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August 7, 2009

VIA CERTIFIED MAIL

Surface Transportation Board
ATTN: Public Comment
395 East Street, SW
Washington, DC 20423

Re: EP 690 0

To Whom It May Concern:

Attached is the statement of Mark F. (Thor) Hearne, II, as public comment to the July 8, 2009 hearing entitled "Twenty-Five Years of Railbanking: A Review and Look Ahead" in EP 690 0.

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Best regards,

LATHROP & GAGE LLP

By:

Lindsay Brinton
Lindsay S.C. Brinton

LSCB/sew
Enclosure

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NEW YORK

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



STB Ex Parte No. 690

TWENTY-FIVE YEARS OF RAIL BANKING: A REVIEW AND LOOK AHEAD

**WRITTEN TESTIMONY OF
MARK F. (THOR) HEARNE, II**

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The Trails Act: Railroading Property Owners and Taxpayers For More than a Quarter Century.

I. Recreational Trails and Preservation of Railroad Corridors Are Worthy Goals.

Add my voice to the choir. A well-administered public recreational trail can be a valuable and appreciated public amenity.¹ I grew up in a family that has always appreciated outdoor recreation and biking and hiking trails. One of the earliest pictures I have from my childhood is my father hiking the Appalachian Trail with me. My brothers and I grew up biking. My younger brother biked across the country from Oregon to Virginia at the age of twelve and later was a candidate for the U.S. Olympic bicycling team and trained at Colorado Springs. My father, now nearly seventy years old, bikes fifteen miles most afternoons around north Lake Leelanau in Michigan.

While I did not aspire to be an Olympic bicyclist and I do not have occasion to bicycle as frequently as my father, I do appreciate the exercise and enjoyment of biking. I also appreciate the need for bike trails and bike paths. Twice, while biking on a local two-lane road as a teenager, I was hit by a car. Fortunately, though not insignificant, my injuries were not serious. These experiences did not cause me to lose my appreciation for bicycling. Rather, they gave me a greater appreciation for the value of well-planned, well-maintained and well-managed bike paths.

I also come from a family with a longstanding connection to railroads. My grandfather worked for the Missouri Pacific Railroad and my great grandfather owned the lumber company that sold the MoPac the ties and trestles used to build its rail lines from Missouri to the west coast. Because of this family heritage I appreciate the great value railroads have brought our nation as they opened our land to farming and continue to provide energy-efficient transportation.

¹ However, as noted below, a poorly administered trail or a trail in a location of no recreational value can be a nightmare. Unfortunately, there are many of these situations.

The 1983 Amendments to the Trails Act² were adopted for the purpose of converting abandoned rail lines into public recreation trails and preserving the otherwise abandoned easement as a corridor over which the STB could authorize some railroad to build a new rail line at some indefinite date in the future.

However, the fact that the object of legislation benefits the public does not excuse the Government of its obligation to pay a landowner "just compensation" for property the Government takes in pursuit of this objective. The Fifth Amendment to our Constitution requires that when the land of one citizen is taken for the benefit of the public, the citizen whose property has been taken must be paid "just compensation."

Justice Holmes noted this point in *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416, 43 S.Ct. 158, 160 (1922), when he wrote, "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

I am an attorney and for almost twenty years I have represented clients in matters concerning real estate and property law. My legal practice has included representing landowners whose property has been taken in a "rail-to-trail" conversion when an abandoned rail line is converted to a public recreational use under the Trails Act. It has been a tremendous honor and privilege to represent these fellow citizens. Most of those whose land has been taken in a "rail-to-trail" conversion are families of modest income whose greatest asset is their home or farm.

Those I have represented in these rails-to-trails cases have included ranchers in Arizona, retirees in Florida, and family farmers in Michigan, Kansas and Missouri. I have also represented local governments, schools, cemeteries, and not-for-profit youth associations. All of these are fellow citizens (and community organizations and businesses) whose land the Federal Government has taken for a public trail. Some have received compensation; others have not yet been paid.

² Pub.L. 98-11, 97 Stat. 48, to the National Trails System Act, Pub.L. 90-543, 82 Stat. 919 (certified, as amended, at 16 U.S.C. §1241 *et seq.* (Supp. II 1996)).

I am not here to speak for any one of these clients. Rather, I want to provide the STB with my assessment of the Trails Act from the perspective of an attorney who supports the objective of the program, a taxpayer who pays part of the cost of the program and also an attorney with almost two decades of experience representing more than a thousand of those landowners whose land has been taken from them by operation of the Trails Act.

In short, I have found the Trails Act to be a federal program seeking a worthy objective that is seriously flawed in its pursuit of this objective. The flaws in the Trails Act combined with this Board's and the Department of Justice's implementation of the Trails Act has made the Trails Act substantially more costly for American taxpayers. Fortunately, I believe the legitimate objective of the Trails Act – public recreational trails and preservation of railroad corridors – may be fairly, efficiently, and cost-effectively achieved. But, this can only be accomplished if this Board, Congress, and the Department of Justice each change the way in which this program is currently administered. If this is done, land owners will be fairly treated, there will be more and better recreational trails, and less of the taxpayers' money will be spent.

II. A Trails Act Parable.

Suppose you own a home. It is a home that has been in your family for generations and is of cultural and historic interest – George Washington once spent the night and wrote his farewell address in this house. This home is on land owned by your family for generations and is next door to the house you live in. You are not currently using this home and a neighborhood businessman wants to buy the home. But, you don't want to sell and would prefer to keep the home in your family. You do think it would be good for the neighborhood, however, to have someone living in the home and this businessman is a nice fellow. (He is a former railroad executive and it seems that he would be a responsible neighbor who would take care of the home while he lives in it.) So, you agree to sell him a life estate in the home. The businessman can live in the home for the rest of his life. When the businessman dies – whether in a week or in eighty years – you (or your heirs) get the home back.

Several decades later the Federal Government passes a "Historic Preservation" law which says a government agency may authorize those living in historic homes to sell them to a private

group or local government that will operate the home as a public museum. This law further provides that the person living in the home may sell the home to a private group or to local government notwithstanding any provision of state property law – such as a life estate – which would prevent them from selling the home.

The businessman who bought your home has become quite sick and fallen on hard times. (The railroad business isn't what it used to be and his railroad pension does not cover his medical expenses.) So, he tells the federal agency that he is terminally ill and will soon no longer need the home. The federal agency – without ever telling you – issues an edict that authorizes the businessman to sell the home to a group that wants to open it to the public as a museum. Under this arrangement the museum gets the home when the businessman dies, notwithstanding state law which says the businessman has only a life estate. The businessman's only heirs are some estranged third cousins. A provision of this federal Historic Preservation law allows these estranged third cousins to move into the house in the future if the federal agency grants them permission to do so.

You, as the owner of this home don't know anything about any of this. No one – not the businessman, not the museum, and not the Federal Government – ever told you about this scheme to sell your home to a museum with the possibility of the businessman's third cousins moving back in.

Fortunately for the businessman, he does not die for several more years. When he finally does die, sad as you are about his passing, you go to reclaim your home. But when you do, a private group appears on the scene and tells you they own the land by reason of this federal Historic Preservation law and the order of the federal agency. This private group plans to operate a public museum in the home. They will charge admission and have a concession stand³ and bookstore in the home.

³ Recently, in a hearing before federal judge, Nancy B. Firestone, the judge asked the Department of Justice whether concessionaires would be permitted to set up a stand to sell things to the hikers and bikers along the trail, stating. The Justice Department's attorney responded, "I don't believe that they could be prevented from putting up a concession stand." *Biery v. United*

You protest. This is your home. The businessman had only a life estate. The United States Supreme Court rules that Congress may constitutionally convert your home into a museum because Congress has the power of eminent domain. But, the Supreme Court rules, the Fifth Amendment requires the Federal Government to pay you “just compensation” for the home it has taken from you.

You would rather have your home back. But, lacking that, you would like to receive the “just compensation” you are constitutionally entitled to receive. So you file a claim in the Court of Claims seeking that compensation. But now the Justice Department opposes your right to be paid compensation. The Justice Department argues, “It may be true that the businessman only had a life estate in your home. But we have decided that a ‘life estate’ in a historic home has been ‘redefined’ or has ‘shifted’ to include the right of a private museum group to operate the home as a public museum – including a concession stand and bookstore.”

We all agree – you most of all – the home is of great historic and cultural importance. This is why you wanted to keep it in your family. It is also a very good thing that we remember where our first president slept and dioramas portraying the event and books recounting his life are all of great national importance. After all, where would we be without George Washington?

When you learned the private museum group claimed to own your property because of the federal agency’s edict, you promptly filed a claim with the Federal Government seeking “just compensation” you are entitled to receive under the Fifth Amendment to our Constitution. After five years of litigation with the Federal Government, you and the Justice Department reach a settlement specifying the amount of compensation you are to be paid for this home. A federal judge reviews this settlement and approves the compensation you are to be paid. But just two days before this order approving the settlement is final, the court of appeals issues a ruling in a different case involving a house the Federal Government has taken from a famous general in Georgia. (The Federal Government also took this Army general’s home without paying him.) Under the Court of Appeals’ “new rule,” a homeowner must file a claim for compensation within

States (07-693L) and *Pankratz v. United States* (07-675L) (Transcript of Hearing held Dec. 18, 2008, p. 92).

six years of the federal agency issuing its edict to the businessman. You protest, "This is not fair. No one ever told me about the federal agency's order. I didn't know anyone had taken my home until I heard about the deal between the businessman and the museum group – and even then I only heard about because it was in the newspaper. Plus, I filed my claim before this 'new rule' was announced and under the 'old rule' I couldn't even file a claim until the businessman had died and I had the right to my home under state law."

"Too bad." The Justice Department says. In effect - "Gotcha. You're out of luck. The museum group gets your home and we get out of our settlement agreement so the Federal Government doesn't have to pay you. Sometimes life is just not fair."⁴

⁴ The Justice Department, argued before U.S. Court of Federal Claims Judge Eric Bruggink that although the government had admitted liability for a taking of several Missouri property owners' land, a subsequent decision in an unrelated case changed the statute of limitations and the Justice Department relied on that decision to abandon a settlement that was days from being entered in the property owners' favor. Justice Department attorney Kristine S. Tardiff argued:

[T]he extent that some of this discussion is really turning on the perceived equities, or inequities, of the government raising the statute of limitations' issue again after having litigated the case for a number of years, we have quoted in one or both of our brief [*sic*],. . . It states: that age-old rule that a court may not, in any case, even in the interest of justice, extend its jurisdiction where none exists has always worked injustice in particular cases. *Illig v. United States*, Transcript, June 17, 2005, p. 34.

Congress has condemned the Justice Department's use of the statute of limitations as a "gotcha game" to deny deserving citizens their right to compensation. In a hearing before the Subcommittee on National Parks of the Committee on Energy and Natural Resources, held April 23, 2008, Senator Burr stated as follows:

Mr. Chairman, my last statement's not a question, but it is a statement. I understand it's appropriate for the Park Service to come in and say that the issue of Rails-to-Trails and the clarification that's needed is not a National Parks Service issue, and I can appreciate that.

I hope you will take back to the individuals at Justice Department that have made this determination that I take very seriously a takings and I think that when somebody's land is taken there has to be compensation for that.

You cannot believe this. So you ask if any other citizens have had this happen to their homes. You find that a lot of other citizens have also lost their homes under this federal program and very few have yet been paid.

One homeowner tells you his home was taken under this program when the federal agency granted a county government the right to take the family home for a museum. But the county has never used the home for the museum. Rather, the home has been neglected and vandalized and the grounds are littered with trash. The county government, who was given the right to use this home, said it wanted the home for a museum but the government really had no interest in opening a museum. Rather, the county really wanted to use the federal Historic Preservation program to acquire the land so the county could make money by leasing the home to a cell tower company and digging a sewage lagoon in the back yard for a community septic system.⁵ The property owners complained to the federal agency but the federal agency told them

I'm not an expert on what limitations, statute of limitations we've got currently or what triggers the clock starting. I have always found regardless of what I look at, the that Federal Government's clock starts well before usually people on the other side and it's only because we get to interpret and they have to guess.

I truly believe that we have people that were engaged in what they thought was an honest negotiation. If for some reason we found a technical reason to run the clock out and now the position from the Justice Department is "oops, so sorry, you missed out on compensation." That's not the American way.

So, you might send a message to the Justice Department. I would advise finding a way to settle this. If not legislatively, we will accommodate the needs of those property owners who have not been compensated.

And, I'm sorry to use you on your birthday as a telegraph to the Justice Department, but I think you can go back and tell them in the spirit that I gave this in much more so than I can.

⁵ In the case *Pankratz v. United States*, No. 07-675L, currently pending in the United States Court of Federal Claims, the STB docket indicates that the Butler County Parks Department acquired the railroad right of way, not to build a recreational trail, but rather as an easement to lay fiber optic cable.

it had no jurisdiction to regulate how a “museum group” can use the land. The Justice Department says the “museum group” can use the land for anything it wants – it does not have to be a museum. The only requirement is that the “museum group” not do something that would make it impossible for the estranged third cousins to move back to the land and build a new home. No one really knows what this would be. In one case the “museum group” tore down the home and built a heliport.⁶

In yet another case, the heirs of the deceased life estate tenant are using this program to try and get money for the home by selling it to a Mexican corporation.⁷ In the meantime, the home has fallen into disrepair; the pool has overflowed and flooded the owner’s adjoining home and a group of illegal aliens are using what is left of the home for a methamphetamine lab. Every few days the police are called to break into the house and arrest them but it continues to be used for a meth lab and a shelter for illegal aliens. Whenever the owners try and lock the home and prevent it from being used, they are run off by the police who say that, under this federal program, the owners have no right to go onto the land, not even to protect their adjoining land from being flooded.⁸

For those fortunate enough to learn that the federal agency has issued an edict authorizing their home to be converted into a museum in time to file a claim for compensation, the Justice Department will claim the government still does not need to pay them for taking their ancestral home. In its defense of these museum act taking cases, the Justice Department has pursued a litigation strategy that is both very expensive and greatly delays a homeowner being paid compensation. The Justice Department argues:

(a) The businessman still lives in the home and therefore the “life estate” is still in force. True enough, the businessman is dead and buried and it is also true he had only a life estate to

⁶ See testimony of Marianne Wesley Fowler presented to the STB, June 29, 2009.

⁷ See *Ladd v. United States*, No. 07-271L, currently pending in the United States Court of Federal Claims; see also STB Docket No. AB-1081X, Environmental Assessment, issued November 9, 2005.

⁸ See *Ladd*, Docket Nos. 64-2 and 81-2.

use the property, but since the federal agency may grant his estranged third cousins the right to move into the house sometime in the future, the businessman is really still living in your house now.

If you don't buy argument (a) the Justice Department offers argument (b) as justification for taking your home without having to pay you.

(b) Your home is really a museum and was a museum all along. The original owners of the home allowed George Washington to sleep there because George Washington was a public figure. Therefore, a public museum commemorating George Washington's slumber in the home is a use consistent with the invitation the original owner granted George Washington when he was asked to spend the night. George Washington was a *public* figure so a *public* museum commemorating this event are both similarly permitted *public* uses of this home within the "scope" of the original invitation to George Washington. Additionally, since you granted the businessman the right to perpetually use this home for a single family residence as long as he lived, you cannot complain about the use of your land as a public museum since, if the businessman had not died, he could still be using the home. The public museum imposes no "greater burden" on your ownership of the reversionary right to this home than was the case when the businessman used it.

Okay, okay. So that argument is an invalid syllogism on the order of: "God is Love, Love is Blind; Therefore, Stevie Wonder is God." But, the Department of Justice has one more argument to avoid paying compensation in these Home-to-Museum cases.

(c) Assuming you reject argument (a) and argument (b), the Justice Department argues that the Federal Government can still take your property without having to pay you because the government (or a judge sympathetic to the Federal Government) can "redefine" or "shift" your property interest in your home. The argument goes like this: When you and the businessman negotiated the original agreement, he obtained a life estate to use your home. The life estate did not allow him to sell your home to a museum – or to allow his estranged third cousins to use the home after he died. "But," the Justice Department argues, "Times have changed. It was several decades ago that you and the businessman negotiated the life estate. Since then, we have come

to have a much greater appreciation of George Washington and the importance of preserving our historical connection with our first president. It is appropriate for the Federal Government (or a judge sympathetic to the Federal Government) to “redefine” the life estate granted the businessman in light of the current reality of our appreciation of George Washington. Thus, a life estate granted for the life of the businessman who lived in a home in which George Washington once slept should be redefined or “shifted” to be a “life estate” that endures so long as we never forget the life of George Washington.

The preceding parable of a private home taken for a public museum is precisely analogous to what happens to a property owner in a “rails-to-trails” taking under the federal Trails Act.⁹ If you substitute “railroad” for “businessman,” “recreational trail” for “museum,” and “reversionary interest” for “life estate” you have an accurate statement of the Trails Act and how it influences the interested parties – the railroad, the trail sponsor, and the owner of the land taken for a trail.

III. The Reality of How the Trails Act Operates.

The Trails Act is not – in reality - about preserving railroad corridors. This is a fiction. The Trails Act is really about converting land that was once the site of a – now abandoned – rail line to a new and different use as a public recreational trail. And, as the Federal Circuit, as well as other courts have made clear, public recreational use is quite different from operating a railroad.

⁹ While some rail lines have been established by a conveyance of the fee title to the railroad with the grantor retaining a reversionary right, this is a very unusual situation. The common means by which a rail line is established is by granting the railroad an easement. An easement is a right to use the land – not ownership of the land. And, an easement is limited to use of the land for the specific purpose for which it was granted. However, in the Trails Act context, the term “reversionary right” or “reversionary interest” is frequently used as a shorthand description of the landowners’ interest. As the Federal Circuit has noted, this is a common shorthand, though technically incorrect use of the term.

According to the testimony before this Board, out of 5,079 miles of track subject to a NITU, only 1,596 have been converted to trail use. Of 1,596 miles, only 9 times has a rail line been rebuilt on the land. And, often “reactivation” has only been a very small segment of the line. Thus, while it is true the Trails Act preserves the *hypothetical* possibility that the STB may at some future time allow some unidentified railroad to build a new rail line across the land, the reality is this will never happen.

In the vast majority of cases, the land has been permanently converted to public recreational use and has never – or will never – be the site of a future railroad. Many of the abandoned rail lines converted to public recreational use are spur lines or dead-end lines that run nowhere any railroad will ever be needed in the future. Most of these abandoned rail lines are not of significant value as a rail corridor. Indeed, the law governing this Board requires that, before issuing a NITU (or CITU), the Board must first conclude that there is no present or foreseeable use of the land for a rail corridor. 49 U.S.C. §§ 10903-10904.

IV. Almost Every Time It is Invoked, the Trails Act Takes A Citizen’s Land.

It is now settled law that in the great majority of cases, the Trails Act operates to take a compensable interest in land from a United States citizen.

A. Railroads Typically Hold Only an Easement in Land.

As Justice Brennan observed in *Preseault v. United States*, 494 U.S. 1 (1990) (“*Preseault I*”), “many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests. . . [and] frequently the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations.”¹⁰ As noted by the court in *Davis v. MCI* 606 So. 2d 734, 738 (1992), “Except to site a station house or similar land use here and there, the railroads had no need or desire for any interest except ‘right-of-way.’”

¹⁰ *Preseault*, 494 U.S. at 9.

Judge Posner noted the fundamental presumption (recognized in almost every state) that a railroad's interest in land used for a rail line is only an easement allowing the railroad to use the land – not a fee simple estate in the land itself. Judge Posner noted the public policy underlying this presumption in *Penn. Cent. Corp. v. U.S.R.R. Vest Corp.* 955 F. 2d 1158, 1160 (1992, 7th Cir, Ind.):

The presumption is that a deed to a railroad or other right of way company (pipeline company, telephone company, etc.) conveys a right of way, that is, an easement, terminable when the acquirer's use terminates, rather than a fee simple. Transaction costs are minimized by undivided ownership of a parcel of land, and such ownership is facilitated by the automatic reuniting of divided land once the reason for the division has ceased. If the railroad holds title in fee simple to a multitude of skinny strips of land now usable only by the owner of the surrounding or adjacent land, then before the strips can be put to their best use there must be expensive and time-consuming negotiation between the railroad and its neighbor—that or the gradual extinction of the railroad's interest through the operation of adverse possession. It is cleaner if the railroad's interest simply terminates upon the abandonment of railroad service. A further consideration is that railroads and other right of way companies have eminent domain powers, and they should not be encouraged to use those powers to take more than they need of another person's property—more, that is, than a right of way.¹¹

The Federal Circuit similarly construed instruments conveying a right of way to a railroad as only passing an easement, even when the instrument purported to convey a fee simple estate in the land and did not use the term “right of way.” See *Preseault v. United States*, 100 F.3d 1525, 1535-36 (Fed. Cir. en banc, 1996), wherein the court considered the Manwell deed. The Federal Circuit noted, “The deed appears to be the standard form used to convey a fee simple title from grantor to grantee. But did it? . . . Despite the apparent terms of the deed indicating a transfer in fee, the legal effect was to convey only an easement.”

Many states, like Missouri, amended their state constitutions to specify that a railroad obtained only an easement to use the land – even when the document purported to be a

¹¹ Citing, *Brown v. Penn Central Corp.*, 510 N.E.2d 641, 644 (Ind.1987); *Ross, Inc. v. Legler*, 245 Ind. 655, 199 N.E.2d 346 (1964); *Highland Realty Co. v. City of San Rafael*, 46 Cal.2d 669, 678, 298 P.2d 15, 20 (1956); *Sherman v. Petroleum Exploration*, 280 Ky. 105, 132 S.W.2d 768 (1939); *Johnson v. Ocean Shore R.R.*, 16 Cal.App.3d 429, 94 Cal.Rptr. 68 (1971), *Henry v. Columbus Depot Co.*, 135 Ohio St. 311, 20 N.E.2d 921 (1939).

conveyance in fee simple absolute. See *Brown v. Weare*, 152 S.W.2d 649 (Mo. 1941); *Boyles v. Missouri Friends of the Wabash Trace Nature Trail, Inc.*, 1998 WL 792070 (Mo. App. 1998)

Another example is Kansas, where the Supreme Court has repeatedly held that a railroad obtains only an easement in a strip of land used for a rail line – no matter what the conveyance document states. The Kansas Farm Bureau filed an amicus brief in the Kansas Supreme Court making just this point.¹²

As the Florida court observed in *Davis v. MCI*, 606 So. 2d 734, 738 (1992), “Except to site a station house or similar land use here and there, the railroads had no need or desire for any interest except ‘right-of-way.’” Likewise, in *Dean v. MOD Properties, Ltd*, 528 So.2d 432, 434 (Fla. App. 1988), the court noted, “[O]nly an easement is needed to lawfully construct and maintain a road right-of-way on and over land.”

B. A Easement Granted a Railroad For the Operation of A Railway Does Not Include the Right of a Non-Railroad to Use the Land for Public Recreation.

When a railroad stops using a rail line and removes the tracks and ties, the easement is abandoned. This is the law in every state.

There are literally hundreds of cases in states holding a railroad easement has been abandoned when the railroad no longer runs trains across the land and the tracks and ties are removed. See, e.g., *Preseault II* (holding that under the law of Vermont, the railroad had abandoned the railroad easement when the railroad ‘ceased using the easement for active transport operations and used the tracks solely to store railroad cars . . . Vermont Railroad removed the rails and other track materials from the segment of line crossing the Preseaults’ property.’ 100 F.3d at 1547. And, “While it is not disputed that an easement will not be extinguished through mere non-use, removing the tracks and switches from a railway cannot be termed non-use. Non-use of the easement began in 1970; abandonment occurred, as evidenced

¹² The Kansas Farm Bureau represents the interest of 40,000 Kansas farmers and filed an amicus brief opposing the Department of Justice argument that Kansas property law can be “shifted” to allow recreational trail use of abandoned rail lines.

by the more permanent lack of operability, in 1975 [upon removal of the tracks].” 100 F.3d at 1553 (J. Rader, concurring)), *Marthens v. B&O Railroad*, 289 S.E.2d 706, 710 (W. Va. 1982) (holding that the property was abandoned or no longer used for railroad purposes because “the property [has] actually been alienated by sale or lease”); *Cannco Contractors, Inc. v. Livingston*, 669 S.W.2d 454 (Ark. 1984) (holding that the railroad had abandoned the easement when it deeded all of its interest in the easement to a private company - even though track remained and trains continued to use the line to service a private business); *Lawson v. State*, 730 P.2d 1308 (Wash. 1986) (holding that the “change in use of railroad right-of-way to recreation or nature trail was change of use evidencing abandonment of right-of-way, where easement was granted for railroad purposes only”); *Seventy-Ninth Street Improv. Corp. v. Ashley*, 509 S.W.2d 121, 123 (Mo. 1974) (“An offer to sell [right of way for use other than that for which is granted] is totally inconsistent with any position other than that the use of the strip for railroad purposes has been abandoned.”); *Loveland v. CSX Transp. Inc.*, 622 So.2d 1120, 1121-23 (Fla. App. 1993) (holding that the railroad’s sale of its easement to a non-railroad constituted abandonment of the easement); *Pollnow v. State Dept. of Natural Resources*, 276 N.W.2d 738 (Wisc. 1979) (railroad had abandoned the rail line when it removed the tracks, applied to the governing authority for permission to abandon, as a result of which the railroad could not subsequently transfer title to the state for use as a recreational trail); *Carmody-Lahti Real Estate*, 699 N.W.2d 272 (Mich., 2005) (railroad’s conveyance of railroad easement to state Department of Natural Resources for a snowmobile trail was an abandonment of the easement.) *Boyles v. Missouri Friends of the Wabash Trace Nature Trail, Inc.*, 981 S.W.2d 644 (Mo. 1998) (“Abandonment is complete when the privilege of use authorized by the easement wholly and permanently ceases. Abandonment is proven by evidence of an intention to abandon without an intention to again possess it. An easement for a railroad right-of-way is extinguished or abandoned when the railroad ceases to run trains over the land. ‘An intention to abandon is inferred by the discontinuance of rail service with no prospect for resumption.’” The Boyle court further held, “Use of the right-of-way as a hiking, biking, cross-country skiing, and nature trail was not a ‘use for which [the easement was] taken’ under Article I, section 26, of the Missouri Constitution and was consistent only with an intent to wholly and permanently cease railway operations.” citing, among other authority, *Kansas City Area Transp. Auth. v. 4550 Main Assoc., Inc.*, 742 S.W.2d 182, 189 (Mo.

App. W.D. 1986), cert. denied, 484 U.S. 1063. *Schuermann Enter., Inc. v. St. Louis County*, 436 S.W.2d 666, 668 (Mo. 1969), *Brown v. Weare*, 152 S.W.2d 649, 652 (Mo. 1941) and *Quinn v. St. Louis-San Francisco Ry. Co.*, 439 S.W.2d 533, 535 (Mo. banc 1969)).

The Government is fond of citing *Chevy Chase Land Co. v. United States*, 733 A.2d 1055 (Md. 1999), and *Washington Wildlife Preservation, Inc. v. State*, 329 N.W.2d 543 (Minn. 1983), for the proposition that a railroad easement includes the right to use the land for a public recreational trail or that the railroad easement is not abandoned when the land is converted to a public recreational trail. These two cases do not so hold. In both *Chevy Chase Land* (as discussed more fully below) and *Washington Wildlife*, each Court very specifically held that the easements involved in those cases (in both cases the easements were acquired by voluntary conveyance and not condemnation) were not limited to use of the land for a railroad. In *Washington Wildlife* the Court premised its holding upon the finding that, “It is assumed that the deeds conveyed only an easement. Significantly, however, none of the deeds expressly limit the easement to railroad purposes, provide that the interest conveyed terminates if use for railroad purposes ceases, or provide that the easement would exist only for so long as the right-of-way was used for railroad purposes. While the grantors were undoubtedly aware that a railroad would be constructed on the land, none of the deeds limit the use to railroad purposes.” *Washington Wildlife*, 329 N.W.2d 546 (emphasis added).

The Federal Circuit read the Maryland Supreme Court’s decision as holding:

The [Maryland Supreme] [C]ourt unanimously held that the 1911 conveyance was an easement, and that the terms of the original conveyance were sufficiently broad to embrace its use as a recreational trail. . . . Citing its law, the court held that since the easement is not limited in scope to railroad purposes, and embraces the current trail use, “a party alleging abandonment must show more than an intent to abandon railroad service.”

Chevy Chase Land Co. v. United States, Nos. 97-5079, 97-5083, 1999 U.S. App. LEXIS 32838, at *5-6 (Fed. Cir. 1999 (emphasis supplied); see also *Toews*, 376 F.3d at 1380 (where the

Federal Circuit noted that the easement in *Chevy Chase Land* was not limited to railroad purposes).

Public recreational use of land by a non-railroad (or even by a railroad) is not a “railroad purpose.” The Oxford English Dictionary defines “recreation” as “an activity or pastime pursued” and “trail” as “a beaten track or path or track, esp. in a wild or uninhabited region. Also, a marked route through countryside, around a town, etc., indicating points of interest or historical significance.” *Id.* “Hiking” is described as “to walk vigorously,” and “biking” is described as “ride on a bike.” *Id.* “Concessionaire” is defined as “The holder of a concession or grant, esp. of the use of land or trading rights.” *Id.* None of these terms includes or references anything that can be remotely characterized as relating to the operation of a railroad.

The United States Congress has defined a railroad at 11 U.S.C. § 101(44) as follows: “The term ‘railroad’ means common carrier by railroad engaged in the transportation of individuals or property or owner of trackage facilities leased by such a common carrier.”

The Federal Circuit, in *Toews v. United States*, 376 F.3d 1371, 1376 (2004), recognized that recreational activities are very different from those of a railroad:

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

I know of no court – state or federal -- that has ever accepted the Department of Justice argument that a public recreational use of land by a non-railroad is within the limited railroad purposes allowed under an easement granted to a railroad for the construction of a rail line.

C. “Railbanking” is Not a Railroad Purpose.

The government argued in *Preseault II* that “railbanking” and recreational trail use were “railroad purposes” within the scope of the easement granted for the operation of a railroad under state law (in that case, Vermont law). The Federal Circuit rejected this argument, stating, “We find no support in Vermont law for the proposition . . . that the scope of an easement limited to railroad purposes should be read to include public recreational hiking and biking trails.” *Preseault II*, 100 F.3d at 1530.

In *Glosemeyer v. United States*, 45 Fed. Cl. 771 (Ct. Ct. 2000) (consolidated for decision with *Moore v. United States* and *Town of Grantwood Village v. United States*), the government attempted to argue that “railbanking” and recreational trail use were “railroad purposes” under Missouri law. The Court of Federal Claims rejected this argument, noting that “trail use, by itself, would not constitute a railroad purpose. The transportation use contemplated by a railroad purpose would clearly be the movement of trains over rails. Recreational hiking, jogging and cycling are not connected with railroad use in any meaningful way.” *Id.* at 778. The court also stated:

The term ‘railroad purpose’ . . . does not encompass other forms of transportation, such as walking or bicycling . . . The proposed development of a hiking, biking, cross-country skiing , and nature trail is completely unrelated to the operation of a railway and consistent only with an intent to wholly and permanently cease railway operations. *Id.* at 779 (citation omitted).

The Federal Circuit in *Preseault II*, 100 F. 3d at 1554, likewise held:

Realistically, nature trails are for recreation, not transportation. Thus when the State sought to convert the easement into a recreational trail, it exceeded the scope of the original easement and caused a reversion. . . . the State’s transparent attempt to retain property condemned for a narrow transportation use crumbled when it converted that property to a recreational trail. . . . The United States and Vermont have converted a right to use the [landowners] land for a railroad into a

right to hold the land in perpetuity. The vague notion that the State may at some time in the future return the property to the use for which it was originally granted, does not override its present use of that property inconsistent with the easement. That conversion demands compensation.

“Railbanking” is not defined by The Oxford English Dictionary. “Railbanking” as a term does not even appear in the text of the Trails Act. “Railbanking” is the shorthand term that describes operation of §1247(d) of the 1983 Amendments to the Trails Act. *See, generally, Goos v. I.C.C.*, 911 F.2d 1283 (8th Cir. 1990), and *National Wildlife Federation v. I.C.C.*, 850 F.2d 694 (D.C. Cir. 1988).

“Railbanking” is “the conversion and use of the right of way for non-railroad purposes.” *Goos* at 1295 “Railbanking” is not the situation where the BNSF (or some other railroad corporation) continues to hold an interest in a railroad easement but simply chooses to not run trains over the railway. “Railbanking” is not the situation where a railroad company is holding a railroad easement over property with plans to build or construct a railway over the easement at some time in the future. “Railbanking” is not even the situation in which a non-railroad is holding the easement with a plan or hope of restoring railroad service across the land.

Before any rail line may be “railbanked” and converted to recreational trail use, railroad use over the rail line must first be abandoned. Abandonments are governed by 49 U.S.C. §§ 10903-10904, and allow a rail carrier to abandon existing line if the I.C.C. [now STB] finds ‘that the present or future public convenience and necessity require or permit the abandonment or discontinuance.’ 49 U.S.C. § 10903. In considering the present or future public convenience, the I.C.C. weighs the potential harm to affected shippers and communities against the burden of continued operation on the railroad and on interstate commerce. *See Colorado v. United States*, 271 U.S. 153, 46 S.Ct. 452 (1926).” *Goos* at 1293.

“The [STB] views abandonment and conversion as separate proceedings.” *Goos* at 1293. As a matter of federal law “railbanking” can only occur after both the railroad and the STB have determined that the easement is no longer needed for railroad service and more than two years

have passed since the easement was last used for railroad service and a non-railroad agrees to use the land for a public recreational purpose.

While the term “rail” is used in the word “railbanking”, the use of the land during such time as it is “railbanked” has absolutely nothing to do with a railroad. No railroad has an interest in the land. The railroad tracks and ties are removed from the land. And, a non-railroad is using it for a purpose that has nothing to do with trains. At most there is a vague existential notion that maybe someday a railroad will come back.

“[The government] contends that holding out the possibility of a reactivation, even if remote and indefinite, is a railroad purpose in and of itself. This future potentiality thus becomes a present railroad purpose in the view of the government.” *Glosemeyer v. United States*, 45 Fed.Cl. 771, 781 (2000). The Federal Court of Claims rejected this contention: “In sum, neither component of railbanking – the preservation of the rail line for future use nor the ‘interim’ use of the easement as a recreational trail – constitutes a railroad purpose under Missouri law.” *Id.* As we show below, the same is true as a matter of Kansas law.

“‘When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean — neither more nor less.’” “‘The question is,’” said Alice, “‘whether you *can* make words mean so many different things.’” “‘The question is,’” said Humpty Dumpty, “‘which is to be master— that’s all.’”¹³ The parody *LAWYERS HANDBOOK* teaches that, “With regard to definitions, do not hesitate to define things in improbable ways. A good lawyer feels no compunction about defining ‘person’ to mean ‘corporations, partnerships, and livestock’; ‘automobile’ to mean ‘airplanes, submarines, and bicycles’; and ‘cash’ to mean ‘stocks, bonds, and whiskey.’”¹⁴

Were we to follow the counsel of Humpty Dumpty or the *LAWYERS HANDBOOK* it may be possible to contend that a “locomotive” is a “bike,” a “railroad” is a “hiking trail,” and

¹³ Lewis Carroll, *THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE*, 1871.

¹⁴ D. Robert White, Esq., *THE OFFICIAL LAWYER’S HANDBOOK*, Simon & Schuster, Inc. (1983), 185-86.

“railbanking,” the non-use of an abandoned right of way by a non-railroad, is a “railroad purpose.” However, such use of language empties words of their meaning and is an attempt to do precisely what the Supreme Court has said the sovereign cannot do – to redefine state property interests by *ipsi dixit* in an effort to avoid paying compensation. The sovereign may indeed redefine state property interests. However, when doing so destroys the citizens' property interest, “just compensation” must be paid.

D. The 1983 Amendments to the Trails Act Were Adopted Precisely Because “Railbanking” Is Not a “Railroad Purpose” Under State Law.

When the Justice Department (or others) argue that both “railbanking” and recreational trail use are a “railroad purpose,” the Government is attempting to bootstrap into state law a concept invented by Congress in the 1983 Amendment to the Trails Act. This effort fails for the additional reason that it misinterprets the intent and meaning of the 1983 Trails Act Amendment. The 1983 Amendment to the Trails Act was adopted precisely because Congress understood that “railbanking” and recreational trail use were not a “railroad purpose” under state law. If “railbanking” and recreational trail use were “railroad purposes” under state law, there would have been no need for the 1983 Amendment to the Trails Act.

The United States Supreme Court and the United States Courts of Appeal have detailed at length the intent and operation of the 1983 Amendments to the Trails Act and how the Trails Act operates to work a taking of a landowner's “reversionary” right in their property. A few of the key decisions are referenced below:

- *Preseault I*, 494 U.S. 1 (1990): Trails Act is constitutional but the Fifth Amendment requires “just compensation” when §8(d) preempts a landowner's state law reversionary interest in land subject to rail to trail conversion.
- *Preseault II*, 100 F.3d 1525 (Fed. Cir. 1996): Conversion of abandoned railroad easement to recreational trail use under the Trails Act was a compensable taking requiring payment of “just compensation.”

- *National Wildlife Foundation v. ICC*, 850 F.2d 694 (D.C. Cir. 1988): Trails Act did not provide the ICC authority to compel a railroad to convert abandoned right of way to trail use when railroad did not agree to conversion and “that reversionary property owners whose property interests are defeated by the preemptive effect of the Trails Act upon state laws” have a claim for “just compensation” for the taking of their property.
- *Citizens Against Rails-to-Trails v. Surface Transportation Board*, 267 F. 3d 1144 (D.C. Cir. 2001): STB’s issuance of NITU is ministerial and is not subject to National Environmental Policy Act [NEPA].
- *Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990): STB’s issuance of NITU is ministerial and is not is not subject to NEPA.
- *Jost v. Surface Transp Bd.* 194 F. 3d 79 (D.C. Cir. 1999): The STB “shall” impose a trail condition, and not permit abandonment of a line whenever a railroad is prepared to convey the right-of-way to a [trail sponsor]” the statute gives the [STB] ‘little, if any, discretion to forestall a voluntary agreement to effect a conversion to trail use.’”
- *National Association of Reversionary Property Owners v. Surface Transportation Board*, 158 F. 3d 135 (D.C. Cir. 1998): STB is not required to provide actual notice to landowners of a proposed rail-to-trail conversion and “[b]ut for the negotiation of a trail use agreement, state property law would be revived and, possibly, trigger the extinguishment of rights-of-way and the vesting of reversionary interests. When such a reversion is blocked, the interim trail use has been deemed a taking and the holder of a reversionary interest that does not vest because of a trail use may seek compensation in the United States Court of Federal Claims.”
- *RLTD v. Surface Transportation Board*, 166 F. 3d 808 (6th Cir. 1999): STB does not retain jurisdiction of railroad lines that are not part of the national rail system

and that “railbanking may be had only in conjunction with an abandonment application.”

- *Becker v. Surface Transportation Board*, 132 F. 3d 60 (D.C. Cir. 1997); *Birt v. STB*, 90 F. 3d 580 (D.C. Cir. 1996): STB was without jurisdiction to issue a second NITU after its jurisdiction had terminated upon the railroad consummating abandonment under the original NITU.
- *Grantwood Village v. Mo. Pac.* 95 F. 3d 654 (8th Cir. 1996): “ICC’s determination of abandonment is plenary, pervasive and exclusive of state law and federal law preempts state law on question of abandonment. *** State law claims can only be brought *after* the ICC has authorized an abandonment.”
- *Fritsch v. I.C.C.*, 59 F. 3d 248 (D.C. Cir. 1995): STB lost jurisdiction over abandoned railroad right of way when railroad abandoned right of way.
- *Hash v. United States*, 403 F. 3d 1308 (Fed. Cir. 2005): The General Railroad Right-Of-Way Act of 1875 granted railroads only an easement across public lands and the fee title was conveyed to homesteaders, and their successors in title, who subsequently acquired title from federal Government. Trails Act conversion of these abandoned railroad rights of way to trail use required the Government to pay landowners compensation for taking their property.
- *Toews v. United States*, 376 F. 3d 1371 (Fed. Cir. 2004): Grant of easement to railroad did not include right to use property for recreational trail use and the Fifth Amendment mandated that owners of “reversionary” interest in abutting property be paid just compensation.
- *Caldwell v. United States*, 391 F. 3d 1226 (Fed. Cir. 2005): Fifth Amendment taking claim for compensation in Trails Act taking arose upon STB’s issuance of NITU.

- *Barclay v. United States* 443 F. 3d 1368 (Fed. Cir. 2006) (consolidated on appeal with *Renewal Body Works v. United States*): Reaffirmed holding in *Caldwell* that taking claim arose upon STB issuing NITU.

As the Court of Appeals for the D.C. Circuit noted in *National Wildlife Foundation v. ICC*, 850 F.2d 694, 698 (1988), “As originally enacted, the Trails Act made no specific provision for the conversion of abandoned railroad rights-of-way to trails. Congress’s first effort to encourage this type of adaptive re-use appeared in §809 of the Railroad Revitalization and Regulatory Reform (“4-R”) Act of 1976.”¹⁵ Section 10906 of the 4-R Act authorized the ICC to delay disposition of abandoned railroad corridors for up to 180 days after an effective abandonment order “unless the property had been first offered on reasonable terms for sale for public purposes.” *Id.* Section 10906 is referred to as a “Public Use Condition.”

Section 10906 did not, however, achieve Congress’s hoped-for result. As the D.C. Circuit noted, “Section 10906 has no railbanking provision that would preempt state laws that could otherwise result in reversion of rights-of-way to abutting landowners upon a cessation of rail service.”¹⁶

The lack of a “railbanking” provision that preempted state laws providing for reversion created a “problem” in that railroad rights of way for which the railroad held an easement would be lost under state law when the railroad abandoned the right of way. For this reason, “Congress renewed its effort to promote the conversion of railroad rights-of-way to trail use when it enacted the current §8(d) as part of the 1983 Trails Act Amendments.”¹⁷ Section 8(d) was added to

[R]eflect[] the concern that previous [C]ongressional efforts have not been successful in establishing a process through which railroad rights-of-way which are not immediately necessary for active service can be utilized for trail purposes.
*** [this provision] should eliminate many of the problems with this program.

¹⁵ P.L. 94-210, Title VIII, 90 Stat. 144 (codified as amended at 49 U.S.C. §10906 (1982)).

¹⁶ *National Wildlife Foundation*, 850 F.2d at 701.

¹⁷ *Id.*

The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use.¹⁸

In *Grantwood Village v. Missouri Pacific Railroad Company*, 95 F.3d 654 (8th Cir. 1996), the court stated:

One of the major impediments to preserving these rights-of-way existed in state property laws which prescribed that once rail service is discontinued after the ICC's approval of abandonment, such easements would automatically expire and the rights-of-way would revert to adjacent property owners. In response to this problem, Congress enacted the Trails Act Amendments of 1983.¹⁹

The United States Congress itself has made clear that the 1983 Amendments to the Trails Act were intended to pre-empt state law and that, when the Trails Act operated to preempt property rights enjoyed by landowners under state law, "just compensation" would be paid to the landowners. Congressmen Barr, then Chairman of the House Judiciary sub-committee holding hearings into the Trails Act, noted:

At first glance, it may appear Congress did not consider the fact that if the railroad land was not transferred in fee simple it may belong to the property owner, and not the railroad. However, Congress intended the railbanking aspect of this Federal law would preempt State law and hold the land essentially in perpetuity, until possible rail reactivation. In the 1996 *en banc* decision in *Preseault v. United States*, involving the same plaintiffs as in the Supreme Court case I just mentioned, the U.S. Court of Appeals for the Federal Circuit held that railroad

¹⁸ H.R. Rep. No. 28, 98th Cong., 1st Sess. 8-9 (1983), *U.S. Code Cong. & Admin. News* 1983, 112. Congress adopted the Trails Act and the 4-R Act to address the loss of railroad rights of way. Congress was not alone in noting the decline of railroads in the 1970's. See Steve Goodman, *The City of New Orleans* (1970) ("And the steel rail still ain't heard the news. The conductor sings his songs again 'The passengers will please refrain: This train got the disappearing railroad blues.'"), as sung most famously by Arlo Guthrie on the album *Hobo's Lullaby* (1972).

¹⁹ See also *Citizens Against Rails-to-Trails v. Surface Transportation Board*, 267 F. 3d 1144, 1149 (D.C. Cir. 2001) ("By deeming interim trail use to be like discontinuance rather than abandonment, Congress sought to prevent property interests from reverting to the landowners under state law."), citing *Preseault I* 494 U.S. 1 at 8; and *National Wildlife Foundation*, 850 F.2d at 702.

abandonment constituted a *per se* taking, and therefore would require payment of just compensation to the affected land owners, under the Fifth Amendment.²⁰

Here is the point: It is beyond dispute that Congress, the United States Supreme Court and the Courts of Appeal all understand that the “railbanking” provision of the 1983 Trails Act Amendment was intended to preempt contrary state law and, in so doing, to take the reversionary property owners’ interest in their land. If “railbanking” and interim recreational trail use were understood to already be a “railroad purpose” under existing state law, there would have been no “problem” with the Trails Act that Congress needed to “fix” with the 1983 Amendment.

V. The Trails Act Takes a Landowner’s Interest in Land for which the Fifth Amendment to our Constitution Requires the Federal Government To Pay the Landowner.

Originally the ICC believed the Trails Act did not involve a taking of the reversionary owners’ interest in land upon which the abandoned rail line had once been located. The ICC was, of course, wrong on this point. The U.S. Supreme Court and the U.S. Court of Appeals for the D.C. Circuit and Federal Circuit have each rejected the ICC’s original position and ruled that the Trails Act can and does operate to take a landowner’s “reversionary” interest in their land. *Preseault v. United States* (“*Preseault I*”), 494 U.S. 1, 110 S.Ct. 914 (1990), *Preseault v. United States* (“*Preseault II*”), 100 F.3d 1525, 1531 (Fed. Cir. 1996) (*en banc*).²¹ The taking caused by

²⁰ U.S. House of Representatives, Judiciary Committee, Subcommittee on Commercial and Administrative Law, “Litigation and Its Effect on the Rails-to-Trails Program,” Statement of Chairman Barr, June 20, 2002.

²¹ The Rails-to-Trails Conservancy is fond of describing the *Preseault I* and *Preseault II* decisions as “non-precedential.” For example in her testimony before this Board, Marianne Wesley Fowler, Senior Vice President of Federal Relations for the Rails-to-Trails Conservancy, testified:

There has been much sound and fury over the purported impact of railbanking orders on the putative ‘property rights’ of adjacent landowners, or so-called ‘reversionary property owners.’ These adjacent landowners point to a questionable, and, most importantly, non-precedential decision rendered by the

the Trails Act is a *per se* physical taking for which compensation is due under the Fifth Amendment. See *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004), *Barclay v. United States*, 443 F.3d 1368 (Fed. Cir. 2006), rejecting the argument that the STB's issuance of a NITU is a "regulatory" taking.²²

In *Preseault I*, Justice Brennan, writing for a unanimous Supreme Court, explained the nature of the taking which resulted from the Trails Act.

This language [of 16 U.S.C. §1247(d)] gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests. While the terms of these easements and applicable state law vary, frequently the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations.

Preseault I, 494 U.S. at 8.

U.S. Court of Appeals for the Federal Circuit, *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996)"

See Written Testimony of M. Fowler, p. 7.

This is, frankly an absurd statement. To characterize the decisions of a unanimous United States Supreme Court and a majority of the United States Court of Appeals for the Federal Circuit sitting *en banc* as "non precedential" is to make a statement that is jurisprudentially illiterate. Whether one agrees or disagrees with the decisions in *Preseault I* and *Preseault II*, they are settled law.

²² Charles Montange suggested in his testimony that the Trails Act is a "regulatory taking." See Testimony of Charles H. Montange before the Surface Transportation Board, July 8, 2009 (oral testimony). Mr. Montange is in error on this point. The Federal Circuit has consistently treated Trails Act takings as a *per se* physical taking – not a regulatory taking. See *Caldwell* and *Barclay*. Indeed, the Department of Justice has said that the STB's issuance of the NITU is the compensable taking because it is a "cloud upon the title" of the reversionary owner. And, the premise upon which the Federal Circuit decided both *Caldwell* and *Barclay* is that the interest taken from the property owner is their "reversionary" interest in the land under state law. This taking occurs upon the STB's issuance of the NITU which acts as a "single trigger" to preempt the interest a landowner has in their property under state law. This interest is taken when the NITU is issued, not when the trail user subsequently reaches a Trail Use Agreement with the railroad and not when the railroad records a conveyance purporting to transfer whatever interest it held in the rail line (generally by quit claim deed) to the trail user.

This compensable taking occurs when the STB issues a Notice of Interim Trail Use. This is the event which triggers the taking. Indeed, the Solicitor General has confirmed that for a compensable Trails Act taking, only a NITU is needed, not an actual trail. *See* The United States Brief in Opposition to Plaintiffs' Petition for *Certiorari* in *Illig v. U.S.*, 08-852. The taking is of the property owner's reversionary interest in the land, not necessarily the subsequent creation of a trail.

VI. The Trails Act in its Current Form Has Been a Miserable Failure in Providing a Fair and Cost-Efficient Method for Landowners to be Paid Compensation.

A. There is No Fair and Cost-Efficient Method for Landowners to be Paid Compensation.

When Congress created the Trails Act, even though Congress understood it could be a taking of the reversionary owners' land, Congress did not provide a means to pay these landowners compensation when their land was taken. Instead, Congress left landowners with the Tucker Act as the only means to receive compensation. Claims under the Tucker Act are "inverse condemnation" claims, which are much more time consuming and expensive to bring and to defend.

When it takes land for a recreational trail the federal Government must pay: (1) severance damages – which are calculated as the difference in value of the specific parcel of land before the taking (with no easements) and the value of the land after the taking (with two new easements on the property – one for trail use and a second for potential railroad use in the indefinite future); (2) attorneys fees and costs (pursuant to the Uniform Relocation Act); and (3) interest from the date the STB issues the NITU.

B. The Costly Nature of Tucker Act Claims is Compounded by the Strategy of the Department of Justice.

The Department of Justice has pursued a "scorched-earth" litigation strategy in which the Government litigates (and re-litigates) each and every issue. (The recent series of "*Hash*" cases are an example of this. Other examples are the Department of Justice's repeated litigation and

re-litigation of the so-called “shifting public use” argument that has been repeatedly rejected by every court to consider the argument.) Taxpayers end up paying not only for the Department of Justice’s litigation expenses²³ but also the landowners’ litigation expenses responding to these arguments.

For example, only the federal Government is capable of devising a system in which taxpayers would pay almost \$300,000 in attorney fees and costs in a dispute over a \$19,000 piece of land.²⁴ Currently, the Department of Justice is attempting to prevent the use of class-action procedures as a judicial tool to efficiently resolve Trails Act taking claims.²⁵ This is a legal strategy that, quite simply, makes no sense. For Trails Act taking cases, the class-action procedure is the most efficient manner to resolve these claims.²⁶

In addition to the cost of litigation, the delay in resolving Trails Act taking cases imposes substantial interest cost on the federal Government. Because the Government’s obligation to pay interest begins to run when the NITU is issued, and because it frequently takes more than five

²³ The cost of litigating Trails Act cases is a significant expense for the federal Government.

²⁴ See *Grantwood Village*, 95 F.3d 654 (1996), where the Government paid \$19,000 for the value of the land and almost \$300,000 in attorney fees and costs.

²⁵ See *Fauvergue v. United States*, Fed. Cir. Docket No. 2009-5048.

²⁶ In *Carl Junction R-1 School Dist. v. United States*, (05-3L & 05-4L), the Government paid \$155,183 for the land, \$43,000 interest, and \$423,727 in attorneys’ fees. Compare these individual cases (*Carl Junction* and *Grantwood Village*) with *Miller v. United States*, 67 Fed.Cl. 542 (2005), a class-action involving 116 parcels of land brought as a class-action. The Government paid almost \$7.4 million (including interest) for the land. The individual landowners’ claims ranged from \$6,000 to more than \$1 million. See Joint Proposed Settlement, Docket No. 122, 03-2489. Yet, the Government reimbursed landowners only \$770,000 in legal fees and expenses. The conclusion is obvious. It is substantially less expensive to both landowners and, ultimately, the Government for these cases to be resolved using a class-action procedure.

years of litigation to finally resolve a Trails Act claim, the Government's interest obligation is equal to or greater than the cost of the land.²⁷

It is rare that a rails-to-trails case is resolved in less than five years. This is in part due to the DOJ's "scorched-earth" strategy referenced above. However, this is also in part due to repeated extensions that the Department of Justice typically seeks and the traditionally slower resolution of cases in the U.S. Court of Federal Claims as compared to federal district courts. (See S.B. 2243 (April 7, 2004)).

These costs incurred by resolving Trails Act taking claims by bringing an inverse condemnation claim pursuant to the Tucker Act in the Court of Federal Claims are substantial and inefficient. Not only do the parties directly bear significant costs, the U.S. taxpayer is also indirectly strapped with the bill. This costly and inefficient process is largely unnecessary. As I suggest below, Congress should adopt a procedure to pay for the land taken for recreational trails "up front." Additionally, lacking Congressional action, this Board and the Department of Justice can each take steps to more efficiently resolve these cases by using alternative dispute resolution and abandoning the extremely costly "scorched earth" litigation strategy currently being pursued.

VII. Even When Land Owners are Ultimately Paid Compensation, the Trails Act Nonetheless Harms those Citizens Who Own the Land.

While in some cases operation of the Trails Act results in a well-managed, attractive recreational trail that is appreciated by the public, it is certainly not the result in every case. In fact, it is not the case in many instances. In many cases, operation of the Trails Act creates a logistical nightmare for landowners and puts their property in limbo, creating substantial adverse effects.

In *Ladd v. United States*, No. 07-271, currently pending in the United States Court of Federal Claims, the Ladd family has experienced significant and constant difficulties because of the Trails Act's impact on their land. In sum, the Ladd family cannot access or make any use of their land. They cannot restrict use of their land, prevent cattle from leaving their land, or

²⁷ See *id.*

prevent erosion to their land. Because they cannot restrict use of their land, the Ladd family has experienced an influx of illegal aliens traveling through their land from Mexico.

The Ladd family is not alone. In *Pankratz v. United States*, No. 675L, the trail operator sent a letter in April of 2008 to one of the landowners, Jerramy Pankratz, denying him the right to use any portion of his land upon which the trail operator now claimed an easement under the Trails Act. The trail operator wrote, “you do not have the right to make any improvements to the land within the right of way (including fencing, erecting structures, or grading out the rail bed) . . . you can clean out the right of way of weeds, debris, etc., however, no further improvements can be made.” Interestingly, the trail operator doesn’t even have any plans to use the abandoned rail line as a recreational trail. Instead, the STB Docket suggests that the trail operator plans to lay fiber optic cable over his land.

The Trails Act is all too often not used to build trails, but as a pretext for an entity to achieve the ulterior motive of acquiring land to use it for something that entity did not have the right to use the land. Even proponents of the Trails Act have noted this unfortunate result.

VIII Recommendations to Improve Implementation of the Trails Act.

The STB has requested public comment on six questions. Our previous discussion responds to those questions. I would also like to propose four recommendations that would greatly improve the Trails Act and allow it to more fairly achieve its objective at less expense to taxpayers.

1. Property Owners Should be provided timely notice of an NITU (or CITU) that affects their property.

Currently, landowners receive no notice that their land has been taken in a rail-to-trail conversion. This is wrong. The STB should provide notice to property owners whose land is subject to a NITU within thirty days after issuing an NITU.²⁸ The land records are available in every county to identify the owners of the land. Further, the railroads and federal Government

²⁸ My reference a “NITU” applies equally to a CITU.

have valuation maps and the other documents which describe the conveyances or condemnation decrees by which the rail line was originally established. The cost of mailing notice to the land owners is nominal, but the benefit is substantial. Fundamental fairness requires that landowners should receive timely notice of the NITU, which is the event giving rise to their constitutional claim for compensation.

2. Trail Use Agreement should be filed with the STB.

The authority by which the Trail Use Agreement is created is by reason of the Trails Act. The Trail Use Agreement is the event that consummates creation of a recreational trail under the Trails Act and defines the terms of the railroad's interest. Therefore, this should be a public document that is available to landowners and any other interested parties. There is no rational reason why the Trail Use Agreement should be a secret document not available to the landowners and interested public.

3. More timely and cost-efficient resolution of Fifth Amendment takings claims.

There is no reason it should ever take more than two years to resolve a Fifth Amendment takings claim under the Trails Act. In some cases, the Department of Justice counsel for the landowners have developed methods of alternative dispute resolution and common appraisal methods to quickly and efficiently determine the value of the land taken. However, the Department of Justice's "scorched-earth" litigation strategy and the lengthy time to resolve a case in the Court of Federal Claims frustrates a timely and efficient resolution of the property owner's claim. This delay also greatly increases the cost to the taxpayers. The Government must pay both the litigation costs and interest. Lengthy litigation of every minutia of a legal issue and every possible argument very substantially increases this expense to taxpayers.

4. Independent review of the trail operator's capacity and ability to develop the abandoned rail line as a recreational trail of public value.

The Trails Act is indiscriminate. Even when an abandoned rail line has no legitimate value for trail use it can still be attractive to a "trail group" because they can profit by taking control of the land under the Trails Act and licensing the use of the land to a utility. (In one Missouri case, the private trail group received \$200,000 annually from the electric utility. This

money would otherwise have been paid to the landowners.²⁹⁾ In other cases, private trail groups do not have the capacity to maintain the land and the land is neglected and left to become a public nuisance.³⁰ The abilities of each potential trail operator to responsibly develop and maintain a recreational trail should be reviewed by the STB *before* a NITU is issued. Trail sponsors should submit a proposed Trail Development Plan to the STB describing the proposed trail-related improvements and the funding to accomplish these improvements. This plan should be available for public comment and notice of the plan provided to all affected landowners. Should the trail not be developed, the NITU as specified in the plan, the STB should have the authority to revoke the NITU. After, all if the taxpayers are paying for the property, we should be sure that land is responsibly developed as a public trail consistent with the objective of the Trails Act.

IX. Conclusions

Mr. Chairman and members of the Board, I appreciate the opportunity to submit my statement. I hope my experience can provide this Board with some observations that will allow the Board to improve the Trails Act and remedy the existing flaws in how the Trails Act is currently administered.

I like trails and I appreciate the objective of the Trails Act – providing well-maintained and well-managed public recreational trails over land once used for now-abandoned railroad lines. However, it is wrong to seek to accomplish this worthy public objective in a manner that tries to deny landowners their constitutional right to be paid “just compensation” for the taking of their property.

The Government’s efforts to circumvent the Fifth Amendment are, in the majority of cases, not successful and the attempt to do so ends up substantially increasing cost of the Trails Act to taxpayers. Public support for this program is undermined by orders issued by this Board

²⁹ See *Illig et al. v. Union Electric Co.*, No. 03-135 L (E.D. Mo.). See also *Pankratz v. United States*, No. 07-675L.

³⁰ *Pankratz v. United States*, No. 07-675L.

that take American citizens' land without notice, the Justice Department repeatedly litigating the same meritless arguments, and the Justice Department endlessly delaying resolution of landowners' claims. In addition to undermining the public's support, these tactics wind up costing American taxpayers many millions of dollars. Americans support the creation of well-designed appropriately located public recreational trails. Americans do not, however, like to see the Trails Act administered in a manner that: (a) unfairly denies fellow landowners their constitutional right to compensation; (b) greatly and needlessly inflates the legal fees and other costs of the program; and (c) allows some special interests to misuse the Trails Act as a pretext to obtain profit at the expense of our fellow citizens.

Over the past twenty-five years the Trails Act has accomplished some of its intended purpose. Some great recreational trails have been established. But these trails were established at substantially greater expense than necessary and the constitutional right of American citizens to be compensated for the government taking their land has been trampled.

For the Trails Act to succeed in accomplishing its objective we must recognize that, in its current form, the Trails Act is deeply flawed. Fortunately, we can fix these flaws and I encourage this Board to adopt those recommendations that this Board can implement pursuant to its own authority and to recommend Congress to consider legislation that will amend the Trails Act to fix those flaws in the Trails Act requiring congressional action.