

National Association of Reversionary Property Owners (NARPO)

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Cynthia Brown

Chief, Section of Administration Surface Transportation Board

Office of Proceedings 395 E Street, SW Washington, DC 20423

RE: EP 749-1 Rebuttal on Rulemaking on limit of NITU extensions

Dear Ms. Brown:

This is NARPO's rebuttal/reply on our request for rulemaking in EP 749-0 and NARPO's rebuttal/reply on EP 749-1. While NARPO requested a rule change on three specific rules in EP 749-0, the STB decided to limit the rulemaking to one issue in EP -749-1, that issue being the limits of Notice of Interim Trail Use (NITU) extensions to six 180 day extensions.

Preliminary Issue in EP 749-0

NARPO would hope the STB would take a further look at NARPO's second issue which was "giving constitutional due process notice" to the property owners owning the underlying land of railroad rights of way (ROW) that are being considered for Interim Trail Use (ITU). As the Board may be aware, 90% of the lands under railroads in America were acquired 120 to 170 years ago with easement for railroad purposes. Numerous federal courts including the U.S. Supreme Court in **Preseault v U.S.**, 1 US 494, 1989, ruled that property owners owning the reversionary rights to the land under railroads ROWs have constitutional rights to just compensation for the "taking" of their reversionary rights. In a normal condemnation, any government entity has to notify each and every property owner involved in a proposed condemnation of the pending action. Depending on each state law and or federal law, the entity has to research who owns each parcel and give certified notice that the property owners have been served with notice. This is all NARPO asked the STB to do by requiring the

railroad, if it agrees to Interim Trail Use, or the proposing trail entity, to research who the property owners are and notify the affected property owners of the pending Interim Trail Use. The railroads are exacting millions of dollars from the sale of the NITUs to trails groups, and the government entities proposing these trails are spending millions of dollars more to develop the trail, and the railroads are deducting millions of dollars more for questionable corporate tax deductions as donations. NARPO believes that the STB could mandate that these entities spend a few thousand dollars more to accomplish what the United States Constitution calls for—due process notification before a “taking”.

EP 749-1 A Maximum of Six NITU Extensions

The prevailing legal precedence for agencies adopting rules emanates from **Chevron USA v. National Resources Defense Council Inc.**, 476 US 837 (1984).

When the U.S. Supreme Court examines a challenge to an agency rulemaking, only two questions are asked by the Court; First, has Congress spoken directly to the precise question at issue, and Second, if Congress has explicitly left a gap for the agency to fill, the agency’s regulation is given controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute.

The statute at issue in EP 749-1 is 16 USC 1247(d). 1247(d) as written by Congress in 1983 is obviously ambiguous on its face when Congress left a huge gap for the ICC and now the STB to fill in the blanks. It has been 32 years since the ICC wrote the first set of rules for 1247(d) and are now codified as 49 CFR 1152.29.

Much has happened in those 32 years as it pertains to how NITUs have been issued, used and abused. NARPO believes the STB is well within its legal parameters to change 49 CFR 1152.29 to limit NITUs to a maximum of six extensions or three years. Congress didn’t speak to the issue of NITUs or to NITU extensions. Below is part of 1247(d):

. . . 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.

Nothing in the Congressional language says no extensions or 50 extensions of NITUs, and in actuality there is no mention of NITUs at all as the NITU

language was promulgated in the first ICC rulemaking in 1986. NARPO, in its original request for a rulemaking in EP 749-0 cited many NITUs that have gone on for up to eighteen years or 36 extensions with the STB having to process each NITU extension. One line was abandoned in 1991, AB 290-117X, and then the abandonment was revived in 2017 so a NITU could be issued.

Entities that have had a NITU issued by the STB and then dragged out getting a Trail Use Agreement signed have built buildings in the ROW, sold off pieces of the ROW, allowed other uses on the ROW like power lines and fiber optic lines. One entity, King County in Washington State, even built a light rail system on the ROW with a NITU imposed, and the property owners who own the underlying land have to stand by and watch all this go on with no recourse. NARPO has recently brought some of these NITU transgressions to the STB's attention, and hopefully the STB will crack down on these offenders.

Comments by other Commenters to EP 749-1

While NARPO read through all the comments submitted in EP 749-1, all of the comments against the rulemaking with the exception of the comment from Madison County (authored by Charles Montange) had the same theme—in effect, we want to use other people's property so don't impede us from getting our trails by limiting the time we can get a trail use agreement--. What every one of those comments lacks is that the abutting property owner's issues are pushed aside for their own gratification of having a trail handy for their use. These commenters, including Mr. Montange, forget the real cost of these trails. The trails do not fall out of the air; they have a huge financial cost and other underlying costs including excessive crime on trails.

Some of the financial cost to the U.S. taxpayers include claims approved and pending by the U.S. Court of Claims for rails to trails "taking" cases—over \$2 billion and counting (\$147 million for just one 5 mile trail), \$2.5 billion from the federal gas tax Enhancement Funds to build rail trails, close to \$800 million from local and state taxpayers for rail trails, and unknown \$ millions that the railroads have taken for corporate tax deductions for ROW. These railroads have no fee title interest to the ROWs, but the railroads have coerced trails entities to provide needed donation paperwork to try and satisfy IRS rules in 26 CFR 170 et., seq, regardless of the fact the railroads don't any fee title interest in the ROWs.

It appears that the Rails To Trails Conservancy (RTC) gave instructions on how to sugarcoat the comments by their members as one member mistakenly put the RTC instructions in his comment; see Comment 246621 in paragraph 4. While NARPO asked their members to comment on EP 749-1, we asked the members to state in their own words the troubles they have encountered over the years with NITUs.

The loss of rights by the abutting property owners can be reduced by the STB through adoption of the proposed rulemaking, but the financial cost and mental issue costs to the abutting property owners and taxpayers who foot the cost for the trails does not make it right to drag out these NITUs for years and years. If the trails groups can't get approvals and funds together in three years, then maybe it isn't a project with such a high priority for government officials.

Madison County's comment went on for 10 pages with not much new. Mr. Montange has been pushing the same arguments for the past 30 years. NARPO has repeatedly been approved by courts to participate in court actions and rulemakings. Mr. Montange makes much of the fact that STB imposed Historic and Environment issues can delay trail agreements, but the only reason Historic and Environment issues are delayed is because the abandoning railroads delay doing the most simplest of filings to state historic preservation agencies. This delay is done on purpose in order to keep the abandonment and possible trail use agreement still under STB jurisdiction. On the few abandonments where the railroads own most of the ROW in fee, they never agree to Interim Trail Use and the Historic and Environments issues are settled in a month or so and the rail line abandonment consummated. This is just another way the railroads game the STB system and string along trails groups until the trail groups get the large funding the railroads want in order to sign a trails use agreement.

Statute of Limitations

Almost all statutes, both federal and state, have statutes of limitation attached to the laws and regulations. The one statute of limitations that is pertinent to EP-749-1 is the six year statute of limitations imposed when an abutting property owner can start a takings case before the U.S. Court of Claims for compensation for the "taking" of land for an issued NITU. The Federal Circuit has a "bright-line rule" that the six year statute of limitations begins to run on a physical takings claim in a rail-to-trail case when a property owner's state law reversionary

interest is blocked. *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2005) and *Barclay v. United States*, 443 F.3d 1368 (Fed. Cir. 2006). The *Caldwell* court determined the statute of limitation on a NITU taking claim starts the day the STB issued the NITU. If the STB limits NITU extensions to six extensions, then the abutting property owners still have some time left to file their takings case in the U.S. Court of Claims. The limit to six extensions is very helpful to abutting property owners because a lot of the time they are not even aware that a trail is proposed on their property. The reason the abutting property owners are not aware that a trail is proposed on their property is because the STB, the trail proponent, and the railroad never notified them that a trail was being proposed on their property.

Again this gets us to the deficient constitutional due process of notification before a condemnation which NARPO brought out in earlier requests for due process notification at the time the NITU is issued.

Land Title Issues

It “would also undermine the well-settled preference for finality and stability in land title” because title to the property would remain in flux “with little assurance [the challenging party] will subsequently redeem.” *Millay*, 135 Wn.2d at 203-04. *See Millay v. Cam*, 135 Wn.2d 193, 205, 955 P.2d 791 (1998). The above is quoted from a Washington State case on land titles. The U.S. Supreme Court has also weighed in on land title issues; see *UNITED STATES, Petitioner, v. LITTLE LAKE MISERE LAND COMPANY, INC., et al.* 412 U.S. 580, 597-599, 1973, where the Court said “certainty and finality are indispensable in any land transaction, but they are especially critical when, as here, the federal officials carrying out the mandate of Congress irrevocably commit scarce funds”.

Where does certainty, finality and stability fit into the rails to trails scheme and NITU extensions? The way the STB currently handles NITU extensions and due process notification, there is no certainty, finality and stability in the land titles of the property owners abutting these proposed rail trails. As it now stands, the abutting property owner’s land title is in limbo for eternity because no one knows if and when a trail will be built through their property. If a property owner wants to sell his/her property for whatever reason, they have to disclose to the prospective buyer the possibility that a trail may be built through their property. If the NITU is still pending, nobody knows for sure when or if a trail will be built and

what kind of trail be it; motorized or non-motorized. And if the abutting property owner isn't aware that a possible trail is going to be built through their property because of lack of due process notification by the STB, then the property owner will be liable for misrepresentation of the property description in the sale literature.

The STB is also going to have to rein in the games the railroads are playing with the NITU extensions and Section 106 Historic Preservation time limits. The railroads use the Section 106 and other environmental requirements set by the STB Office of Environment Assessment to extend their consummation of abandonments in the hope a trail entity comes up with the big bucks for a trail use agreement. If a simple requirement by the railroad to notify the SHPO is ignored, then the STB could require the railroad to file a whole new abandonment application with the associated fees if the consummation deadline is passed. As it now stands, the railroads have no incentive to consummate the abandonment unless they own the underlying ROW in fee title in which case they never agree to a NITU in the first place and finish up the Section 106 or other environmental requirements ASAP.

Conclusion

The STB has repeatedly refused to notify abutting property owners when it issues an order "taking" their property for public recreational use. Most landowners never learn their land has been subject to a federal Trails Act "taking" until years after the government (the STB) issues its order taking their land with a NITU. Many do not learn of the NITU until more than six-years after the NITU is issued and the statute of limitations for a "taking" has passed. Since the mid-1990's, property owners through their organization, NARPO, have been asking the STB to provide notice to landowners when the STB issues an order that takes land pursuant to the Trails Act, yet nothing has been done to correct the situation. The opponents to EP 749-1 have a myopic view of the issue because they like trails, so their thinking goes everyone should like trails regardless of the hardships and costs; but everything has costs as mentioned earlier in this reply. It is just that a lot of folks don't see the costs and hardships. It also appears that many of the opponents of EP 749-1 do not understand how property rights are adjudicated in America or they think property rights exist for them but not others.

The maximum of six 180 day NITU extensions or three years is a compromise to allow some measure of finality and certainty to the abutting property owners.

They know that in three years or less, the trail will be built or they will get their land back and use it for their farm, their backyard, their driveway or their beach. The trail use and NITU extensions of the past 32 years have denied rights to the people who are the most directly and negatively affected: the abutting property owners. The STB has the power to reduce this inequity.

In the EP 749-1 as proposed by the STB on October 2, 2018, the STB says they might allow an extension past the six limit extension for extraordinary circumstances. NARPO would hope that extraordinary circumstances are not the same lame excuses the trail entities have been using for the past 32 years such as getting appraisals or getting county council approval. Appraisals should be a non-issue; the railroads own less than 10% of ROWs as the abutting property owners own the underlying land of the ROW. These things should have been done before they even started the proposed trail. The availability of the STB required System Diagram Map should give trail proponents many months if not years to prepare for a trail.

NARPO members and property owners throughout appreciate the STB's time in considering new rule making to take the rights of property owners into account in the rails-to-trails issue.

Sincerely yours, Dick Welsh, Executive Director, NARPO