-2220), 2023 WL 2583284, at *4 (cleaned up). They have further claimed that the Board is “[e]ncumbering an owner’s land with a Trail Act easement” and stated that they should not be placed “in a Trails Act-limbo where the government has denied them use and possession of their land but the owners are not entitled to compensation unless and until the railroad and trail-sponsor reach a trail-use agreement.” *Id.* at

⁴ 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.” Br. for United States, *Caquelin v. United States*, 959 F.3d 1360 (Fed. Cir. 2020) (No. 16-1663), 2016 WL 4419147, at *3; *see also* Surface Transp. Bd., *Performance and Accountability Report Fiscal Year 2023* 59 (2023), <https://www.stb.gov/wp-content/uploads/STB-FY-2023-PAR.pdf> (explaining that the Board assists ENRD in defending takings litigation).

*8-9. One aspect of landowner concerns is that if a railroad is compelled to delay abandonment of a railroad corridor by operation of the Trails Act (as landowners claim), a burden on a landowner's unfettered use of property in the corridor can occur, resulting in a temporary taking of real property rights.

IV. RECOMMENDED REGULATORY REFORMS

Petitioners identify in the Appendix specific amendments to 49 C.F.R. § 1152.29 that the Board could adopt to implement the recommended reforms.⁵ The amendments primarily would function to allow railroads and potential trail sponsors to negotiate agreements that facilitate interim trail use, without requiring the railroad to obtain authority to abandon the rail line. This requirement is not imposed by the Trails Act Amendments (as discussed in Part V), and it is not necessary because interim trail use and railbanking do not involve or equate to abandonment of a rail line. Interim trail use and the associated railbanking instead help to avoid potential abandonment of unused rail lines, preserving rail corridors and providing an opportunity for future reactivation of active rail service.

The reforms would eliminate the requirement to obtain authorization of abandonment in part by creating a new discontinuance pathway to railbanking. A railroad could elect to use this new pathway by initiating a discontinuance exemption proceeding, rather than an abandonment exemption proceeding. The reforms would also make clarifying adjustments to the existing path to railbanking (an abandonment exemption proceeding), starting the process with a simplified "Notice of Negotiations" that would authorize interim trail use negotiations. Abandonment

⁵ The amendments implement the reforms only as to exemption proceedings. If the Board opens a rulemaking proceeding, it could solicit comment on whether similar regulatory reforms should be implemented for regulated abandonment proceedings, which are also addressed in 49 C.F.R. § 1152.29, but are initiated by railroads far less frequently than exemption abandonment proceedings.

would be available at a later point if negotiations result in no agreement. The process would conclude with a “Notice of Railbanking” if a trail use agreement is reached.

The reforms include language confirming that railroad participation in railbanking is voluntary and, as is currently the case, that the railroad is not binding itself to negotiate for the entire period established by the Board. *See, e.g.*, Proposed Revised § 1152.29(d)(1), (d)(1)(iii). The language also would confirm the voluntary nature of the new discontinuance pathway, making the new pathway consistent with the Board’s longstanding focus on minimizing regulatory burdens and its longstanding interpretation of the Trails Act Amendments as only permitting voluntary arrangements.

A. Discontinuance Pathway to Railbanking

The Board would create the new discontinuance pathway to railbanking by adding a new subsection (i) to 49 C.F.R. § 1152.29 (or a similar provision elsewhere in the Board’s regulations) that allows a railroad to file a notice of exemption under 49 C.F.R. § 1152.50 or a petition for exemption under 49 C.F.R. § 1152.60 that seeks authority to discontinue service over a line⁶ and that expressly states that the railroad elects to make 49 C.F.R. § 1152.29 applicable.⁷

In a significant fraction of existing railbanking proceedings, the railroad has already identified an interested trail sponsor. This petition thus provides a new pathway to railbanking

⁶ The Board could consider during the rulemaking whether it is necessary and appropriate to expressly limit the availability of the new pathway to circumstances where a railroad is seeking authority to discontinue service over a line it owns, as opposed to over a line owned by another railroad.

⁷ This petition does not discuss Offers of Financial Assistance (OFAs), which can be submitted by a third party in an abandonment or discontinuance exemption proceeding to facilitate continued rail operations. Petitioners observe that under the recommended regulatory reforms, bona fide OFAs and rail service would continue to take precedence over railbanking. For the new discontinuance pathway, there would be an opportunity for the submission of offers to subsidize continued rail operations (but not for the submission of offers to purchase rail lines). *See* Offers of Financial Assistance, 82 Fed. Reg. 30997, 30997 (July 5, 2017) (“Under the OFA process, as

that can be used in these circumstances to reduce burdens on stakeholders and the Board. And the availability of this pathway may encourage railroads to more frequently seek to identify trail sponsors prior to initiating proceedings, further reducing burdens. The petition provides an alternative mechanism, also based on the discontinuance model, for instances in which the railroad has not yet reached an agreement with a trail sponsor when it initiates an exemption proceeding.

1. Interim Trail Use Agreement Already Reached

As shown in proposed new section 1152.29(i)(1), if the railroad has already reached an agreement with a trail sponsor, it would attach to the notice of exemption or petition for exemption a joint notice indicating that an agreement has been reached, contingent on the outcome of further proceedings. The filing additionally would include the content that railroads and trail sponsors must submit when they reach an agreement using the existing pathway to railbanking (e.g., a certification that the interim trail use agreement requires the trail sponsor to fulfill the requisite legal and financial responsibilities). At the conclusion of the exemption proceeding (i.e., if the railroad receives authority to discontinue service), the Board would issue a “Notice of Railbanking” to acknowledge and document the railbanking on the discontinuance exemption docket. The parties then could implement their agreement. This Notice of Railbanking would identify the trail sponsor and line that is railbanked; it could be vacated or superseded as circumstances dictate (for example, due to a change in trail sponsor).

implemented in the Board’s regulations at 49 CFR 1152.27, financially responsible parties may offer to temporarily subsidize continued rail service over a line on which a carrier seeks to abandon or discontinue service, or offer to purchase a line and provide continued rail service on a line that a carrier seeks to abandon.”).

2. Interim Trail Use Agreement Not Already Reached

If the railroad has not already reached an agreement with a trail sponsor, it would pursue railbanking after initiating a Board proceeding, similar to the existing pathway. For example, the Board's Federal Register notice would provide notice of, *inter alia*, the opportunity for railbanking, and a potential trail sponsor would have a short period of time (consistent with the existing pathway to railbanking) in which to file a statement expressing interest in negotiating an agreement with the railroad. *See* Proposed New § 1152.29(i)(2). If the railroad elects to negotiate with an interested trail sponsor, the Board would issue a "Notice of Negotiations" (not a NITU) to initially establish a one-year negotiating period. Proposed Revised § 1152.29(d)(1). The Notice of Negotiations would authorize discontinuance of service and cancellation of applicable tariffs (which is currently done by a NITU in the existing abandonment track to railbanking). Proposed Revised § 1152.29(d)(1)(i).

If the railroad and the trail sponsor file a joint notice indicating that an agreement has been reached (and provide the same information they must provide when reaching an agreement under the existing regulations), the Board would issue a Notice of Railbanking. Proposed Revised § 1152.29(d)(2), (h). The parties then would implement their agreement, and the Notice of Railbanking could be vacated or superseded as circumstances dictate. *See, e.g.*, Proposed Revised § 1152.29(f)(2).

B. Adjustments to Existing Pathway to Railbanking

The reforms would also include conforming adjustments to the existing pathway to railbanking (again, the initiation of an abandonment exemption proceeding). The primary change would be the use of a Notice of Negotiations (in lieu of the NITU) that would not by its terms authorize abandonment if negotiations fail. Proposed Revised § 1152.29(d)(1). If the Notice of

Negotiations expires (or the railroad decides to withdraw from the negotiations), the railroad could then elect to ask the Board to authorize abandonment, which could lead to abandonment as it occurs under the existing process (i.e., when the railroad files a consummation notice). *See, e.g.*, Proposed New § 1152.29(d)(1)(iii), (e)(2).

The adjustments also would include other clarifying and conforming changes. For example, when the railroad and trail sponsor file a joint notice indicating that an agreement has been reached (and provide required information), the Board would issue a Notice of Railbanking. Proposed Revised § 1152.29(h). The parties then would implement their agreement, and the Notice could be vacated or superseded as circumstances dictate. *See, e.g.*, Proposed Revised § 1152.29(f)(2).

V. DISCUSSION

A. The Reforms Are Consistent with the Trails Act Amendments and Further the Legislation’s Underlying Purposes.

The recommended reforms are fully consistent with the Trails Act Amendments and would further the express purposes of the legislation. As Member Fuchs’ concurring expression recognized in *R.J. Corman*, nothing in the Trails Act Amendments suggests an intent to limit the availability of railbanking to circumstances where a railroad has received authority to abandon. Consistent with Congress’ clear focus on preserving rail corridors by creating a mechanism that avoided the abandonment of rail lines, the Trails Act Amendments do not condition the availability of railbanking on the existence of an authorized (or otherwise imminent) abandonment. 16 U.S.C. § 1247(d). Instead, the final sentence of 16 U.S.C. § 1247(d) references “abandonment or discontinuance,” suggesting railbanking could occur in connection with either abandonment or discontinuance proceedings. Consistent with this textual indication, the legislative history is best interpreted as showing that Congress intended to allow railbanking of

lines “not immediately necessary for active service” and ensure railbanking was considered prior to abandonment (which the recommended reforms would help accomplish). H.R. Rep. No. 98-28, at 8-9. And, there would have been no reason for Congress to have intended to require an authorization of abandonment as a prerequisite for railbanking, where the purpose of railbanking is to help avoid abandonment of rail lines and where railbanking merely involves discontinuance of service and does not result in potential abandonment of rail lines.

Moreover, the recommended reforms would further the Trails Act Amendments’ express purpose of encouraging interim trail use, a form of “energy efficient transportation.” 16 U.S.C. § 1247(d); *see* H.R. Rep. No. 98-28, at 8. At a minimum, the recommended reforms should provide a reduction in regulatory burdens that streamlines the path to interim trail use by sidestepping disputes like the one that arose in the *R.J. Corman* proceeding. It is also likely that the recommended discontinuance pathway will otherwise provide a less burdensome pathway for railroads to pursue railbanking, and will facilitate railbanking negotiations between railroads and trail sponsors without the time constraints of the existing regulatory process, so that the availability of that new pathway would result in additional interim trail use.

B. The Reforms Would Benefit Railroads, the Board, Trail Sponsors, and Potentially Other Stakeholders, While Maintaining a Ministerial Role for the Board in Railbanking.

The recommended reforms would have very substantial benefits for railroads, the Board, trail sponsors, and (potentially) entities involved in environmental and historic reviews (and also landowners, as discussed in Part C), while maintaining the Board’s ministerial role in the railbanking process. First and foremost, the reforms would reduce regulatory burdens on

railroads and burdens on the Board.⁸ Railroads would be able to railbank lines not needed in the near term for active service, without obtaining authority to abandon the lines. This should allow railroads to sidestep the need to litigate protracted disputes like the one at issue in the *R.J. Corman* matter, which would mean the Board would not have to adjudicate such disputes (all while maintaining rail network connectivity).

In addition, to the extent there are fewer other objections (i.e., not related to abandonment authority) and comments submitted in an exemption proceeding when railroads seek authority to discontinue service over a line, rather than authority to abandon the line, the availability of the new discontinuance pathway would further reduce burdens on railroads and the Board.

Abandonment of a rail line has potential consequences for stakeholders that are broader than railbanking due to the potential for permanent loss of the corridor. Under the current approach, stakeholders must consider and potentially address those additional consequences even though they will not arise if the line is railbanked. With fewer objections and comments, railroads using the discontinuance pathway would need to respond to fewer filings and the Board would need to review fewer filings and, presumably, resolve fewer disputes.⁹

It also is possible that, with the benefit of stakeholder input during the rulemaking proceeding, the Board may identify additional opportunities to reduce regulatory burdens. For

⁸ Although not discussed below, the Board might consider whether it could implement a reduced filing fee for the new discontinuance track to railbanking, in light of the anticipated burden reductions discussed in this Part.

⁹ A cursory review of abandonment and discontinuance exemption proceedings demonstrates that, even putting aside filings related to environmental and historic reviews and related issues (and ones related to potential interim trail use), abandonment exemption proceedings (on the balance) are substantially longer in duration and involve more filings by third parties (e.g., offers of financial assistance or requests for public use conditions) than discontinuance exemption proceedings.

example, the Board may identify opportunities to make environmental and historic reviews more efficient when railroads use the new discontinuance pathway to railbanking, with railroads realizing an associated reduction in regulatory burdens and entities involved in environmental and historic reviews (federal agencies, state clearinghouses and agencies, and other entities) also realizing benefits. Petitioners understand that the Board's environmental reviews for proposed abandonments at least generally include neither speculation about how a right-of-way may be used post-abandonment nor an evaluation of what impacts may arise from speculative future uses of the right-of-way.¹⁰ However, it is at least hypothetically possible there will be fewer environmental and historic preservation concerns raised by commenters and less need for comprehensive environmental and historic review, if abandonment of the line and the accompanying uncertainty is not on the immediate horizon.

The proposed revisions would also reduce the time typically required to conclude the Board's railbanking process, especially in circumstances in which a railroad and trail sponsor have already negotiated an agreement by the time the railroad initiates the exemption proceeding. Streamlining and shortening this process would reduce burdens on railroads, as well as others involved.

¹⁰ The Board's Office of Environmental Analysis typically prepares and publishes in an abandonment proceeding draft and final environmental assessments that, along with any comments submitted to the Board, inform the Board's decision of whether to impose conditions on any abandonment that it authorizes. *See* 49 C.F.R. § 1105.6(b)(3). The Board's existing practice of preparing draft and final environmental assessments should continue in exemption abandonment proceedings and the new discontinuance-based process proposed in this petition. *See also Goos*, 911 F.2d at 1297 (finding that the Board does not need to consider the potential impacts of interim trail use in its environmental reviews). The Board could consider the possibility of streamlining or simplifying the environmental and historic reviews for discontinuance-based petitions, once the Board has had some time to observe what kinds of issues arise in connection with the reviews.

Importantly, while the recommended reforms provide these benefits for railroads, they would not impose any new burdens on them. For example, a railroad that desires to abandon a line without engaging in interim trail use negotiations could abandon the line using the same straightforward procedures available under the existing regulations. And the railroad could consummate the abandonment in the same timeframe in which it may consummate the abandonment under the existing regulations. This petition proposes some adjustments and clarifications to the existing railbanking process, but those revisions would clarify the voluntary nature of railbanking proceedings for railroads and would not limit their options in navigating the railbanking process.

As suggested by the discussion above, trail sponsors would also benefit from the reforms. First, by eliminating the requirement for authorization of abandonment prior to railbanking, the recommended reforms might provide additional opportunities for trail sponsors to negotiate interim trail use agreements (i.e., when the railroad would be unlikely to initiate a proceeding to abandon an unused line). Second, streamlining and simplifying the railbanking process would benefit trail sponsors by minimizing delays and reducing costs associated with participation in Board proceedings. Third, as the NITU issued under the existing regulations authorizes both interim trail use negotiations and (in the event that negotiations fail) abandonment of the line, the opportunity for interim trail use may be forever lost if negotiations fail and the railroad consummates the abandonment. The new discontinuance pathway would allow railroads to explore potential railbanking with trail sponsors without the prospect of abandonment and permanent loss of the rail corridors on the immediate horizon.

Fourth, the new discontinuance pathway would expressly accommodate scenarios where a railroad identifies a trail sponsor prior to initiating an exemption proceeding. Petitioners are

aware of discrete instances where railroads have indicated in filings when initiating exemption proceedings that they already had identified interested trail sponsors. Further, the Rails to Trails Conservancy filed a rulemaking petition in 2018 that suggested this kind of scenario may arise with regularity. *See* 2019 Final Rule, 84 Fed. Reg. at 66321 (explaining that the Conservancy's data showed that between 1987 and November 2018, roughly 22% of railbanking proceedings concluded within 180 days). This feature of the pathway thus could encourage railroads to more frequently seek out potential trail sponsors prior to initiating an exemption proceeding, which should allow trail sponsors to evaluate whether they are interested in railbanking (and potentially negotiate an agreement) without the time pressure imposed by the existing regulations. *See* 49 C.F.R. § 1152.29(b)(2) (requiring the trail sponsor to file a statement of interest within 10 or 20 days of the Federal Register notice, depending upon whether a notice of exemption or petition for exemption is filed).

Finally, the Board would maintain a ministerial role in the railbanking process. While the regulatory reforms would make changes to the Board's regulations, the reforms would not require the Board to make any significant new determinations or evaluate any significant new issues. The Board's role in railbanking would continue to be largely limited to its review of whether the requirements of the Trails Act Amendments are met (i.e., primarily that the trail sponsor has agreed to assume the requisite legal and financial responsibilities). *See Goos*, 911 F.2d at 1295; *Citizens Against Rails-to-Trails*, 267 F.3d at 1152.

C. The Board Should Open the Recommended Rulemaking Proceeding for the Additional Purpose of Eliminating the Burden of Temporary Takings.

The Board should open the recommended rulemaking proceeding for the additional purpose of eliminating temporary takings for the benefit of landowners. As noted above, courts have sometimes concluded that temporary takings arise from the operation of the Board's

existing regulations, agreeing with landowners' arguments that the Board in certain circumstances is "confiscating an owner's property or practically ousting an owner from possession of his property" by issuing a NITU that (in the view of landowners and the courts) mandates or compels the continuation of a railroad's easement. *See supra* Part III.D.¹¹

The Board may wish to affirm in the notice of proposed rulemaking that mitigating takings of property associated with a regulatory scheme, thereby reducing burdens on the public fisc, is an appropriate goal for regulatory reform. While the Board is an independent agency, the following direction provided in Executive Order 12630 for executive departments and agencies may be instructive and helpful:

Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate.

Exec. Order No. 12630 at § 1(b). Adopting the proposed reforms would be consistent with these principles, because the reforms would eliminate features of the regulations that landowners (and sometimes courts) have viewed as temporarily burdening landowner property (i.e., as resulting in "temporary physical takings").

For the same reason, landowners would directly benefit from the recommended reforms. The reforms, including the specific language confirming that railroad participation in railbanking is voluntary (and, as is currently the case, that the railroad is not binding itself to negotiate for the entire period established by the Board), would confirm that the Board is not mandating or

¹¹ To the extent that the rights of property owners are affected by the Board's issuance of a Notice of Railbanking under the proposed regulations (i.e., putting aside temporary takings), this petition is not intended to affect the rights or remedies of those property owners.

compelling the continuation of the railroad’s easement during the negotiating period. Thus, to the extent that the existing regulatory structure has been found by some courts to result in temporary takings, *see, e.g., Memmer*, 50 F.4th at 145, the changes proposed in this petition will reaffirm that the process of developing and approving a railbanking agreement does not involve compulsion under federal law but instead is a negotiation between non-federal parties. In addition, to the extent the reforms are effective in streamlining the railbanking process by reducing burdens on railroads, the Board, and trail sponsors, the reforms may further benefit landowners 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.

VI. CONCLUSION

For the reasons discussed above, the petition demonstrates adequate justification for the Board to open a rulemaking proceeding to consider the recommended regulatory reforms. *See* 49 C.F.R. § 1110.2(b), (e).¹² Petitioners respectfully urge the Board to take this action and promptly commence its consideration of these reforms.

Respectfully submitted,

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¹² The Board has previously opened a rulemaking proceeding in response to a petition filed by a federal agency. *See Notification of Rate Proposals Following Prior Independent Action*, 359 I.C.C. 877, 878 (1978); *see also* 49 C.F.R. § 1110.2(a) (referring to “agencies of the United States” and “*other* persons,” indicating that federal agencies are “persons” (emphasis added)). However, if the Board does not believe it can consider this petition under 49 C.F.R. § 1110.2(b), Petitioners respectively ask the Board to treat the petition as a recommendation under 49 C.F.R. § 1110.2(a) that the Board open a rulemaking proceeding on its own motion.

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December 20, 2024

APPENDIX

Specific Recommended Amendments to 49 C.F.R. § 1152.29¹³

§ 1152.29 Prospective use of rights-of-way for interim trail use and rail banking.

(a) Contents of request for interim trail use. If any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line ~~proposed to be abandoned~~ for interim trail use and rail banking pursuant to 16 U.S.C. 1247(d), it must file a comment or otherwise include a request in its filing (in a regulated abandonment proceeding) or a petition (in an abandonment or discontinuance exemption proceeding) indicating that it would like to do so. The comment/request or petition must include:

...

(3) An acknowledgment that interim trail use is subject to the sponsor's continuing to meet its responsibilities described in paragraph (a)(2) of this section, and subject to possible future reconstruction and reactivation of the right-of-way for rail service. The statement must be in the following form:

Statement of Willingness To Assume Financial Responsibility

In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29 with respect to the right-of-way owned by _____ (Railroad) and operated by _____ (Railroad), _____ (Interim Trail Sponsor) is willing to assume full responsibility for: (1) Managing the right-of-way, (2) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability), and (3) the payment of any and all taxes that may be levied or assessed against the right of way. The property, known as _____ (Name of Branch Line), extends from railroad milepost _____ near _____ (Station Name), to railroad milepost _____, near _____ (Station name), a distance of _____ miles in [County(ies), (State(s)]]. The right-of-way is part of a line of railroad ~~proposed for abandonment~~ that is the subject of the proceeding in Docket No. STB AB _____ (Sub-No. _____). A map of the property depicting the right-of-way is attached.

_____ (Interim Trail Sponsor) acknowledges that use of the right-of-way is subject to the sponsor's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. A copy of this statement is being served on the railroad(s) on the same date it is being served on the Board.

...

¹³ While the amendments are not shown or discussed in the petition, the Board additionally would need to amend 49 C.F.R. § 1011.7(a)(2)(iv) by replacing “abandonment proceedings” with “exemption proceedings” and replacing “Notices of Interim Trail Use or Abandonment” with Notices of Negotiations.”

(d) Abandonment and discontinuance exemption proceedings.

(1) In abandonment and discontinuance exemption proceedings, if continued rail service does not occur under 49 U.S.C. 10904 and § 1152.27, and a railroad ~~agrees~~decides to negotiate an interim trail use/railbanking agreement, ~~then with an interim trail sponsor, the railroad's reply under paragraph (b)(2) of this section shall include a statement affirming that it is voluntarily entering into interim trail use/rail banking negotiations and that the railroad understands that it may withdraw from the negotiations at any time. Upon receipt of the requisite statement, the Board will issue a Notice of ~~Interim Trail Use or Abandonment (NITU) Negotiations~~ to the railroad and to the interim trail sponsor for the portion of the right-of-way ~~as that is to which both parties are willing to negotiate.~~be the subject of negotiations.~~

(i) The ~~NITU~~Notice of Negotiations will permit the railroad to discontinue service, cancel any applicable tariffs, and (in an abandonment exemption proceeding) salvage track and materials, ~~consistent with interim trail use and railbanking,~~ as long as such actions are consistent with interim trail use, rail banking, and any other Board order, 30 days after the date the ~~NITU~~Notice of Negotiations is issued; ~~and permit the railroad to fully abandon the line if no interim trail use agreement is reached within one year from the date on which the NITU is issued, subject to appropriate conditions, including labor protection and environmental matters.~~

(ii) In general, the Notice of Negotiations will expire after one year. Parties may request a Board order to extend, for one-year periods, the ~~interim trail use~~ negotiation period. Up to three one-year extensions of the initial period may be granted if the trail sponsor and railroad agree. Additional one-year extensions, beyond three extensions of the initial period, are not favored but may be granted if the trail sponsor and railroad agree and extraordinary circumstances are shown.

(iii) In an abandonment exemption proceeding, if the Notice of Negotiations expires or the railroad at any time files a notice indicating that it has decided to withdraw from negotiations under a Notice of Negotiations and asking for authority to abandon the line, the Board will issue a decision indicating whether the railroad may fully abandon the line (or portion thereof, as applicable) subject to any other Board orders and appropriate conditions (including labor protection and environmental matters), within 30 days of the expiration or withdrawal notice.

(2) The ~~NITU~~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 (a)(2) of this section. The Notice of Negotiations will confirm that the railroad's decision to negotiate with a potential trail sponsor is voluntary and that the railroad may withdraw from negotiations at any time. The ~~NITU~~Notice of Negotiations will also provide that, if an interim trail use agreement is reached ~~(and thus interim trail use established)~~, the parties shall file the notice described in paragraph (h) of this section. The Notice of Negotiations will further provide that interim trail use may not commence unless and until the Board issues a Notice of Railbanking under that paragraph. Additionally, the ~~NITU~~Notice of Negotiations will provide that if the sponsor intends to terminate interim trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must ~~send~~ask the Board ~~a copy to vacate the Notice of the NITU and request that it be vacated~~Railbanking on a specific

date. If a party requests that the ~~NITU~~Notice of Railbanking be vacated for only a portion of the right-of-way, the Board will issue an appropriate replacement ~~NITU~~Notice of Railbanking covering the remaining portion of the right-of-way subject to the interim trail use agreement. The Board will reopen the exemption proceeding, vacate the ~~NITU~~existing Notice of Railbanking, and (in an abandonment exemption proceeding) issue a decision within thirty days ~~addressing reinstating whether the railroad may abandon the exemption for~~ that portion of the right-of-way. Copies of the decision will be sent to:

- (i) The ~~abandonment~~ exemption applicant;
- (ii) The owner of the right-of-way; and
- (iii) The current trail sponsor.

(3) If an application to construct and operate a rail line over the right-of-way is authorized under 49 U.S.C. 10901 and part 1150 of this title, or exempted under 49 U.S.C. 10502, then the ~~NITU~~Notice of Railbanking will be vacated accordingly.

(4) 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.

(e) Late-filed requests; notices of consummation.

(1) Where late-filed trail use statements are accepted, the Director (or designee) will telephone the railroad to determine whether abandonment has been consummated and, if not, whether the railroad ~~is willing to~~decides to negotiate an interim trail use agreement. The railroad shall confirm, in writing, its response, within 5 days. If abandonment has been consummated, the trail use request will be dismissed. If abandonment has not been consummated but the railroad ~~refuses declines~~ to negotiate, then trail use will be denied. If abandonment has not been consummated and the railroad ~~is willing declines~~ to negotiate, the ~~abandonment~~ proceeding will be reopened, ~~the any~~ abandonment decision granting an application, petition for exemption or notice of exemption will be vacated, and an appropriate CITU or ~~NITU~~Notice of Negotiations will be issued. The effective date of the CITU or ~~NITU~~Notice of Negotiations will be the same date as the vacated decision or notice.

(2) A railroad that receives authority from the Board to abandon a line (in a regulated abandonment proceeding under 49 U.S.C. 10903, or by individual or class exemption issued under 49 U.S.C. 10502) shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line (e.g., discontinued operations, salvaged the track, canceled tariffs, and intends that the property be removed from the interstate rail network). The notice shall provide the name of the STB proceeding and its docket number, a brief description of the line, and a statement that the railroad has consummated, or fully exercised, the abandonment authority on a certain date. The notice shall be filed within 1 year of the service date of the decision permitting the abandonment (assuming that the railroad intends to consummate the abandonment). Notices will be deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation (such as outstanding conditions, including Trails Act conditions). If, after 1 year from the date of service of a decision permitting abandonment, consummation has not been effected by the railroad's filing of a notice of consummation, and there are no legal or regulatory barriers to consummation, the authority to

abandon will automatically expire. In that event, a new proceeding would have to be instituted if the railroad wants to abandon the line. Copies of the railroad's notice of consummation shall be filed with the Chief, Section of Administration, Office of Proceedings. In addition, the notice of consummation shall be sent to the State Public Service Commission (or equivalent agency) of every state through which the line passes. If, however, any legal or regulatory barrier to consummation exists at the end of the 1-year time period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier. For good cause shown, a railroad may file a request for an extension of time to file a notice so long as it does so sufficiently in advance of the expiration of the deadline for notifying the Board of consummation to allow for timely processing.

(f) Substitution of trail user.

(1) When a trail user intends to terminate trail use and another person intends to become a trail user by assuming financial responsibility for the right-of-way, then the existing and future trail users shall file, jointly:

- (i) A notice to apprise the Board ~~copy of the development~~~~the extant CITU or NITU~~; and
- (ii) A Statement of Willingness to Assume Financial Responsibility by the new trail user.
- (iii) An acknowledgement that interim trail use is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

(2) The parties shall indicate the date on which responsibility for the right-of-way is to transfer to the new trail user. The Board will reopen the abandonment or exemption proceeding, vacate the existing ~~NITU~~Notice of Railbanking or CITU; and issue an appropriate replacement NITUNotice of Railbanking or CITU~~to the new trail user~~.

(g) Consent after Board decision or notice. In proceedings where a timely trail use statement is filed, but due to either the railroad's indication of its unwillingness to negotiate interim trail use agreement, or its failure to timely notify the Board of its willingness to negotiate, a decision authorizing abandonment or an exemption notice or decision is issued instead of a CITU or ~~NITU~~Notice of Negotiations, and subsequently the railroad and trail use proponent nevertheless determine to negotiate an interim trail use agreement under the Trails Act, then the railroad and trail use proponent must file a joint pleading requesting that an appropriate CITU or ~~NITU~~Notice of Negotiations be issued. If the abandonment has not been consummated, the Board will reopen the proceeding, vacate ~~the~~any outstanding decision or abandonment notice (or portion thereof), and issue an appropriate CITU or ~~NITU~~Notice of Negotiations that will permit the parties to negotiate for a period agreed to by the parties in their joint filing, but not to exceed one year, at the end of which, any ~~the~~ CITU ~~or~~ ~~NITU~~ will convert into a decision or notice permitting abandonment.

(h) Notice of interim trail use agreement reached; Notice of Railbanking. 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 notice shall include a map depicting, and an accurate description of, the involved right-of-way or portion thereof (including mileposts) that is subject to the parties' interim trail use agreement and a certification that the interim trail use agreement includes provisions requiring the sponsor to fulfill the responsibilities described in paragraph (a)(2) of this section. The Board will issue a Notice of Railbanking to acknowledge and document the parties' agreement, provided the

requirements of the Trails Act Amendments are satisfied. Additionally, if the interim trail use agreement establishes interim trail use over less of the right-of-way than is covered by the CITU or ~~NITU~~Notice of Negotiations, the notice shall also include a request that (for regulated abandonments) the Board vacate the CITU ~~or NITU~~ and issue a replacement CITU~~/NITU~~ for that describes only the portion of the right-of-way covered by the ~~interim trail use~~ agreement or that (for exemption abandonments) asks the Board to authorize abandonment of the portion of the line that is not subject to the agreement. In a regulated abandonment proceeding, ~~the~~ Board will reopen the abandonment proceeding, vacate the CITU~~or NITU~~, issue an appropriate replacement CITU~~or NITU~~ for only the portion of the right-of-way covered by the interim trail use agreement, and issue a decision permitting immediate abandonment of the portion of the right-of-way not subject to the ~~interim trail use~~ agreement. In an exemption abandonment proceeding, the Board will reopen the abandonment proceeding and issue a decision within thirty days addressing whether the portion of the right-of-way not subject to the agreement may be abandoned. Copies of the decision will be sent to:

- (1) The rail carrier that sought abandonment authorization;
- (2) The owner of the right-of-way; and
- (3) The current trail sponsor.

(i) Increased availability of rail banking option.

If an exemption applicant files a notice of exemption to discontinue service over the line under Section 1152.50, or a petition for exemption to discontinue service over a line under Section 1152.60, the railroad may elect in the notice or petition (or in a notice subsequently filed with the Board) to make Section 1152.29 applicable. In the case of such an election:

- (1) If the railroad has already reached an interim trail use/rail banking agreement with the trail sponsor when it files the notice or petition, the railroad shall attach to the notice or petition the acknowledgment identified in paragraph (a)(3) of this section and a joint notice (from the railroad and trail sponsor) indicating that an agreement has been reached, accompanied by a map depicting, and an accurate description of, the involved right-of-way or portion thereof (including mileposts) that is subject to the parties' interim trail use agreement and a certification that the interim trail use agreement includes provisions requiring the sponsor to fulfill the responsibilities described in paragraph (a)(2) of this section. If the railroad receives authorization to discontinue service, the Board will issue a Notice of Railbanking. The railroad then may cancel any applicable tariffs and salvage track and materials, consistent with interim trail use and rail banking, and the parties may implement the agreement, as long as such actions are consistent with any Board orders; and
- (2) If the railroad has not yet reached an agreement, consistent with Section 1152.50(d)(3) or 1152.60(c), as applicable, the draft Federal Register notice submitted by the railroad and the Federal Register notice published by the Board shall (in addition to including other required content) provide notice of the potential opportunity for interim trail use.