

## Commentary

# Rails-to-Trails Conversions: A Review of Legal Issues

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### INTRODUCTION

The construction and development of our nation's system of rail lines was nothing short of a marvel. At the peak of the rail era in 1916, more than 270,000 miles of track crisscrossed the United States, carrying freight and passengers and fueling the economy and growth of a nation. At the turn of the century, the country's labyrinth of rail lines hauled food to market, moved the coal that heated cities, and took settlers into the Western frontier. The strength of our national rail system has also been critical to our national defense. Indeed, the trains that moved iron ore from the Mesabi Range to the steel mills of the Great Lakes helped win World War II.

Just as the miles of rail line peaked, however, other methods of increasingly popular transport—most notably, the trucking industry—began eclipsing the rail industry's dominance, and a long period of decline began. Some rail lines became underused and unprofitable. Starting in the 1970s, several major railroads went bankrupt, and carriers began abandoning rail lines at an alarming rate. Our nation's rail corridor system, "painstakingly created over

several generations," was at risk of becoming irreparably fragmented.<sup>1</sup> Like the difficulty of putting Humpty Dumpty together again, it would be virtually impossible to recreate our national rail corridor system after it was broken into hundreds of parcels of land, due to the difficulties and costs of assembling land in a more populous, increasingly urbanized 21st century America.

The possibility of creating trails for recreation and nonmotorized transportation on these unused railroad corridors became both the opportunity and the solution. With their gentle grades, often following rivers and traversing scenic landscapes, rail corridors make ideal trails, turning vacant, sometimes derelict properties into linear parks, and filling an increasing public need for outdoor recreation areas. According to the database maintained by the Rails-to-Trails Conservancy, as of March 16, 2006, there were 1,393 open rail-trails, totaling 13,365 miles in all 50 states and the District of Columbia, including such national gems as the Minuteman Bikeway, the most used bike trail in Massachusetts, and Missouri's 225-mile Katy Trail State Park.

Rail-trails are subject to a unique, and occasionally complex, mix of federal and state law. Many rail-trail conversions are "railbanked" under Section 8(d) of the National Trails Systems Act, often called "the Railbanking Act" or the "Rails-to-Trails Act." This important federal law, enacted by Congress in 1983 to preserve established railroad corridors for interim trail and future rail use, preempts state or local laws that are inconsistent with these goals. Some rail-trail conversions take place after the corridors have been legally "abandoned" and, therefore, are subject to the vagaries of state law in resolving ownership disputes. And railroad corridors that were originally assembled through federal land grants or federal grants-in-aid of construction are subject to their own unique set of federal laws governing post-railroad use and disposition.

This commentary provides a summary of the legal issues that arise in the context of rails-to-trails conversion, as well as an overview of how some of those issues have been resolved. While citations to pertinent case law are provided, this article does not provide an exhaustive review of relevant legal authority.

Andrea C. Ferster, a lawyer in private practice in Washington, D.C., has served as general counsel of the Rails-to-Trails Conservancy since 1992. RTC is a national, nonprofit conservation organization founded in 1986 for the purpose of identifying, preserving, and converting rail corridors that are not currently needed for rail transportation into public trails, nonmotorized transportation corridors, and other public uses.

1. *Reed v. Meserve*, 487 F.2d 646, 649 (First Cir.1973).

State law rarely had a clear answer to the question of who owns a railroad corridor and the effect of conversion into a trail.

#### ABOUT RAILS-TO-TRAILS CONSERVANCY

Rails-to-Trails Conservancy has been the nation's No. 1 advocate for the conversion of unused railroad corridors into multiuse trails since its inception in 1986. With nearly 1,400 open rail-trails throughout the United States, and more than 1,200 trails in the projects stage, RTC serves as the clearinghouse for rail-trail information.

As part of RTC's role as rail-trail expert and advocate, the nonprofit organization is a familiar presence on Capitol Hill. RTC has defended rail-trails and rail-trail funding within the national transportation legislation in the form of transportation enhancements, and has fought tirelessly against lawmakers that would see the critical railbanking law abolished. RTC is protecting both current and future rail-trails so that generations of active individuals can enjoy these priceless public pathways.

Additionally, RTC provides its technical rail-trail expertise to local and regional trail organizations in need of guidance and support. From acquisition and funding, to design and maintenance, RTC has helped countless rail-trails come to fruition.

With its more than 100,000 members and supporters, Rails-to-Trails Conservancy is moving toward a goal where 90 percent of Americans live within three miles of a trail system—connecting healthier people to healthier places. For more information on Rails-to-Trails Conservancy, visit [www.railstrails.org](http://www.railstrails.org).

#### FEDERAL REGULATION OF RAILROADS AND STATE LAW OBSTACLES TO CORRIDOR PRESERVATION

Railroads have been subject to federal regulation since 1887, first by the Interstate Commerce Commission (ICC) and, since 1991, by the Surface Transportation Board (STB), an agency presently located within the U.S. Department of Transportation.<sup>2</sup> A railroad subject to STB's jurisdiction (basically, railroads operating freight service in interstate commerce) may neither discontinue rail service nor abandon its real property interest in the corridor until the STB issues a certificate of public convenience and necessity authorizing "abandonment."<sup>3</sup> The STB has the exclusive authority to determine whether a railroad has abandoned its line.<sup>4</sup> Any state or local law that interferes with the STB's authority to regulate railroads is preempted and therefore cannot be enforced.<sup>5</sup>

In 1980, Congress significantly loosened the restrictions on railroad abandonments in order to allow the financially beleaguered railroad industry to

shed duplicative or unprofitable lines.<sup>6</sup> Railroads that had been out of service for two or more years were permitted to abandon their lines through a much more abbreviated "notice" process.<sup>7</sup> As a result, the rate of rail abandonments by major carriers accelerated to between 4,000 to 8,000 miles a year.<sup>8</sup> By 1990, the 270,000-mile system of active rail lines had contracted to 141,000 miles.

As thousands of miles of rail lines each year were given abandonment authorization, the railroads removed tracks and ties and either sold off the underlying property or allowed it to be claimed by adjacent landowners. Without a program for preserving these corridors, our Nation's rail system was at risk of becoming irreparably fragmented.

#### THE EMERGENCE OF RAILBANKING AND ITS ANTECEDENTS

In 1976, Congress attempted to address the alarming loss of our national rail corridor infrastructure as part of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act). This law

authorized the ICC to impose a Public Use Condition as part of the abandonment authorization, which deferred the disposition of railroad rights-of-way for 180 days to allow for possible transfers for public use, including rails-to-trails conversions.

However, interested communities and potential trail managers who wanted to purchase unused railroad corridors for conversion into trails faced major obstacles under the set of rules in effect at that time. The biggest challenge came from nearby landowners, many of whom believed—rightly or wrongly—that they were entitled to repossess the land upon abandonment of rail service.

Once the STB lost jurisdiction over the corridor, state law principles that might otherwise find the railroad had "abandoned" its property interest were no longer preempted. As Congress recognized, "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."<sup>9</sup>

State law rarely had a clear answer to the question of who owns a railroad corridor and the effect of conversion into a trail. The possibility of costly and time-consuming "quiet title" litigation disputing a trail manager's ownership of a corridor was a significant disincentive to making the significant investment in a rails-to-trails conversion.

In 1983, Congress hit on an innovative solution to the difficulties of preserving railroad corridors as trails. Section 8(d) of the National Trails System Act established "the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use."<sup>10</sup>

2. ICC Termination Act, 109 Stat. 803 (1995).

3. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile*, 450 U.S. 311, 321 (1981).

4. *Grantwood Village v. Missouri Pac. RR Co.*, 95 F.3d 654 (Eighth Cir. 1996), cert. denied, 519 U.S. 1149 (1997).

5. *City of Auburn v. United States*, 154 F.3d 1025 (Ninth Cir. 1998) (state and local environmental and land use regulation preempted).

6. The Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895 (1980).

7. 49 C.F.R. § 1152.50.

8. Association of American Railroads. *Railroad Facts* (1992).

9. H.R. Rep. No. 98-28, at 8-9 (1983), *U.S. Code Cong. & Admin. News* 1983, p. 119, 120.

10. 16 U.S.C. § 1247(d).

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This law allowed a railroad to free itself of responsibility for an unprofitable rail line by transferring it to a qualified private or public agency for interim use as a trail until such time as the line is needed again for rail service. This process is called “railbanking.”

#### HOW RAILBANKING WORKS

Railbanking allows a rail carrier to transfer an unprofitable or unwanted line—by sale, donation, or lease—to a public or private entity (called an “interim trail manager”) that is willing to assume financial responsibility for the management of the right-of-way. The process is administered by the STB, which has promulgated regulations governing the program.<sup>11</sup> The process works as follows:

- An interested trail manager can request a railbanking order within 30 days after the railroad files an application for an abandonment with the STB (or, in the case of “exempt abandonments,” within 10 days of publication of a Notice of Exemption in the Federal Register).
- The STB will consider “late-filed” railbanking requests so long as it has jurisdiction to do so. The STB’s authority to railbank the corridor is terminated only after abandonment authorization is issued, and the railroad notifies the STB that it has taken steps to consummate the abandonment.
- Either a public agency or a qualified organization can submit a railbanking request to the STB. A statement of willingness to assume financial

and legal responsibility must accompany the request. Since the railroad company must agree to negotiate a railbanking agreement, a copy of the request for railbanking must be served on the railroad at the same time it is sent to the STB.

- If the railroad agrees to enter into negotiations with the trail manager, the STB issues a Notice or Certificate of Interim Trail Use, in lieu of an order authorizing the railroad to fully abandon the line. This railbanking order gives the railroad and a qualified agency or group 180 days (which may be extended) to negotiate a voluntary agreement for the transfer (by sale, lease, or donation) of the corridor for interim trail use. During that period, the railroad may remove tracks, ties, and other property from the corridor.
- Once the parties notify the STB that an agreement is reached for transfer of the corridor to the trail manager, the corridor is added to the national “railbank” for so long as the trail use continues or until the corridor is needed for future restoration of rail service.

#### SCOPE OF THE STB’S RAILBANKING AUTHORITY

The railbanking law has engendered a body of judge-made law, resolving issues ranging from the constitutionality of the law to challenges to regulations implementing the program.<sup>12</sup> One of the most important cases is *Preseault v. ICC*, in which the U.S. Supreme Court, in 1990, unanimously upheld the railbanking law as a valid exercise of Congress’s power under the Commerce Clause of the U.S. Constitution,

stating, “Congress apparently believed that every line is a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable.”<sup>13</sup>

The STB has adopted a policy that it will issue railbanking orders so long as it possesses jurisdiction to do so.<sup>14</sup> Subsequent litigation has clarified the authority of the STB to extend railbanking orders and the manner in which that authority is exercised.<sup>15</sup> If the railroad consummates its abandonment authority prior to the issuance of the Notice of Interim Trail Use, then the STB loses its jurisdiction over the corridor.<sup>16</sup> Likewise, the STB will not issue a railbanking order if the railroad has sold sections of a corridor for nontransportation uses.<sup>17</sup>

The STB views its authority under the Railbanking Act as both limited and ministerial: The STB will not issue a railbanking order where the railroad is not willing to negotiate.<sup>18</sup> By the same token, the STB will not refuse to issue a railbanking order based on third-party objections about the desirability or appropriateness of trail use.<sup>19</sup> The STB has authority to revoke a trail condition only if it is shown that the statutory requirements are not being met (i.e. the trail user is not meeting its financial obligations for the property and its use as a trail).<sup>20</sup>

The courts have rejected efforts by trail opponents to add burdensome procedural requirements, such as personal notification to adjacent landowners, to the railbanking process.<sup>21</sup> The STB’s responsibilities under the federal environmental and historic preservation laws, such as the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, et seq., and Section 106 of the

11. 49 C.F.R. § 1152.29, for regular abandonments, 49 C.F.R. §1152.50, for “exempt” abandonments.

12. See, e.g., *National Wildlife Federation v. ICC*, 850 F.2d 695 (D.C. Cir. 1988) (upholding the ICC’s interpretation of the Trails Act as authorizing only voluntary transactions between railroads and trails groups).

13. *Preseault v. ICC*, 494 U.S. 1 (1990).

14. See Rail Abandonments: Supplemental Trails Act

Procedures, 4 ICC2d 152, 157-58 (1987); *Illinois Commerce Comm’n v. ICC*, 848 F.2d 1246, 1261 (D.C. Cir. 1988), cert. denied, 488 U.S. 1004 (1989).

15. *Birt v. STB*, 90 F.3d 580 (D.C. Cir. 1996).

16. *Fritsch v. ICC*, 59 F.3d 248 (D.C. Cir. 1995), cert. denied, sub. nom. *CSX Transportation v. Fritsch*, 116 S.Ct. 1262 (1996) (holding that ICC lacked jurisdiction to issue railbanking order notwithstanding timely issuance of a

Public Use Condition); *Becker v. STB*, 132 F.3d 60 (D.C. Cir. 1997) (STB lacks jurisdiction to railbank once abandonment has been “consummated”).

17. *RLTD Railway Corp. v. STB*, 166 F.3d 808 (Sixth Cir. 1999) (upholding STB decision that it lacks jurisdiction to railbank corridor that was severed from the interstate rail system); *Jost v. STB*, 194 F.3d 79, 87 (D.C. Cir. 1999) (full-width sales of sections of the corridor is material evidence for the

STB to consider in deciding whether the railroad abandoned the line prior to the issuance of the railbanking order).

18. *National Wildlife Federation v. ICC*, 850 F.2d 694, 699-702 (D.C. Cir. 1988).

19. *Citizens Against Rails-to-Trails v. STB*, 267 F.3d 1144 (D.C. Cir. 2001).

20. *Jost v. STB*, 194 F.3d at 88-89 (upholding STB’s issuance of NITU based on rebuttable presumption that a trail manager is qualified).

21. *National Assn of Reversionary Property Owners v. ICC*, C.A. No. 94-1581 (D.C. Cir., Nov. 3, 1995) (STB need not provide notice to persons who may have a property interest in the rail corridor prior to issuing a railbanking order).

The fundamental premise of the railbanking program was that once a rail corridor is placed in railbanking status, the railroad is entitled to reinstitute rail service on the line.

National Historic Preservation Act (NHPA), 16 U.S.C. § 470f, has also been clarified through litigation.<sup>22</sup>

A key feature of the federal railbanking law is its express preemption of conflicting state law. When a trail is railbanked, the statute expressly provides that interim trail use of railbanked corridors “shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-ways for railroad purposes.” 16 U.S.C. § 1247(d).

Relying on the principle of federal preemption, the courts have uniformly rejected efforts by trail opponents to attack railbanking orders indirectly through challenges to an interim trail manager’s ownership or use of a railbanked corridor.<sup>23</sup> Nor will the courts enforce state or local laws that might operate to interfere with the trail manager’s ownership or right to use the corridor.<sup>24</sup> Actions brought by adjacent landowners seeking to “quiet title” to a railbanked corridor can be transferred to federal court, and then dismissed for lack of jurisdiction.<sup>25</sup>

The protective features of the federal railbanking law apply even where no order has been issued by the STB, so long as the relevant instruments of transfer make clear that the railroad retains the right to reactivate rail service on the corridor.<sup>26</sup> Lawsuits seeking to prevent trail use (as distinct from compensation claims) based on allegations that railbanking works a “taking” are also barred.<sup>27</sup>

#### REACTIVATION OF RAIL SERVICE

The fundamental premise of the railbanking program was that once a rail corridor is placed in railbanking status, the railroad is entitled to reinstitute rail service on the line. At the time of the

initial rail-trail conversion, the possibility of rail service reactivation is, by definition, remote, since the corridor would not have been proposed for railbanking if there had been a foreseeable future need for rail service on the line. Nonetheless, prudent trail managers must anticipate that contingency in order to protect their substantial investment in the acquisition and development of the trail and associated facilities in the event of rail service reactivation. Of particular importance is the need to establish terms and conditions such a compensation and future rights to railbank, since the STB regards its role in the event of a petition to vacate a railbanking order as being ministerial in nature.<sup>28</sup>

The STB has made clear that this right to reactivate service, without the necessity of a full-blown application to construct a new railroad, resides with the abandoning carrier, which nonetheless retains a residential common carrier obligation with respect to the corridor.<sup>29</sup> While the STB has jurisdiction only over freight rail service, railbanking ensures that railroad corridors remain intact for light rail and passenger rail service as well.

#### RAILBANKING AND “TAKINGS”

While legal challenges to the ownership or use of railbanked trails are pre-empted by the railbanking law, aggrieved landowners are not left without a remedy: They may still file a “takings” claim under the federal Tucker Act against the United States under the Fifth Amendment to the U.S. Constitution, which requires the government to pay “just compensation” if it “takes” private property for a public use.<sup>30</sup> The Tucker Act designates a specialized federal court—the

U.S. Court of Federal Claims—to resolve “takings” claims against the United States. 28 U.S.C. § 1491(a)(1). In addition, under the “Little Tucker Act,” claimants seeking compensation from the federal government under \$10,000 can be heard by the federal district court. 28 U.S.C. § 1346(a)(2).

The initial difficulties in resolving whether the railbanking law “takes” private property were exemplified by the *Preseault* case, which challenged the federal railbanking law on its face as a “taking” of their ownership interest in a Vermont railroad corridor. The efforts of the Preseaults to secure compensation have resulted in no less than eight reported court decisions in the state and federal courts. The U.S. Court of Appeals for the Second Circuit, as well as the Claims Court and a three-judge panel of the U.S. Court of Appeals for the Federal Circuit, all initially ruled that the Railbanking Law did not effect a taking of any property interest.<sup>31</sup> These decisions, however, were subsequently reversed by the full Federal Circuit, sitting en banc, and a new decision was issued by a plurality of the court, along with a concurring and a dissenting opinion.<sup>32</sup>

The plurality decision in the *Preseault* case held that the application of the Railbanking Law under the facts of that case resulted in a physical occupation of the underlying property, which is a category of government action that constitutes a per se taking. As a result, the only issue in the case was whether, under Vermont state property law, the railroad held an easement interest that had been abandoned—a question answered in the affirmative by the court. The decision, however, made clear that the federal government, and not the trail

22. *Goos v. ICC*, 911 F.2d 1283 (Eighth Cir., 1990) (STB need not undertake any environmental review prior to issuing railbanking orders; NEPA compliance occurs in connection with STB consideration of the application for abandonment authorization); *Friends of Atglen-Susquehanna Trail, Inc. v. STB*, 252 F.3d 246 (Third Cir. 2001) (STB has ongoing responsibility to comply with NHPA in connection with abandonment decision).

23. See, e.g., *Dave v. Rails to Trails Conservancy*, 863 F. Supp. 1285 (E.D. Wash. 1994), aff’d, 79 F.3d 940 (Ninth Cir. 1996).

24. *Friends of the East Lake Sammamish Trail v. City of Sammamish*, 361 F. Supp.2d 1260 (W.D. Wash. 2005) (City law requiring consideration of alternatives to trail held preempted by railbanking law).

25. *Grantwood Village v. Missouri Pacific Railroad Co.*, 95 F.3d 654 (Eighth Cir. 1996), cert. denied, 519

U.S. 1149 (1997); *Victor Oolitic Stone Co. v. CSX Transp., Inc.*, 852 F. Supp. 721 (S. D. Ind. 1994); *Schneider v. Union Pacific R. Co.*, 864 F. Supp. 12 (D. Neb. 1994).

26. *Buffalo Township v. Jones*, 813 A.2d 659 (Pa. 2002), cert. denied, 124 S. Ct. 134 (2003).

27. See, e.g., *Louisiana Pacific Corp. v. Texas Dep’t of Transp.*, 43 F. Supp.2d 708 (E.D. Tex. 1999); *Good v. Skagit County*, 17 P.3d 1216 (Wash. App. Div. 1, 2001).

28. *Georgia Great Southern Division, South Carolina Central Railroad Co.—Abandonment Exemption—between Albany and Dawson in Terrell, Lee, and Dougherty counties, Georgia*, Ab 389 (Sub-no. 11X), served May 16, 2003.

29. *Norfolk and Western Railway Co., Abandonment between St. Marys and Minster in Auglaize County, Ohio*, Dkt. No. AB-290 (Sub-No. 68), 9 I.C.C.2d 1015 (1993); See *Iowa Power, Inc.—*

*Const. Exemption—Council Bluffs, Iowa*, 8 I.C.C.2d 858 (1990).

30. See *Preseault v. ICC*, 494 U.S. at 11-12.

31. *Preseault v. ICC*, 853 F.2d 145, 151 (Second Cir. 1988), aff’d on other grounds, 494 U.S. 1 (1990); *Preseault v. U.S.*, 27 Fed. Cl. 69 (1992), aff’d, 66 F.3d 1190 (Fed. Cir. 1995), vacated, 100 F.3d 1525 (1996).

32. *Preseault v. U.S.*, 100 F.3d 1525 (Fed. Cir. 1996).

As the Supreme Court explained in the 1990 *Preseault* case, “under any view of takings law, only some rail-to-trail conversions will amount to taking...”

manager, was solely responsible for the payment of any compensation owed. Moreover, the sole remedy available to the claimant is payment of just compensation; trail use cannot be halted or disrupted.

As a plurality rather than a majority decision, the Federal Circuit’s decision in *Preseault* has no precedential value, and is in conflict with the analysis of the Second Circuit. Moreover, the analysis of the plurality decision has come under substantial scholarly criticism.<sup>33</sup> Nonetheless, the analysis of the Federal Circuit’s plurality decision in *Preseault* has, for the time being, established the applicable jurisprudence for judicial review of takings cases involving the Railbanking Law.

As the Supreme Court explained in the 1990 *Preseault* case, “under any view of takings law, only some rail-to-trail conversions will amount to takings . . . Others are held as easements that do not, even as a matter of state law, revert upon interim use as nature trails.”<sup>34</sup> Subsequent “takings” cases therefore focus on whether claimants can establish, under the applicable state law, a property interest in the railroad corridor that would have become possessory but for the application of the Railbanking Law.

There are now a number of railbanking “takings” cases pending in courts around the country and in the U.S. Court of Federal Claims. Many of the cases have been certified as class actions on behalf of all persons claiming a compensable interest in the railbanked corridor. One case has been certified as a statewide class action.<sup>35</sup> The U.S. Court of Appeals for the Federal Circuit has been called on to resolve appeals in several of these cases.

In one case involving a railbanked corridor in Montgomery County,

Maryland, the Federal Circuit certified the predicate state law questions to the Maryland Court of Appeals (Maryland’s highest court). In a lengthy opinion joined by six of the Court’s seven judges, the Maryland Court of Appeals held that the scope of the applicable railroad easement was sufficiently broad to include trail as well as railroad uses, and that the railroad’s participation in the federal railbanking program was inconsistent with an intent to abandon its interest in the corridor.<sup>36</sup> The Federal Circuit relied on this decision in holding that no taking had occurred.<sup>37</sup>

The Federal Circuit has upheld lower court decisions finding that the claimants had a possessory interest in the underlying rail corridor under applicable law<sup>38</sup> and also clarified that the statute of limitations for filing takings claims begins to run when the first railbanking order is issued by the STB/ICC.<sup>39</sup>

While a number of bills have been introduced in Congress over the years to amend the railbanking law, many to deal with compensation issues, none of these proposed amendments, to date, have passed.

#### DISPUTES OVER OWNERSHIP OF RAIL-TRAILS

Unlike railbanked corridors, managers of rail-trails that have not been railbanked remain vulnerable to being dispossessed by “quiet title” lawsuits. Quiet title litigation refers to an action brought under state law to secure a judicial declaration that permanently resolves adverse claims of ownership interest and rights in property.

Determining the nature of the ownership interest acquired by a railroad often requires a parcel-by-parcel inquiry, under which the language of the railroad deeds are examined and

viewed against the applicable common and statutory law, including the laws in place at the time of the original acquisition as well as current law. Each state applies its own rules of construction.<sup>40</sup>

Resolution of questions over the ownership of a rail-trail typically involves the following determinations.<sup>41</sup>

- What is the nature of the interest acquired by the railroad? The typical railroad generally acquired its property interests in its corridor through one of four methods: a private grant from individuals resulting from negotiations with willing landowners; condemnation proceedings when they were not; and federal grants for portions traversing federal land or by prescription (adverse possession) where no deed or other ownership document exists.
- The railroad might acquire one of at least six common property interests: fee simple absolute, fee simple determinable, fee simple subject to condition subsequent, a general easement, a limited easement, or a license.
- In the case of conditional fees (called defeasible fees) that may be subject to divestment or reversion upon the occurrence of a specified event, such as cessation of rail service, state law may extinguish any possibilities of reverters or other conditions on a base fee that are not formally recorded through “marketable title” laws.
- In many cases, railroad deeds do not clearly denominate the interest as either a “fee simple” or an “easement” interest, but instead refer simply to a grant of land, with or without a reference to a “right-of-way.” There is considerable conflict

33. Richard A. Allen, “Does the Rails-to-Trails Act Effect a Taking of Property?” Vol. 31 *Transportation Law Journal* 35 (2005); Danaya C. Wright, “Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court’s Fifth Amendment Takings Jurisprudence?” 26 *Colum. J. Envt’l L.* 399 (2001)

34. *Preseault v. ICC*, 40 U.S. at 924.

35. *Schneider v. United States*, No. 8:99CV315 et al. (D. Neb. August 29, 2003).

36. *Chevy Chase Land Co. v. United States*, 733 A.2d 1055 (Md. 1999).

37. *Chevy Chase Land Co. v.*

*United States*, 158 F.3d 574 (Fed. Cir. 1998), cert. denied, 531 U.S. 957 (2000).

38. *Toews v. U.S.A.*, 376 F.3d 1371 (Fed. Cir. 2004).

39. *Caldwell v. U.S.A.*, 391 F.3d 1226 (Fed. Cir. 2004) cert. denied, 126 S.Ct. 366 (2005); *Barclay v. United States*, 443 F.3d 1368 (Fed. Cir. April 11, 2006).

As of this writing, there is a bill pending in Congress (H.R. 4581, the Easement Owners Fair Compensation Claims Act of 2006), which would reverse the *Caldwell* and *Barclay* decisions by providing takings claim cannot “accrue” until the railroad has transferred, by written agreement, control of the corridor to the interim trail manager.

40. *State v. Hess*, 684 N.W.2d 414 (Minn. 2004).

41. D. Wright and J. Hester, “Pipes, Wires, and Bicycles,” 27 *Ecology L.Q.* 351 (2000).

Many of the railroad corridors in the United States, particularly corridors in the West and Midwest, were assembled with land grants made by the United States government in the 19th century for the purpose of opening up the Western frontier.

- in the case law as to the construction of such deeds as conveying a fee or easement.<sup>42</sup> Some courts have held that “right-of-way” could be either a fee or an easement, and resort to rules of construction or extrinsic evidence to aid in discerning the parties’ intent.
- Where the railroad has acquired an easement over the land, a determination must be made whether the easement has been abandoned. In most states, non-use of an easement, alone, is not sufficient, but must be coupled with other affirmative actions, including removing of tracks and ties or piecemeal sales of a railroad corridor.<sup>43</sup>
  - The word “abandoned” has a federal and state law meaning in the context of railroad law. A railroad has been “abandoned” for purposes of the federal law when STB has granted the railroad permission to terminate its common carrier obligation to provide rail service on the line and liquidate its property interest in the rail corridor. Abandonment, for purposes of state law, means that the railroad intends to permanently relinquish its property interest in the corridor, generally evidenced by nonuse of the corridor coupled with actions giving effect to that intent, including removal of track and ties and transfer of the line for nonrailroad use. STB abandonment authorization is permissive only; a railroad must still take steps to effectuate that permission.<sup>44</sup>

- Abandonment of a railroad easement may be inferred where the corridor is put to uses that are outside the scope of the easement. Alternatively, in some states, trail use is considered to be within the scope of a railroad easement. This is sometimes known as the “shifting public use policy,” under which the railroad easement is deemed broad enough to encompass other types of transportation or public highway uses.<sup>45</sup> Other states have rejected such a policy.<sup>46</sup>

#### FEDERALLY GRANTED RIGHTS-OF-WAY

Many of the railroad corridors in the United States, particularly corridors in the West and Midwest, were assembled with land grants made by the United States government in the 19th century for the purpose of opening up the Western frontier.<sup>47</sup> The early federal grants for railroad construction relied upon individual grants to railroads (or federal grants to a state in trust to employ for the rail line for which the grant was made). In 1852, Congress adopted a general right-of-way statute, granting a right-of-way across public lands 100 feet in width to “all rail and plank road, or Macadamized turnpike companies. . . .”<sup>48</sup> Under the 1852 Act, the roads were to be begun within 10 years, and finished within 15 years thereafter. Moreover, if the road was abandoned, the 1852 Act provided that “said lands hereby granted . . . revert back to the general government.”<sup>49</sup> In 1875, Congress

adopted the Railroad Right of Way Act of 1875, codified at 43 U.S.C. §§ 934-39 (“1875 Act”), granting a right-of-way through public lands.<sup>50</sup>

There has been much litigation over the nature of the interest conveyed by the federal government to the railroads and particularly, the disposition of federally granted rights of way (FGROW) upon cessation of railroad use. In 1922, Congress passed 43 U.S.C. § 912 to dispose of the federal government’s retained interests in all FGROW in case of abandonment. Under this statute, any federally granted parcel in a railroad corridor continues to exist as a railroad right-of-way, usable only for railroad or other public highway purposes, until Congress adopts a statute transferring the title<sup>51</sup> or until there is a judicial declaration of abandonment, whichever first occurs.<sup>52</sup> If there is a judicial declaration of abandonment, § 912 provides on its face that the title vests in the person or entity owning the legal subdivision traversed by the FGROW in question, unless (a) the FGROW is in a municipality, in which case it goes to the municipality, or (b) a state or local government establishes a public highway on the FGROW parcel within one year of the judicial declaration of abandonment, in which case the government’s interest is transferred to the state or local government. The courts have determined that 43 U.S.C. § 912 controls disposition of all FGROW, including the Civil War era grants,<sup>53</sup> the 1875 Act grants,<sup>54</sup> and the

42. See Annotation: Deed to Railroad Company as Conveying Fee or Easement, 6 A.L.R.3d 973, 977 (1966), and Later Case Service

43. See Annotation: What Constitutes Abandonment of a Railroad Right of Way, 95 A.L.R.2d 468-499 (1966), and Later Case Service

44. See, e.g., *Gulf M. & O. R.R.*, 128 F. Supp. 311 (N.D. Ala. 1954), *aff’d*, 225 F.2d 816 (Fifth Cir. 1955), *cert denied*, 350 U.S. 932 (1956). The exception is in Indiana, where a state statute expressly provides that railroad easements terminate upon issuance of an ICC certificate of abandonment, regardless of the terms of the conveyance. See *Penn Central Corp v. United States R Vest Corp*, 955 F.2d

1158, 1160 (Seventh Cir. 1992).

45. See *State ex Rel. Washington Wildlife Preservation, Inc. v. State*, 329 N.W.2d 543, 545, 547 (Minn. 1983), *cert. denied*, 463 U.S. 1209 (1983) (“Use of the railroad right-of-way as a recreation trail is consistent with the purpose for which the easement was originally acquired, public travel, and it imposes no additional burden on the servient estate”); *Hatch v. Cincinnati & I.R.R.*, 18 Ohio St. 92 (1868) (converting a canal into a railroad does not extinguish the original easement); *Rieger v. Penn Central Corp.*, No. 85-CA-11 (Ct. App. Greene County, Ohio, May 21, 1985).

46. *Schnabel v. County of DuPage*, 429 N.E.2d 671 (Ill. App. 1981); *Pollnow v. State Dep’t of Natural Resources*, 276 N.W.2d

738 (Wisc.1979); *Lawson v. State of Washington*, 730 P.2d 1308 (Wash. 1986).

47. See Paul Gates, *History of Public Land Law Development* (1968); Thomas E. Root, *Railroad Land Grants From Canals to Transcontinentals: 1808-1941*, Natural Resources Law Section, Monograph Series, No. 4: American Bar Assn., 1987.

48. Act of Aug. 4, 1852, 10 Stat. 28, § 1. In the event of deep cuts, the grant was to be of “greater width . . . if necessary, not exceeding in the whole two hundred feet.”

49. *Id.* § 3. There were various extensions of the time deadlines in the 1852 statute until it was eventually supplanted by the 1875 Right of Way Act.

50. The 1875 Act was repealed as a basis for granting new railroad rights of way effective October 21, 1976, by P.L. 94-579, Title VII, § 706(a), 90 Stat. 2793.

51. *E.g., Brown v. Washington*, 130 Wash. 2d 430, 924 P.2d 908, 916 & 924 (1996) (Congress adopts statute authorizing transfer of title to State of Washington for state trail).

52. As a necessary precondition to seeking a judicial declaration of abandonment for purposes of 43 U.S.C. § 912, the ICC, now the STB, must determine that the line is no longer required in interstate commerce, a process known as “authorizing an abandonment.” *Phillips v. Denver & R.G.W.R.*, 97 F.3d 1375, 1377 (10th Cir. 1996), *cert. denied*, 521 U.S. 1104 (1997).

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pre-Civil War state-mediated grants.<sup>55</sup> In 1988, Congress modified the dispositional scheme of 43 U.S.C. § 912 as part of the National Trails System Act Amendments of 1988, 16 U.S.C. § 1248(c)-(g). The Trails Act Amendments of 1988 provides that unless a public highway is established on FGROW per 43 U.S.C. §§ 913 or 912 within one year of a judicial declaration of abandonment, the federal interest in FGROW “shall remain in the United States.” 16 U.S.C. § 1248(c).

Recent litigation in the “takings” context has challenged some of the underlying assumptions about the ownership interest retained by the federal government in FGROW, creating a conflict among the courts. In one recent decision, the Federal Circuit determined that adjacent landowners, whose land was patented from the federal government under the Homestead Act, also acquired the federal government’s rights to railroad corridors that had been acquired through federal land grants.<sup>56</sup>

## CONCLUSION

The law on rails-to-trails conversions is still evolving, particularly in the “takings” litigation. Rails-to-Trails Conservancy has materials and resources on its website and provides other services to assist governmental and nongovernmental organizations sort through the various legal, political, and communications issues that may arise during the course of a rails-to-trails conversion.

53. *E.g.*, *Vieux v. East Bay Regional Park District*, 906 F.2d 1330 (Ninth Cir. 1990), cert. denied, 498 U.S. 967 (1990); *King County v. Burlington Northern*, 885 F. Supp. 1419 (W.D. Wash. 1994).

54. *See, e.g.*, *State of Idaho v. Oregon Shortline R. Co.*, 617 F. Supp. 207 (D. Idaho 1985); *Marshall v. Chicago & North Western Transp. Co.*, 826 F. Supp.1310 (D. Wyo. 1992), aff’d, 31 F.3d 1028 (10th Cir. 1994); *Barney v. Burlington Northern R. Co.*, 490 N.W. 2d 726 (D. So. Dak.1992), cert. denied, 507 U.S. 914 (1993). But see *City of Aberdeen v. Chicago & North Western Transp. Co.*, 602 F. Supp. 589 (D. So. Dak.1984) (holding that 43 U.S.C. § 912 was not applicable to 1875 Act rights of way).

55. *See, e.g.*, *Mauler v. Bayfield County*, 204 F. Supp.2d 1168 (W.D. Wis. 2001), aff’d, 309 F.3d 997 (Seventh Cir. 2002) (applying §§ 912-13 to state-mediated, pre-Civil War federal railroad grants in Wisconsin); *City of Maroa v. Illinois Central R.R.*, 229 Ill.App.2d 503, 592 N.E.2d 660 (App. Fourth Dist.), appeal denied, 146 Ill.2d 631, 602 N.E.2d 456 (1992) (applying § 912 to 1850 state-mediated Illinois Central grant); *Marlow v. Malone*, 315 Ill. App.3d 897, 734 N.E.2d 195 (App. Fourth Dist. 2000) (same).

56. *Hash v. U.S.A.*, 403 F.3d 1308 (Fed. Cir. Four, 2005)