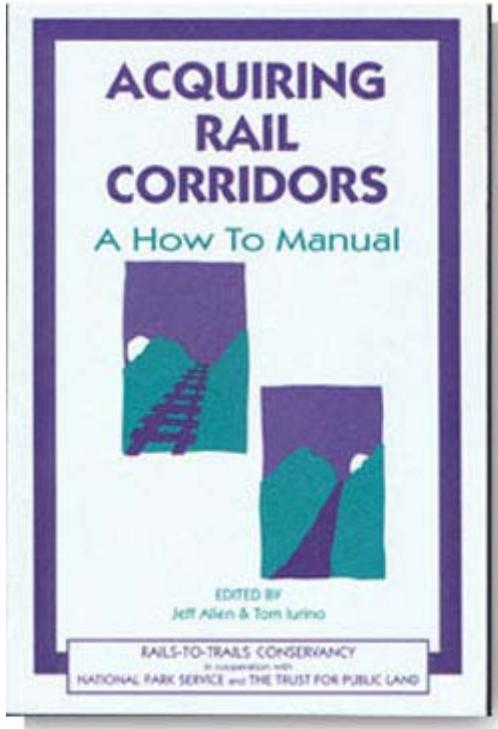


Acquiring Rail Corridors:



Over the past 16 years, the rails-to-trails movement has caught on in America. While there were less than 200 rail-trails in the mid-1980s, and just over 800 in 1996, there are now over 1,200 rail-trails nationwide!

However, acquiring a rail corridor presents unique issues that cannot be adequately addressed through the process of public persuasion. Without a transaction, there will be no trail.

That's where *Acquiring Rail Corridors* fits in. *Acquiring Rail Corridors* summarizes the knowledge of the country's leading attorneys, nonprofit land acquisition agents, local park directors and rail-trail builders who have successfully acquired rail corridors for trail use.

After reading this book, we hope you will be able to approach a railroad with confidence... and be able to strike a deal. Remember, Rails-to-Trails Conservancy is ready to assist you.

Table of Contents

Acknowledgments

Foreword

Introduction

CHAPTER 1: Getting Started

CHAPTER 2: Assembling Your Team

CHAPTER 3: Contacting the Railroad

CHAPTER 4: Understanding the Railroad

CHAPTER 5: Researching the Property

CHAPTER 6: Can You Take Advantage of Railbanking?

CHAPTER 7: Financing Your Acquisition

CHAPTER 8: Reaching a Preliminary Agreement with the Railroad

CHAPTER 9: Due Diligence

CHAPTER 10: Closing the Deal

Acknowledgements

Acquiring Rail Corridors is the product of a cooperative effort involving many of the leading experts involved in creating rail-trails, including railroad executives, trail professionals and government agency representatives. As with RTC's previous "how-to" manuals, this publication would not have been possible without the support and assistance of the Rivers, Trails and Conservation Assistance Program of the National Park Service. In addition, The Trust for Public Land played a key role in ensuring that this book addressed the needs of would-be rail-trail buyers.

Acquiring Rail Corridors resulted from a symposium hosted by RTC and the National Park Service, and the vast majority of the information presented in this publication can be credited to the insights and contributions of the symposium participants: Sarah Whitley of Burlington Northern Railroad, Michael Tosh of Commercial Metals Railroad Salvage Company, Jim Jennings, Ed Dressler of Greene County (Ohio) Recreation and Parks, Mac Wilkerson of Maryland Department of Natural Resources, Dan King of the Surface Transportation Board, Tom Neenan of Iowa Trails Council, Bobbie League of CSX Transportation, Jim Spalding of Michigan Department of Natural Resources, Mark Ackelson of Iowa Natural Heritage Foundation, Jay Ostrow of R.L. Banks and Associates, Les Town of Consolidated Rail Corporation, Stuart Gassner of Chicago & North Western Transportation Company, Chuck Montange, Doug Golden of Mainline Management Services, Kathleen Blaha of The Trust for Public Land, Montey Sneed and Tom Ross and Alan Turnbull of the National Park Service.

Robert Farnsworth of E.P. Hamilton & Associates, Doug Golden, Mark Ackelson, RTC Past President David Burwell and especially Kathleen Blaha deserve special recognition for their assistance in writing portions of this manual. Thanks to Mark King of the Albany County (New York) Planning Department and Grieg Asher of the Placer County (California) Transportation Commission for their helpful comments during the review

process. Thanks also to Simon Sidamon-Eristoff, Andrea Ferster, Marsha Wallen, Sharon Benjamin, Karen-Lee Ryan and Philippe Crist of RTC for their participation, comments and support for this project. Special thanks to April Moore for her wonderful job of editing and improving the initial version of the text. Nelly Ambrose of RTC deserves a great deal of credit for turning the dog-eared computer print-outs into the beautifully designed book you have in front of you.

Finally thanks to all of the staff of the National Park Service's Rivers, Trails and Conservation Assistance Program and Rails-to-Trails Conservancy who provided such valuable feedback as they read through drafts of this document.

Forward

Over the past ten years, the rails-to-trails movement has caught on in America. While there were less than 200 rail-trails in the mid-1980s, in 1996 there are over 800, and today over 1,200.

In helping hundreds of communities build rail-trails, we have learned some essential lessons about trail-building. To be successful, a rail-trail project needs three "supports": a committed public agency; a trail plan; and grassroots support. In *Secrets of Successful Rail-Trails*, we share advice on how to strengthen these three supports and build what we have come to call the "rail-trail triangle."

However, in our experience, building the rail-trail triangle, while critical, is not enough to assure success. Acquiring a rail corridor presents unique issues that cannot be adequately addressed through the process of public persuasion. Absent a transaction, there will be no trail.

That's where *Acquiring Rail Corridors* fits in. *Acquiring Rail Corridors* summarizes the knowledge of the country's leading attorneys, non-profit land acquisition agents, local park directors and rail-trail builders who have successfully acquired rail corridors for trail use.

After reading this book, we hope you will be able to approach a railroad with confidence.... and be able to strike a deal. If complications arise, each of our organizations is ready to assist you.

Good luck!

Introduction

Imagine opening the Sunday paper and finding the following announcement in the Real Estate section:

Sixty acres of riverfront property available for immediate sale. Beautiful views. Historic Structures included. Suitable for building. Prime wildlife habitat. Recreational features. Plenty of access to streets and highways. Income producing. Will go fast. Act now!

Wow! Eagerly, you call the broker for details. Yes, everything the ad says is true. However, there are some problems:

- The 60 acre property was assembled from 25 different owners, and deeds can be found for only about 20 of them. The available deeds are 100 years old and difficult to understand. It is also unclear whether the seller really bought all of the pieces outright.
- Several of the deeds say the land was sold "for the sole purpose of building a hunting camp." You want to build a public park on this land. Will you be able to?
- It is unclear whether you can convert this property into a park under existing zoning ordinances. In fact, your broker is not able to determine whether the property is zoned at all.
- Yes, the property is on the riverfront. But it was used as a marina, and an old fuel depot still sits on the property. Old fuel tanks could be buried on the property, perhaps leaking fuel.
- The marina structure, though dilapidated, has been listed as an historic structure. Any attempt to repair or tear down the structure will require multiple reviews and approvals. In the meantime, if you buy it, you must assume liability for any injury to people using it.

Despite these problems, the owner is asking you to pay a price per acre equal to what adjacent landowners have paid, even though those adjacent parcels have none of the title, zoning, environmental or liability problems this property has.

"No way," you say. There are too many problems. Still, the ad is right: it is a once in a lifetime opportunity.

The views are spectacular, and the property is historically important. If you don't purchase it, it will probably be subdivided and sold to adjacent landowners. You hesitate. Is it worth it?

This story highlights the dilemma faced by public agencies and private organizations interested in acquiring abandoned or unused railroad corridors for conversion to trails or greenways. In almost every case, railroad corridors present spectacular opportunities to reconnect cities and towns with bicycle and pedestrian facilities. These facilities follow historic transportation routes, parallel rivers, pass historic structures, provide close-to-home open space for wildlife preservation and outdoor recreation, and even help control non-point source pollution from highway and agricultural run-off. Even though the acquisition process promises to be as complex as any transaction you have ever encountered, it can be done!

The "Blue Moon" Problem

Railroads abandon lines on a fairly regular basis. However, when a public agency attempts to acquire a rail corridor, it is usually doing so for the first time, since most railroad abandonments occur locally only "once in a blue moon." Public agencies generally have no experience with rail corridor acquisition when they begin planning the acquisition. The railroad, on the other hand, seemingly knows everything about the line: acreage, quality of title, history, appraised value, other potential purchasers, environmental problems, taxes, carrying charges, liabilities, etc.

Given its knowledge and experience, the railroad may appear to have a strong upper hand. They have all the information needed to know what reasonable terms and conditions for purchase would be information they are unlikely to share with you as the potential purchaser. Instead, they are likely to start off asking top dollar for the property. They may then bargain down to a price that appears to be a tremendous concession, but which may still be far above the true value of the property. But how do you know?

The key is preparation.

Although the railroad seemingly knows more about the corridor than you do, here are some things you can learn through good research:

- **Ownership:** The railroad probably has only the original deeds under which it acquired the corridor. All title information must be locally recorded. You can research that information in local land records, including any zoning ordinances, subdivision rules, or other restrictions on the use of the property.
- **History:** Have there ever been environmental problems with the corridor? Accidents? Spills? Railroad records may not be available for all activity on the line, but you have access to the local library's newspaper archives. They may reveal a wealth of information about the history of the corridor that the railroad doesn't know.
- **Condition:** The corridor is local. The railroad's property manager's office is almost certainly not in the local area. In fact, it is highly likely that the railroad's representative(s), who is responsible for hundreds, if not thousands of miles of track, may have never actually seen the corridor. You can obtain permission from the railroad to conduct an on- the-ground inspection.
- **Taxes and Charges:** The railroad probably pays local real estate taxes and complies with other local ordinances. These are all public records that may provide clues as to how the local tax assessor's office values the corridor.

The point here is not to provide an exhaustive account of every piece of information you need for a successful negotiation. Rather, your "information deficit" is not necessarily as debilitating as you may think. With the right team and good research, you can overcome this information deficit and prepare for successful negotiations.

Remember, if building rail-trails were a baseball game, actually acquiring the corridor would usually occur during the sixth inning. It is not the first step in a rail-trail effort. It is

also not the end of the effort design, construction and management all lie ahead. Just as the sixth inning of a baseball game must be preceded by the first five innings, there is a logical progression to rail corridor acquisition as well. This book, based on the experiences of hundreds of rail-trail projects that have been successfully completed, is designed to help you get to the negotiating table, and then, to successfully negotiate a winning deal for your community.

Chapter 1: Getting Started

If you're lucky, you may have the luxury of time to plan for the acquisition of a rail corridor. On the other hand, you may have just learned that the local railroad intends to dispose of a corridor within the next three months. Obviously, a rail line's current status will play a large role in dictating how quickly you must act to preserve a particular corridor for trail use.

Understanding the Status of the Corridor

Generally speaking, corridors fall into one of four categories:

Active rail corridor. Whether one train an hour, or one train a year passes through, these corridors are still considered active. Corridors in active use are almost always owned by a railroad; the rare exception is a corridor owned and operated by a city or state. An agency interested in acquiring an active rail line for trail use may have to wait several months, if not years before the line might become available.

If you have identified an active rail line as a potential candidate for rail-trail development, pay close attention to the frequency of service along that corridor. Active rail lines may become candidates for abandonment in a very short period of time. For example, the relocation of a major manufacturing plant that had previously been served by a particular rail line may be enough to trigger an abandonment application. A sudden decline in service may foreshadow an impending abandonment.

Inactive corridor. These corridors, which generally are still in railroad company ownership, still have tracks and ties in place, but there are no longer any trains operating on a regular basis. An inactive corridor is certainly a good candidate for abandonment, if the railroad hasn't already begun the process. Since a railroad is required to notify the local community when it intends to abandon a corridor, your agency should have at least some time to begin preparations to acquire the property.

Inactive corridor with abandonment authorization. In certain cases, a railroad may have already received abandonment authorization from the Surface Transportation Board (STB) which regulates rail corridor abandonments, but for some reason, it has not yet begun to salvage the corridor that is, to remove the tracks and ties. Until a railroad begins the salvage process, these corridors are still in rail road company ownership. Since the railroad almost certainly notified the local community of its intention to abandon that particular line prior to receiving abandonment authorization, you will have very little time to put together an offer for this type of corridor.

Abandoned corridor. Any corridor which no longer has tracks and ties in place has almost certainly been abandoned. Make sure to confirm, however, that the corridor is in fact abandoned under state law, since the removal of tracks and ties does not automatically constitute abandonment.

Generally speaking, there is less urgency associated with acquiring a previously abandoned corridor since the legal dismantling of the corridor has already taken place. On the other hand, previously abandoned corridors, or sections thereof, may be candidates for sale through auctions leaving little time for you to prepare for acquisition. The issue at this point is to identify the owner or owners. Some possibilities include: the railroad; adjacent landowners; the heirs of the original easement grantors; state or federal government agencies; or corporations.

Are You a Serious Buyer?

If you are like most rail-trail sponsors, you began your efforts by focusing on all the opportunities a rail-trail offers your community. Your belief in the benefits of your rail-trail has almost certainly been strengthened over time. Just make sure that you and the other players are still in agreement that this project needs to happen. Remember that public land acquisitions will be scrutinized. Even the perception of irregularities may attract criticism.

One of the easiest ways to assess the level of commitment to a project is to consider the associated risks. Rail-trail acquisitions pose two primary risks: financial loss and political opposition.

Financial loss. Almost every attempt to acquire a rail corridor requires a substantial financial outlay. You will incur staff costs, consultant fees, and a whole range of administrative expenses as you work toward acquisition. If you fail in your attempts to acquire a corridor, your agency will still be responsible for covering these costs, just as it will be if you succeed. Even if you are successful, the acquisition process might be more complex than you anticipated, and you may be faced with substantial cost overruns.

Political opposition. Although this risk may be far more difficult to measure than the financial costs outlined above, the risk is real. In communities where trails, rail-trails and greenways are not yet part of the public infrastructure, rail-trails may be controversial. You and your agency may find yourselves the target of rail-trail skeptics who fear a loss of privacy, reduced land values, or increased crime. While these fears almost always prove to be unfounded, some landowners may let their fear of the unknown lead them to oppose the project. In a worst case scenario, this controversy may lead to attacks on your integrity and professionalism, and to attacks on your agency as well.

Winning Over Trail Skeptics

Don't let skeptics and critics derail your project. Here are some techniques you may find useful in turning skeptics into supporters:

Reach out to adjacent property owners.

As the nearest neighbors to your rail-trail project, many adjacent landowners may be concerned about the impact of the rail-trail on their property, their home, their business or their family. Talk to these neighbors directly by going door-to-door, by circulating an open letter or by making a community presentation. Talk to as many people as possible.

Faceless bureaucracies scare people -- make sure your potential new neighbors know who you are, and what your intentions are from the outset. Acting in a positive, constructive manner -- no matter how unpleasant a discussion may become -- will enhance your credibility and win support for the project.

Listen to what your neighbors are saying.

Take time to listen to and understand your neighbors' concerns. As a rail-trail is an unknown commodity to many people, it is important that you address specific concerns, offer concrete suggestions and try to work with your neighbors to develop sensible solutions.

Find allies among adjacent landowners.

You may find bicyclists, walkers, runners, families with small children, or individuals with disabilities who live along the proposed trail. Seek out these individuals and urge them to assist with your rail-trail project.

Give adjacent landowners a role in the project.

Establish a trail advisory committee or a neighborhood relations committee and ask adjacent residents to serve on these committees with trail advocates and user groups. When given a chance to participate in the process, skeptics may be willing to work toward solutions.

Invite former skeptics to speak to trail neighbors.

Inviting a former skeptic to visit your community to discuss her real-life experiences living along a rail-trail can help allay your neighbors' concerns. A well-managed, attractive rail-trail is very different from a littered, overgrown, and abandoned rail corridor. Bringing in an outside "expert" who has witnessed this transformation is an excellent way to communicate this message.

If you decide it is too risky to go forward, remember that circumstances change. You may

find that taking some time away from the project actually makes it easier for you to resume work in the future. Perhaps your agency's budget will increase, or maybe you can generate an upsurge in public support that will make the project seem possible once again. Rather than abandon this project, seek out and work with nonprofit partners and "friends of the trail" groups to build enough support for the project to move forward.

The Lackawanna Cut-Off

Although some rail corridors disappear quickly after abandonment, the Lackawanna Cut-Off, a 28-mile corridor through Warren and Sussex Counties, New Jersey, is still being considered for trail conversion nearly 20 years after its abandonment. Conrail abandoned the corridor in 1978, but held onto this architecturally impressive line for almost 10 years, while a buyer was sought. Although Conrail offered to sell the corridor to the state of New Jersey for \$3 million, the state was unable to raise the funding necessary to complete the transaction. With no other options, Conrail sold the corridor to a developer for approximately \$2 million in 1985.

When the developer purchased the corridor, he indicated his intent to dismantle it and sell the fill for construction projects around the state. As the corridor was designed with the slightest possible grade, a great deal of fill material -- rocks and gravel -- was used in its construction.

The state did not want to lose the corridor, with its potential as a mass transit route through a crowded section of New Jersey. The state was also concerned about the environmental impact of removing so much material from the corridor. Consequently, the state has been locked in a contentious battle with this developer over the corridor's future. While the state has successfully blocked the developer's attempts to dismantle the corridor, he has indicated he will not sell it to the state unless he is compensated for the estimated \$40 million of fill he believes the corridor contains. Twenty years ago, the state could have obtained the corridor for around \$3 million. Now the state is attempting to locate the more than \$10 million needed to finance this acquisition. Until the state succeeds, the residents of Warren and Sussex Counties will have to continue waiting for both a trail and a mass-transit route.

Ask Yourself the Right Questions

Before you make another decision about what to do next to acquire the rail corridor, stop and ask yourself these questions:

- What is the status of the rail corridor? Are trains still running? Has the railroad already abandoned the corridor? Are the tracks and ties still in place? If the corridor has not yet been abandoned, when will it be abandoned?
- If the corridor has been abandoned, is the railroad currently prepared to sell the corridor? If not, when will they be ready to sell?
- How much time will you have to put together a deal that meets the railroad's and your needs?
- What will the railroad want in exchange for the corridor?
- How will you fund this acquisition?

These questions form the basic framework for any rail-trail acquisition. Although you may not know the answers to these questions right now, do not lose sight of them. By keeping these questions in mind throughout the acquisition process, you and your agency will remain focused on the important issues. The window of opportunity in which to make the purchase may be small, but resist the temptation to launch headlong into a negotiation without adequate preparation.

Is Your Rail-Trail Project Ready For Prime Time?

Before you even think about buying a corridor for trail use, your rail-trail project must be well-supported by the community. If your project lacks this crucial support, you will be unable to put together a credible acquisition offer.

A rail-trail project needs three support mechanisms, known as the rail-trail triangle:

Public support: Rail-trails represent a community decision. Ideally, by the time you are ready to acquire the corridor, you will have held community-wide workshops to build public support for the project, and a "Friends of the Trail" group will have been formed to assist in creating the rail-trail.

An action plan: Develop maps and plans to indicate the community resources that the trail links together. These will demonstrate how this abandoned corridor could be used for outdoor recreation, open space conservation, historic preservation, and non-motorized transportation.

You also need a financing plan. You don't have to reveal your actual resources -- that's a negotiating strategy -- but you must show that you are prepared to compensate the railroad for its property.

Without concrete plans, you will have a difficult time convincing those you need to convince that your vision of a rail-trail can actually be implemented.

Committed Public Agency: Some entity must agree to own and manage the corridor. Ideally, a public agency -- local or state -- has already agreed to assume this responsibility. A park or transportation agency is an obvious choice. A conservation commission, a department of public works, or even an economic development agency might also be a fine candidate for this responsibility.

Usually, but not always, government agencies need explicit authority from a legislative body to acquire a rail corridor. At this stage, it is still much too premature to request that your agency's leadership, or your local politicians, commit to acquiring the corridor. You merely need permission at this point to explore the feasibility of acquiring the corridor for trail use.

Once you have approval to explore the feasibility of acquisition, make sure you regularly communicate with the appropriate decisionmakers. Hold briefings, field trips, and planning meetings to maintain the decisionmakers' enthusiasm for your rail-trail.

If the railroad doesn't think you have the authority to execute a purchase, you will find it extremely difficult to get their attention.

Without all three legs of the "rail-trail triangle" in place, your rail-trail idea isn't yet ready to move forward. To strengthen your project and garner the necessary community support, read *Secrets of Successful Rail-Trails*, an organizing manual for converting rails into trails.

Chapter 2: Assembling Your Team

Assessing Your Capacity

At this point, you already know a great deal about your agency's abilities. Take some time to consider what has worked to get you this far.

- What tasks were easiest for you to accomplish? In what areas did your agency experience its greatest successes? What were your particular areas of expertise?
- Where did you have the most trouble? Could you have benefited from professional assistance in certain areas?
- What individuals have been most valuable to your efforts so far? Were one or two people responsible for your success, or did you rely on a team effort?

Consider the answers to these questions very carefully. You must understand your agency's strengths and weaknesses.

Once you've reviewed how things have gone so far, take the time to look forward at the issues you will face over the course of your acquisition. Remember, every phase of the conversion process presents new challenges and requires different skills. If you represent

a government agency, it is quite possible that your agency will have an easier time addressing the challenges of acquisition than it did in generating public support for the rail-trail. On the other hand, a nonprofit citizen group may have greater difficulty in handling the highly specialized tasks associated with acquisition than they did in generating public support.

Some of the most important tasks which you will need to accomplish during the acquisition process include:

- Property research;
- Community relations work with adjacent landowners and the community at large;
- Corridor inventory and field assessments;
- Research into the railroad's interests and options;
- Obtaining financing; and
- Environmental assessments.

Think about the acquisition tasks that you are about to face. What sorts of skills and expertise will be needed to complete these tasks? Do you have staff members who can complete them? If so, which tasks? Are there volunteers, board members, or others affiliated with your organization upon whom you can call for pro bono assistance?

Completing this mental exercise can be quite revealing. Don't be surprised if you learn that you don't have enough "in-house" talent to complete every task. If your rail-trail project is like most, there is probably a wide range of agencies and organizations interested in working with you to create the rail-trail. Look to these organizations for assistance.

Involve Your "Stakeholders"

Successful rail-trails are the product of a cooperative public/private effort. Ask yourself, "What groups stand to gain from converting the corridor to trail use?"

Potential stakeholders include local parks, recreation, transportation or public works departments, local elected officials, chambers of commerce and local businesses, local conservation and environmental organizations, local recreation clubs, and perhaps, local or regional utilities.

Some of these stakeholders are obvious, but others may seem like unlikely partners. However, you may find that the local public works department, or electric or water company would be willing to help finance the acquisition in exchange for the right to lay a new sewer, water main or electric line within the corridor. If there is any possibility that the corridor could benefit some organization, especially one that may have funds available to assist with corridor acquisition, make sure to involve them in the acquisition process.

Consult with each stakeholder group to ensure that its interests are addressed during negotiations, as well as to assure ultimate public acceptance of your agreement. While

most stakeholders should not be directly involved in the negotiations, they must be "in the loop" and informed of progress. You may want to ask each stakeholder organization to nominate a representative who is familiar with real estate transactions to serve on an advisory body. In addition, identify key individuals on the staffs of these organizations who may have the requisite knowledge to serve as members of your project team.

Technical Assistance from the National Park Service

For most people, the National Park Service conjures up images of the Everglades or Yellowstone National Park or the Grand Canyon. While it's true that much of the Park Service's mission is to manage some of this country's most beautiful places, there are programs within the Park Service dedicated to assisting local projects just like yours.

The Rivers, Trails and Conservation Assistance (RTCA) Program of the National Park Service supports a community-based approach to conservation, helping citizens in communities across the country develop local greenway, river, and trail projects.

With staff in offices across the country, RTCA is an excellent resource for rail-trail developers. RTCA staff can:

- Explain the rail abandonment process and how to railbank a corridor;
- Recommend strategies to build a trail constituency;
- Suggest sources of funding;
- Help run public meetings to gather support for the trail; and
- Share the experiences of other trail activists and agencies across the country.

To receive RTCA assistance, you must apply to a RTCA office. Any state or local agency, as well as any nonprofit citizen's group supported by a state or local agency, is eligible for RTCA assistance. Since the selection process is competitive, your project must offer numerous opportunities for public involvement and have the potential to garner broad public and private support.

To date, the RTCA program has assisted California's High Sierra Rail-Trail, Nebraska's Cowboy Trail, Utah's Historic Union Pacific Rail-Trail, Oklahoma's Old Frisco Trail, Pennsylvania's Youghiogeny River Trail and many other rail-trails.

For more information about the National Park Service's Rivers, Trails and Conservation Assistance Program, contact:

Rivers, Trails and Conservation Assistance Program
National Park Service
1849 C Street, NW, Rm. 3606
Washington, DC 20240

202-565-1200

For the office nearest you, see the list of RTCA offices in Appendix B.

What Experts Will You Need?

As your rail-trail project moves forward, you will need team members with a wide variety of talents, from visionaries who first suggest converting an abandoned corridor to a trail to rail-trail professionals, such as appraisers, attorneys, and land acquisition agents. Here are some of the roles you will need to fill in order to succeed:

Project Manager

While rail-trail negotiations require a cooperative effort, few cooperative efforts succeed without proper leadership. Directing all aspects of the acquisition process is a little like trying to hold 10 ping pong balls under water with one hand tied behind your back.

By the time your project has gotten to this stage, it may be quite clear to all involved who should direct the process. Generally speaking, the project manager should not only be the person who is most familiar with all aspects of the rail-trail project, but also an individual who has the time, skills and professional background to ensure that all of the necessary talents are brought to bear on the issue.

If you've volunteered (or been nominated) to serve as project leader, congratulations! If your agency still isn't sure who is the right person to fill this role, here are some traits that most successful project managers have: a vision for the project; political savvy; perseverance; patience; familiarity with bureaucracies; an understanding of the project's history; an attention to detail; and the ability to recruit others as well as to delegate. Remember, the project manager's most important responsibility is to ensure that all stakeholders and members of the project team understand and complete each of their responsibilities. Timelines and task deadlines will become crucial during the acquisition process. The project manager must ensure that everything happens when it is supposed to happen.

A project manager doesn't have to know how to complete all tasks associated with the negotiations; she just has to know how to use the experts and the other talent needed to get the job done.

RTC's Trail Conservancy

In 1993, Rails-to-Trails Conservancy formed the Trail Conservancy to undertake complex corridor acquisitions. RTC's Trail Conservancy operates by serving as a short-term intermediary between railroad companies and trail groups or public agencies. Many organizations and agencies, including state and local government agencies, railroad companies, and local trail

groups have benefited from the Trail Conservancy's assistance. RTC's Trail Conservancy develops strategies that capitalize on the unique circumstances of each acquisition, using the following techniques: line buys, donation financing, agency acquisitions, and direct loans.

Contact RTC for more information about whether the Trails Conservancy can assist your particular rail-trail project.

Lead Negotiator

This person is a "deal-maker," with experience in structuring and closing deals. Relevant experience could include a background as a negotiator, an attorney, or a business leader. Although some counties rely on staff attorneys or park directors to handle real estate negotiations, other public agencies contract out land acquisition tasks to private, professional negotiators. Ideally, the lead negotiator will have experience in acquiring railroad property.

In the non-profit sector, Rails-to-Trails Conservancy (RTC) and Trust for Public Land (TPL) offer significant experience with rail corridor acquisition and can often recommend an expert, if they are unable to assist with the acquisition directly. You might also be able to call upon a member of a local land trust to fill this role.

The Trust for Public Land

The Trust for Public Land (TPL) works nationwide to protect land as parks, trails, recreation areas and wilderness. With over 20 years of experience, TPL has been a national leader in the acquisition and preservation of public open space. TPL's staff of attorneys, real estate professionals and planners has played a key role in the creation of rail-trails around the country, including Connecticut's Farmington Canal Greenway, California's Bizz Johnson Trail, and Florida's West Orange Greenway.

Attorney

Over the course of your negotiations, you will need the answers to numerous legal questions, ranging from the railroad's regulatory obligations to the quality of the railroad's title. Although you may be able to answer some of these questions yourself, an attorney can assist in the process. If neither your agency nor your partner agencies have an attorney on staff, find an individual who is not only skilled in real estate transactions but who is also familiar with the region, its residents, and your agency. Since it is unlikely you will be able to locate a local attorney who is knowledgeable about railroad issues, your attorney should work in partnership with either state or national railroad experts. To start, your attorney can contact the railroad division of your state Department of Transportation. Even if these personnel are unable or unwilling to offer significant

assistance, they can help direct your attorney to additional resources, including private firms that specialize in rail issues.

Appraiser

Determining the value of railroad corridors is a difficult undertaking due to their non-standard shapes and characteristics. Hiring an appraiser skilled in corridor appraisals to research the corridor and provide you with an estimate of its value is highly recommended. Since rail corridor appraisals are subjective undertakings, you may want to hold off on hiring an appraiser until you have had the opportunity to discuss the appraisal process with the railroad's representatives. Your appraiser's qualifications and certifications can become an important negotiating point.

Surveyor

Railroad corridors are long and narrow (and often not well marked) parcels of land. To understand exactly what you are acquiring in a transaction with a railroad, you may need a surveyor to examine the property and indicate its actual boundaries.

Corridor surveys are expensive undertakings. If you are unsure whether you need a complete survey, a partial survey, or no survey at all, seek guidance from officials within the rail division of your state Department of Transportation, or from other public officials (for example, a representative from a local transit agency) who have more experience with rail corridor acquisitions. Several states require public agencies to complete a survey before acquiring property.

Environmental Engineer

Although railroad corridors pose relatively few environmental problems, an environmental engineer should conduct an environmental assessment of your corridor. Environmental assessments are a necessary tool in uncovering environmental hazards as well as establishing that you have acted with "due diligence" to uncover environmental problems. Exercising due diligence can protect you from liability for hidden environmental hazards that may surface at a later date.

Historic Preservation Specialist

When abandoning a corridor, railroads are required to disclose the existence of historic property on the corridor. They must also consult with the appropriate State Historic Preservation Officer (SHPO) before selling the property. Don't rely exclusively on the railroad's disclosures, however, since the railroad may have only conducted a cursory review of the historic significance of the corridor and its associated structures.

A member of your local historic preservation society or an architect, engineer or lawyer specializing in historic preservation should walk the corridor and consult newspapers and other historic documents to help you understand the historic significance of the rail corridor and its structures. This knowledge could greatly assist your efforts to build support for your project. Priceless remnants of America's heritage add value to many rail-trail projects.

Spokesperson

Political consensus building and public relations work are two of the most important pieces of any acquisition effort. Although many project leaders feel comfortable assuming the role of public spokesperson for their project, your team may decide to select a particular individual to handle your public outreach work. The spokesperson must be kept abreast of all developments throughout the acquisition process, so she can accurately and intelligently report on any events of particular importance. Remember, however, that your spokesperson will be communicating primarily with the public, not with railroad representatives.

Fielding the Best Team

As you read through this list of roles, you may have made up your mind about how you will fill each of them. While it is quite useful and frequently far less expensive to rely on "in-house" talent, don't be afraid to juggle team responsibilities or to seek outside assistance. If your ultimate goal is to acquire the rail corridor as quickly as possible for as little as possible, you and every potential member of the project team must continually evaluate whether additional assistance is needed.

Acquiring a rail corridor is a long term process. You will almost certainly discover that your team needs additional expertise in a particular situation, just as you are likely to learn that certain members of the project team may have hidden talents. By relying on both "in-house" talent and outside experts, you will be able to assemble the best team.

Chapter 3: Contacting the Railroad

Making The First Contact

Designate one person, most likely your Lead Negotiator, to act as the primary contact with the railroad's representatives throughout the acquisition process. If you allow uncoordinated communications from many different people, your effort will appear uncoordinated, and the railroad's representative may perceive your team as scattered and unfocused, instead of as a serious bidder. Your team members should clearly understand that they must channel all communications with the railroad through your Lead Negotiator, just as the railroad should be instructed to direct all inquiries and correspondence to that individual as well.

Pre-Abandonment Acquisition: If you are attempting to acquire a line that has not yet been abandoned, first contact either the railroad's legal department or the asset management department (sometimes called "Plant Rationalization" or "Strategic Planning"), since both departments play an active role in the corridor abandonment process. (See Chapter 4 for more discussion of these and other railroad departments.)

Post-Abandonment Acquisition: If you are attempting to acquire a line that has already been abandoned, first contact the railroad's real estate department and ask to speak with the agent who is responsible for your area.

In making initial contact with the railroad (which may consist of letters, phone calls or meetings), attempt to accomplish the following:

- Notify the railroad of your agency's interest in the corridor;
- Demonstrate your agency's credibility and commitment to making a deal;
- Distinguish your agency from other buyers;
- Learn more about the railroad and its representatives;
- Determine who has authority to negotiate on the railroad's behalf; and
- Begin your research.

When to Write; When to Call

Making the initial contact with a railroad is frequently a difficult process for trail groups. It takes creativity and persistence to locate the appropriate point of contact. There are numerous ways for your team to initiate contact with a railroad -- from cold phone calls followed by letters restating your interest to personal introductions. Use whatever method makes you most comfortable. The bottom line is that you need to locate an appropriate railroad contact as quickly as possible.

Notify the Railroad of your Interest

Of course the most important reason to contact the railroad is your interest in the corridor. In deciding to make your initial contact, you must balance the need to convey your interest as soon as possible with your need to know as much as you can about the corridor. If you fail to notify the railroad of your interest early enough in the abandonment process, the railroad may take actions, such as the commencement of bridge removal, that would threaten the integrity of the trail corridor and could make a successful rail-trail conversion unlikely.

Demonstrate your Agency's Credibility

Although the rails-to-trails movement has become increasingly sophisticated over the last 10 years, some railroads may still be leery of entering into a relationship with unknown rail-trail advocates, especially if the project could become controversial. In order to facilitate smooth negotiations, it is extremely important that you convince the railroad of your agency's ability and commitment to the project. Such actions as sharing your rail-trail plan and providing the railroad with copies of public resolutions authorizing your agency to pursue acquisition can help demonstrate your credibility. It is also important to pay attention to the details of contracting and timing needs. And be sure to demonstrate a professional approach to information gathering, negotiation and follow-up if you want to be taken seriously in your discussions.

Distinguish your Agency from Other Buyers

As you establish your credibility, you should also begin educating the railroad's representatives about the differences between your agency and other potential buyers. Although this will be discussed in more detail below, two of the most important distinctions between your organization and other buyers include:

1. Your agency wants to acquire the entire corridor (or at least a significant portion of it) intact; and
2. Your agency or organization can access large funding sources (such as the Intermodal Surface Transportation Efficiency Act [ISTEA], or state or local bond monies) that are unavailable to other potential buyers, and which allow you to commit to paying cash upon signing. Other buyers may be unable to generate these sums as quickly.

It is also important that you educate the railroad during the early stages of the process about your responsibilities as public (or nonprofit) officials. Although you must be extremely careful not to say anything that leads railroad representatives to believe your agency is incapable of meeting the railroad's timeline or needs, do be candid about your obligations and constraints. These might include anything from a strict annual budget process to stringent timelines for ISTEA awards. Your candor will help prevent unnecessary conflicts down the road.

Get to Know the Railroad and its Representatives

One of the most important offshoots of a successful series of early contacts with a railroad's representatives is that you may begin to develop a personal rapport with the people (and the institution they represent) sitting across the table from you. Successful negotiations require trust and cooperation, and your ability to develop a meaningful rapport with the railroad's representatives will help build this relationship. While this relationship-building is entirely dependent on the personalities sitting around the table, you might try some of the following techniques to build rapport:

- Share your reasons for pursuing this rail-trail conversion;
- Discuss the history of the corridor and its significance;
- Ask the representative about the railroad's needs and begin a discussion of how you can help meet those needs; and
- Show genuine interest in the railroad's expectations about the negotiation.

Successfully building rapport requires tact and creativity, but it is well worth the effort. A supportive railroad representative is more likely to listen to your needs and to work with you to craft an agreement that meets those needs.

Determine who has Authority to Negotiate on the Railroad's Behalf

Locating the railroad's decisionmaker(s) is another important and delicate task. As you talk with the railroad's representatives, ask yourself, "Will this person be able to close a deal under the terms I hope to propose?" If the answer is "no," you need to find the person who can. If the railroad's representative is unable to identify the ultimate decision-

maker, it may help to talk with other agencies, preferably in your state or region, that have negotiated with this railroad before. These groups may share their experiences and offer valuable advice like naming the railroad employees who were instrumental in the negotiations for their rail-trail. RTC can provide information on the "chain of command" for most major railroads and is ready to share this information with you.

What if You're Not Dealing with a Freight Railroad?

While the vast majority of active rail lines are owned by the major freight railroads, you may be interested in a line owned by some other rail or transit entity. In most cases, these other corridor owners will either be shortline or regional railroads, or state or local transit agencies. Although these owners may act like a freight railroad in certain ways, they are likely to pose different difficulties for an agency interested in acquiring a corridor for trail use.

Unlike the major railroads, most shortlines and regional railroads are much smaller organizations with a less-defined organizational structure. There will probably not be a real estate department or a legal department, for example. This less-defined structure, combined with personnel who may be less experienced with the intricacies of the abandonment and corridor disposal process, may require you to spend a great deal of time educating these railroads about the benefits of railbanking and trail use in general. To make matters worse, some shortline railroads are not governed by Surface Transportation Board regulations, as they are not engaged in interstate commerce. State regulation of railroads varies significantly, and many provisions which can be used to support a rail-trail project, such as the federal railbanking statute, may not be available under state law.

The less bureaucratic structure of many shortlines, however, may allow the railroad's personnel to take a more flexible approach to disposing of the corridor for trail use. Additionally, many shortline railroads depend on the state Department of Transportation (DOT) for a significant portion of their operating funds. If you convince the rail personnel in your state's DOT to assist in your acquisition efforts, your negotiations with the shortline railroad may be eased significantly.

Unlike shortlines or the major railroads, transit agencies are primarily responsible for transporting people. As a result, these agencies tend to have a greater appreciation for the transportation potential of a proposed trail. In many cases, this understanding has led to cooperation between a trail developer and a transit agency, especially when trail supporters can demonstrate that the trail will be used as a means for accessing the

transit system. Despite successful examples of cooperation in communities like Los Angeles, Boston, and Dallas, however, don't expect to be received with open arms by a transit agency.

Since most transit agencies operate only a bare-bones rail transit network in the communities they serve, it is extremely unlikely that a transit agency will abandon a rail line. There are two primary instances in which you are likely to be involved in negotiations with a transit agency:

- The establishment of an interim trail on a corridor planned for future transit use; and
- The establishment of a rail-with-trail.

In both cases, the transit agency may greet the establishment of a trail with skepticism or distrust.

Many state and local transit agencies, particularly in the northeast, have acquired corridors which were abandoned by freight railroads for their long-term potential as transit routes. In many instances, these corridors have gone undeveloped since it is currently too costly to establish transit routes on these lines. Putting a corridor into productive use as a trail may seem logical, but some transit agencies may oppose such a proposal.

Many transit systems encounter a great deal of opposition whenever they propose to expand mass transit. As a result, these agencies tend to jealously guard all corridors they currently own against any non-transit use. Agencies, including the Massachusetts Bay Transit Authority, the Florida Department of Transportation, the Connecticut Department of Transportation, and the New Jersey Transit, have all opposed rail-trail proposals for fear that the creation of a trail might preclude the eventual establishment of a transit line within the corridor. Convincing a transit agency to allow interim trail use requires perseverance, patience, and creativity.

Rails-with-trails proposals are also likely to meet with a great deal of skepticism. Although rails-with-trails can be safe, popular facilities with proper design and management, transit agencies are likely to worry about their liability risks and the potential for a deadly accident between trail users and a train. Again, patience and perseverance are essential to winning over a transit agency.

Begin your Research

In addition to getting to know the railroad and its representatives better, use your early meetings and conversations with the railroad to begin researching the corridor. Explain the research you plan to conduct and confirm the railroad's expected selling date. These steps will help establish a timeline and will lay the groundwork for subsequent meetings. Take advantage of these early conversations and meetings to make any reasonable requests for information or assistance from the railroad, e.g. asking for permission to tour the corridor.

Once you've convinced the railroad's representatives that you are a credible negotiating partner, they will be much more amenable to sharing their information about the corridor with you. By using whatever information the railroad is willing to provide, you can begin to understand its analysis of particular issues.

Strive to be flexible enough to handle whatever issues the railroad's representatives might raise in your early meetings. However, you are not ready for actual negotiations. If, for example, the railroad's representative asks you how much you would be willing to pay for the corridor, don't be afraid to say you believe it is premature to discuss purchase price or specific terms.

Do You Know A VIP?

Sometimes whom you know is as important as what you know. Before allowing your project to get lost in the bureaucratic maze of railroad offices and personnel, determine whether anyone associated with your project is a friend or colleague of a member of the railroad's leadership, or better yet, is actually a part of the railroad's leadership itself. If no one obvious comes to mind, you might read the biographies of the railroad's board of directors in the railroad's annual report. Does anyone on the board come from your community? Does any railroad board member also sit on the board of another organization with which you have dealt?

If you aren't able to locate a VIP this way, consider asking a politician to intercede on your behalf. For this to work effectively, concentrate on locating a state or national politician -- the Governor or a Member of Congress from your state -- to act as your advocate. At this point, you want the railroad to understand that you are a credible organization working on a project that has wide political and public support. Having a politician intercede on your behalf could jump-start the acquisition process.

Chapter 4: Understanding the Railroad

A cardinal rule in any rail-trail negotiation is to understand the railroad's perspective and objectives in corridor disposition. If you have a basic understanding of what the railroad wants, you can develop a position that strikes a fair balance between your needs and the railroad's.

Back From The Brink: Deregulation Saves The Railroads

In the 1990s, railroads have experienced a resurgence and have re-emerged as a vibrant and increasingly efficient part of the nation's infrastructure. Just a few years ago, the situation was much different. In the early 1970s, nearly a quarter of the nation's 275,000 miles of railroad were being operated under bankruptcy, largely because the railroads were unable to respond quickly enough to the changing market. In many cases, they were burdened with unprofitable operations.

Back in the 1950s and 1960s, railroads faced increasing competition from trucking companies. Interstate Commerce Commission (ICC, now the Surface Transportation Board) regulations made it even more difficult for the railroads to compete. Most railroads' corporate cultures left them unprepared to meet the challenge brought by the trucking industry. Railroad companies lost business, and they under-maintained their trackage and equipment as revenues declined.

Faced with the imminent collapse of the nation's rail network, Congress passed the Staggers Act in 1980 to lift much of the railroads' federal regulatory burden in an attempt to make the railroads more competitive. The Staggers Act enabled railroads, for the first time in nearly a century, to set shipping rates based on expenses and traffic demand. Equally important, the Staggers Act redefined the merger and abandonment process, enabling railroad companies to abandon unprofitable lines more quickly and easily than before. In some cases, the new abandonment rules permitted railroads to abandon lines in just 90 days.

The Staggers Act triggered profound change. Railroads cut costs, reduced their debts, and started investing in money-making ventures. During the 16 years since deregulation, the railroads have radically pared down their routes, abandoning almost 70,000 miles of non-productive corridors. This new freedom to compete has led to higher profits, allowing the railroads to improve track maintenance and safety, as well as overall service levels. These improvements have attracted new customers.

As railroad companies continued to streamline throughout the 1980s and early 1990s, they diversified as well. Today railroads not only transport goods by rail; they also operate shipping lines, barges and trucking companies. Railroads manage and develop property and provide financial services as well.

Most railroads now realize that their primary competition is not other railroads but other transportation modes trucks, barges, and cargo planes. Some railroads have even forged agreements with major trucking companies, including Schneider, J.B. Hunt and Roadway, and with shippers such as American President Lines. United Parcel Service is a heavy user of intermodal services to transport its containers and trailers over long

distances. In effect, the railroads have become wholesale providers of transportation services.

As railroads develop their new "wholesale" niche in the transportation industry, they are continuing to use mergers and abandonment of unproductive lines to streamline their operations even further. This streamlining guarantees that there will continue to be a significant number of rail corridors available for acquisition by trail groups for the foreseeable future.

Railroad Personnel

Railroad companies are large bureaucracies, with departments responsible for specific functions. Throughout the acquisition process, you will encounter people working in many departments. Since railroads make only about one percent of their income from real estate sales, don't be surprised if your interest in acquiring a corridor is not the top priority for many railroad personnel.

Asset Management (Strategic Planning) Department

What The Department Does: The Asset Management Department, which may also be called Strategic Planning or Plant Rationalization, consists of a railroad's long-term thinkers. This department is responsible for continuously evaluating the profitability of all the rail corridors in a railroad's system and determining which are, and which are not, making a profit. Once the Asset Management Department finds that a line is not making a profit, the railroad determines whether it is in the company's long-term interest to continue operating over that line. If the line is neither unprofitable nor strategically important to the railroad, the Asset Management Department then decides how to dispose of the property.

What the Department Can Do to Help You: As one of the primary decision-making bodies in determining the disposition of rail lines, the Asset Management Department plays a critical role in the rail abandonment process. Asset Management departments publish System Diagram Maps that provide a peek into the future about which lines railroad companies are planning to eliminate from their systems. Make sure you specifically request a System Diagram Map from the Asset Management Department, since railroads also publish "System Maps," which merely indicate the lines a railroad owns and/or operates over.

System Diagram Maps

Under federal law, each railroad is required to produce a map on an annual basis that indicates the status of all rail lines within its system. These system diagram maps must be submitted to the Surface Transportation Board (STB), to the Governors of all states in which a railroad operates, and to the appropriate state agencies that oversee railroad operations. Rail lines listed on system diagram maps are placed in one of five categories:

- Category 1: Line that the railroad anticipates abandoning in the next three years (most likely much sooner than that);
- Category 2: Line that the railroad is studying as a possible abandonment candidate due to operating losses or rehabilitation costs;
- Category 3: Line currently involved in an STB abandonment proceeding or a request to discontinue service;
- Category 4: Line operated under some form of subsidy; and
- Category 5: Line in regular service

Although system diagram maps are important tools, they are not the definitive source for information on upcoming abandonments, since the maps only list corridors likely to be abandoned through the most stringent regulatory process for abandonments. Using the "exempt" rail corridor abandonment process, a railroad can skip many of the regulatory burdens to abandon a line which has been unused for two years or more. Additionally, a line listed in Category 4 or 5 may suddenly become an abandonment candidate due to a sudden change in circumstances. On the other hand, if you are interested in a line listed in Category 1, 2 or 3, you should begin your acquisition efforts in earnest.

Operating Department

What The Department Does: At a minimum, the Operating Department schedules and operates trains and maintains the rolling stock and track. In addition, some railroad companies give the Operating Department direct responsibility for profit and loss in an assigned area.

What the Department Can Do to Help You: Generally speaking, you will have very little involvement with operating personnel as you work to acquire a rail line. Day-to-day operations are extremely time-consuming, and these individuals are rarely involved in any decisions about the future of a particular rail corridor. However, operating personnel often have a deep, personal connection to the line and the communities it served. Informing these personnel of your interest in a particular line and engaging them in conversation may provide you with a great deal of useful information about the corridor. Since these individuals have first hand experience with the corridor, they can often provide you information concerning the condition of structures, the existence of drainage problems and other maintenance issues.

Taking a First Hand Look

Once you've identified a potential rail-trail corridor, it's only natural to want to take a closer look. Even if it appears that the line is no longer in use, don't assume this to be the case. To avoid misunderstandings,

contact the railroad's representative(s) prior to any site visit. If you explain you are interested in acquiring this property, the representative will generally be more than willing to give you permission to tour the property.

While you can approach almost any of the railroad's representatives for permission to tour the property, you may find it most convenient to handle these arrangements with the operating personnel. The Regional Manager may even be able to arrange a supervised tour of the line under the direction of the Track Supervisor or the Roadmaster, and possibly even provide a hi-rail vehicle (a truck that has been modified to run on railroad tracks) for a tour.

If you have the opportunity to hi-rail the line with railroad personnel, use this trip to explore their history and connection to the line. The conversation during the inspection trip will give both sides a good chance to size up each other's intentions, sincerity, and wherewithal.

Legal Department

What The Department Does: The Legal Department evaluates contracts and issues opinions on matters affecting labor, government, and business relations. In addition, the Legal Department submits the paperwork required by the Surface Transportation Board (STB) as part of the process for obtaining authorization for abandonment.

What the Department Can Do to Help You: The Legal Department can furnish copies of line abandonment applications, notices, and other legal documents. These materials often contain useful information about the condition of the line as well as the railroad's estimate of the value of both the track materials and the real estate. In some railroad companies, Legal Department staff have proven to be the most receptive to rail-trail negotiations, so you may want to consider negotiating the corridor acquisition directly with the Legal Department.

Real Estate Department

What The Department Does: The Real Estate Department manages the railroad's real estate assets and is responsible for maximizing corporate returns on any real estate investments, including selling abandoned rail corridors for the best price possible. Real estate sales may be handled by a railroad's own Real Estate Department or by a corporate subsidiary not actually affiliated with the railroad, or may even be contracted with private real estate agents.

What the Department Can Do to Help You: In many cases, the railroad will expect you to negotiate with their real estate agents to acquire a rail corridor. If you are attempting to acquire a corridor that has already been abandoned, the Real Estate Department will have ultimate authority over how to dispose of the corridor. The Real Estate Department can

provide you with documents and information concerning the railroad's ownership, such as valuation maps, as well as with information about easements, crossing agreements, or similar arrangements that may apply to the corridor.

Public Affairs (Government Relations) Department

What The Department Does: The Public Affairs Department, usually staffed by attorneys, monitors state and local politics that may affect the railroad. A public affairs representative may have responsibility for more than one state, although larger states and states of greater importance may have a single representative assigned exclusively to them.

What the Department Can Do to Help You: Public Affairs representatives often can break the logjam between different railroad offices. These personnel are typically well-schooled in community affairs and are more than willing to assist with high profile, widely-supported projects. Not only do these people have access to the highest levels of the corporation, they often have the authority to force action from an unwilling department. They understand many of the nuances in the rail-trail acquisition process and can play a constructive role in negotiations with the company. Just remember, your concerns are a small portion of their responsibilities.

Understanding Your Railroad

While it is important to understand the climate of the rail industry, it is even more important to understand the specific railroad with which you are dealing. What issues is the corporation facing? Is it scrambling for cash to reduce its debt? Is it trying to eliminate branch lines in an attempt to focus on mainline service? Is it diversifying and experimenting? Is it expanding its resource base?

To help you answer these questions:

- Read a copy of the railroad's annual report, and take special note of the chairman's message;
- Talk with local transportation planners; and
- Talk with the state Department of Transportation rail representative.

This should give you a sense of the business strategy of the railroad. It may or may not directly affect your negotiations, but it certainly doesn't hurt you to have a better understanding of the railroad's needs.

The Decision to Abandon a Line

Railroads abandon lines when they are no longer profitable. An unprofitable line has one or more of the following characteristics:

- Carries relatively little traffic;
- Paralleled by a better route;
- High maintenance costs (e.g. the corridor is subject to frequent flooding) or numerous grade crossings; and/or
- Requires considerable (and expensive) upgrading because of poor track conditions or other structural problems.

In addition, sudden changes might render a financially viable line unprofitable. For instance, the closure of a major industry might result in little or no traffic remaining on a branch line. Damage to a major bridge, tunnel, or other structure might be enough to warrant downgrading or abandoning the affected segment. Severe flooding caused by Hurricane Agnes in 1972, for example, forced the abandonment of many Mid-Atlantic rail corridors, several of which are now rail-trails.

Each railroad reviews its transportation network on a regular basis to determine whether a line is profitable and, therefore, worth keeping. Even on profitable lines, railroads must weigh the profits generated from such lines against the value of the assets that can be recouped through liquidation. Depending on the value of the rails, ties and underlying real estate, light-density lines will usually have a liquidation value for the track materials and land of between \$50,000 and \$100,000 per mile (assuming the railroad owns fee title to the land). These figures represent a sizable capital investment that a railroad may be able to better utilize somewhere else in its system.

In most cases, the ultimate decision about whether to abandon a line rests with the Asset Management Department. Once a line has been identified for abandonment, the railroad's Legal Department files the formal abandonment application with the Surface Transportation Board (STB). Upon receiving abandonment approval, the railroad may assign responsibility for disposition of the track materials to one department (usually the Engineering Department), while another department (usually the Real Estate or Property Management Department) is given responsibility for disposing of the corridor.

If you wait until the Engineering and Real Estate Departments have been assigned the liquidation functions, you may be too late, since these departments may begin dismantling the corridor immediately. You will find the acquisition process easier if you can contact the Asset Management, Strategic Planning, or Legal Departments before the railroad receives abandonment authorization. If railroad personnel learn of your interest early in the abandonment process and they believe you would be a credible negotiating partner they may be willing to put final disposition of the corridor on hold to give you an opportunity to negotiate with them.

The Railroad's Options For Corridor Disposal

Knowing what options a railroad has will allow you to approach your corridor acquisition in an informed fashion. If a car salesman told you, "I've already had five people look at that car today," you would take this fact (if you chose to believe it) into account as you developed your negotiation strategy. Maybe you may make your offer more quickly, or perhaps you would make a higher bid than you might have made otherwise. On the other

hand, if you knew the car had been sitting on the lot for the last year, you would use that knowledge and not the salesman's word and offer less for the car.

A railroad's disposal options typically include:

Voluntary Sale to Other Railroads

Lines that a railroad believes may support some form of continued rail use are often marketed to regional or short-line railroads. This is generally the most profitable and easiest disposal option for a railroad, and is called a line sale. Such a line is not a likely candidate for trail use.

Involuntary Sale to Other Railroads: Offers of Financial Assistance (OFA)

When a railroad believes a line is not economically viable, even for a short line operator, the railroad will usually file an abandonment notice with the Surface Transportation Board (STB).

If a railroad files for abandonment, short-lines, shippers or local governmental agencies may still attempt to keep this line in service by submitting an application for an "involuntary" transfer of the corridor to them, called an "Offer of Financial Assistance" (OFA). If the offeror agrees to the terms set by the STB, the railroad must transfer the corridor, since the STB will always favor financially responsible offers that preserve freight operations.

"Piecemeal" Sales to Adjacent Landowners

If there is no reasonable offer made to maintain the corridor as a rail line, the natural interest of the abutting owners (many deeds for railroad property contain reversionary clauses calling for parcels to revert to the neighboring owner(s) when the line is no longer used for railroad purposes) means that railroads will usually first offer the corridor to them. Traditionally, the railroad will subdivide the corridor and sell as many parcels as possible to the adjacent landowners. Typically, a railroad that follows this approach will be able to sell only about 50 percent of the corridor on a piecemeal basis. This is an important point to remember in your negotiations. By selling an entire corridor to your agency for trail use, a railroad can avoid the financial and legal liability associated with long-term ownership of unmarketable corridor parcels. Reminding a railroad of this fact may convince them to accept your offer.

Bulk Sale to Private Interests

Increasingly, adjacent landowners have banded together as "landowner associations" solely to make a bulk purchase offer to a railroad. These private landowner associations usually form to compete with trail groups for the corridor. In addition, land developers are sometimes interested in parcels that are wide enough to support industrial or commercial developments.

St. Ignace to Trout Lake Trail

In 1986, the Soo Line Railroad chose to abandon a 27-mile rail line

between St. Ignace and Trout Lake in Michigan's Upper Peninsula. At that time, Rails-to-Trails Conservancy joined with the Michigan Trails Alliance a statewide coalition of recreational and conservation organizations and the Mackinac County Economic Development Corporation to request railbanking negotiations. The Soo Line denied the request, and trail advocates believed the corridor had been lost for trail use.

Upon receiving abandonment authorization, the Soo Line sold the corridor to Michigan Bell Telephone, which was eager to lay a fiber optics line within the corridor. Although Michigan Bell began efforts to lay its fiber optics line within the corridor immediately, the company was aware of the corridor's potential as a trail route. Over the next several years, Michigan Bell attempted to locate local citizen supporters who would take responsibility for developing and managing a trail in the corridor. Finally, Michigan Bell and the United States Forest Service were able to negotiate an arrangement to allow for trail development. Under the terms of the deal, Michigan Bell retained a perpetual easement for its fiber optic line, while donating the corridor to the Forest Service. The property transfer took place in 1992 and the Forest Service developed and opened the St. Ignace to Trout Lake Trail soon after.

In addition to making this trail possible, Michigan Bell also helped to create the Hancock/Calumet Trail and the Mackinaw/Alanson Trail by working with trail supporters at the state and local levels.

Utility Sales

If a railroad is interested in selling the entire corridor in a single transaction, it may attempt to sell the corridor to one or more utility companies. Electric companies, pipeline companies, local water and sewer authorities, and telecommunications companies may all have an interest in the corridor for power lines, pipelines or fiber optic cables. Utilities can present the railroad with a financially sound offer, but may only need subsurface or air rights. Since your agency may need only surface rights for a trail, you may be able to develop a joint bid for the corridor with a utility.

Developing a Partnership with a Transit Agency

The Pinellas Trail Story

In the early 1980s, the Pinellas County Metropolitan Planning Organization (MPO) and the Pinellas County Commission identified portions of a 35-mile CSX Railroad corridor as a potential mass transit route. With the cooperation of the Florida Department of Transportation, the MPO and the county worked to pass a special state

funding bill to acquire this corridor. Between 1983 and 1985, the Department of Transportation (DOT) spent \$19 million to acquire the corridor in phases. Although portions of the corridor had not yet been abandoned when the DOT began acquiring it, none of the corridor was railbanked. With the completion in 1985 of most of the acquisition, DOT and the county seemed content to allow the abandoned corridor to sit unused until needed for transit use.

As the corridor sat unused and unmaintained, bicycle activists throughout the county began to realize the corridor would make an excellent bicycle path. When these activists first made a presentation before the MPO, their rail-trail proposal was rejected because the MPO felt it might interfere with future transit use; the 90 at-grade street crossings posed safety and liability concerns; and no one would use the trail.

Despite this initial setback, the activists, many of whom served on the county's Bicycle Advisory Committee, continued to encourage the county to develop the corridor as a trail. In 1988, alarmed by five years of statistics which indicated that Pinellas County's per capita bicycle fatality and injury rates were among the top five in the state, the Bicycle Advisory Committee again approached the MPO about the creation of a trail. This time, the MPO was more receptive to the plan and challenged the Bicycle Advisory Committee to "show that the community is willing to pay for and support a trail project."

Within months, a nonprofit organization, Pinellas Trails, Inc., was formed to promote and assist with the development of the Pinellas Trail. Shortly thereafter, in August 1989, Pinellas Trails, Inc. had generated enough support for the trail to convince the MPO to negotiate a lease agreement with the DOT to allow creation of the Pinellas Trail. Pinellas Trails' efforts paid off. Construction began in July 1990 and the first five miles of the Pinellas Trail opened in December 1990.

Sales to Other Public Interests

Most public transportation agencies monitor rail corridor abandonments on a regular basis since these agencies may have plans to use the corridor for other public purposes. In some cases, primarily in urban and suburban areas, transit agencies may be interested in acquiring a corridor for conversion to light rail use. State or local departments of transportation may also choose to acquire a corridor for a road construction or improvement project. Although these plans may not be compatible with the creation of a rail-trail, there are numerous examples of cooperative efforts involving road/transit projects and rail-trails.

Tourist Trains

Tourist train operators may also be interested in the entire corridor. Since the railroad will expect to be compensated for the value of the real estate as well as the actual track material (which can cost more than \$10,000/mile), tourist trains generally have more difficulty than utilities in putting together an economically feasible offer. However, tourist trains are seen as highly attractive economic development opportunities in certain communities, so don't be surprised if there is discussion of a tourist train along the corridor. Again, your interests may not compete. You may want to consider a "rail-with-trail" project in collaboration with a tourist train operator.

White Mountains Rail-Trail

Until recently, the state of New Hampshire was involved in a long-standing dispute with Guilford Transportation, Inc. over the ownership of several rail corridors throughout New Hampshire. In fact, it took a 1994 court ruling to resolve this dispute. Shortly after the suit was settled in January 1994, the state assumed ownership of 186 miles of inactive rail lines, including a 52-mile line between Conway and Whitefield, New Hampshire.

This line, known as the Mountain Division, crosses some of the most scenic portions of New Hampshire's White Mountains and has long been considered for tourist train operations. In fact, the Conway Scenic Railway, which operates on an adjacent segment of this line, expressed interest in maintaining a significant portion of this track for a tourist train. At the same time, many people pointed out the corridor's long-term potential as a rail-trail. There has been a great deal of speculation as to how the state will respond.

Although no final decision has been made, the state has tentatively indicated it is willing to allow both rail and trail uses to move forward. Although the Conway Scenic Railway is an important business venture in the region, the state knows the Railway will be using certain portions of the corridor on an infrequent basis only. Rather than close off this scenic route to trail users, the state is exploring, with the assistance of all parties, the development of a rail-with-trail which will maximize the corridor's benefits.

Trail Use

Finally, an increasingly popular option for railroads is to railbank a line and sell it to a group interested in acquiring a corridor with future rail potential for interim use as a trail. If the title to an about-to-be abandoned corridor is questionable, railbanking is the best method for acquiring the entire corridor intact. See Chapter 6 for more information on railbanking.

What a Railroad Expects From a Sale

Remember, corporate decision-makers are fiduciaries, or managers of their shareholders' money and assets. A railroad's representatives cannot act as individuals, but only as functionaries within an organization tasked with improving the corporation's bottom line. Not surprisingly, the railroad's representatives look for disposal options which bring the highest return. The primary factors which are considered in evaluating an offer include:

Highest Value

The railroad's primary expectation is to get the highest value possible for the line. There is value in both the capital investment track, ties, signals, ballast, etc. and in the underlying real estate. The Operating Department will decide whether to salvage the material in-house or to request bids from private salvage companies. For the underlying real estate, a railroad will seek the highest value for the land.

Quick Sale

In addition to receiving fair market value, railroads are interested in a quick transaction. Property sales that drag on can adversely affect the railroad's bottom line. Like all corporations, railroads have quarterly performance objectives. Making a sale may help a representative, or an entire department, meet quarterly objectives.

All things being equal, a railroad will favor the offer that requires the least amount of time to complete the property transfer.

Transfer of Obligation and Liability

An abandoning railroad is usually required to remove bridges over highways and navigable waterways and to restore grade crossings at its own expense. Sometimes railroads must obliterate berms and culverts as well, and restore the corridor to its original contours. Since meeting these requirements can be quite expensive, railroads frequently want to dispose of the corridor in a way that limits their financial obligations. In addition, the railroad retains some risk from the unauthorized use of structures that remain intact. For example, if a trespasser falls off an abandoned bridge, even if the bridge is blocked off, the railroad may still be liable. A railroad wants to be absolved of its associated liability as part of any sale. These are valuable negotiating points for trail advocates.

Retention of Certain Interests

A railroad might want to retain certain property interests as part of a corridor sale. Such present and future rights might include longitudinal easements for pipelines, transmission lines, air rights, or fiber optics, as well as underground mineral rights. The negotiation of these rights is a vital part of any transaction.

Avoidance of Controversy

Finally, and perhaps most importantly for rail-trail advocates, a railroad wants to avoid controversial sales. If neighboring property owners strenuously and vocally object to a trail, a railroad may avoid a sale for trail use. For this reason, you must consider the

interests and expectations of adjacent landowners, even if you are negotiating exclusively with the railroad.

Is The Railroad Exploring Other Options?

Have the adjacent landowners already approached the railroad with an offer? Is a developer proposing to acquire the property for a new office park? Has a utility company expressed an interest in locating a cable or pipeline along the corridor?

Visit the local planning office. Has any entity submitted a subdivision permit for the land? Is there any development activity surrounding the corridor? Is the corridor appropriate for utilities or other public improvements? If the answer to any of these questions is yes, the railroad might well be able to sell the property for one of these uses. If not, you may be the railroad's best offer. By analyzing these other options (if they exist), you can develop a negotiation strategy and bid that offer the railroad your best possible package.

Chapter 5: Researching the Property

Collecting information about the rail corridor not only helps you determine whether to purchase the rail corridor, but also provides information that helps shape your strategies in designing the transaction and negotiating the acquisition of the land.

Attorneys call the research phase "due diligence," and it is the most important step in considering whether to invest time, money and technical resources into a negotiation process.

Most agencies and organizations find it far too expensive to complete this due diligence without assurances that the railroad will sell at a reasonable price. Most groups want to balance the costs of research against the likelihood of purchase and acquisition. For this reason, look at property research as a two-step process.

The first step is gathering existing and readily available information to help assess whether to proceed with negotiations and to prepare for initial negotiations with the railroad. The second step involves formal title, environmental, and other reviews. Since the majority of these reviews require professional assistance and are therefore fairly expensive, they are generally conducted after you have gained an interest in the property, such as an option, but before the property transfer actually occurs. (See Chapter 9 for more details on this second step.)

What Do You Need to Buy?

Like any piece of real estate, a rail corridor consists of a wide range of property interests. Lawyers think of land as "a bundle of rights," meaning a collection of severable interests.

Here are some of the rights you may want to buy:

Surface: To build a rail-trail, you need to obtain the right to use at least a portion of the surface. Unfortunately, there is no easy formula for how much of the surface is enough. Do you plan to build just a trail, or would you like to build other structures as well? Is the railroad interested in selling the entire corridor, or would it consider an offer to purchase only a part of the corridor? Are the land uses along the corridor compatible with trail use, or do you need to ensure there is a buffer of open space between the trail and the adjacent properties?

Subsurface: Depending on the length and location of the corridor, the right to use or lease the subsurface for water or sewer mains, gas pipelines, or telecommunications could be valuable. Don't assume the railroad owns these subsurface rights, however. Research the title to determine whether the railroad is in a position to sell these rights.

Remember, the railroad will almost certainly understand the value of these subsurface rights; don't expect to get them for nothing. Also, keep in mind that subsurface users usually need access to maintain cables or pipelines. Don't allow subsurface uses that threaten the trail's integrity.

Air rights: Local power companies, cable companies, and utilities with high-voltage transmission lines, may value rail corridors as locations for transmission facilities. Consider whether such uses are compatible with your vision for the corridor. If not, make sure you acquire those rights from the railroad so they can't be sold to third parties. On the other hand, you might consider acquiring these rights and leasing them to collect additional revenues.

Joint Use: If a railroad is abandoning only one of several tracks along a line, you may want to negotiate for rail-with-trail use, that is, trail use adjacent to an active rail corridor. Although railroads are reluctant to allow joint use, a rail-with-trail can be as safe as a rail-trail if it is properly designed and managed.

Rails-with-Trails

Although negotiating with a railroad to develop a rail-with-trail alongside an active rail line is beyond the scope of this publication, this book does contain a number of basic lessons that can be applied to negotiations for joint use. Perhaps foremost, any agency interested in establishing a rail-with-trail must devote a great deal of time to considering and analyzing a railroad's potential concerns. Rail corridors are dangerous places, and railroad representatives are apt to question the sanity of any proposal that suggests combining active rail lines with recreational or alternative transportation opportunities for individuals. Expect this reaction. On the other hand, don't let the conversation end there.

Nationwide, there are approximately 50 open rails-with-trails, as well as several dozen rails-with-trails projects. These facilities can be developed and managed without any additional risk to a railroad, if you take steps to address each and every one of the railroad's concerns from the amount of separation between the tracks and the trail to the minimum height for a fence or other barrier between the two.

In addition to addressing a railroad's concerns, remember that every railroad's primary business is the movement of freight or passengers. No matter how safe, useful or attractive a proposed rail-with-trail might be, a railroad will almost always need some additional incentive to allow joint use. Generate incentives to encourage a railroad to support joint use. By linking some incentive a cash payment, an agreement allowing the railroad to construct an additional rail line within a particular jurisdiction, or the settlement of some long-standing dispute between your agency and the railroad you will be much more likely to obtain cooperation from a railroad's representatives.

*For more information about rails-with-trails, see RTC's study *Rails-with-Trails: Sharing Corridors for Recreation and Transportation as well as Trails for the Twenty-First Century: A Planning, Design and Management Manual for Multi-Use Trails**

Improvements: There are basically two types of improvements that can be transferred with railroad corridors: track materials and non-track properties. Track materials include tracks, ties, ballast, tunnels, trestles, bridges, culverts and other equipment necessary for the operation of trains, such as signals and switch boxes. Non-track properties include depots and other buildings. You may not be interested in acquiring all of these improvements, just as the railroad may not want to sell all of them. What is important is that you understand the value of these improvements and that you reach an explicit agreement.

Remember, the purchases you make will affect the trail you build and determine its protection from future encroachments as well. You may decide not to buy air rights, but do you want high-tension wires along your trail? You may not need subsurface rights, but are you willing to suffer periodic disruptions as maintenance crews tear up the corridor to service a water or sewer line? You may need a stretch of land only 15-20 feet wide for a trail, but do you really want houses, parking lots or industrial sites immediately adjacent to the trail surface? Buy all the rights needed to ensure a quality experience for the users of your trail.

Finally, try to figure out which rights in the corridor are non-essential to you but have value to the railroad. If the railroad has a fiber optics company bidding for subsurface

rights, you may not want to insist on those rights for yourself. Such companies can, no doubt, pay more than you can. On the other hand, if no subsurface user is on the immediate horizon the railroad may not value subsurface rights highly at all. This is where good intelligence about competitors for use of the corridor is critical.

Also, consider this option. If you are bidding against a third party who wants to use the entire corridor, you may decide to walk away from the negotiation, let the third party buy the corridor, and then negotiate with them rather than the railroad. Or you may want to pre-negotiate a deal with the third party (such as a utility), under which they would buy the corridor and then grant you a trail easement. Remember, however, that utilities generally buy only easements. They may not be able to give you a trail easement as a subset of their utility easement.

Obviously, the property interest you need to purchase for your trail is a matter for much discussion within your agency. Think it through and work it into your negotiation strategy.

Research the Corridor's Ownership

Most railroads acquired their corridors in one of three ways: through easements; through an outright purchase; or through land grants from local, state and/or federal governments. These acquisitions could be voluntary (freely negotiated or granted) or involuntary (taken by "eminent domain" or condemnation). It is quite possible that your corridor was constructed using all three methods; however, the methods are not equal in terms of the quality of ownership.

Easements

If a railroad holds an easement, it does not own the property it simply has the right to use the land for certain purposes. Railroads sometimes purchased easements because they were (and are) less expensive than buying a complete parcel of land. However, easements convey limited rights, typically limiting the railroad to rail use only. In some states, courts have interpreted "rail use only" or "for railroad purposes only" to mean any transportation use. Some states and courts have even held that "rail use" includes the right to construct communication lines, like fiber optics, within the corridor, since effective communication is a necessary element of operating a rail line. However, other states have interpreted the same words to mean actual railroad use. You will need to research your state's interpretation of these terms.

Once a railroad stops using the property in accordance with the terms of the easement agreement, and it has abandoned the corridor in accordance with state and federal laws, the railroad's rights are extinguished.

Outright Purchase

In other instances, a railroad may have purchased a parcel outright (called acquiring "fee title") because it wanted exclusive control of the property. In this case, the railroad would retain control of the property even after deciding not to operate a train along the corridor.

The railroad could choose to develop the property itself or to sell it for any number of uses.

Land Grants

The final acquisition strategy that railroad's used land grants fits somewhere between easements and outright purchase. When the majority of railroad corridors were developed in the 1800s, governments at all levels frequently provided railroads with incentives to develop rail corridors. Governments, particularly those managing land west of the Mississippi River, turned over millions of acres of public land to railroads, with the understanding that the railroads would develop rail lines for the national good.

Depending on the state in which the corridor is located, an abandoning railroad may be able to dispose of the corridor as if it had acquired the property outright. In other states, a land grant did not transfer complete control of the property to a railroad; it conferred only limited rights, like an easement. Contact your state's Attorney General's office to learn how your state handles these land grants. Under the National Trails System Act Amendments of 1988, any abandonment of a federally-granted corridor reverts to the federal government, with a directive to preserve it for future rail use through interim use as a trail.

The exact nature of railroad ownership, and the company's ability to convey that ownership, are key to understanding the value of and rights to the property. An agency attempting to acquire a railroad corridor needs to ensure the railroad in fact owns what it is attempting to acquire.

Much of the information you need to conduct a preliminary analysis of the railroad's ownership is publicly available, often directly from the railroad. Virtually every major railroad has a map, called a "track map," of each corridor it owns. The map includes the parcel size and location, survey information (if the corridor has ever been surveyed), the location of all easements and encroachments, and references to the deeds by which all parcels were acquired. Ask the railroad's representative for a copy of the track map as early in the process as you credibly can.

In addition to studying the track maps, plan to review a variety of other public records tax maps, property surveys, and copies of the deeds that confirm ownership status. Visit the county courthouse and the local tax assessor's office to review these documents.

Carefully examine the information you have collected. Review the track map, tax maps, and deeds to develop a rough estimate of how much of the corridor the railroad owns through each acquisition type. If you are not railbanking the corridor, you will probably find it difficult to create a rail-trail if the railroad owns less than 50 percent of the corridor outright. This is because acquiring the remainder of the corridor will probably require many separate negotiations with individuals.

Field Assessments

In addition to understanding who owns the property and how it is held, it is also

important to understand the physical and structural characteristics of the land. If the railroad has abandoned the corridor or has used it only infrequently, encroachments, trespassing, and illegal uses of the corridor may be a problem. Landfills, dumps, and junkyards, often illegally established, can create real hazards for a property manager. By examining the corridor before you acquire it, you will know what problems exist. If the corridor is poorly maintained, overgrown and obviously misused, prepare for skepticism from adjacent landowners about your trail idea. They have already suffered as a result of one owner's neglect, so they may believe that your agency will treat the corridor in a similar fashion.

Document the presence of any inappropriate structures or materials in or along the corridor during your preliminary site visits. These encroachments dumps, storage areas, driveways, parking lots, gardens or even buildings may not only affect the property's value, but may also contribute to the degradation of the land. In addition, encroachments by adjacent landowners or other users can complicate your effort to take title to land. (Under some states' laws, encroaching landowners have certain rights if they have occupied the corridor for a period of years.) Although you will probably need to rely on professionals to determine whether the encroachments will complicate your acquisition, your knowledge of their existence and location will make it easier to track the legal history.

As you inventory the corridor, record the location of every private and public crossing (such as roads and driveways) because crossings require careful consideration as you begin to develop and manage a rail-trail. You should also examine the land uses adjacent to the corridor, as they may have a significant impact on the development of the trail.

Reassembling a Rail Corridor

Development of the Snohomish County Centennial Trail

In the spring of 1988, Robin Thome, a member of the Snohomish County Parks Board in Washington, learned that \$100,000 designated in the county budget for the purchase of an abandoned rail corridor had been removed from the budget. As the owner of property next to the abandoned rail corridor, she knew the rail corridor offered tremendous recreational and community improvement potential if it were developed as a rail-trail. With county officials apparently developing cold feet, she sprang into action and began organizing a citizens group, the Snohomish-Arlington Trail Coalition.

When the Trail Coalition began investigating the corridor's potential as a trail, Burlington Northern Railroad was in the final stages of removing tracks and ties from the 43-mile long corridor. In fact, portions of the corridor had been abandoned as early as 1972, and the corridor had been used for informal recreational activities for years. Armed with petitions

signed by 6,000 people and overwhelming public support for their proposal, the Trail Coalition was able to convince the County Council to approve efforts to acquire the corridor and develop a rail-trail. Shortly thereafter, the Snohomish County Parks and Recreation Division created a new staff position County Trails Coordinator to direct the rail-trail effort.

As the rail-trail project moved forward, trail supporters were pleased to learn that Burlington Northern Railroad still owned nearly 70 percent of the corridor. Although it would require a great deal of work to reassemble the entire corridor, Burlington Northern's extensive holdings convinced trail supporters that it could be done.

Initially, the county used its Property Management Office to handle the acquisition, although a permanent property acquisition position was soon created with the Parks and Recreation Division. In conjunction with Universal Field Services (one of many companies which specializes in corridor acquisition) the county undertook a review of the corridor's title and began negotiations with Burlington Northern. Although Burlington Northern would only sell the property through a quit claim deed, the railroad was more than willing to sell its real estate parcels to the county for \$2,500 an acre (1990 dollars). With an agreement reached, the county began acquiring the Burlington Northern-owned sections in 1990.

At the same time, county personnel began efforts to acquire the remainder of the corridor from the individuals and entities who now owned portions of the property. From the start, efforts were made to include all concerned property owners in the formulation of the rail-trail plan. As a result, many of the neighbors approached their negotiations with the county as a friendly transaction. Some property owners even donated their parcels for trail development. Of the entire 44-mile corridor, nearly 25 miles have been acquired, at an overall acquisition cost below the amount originally anticipated.

Despite the overall ease of these transactions, there have been some problems. Some property owners oppose the trail and have refused to sell. Others are using the negotiations as an opportunity to voice complaints that are unrelated to the trail, and still others are trying to win concessions from the county on other issues. To date, these hold-outs have not significantly jeopardized trail development activities, as the county has developed almost 7 miles of the Snohomish County Centennial Trail.

Inventorying existing improvements, and determining their condition (for liability purposes) and value is another critical step during the site review process. The field

assessment should be used as an opportunity to note the existence of bridges, tunnels, culverts, rails and ballast, ties, and any buildings owned by the railroad along the corridor. Which of them will be useful for future trail use? What would demolition, removal and salvage cost? Do the structures appear to be in relatively good shape?

Research Strategies

Don't limit your background research by relying on only one research tool. In gathering information about the property, you'll find it useful to:

- Walk the corridor;
- Check ownership deeds;
- View aerial photographs and/or maps;
- Discuss the corridor with railroad personnel; and
- Discuss the corridor with adjacent landowners, community members, and local government officials.

Be a creative researcher. A great deal of useful information is in the public domain.

If you have completed each of the steps described above, you may have more questions than you had when you started, although you now have more information. At this point, you must decide whether the likeliness of a successful acquisition justifies the cost of a more thorough analysis of the corridor.

Chapter 6: Can You Take Advantage of Railbanking

As mentioned in the previous chapter, a rail corridor generally has several ownership types along its length. These ownership differences are largely irrelevant to a railroad while the corridor is in active use, since the railroad had acquired the right to lay down tracks and operate a train over the entire corridor. Once a railroad decides to abandon a corridor, however, these ownership distinctions become important.

Upon abandonment, the railroad loses control of all parcels of land within the corridor to which it merely held an easement. At this point, even though the corridor may appear unchanged, it legally no longer exists. In these cases, acquiring a corridor can become incredibly complex, since it may be owned by many different people.

In certain cases, however, it may be possible to avoid this complexity in the acquisition process. If the rail corridor has not yet been abandoned, you may be able to take advantage of the federal "railbanking" statute to increase your chances of success.

What is Railbanking?

In the early 1980s, Congress became concerned about the dramatic decline in the nation's railroad infrastructure. With so many railroads abandoning corridors, it became apparent to certain Members of Congress that something needed to be done to preserve the nation's rail system for future transportation uses. In 1983, Congress amended Section 8(d) of the National Trails System Act to create a program to preserve rail corridors for future transportation use. This program, called "railbanking," is a method by which corridors that would otherwise be abandoned can be preserved for future rail use through interim conversion to a trail.

Under the railbanking statute, a railroad is allowed to remove all of its equipment, with the exception of bridges, tunnels, and culverts, from a corridor and to turn the corridor over to any qualified private organization or public agency that has agreed to maintain the corridor for future rail use. This property transfer precludes abandonment. In 1990 the U.S. Supreme Court unanimously ruled, in the case of *Preseault v. United States*, that preserving a corridor for future rail use through railbanking is a legitimate exercise of governmental power. Although the corridor will no longer have tracks and ties, it is still being used for railroad purposes, legally speaking. This means that a railroad can legally transfer all forms of its ownership, including easements, to a trail group.

Like most things in life, railbanking does have a few catches. Any railroad may legally decide to re-establish rail service on a railbanked corridor. Should that occur, the trail managing agency would be entitled to compensation from the railroad that wants to re-establish rail service. In most cases, a trail group could expect to receive fair market value for the property as well as payment for all improvements. However, this issue may need to be specifically addressed in the initial contract with the abandoning railroad, since it may want to develop other payment terms.

As railbanking is voluntary, you will need to convince the railroad that railbanking the corridor is in the railroad's best interest. This is particularly important because most railroad personnel have historically relied on the piecemeal sale of a corridor as their preferred method for disposing of a corridor.

Requesting Railbanking

Since the establishment of railbanking in 1983, trail activists and organizations have requested more than 200 railbanking orders from the Surface Transportation Board (STB) and its predecessor, the Interstate Commerce Commission. While certain railroads have been more cooperative than others, every major railroad should understand the railbanking process.

The STB has developed different abandonment procedures which a railroad must follow, depending on the nature of rail service on the particular line the railroad wants to abandon. If the line has not been used in two or more years, or if the STB finds there is no vital interest in continuing rail service on that line, the railroad may follow a less stringent "exemption" procedure. Regardless, to railbank a corridor you need to send a

letter to both the STB and the Legal Department of the railroad applying for abandonment authorization. You must send your letters before the railroad has consummated the abandonment. For a sample letter requesting railbanking, see the box on the following two pages.

What Constitutes an Abandonment

Legally, the process of abandoning a railroad corridor consists of two stages:

1. The STB must authorize abandonment of the rail corridor.
2. Physical abandonment of the corridor must occur.

In most states, mere non-use of the corridor by the railroad is not sufficient for the corridor to be considered abandoned. Often, state laws require one or more demonstrable acts by the railroad acts ranging from removing the tracks and ties to selling off the railroad's interest in the corridor before the corridor is considered abandoned. To find out what constitutes abandonment in your state, contact a knowledgeable attorney or the Rail Branch of your state Department of Transportation.

Your request for railbanking should include a "Statement of Willingness to Assume Financial Responsibility." By filing a "Statement of Willingness to Assume Financial Responsibility," you are merely indicating that you are capable of assuming financial responsibility should your agency and the railroad reach mutually agreeable terms for the transfer of the corridor. This is not a contract, and your agency is under no obligation to acquire the corridor.

Request for Railbanking

The following letter requests both a public use condition and railbanking. Complete the items in italics, as well as fill in the blanks.

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW, Room 711
Washington, DC 20423

Re: [Name of Railroad Company]-Abandonment-[Name of County and State] AB-xx (Sub-no. yy)[STB Docket Number]

Dear Mr. Williams:

This comment should be treated as a protest or a petition for reconsideration in the above-captioned proceeding. This comment is filed on behalf of [Agency Name] which is a [political subdivision or government agency interested in transportation and/or natural resources, private public interest organization interested in conservation and/or recreation, etc.], which is hereinafter referred to as "Commenter".

While not taking a position on the merits of this abandonment, Commenter requests issuance of a Public Use Condition as well as a Certificate or Notice of Interim Trail Use rather than an outright abandonment authorization between [endpoint a] and [endpoint b].

A. Public Use Condition

Commenter requests the STB to find that this property is suitable for other public use, specifically trail use, and to place the following conditions on the abandonment:

1. An order prohibiting the carrier from disposing of the corridor, other than the tracks, ties and signal equipment, except of public use on reasonable terms. The justification for this condition is that [example: the rail corridor in question is along a scenic river and will connect a public park to a major residential area. The corridor would make an excellent recreational trail and conversion of the property to trail use is in accordance with local plans. In addition, the corridor provides important wildlife habitat and greenspace and its preservation as a recreational trail is consistent with that end.] The time period sought is 180 days from the effective date of the abandonment authorization. Commenter needs this much time because [example: we have not had an opportunity to assemble or to review title information, complete a trail plan or commence negotiations with the carrier.]

2. An order barring removal or destruction of potential trail-related structures such as bridges, trestles, culverts and tunnels. The justification for this condition is that these structures have considerable value for recreational trail purposes. The time period requested is 180 days from the effective date of the abandonment authorization for the same reason as indicated above.

B. Interim Trail Use

The railroad right-of-way in this proceeding is suitable for railbanking. In addition to the public use conditions sought above, Commenter also makes the following request:

STATEMENT OF WILLINGNESS TO ASSUME FINANCIAL RESPONSIBILITY

In order to establish interim trail use and rail banking under section 8(d) of the National Trails System Act, 16 U.S.C. §1247(d), and 49 C.F.R. §1152.29, [Agency Name] is willing to assume full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against the right-of-way owned by [Name of Railroad Company] and operated by [Name of Railroad Company].

The property, known as the extends from railroad milepost near [endpoint a] to railroad milepost near [endpoint b] a distance of miles in [County Name(s)], [State]. The right-of-way is part of a line of railroad proposed for abandonment in STB Docket No. AB-xx (Sub-no. yy).

A map depicting the right-of-way is attached.

[Agency Name] acknowledges that use of the right-of-way is subject to the user's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service.

By my signature below, I certify service upon [Railroad Company and address], by U.S. Mail, postage prepaid, first class, this day of 19 .

Respectfully submitted,

Name:
on behalf of:

In addition, ask the STB to establish a "Public Use Condition" (PUC). A PUC prevents the railroad from selling or otherwise disposing of any property or trail-related structures, including bridges, tunnels, or culverts for a 180 day period from the effective date of abandonment. Since a railroad may not agree to a railbanking negotiation, requesting a PUC, which the STB will grant fairly automatically, may buy additional time to convince the railroad to negotiate with you.

As soon as the railroad has received permission to abandon the line, and has consummated the abandonment, the STB no longer has jurisdiction over the line. At that point, railbanking is no longer an option.

The ICC, the Surface Transportation Board and the Future of Railbanking

In 1887, Congress created the Interstate Commerce Commission (ICC) to protect farmers, shippers, rural Americans and others from the monopolistic power of the railroads. As Congress and the Administration have struggled to re-invent government over the past few years, they placed the ICC, the nation's oldest federal regulatory agency, under great scrutiny. Many Members of Congress questioned the need for continued regulation of the rail industry now that Americans are no longer threatened by the monopolistic power of railroads. In the fall of 1995, Congress passed legislation to eliminate the Interstate Commerce Commission, and to transfer the ICC's oversight of the rail corridor abandonment process to a new entity, the Surface Transportation Board (STB) within the US Department of Transportation.

Although the ICC Termination Act of 1995 signals the end of the Interstate Commerce Commission as an independent government agency, the Act should only lead to minor changes with respect to rail corridor abandonments. The "abolition" of the ICC is more a downsizing coupled with a name change than a true abolition. The Surface Transportation Board still has a great deal of responsibility with respect to the railroad industry, including some rate-related regulation, rail merger regulation, new rail construction regulation, and continued rail abandonment regulation. There will be a small staff, headed by three Commissioners (as opposed to five ICC Commissioners) to complete all of the work. As a result, railbanking and interim trail use issues are unlikely to be among the STB's top priorities. Rails to Trails Conservancy (RTC) will, however, continue to monitor implementation of the railbanking provisions, and RTC staff are available for consultation and advice.

The most significant changes affecting the rail abandonment process are (1) the removal of statutory timelines for STB approval of rail abandonment applications, and (2) modification in the timing for invocation of the forced sale for continued rail use. The ICC Termination Act did not substantially alter the provisions of the National Trails System Act and the Revised Interstate Commerce Act that previously governed railbanking/interim trail use. In addition, the two legislative cornerstones of railbanking, Section 8(d) of the National Trails System Act, 16 U.S.C. §1247(d), and the "public use" condition, 49 U.S.C. §10905, were reenacted.

For the time being, the Surface Transportation Board will be headquartered at the former ICC building:

Surface Transportation Board
1925 K Street, NW, Room 711
Washington, DC 20423

Feel free to contact the STB for additional information.

Once the railroad has received your letter, it will notify the STB as to whether the railroad is interested in entering into railbanking negotiations with you. If the railroad agrees, the STB will issue either a "Certificate of Interim Trail Use" (CITU) or a "Notice of Interim Trail Use" (NITU), depending on the nature of the abandonment. Although NITUs are issued during the exempt abandonment process, while CITUs are issued during the regulated process, these documents are otherwise identical. From the date the Certificate or Notice is issued, you will have 180 days to reach an agreement with the railroad. As this is a non-binding negotiation, the railroad has the option to end negotiations at any point and dispose of the property however it wishes. On the other hand, if both sides are pleased with the progress, you can request an extension of the negotiating period from the STB should you need one.

Two points of interest:

First, since railbanking is a pre-abandonment strategy, you will be dealing with either the Legal Department or the Asset Management Department. The people in these departments may have a better understanding than those in the Real Estate Department of how a bulk sale to a trail group can benefit a railroad. This understanding may give you some leverage, since you and the railroad negotiator have a common interest: corridor preservation. Once a corridor is abandoned and assigned to the Real Estate Department for liquidation, maximizing the sale price becomes the overriding railroad objective.

Second, on valuation, pay only for property to which the railroad has good title. While railbanking preserves easements, the railroad would not be able to realize any return on easement property in the absence of railbanking. This is because the railroad's control over the property would be extinguished upon abandonment. A railroad may try to extract a payment from you for railbanked property that it holds only as easements; resist such a demand. Point out that, absent railbanking, the railroad would be unable to sell any of the parcels it holds as easements.

Creating a State Rail Corridor Preservation Policy

While the federal railbanking statute is one of the most important tools in a trail developer's "toolbox," another valuable tool is a state railbanking statute or rail corridor preservation policy. RTC research shows that when a state government develops explicit policies to promote the preservation of rail corridors through rail-trail acquisition and development, a greater number of corridors are preserved than

would have been otherwise. Wisconsin, Connecticut, Texas, New York, West Virginia, Michigan, and Pennsylvania all have policies promoting rail corridor preservation. If you live in one of these states, contact your state Department of Transportation to learn more about these policies, so you can take advantage of any resources your state has allocated to assist with corridor acquisition.

If your state doesn't have a rail corridor preservation policy, you should consider working with the state Department of Transportation and/or the state Department of Natural Resources to create one. Obviously, this policy may not be in place in time to assist with your acquisition, but it may prove useful in the future.

As a starting point, the goal for a state rail preservation policy should be no net loss of corridors. Rail corridors are extremely difficult to reassemble, so the state should commit to preventing their loss. Specifically, a strong policy should include the following elements:

- Establishment of a rail-trail program within a state agency;
- Development of a rail corridor assessment and planning process to ensure that all rail corridors are evaluated for their future rail, transit, and trail potential;
- Establishment of a right-of-first-refusal statute so state agencies (or their designees) would have the first option to buy a soon-to-be abandoned corridor; and
- Creation of a dedicated funding mechanism to assist with acquisition.

For more specific information about creating a policy in your state, please contact the National Policy Division at RTC to obtain a copy of Integrating Rail-Trails into the Statewide Long Range Plan.

Chapter 7: Financing Your Acquisition

In these times of shrinking public budgets, rail-trail acquisitions are not always easy to fund. Whether you anticipate spending a few thousand dollars, or several million dollars, you must have a concrete plan for funding your acquisition before you begin to negotiate with the railroad. If finding funds seems difficult, don't be afraid to involve your stakeholders and citizen supporters in the quest to unlock seemingly unavailable funding sources or to develop creative financing options of your own. While this chapter explains various funding sources and scenarios, it is by no means a comprehensive list.

ISTEA

When Congress passed the Intermodal Surface Transportation Efficiency Act (ISTEA) in 1991, most trail supporters could not even begin to understand how significant an impact

this program would have on the trails movement. Before ISTEA, most federal trail development funds were administered through either the Department of Interior (Land and Water Conservation Fund, for example) or through the Department of Agriculture, which administers the Forest Service and associated programs. The passage of ISTEA changed that. For the first time in the history of federal transportation law, ISTEA made rail-trail acquisition and development, as well as almost all types of trails, pathways, greenways and other bicycle and pedestrian facilities, specifically eligible for federal highway funds.

Although ISTEA addresses far more than trails and rail-trails, several provisions of ISTEA are particularly relevant for trail builders. These include:

- Surface Transportation Program;
- Transportation Enhancements Program;
- Congestion, Mitigation and Air Quality Improvement Program (CMAQ);
- National Recreational Trails Fund Act (NRTFA); and
- Federal Lands Highway Program

While this is by no means a comprehensive list of possible trail funding sources within ISTEA, these programs and provisions tend to be the easiest to access for trail-related purposes.

Surface Transportation Program (STP)

The primary source of funds within ISTEA is the Surface Transportation Program (STP), which will provide state departments of transportation with about \$23 billion in federal funds over the six year life of ISTEA (1992-1997). STP funds can be used for a wide range of road, highway and bridge construction and reconstruction projects, transit projects, and bicycle/pedestrian projects among other things. STP is a primary source for road building and maintenance funds, so the competition for "core" STP funds is extremely fierce. Very few trail projects have received "core" funds; only the most exceptional trail projects with extremely strong political support are likely to have even a chance at obtaining these funds.

Transportation Enhancements Program ("Enhancements")

The Transportation Enhancements Program is a special set-aside within the Surface Transportation Program. ISTEA requires that 10% of all STP funds, or roughly \$3 billion dollars over six years, be set aside to fund non-traditional highway projects that enhance the existing transportation infrastructure. Each state has been apportioned a percentage of this \$3 billion in accordance with a population-based formula.

The Enhancements Program funds the following ten activities:

1. Bicycle and pedestrian facilities;
2. Acquisition of scenic easements and scenic or historic sites;
3. Scenic or historic highway programs;
4. Landscaping and scenic beautification;

5. Historic preservation;
6. Rehabilitation and operation of historic transportation buildings, structures or facilities (including historic railroad facilities and canals);
7. Preservation of abandoned railway corridors (including the conversion and use thereof for pedestrian and bicycle trails);
8. Control and removal of outdoor advertising;
9. Archaeological planning and research; and
10. Mitigation of water pollution due to highway runoff.

Rail-trails are specifically eligible for funding under categories #1 and #7. In addition, rail-trails that are part of larger projects, or that incorporate elements of the other Enhancements categories, may be eligible for funding in other categories as well.

The Enhancements provisions are administered by each state's Department of Transportation (DOT). To receive Enhancements funds, you will need to submit a formal application to your state DOT. In most states, the project sponsor submitting an Enhancements application must be a local or state agency, although some states also allow nonprofit organizations to submit applications. Nonprofits are generally required to demonstrate some level of government sponsorship or endorsement before their applications are considered.

All Enhancements awards require that the project sponsor or the state provide at least 20% of the project's funding. The federal government provides the remaining 80%. This local match requirement is an extremely important issue that project sponsors need to address carefully, especially since matching rules and ratios vary from state-to-state.

Since requests for Enhancements funding exceed the funds available, Enhancements funds are awarded through a highly competitive selection process. In most states, the selection process begins when applications are submitted to the local Metropolitan Planning Organization (MPO) or other regional transportation planning body. MPOs play an active role in screening, endorsing, prioritizing, and, in some cases, actually selecting projects for funding. Once your application has been reviewed by your MPO, it will be passed along to the state DOT for statewide review. Many states have created statewide advisory committees to assist in evaluating projects. These advisory committees typically consist of citizens and representatives from the state DOT and other state agencies such as Department of Natural Resources and the Department of Tourism. To obtain more information about your state's selection process and selection criteria, contact your state's Enhancements Coordinator listed in Appendix F.

Congestion, Mitigation and Air Quality Improvement Program (CMAQ)

The CMAQ program funds transportation investments that help achieve the clean air goals set forth in the federal Clean Air Act. Under this program, which is authorized for \$6 billion nationally over six years, states and Metropolitan Planning Organizations are required to use a variety of Transportation Control Measures (TCMs) to reduce air pollution. Bicycle and pedestrian facilities are two types of TCMs. If your project is in a metropolitan area that does not meet the national air quality standards for ozone and carbon monoxide levels (called a "non-attainment" area), you may be able to use CMAQ

funds for your rail-trail. Trail projects in Portland, Chicago, and Washington, D.C. have been funded with CMAQ funds. In many urban areas, trail projects have very strong funding prospects through the CMAQ program.

National Recreational Trails Fund Act (NRTFA)

This program, also known as the Symms Act, was established to redirect sales tax revenue generated through the sale of fuel for off-highway vehicle use to support both motorized and non-motorized trail projects. While some rail-trail projects have received funding through this program, it is primarily intended to fund back-country trails and trail projects, as opposed to urban or suburban trails.

Although ISTEA authorized up to \$30 million for this program, Congress appropriated only \$7.5 million in 1993, and appropriated no funds in either 1994 or 1995. However, Congress voted in the fall of 1995 to appropriate \$15 million for Fiscal Years 1996 and 1997. Since funding for this program is very limited, it is extremely important that you contact the State Trail Coordinator for information about your state's application and selection processes. See Appendix D for a list of State Trail Coordinators.

Federal Lands Highway Program

If your rail-trail project parallels or is adjacent to a road on federal land, including roads in National Parks, National Recreation Areas, National Forests, Bureau of Land Management lands, federal Parkways, or Native American reservations, you may be eligible for funds from the Federal Lands Highway Program. For example, in 1993, \$2.8 million was spent on trailheads and bridge replacements along a Colorado trail, and a few other minor trail and recreation-related projects have also been funded through this program. Over the life of ISTEA, \$2.6 billion in funding has been authorized for this program.

In addition to these ISTEA programs, there are a number of other federal funding sources for trail projects.

Community Development Block Grant Program (CDBG)

As rail-trails become increasingly important community development tools, rail-trail projects may be eligible for funding through the Community Development Block Grant (CDBG) program of the U.S. Department of Housing and Urban Development. The CDBG program is designed to support community improvement and redevelopment projects. Rail-trails with documentable economic, cultural and historic merit may be eligible for CDBG funding. Seattle's Burke-Gilman Trail and the Baltimore & Annapolis Trail in Maryland both received funds through this program.

To learn more about Community Development Block Grants, contact your mayor's office or your local planning or community development department. You might also contact the appropriate regional office of the Department of Housing and Urban Development. As with many federal programs, Congressional appropriations to this program have been on the decline for the past several years. Competition will be fierce.

State and Local Funding Sources

In addition to administering many federal programs, state and local agencies may also administer funds that can be used for trail acquisition. Your state's Department of Natural Resources (or its equivalent), or your local parks and recreation department are two obvious non-federal funding possibilities, but you should also explore other agencies such as transportation departments and community and economic development agencies.

State and local agencies may be able to fund rail-trail acquisitions using, one or more of the following methods:

- General appropriations;
- Special (project-specific) appropriations; and
- Set-aside programs (lotteries, bond issues, special taxes, etc.).

General Appropriations

If a state or local agency is the likely owner and/or manager of your rail-trail, the agency may have funds available in its general budget to assist with acquisition. If so, you need to ensure your project is as high on the funding priority list as possible. Demonstrating strong public support for your project is a key to convincing an agency to give your project funding priority. Make your case as convincingly as possible in order to persuade an agency to shift its limited resources to support your project. Realistically speaking, however, the vast majority of government agencies only budget for salaries and construction and maintenance activities, not for land acquisition.

Special Appropriations

In certain instances, it may be possible to win a special legislative appropriation to support your trail. While these appropriations are rare, once-in-a-lifetime opportunities, your trail may generate enough political support for a special appropriation. Obviously, convincing an elected official or legislative body to approve a special appropriation requires a great deal of political expertise and a long lead time.

Set-Aside Programs

As government agencies look to develop new funding mechanisms, earmarking certain revenues to support specific kinds of programs has become increasingly popular. These set-aside programs come in many forms: open space bond issues, user fees and taxes, vanity plates, sales tax increases, mineral and gas exploration fees, impact fees, and lottery revenues. If your state or community has developed any of these special set-aside programs, you should work with the appropriate agencies to have your project considered for funding. If no set-aside program currently exists, you may want to begin one, or get involved with ongoing efforts to create such a program, as your trail project may find itself in need of additional money in the future.

Penny for Pinellas: Financing the Pinellas Trail

During the late 1980s, Pinellas County officials began to consider ways

to fund a long-term countywide Capital Improvement Program. After much discussion, the county leadership settled on a one-cent local-option sales tax as the preferred funding mechanism. By early 1989, the Capital Improvement Plan was in place, and the sales tax increase was ready to go onto the ballot. Even though the spending plan and the sales-tax increase were developed with considerable citizen input and the support of municipal governments, many thought fiscally conservative Pinellas County would never approve a sales tax increase. Recognizing the level of local support for the Pinellas Trail, the County Administrator amended the \$1.1 billion funding package to add more than \$5.25 million dollars in development funds for the Pinellas Trail in an effort to sweeten the deal.

With funding to complete the Pinellas Trail included in the Capital Improvement Campaign, Pinellas Trails, Inc. became a leading force in the "Penny for Pinellas" campaign. Pinellas Trails members spoke to community groups, appeared on radio and television, testified at public hearings, staffed phone banks, and distributed over 25,000 flyers urging support for the campaign.

Partly as a result of Pinellas Trails' efforts, the sales tax increase passed by a narrow margin of 398 votes out of 134,864 ballots cast. As then County Commission Chairman Bruce Tyndall said, "The critical difference was the formalized support of Pinellas Trails. You were the voice, not of government, but of the people, pushing for what you wanted." As a result of the victory, Pinellas Trails, Inc. was guaranteed long-term financial support to develop the 35-mile long Pinellas Trail.

Non-Governmental Funding

With the general decline in public sector funding for many community development and recreation projects, the private sector is being asked to play an increasingly important role in financing community projects. One of the benefits of private sector financing is that these funds usually come with fewer restrictions and bureaucratic requirements than do public funds. The trick is locating and mobilizing private sector funders.

Generally speaking, a private sector fundraising campaign should target three types of potential funders:

- Individuals;
- Foundations; and
- Corporations.

There are advantages and disadvantages with each of these types of funders, so it is extremely important to develop a fundraising strategy before you begin asking for money.

The first lesson to remember in developing a private sector funding campaign is that potential contributors will need a wide variety of options to consider in deciding how to support a rail-trail project. Asking for too much or too little money is a sure way to complicate your fundraising. Make sure you know your targets.

Individuals

Individuals and families will almost certainly represent the backbone of any "friends of the trail" group. It is reasonable to ask members to pay a small membership fee to support the work of the "friends" group. In addition, you can develop a wide variety of special events bake sales, hike-a-thons, raffles, sales of rail-trail merchandise, and adopt-a-trail campaigns to raise additional funds for you efforts.

You should also make a special effort to locate wealthy philanthropists in your community. Share your vision with these individuals and offer them a way to make a substantial contribution for the betterment of their community. If you approach this fundraising professionally, you may very well receive sizable contributions to support your efforts.

Corporations

As community and economic development tools, rail-trails offer a wide range of benefits to the local business community. Whether it's a bike shop owner who is likely to experience a growth in bicycle sales or the CEO of a major company headquartered in your area, the business community should be included in your fundraising efforts. Not only should you create special corporate membership categories for the "friends" group, but you should also develop special fundraising programs that appeal to corporations. Consider developing a rail-trail wish list, an adopt-a-trail campaign, a special corporate gifts program, an in-kind giving program (particularly during the development phase), cause-related giving programs with bicycle or sporting goods stores, or a matching funds program to leverage corporate dollars.

Remember, businesses come in all shapes and sizes. It is important to research corporations to understand their philanthropic abilities as well as the extent to which your rail-trail could improve their business. Large corporations are likely to have corporate giving programs which could provide substantial funds for your trail. Don't limit your corporate giving program to "obvious" partners, however. Other rail-trails have benefited from such unlikely sources as a dish manufacturer and a contractor required to perform community service work.

Foundations

The foundation community may be a good source of funding during the rail-trail conversion process. Unlike individuals and corporations, however, many foundations have strict giving guidelines and sometimes burdensome application processes. For example, some foundations only support specific types of activities community organizing, for example, but not land acquisition projects. In addition, most foundation grants require long lead times between the application for funding and payment of the

grant award. Consequently, foundations may be more suitable funding sources for organizational development activities than for immediate financing of land acquisition.

Other Types of Non-Governmental Funding

Line Buys

If you are acquiring a corridor through railbanking, you may be in a position to finance your acquisition through the purchase and subsequent resale of all railroad-related material in the corridor. This is called a "line buy". Line buys are very complicated transactions that require extensive understanding of the value of the entire corridor (not simply the real estate) as well as the costs associated with dismantling the corridor. Line buys work because you may be able to profitably manage the salvage of a corridor, while a railroad, because of its legal obligations, may be unable to do so.

Generally, state and federal regulations require an abandoning railroad to return a corridor to its original condition. If a corridor contains a significant number of improvements, especially bridges and tunnels, restoring the corridor's original condition can be an extremely expensive proposition. The railroad will likely have to pay a salvage operator to remove these improvements. On the other hand, a successful rail-trail may depend on keeping these bridges and tunnels intact. These two facts make the economics of a line-buy work.

If a significant number of structures need dismantling, or if any of these structures is of significant size, the railroad may find that the cost of dismantling these structures is roughly equal to the value of the tracks and ties within the corridor. You may be able to offer the railroad more for the entire corridor than a salvage operator would pay, since he would tend to bid lower to reflect the costs of dismantling these structures. If your bid is successful, you could sell the salvage rights to all track-related materials within the corridor tracks, ties, and ballast (first make sure you don't need the ballast as a trail surface or subsurface) to a salvage operator. Since you would not require the salvage operator to dismantle structures like bridges, he may be willing to purchase the salvage rights for more money than you have agreed to pay the railroad.

In some cases, trestles and bridges can be salvaged at a profit, but you can at least expect to break-even. The economics of a line-buy vary significantly, depending on the location of the corridor, the quality of the tracks and ties, and many other variables. Do not underestimate the complexity of a line buy. To succeed, you may need to ask Rails-to-Trails Conservancy for assistance.

The Cowboy Trail

RTC's Trail Conservancy began working in earnest to acquire the 321-mile Cowboy Line from the Chicago & North Western Transportation Company (C&NW) in the fall of 1993, when C&NW indicated it was going to abandon this corridor in the near future. Although C&NW had

been unable to operate trains profitably on this corridor, Nebraska's governor, its legislature, and residents of communities along the Cowboy Line were afraid this abandonment would adversely affect the economy of northern Nebraska for years to come. When RTC suggested railbanking the corridor as a way to preserve the corridor for future rail use, while allowing C&NW to avoid continued losses on the line, both parties were interested.

Under the terms of an agreement that RTC brokered for the state of Nebraska, C&NW donated 73.5 miles of the Cowboy Line to NEBKOTA, a shortline railroad located on the western end of the line, while the remainder of the corridor was sold to RTC. RTC financed this acquisition through sale of the salvage rights to a commercial salvage company. Due to the significant number of bridges along the corridor, as well as C&NW's desire to eliminate its liabilities associated with the corridor as quickly as possible, RTC was able to negotiate financial terms that allowed RTC to donate the remainder of the corridor to the Nebraska Game and Parks Commission. RTC also provided several hundred thousand dollars in the form of construction work on the trail, as well as an endowment fund to help ensure the trail's long-term viability.

Sale of Excess Property

In some instances, a trail group may learn that the railroad is willing to sell them more than just the corridor. For example, a railroad may own additional parcels of land adjacent to the corridor. A potential buyer might be able to sell this land to help finance the acquisition. In addition, the rails, ties, ballast and other improvements made to the corridor may be quite valuable. Although railroads almost always sell the rails, ties and ballast to a salvage operator for reuse or resale as scrap before turning the property over to a trail group, you may discover that some or all of these valuable materials may have been left in the corridor. If so, you may be able to sell these materials, depending on their quantity and quality, for as much as \$10,000 a mile.

Identifying all possible funding sources is obviously a time-consuming process. Use this sampling as the basis for developing your funding plan, but don't forget to explore additional funding mechanisms. Creativity and hard work can leverage a great deal of funds. Make sure you bring both of these strengths to your fundraising campaign.

Chapter 8: Reaching a Preliminary Agreement with the Railroad

No one wants to devote time and energy to acquiring a rail corridor, only to see the corridor sold off to some competing interest. Unfortunately, many rail-trail advocates have failed to act quickly enough to acquire a corridor before it is dismantled or sold. To prevent this from happening, you need to negotiate an initial agreement with the railroad

to ensure the corridor's availability for trail use, as well as gain additional time to complete your corridor research. Negotiating a preliminary agreement with a railroad is the best way to accomplish this.

There are three elements to a preliminary agreement:

- Gaining site control;
- Setting a purchase price; and
- Establishing an acquisition process and timeline.

If you develop a preliminary agreement with the railroad which guarantees the corridor's availability until you have completed your due diligence requirements (under whatever terms you may negotiate), you can minimize the risks associated with corridor acquisition.

What Will You Do if There is No Deal?

Consider this basic rule of negotiation: An individual who is unwilling to walk away from a negotiation may be forced into agreeing to whatever terms the other negotiator proposes. This is common sense.

Before you sit down to negotiate with the railroad, ask yourself, "What can we do if we can't reach an agreement with the railroad?" Consider your alternatives. Could you ask someone else to step in and negotiate on your behalf? Could you reach a lease agreement that might allow immediate use of the land while postponing a sale agreement? Is joint use an option? Could you rely on an alternative routing for the trail, such as a public utility right of way? There are obviously advantages and disadvantages associated with each of these options. It is extremely important, however, that you give some thought to which of these options, if any, could serve your purposes.

Another option is to take the property by eminent domain. This is a powerful and coercive strategy, and it is unlikely to lead to a positive relationship with either the railroad or the adjacent landowners. However, it is an option applied routinely in certain areas of public acquisition, such as highway construction. For this approach to succeed, there must be widespread public support for the trail. Consequently, the trail project should be integrated with open space plans, comprehensive development plans, transportation plans and other public planning documents addressing the future form and function of public infrastructure. If your trail is integrated into those plans, the railroad will understand your determination to secure the corridor and will view the possibility of eminent domain as a viable negotiating strategy. This will greatly increase the railroad's willingness to reach a voluntary agreement.

In short, you cannot negotiate effectively unless you have a backup plan. If the railroad knows you have an alternate means to develop your trail, the railroad will tend to be more cooperative in its negotiations with you.

By this time, you know exactly what you need to create a rail-trail from the corridor that interests you. You should also have a strong sense of how much you will be able to spend to acquire it, as well as where these funds will come from. Using this information, create a list of items that you want to include in the preliminary agreement you reach with the railroad. Consider these issues in developing your list:

- What property rights are needed to create this rail-trail?
- Is it necessary to acquire the entire length of the corridor, or are you only interested in a specific section?
- Who is responsible for salvaging the corridor?
- What happens to the improvements along the corridor? What structures do you need for a successful trail? What structures do you want the railroad to remove?
- How much time do you need to complete your due diligence requirements?
- If the financing is not yet in place, when will it be in place?
- What else needs to happen before you accept ownership of the corridor from the railroad?

Answering these questions will allow you to articulate your needs. You will also get a sense of your thresholds in each area, and you will know which issues are negotiable and which are not. Remember, however, if you're unwilling to negotiate on a particular issue, you will need to convince the railroad that you have sound reasons for your recalcitrance.

Understanding the Basics of Negotiation

In *Getting to Yes*, one of the most popular books on negotiation, a story is told about two people fighting over an orange. Each had to have the entire orange, and any effort to slice the orange in half was equally unacceptable to both parties. The situation looked impossible, until a third party asked why each wanted the whole orange. One needed the peel for grating; the other needed the pulp for orange juice. Suddenly, the solution became obvious: one person got the entire peel; the other got the entire pulp. By clarifying each party's needs, the impossible became reality.

Developing mutually advantageous outcomes is not as difficult as it seems. The first step is to understand the reasons behind your preferred outcome. Why do you feel that you can only pay \$100,000 (or \$10,000 or perhaps only \$1,000) for the corridor? Is that how much you received

from the ISTEA Enhancements program? Are you worried you won't have enough money to develop the corridor if you spend too much purchasing it? Is your agency prohibited from spending more to acquire a property than an official appraisal says it is worth? Or perhaps your agency is only authorized to spend so much money on land acquisitions each year. Make a list of all the reasons which affect your price, timing, and other needs.

Now you need to analyze the railroad's needs. Your initial conversations with the railroad's representatives may offer clues. However, this step is much harder, since the railroad's representatives may not give you any clues as to the railroad's interests until late in your negotiations. Don't use that as an excuse not to consider the railroad's position at the beginning of negotiations. As time passes and you learn more about the railroad's needs, you can always re-analyze the railroad's motivations.

Continuously analyzing both your own and the railroad's positions and brainstorming solutions that might meet both your needs are the keys to successful negotiations.

As mentioned, gaining site control offers you the security of knowing that the corridor will not be sold or disposed of to any competing interests, except in accordance with the terms specified in your agreement with the railroad. It is important to understand that the terms of a site control agreement also benefit the railroad as a potential seller. Just as your agency needs assurances that the property will be available for purchase upon completion of your due diligence, railroad personnel need assurances that all the work they've invested in arranging a deal with your organization will pay off. By offering some form of payment or consideration in exchange for site control, your agency can convince the railroad's personnel that you are financially capable of completing a project. In addition, railroad personnel can develop terms in these site control arrangements that help them meet their needs whether it is the sale of the property before the end of the fiscal year, or a guarantee that your agency will pay a set amount to acquire the property.

To gain site control, you will need to enter a contractual arrangement with the railroad. Remember, you will need to work with the railroad to tailor this arrangement to meet your timing, research, and financing needs. Gaining site control will only move you closer to your goal if you take the time to address all of the outstanding issues in the initial agreement.

There are three standard contractual tools used to accomplish site control: options, purchase and sale agreements, and donation agreements.

Options: An option is a legal instrument through which a landowner, in this case the railroad, gives a potential buyer the right to acquire the property within a specified period

of time. Generally, the landowner granting the option will insist that the potential buyer make some form of payment as part of the option. This payment, which may or may not be applied towards the ultimate purchase price, can range from a modest amount perhaps even as little as \$10 to several thousand dollars or more. Clearly, the amount depends on the size of the property and the nature of the deal. The size of the option payment is seen by many potential sellers as an indication of a potential buyer's financial capabilities, as well as the buyer's commitment to completing a deal.

Once an option agreement is in place, the potential buyer then has a specified period of time in which to complete the deal, before the seller markets the property to other buyers. If the potential buyer fails to raise the funds or complete any of the elements specified in the option agreement, the potential buyer would then forfeit the initial payment and the seller would be free to market the property to other buyers.

In drafting an option, be sure that its terms provide enough time to raise the funds necessary to complete the deal and to address any outstanding issues prior to acquiring the property. Make sure the option specifies grounds for termination of the option agreement, at no penalty to you, the potential buyer. These terms are especially important because your agency will be signing the agreement before completing all due diligence requirements.

Purchase and Sale Agreements: Purchase and sale agreements resemble options in many respects, but there is one important difference. In a purchase and sale agreement, the buyer makes an initial payment to gain site control while simultaneously committing to paying the full amount owed within a specified time. If the buyer fails to live up to this commitment, the seller may retain the deposit or, if the contract permits, compel the buyer to complete the transaction. Thus, purchase and sale agreements should only be signed if you are fully committed to acquiring the property.

If the railroad's representatives insist on a purchase and sale agreement, you can negotiate a more flexible agreement. For example, you can ask the railroad to include contingencies that grant you more time for site assessment. You can also negotiate for the ability to cancel the contract should certain conditions not be met.

Donation Agreements: While it is rare for a railroad to agree to donate a corridor for trail use, there are circumstances in which you may be able to convince a railroad to donate a corridor to you. If the railroad signs a donation agreement, you gain the assurance that the railroad will not change its mind about the donation. In addition, a carefully written donation agreement will give you the opportunity to negotiate such critical items as the payment of environmental remediation, closing costs, survey or title research costs, and similar items. As a last resort, you may want to include the option of refusing the corridor if you are unable to reach an acceptable agreement with the railroad about certain issues. Even though a property donation may appear to be the answer to your prayers, you still need to ensure that there are no unforeseen problems with the corridor.

An Alternative to Site Control: Site Influence

If you attempt to gain site control through one of the three contractual arrangements, only to discover that the railroad is either uninterested or unwilling to agree to mutually acceptable terms, you may want to consider requesting a less favorable arrangement - site influence. Site influence differs from site control in that the seller offers no guarantees about the long-term availability of the property. You can gain site influence through:

Right of First Refusal: With this method, the railroad would agree to notify you before it sold the property to any other buyer. You would then have the option of committing to purchase the property, under terms that may or may not have been previously specified, but you would have to act immediately.

Letter of Intent: The railroad may consider signing a letter of intent that documents its interest in exploring the property transfer with you and your agency. The railroad might even commit to transferring the property to you. If the railroad is agreeable to this approach, work with railroad representatives to make the letter's language as specific and formal as possible. While letters of intent are generally non-binding instruments, a formal letter of intent indicates the railroad is committed to successfully completing negotiations with you. Such a letter can be extremely useful in obtaining funding to acquire the property.

For more information on site control issues, read *Doing Deals: A Guide to Buying Land for Conservation*, published by The Land Trust Alliance and The Trust for Public Land. This publication includes an excellent discussion of site control issues and is a valuable resource for agencies and organizations involved in land acquisition for conservation purposes.

Setting a Price

As you enter into preliminary negotiations with the railroad, you probably have a preconceived notion of what the final terms should be. Perhaps you've decided the corridor is worth \$100,000. Or you may have decided you will only purchase the corridor if the railroad agrees to dismantle both of the adjacent dilapidated depots. "Our terms aren't unreasonable," you may say to yourself. And you may be right. If you're lucky, you may even get what you want.

On the other hand, you may find that the railroad's representatives have their own scenario that is drastically different than yours. "How in the world could that trail group

expect us to sell this corridor for less than \$150,000. Do we look like a charity?" they may ask themselves.

If you're lucky, you may be able to make your entire offer to the railroad's representatives before one of them interrupts to ask, "How much are you willing to pay for this?" Don't expect to discuss your needs without also discussing the railroad's needs, however. Chief among these, in most cases, is payment.

If you were negotiating to buy a house, you almost certainly wouldn't sit down with the homeowner to negotiate the terms of sale without being prepared to discuss price. Shouldn't you be prepared to do so in this situation as well? The answer is yes and no.

Acquiring a rail corridor has many complicating factors that distinguish it from other land deals:

1. Multiple deeds;
2. Restrictions on the railroad's interest (e.g. it may have only an easement "for railroad purposes");
3. Potential environmental problems from fuel storage, spills, or use of toxics on the right-of-way;
4. Regulatory restrictions on railroad disposal (if the corridor is still under the jurisdiction of the Surface Transportation Board, or if another public agency has a right-of-first-refusal under state railroad law); and
5. Trestles, tunnels and other improvements that may present liability problems for transferees.

Despite all your research, you've only begun to understand how these issues may affect your rail-trail plans. How can you possibly discuss a specific purchase price without the answers to these questions?

Set a price or price range pending the outcome of your due diligence work: With this method, you would develop an internal estimate of the corridor's value based on the research you have completed to date. It is possible, although quite tricky, to develop this estimate without an appraisal, but you should only use this approach if you are very familiar with the corridor and with comparable land values in the area.

Using this method, make a bid to the railroad that is based upon an analysis of local real estate prices. If, for example, the rail corridor runs through farmland, and the average per acre price for farmland in the area is \$500, you might offer the railroad \$500 for every acre the railroad owns outright. However, you need to include provisions and exceptions in this initial framework as protection against unexpected results during the due diligence process. Perhaps you could include a provision that requires the railroad to quitclaim the entire corridor to you even though you will only pay \$500 per acre for those parcels with good title. Likewise, you might include an exception that voids the offer if you discover substantial contamination within the corridor.

A variation on this approach is to commit to paying a figure within a certain price range for the corridor. While the final purchase price would depend on the outcome of the due diligence process, both parties would have assurance that the final price of the corridor would meet both parties' needs.

A potential buyer cannot be too cautious in using this approach. If your agency considers this approach, or if the railroad insists upon it, make sure to spell out every conceivable exception that would affect the price.

Agree to a process for establishing a price: In most cases, a potential buyer will find it far easier, and much less risky, to use the initial negotiations as a time to agree to a process for establishing a purchase price for the property. Both parties should agree to the use of objective standards to establish the corridor's price. A negotiation based on this method should result in an agreement to contract with an outside expert to appraise the corridor in accordance with acceptable instructions. Agree in advance about who will pay for the appraisal.

Although you will still need to exercise caution in establishing the instructions for the appraiser, this process reduces the risk of overpaying for the corridor.

Establishing an Acquisition Process and Timeline

Since your initial agreement is designed to help you gain site control, and to buy enough time to complete your due diligence, it is extremely important that the agreement include enough time for you to complete all of your additional work. It is far easier to ask for more time before the paperwork has been signed than it will be at the end of the time period to which you initially agreed.

In addition, make sure you discuss with the railroad's representative(s) the process for completing the necessary work and finalizing the deal. By spelling out the process in the agreement, you can prevent misunderstandings from arising as you attempt to complete the deal. Make sure this agreement includes a discussion of both parties' responsibilities over the upcoming months. This step is particularly important if you've agreed to a process for jointly establishing the purchase price for the corridor.

Getting Your Agreement Signed

Once you have reached a general agreement with the railroad, move to formalize the agreement as quickly as possible, before circumstances change. For example, newly elected officials could change public policies or budgets; new railroad employees may be hired; or a natural disaster could change the priorities of a public agency, the local community or the railroad. Don't be surprised if the written agreement itself becomes yet another topic of negotiation.

As the old saying goes, "the devil is in the details." Drafting contract language is always a delicate process; one misunderstanding can undo months or even years of work. For this reason, handle the issue of who will write the first draft as well as the process for reviewing the draft with great care. If you can convince the railroad to let your attorney(s)

take the first shot at drafting the language, you may have the opportunity to detail specific terms in ways that meet your needs. Remember though, the final document must be acceptable to both sides.

Although it may take several attempts to draft a site control agreement that is acceptable to both sides, keep the process moving forward. In case of a misunderstanding or confusion, refer to your written notes of your discussions with the railroad.

This is a delicate time as the attorneys work to translate the lay language of the negotiations into the more precise language of contracts and agreements. Avoid a situation in which those who conducted the negotiations are not involved in preparing the closing terms and documents. Your negotiating team and the railroad's representatives are the most knowledgeable about the land and the people involved because all of you have worked together for months. If a misunderstanding or a new issue arises during the preparation of documents, you and the railroad's negotiators can probably resolve it quickly and smoothly.

If new issues arise that appear difficult to resolve, consider putting them on hold until you've completed your due diligence and both sides are ready to finalize the deal. You've built momentum; don't lose it now.

Your written agreement with the railroad should address the following issues:

Contingencies: Negotiating a preliminary agreement before you complete your due diligence is similar to diving into a pool of water before you know how deep it is. If you plunge right in, you may find yourself in a great deal of trouble. For this reason, your agreement must detail every possible contingency that may arise as a result of your due diligence. Some common contingencies include:

- Securing financing;
- Clean environmental assessment;
- Acceptable title report; and
- Securing an appraisal.

Payment: In most cases, you can expect the railroad to insist on some form of compensation in exchange for agreeing to the terms of the site control agreement. Make sure these financial terms are spelled out in the agreement. Pay particular attention to provisions that allow for a full refund of your money, or its credit against the final purchase price. Make sure the payment is not so large that it poses a financial burden to your agency or a threat to the project. In addition, listen carefully to the railroad's needs in setting this payment figure. If you can afford to cooperate (pending adequate safeguards), do so.

Once you and the railroad's representatives are comfortable with the final terms and language of your preliminary agreement, get it signed by the appropriate officials as

quickly as possible. Once signed, you can complete your due diligence and finalize the acquisition.

Chapter 9: Due Diligence

Examining the State of Title

Once you've negotiated the basic framework for a deal, you need to supplement your preliminary analysis of the railroad's ownership. This requires contracting with someone a real estate attorney, a title abstract company or a title insurance company who understands the intricacies of land ownership well enough to produce a report on the railroad's ownership, called a title report or title abstract. An expert can quickly determine the extent of the railroad's rights as well as the existence of certain legal risks or limitations that will affect the terms and price of any transaction you might undertake. When the examination is complete, you will have a report that details all restrictions and encumbrances on the property, as well as the extent to which a title company would be willing to insure over those restrictions and limitations.

The most common restrictions or limitations to title are easements, leasehold interests, and restrictive covenants. In many cases the railroad owning the property may have provided an easement to a utility company to run telephone or electric lines or a pipeline under or adjacent to the corridor. In other cases, the railroad may have leased portions of the rail corridor to individuals or companies interested in using the corridor for some non-rail use. Restrictive covenants may allow permanent use of the corridor for a specific purpose, as with crossings, or they may disallow particular uses. Regardless, an experienced real estate professional should review these terms and explain the implications to you. Don't hesitate to ask for this explanation in writing.

A title abstract will also identify other limitations and encumbrances to title, including tax liens, mortgages and mechanic's liens. Liens are claims against the value of a property such as unpaid property or income taxes, unpaid bills for services, and mortgages where the railroad may still owe money on a land purchase. Obviously, you need to know about all such claims so they can be resolved during the course of your negotiations with the railroad.

Some jurisdictional issues the local, state, and federal laws governing the property's use will be identified through a title abstract as well. The nature of the laws governing property use laws covering everything from environmental issues to the types of allowable uses of the corridor may also affect how a proposed transaction can occur. For example, land use laws that protect wetlands may not permit the construction or reconstruction of embankments if this activity would damage wetlands.

Finally, a title report should include a detailed description of the agreements that permit private and public crossings of the railroad line. Public roads traversing the corridor will most likely be based on specific crossing agreements with state agencies. Private crossings for residential driveways, private businesses, or agricultural uses may be less specific and are often not codified in writing. Although a title report can only identify

those crossings for which there is a recorded, written agreement, the information contained in the report is an important supplement to your site visit observations.

Surveying the Property

A survey helps to establish the boundaries of the corridor and to document encroachments and other boundary issues. Some states, such as Ohio, may even require the completion of a survey before deeds can be recorded in county records. Although you may decide that the railroad's records, particularly current valuation maps, provide sufficient information about the property's boundaries, you should not take this decision lightly.

Land is typically described through surface measurements resulting in a map or a description (the survey) that shows the precise boundaries of property ownership. Surveys also show the slope, or topography of the property; the location of any improvements, such as railroad track(s); utility or pipeline easements; private and public crossings; encroachments by adjacent landowners; and other physical features of the site.

Surveyors use title research and any available maps or previously-completed surveys held by the railroad, as well as legal research to locate the property's boundaries and prepare a description.

An accurate survey is particularly important should you choose to acquire title insurance. Title insurance, which is offered by title companies, is like more familiar types of insurance car, health, etc. For a nominal one-time fee, usually on the order of \$250 - \$2,500, a title company will agree to cover the costs associated with any legal challenge to your ownership of the property. Title insurance is by no means comprehensive, since title companies exclude a variety of title defects from the insurance. Unless a survey is completed, many title companies will not insure against encroachments, overlaps, boundary line disputes, and other matters not disclosed in an accurate inspection and certified survey. This does not mean you will be unable to obtain title insurance. Rather, the title insurance you do obtain will be much more limited than it would be if you had completed a survey.

Since surveys are expensive, discuss survey requirements with title companies before you conduct the survey to avoid having to repeat parts of it. You may also choose to forego title insurance to avoid the cost of a survey, although you will not have the additional legal protection title insurance offers.

Appraising the Corridor's Value

Once you know how much of the corridor the railroad actually owns, the next step is to develop an estimate of how much the property is worth. You may be able to estimate the corridor's value on your own, but consider contracting with a professional appraiser unless you have one on your negotiating team as they offer many benefits.

Appraisers make a living following real estate trends and keeping an eye on the market. The best appraisers know who's selling and who's buying property, how much it costs,

and what techniques to use in estimating the value of a property. An appraiser can support an estimate of the property's value with a wide range of statistics and justifications.

Be sure to give your appraiser clear instructions. If your preliminary agreement with the railroad calls for the use of mutually-agreeable standards, make sure you work with the railroad's representative(s) to issue the appropriate instructions. Failing to issue clear, appropriate instructions may result in an inaccurate appraisal, forcing you to spend additional time and money adjusting the appraisal to compensate for these inaccuracies. Finally, instruct your appraiser to review his findings with you (and the railroad if you have jointly issued instructions) before the final report is written. Reviewing the appraiser's findings before he produces a report will give you an opportunity to discuss any concerns you have. For example, the appraiser may produce a report that fails to acknowledge the rail corridor's passage through a wetland area that would limit the range of productive uses for the property.

If possible, your appraiser should meet and tour the property with the appropriate railroad personnel during the appraisal process. In doing so, the appraiser will not only develop a better understanding of the property's limitations, but he can also educate the railroad's personnel about any limitations he identifies.

Keep in mind that a railroad will almost certainly have appraised the corridor as well. If the railroad applied for abandonment authorization through the most strictly regulated process, the railroad should have included an estimate of the corridor's value as part of the documentation it submitted to the Surface Transportation Board (STB). Contact the STB to obtain a copy of this filing. Make sure you know the docket number, as the STB will need it to locate the appropriate documents. Don't be surprised if the railroad's appraisal is significantly higher than yours.

Appraisal Techniques

Appraisers tend to use one of two methods to appraise a rail corridor:

- Across the Fence (ATF); or
- Net Liquidation Value (NLV).

Although railroads occasionally try to use a third appraisal technique called "Going Concern," this only applies when a railroad is selling a line to another railroad.

While you do not need to understand the intricacies of these methods, you should understand their general principles so you can instruct your appraiser to use the appropriate method.

Across the Fence (ATF): This method may be the most straight-forward approach to appraising a rail corridor. The ATF method estimates the corridor's value by comparing it to a similar piece of property the one right "across the fence" from it. To do this, an appraiser reviews tax assessments, existing appraisals, recent property sales, and other

public records that indicate the value of land near the corridor. By assuming that the land within the rail corridor is roughly equivalent to the adjacent land that is, it has roughly the same topography and can be used for the same purposes an appraiser can estimate the value of the rail corridor.

If your appraiser stopped there, however, you would probably end up paying too much. Anyone who has ever walked along a rail corridor knows that a corridor is usually not the same as land across the fence. Rail corridors were generally built on the least productive land in an area. Unlike the land across the fence, a rail corridor may run along a river bank subject to frequent flooding, may pass through an industrial area that limits its use, or may just run through the least desirable parts of an area. Furthermore, rail corridors are almost totally landlocked (with the exception of road crossings), while most real estate offers regular access to roads and other public areas. The irregular shape of most rail corridors may make them less suitable for development as well. And in many places you will find that property across the fence has been improved with water, sewer and utility access, while rail corridors are generally unimproved.

Perhaps more significantly, railroads generally are unwilling to guarantee their ownership of a rail corridor. If you have ever bought a house you expected, and probably received, a warranty deed assuring you that the seller owned the house and would defend you against any claims by a third party contesting your ownership. Railroads won't do that. Railroads generally sell property through what is known as a "quitclaim" deed. Rather than reconstructing the entire title history, railroads tend to say, "We'll sell you whatever property we own, but you, the buyer, are responsible for determining exactly what we own." Railroads rely on quitclaim deeds because they are uninterested in, or unable to devote the resources to tracing the property's chain of title.

These factors generally decrease the price of most rail corridors compared to an initial ATF estimate. It is important, therefore, to instruct your appraiser to compensate for this disparity by discounting all factors that make your corridor less valuable than adjacent property. Make sure your appraiser documents how and why these discounts were developed.

Net Liquidation Value (NLV): According to the STB (and its predecessor, the ICC), the minimum constitutional compensation for involuntary transfer of railroad property from one railroad to another is Net Liquidation Value. NLV entitles the railroad to the value it would receive if it had to liquidate the corridor on a parcel-by-parcel basis. This type of liquidation is costly to the railroad because it requires marketing, appraisals, administrative and overhead expenses and real estate commissions if sales are conducted by outside agents. In addition, sales will occur over several years and must be discounted because a return cannot be realized until the date of a sale (a parcel selling five years from now for \$1,000 may only be worth \$600 now).

The process for determining NLV involves determining what the railroad owns outright; it cannot sell easement property unless it is railbanked. This figure is then discounted for marketing and overhead charges, and the time value of money (the fact that many parcels

will not be sold for years). Since there is no absolute formula for determining the corridor's net liquidation value, be prepared for extensive negotiations with the railroad over the "true" value of the corridor.

In most circumstances, you will get the best terms for the transaction by using the ATF method. Make sure you can make a compelling argument for using this method, or whichever method you choose, because the railroad may challenge your assumptions during the actual negotiations.

Assessing the Integrity of Structures Within the Corridor

Once you have inventoried the property, contract with an architect or a structural engineer to examine all major improvements like bridges, tunnels, or buildings for structural weaknesses, unless the railroad has provided the results of a recent structural evaluation. If weaknesses are discovered, ask the architect or engineer to make recommendations for the rehabilitation and renovation of the structures.

If a building needs to be demolished or the supports for a bridge can no longer hold the weight of a maintenance vehicle, the value of the corridor will be affected. This could become an important issue in negotiations. In addition, an architect or an engineer should be able to tell you if the structure has historic value. She can also explain state and federal regulations governing historic designations and guidelines regarding demolition or renovation.

Environmental Assessment

Hidden environmental hazards may exist within the corridor, so you will want to hire an environmental engineer to conduct an environmental assessment of the property. The nature of the assessment will depend on the property and the potential for contamination but should include at a minimum the equivalent of a "Phase I" assessment.

A Phase I environmental assessment combines research into the property's history with a visual inspection. Courthouse records, title abstracts, historic aerial photographs, and newspaper accounts that offer background on the past uses of the site might provide some insight into the property's history. Interviews with local government representatives, adjacent landowners, and state and federal officials may also uncover historical events about which the current railroad knows nothing.

Documents, including environmental impact reports, past audits or assessments, and hydrologic or geologic studies of the corridor, may be requested from the railroad as well. Federal, state, and local agencies may have records of complaints regarding hazardous substances, property use, and waste management. These agencies should also have inspection reports, monitoring data, violation reports, and other correspondence affecting the property on file. In addition, railroads usually have records of any chemicals, fuels or pesticides known to have been stored on the property, particularly where railroad yards or storage buildings are included in the possible purchase.

A physical inspection of the property will usually uncover any evidence of chemical

storage or spillage, as well as the possible presence of underground or above ground tanks. Although railroad property is generally free from most forms of environmental contamination, there may be problems. If the corridor was used to store diesel fuel, for example, the tanks may have leaked. PCBs in battery-powered switching boxes can also be a problem. Chemicals used for weed control are rarely a problem, however, because their toxicity is relatively short-lived.

A Phase I assessment of the property may be all that is necessary to determine whether the property poses a contamination threat. If a Phase I assessment of the property indicates that serious contamination may have occurred, do not purchase the property before you arrange for further assessment.

A Phase II assessment involves more thorough testing of water, air, and soil samples, as well as a more thorough investigation of the site. If contamination is found, a Phase III assessment will provide the remediation plan for clean-up.

While the techniques for identifying environmental contamination have become increasingly sophisticated, the cost and responsibility for clean-up and restoration are less clear. Federal law targets past and present owners, operators, transporters and generators of hazardous substances. Assigning responsibility and collecting money for clean-up is complicated by the history of contamination and the likelihood that the original contaminators may no longer be traceable, or if they still exist, do not have the funds to pay for clean-up. Although the railroad has certain responsibilities as the property owner, do not be surprised if the railroad's representative(s) wants to include clean-up costs as a negotiating point.

Overall, an environmental assessment can cost anywhere from a few thousand dollars to more than \$20,000 if extensive soil and water samples are taken over a broad area. The assessment and its results can quickly become a critical issue in negotiations to acquire the property. Before you take title to the property, make sure the purchase contract clearly states who will pay for any environmental problems that have been discovered. Seek warranties and representations from the railroad that indicate there is no known contamination, or if that is not the case, that disclose the actual situation and plans for remediation.

Chapter 10: Closing the Deal

Now that you've completed your due diligence, it's time to reassess your original agreement with the railroad. If you're fortunate, the due diligence contained no surprises. However, most potential buyers discover something in their due diligence that requires further discussion with the railroad.

Renegotiating the Terms

There is no way to anticipate exactly what you will need to discuss with the railroad upon completion of your due diligence. The most important thing to remember is that your work is almost done. Don't let these issues turn into deal breakers. If there are little

problems, don't get bogged down in the details. If there are big problems, don't be afraid to re-examine the structure of the deal to see if there are elements you can trade off to make it easier for you and the railroad to resolve your differences.

In some cases, you will need to raise new issues that have developed as a result of your due diligence. For example, you may have learned that the corridor shows signs of contamination, and your environmental engineer has recommended the completion of a Phase II assessment. In other cases, both parties may have initially agreed to put a discussion on hold until all the facts were available. Now is the time to discuss these issues and their effect on the final deal with the railroad.

Tools for Solving Title Problems

Should you learn that the railroad may not own the corridor outright, or should you find yourself challenged by an adjacent landowner claiming to be the rightful property owner, you have several options to resolve these problems:

- Quiet title action;
- Ejectment;
- Slander of title suit;
- Mediation; and
- Eminent domain.

Of these, a quiet title action is the most frequently used mechanism for resolving title disputes. Essentially, a quiet title action asks a court to evaluate competing claims to a piece of property to determine who has the more legitimate claim to ownership. Like a poker game, a quiet title action is a comparative process neither side has to prove absolute legal ownership; merely that its claim is better than the other party's. A quiet title action is generally accompanied by a request for "ejectment" having the other party and its possessions removed from the property. In certain instances, a quiet title action, may also be accompanied by a slander of title action a request for compensation as a result of losses incurred by the other party's claim to ownership.

If you're unsure of the legitimacy of your property claim, you may consider mediation or some other form of alternative dispute resolution to resolve a title dispute. While mediation can only occur if both parties voluntarily agree to discuss their ownership dispute in a non-litigious setting, it may be an effective way to develop creative solutions to the dispute.

Should these actions fail to resolve the dispute, a public agency may

have the ability to exercise eminent domain to acquire the property through condemnation proceedings. Condemnation is an extreme measure that requires the government agency to demonstrate a compelling public reason for acquiring the property. Many public agencies are unwilling to exercise this power to acquire property for a trail.

Renegotiation is a natural part of the acquisition process. In fact, you may find yourself returning to the negotiating table several more times before you are done. Remember the basic rules of negotiation: build on your successes; and work to keep everyone focused on completing the deal. The trust you've built with the railroad's representatives will begin to pay off now.

Closing the Deal

After a great deal of hard work, you've managed to iron out the final details with the railroad's representatives. While it's tempting to pat yourself on the back, you're not quite done. It is true that closing on the property is largely a pro forma exercise but you don't want to be tripped up by any last minute surprises.

Once you and the railroad have signed the agreement to transfer ownership of the property, you should hire an attorney, escrow agent, or experienced real estate agent to supervise the closing. As property transfers are governed by state laws, there is no single way to close on the property. There are, however, a number of standard actions likely to occur during this phase of the acquisition:

- Preparing escrow instructions (if an escrow agent is being used to handle closing arrangements);
- Reviewing the title report;
- Transferring ownership deeds from buyer to seller in exchange for payment;
- Paying any taxes that are due;
- Filing paperwork with appropriate local agencies; and
- Preparing a closing statement to account for all funds involved in the transaction (purchase price, any services that were required as part of the transaction, and a detailed list of all closing costs including taxes, notary, brokerage, escrow fees, and the like).

Obviously, hiring an experienced real estate professional to supervise the closing is the best way to ensure completion of the necessary closing tasks.

Wrapping Up and Celebrating

Congratulations!

Your rail-trail is well on its way to becoming reality. You, your negotiating team, your agency, the railroad's personnel, and many others have all put a great deal of time and

effort into making this acquisition happen. You all deserve a pat on the back.

As this is a significant milestone for you and your project, take the time to celebrate your success. Schedule a media event to talk about how far you've come and what your next steps will be. Don't forget to publicly thank all participants from city councilmembers to railroad staff for their hard work. You may need these people to help with subsequent phases of the project, so make a special effort to let all participants know how valuable they were in achieving this milestone.

Before taking a well-deserved break, you have one more task to complete. Now that you own the rail corridor, it is important that you begin to act like its owner. If you let the corridor sit vacant and un-maintained, you may be fueling the anxieties of adjacent landowners and others who are skeptical about the value of a rail-trail. Make a concerted effort to maintain the corridor: mow it; schedule regular litter clean-ups; conduct frequent site visits; and ensure regular police patrols. You will send the message that your agency is committed to developing a high-quality community resource as quickly as possible.

What's Next?

Now that you own the corridor, it's time to begin developing it. For help with planning, design and development activities, RTC has developed a comprehensive guide to all aspects of trail development and management, called *Trails for the 21st Century: A Planning, Design and Management Manual for Multi-Use Trails*.

With this manual, and your continued hard work and dedication, you should be well on your way to completing your rail-trail. Happy trails.