No. 12-1173

IN THE

Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* RAILS TO TRAILS CONSERVANCY, AMERICAN TRAILS, AMERICAN HIKING SOCIETY, AMERICAN RECREATION COALITION AND NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES IN SUPPORT OF RESPONDENT

ANDREA C. FERSTER, ESQ.
Counsel of Record
2121 Ward Court, N.W., 5th Floor
Washington, D.C. 20037
(202) 974-5142
aferster@railstotrails.org

Attorney for Amici Curiae Rails to Trails Conservancy, American Trails, American Hiking Society, American Recreation Coalition and National Trust for Historic Preservation in the United States in Support of Respondent

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STATEMENT OF INTEREST[1]

The Rails-to-Trails Conservancy (RTC) is a nonprofit corporation whose mission is to create a nationwide network of trails from former rail lines and connecting corridors to build healthier places for healthier people. RTC provides technical and other assistance to state and local governments and other organizations in preserving otherwise-to-be-abandoned railroad corridors for continued public use. RTC has more than 100,000 members and supporters nationwide. As an organization that promotes the preservation of rail corridors, RTC is acutely interested in the federal statutes that govern federally granted–railroad rights-of-way (FGROW). RTC and its members support the preservation of these transportation corridors for continued public transportation uses, including the Medicine Bow Trail at issue in this case, a magnificent rail-trail through southeastern Wyoming's Medicine Bow National Forest.[2] RTC has participated as *amicus* in several cases related to these transportation corridors, including in *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005), which is in conflict with the decision under review. RTC also submitted an *amicus* brief in the Tenth Circuit in the instant case.

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1. No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund such preparation or submission. The Petitioners have filed blanket consents with the Court consenting to the filing of all *amicus* briefs. The consent of the Respondent is attached thereto.

2. For photographs of this stunning rail-trail, *see* http://www.railstotrails.org/resources/documents/magazine/2009_Spring-Summer_Cover%20Feature.pdf.

American Hiking Society (AHS) is a national, nonprofit organization formed in 1976 serving the more than 43 million Americans who hike through its mission of promoting hiking trails, their surrounding natural areas and the hiking experience. AHS promotes the protection and management of rail corridors for recreation and public transportation, including through the federal statutes that govern FGROW.

The National Trust for Historic Preservation in the United States ("National Trust") was chartered by Congress in 1949 as a nonprofit organization for the purpose of furthering the historic preservation policies of the United States and to "facilitate public participation" in the preservation of our nation's heritage. 16 U.S.C. §§ 468–468d. With some 750,000 members and supporters nationwide, the National Trust carries out a wide range of programs and activities to advance the public interest in the preservation of America's heritage, including the protection of historic resources on public lands.

The American Recreation Coalition (ARC) is a nonprofit organization formed in 1979 to catalyze public/private partnerships to enhance and protect outdoor recreational opportunities and the resources upon which such experiences are based. ARC has a strong interest in the protection, enhancement, and expansion of trails—including rail-trails and the federal statutes that govern FGROW.

The unique nature of FGROW has caused courts (including this Court) to attach differing common law property labels to this federally granted right. In this case, those labels are of secondary importance and have

led some lower courts (including the United States Court of Appeals for the Federal Circuit) to reach a result that cannot be squared with the plain language and legislative history of the laws creating and governing FGROW. This Court's recognition of the United States' retained property interest in the FGROW would resolve one of the major issues confronting RTC and the other *amici* seeking to protect the public's interest in these irreplaceable transportation corridors.

Of comparable importance, a finding in favor of the United States would be a step toward redressing the Federal Circuit's decision in *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005). That case has damaged efforts nationwide to preserve our Nation's built rail infrastructure for continued and future public transportation use by holding that the United States did not retain any interest in FGROW where the adjacent lands had been conveyed to private parties in patents that did not describe and reserve the United States' interest in the land embraced by the FGROW.

A definitive recognition of the United States' continued interest in federally granted transportation corridors by this Court will help steer the lower courts away from this destructive path.

SUMMARY OF ARGUMENT

Petitioners and their *amici*, like the plaintiffs in *Hash*, rely on state common law property concepts, arguing that FGROW are "easements" whose attributes are comparable to easements defined by state law. Their argument ignores the plain meaning of the General Railroad Right-of-

Way Act of 1875, 43 U.S.C. §§ 934–939 (1875 Act), which authorized the acquisition of the right-of-way through federal lands, the legislative history of the 1875 Act, and Congress's later statutes, which further defined how these federal property interests could be forfeited, abandoned, or conveyed. If, as Petitioners argue, the land underlying the FGROW passed to the patent holders, then the purpose of these later statutes would be frustrated once the adjoining land passed from federal hands to private ones—the transportation corridors would disappear as soon as the railroad itself ceased its operations. Congress has repeatedly and explicitly repudiated any intent to relinquish the United States' interest in these rights-of-way even after abandonment by railroads.

In *Great Northern Railway Co. v. United States,* 315 U.S. 262 (1942), a case on which Petitioners rely, this Court held simply that 1875 Act FGROW did not convey to the railroad the United States' mineral rights, and explained that exclusion by using the easement concept. That court did not define the actual contours of this unique federal property interest with respect to the continuing role of the United States; nor did it overrule the Supreme Court's prior ruling that the 1875 grant was "a limited fee made on the implied condition of reverter to the United States." *Northern Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903). In fact, the *Great Northern* case and *United States v. Union Pacific Railroad Co.*, 353 U.S. 112, 119-20 (1957) (the only other Supreme Court case to address the nature of 1875 Act FGROW) do not deal with the rights of private landowners at all.

Federal law alone should govern the interpretation of the FGROW when interpreting the specific 1875 Act

grant at issue here. Like prior federal statutes granting FGROW, the 1875 Act authorized railroad rights-of-way through *public* lands—to apply state law would be illogical. The implied reservation of rights in the right-of-way to the United States in patents of adjacent lands effectuates the clear intent of Congress to regulate, maintain, and control the disposition of these corridors once the original railroad (or its assignees) abandoned their operations. To that end, Congress has regulated these FGROW for more than a century by, *inter alia,* managing the process by which railroad operations cease operation and permitting the construction of public highways and transfers to municipalities.

Since 1875, Congress has maintained its right to "alter, amend, or repeal" the statutory scheme governing FGROW. 43 U.S.C. § 939. This Court has recognized that such language permits Congress to modify rights enumerated in a statute, and in subsequent legislation Congress did just that as it managed future uses of the FGROW. *Sinking-Fund Cases*, 99 U.S. 700, 719-20 (1878). The ongoing statutory scheme maintained and periodically revisited by Congress illustrates more than concern for the fate of transportation corridors; it also demonstrates Congress's continued intent to control FGROW to ensure their future vitality. Thus, contrary to Petitioners' contention that abandonment pursuant to Section 912 is irrelevant to the resolution of this matter, Section 912 and the FGROW statutory scheme as a whole are important expressions of the intent of the original grantor—Congress—as to the scope and nature of this federally created right-of-way.

Petitioners' view—that an FGROW under the 1875 Act vanishes upon physical abandonment by a railroad —not only divorces the law from its history but also demands that this Court turn a blind eye to this subsequent federal legislation. Most fundamentally, in 1922, Congress dictated a process by which a railroad "abandons" the FGROW—the mere desire of the railroad to cease operations and remove the tracks is not sufficient. Railroads cannot freely alienate these corridors and otherwise dispose of the FGROW except in narrowly defined ways described by Congress. Congress's continued regulation and preservation of the FGROW is consistent with the Tenth Circuit's holding that the United States retains an interest in this 1875 Act FGROW.

Prior cases of this Court that have touched upon the nature of FGROW, including *Great Northern*, never addressed the interest of private landowners in FGROW. Regardless of whether a court has labeled an 1875 Act FGROW an "easement" or "limited fee" in past opinions, it is clear that Congress has always viewed these transportation corridors as federally controlled and subject to use for public purposes after abandonment by a railroad.

Finally, this Court should reject the invitation of Petitioners and their *amici* to adopt the rationale of the United States Court of Appeals for the Federal Circuit in *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005). The *Hash* decision arises in a wholly different context—a "takings" challenge to a different federal law—Section 8(d) of the National Trails Systems Act, 16 U.S.C. § 1247(d). In removing the FGROW from federal control, *Hash* applied an already problematic analysis of "takings"

claims that this Court has previously noted would apply only to rail corridors involving property rights created and defined by "state law." *See Preseault v. ICC*, 494 U.S. 1, 20 (1990). Indeed, *Hash* applies the Federal Circuit jurisprudence in *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996)—a ruling that is inconsistent with this Court's decisions applying the "takings" clause. That decision also warrants review by this Court, but here this Court should affirm the Tenth Circuit's decision to reject an interpretation of federal law that would frustrate Congressional statutes enacted to preserve these transportation corridors.

ARGUMENT

I. THE TENTH CIRCUIT DECISION BELOW SHOULD BE AFFIRMED BECAUSE CONGRESS INTENDED THAT THE UNITED STATES RETAIN AN INTEREST IN 1875 ACT FGROW IN ORDER TO MAINTAIN TRANSPORTATION CORRIDORS FOR PUBLIC USES.

A. Federal law—not state law—governs FGROW as they were carved out of public lands by the United States.

This Court has articulated the logical approach for examining FGROW. When presented with a question of abandonment pursuant to the 1922 Act, this Court stated that "Congress has power to authorize abandonment, because the state's power to regulate and promote intrastate commerce may not be exercised in such a way as to prejudice interstate commerce." *Colorado v. United States*, 271 U.S. 153, 163 (1926). The *Colorado*

decision was rooted in Congress's need for "paramount control" in furtherance of interstate commerce, of which the railroads are an instrument. *Id.* at 165-66. *See also S. Ry. Co. v. North Carolina*, 376 U.S. 93, 104-06 (1964) (reiterating Congress's authority to structure a scheme for the regulation of interstate rail service).

Similarly, the Tenth Circuit has stated that "[i]t is enough to say that state law cannot operate to "impair the efficacy" of a federal grant or vest title in someone other than the federal grantee." *Boise Cascade Corp. v. Union Pac. R.R. Co.*, 630 F.2d 720, 724 (10th Cir. 1980). Because federally granted transportation corridors were the creation of Congress and have been continually revisited by Congress in an effort to ensure their continued viability for future generations, federal law operates to the exclusion of any conflicting state property law.

B. The United States retains the right to manage the FGROW that it used to develop transportation corridors throughout the nation.

When Congress created rights-of-way and left them in the possession of private railroad companies, it expected to maintain an interest in these transportation corridors. This expectation was rooted in Congress's role in promoting commerce and the development of the nation through, *inter alia*, the disposition of federal land in the sprawling but under-developed West. From its governance of canals in the early days of the nation, to the railroad age in the latter half of the nineteenth century, to the interstate highway system in the latter half of the twentieth century, Congress has used its legislative

powers to create and maintain this nationwide network of transportation corridors for the benefit of commerce in an expanding nation. *See generally* Paul W. Gates, *History of Public Land Law Development* (1968) (*Public Land*). The 1875 Act was one of several laws that governed federally granted rights-of-way to railroad companies, which sped the further development of western territories after the construction of the transcontinental railroads and the passage of the Homestead Act in 1862. *See* Danaya C. Wright, *The Shifting Sands of Property Rights, Federal Railroad Grants, and Economic History:* Hash v. United States *and the Threat to Rail-Trail Conversions*, 38 Envtl L. 711, 717-24 (2008). These FGROW balanced the interests of the United States with those of the railroads, carved out a new property interest in public lands, and encouraged the development of railroad infrastructure by private enterprise.

Understanding the uniquely federal nature of the FGROW in the 1875 Act requires an understanding of the 1875 Act's predecessor statutes. In 1834, Congress began issuing individual railroads rights-of-way through public lands along the eastern seaboard and into the southern territories. These grants were broadly defined grants along a defined route 60-100 feet wide for road construction and the right to take timber, gravel, and water along the right of way. Resolution of June 25, 1834, ch. 3, 4 Stat. 744. With demand for public transportation increasing, Congress enacted the general right-of-way act of 1852 (1852 Act), which gave any charter railroad a 100-foot right-of-way across public lands plus the right to use earth, stone, and timber on adjacent public land for railroad construction, and to take additional land for depots and water tanks. Act of Aug. 4, 1852, ch. 80, 10 Stat. 28.

Congress's next round of legislation addressed the public need not only for transportation corridors, but also for roads and infrastructure. The federal government granted land to the newly-formed states adjoining the railroad's right-of-way with the expectation that they would in turn grant the land to the railroad, which would use the excess land to fund the construction. *See Public Land*, at 384-85. This multi-step, *ad hoc* partnership with the states evolved into legislation whereby Congress directly granted land in fee simple absolute in addition to its right-of-way grant. *St. Joseph & Denver City R.R. Co. v. Baldwin*, 103 U.S. 426 (1880) (determining that a grant by Kansas to a railroad in 1866 created a fee simple absolute). This direct form of aid to the railroads was born out of the United States' desire to complete transcontinental railroads at a time when private railroads lacked the economic and legal resources to mount a project of that scale. The first "grant in aid" was to the Union Pacific in 1862, followed by the Northern Pacific in 1864, the Southern Pacific in 1866, and the Texas Pacific in 1871.[3] Each "grant in aid" included generous donations of land for the railroad to sell to raise construction funds along with the right to place telegraph lines, and generous rights to gather timber, gravel, and water along the road. While these generous grants in aid spurred the completion of the railroad projects, they became unpopular with the public because various constituencies disliked the subsidies that had been pegged to the otherwise public works projects. *Public Land,* at 380-81. In response to public outrage at

3. *See* Act of July 1, 1862, ch. 120, 12 Stat. 489, 493-94, *amended by* Act of July 2, 1864, ch. 216, 13 Stat. 356; Act of July 2, 1864, ch. 217, 13 Stat. 365, *amended by* Act of May 31, 1870, 16 Stat. 378, 378-79 (1870); Act of July 27, 1866, ch. 278, 14 Stat. 292; Act of Mar. 3, 1871, ch. 122, 16 Stat. 573, 578.

the largesse bestowed on the railroads, Congress ceased issuing "grants in aid" in 1871. *Public Land,* at 376-77.

While the "grants in aid" were themselves unpopular, the desire for additional railroad lines had not diminished. Congress responded with the statute directly at issue in this case: the General Railroad Right-of-Way Act of 1875 (1875 Act), which granted to all railroads a 200-foot right-of-way across public lands, but eliminated the concomitant land grant common in the grants in aid of the 1850s and 1860s. General Railroad Right-of-Way Act of 1875, ch. 152, 18 Stat. 482 (*codified as amended at* 43 U.S.C. §§ 934–939). The language of the 1875 Act also refrained from mandating a specific, limited purpose for the given right-of-way. The broad right-of-way grant in the 1875 Act differed from the language in the Act of July 1, 1862, 12 Stat. 489, which provided in Section 2: "That the right of way through the public lands be, and the same is here granted to said company [the Union Pacific Railroad] *for the construction of said railroad and telegraph line.*"[4]

Some litigants and courts, including the Petitioners here and the Court in *Great Northern*, have described the 1875 Act as a "shift in policy" between 1871 and 1875, signaling the turn from a grant in fee to a grant in easement. Scholars have challenged that concept as "myth." *See* Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress's "1871 Shift,"* 82 Univ. Colo. L. Rev. 85 (2011).

4. In *United States v. Union Pacific Railroad Co.*, 353 U.S. 113, 114 (1957), this Court noted this limitation, stating "this right of way was granted Union Pacific 'for the construction of said railroad and telegraph line.' § 2. That purpose is not fulfilled when the right of way is used for other purposes."

Darwin Roberts highlights the fact that while land grants did cease after 1871, these earlier grants in land were coupled with grants of rights-of-way. Congress's "shift" in policy in 1871 was the elimination of the land grant; what remained constant in grants both before and after 1871 was the creation of transportation corridors—designated as a "right of way" in each grant—which was placed in the present possession of the railroad to satisfy public transportation needs.

The mythical "shift" does not warrant a conclusion that the United States no longer retained a substantial interest in each right-of-way following its abandonment by the railroad. This retained federal interest is confirmed by contrasting the FGROW carved out of public lands with those carved out of Indian lands. Congress explicitly issued "easements" for railroads that passed over Indian land, and it included language that recognized the limits of its powers and future interests. Act of Feb. 28, 1902, ch. 134, 32 Stat. 43, 44. In contrast, no easement-like language exists in the 1875 Act right-of-way.

The legislative history of the 1875 Act supports the view that Congress, in passing the Act (and earlier statutes), retained for the United States an interest in the FGROW. Members of Congress recognized both the scope of the grants and the fact that ownership of adjoining land would change as settlement of Western territories continued, especially in light of the Homestead Act of 1862. The House Report of January 12, 1875 recognized Congress's continued interest in the railroad's right-of-way, even when the land adjoining that FGROW passed to private ownership, noting that when a potential conflict arose between the United States and all other interested

parties, the "people of the State" would not have the right to alter or impinge upon the railroad's interest in or exercise of its FGROW—only the United States retained that right. *See* 3 Cong. Rec. 406 (1875) (Statement by Congressman Hoar on the legal status of FGROW).

This legislative history reveals that in the 1875 Act Congress set aside public land with the understanding that it retained a future interest in these transportation corridors. This federal interest would trump conflicting interests of the railroad companies or of the various state interests that would inevitably arise in the future —an observation reflected in Congressman Hoar's statement. The future of these transportation corridors would be determined by Congress and not by the states.

Congress saw a continuing role for itself in the management of rights-of-way. These FGROW pursuant to the 1875 Act reflect Congress's view that its largesse—its use of sovereign power to foster transportation arteries vital to the expansion of the young nation—was not merely a handout to railroads. FGROW were placed in railroad companies' possession for transportation use. There the FGROW would remain until such time as the railroad no longer operated along the corridor, at which point the FGROW would be subject to disposition under federal law.

C. Legislation passed by Congress subsequent to the 1875 Act demonstrates Congress's ongoing exercise of authority over federally granted transportation corridors.

When rail lines became less economically viable in the early twentieth century, Congress confronted the

question as to how it would manage the United States' continued property interest. In response to the desire of railroads to abandon FGROW, either before or after construction, Congress enacted a number of statutes to regulate this process while preserving to the greatest extent possible the continued vitality of FGROW. Congress passed numerous acts to manage these railroad right-of-way grants, including those passed in 1898, 1906, 1909, 1920, 1921, and 1922.[5] Through such legislation, Congress established rules controlling the forfeiture and abandonment of the FGROW. Each act demonstrated Congress's understanding that it alone had authority to regulate, preserve, or destroy transportation corridors.

1. Congress Has Designed a Unique Abandonment Process for the FGROW.

After the expansion of the national railroad network and nationalization during World War I, many companies sought to abandon their rights in unprofitable lines. Abandonment of FGROW, however, did not operate under the common law concept—instead Congress developed an executive process to preserve the FGROW for public use. The scheme leaves no room for Petitioners' (and the *Hash* court's) view on abandonment, which simply ignores Congress's right to modify the nature of its FGROW. In this historical context, Congress considered various

5. Alaska Homestead Act of May 14, 1898, cc.299, 30 Stat. 409 (codified at 43 U.S.C. § 942-1 to 942-9); Railroad Forfeiture Act of June 26, 1906, c.3350, 34 Stat. 482 and Act of Feb. 25, 1909, c.191, 35 Stat. 647 (codified as amended at 43 U.S.C. § 940); Act of May 25, 1920, c.197, 41 Stat. 621 (codified at 43 U.S.C. § 913); Federal Highway Act of Nov. 21, 1921, c.119, 42 Stat. 212, 216 (codified as amended at 23 U.S.C. § 316).

options to deal with the decline of railroad operations. Two acts in particular illustrate the legislative scheme Congress developed.

In 1920, Congress passed 43 U.S.C. § 913, authorizing a railroad to "convey to any State, county, or municipality any portion of such right of way to be used as a public highway or street." The statute structured the conveyance of a right-of-way from the possession of the private railroad to a public entity other than the federal government for use as a different kind of transportation corridor. The House Report for 43 U.S.C. § 913 confirmed the urgent need to preserve these corridors, stating: "this bill is greatly needed in the interest of the public highway development of the country. And the railroads are in many instances perfectly willing and anxious to be given this authority, and the States and counties and highway improvement associations are exceedingly anxious to have this legislation at the earliest moment." H.R. Rep. No. 66-843, at 4 (1920). The restrictions on conveyance in 43 U.S.C. § 913 reveal the intention of Congress to maintain authority over transportation corridors—even when overseeing the use of railroad corridors for other, new public purposes.

In formulating a process for legal "abandonment" of rights-of-way by railroads, Congress created a mechanism for retaining the public interest in the transportation corridor for as long as possible before finally transferring (as opposed to "returning") the right-of-way to a private party. Congress's concept of FGROW abandonment became a two-part process. First, Congress has significantly limited the rights of all railroads operating in interstate commerce to permanently

abandon rail operations. In a 1920 statute, Congress designated the Interstate Commerce Commission (ICC) to manage the abandonment process for all freight rail lines operating in interstate commerce. The ICC, and its successor, the Surface Transportation Board (STB), must determine whether public convenience and necessity permit discontinuation of rail service, which requires consideration of "serious adverse impact[s] on rural and community development." ICC Termination Act of 1995, 49 U.S.C. § 10903(d).

The federal interest in the preservation of FGROW continued with the passage of the Abandonment of Rails Act in 1922. 43 U.S.C. § 912. The 1922 Act added another layer to the abandonment process. Even after receipt of a declaration of abandonment from the ICC/STB, an FGROW was not considered "abandoned" until that abandonment had been "declared or decreed by a court of competent jurisdiction or by Act of Congress." *Id.* Congress further exercised control over the disposition of FGROW by allowing transfer to a municipality or the establishment of a public highway on the subject FGROW within a year of abandonment. Only then would "all right, title, interest, and estate *of the United States* . . . be transferred to and vested in any person . . . in title and interest to whom or to which title of the United States may have been or may be granted." 43 U.S.C. § 912. The plain language of Section 912—in discussing the "estate of the United States"—makes clear that the United States had retained a property interest in the grants made under the 1875 Act.

This two-part process created by Congress illuminates a statutory scheme for regulating the abandonment of

rights-of-way that preserves the interest of the United States for an extended period of time and preempts contrary common law definitions of abandonment. Indeed, lower courts have consistently determined that both steps in the process are necessary to effect abandonment. *See, e.g., Phillips v. Denver & Rio Grande W. R.R. Co.,* 97 F.3d 1375, 1377 (10th Cir. 1996) (no abandonment of 1875 Act right-of-way where railroad has not yet received authorization from ICC); *Vieux v. E. Bay Reg'l Park Dist.*, 906 F.2d 1330, 1339 (9th Cir. 1990) (ICC/STB abandonment authorizations are not determinations of abandonment under 43 U.S.C. § 912). If the United States had relinquished all interest in 1875 Act FGROW such that Section 912 was inapplicable to such rights-of-way, a position asserted by Petitioners, both the process itself and the legislative scheme would be limited to only those rights-of-way granted before passage of the 1875 Act. In fact, many courts have found that Section 912 indeed applies to 1875 Act FGROW.[6] More significantly, this limitation would ignore Congress's clear and continuous assertion of its unique interest in transportation corridors irrespective of the land grants given or withheld along with them.

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6. *See, e.g., Marshall v. Chicago & Nw. Transp. Co.*, 826 F. Supp. 1310 (D. Wyo. 1992), *aff'd*, 31 F.3d 1028, 1030 (10th Cir. 1994); *State of Idaho v. Oregon Shortline R.R. Co.*, 617 F. Supp. 207 (D. Idaho 1985); *Home on the Range v. AT&T Corp.*, 386 F. Supp. 2d 999 (S.D. Ind. 2005) (applies to pre-1875 Act); *King Cnty. v. Burlington N. R.R. Corp.*, 885 F. Supp. 1419 (W.D. Wash. 1994) (applies to pre-1871 FGROW); *Keife v. Logan*, 75 P.3d 357 (Nev. 2003) (applies to pre-1875 Act).

2. The Legislative History of the 1922 Abandonment Statute Confirms the United States' Retained Interest in FGROW.

As with the 1875 Act itself, the legislative history of the 1922 Act supports a finding that the United States retained a property interest in the FGROW. In passing the 1922 Act, Congress was responding to this Court's decisions in *Northern Pacific Railway Co. v. Townsend*, 190 U.S. 267 (1903), and *Rio Grande Western Railway Co. v. Stringham*, 239 U.S. 44 (1915), where the Court had assessed the nature of the FGROW when faced with claims from land owners adjacent to the FGROW. As discussed *infra*, this Court recognized an implied right of reverter to the United States in *Townsend* and a defeasible fee interest in *Stringham*. In a report, the House Committee on the Public Lands for the 67th Congress recognized explicitly that the Court had held that the railroads receiving 1875 grants had taken a "qualified fee with an implied right of reverter." H.R. Rep. No. 67-217, at 1-2 (1921). The report further recognized that the "abandoned and forfeited strips are of little or no value to the Government" once back in its possession after reversion but maintained that in the aggregate it "might be desirable to establish highways on such as may be abandoned in the future." *Id.*

When statutory language is ambiguous, courts may draw on legislative history, legislative purpose, or subsequent legislation to make sense of a given statute. *See United States v. Union Pac. R.R. Co.*, 91 U.S. 72, 79 (1875). Petitioners are incorrect in their assertion that Section 912 has no role in this dispute. As stated in *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980), "while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such

views are entitled to significant weight, and particularly so when the precise intent of the enacting Congress is obscure." *See also Tiger v. Western Inv. Co.*, 221 U.S. 286, 309 (1911) ("subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject.") Here, the legislative history of Section 912, when read alongside the statute and the 1875 Act, confirms that the United States intended to retain a property interest in the continued use and disposition of FGROW upon abandonment.

3. The 1988 Amendment to the National Trails System Act is the latest expression of Congressional intent to preserve the United States' interest in FGROW for future transportation needs.

In 1988, Congress modified the laws concerning the effect of abandonment of an FGROW by a railroad to further protect for public use the federal government's interest in these federally created transportation corridors. The 1988 amendments to the National Trails System Act (NTSA) provided that, as of 1988, the United States' interest in abandoned FGROW would "remain in the United States": "any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in section 912 of Title 43, shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof, except to the extent that any such right-of-way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such section." 16 U.S.C. § 1248(c). This recent legislation reinforces the federal interest in the FGROW.

D. Given the unique nature of FGROW, it is clear that the United States did not cede any rights in the corridor to Petitioners.

Congress's active role in creating and regulating rights-of-way through federal lands makes clear that Petitioners' land patent did not include the FGROW. The patent of land to Petitioners' predecessors noted that the grant was "subject to those rights for railroad purposes"—in essence describing the FGROW.

Petitioners (and the supporting *amici*) adopt a narrow and inappropriate construction of this language. The reservation of a "railroad right-of-way" is common in land patents to individual landowners—it is not an after-the-fact limitation of a general right of way grant that on its face contains no such limit. What Petitioners disregard in their analysis is that only Congress has the right to shape the scope of the FGROW in terms of what activity can occur within the right-of-way. Congress noted in passing the 1875 Act that it wanted to foster the development of transportation corridors. Congress did *not* adopt Petitioners' myopic view that only railroads and the adjacent landowners would benefit from this program, and indeed, it emphatically rejected such a view in 1988 when it enacted 16 U.S.C. § 1248(c).

The congressional intent underlying these statutes is the recognition that the FGROW is not merely a grant of surface rights to private railroads but instead a guarantee of corridors for public commerce and travel. Whether understood as an easement or fee, the reservation for "railroad purposes" incorporates all of the uses designated by Congress for FGROW, including

railroads, public highways, and those public highways used for non-motorized transportation (as they commonly were in 1920). Petitioners' argument that the government failed to properly reserve its interest is thus inapposite and demonstrates Petitioners' refusal to acknowledge Congress's continued rights in the FGROW. Put simply, Congress *did* reserve its ongoing interest in the federally granted right-of-way that has now become part of the Medicine Bow Trail.

II. PRIOR SUPREME COURT AND LOWER COURT PRECEDENT SUPPORT THE TENTH CIRCUIT'S HOLDING THAT THE UNITED STATES RETAINED AN INTEREST IN THE USE AND DISPOSITION OF 1875 ACT FGROW.

A. The Supreme Court cases addressing FGROW support the conclusion that the United States has a retained interest in federally granted transportation corridors.

In early Supreme Court cases, including *Townsend* and *Stringham*, the Court recognized the unique nature of the FGROW when presented with challenges from encroaching settlers or from enterprising railroads looking to maximize the value of the grant. In each opinion, the Court used state common law property labels to explain its decision. The resort to such labels for describing the unique federal interest created by the 1875 Act in *Great Northern* resulted from that Court's use of the term "easement" in order to underscore its holding that the railroads did not acquire any mineral rights in FGROW. The change from the "limited fee with the right of reverter" language over a short period of time reflects

only the issue before the Court—that the railroad had only limited rights in the FGROW.

Here this Court considers for the first time the nature of FGROW as an element of the statutory scheme created by Congress to regulate and preserve transportation corridors. None of the previous FGROW decisions by this Court discuss the abandonment statute, 43 U.S.C. § 912, or the 1988 Amendments to the National Trails System Act (NTSA), 16 U.S.C. §1248(c). In fact, the Federal Circuit in *Hash* ignored the NTSA altogether and simply declared Section 912 to be inapplicable because the United States did not explicitly retain "a fee interest . . . when granting the land patents here involved." *Hash v. United States*, 403 F.3d at 1318.

Although Petitioners pay significant attention to the decision in *Great Northern*, this Court's previous assessment of FGROW in *Townsend* has been the only occasion where the Court has had the opportunity to assess the nature of the 1875 Act FGROW itself, as opposed to its scope with regard to mineral rights. Prior to *Townsend*, this Court held that railroads hold fee simple title to possess individual direct grants of rights-of-way by Congress. *See, e.g.*, *Mo., Kan., & Tex. Ry. v. Oklahoma*, 271 U.S. 303, 309 (1926); *Western Union Tel. Co. v. Pa. R.R. Co.*, 195 U.S. 540 (1904); *St. Joseph & Denver City R.R. Co. v. Baldwin*, 103 U.S. 426, 429-30 (1880). In those cases, this Court recognized that these federally granted rights-of-way are distinct from ordinary easements because they have the "attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property." *New Mexico v. U.S. Trust Co.*, 172 U.S. 183 (1898). As the

railroad industry became less profitable at the beginning of the twentieth century and settlement along rights-of-way matured into established communities, this Court in *Townsend* articulated a more appropriate vision for the property interest in FGROW: the "limited fee."

In *Townsend*, individual landowners claimed to adversely possess land that was included in the Pacific Railroad Act of 1864 but was unused by the railroad. *Townsend*, 190 U.S. at 269. This Court evaluated whether title to the FGROW was susceptible to alienation or whether it was a property interest uniquely tied to a public purpose. It determined that the railroad held the FGROW in limited fee, "made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted." *Id.* at 271. Railroads in present possession of a transportation corridor could not alienate the land for a private purpose because "[t]he substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same for so long as it was used for the railroad right of way." *Id.*

The public interest in the FGROW was so significant, in fact, that upon possession by the railroad such land "was taken out of the category of public lands subject to pre-emption and sale." *Id.* at 269-71. Homestead patents did not convey subdivisions of the right-of-way to individuals because the Land Department "was . . . without authority to convey rights therein." *Id.* at 269.

The Court extended this "limited fee" concept to 1875 Act FGROW in *Stringham*, 239 U.S. at 47. In *Stringham*,

an 1875 FGROW was held to be "neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter." *Id.* To describe the FGROW as a limited fee protected railroad companies' use rights while respecting the dominion of the United States over the corridor.

The Court relied on a different concept, however, when confronted with challenges involving mineral rights, which did not fall within the courts' understanding of the FGROW. As the Government's brief describes in detail, *Great Northern* considered a railroad possessing an 1875 FGROW which sought to drill for oil, gas, and minerals underlying the right-of-way. The United States sued to enjoin the railroad from drilling within the corridor by characterizing the FGROW as an "easement." Brief for the United States at 8-9, *Great Northern*, 315 U.S. (No. 149), 1942 WL 542545. When this Court considered the nature of the railroad's interest in the transportation corridor, it focused on the interests attached to the natural resources embedded in the right-of-way and *not* on the interest in the right-of-way itself. The Court's conclusion that the 1875 Act grant did not entitle the railroad to drill for oil and gas turned in large part on the fact that such mineral rights were not conveyed in the original grant. *See Great Northern*, 315 U.S. at 275 ("[I]t is improbable that Congress intended [in the 1875 Act] to grant more than a right of passage, let alone mineral riches.").

Furthermore, the collateral applications of the Court's use of the term "easement" in later jurisprudence is misplaced, because under the facts of *Great Northern* the land adjacent to the right-of-way in question was

federal land.[7] The Court extended the easement concept to similarly exclude mineral rights from pre-1871 FGROW in *Union Pacific* without deciding the precise nature of the rights in question. *Union Pacific*, 353 U.S. at 119-20.

Great Northern, in other words, did not re-interpret the nature of FGROW *per se*. Rather, the decision excluded mineral rights from the federal grant without addressing the overall nature and scope of the right-of way itself. Recognition of the United States' unique federal interest in 1875 Act FGROW thus does not require overruling this Court's previous precedent in *Great Northern*.

Opinions like *Townsend* and *Stringham* recognized that these rights-of-way were no ordinary parcels of land subject to state common law. Instead, the Court described FGROW as imbued with a public purpose that trumped the private interests of railroad companies and individual landowners alike. In the later cases, *Great Northern* and *Union Pacific*, the Court reassessed the "limited fee" concept and refined its applicability to the surface transportation corridor. These later decisions ensured that railroads received no less and *no more* than what was granted by Congress. These opinions left unaddressed,

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7. The sections of FGROW at issue in *Great Northern* were located "within the exterior boundaries of the Glacier National Park." *Great N. Ry. Co. v. United States*, 315 U.S. 262, 280 n.22 (1942). Due to debate over title in the United States of the areas in question, the Court permitted the parties to stipulate that the United States retained title to lands in "limited areas" where the railroad intended to drill. *Id.* at 279-80. The Court "modified and limited" its holding "to the areas described in the stipulation." *Id.* at 280. It therefore did not resolve the issue currently before this Court.

however, the effect of Congress's ongoing oversight of FGROW via the passage of statutes such as 43 U.S.C. § 912. The Court should take this opportunity to effectuate Congress's statutory scheme for FGROW.

B. Lower courts have also recognized the United States' retained interest.

Prior to *Hash*, courts in other circuits analyzed FGROW by turning to Congress's statutory scheme, including 43 U.S.C. § 912 and 16 U.S.C. § 1248(c), and reconciling the competing demands of railroad companies, individual landowners, and the United States. These courts have by and large recognized the unique nature and scope of FGROW regardless of whether they label such rights-of-way as "easements" or "fees."

A District of Idaho case has been particularly influential in the development of this precedent. In *Idaho v. Oregon Short Line Railroad Co.*, 617 F. Supp. 207 (D. Idaho 1985), which the *amicus* brief of National Association of Reversionary Property Owners (NARPO) refers to as an "odd" case, the court held that the United States retained an interest in FGROW regardless of the date of the grant. In reaching this conclusion, the court described the nature of FGROW in a manner later invoked by other courts. The court noted that "[t]he precise nature of [the government's] retained interest need not be shoe-horned into any specific category cognizable under the rules of real property law . . . . [43 U.S.C. § 912] evince[s] an intent to ensure that railroad rights-of-way would continue to be used for public transportation purposes, primarily for highway transportation." *Id.* at 212 *See also Marshall v. Chi. & Nw. Transp. Co.*, 31 F.3d 1028 (10th

Cir. 1994) (quoting *Or. Short Line R.R. Co.*, 617 F. Supp. at 212); *Vieux v. E. Bay Reg'l Park Dist.*, 906 F.2d 1330 (9th Cir. 1990) (quoting *Or. Short Line R.R. Co.*, 617 F. Supp. at 212); *Whipps Land & Cattle Co. v. Level 3 Commc'ns, LLC*, 658 N.W.2d 258 (Neb. 2003) (holding that the United States retained a reversionary interest in the right of way as implied in 43 U.S.C. § 912).

Regardless of the specific date of the grants in question, these lower courts have recognized the validity of congressional statutes in managing and preserving FGROW. These courts apply the abandonment statute, 43 U.S.C. § 912, despite the fact that the statute post-dates the grant of rights-of-way because courts recognize the special nature of transportation corridors. The United States created a special estate in the form of FGROW—one in which the public is guaranteed present and future use as a transportation corridor. State common law property concepts simply fail to capture the unique nature of the rights created in these corridors. The District of Idaho identified the unique public interest in this federally created transportation corridor:

> Even if the 1875 Act granted only an easement, as opposed to a higher right-of-way interest, Congress had authority, by virtue of its broad power over interstate commerce, to grant such easements subject to its own terms and conditions—which were to preserve a corridor of public transportation, particularly the railroad transportation, in order to facilitate the development of the "Western vastness."

Or. Short Line R.R. Co., 617 F. Supp. at 212. This Court should similarly recognize the unique federal interest in federally granted transportation corridors and give effect to congressional statutes regulating FGROW accordingly.

III. THE TENTH CIRCUIT OPINION AT ISSUE HERE EMBODIES THE CORRECT APPROACH, IN CONTRAST TO THE FEDERAL CIRCUIT'S APPROACH IN *HASH V. UNITED STATES*.

A. The Federal Circuit Has Misconstrued the Nature and Scope of the FGROW.

The Tenth Circuit's decision in this case conflicts with the decision of the United States Court of Appeals for the Federal Circuit in *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005), which held that the United States did not retain any interest in 1875 Act FGROW where the adjacent lands had been conveyed without explicitly reserving the United States' interest in the land (as distinct from the right-of-way). Indeed, the distinction between the Tenth Circuit and *Hash* reflects a broader circuit split on the issue of the United States' interest in federally granted rights-of-way. *Compare Marshall v. Chicago & Northwestern Transp. Co.*, 31 F.3d 1028 (10th Cir. 1994) *and Vieux v. E. Bay Reg'l Park Dist.*, 906 F.2d 1330 (9th Cir. 1990) *with Samuel C. Johnson 1988 Trust v. Bayfield Cnty.*, 649 F.3d 799 (7th Cir. 2011) (suggesting that the analysis in *Hash* applies to pre-Civil War FGROW). The brief for NARPO in support of Petitioners portrays *Hash* as taking the correct view, rather than as a misguided break with established precedent. *Amici* believe that the analysis of the case at bar would benefit from some additional context for the Federal Circuit's conflicting decision in *Hash v. United States*.

The *Hash* case involved a trail-wide class action brought by adjacent landowners to the Weiser River Trail in Idaho, seeking compensation from the United States for the alleged "taking" of their property when the STB issued an order authorizing the railroad to negotiate with a potential interim trail manager to "railbank" the corridor for interim trail use and future rail service, pursuant to 16 U.S.C. § 1247(d) (Trails Act). Much of the corridor was 1875 Act FGROW, and therefore the trail manager's right to acquire the corridor for interim trail use was protected by federal law, 43 U.S.C. § 912. Nonetheless, the trail manager "railbanked" the corridor under the Trails Act since part of the right-of-way was acquired by the railroad from private landowners after the lands were patented under the Homestead Act, and therefore were not acquired by the railroad pursuant to the 1875 Act.

The *Hash* decision is one of several decisions issued by the Federal Circuit following its questionable plurality decision in *Preseault v. United States,* 100 F.3d 1525 (Fed. Cir. 1996), establishing a rule of *per se* liability to claimants possessing the requisite state law property interest in rail corridors that were railbanked under the Trails Act. However, the *Hash* decision was a radical expansion of the Federal Circuit's plurality decision in *Preseault*, which was premised on the determination that "[w]hen *state-defined* property rights are destroyed by the Federal Government's preemptive power [under the Federal Railbanking Law] . . . the owner of those rights is due just compensation." 100 F.3d at 1552 (emphasis added).

Unlike the Federal Circuit's decision in *Preseault* and subsequent cases, *see, e.g.*, *Toews v. United States*,

376 F.3d 1371 (Fed. Cir. 2004), the *Hash* case concerned a railroad corridor and all attendant property rights were carved from *federal*, not state lands, whose creation, use, and disposition were controlled by federal statutes. And yet the Federal Circuit simplistically applied the analysis in cases involving rail corridors created by state law in *Preseault*, and ruled that the FGROW should be treated for all analytical purposes as if it were a purely state law easement.

Indeed, the *Hash* decision is inconsistent with this Court's decision in *Preseault v. ICC,* 494 U.S. 1 (1990), which upheld the constitutionality of the Trails Act. That decision acknowledged that the premise of any "takings" claim involving the Trails Act was its intent to "displace state law as the traditional source of the real property interests." *Id.* at 927; *see also id.* at 926 ("state law creates and defines the scope of the reversionary or other real property interests affected by the ICC's actions pursuant to [the Trails Act],") (O'Connor, J., concurring). The *Hash* court's mistaken application of its own plurality decision in *Preseault* caused the Federal Circuit to ignore the federal statutory scheme creating and governing the FGROW, and how that scheme reflected Congress's intent to preserve and protect transportation corridors.

B. The Federal Circuit's Decision in Hash Was Analytically Flawed By Its Failure to Address the Questions of Abandonment and Scope of the Right-of-Way Prior to Finding the United States to Be Liable for Compensation.

The *Hash* decision also failed to determine the scope of the FGROW or whether the corridor had been

abandoned. As the analysis invited by the Federal Circuit's plurality *Preseault* decision makes clear, "if the terms of the easement when first granted are broad enough . . . to encompass trail use, the servient estate holder would not be in a position to complain about the use of the easement for a permitted purpose." *Preseault,* 100 F.3d at 1552. Nonetheless, the *Hash* decision found a "taking" without addressing whether the *scope* of the 1875 Act right-of-way was sufficiently broad to encompass interim trail use. Significantly, the Federal Circuit itself subsequently acknowledged that the *Hash* case does *not* resolve the issue concerning the *scope* of the federal "easements" granted under the 1875 Act. *Ellamae Phillips v. United States,* 564 F.3d 1367 (Fed. Cir. 2009). Neither Petitioners nor their *amici* acknowledge the failure of *Hash* to address or resolve this potentially dispositive issue.

Additionally, the *Hash* decision never made a predicate finding of abandonment prior to issuing judgment of liability in favor of the claimants despite acknowledging that such a determination was necessary under *Preseault*. *See Hash*, 403 F.3d at 1318. That aspect of the decision contradicted *Beres v. United States*, which recognized, even where it found that the United States did not retain a "reversionary interest" in 1875 Act land, "there remain numerous issues to resolve before this court can determine if the plaintiffs are entitled to compensation, *including . . . . whether or not there was an abandonment*." 64 Fed.Cl. 403, 428 (2003) (emphasis added).

Here, as noted above, the United States plainly reserved its interest in the federally granted right-of-way itself in the patent to the adjacent landowners. Cert. Petition App. 78. Even if the conveyance of the adjacent

lands without a reservation of the United States forecloses the applicability of 16 U.S.C. § 1248(c), Section 912's requirements concerning the abandonment of the right-of-way and post-abandonment disposition of the United States' interest in any portion of the right-of-way "as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment" remain fully applicable and would lead to the opposite conclusion from the *Hash* decision.

C. This Federal Circuit Jurisprudence Is Inconsistent with Supreme Court Jurisprudence under the "Takings" Clause of the U.S. Constitution and With the Federal Circuit's Own Decisions.

The *Hash* and *Preseault* decisions are also part of a larger body of Federal Circuit jurisprudence under the Trails Act that misapplies this Court's "takings" jurisprudence. The troubling line of cases fueled by the Federal Circuit's plurality decision in *Preseault* is well illustrated by the Federal Circuit's recent decision in *Ladd v. United States,* 630 F.3d 1015 (Fed. Cir. 2010). In *Ladd,* the Federal Circuit held that the mere issuance of a regulatory order by the STB that delayed the abandonment of the corridor for 180 days resulted in a "taking" of private property, even though the order expired without conveying any rights to use the corridor for trail purposes, and remanded the case for a determination of just compensation to the adjacent landowners. Since the corridor in the *Ladd* case was never occupied by a trail, this conclusion is in conflict with the "takings" analysis of the *Preseault* plurality decision, which was based on the rationale that the construction of a bike path pursuant to the Trails Act authorized a

"physical entry upon the private lands of the Preseaults." *Preseault,* 100 F.3d at 1551. Instead, the regulatory order merely delayed the abandonment of the corridor, which this Court has made clear does *not* constitute a regulatory taking. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

The Federal Circuit's internally inconsistent jurisprudence, as evidenced by its decisions in *Preseault, Hash,* and *Ladd*, has opened the door to thousands of claims for compensation by adjacent landowners under the Trails Act. According to the *National Law Journal,* the federal government has paid $49 million to property owners who filed just compensation claims against "railbanked" rail-trails this year alone, and there are 8,000 claims pending. *See* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202617646798&thepage=2&slreturn=20131111163805. Ironically, the United States' substantial payments to the adjacent landowners do not even result in the United States acquiring any property interest in these corridors. *Id.* Supreme Court review of this line of "takings" decisions involving the Trails Act would be a logical extension of the Court's examination of the FGROW.

Accordingly, a decision affirming the Tenth Circuit in this case would reverse the troubling precedent established by the *Hash* case and reduce the contradictory liability of the United States in numerous other "takings" cases under the Trails Act that are controlled by *Hash*.[8]

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8. *See Blendu v. United States,* 75 Fed. Cl. 543, 545-49 (Fed. Cl. 2007); *Ellamae Phillips Co. v. United States*, 77 Fed. Cl. 387, 393-95 (Fed. Cl. 2007); *Beres v. United States,* 64 Fed. Cl. 403 (2005); *Seger/Schneider v. United States*, CA. No. 8:99-cv-0315 (D. Neb., Jan. 15, 2008) [dkt # 294].

CONCLUSION

The federal statutes defining the acquisition, forfeiture, abandonment, and disposition of FGROW were designed to create and preserve the public investment in these transportation corridors. In updating these policies, Congress recognized that today it would be virtually impossible to recreate this system "painstakingly created over several generations" once the rights-of-way are abandoned, sold, and destroyed along with bridges, tunnels, and other costly structures due to the high cost of land and the difficulties of assembling rights-of-way in our increasingly populous nation. *Reed v. Meserve*, 487 F.2d 646, 649-50 (1st Cir. 1973). This long-standing national policy should be given continuing effect.

The decision of the Tenth Circuit should be affirmed.

Respectfully Submitted,

Andrea C. Ferster, Esq.
Counsel of Record
2121 Ward Court, N.W.,
5th Floor
Washington, D.C. 20037
(202) 974-5142
aferster@railstotrails.org

Attorney for Amici Curiae Rails to Trails Conservancy, American Trails, American Hiking Society, American Recreation Coalition and National Trust for Historic Preservation in the United States in Support of Respondent