

Before the Surface Transportation Board

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National Association of Reversionary)
Property Owners – Petition for a) Ex Parte 749
Rulemaking) (Sub-no. 1)
)
Limiting Extensions of Trail Use)
Negotiation Periods)
_____)

COMMENTS OF THE RAILS-TO-TRAILS CONSERVANCY

INTRODUCTION

These Comments, filed on behalf of The Rails-to-Trails Conservancy (“RTC”), are in opposition to the Surface Transportation Board’s proposed rule, which would adopt a new regulatory standard disfavoring interim trail use/railbanking negotiations that last beyond three years, and establish new regulatory barriers to securing necessary extensions.

SUMMARY OF COMMENTS

This proposed rule, if adopted, would undermine the statutory and regulatory objectives and policies of the federal railbanking program as it is administered by the Surface Transportation Board (“STB” or “the Board”) based on speculative and wholly unsupported assertions about the need for “administrative efficiency and clarity,” or worse, ideologically-based efforts by the avowed opponents of this federal policy and program. According to RTC’s data on railbanking, which is the most comprehensive database of information about railbanked corridors in existence, the actual experience in railbanking over the past 30 years does not support the need for this proposed rule in order to promote “administrative efficiency and clarity.”

To the contrary, arbitrarily foreclosing any extensions of railbanking orders beyond three years except in cases involving undefined “extraordinary circumstances” will transform this Board’s ministerial function of issuing and extending interim trail use/railbanking orders into contested proceedings, fundamentally complicating a process that has worked efficiently and promptly over the last 30 years, and that has resulted in the preservation of 393 rail corridors representing 5,895.53 miles for continued and future public use. Under this proposed new rule, this Board will be required to make discretionary decisions to curtail good faith trail use negotiations based on an unsupported regulatory presumption that three years is sufficient time to negotiate a trail use agreement. This new discretionary role for the Board is in direct conflict with the mandatory language of the railbanking law, which provides that this Board “*shall* impose such terms and conditions as a requirement of any transfer or conveyance for interim trail use *in a manner consistent with this chapter.*” 16 U.S.C. § 1247(d) (emphasis added).

Further, neither the Notice of Proposed Rulemaking (“NPR”) or the rulemaking petition that prompted this NPR provides any actual data, analysis, or evidence that would support the asserted need for this proposed rule. By contrast, data collected by RTC and summarized in the attached declaration prepared by the manager of RTC’s database, demonstrates that this proposed rule change will lead to undesirable effects, including increased administrative costs and burdens on this Board and will introduce grave uncertainties into what has been up to now an administratively efficient process for railroads and potential trail managers. These uncertainties will discourage and undermine the use of the federal railbanking law, resulting in the irreparable loss of rail corridors, and, more fundamentally, will undermine the plain language, articulated public policy, and objectives of the statute.

RTC's authoritative database of information on rail-trails and railbanking further demonstrates that. while a majority of rails-to-trails conversions under the railbanking law are completed within three years, there are a significant number of successfully railbanked corridors in which the negotiating period has lasted beyond three years due to circumstances beyond the control of the trail manager or the railroad, including compliance with environmental and historic preservation conditions, rail regulatory proceedings, or delays in public funding that must be completed prior to the conclusion of railbanking/interim trail use negotiations. The fact that these negotiations were ultimately successful in preserving these corridors through interim trail use is powerful evidence that the STB's current policy of granting liberal extensions advances the goals and policies articulated in the railbanking law.

Based RTC's actual information and database of railbanking proceedings, RTC urges this Board to adopt a different rule. Because only a small percentage (22%) of railbanking negotiations are ever concluded in the initial 180-day period, any proposed rule should establish a one-year period for any initial interim trail use/railbanking negotiating period and permit the Board to grant extensions of this one-year period for good cause shown. Such a proposed rule would serve the interests of administrative efficiency and clarity in administering the railbanking law without violating its statutory language, goals, and articulated public policy to promote and encourage railbanking and interim trail use.

INTEREST OF RTC

RTC is a non-profit corporation with more than 162,000 members and supporters nationwide and a grassroots network of over one million that facilitates the preservation of inactive rail corridors for continued and future public transportation uses, including for possible future rail reactivation ("railbanking") and for other compatible interim public uses, including

use as trails, pursuant to Section 8(d) of the National Trails System Act Amendments, 16 U.S.C. § 1247(d) and the Board's regulations implementing the statute, 49 C.F.R. § 1152.29. For the past 32 years, RTC has been substantially involved in the interpretation, implementation, and legal defense of the federal railbanking law, which was enacted by Congress in 1983 to preserve our nation's irreplaceable national rail system, painstakingly built with substantial federal assistance over more than a century, for future rail service and for other compatible interim public uses, including use as trails.

One of RTC's unique resources is its database of rail-trails that includes specific information on railbanked trails gathered through records maintained by the STB and through direct communications with trail managers. As set forth in the attached declaration of Eli Griffen, manager of RTC's database, since 1987, RTC has tracked all abandonment filings by the Board-assigned docket number, filing and decision dates, status before the Board, corridor location, length, abandoning railroad, and parties to the proceeding. For corridors where this Board has issued a Notice of Interim Trail Use (NITU) or Certificate of Interim Trail Use (CITU) to allow interim trail use/railbanking negotiations between a potential trail manager and a railroad, RTC collects information about the NITU/CITU filer, whether the railroad agrees to negotiate, whether the Board grants the NITU/CITU request, negotiation begin and end dates, negotiation success or failure, and the names of any trails opened on the corridor or planned to open in the future. While this process relies on accurate information put before the Board, consistency from RTC staff in tracking abandonment filings and decisions, and precision in entering data—and some records may suffer from minor inaccuracies or omissions—RTC's database is widely acknowledged to be the most authoritative source of information on rail-trails and railbanking in existence. RTC's comments on the Notice of Proposed Rulemaking are

informed by this real-world data and information.

DISCUSSION

- I. A Limitation on the Number of NITUs Would Lead to Inefficiency, Administrative Costs, and Uncertainty That Would Undermine The Language, Policies and Goals of the Railbanking Law.
 - A. Any Rulemaking Must Be Guided By and Advance the Federal Policies Underlying the Railbanking Law.

Any proposed rules for implementing the federal railbanking law must be guided by and advance the statutory language and policies of “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.” 16 U.S.C. § 1247(d). Congress directed that, in implementing the law, “the Commission shall impose such terms and conditions as a requirement of any transfer or conveyance for interim trail use *in a manner consistent with this chapter. Id.* (emphasis added). The statute further directs the Interstate Commerce Commission (“ICC” or “the Commission”), now the STB, to “encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs.” *Id.*

As numerous courts have recognized, the federal railbanking law embodies a public policy favoring preservation of otherwise-to-be abandoned rail corridors intact for possible future use, and for interim use as trails. In the words of the Supreme Court, “Congress apparently believed that every line was a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable. Given the long tradition of congressional regulation of railroad abandonments, ... that is a judgment that Congress is entitled to make.” *Preseault v. ICC*, 494 U.S. 1, 19. (1990).

In the 35 years since the statute's enactment, it is clear that railbanking has been instrumental in achieving the statute's purposes. Despite the fact that a NITU or CITU will not be issued unless a railroad and qualified potential trail manager voluntarily agree to initiate negotiations, this Board has issued 718 NITUs and CITUS to facilitate rails-to-trails conversions through railbanking, and at least 393 corridors were successfully railbanked and remain railbanked today. These 393 railbanked corridors represent 5,895.53 miles that have been preserved for future rail use and interim use as trails. The issuance of railbanking orders has enabled such trail treasures as Missouri's 225-mile Katy Trail State Park, and Nebraska's 320-mile Cowboy Trail, two of the longest rail-trails in the country. Without railbanking, these extraordinary public resources would have been irreparably lost.

In furtherance of these policies, the Board has adopted the policy and practice of liberally granting extensions of a CITU or NITU while interim trail use/railbanking negotiations are pending in recognition of the "strong Congressional policy favoring trails use/rail banking." *St. Louis S.W. R.R. Co.—Abandonment—in Smith and Cherokee Counties, Texas*, No. AB-39 (Sub-No. 12), 1992 ICC WL 457275 at *3 (Mar. 23, 1992). Indeed, the D.C. Circuit relied on this Board's stated policy of accepting (and by implication extending) trail use requests "so long as it still retains jurisdiction to do so" in rejecting a challenge brought by RTC claiming that the time frames afforded in exempt abandonment proceedings were inadequate to carry out the purposes and policies of federal railbanking law. *Illinois Commerce Commission v. ICC*, 848 F.2d 1246, 1261 (D.C. Cir. 1988). See *Missouri Pacific Railroad Co. – Abandonment in Okmulgee, Okfuskee, Hughes, Pontotoc, Coal, Johnson, Atoka, and Bryan Counties, OK*, Docket No. AB-3 (Sub-No. 63), 1989 ICC Lexis 380, * 8 (Dec. 18, 1980) ("An extension of the negotiating period promotes the establishment of trails and rail banking consistent with the purpose of Section

1247(d). Time limits are imposed on these negotiations to encourage the parties to complete them in a timely manner.”).

The proposed rule change is contrary to the plain statutory language of the railbanking law, which provides that “the Commission *shall* impose such terms and conditions as a requirement of any transfer or conveyance for interim trail use *in a manner consistent with this chapter*. 16 U.S.C. § 124(d) (emphasis added). The Commission has interpreted this mandatory directive as giving it “no power to compel a conversion between unwilling parties, and, conversely, no discretion to refuse one if voluntarily negotiated.” *Goos v. ICC*, 911 F.2d 1283, 1295 (8th Cir. 199). As we now discuss, the proposed change to the STB’s current policy of liberally extending NITUs will jeopardize current potential projects that are presently the subject of good faith negotiations under the statute, is entirely at odds with the agencies’ prior interpretations of the statutory language of railbanking law and will discourage future efforts to use the railbanking law to carry out Congress’ intended objectives.

B. The Proposed Arbitrary Limit on the Number of NITU Extensions Would Lead to Administrative Inefficiency, Costs, and Uncertainty that Would Undermine the Statutory Language, Purpose, and Declared Policies of the Federal Railbanking Law.

This Board’s Notice of Proposed Rulemaking (“NPR”) was prompted by the proposal to limit NITU extensions made in the petition filed by the National Association of Reversionary Property Owners (“NARPO”), an opponent of public laws that encourage or provide public funding for trails. <http://home.earthlink.net/~dick156/row.htm>. As will be discussed below, NARPO’s proposal to limit the number of NITU extensions is premised on its ideological opposition to the railbanking law, which is not a lawful basis for this proposed rule. While the NPR does not specifically cite to endorse any of NARPO’s rationales, the NPR makes no attempt to articulate any way in which placing arbitrary limits on the number of NITU extensions would

advance the statutory purpose of the railbanking law and the federal policies articulated directly in that statute, nor is this proposed rule backed by any actual data or experience that in any way suggests that unlimited NITU extensions have caused any demonstrable or measurable harm to any legitimate interests or objectives of the Board or any stakeholders.

Instead, the NPR suggests that NARPO's proposed rule advances the "interests of administrative efficiency and clarity." However, the NPR fails to cite any evidence that, in the 30 years since the promulgation of these rules, these requests have resulted in any administrative burdens or inefficiency. Instead, the NPR relies on *dicta* in a court decision, which upheld the STB's authority to extend NITUs "when presented with evidence of good-faith negotiations between the railroad and potential trail sponsor." *Birt v. STB*, 90 F.3d 580, 589(D.C. Cir. 1996). That decision also speculated that the possibility of unlimited extensions "could have the undesirable effect of allowing the railroad to stop service without either relinquishing its right to the easement or putting the right-of-way to productive use." *Birt v. STB*, 90 F.3d at 589. However, this speculation about the effects of unlimited extensions is not backed by any real data or analysis, and the decision certainly did not suggest that the remedy was to presumptively cut off railbanking negotiations based on an arbitrary time period.

The STB cites absolutely no data to support the implicit notion that NITU extensions have resulted in administrative inefficiencies. Rather, RTC's data tells a very different story. In the past 32 years, there has been no evidence of any undesirable effects resulting from this Board's policy of liberally granting NITU extensions. To the contrary, following the decision in *Birt* upholding this Board's policy of liberally extending NITUs, the Board's decisions to extend NITUs have not been the subject of litigation, or even administrative appeals. Over the past

thirty years, more than 700 NITUs have been issued, and requests for extensions are resolved promptly and with little controversy.

In past rulemaking proceedings to develop procedures implementing the railbanking law, this Board and its predecessor have stressed the objective that procedures “minimize our role in the agreement process and, in turn, minimize regulatory burdens.” *Rail Abandonments – Use of Rights-of-Way as Trails* – Ex Parte No. 274 (Sub-No. 13), at 13 (Served May 6, 1986) (2 I.C.C.2d 591). In furtherance of this goal, authority to extend NITUs was delegated as an initial matter to the Director of the Proceedings in order to “avoid the administrative burden and delay of having an entire Commission vote on all decisions incidental to these [interim trail use] proposals.” *Rail Abandonments – Use of Rights-of-Way as Trails – Supplemental Trails Act Procedures*, Ex Parte No. 274 (Sub-No. 13), at 3 (Served Dec. 9, 1987) (reported at 4 I.C.C.3d 152).

This proposed rule will have the opposite effect: it would interject this Board into trail use negotiations in a new and unprecedented manner. Ideological opponents to railbanking such as NARPO will rely on the proposed rule to protest all requests for extensions beyond three years as a means of preventing and obstructing good faith interim trail use negotiations. Contrary to this Board’s prior, ministerial role in granting and extending NITUs, the Board will assume a new, discretionary role as arbiter of whether and when voluntary negotiations between the railroad and a willing potential interim trail manager should be curtailed.

As a result, if this proposed rule is adopted, the Board will likely see a significant increase in appeals being filed by proposed interim trail managers of orders denying extensions or by adjacent landowners disputing such extensions, and a concomitant increase in administrative burdens to the Board to adjudicate such appeals. Given that a railbanking order is

essential to most rails-to-trails conversions, any denial of extensions will likely result in litigation over the question of whether the grant or denial of an extension was warranted based on sufficient “extraordinary circumstances.” This proposed new rule will convert a process that is currently administratively efficient and prompt into one that imposes new costs and administrative burdens on this Board. This in turn will introduce greater uncertainty over the disposition and use of rail corridors proposed for abandonment that will create disincentives to the parties to enter into these negotiations to begin with.

C. RTC’s Data and Research Demonstrates That Limiting NITU Extensions to Three Years Except In Cases of “Extraordinary Circumstances” Would Not Further the Goal Of Granting Extensions To Further Good Faith Negotiations.

The NPR also fails to provide any data or even explanation for adopting the draconian standard that “[r]equests for additional extensions beyond six are not favored and will be granted only if the requests demonstrate that extraordinary circumstances warrant a further extension.” *Limiting Extension of Trail Use Negotiating Periods* -- EP 749 (Sub. No. 1), served Oct. 2, ,2018). This standard is directly contrary to the policy articulated in numerous prior agency decisions of liberally extending NITUs whenever this Board retains jurisdiction to do so. As one decision explained, this liberal extension policy is “[a]nalogous to . . . our policy of accepting late-filed trail use statements when good cause is shown and our jurisdiction has not lapsed.” *Missouri Pacific Railroad Co. – Abandonment in Okmulgee, Okfuskee, Hughes, Pontotoc, Coal, Johnson, Atoka, and Bryan Counties, OK*, Docket No. AB-3 (Sub-No. 63), 1989 ICC Lexis 380 * 9 (Dec. 18, 1980). As one Court noted, “the Commission’s policy of granting extensions when presented with evidence of good-faith negotiations between the railroad and potential trail sponsor” serves “the goal that a CITU is intended to advance—providing a defined window of opportunity for reaching agreement on a trails conversion” *Birt v. STB*, 90 F.3d at 589.

There is little precedent in the STB regulations or regulatory practice for adopting a standard that strongly disfavors extensions, regardless of any good cause for the requests. To the contrary, this Board routinely waives its regulatory deadlines for other stakeholders based on “good cause shown.” *See, e.g. Buckingham Branch Railroad Company -- Change in Operators Exemption -- Buckingham Branch Railroad Company*, STB Docket No. FD 3620 (served July 21, 2018). Likewise, STB regulations that specifically address requests for extensions also require only a showing of “good cause.” *See, e.g.* 49 C.F.R. §1152.29(e)(2) (allowing a railroad to request extensions of the time for filing a “consummation notice” for “good cause shown.”); *id.* § 1152.25(d)(5) (requiring “good cause” for late pleadings); *id.* § 1113(c) (late intervention petitions accepted for “good cause shown.”). No other regulatory actions by this Board are subject to such a high or demanding standard, and there is little context by which to evaluate how such a standard would be applied. Moreover importantly, the NPR provides no explanation whatsoever for why it would choose to abandon its longstanding policy to rely on “good cause” to grant extensions and waivers from regulatory deadlines in almost every other context, while establishing a potentially insuperably high standard in the context of railbanking negotiations.

The harm that would result from the unsupported regulatory presumption disfavoring more than six extensions is amply demonstrated by RTC’s database. Of the 370 successfully railbanked corridors where RTC has identified the length of railbanking negotiations, 65 required more than six extensions. Additionally, at least 32 dockets are in active railbanking negotiations, and 23 of these dockets have required more than six extensions. All told, at least 88 dockets have extended beyond six railbanking negotiating periods.

Nor is there any data suggesting that this draconian standard is in any way warranted. Unlike the proposal advanced by NARPO, RTC’s opposition to the proposed rule is informed by

this solid evidence about the number of times NITUs are extended, the length of time it takes to negotiate, and the reasons for requesting extensions of the negotiating period. As demonstrated by the attached declaration prepared by Eli Griffen, the manager of RTC's railbanking database, the proposed limit of six extensions for NTIUs is unreasonable and would significantly undermine the implementation and effectiveness of the federal railbanking law in accomplishing its congressionally mandated goals

This NPR appears to be focused improperly on the minority of NITU/CITU negotiations requiring more than six extensions as evidence, as NARPO suggests, of abuses requiring a stricter approach to extensions. However, RTC's data shows that protracted railbanking negotiations are the exception rather than the rule. Of the 370 railbanked corridors where RTC has identified railbanking negotiation lengths, negotiations for 305 were consummated before six 180-day negotiating periods were concluded. Of the remaining 65 that required more than six extensions, nearly all negotiations (53) were completed before six years had lapsed.

Moreover, the NPR fails to acknowledge the legitimate reasons for delays in negotiations in these few cases. The vast majority of abandonment applications proceed under this Board's exempt abandonment procedures, in which requests for trail use conditions must be filed within ten days of publication of notice of the abandonment in the *Federal Register*. This notice may be the first notice received by the public of this opportunity to negotiate an interim trail use agreement. Experience over the past 30 years has shown that it unreasonable and unrealistic to expect that the parties will be able to conclude in six months a complex real estate transaction that must take place within the context of an unpredictable and equally complex regulatory environment.

As discussed in more detail in the attached declaration of RTC's database manager, the need to extend the railbanking negotiating period arises from innumerable factors not attributable to any lack of diligence or good faith on the part of the negotiating parties. On the regulatory side, extensions are needed in order to comply with environmental and historic preservation conditions. Negotiations for Offers of Financial Assistance, and the time required for railroads and the STB to evaluate offers, can also halt concurrent railbanking negotiations. In some cases, regulatory requirements and public-involvement requirements on the trail managers caused the delays. Time frames for securing public funding do not align with the time frames in the abandonment process – funding cycles in some cases occur only on alternative years -- and then the actual consideration of applications by funding agencies will take additional time. Granting extensions to allow trail managers to secure this public funding is fully consistent with the purpose of the congressional statutes authorizing the use of federal funds for trails. Conversely, these policies will be subverted by the imposition of an arbitrary cut-off for trail use negotiations that may foreclose use of these federal funding programs, which are on a different time table.

The ability to extend NITUs where more time is needed is critical to carrying out the purposes and policies of the federal railbanking law. Negotiating a railbanking/interim trail use agreement is a complex undertaking, requiring the potential trail manager to assume extensive liabilities and long-term financial responsibilities for the management of the corridor. Public agencies are constrained by existing, legislatively-approved budgets, and so must go through often extensive public procedures to secure expenditure authorizations or make budgetary changes. Available public funding mechanisms necessary to acquire a corridor, such as bond referenda or federal grants, likewise take time to secure. Delays inherent to any acquisition negotiation, including appraisal disagreements, personnel turnover, and the need to complete

engineering or design work, or complete complex salvage operations, are also a common reason why negotiations may persist beyond six extension requests.

Most importantly, denying extensions after three years will result in the irretrievable destruction and loss of rail corridors – a result that is completely at odds with the purpose of the railbanking law “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.” 16 U.S.C. § 1247(d). NITU/CITU negotiations extending beyond six 180-day periods not only represent portions of 33 open and beloved rail-trails (and dozens more proposed rail-trails) spanning the country—including the Modoc Line Rail Trail in California, Dawkins Line Rail Trail in Kentucky, Panhandle Trail in Pennsylvania and West Virginia, Eisenbahn State Trail in Wisconsin, and Katy Trail State Park in Missouri—but also 1,212.35 miles that would no longer be under this Board’s jurisdiction, and thus no longer available for rail use in the future. The railbanking agreement for the wildly-popular Highline Trail in New York City, which attracted 7.6 million visitors in 2015,¹ required more than three years to negotiate. Without liberal extensions, these corridors would have been irretrievably removed from the national rail system.

RTC’s experience strongly suggests that a standard of “good cause” would appropriately address those rare situations in which there appears to be a lack of good faith in negotiations. According to RTC’s records, of the 370 railbanking orders issued by the STB since 1986 for which negotiation lengths are available, only 12 have been extended for more than six years. In those few cases, this Board has exercised its discretion to ask for additional information, on a case-by-case basis, to determine whether good cause exists for extending a NITU.² Indeed, this

¹ <https://indd.adobe.com/view/4c7159a4-7728-4f50-8154-d6ff6559afda?ref=idm>.

² Consistent with this guidance, and in response to objections made by NARPO to a particularly lengthy interim trail use/railbanking negotiation, this Board, in granting the requested extension,

experience suggests that the burden should be on protestants such as NARPO to demonstrate that there are extraordinary circumstances, such as fraud, bad faith or dishonesty, that would warrant denying a request for an extension.

The NPR will also create profound uncertainties for the 32 corridors proposed for abandonment that are presently the subject of active railbanking negotiations pursuant to NITUs issued by this Board. Negotiations for 23 of these corridors have already extended beyond three years. The notice of proposed rulemaking will also have an undesirable effect on the willingness of railroads to initiate abandonment proceedings based on the assumed continuation of the current regulatory regime, under which NITUs are liberally extended to allow for meaningful negotiations for a transfer of the corridor for interim trail use.

D. NARPO Offers No Legitimate Rationale For Presumptively and Arbitrarily Restricting the Number of NITU Extensions to Six.

As previously noted, this NPR was initiated in response to a petition by NARPO, which offered anecdotal evidence of four NITUs that had been extended more than six years, claiming that these NITUs worked a “procedural injustice.” NARPO offered absolutely no evidence that the lengthy negotiating period in these cases had cause any harm or that lengthy negotiations were in any way undertaken to “abuse” the process or to achieve any improper goals other than

specifically directed the parties in any future extension requests to “describe in detail (1) the progress of its negotiations with UP since the last extension was granted, (2) the specific actions still needed to be taken before an agreement can be reached (including when those actions are expected to be completed), and (3) when (assuming the parties’ further negotiations are successful) it expects an agreement with UP to be finalized.” *Union Pacific Railroad Company -- Abandonment Exemption -- in Fulton and Peoria Counties, IL*, 2018 WL 1965551 (STB Docket No. AB-33 [Sub-No. 262X], served April 25, 2018). Unlike the proposed rule, the information requested in this order appropriately balances the statutory purpose of promoting and encouraging use of the railbanking while “providing a defined window of opportunity for reaching agreement on a trails conversion” *Birt v. STB*, 90 F.3d at 589.

to advance the legitimate and wholly constitutional statutory objective of preservation of our Nation's built rail infrastructure for continued public use.

As NARPO's comments in that proceeding make clear, NARPO's outrage over the length of interim trail use negotiations is motivated, not by any demonstrable harm that results from those few incidents, but by NARPO's ideological opposition to trails and to Congress' judgment that "every line is a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable." *Preseault v. ICC* 494 U.S. 1, 19 (1990). As the U.S. Supreme Court observed in unanimously upholding the constitutionality of the railbanking law, "Given the long tradition of congressional regulation of railroad abandonments, ... that is a judgment that Congress is entitled to make." *Id.* Each of NARPO's ideologically-based rationales for limiting the number of times a NITU can be extended are premised on its fundamental disagreement with the U.S. Supreme Court's holding that "[i]nvariably, interim trail use will conflict with the reversionary rights of adjacent land owners, but that is the very purpose of the Trails Act." *Id.* at 11.

NARPO submitted no evidence that any adjacent landowners possess a property interest in those few corridors that have been the subject of protracted interim trail negotiations nor demonstrated that the length of these negotiations have harmed them in any way. However, in any case, the courts have made clear that the existence of a colorable claim for compensation cannot be used to challenge or thwart the issuance of a NITU or prevent the interim trail use negotiations. *Dave v. Rails to Trails Conservancy*, 79 F.3d 940, 842 (9th Cir., 1996). Rather, as the U.S. Supreme Court has made clear, the exclusive remedy for these perceived harms is to file a compensation claim against the United States. *Preseault v. ICC*, 494 U.S. at 22.

NARPO's comments also make clear that the purpose for its proposed limit on the

number of NITUs is its assertion that the parties are “manipulating the STB process to collect not only state and county monies, but copious amounts of the U.S. Taxpayers money” to acquire and develop interim trails on railbanked corridors. NARPO Reply in Ex Parte 749, at 5 (filed July 23, 2018).³ However, NARPO’s ideological opposition to “U.S. Taxpayer monies” funding trails, does not justify arbitrarily cutting off good-faith interim trail use negotiations. To the contrary, as noted above, public funding delays where the parties are engaged in good-faith efforts to secure available public funds should represent a good cause for requesting an extension of the interim trail use/negotiating period. Accordingly, NARPO’s ideological objections to railbanking and public funding of trails are not a legitimate or lawful basis for this proposed rule.

II. Any Rule Adopted by this Board Should Establish A One-Year Trail Use Negotiating Periods And Permit Additional One-year Extensions For Good Cause.

As the *Birt* case makes clear, the railbanking law does not mandate any particular time limit on the NITU negotiation period. Indeed, the 180-day limit established in the initial 1986

³ In its reply, NARPO also expresses concern over the fact that “the U.S. taxpayer gets whacked again when the U.S. Claim Court requires payment of billions of dollars for the takings of the reversionary rights.” NARPO Reply, at 5. NARPO’s concern for the U.S. Taxpayers is ironic and disingenuous, since these taxpayers’ funds are being paid to NARPO’s own constituency of reversionary landowners and their class action lawyers, who have filed compensation claims on their behalf. In any event, arbitrarily limiting NITU extensions will not prevent such payments, since, under current jurisprudence, any aggrieved landowners can file a claim for compensation immediately upon issuance of the initial NITU. See *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010), *reh’g and reh’g en banc denied*, 646 F.3d 910 (2011). Indeed, three of the four cases mentioned in NARPO’s filing in which trail use negotiations remain ongoing through NITU extensions are already the subject of “takings” claims filed by adjacent landowners. See *Barlow v. United States*, Court of Federal Claims No. 13-cv-396 (STB AB 33-262X; *BHL Properties v. United States*, Court of Federal Claims No. 15-cv-00179 (STB Docket No. AB-57 [Sub-No. 61X]) and *Brown v. United States*, Court of Federal Claims No. 14-cv-94 (STB AB 55-694X). Arbitrarily limiting NITU extensions will not protect the federal government from liability for these compensation claims, or even significantly reduce those payments, the lion’s share of which go to pay the attorney’s fees of the class action attorneys filing these cases.

trails act rulemaking proceeding was selected without any real data informing the agency on the amount of time needed to negotiate an interim trail use/railbanking agreement.⁴ As noted above, this Board's policy of liberally extending NITUs was based on its recognition that this 180-day period provided an insufficient length of time to allow for the completion of interim trail use negotiations, which, as noted above, are affected by a constellation of factors, many of which are beyond the control of the railroad or the potential interim trail manager.

As noted above, today it is even more clear that 180 days is an unrealistic amount of time to complete a railbanking negotiations. RTC's data shows that only a small percentage (22 percent) of railbanking negotiations are concluded in the initial 180-day period, and that the vast majority (nearly 80 percent) of all NITUs issued required at least one extension to complete interim trail use negotiations. Moreover, more than half of all successfully railbanked corridors required extensions of more than one year. Accordingly, the congressional policy favoring trail use and railbanking as well as the interests of administrative efficiency strongly suggest that this Board amend its rules to establish a one-year negotiating period for any initial NITU and one-year extensions of that period. Indeed, the STB is already doing this in some cases. *See Missouri Central Railroad Company—Abandonment Exemption—in Cass, Pettis, Benton, Morgan, Miller, Cole, Osage, Maries, Gasconade, and Franklin Counties, Mo.*, Docket No. AB 1068(Sub-No. 3X) (served January 19, 2018).

The establishment of one-year interim trail use negotiating periods is further bolstered by the STB's decision to adopt this time frame for the railroads to file a notice of consummation of abandonment authority. 49 C.F.R. §1152.29(e)(2). As the STB explained in its final rulemaking

⁴ Rather, this time frame was picked simply because Congress established this time frame in public use conditions. *See* 49 U.S.C. § 10904.

order adopting this one-year period, “[w]e believe that a 1-year period is appropriate. That time period . . . is long enough to give carriers that do not want to exercise their abandonment authority immediately time to hold open the possibility that new shippers will seek rail service or that the right-of-way could be used for interim recreational or conservation purposes under 16 U.S.C. 1247(d) . . .” *Abandonment and Discontinuance of Rail Lines and Rail Transportation under 49 U.S.C. § 10903*, STB Ex Parte No. 537, at 9 (served Dec. 24,1996). Notably, the STB specifically rejected comments suggesting that a 180-day period would suffice. *Id.* Further, as noted above, extensions of this time frame should continue to be liberally granted “for good cause shown.” to effectuate the purposes of the railbanking law.

CONCLUSION

For the foregoing reasons, RTC believes that this rulemaking proceeding was improvidently initiated and that the proposed rule should not be adopted. Instead, this Board should adopt a rule that reflects both the real-world experience of negotiating an interim trail use railbanking agreement and the plain language, purpose and policies of the federal railbanking law, by establishing a one-year initial negotiating period and authorizing this Board to extend this period for good cause shown so long as it retains jurisdiction to do so.

Respectfully submitted

A handwritten signature in black ink, appearing to be 'A. Ferster', written over a horizontal line.

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