Rails-to-Trails Conversions: A Legal Review[1]

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Introduction

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

Just as the miles of rail line peaked, however, other methods of increasingly popular transport—most notably the trucking industry—began eclipsing the rail industry's dominance, and a long period of decline began. Some railroad lines became underused and unprofitable. In the 1970s, several major railroads went bankrupt, and carriers began abandoning rail lines at an alarming rate (4,000 to 8,000 miles per year). Our nation's rail corridor system, "painstakingly created over several generations," was at risk of becoming irreparably fragmented.[2] Like Humpty Dumpty, once broken into hundreds of parcels of land, it would be virtually impossible to recreate our national rail corridor system due to the difficulties and costs of assembling land in a more populous, increasingly urbanized 21st century America.

The possibility of creating trails for recreation and non-motorized transportation on these unused railroad corridors became both the opportunity and the solution. With their gentle grades, often following rivers and traversing scenic landscapes, rail corridors made ideal trails, turning vacant, sometimes derelict properties into linear parks and filling an increasing public need for outdoor recreation areas. According to the database maintained by Rails-to-Trails Conservancy, as of April 2017, there were 2,032 open rail-trails totaling 22,760 miles in all 50 states and the District of Columbia, including such national gems as Massachusetts' Minuteman Bikeway, which roughly follows the route of Paul Revere's famous ride, and Missouri's 240-mile Katy Trail State Park.

Rail-trails are subject to a unique, and occasionally complex, mixture of federal and state law. Many rail-trail conversions are "railbanked" under Section 8(d) of the National Trails System Act, often called "the Railbanking Act" or the "Rails-to-Trails Act."[3] This important federal law, enacted by Congress in 1983 to preserve established railroad corridors for interim trail and future rail use, preempts state or local laws that are inconsistent with these goals.

Other rail-trail conversions take place after the corridors have been legally "abandoned" and are therefore subject to the vagaries of state law in resolving ownership disputes. And railroad corridors that were originally assembled through federal land grants or federal grants-in-aid of construction are subject to their own unique set of federal laws governing post-railroad use and disposition.

This article provides a summary of the legal issues that often arise in rails-to-trails conversions, as well as an overview of how some of those issues have been resolved. While citations to pertinent case law are provided, this article does not provide an exhaustive review of relevant legal authority.[4]

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

[3] 16 U.S.C. § 1247(d).

[4] It is important to note that every rails-to-trails conversion is unique and may require different legal tools or applications of law. This article does not provide legal advice and is not a substitute for securing the assistance of experienced legal counsel.

Federal Regulation of Railroads and State Law Obstacles to Corridor Preservation

Railroads have been subject to federal regulation since 1887, first by the Interstate Commerce Commission (ICC) and since 1991 by the Surface Transportation Board (STB), an agency presently located within the U.S. Department of Transportation.[5] Railroads subject to STB's jurisdiction (basically, railroads operating freight service in interstate commerce) may neither discontinue rail service nor abandon its real property interest in the corridor until the STB issues a certificate of public convenience and necessity authorizing "abandonment."[6] The STB has the exclusive authority to determine whether a railroad has abandoned its line.[7]Any state or local law that interferes with the STB's authority to regulate railroads is preempted and therefore cannot be enforced.[8]

In 1980, Congress significantly loosened the restrictions on railroad abandonments in order to allow the then financially beleaguered railroad industry to shed duplicative or unprofitable lines.[9] Railroads that had been out of service for two or more years were permitted to abandon their lines through a much more abbreviated "notice" process.[10] As a result, the rate of rail abandonments by major carriers accelerated to between 4,000 to 8,000 miles a year.[11] By 1990, the 270,000-mile system had contracted to 141,000 miles.

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

The Emergence of Railbanking and Its Antecedents

The U.S. Congress attempted to address the alarming loss of our national rail corridor infrastructure as part of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act). This law authorized the ICC to impose a Public Use Condition as part of the abandonment authorization, which deferred the disposition of railroad rights-of-way for 180 days to allow for possible transfers for public use, including rails-to-trails conversions.

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

The problem was that once the STB lost jurisdiction over the corridor, state law principles that might otherwise find that the railroad had "abandoned" its property interest were no longer preempted. As Congress recognized, "[t]he concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use."[12]

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

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[5]ICC Termination Act, 109 Stat. 803 (1995).
[6]*Chicago & N.W. Transp. Co. v. Kalo Brick & Tile*, 450 U.S. 311, 321 (1981).
[7]*Grantwood Village v. Missouri Pac. RR Co.*, 95 F.3d 654 (8th Cir. 1996), *cert. denied,* 519 U.S. 1149 (1997).
[8]*City of Auburn v. United States,* 154 F.3d 1025 (9th Cir. 1998) (state and local environmental and land use regulation preempted).
[9]The Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895 (1980).
[10]49 C.F.R. § 1152.50.
[11]Association of American Railroads, *Railroad Facts* (1992).
[12]H.R. Rep. No. 98-28, at 8-9 (1983), *U.S. Code Congressional & Administrative News* 1983, p. 119, 120.

In 1983, Congress devised a solution. Section 8(d) of the National Trails System Act established "the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use."[13] This law allowed a railroad to divest itself of responsibility for an unneeded rail line by transferring it to a qualified private or public agency for interim use as a trail until such time as the line is needed again for rail service. This process is called "railbanking."

How the Federal Railbanking Process Works

Railbanking allows a rail carrier to transfer an unprofitable or unwanted line "by sale, donation or lease" to a public or private entity (called an "interim trail manager") that is willing to assume financial responsibility for the management of the right-of-way. The process is administered by the STB, which has promulgated regulations governing the program.[14]

The opportunity to railbank a corridor for interim trail use begins when a railroad requests permission from the STB to abandon rail service on a line. The STB has the exclusive authority to permit a railroad to abandon or discontinue rail service on a regulated line, and will permit abandonments or discontinuances only upon a determination that the "present or future public convenience and necessity require or permit the abandonment."[15]

Abandonment proceedings can be either fully regulated or "exempt." A fully regulated abandonment proceeding applies to active rail lines not otherwise exempted from full regulation and allows more generous time frames and opportunities for public participation, protests, hearings and appeals.[16] Alternatively, the STB has the authority to "exempt" certain rail lines from the normal abandonment process.[17] Exempt abandonment procedures are generally available where a corridor has been out of service for more than two years.[18] The vast majority of rail abandonments now follow these exempt procedures.

In response to notice of both regulated and exempt abandonment proceedings, shippers or other carriers are given an opportunity to file an Offer of Financial Assistance (OFA) to continue or subsidize rail service.[19] If an OFA is accepted, the corridor will not be railbanked.

[13] 16 U.S.C. § 1247(d).
[14] 49 C.F.R. § 1152.29 for regular abandonments, and 49 C.F.R. § 1152.50 for "exempt" abandonments.
[15] 49 U.S.C. § 10903(d).
[16] 49 C.F.R. § 1152.
[17] 49 U.S.C. § 10502.
[18] 49 C.F.R. § 1152.50.
[19] 49 C.F.R. § 1152.27.

The railbanking process works as follows:[20]

- An interested trail manager can request a railbanking order within 30 days after the railroad files an application for an abandonment with the STB (or, in the case of "exempt abandonments," within 10 days of publication of a Notice of Exemption in the Federal Register).

- The STB will consider "late-filed" railbanking requests so long as it has jurisdiction to do so. The STB's authority to railbank the corridor is terminated only after abandonment authorization is issued and the railroad notifies the STB that it has taken steps to consummate the abandonment.

- Either a public agency or a qualified organization can submit a railbanking request to the STB. A statement of willingness to assume financial and legal responsibility must accompany the request, along with a map of the right-of-way and a filing fee set by the STB.[21] This fee is waived for federal government agencies and local or state government entities.[22] Since the railroad company must agree to negotiate a railbanking agreement, a copy of the request for railbanking must be served on the railroad at the same time it is sent to the STB.

- If the railroad agrees to enter into negotiations with the trail manager, and no Offer of Financial Assistance to allow for continued freight rail service is submitted or accepted, the STB issues a Notice or Certificate of Interim Trail Use in lieu of an order authorizing the railroad to fully abandon the line. This railbanking order gives the railroad and a qualified agency or group 180 days (which may be extended) to negotiate a voluntary agreement for the transfer (by sale, lease or donation) of the corridor for interim trail use. During that period, the railroad may remove tracks, ties and any other property from the corridor so long as any such removal is consistent with interim trail use.

- If an agreement is reached for transfer of the corridor to the trail manager during the negotiating period, the corridor is added to the national "railbank" for so long as the trail use continues or until the corridor is need for future restoration of rail service. If no agreement is reached, the abandonment becomes final upon the satisfaction of any other conditions that may have been imposed by the STB (e.g., environmental, historic preservation).

[20]This information can also be found on RTC's website: https://www.railstotrails.org/build-trails/trail-building-toolbox/railbanking/.

[21]A sample Statement of Willingness can be found on RTC's website: https://www.railstotrails.org/resourcehandler.ashx?id=4614.

[22]49 C.F.R. § 1002.2.

Scope of the STB's Railbanking Authority

The Railbanking Act has engendered a body of judge-made law, resolving issues ranging from the constitutionality of the law to challenges to regulations implementing the program.[23]

One of the most important cases is *Preseault v. ICC*, in which the U.S. Supreme Court unanimously upheld the constitutionality of the Railbanking Act as a valid exercise of Congress' power under the Commerce Clause. In upholding the constitutionality of the law, the Court stated: "Congress apparently believed that every line is a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable."[24] The Court also held that any claim that the Railbanking Act "takes" private property without the just compensation required by the Fifth Amendment to the U.S. Constitution can be addressed by filing a claim for compensation under the Tucker Act. [**See Railbanking and "Takings", below.]**

The STB views its authority under the Railbanking Act as both limited and ministerial; the STB will not issue a railbanking order where the railroad is not willing to negotiate.[25] However, if the railroad is willing to negotiate, the STB will issue a railbanking order, even where the request is not timely made, so long as it has jurisdiction to do so.[26] The ICC has long stated that its policy is to apply Section 8(d) liberally in light of strong congressional intent favoring trail use/railbanking.[27]

The STB's continued jurisdiction over a line that has been authorized for abandonment depends on whether the railroad has "consummated" the abandonment authorization. If the railroad consummates its abandonment authority prior to the request for a Notice of Interim Trail Use (NITU), then the STB loses its jurisdiction over the corridor.[28]

For railroads that have received abandonment authorization prior to 1997, there is no time limit on when a railroad is required to consummate abandonment authorization. Instead, whether abandonment authority has been "consummated" is based on "a spectrum of facts varying as appropriate from case to case."[29] If these factors are satisfied, the STB loses jurisdiction over the line, notwithstanding the existence of an extant post-abandonment condition that has not been discharged.[30]

In 1997, the STB changed its rules to provide greater clarity regarding when a railroad has "consummated" abandonment authorization. For abandonments authorized after Jan. 23, 1997, a railroad must provide notice to the STB that it has consummated abandonment authorization and fully abandoned the line (e.g., discontinued operations, salvaged the track, canceled tariffs and intends that the property be removed from the interstate rail network). If no notice is filed within one year of the abandonment authorization (and there are no outstanding conditions, including trail use conditions), authority to abandon will automatically expire, and the corridor will remain under the STB's jurisdiction. The railroad may, with good cause, file a request in advance of the expiration date seeking an extension of time to file the notice of consummation.[31]

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

[24] *Preseault v. ICC,* 494 U.S. 1 (1990).

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

[26] *See Rail Abandonments: Supplemental Trails Act Procedures*, 4 ICC2d 152, 157-58 (1987); *Illinois Commerce Comm'n v. ICC,* 848 F.2d 1246, 1261 (D.C. Cir. 1988), *cert. denied,* 488 U.S. 1004 (1989).

[27] *Missouri Pacific R.R.—Abandonment In Okmulgee, OK*, No. AB-3 (Sub-No. 63), 1990 ICC Lexis 414 (ICC Dec. 19, 1990).

[28] *Fritsch v. ICC,* 59 F.3d 248 (D.C. Cir. 1995), *cert. denied, sub. nom CSX Transportation v. Fritsch,* 516 U.S. 1171 (1996) (holding that ICC lacked jurisdiction to issue railbanking order notwithstanding timely issuance of a Public Use Condition); *Becker v. STB*, 132 F.3d 60 (D.C. Cir. 1997) (STB lacks jurisdiction to railbank once abandonment has been consummated.).

[29] *Black v. ICC*, 762 F.2d 106, 113 n.15 (D.C. Cir. 1985).

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

[31] 49 C.F.R. § 1152.29(e)(2).

If the STB has jurisdiction over the corridor and the railroad consents to railbanking, the STB will not refuse to issue a railbanking order based on third-party objections about the desirability or appropriateness of trail use.[32] The STB has authority to revoke a trail condition only if it is shown that the statutory requirements are not being met (i.e., the trail user is not meeting its financial obligations for the property and its use as a trail).[33]

The courts have rejected efforts by trail opponents to add burdensome procedural requirements, such as personal notification to adjacent landowners, to the railbanking process.[34] The STB's responsibilities under the federal environmental and historic preservation laws, such as the National Environmental Policy Act (NEPA)[35] and Section 106 of the National Historic Preservation Act (NHPA)[36], have also been clarified through litigation.[37] \Other actions taken by a railroad post-abandonment authorization can cause the STB to lose jurisdiction over a corridor. For example, the STB will not issue a railbanking order if the railroad has sold full-width sections of a corridor for non-transportation uses[38] or if the corridor has become severed from the national rail system.[39]

Private Railbanking

The STB has ruled that protective features of the Railbanking Act apply even where a corridor is not subject to STB jurisdiction, so long as the corridor has not been fully "abandoned" under applicable state law.[40] This is called "private railbanking."

The Pennsylvania Supreme Court upheld the validity of private railbanking where the relevant instruments of transfer and/or the recorded deed include provisions that the railroad retains the right to reactivate rail service on the corridor.[41] Private railbanking has been upheld even where the railroad declines to consent or participate in the railbanking agreement.[42]

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

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

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

[35] 42 U.S.C. § 4321, *et seq*.

[36] 54 U.S.C. § 306108.

[37] *Goos v. ICC,* 911 F.2d 1283 (8th Cir. 1990) (STB need not undertake any environmental review prior to issuing railbanking orders; NEPA compliance occurs in connection with STB consideration of the application for abandonment authorization.); *Friends of Atglen-Susquehanna Trail, Inc. v. STB,* 252 F.3d 246 (3d Cir. 2001) (STB has ongoing responsibility to comply with NHPA in connection with abandonment decision.).

[38] *Jost v. STB*, 194 F.3d 79, 87 (D.C. Cir. 1999) (full-width sales of sections of the corridor is material evidence for the STB to consider in deciding whether the railroad abandoned the line prior to the issuance of the railbanking order.)

[39] *RLTD Railway Corp. v. STB,* 166 F.3d 808 (6th Cir. 1999) (upholding STB decision that it lacks jurisdiction to railbank corridor that was severed from the interstate rail system).

[40] *Southern Pacific Transportation Co., Exemption,* 1991 WL 108272 (I.C.C. 1991).

[41] *Buffalo Township v. Jones*, 813 A.2d 659 (Pa. 2002), *cert. denied,* 540 U.S. 821 (2003).

[42] *Moody v. Allegheny Valley Land Trust,* 976 A.2d 484 (Pa. 2009), *cert. denied*, 559 U.S. 537 (2010).

Federal Preemption

A key feature of the Railbanking Act is its preemption of conflicting state law.[43] When a trail is railbanked, the statute expressly provides that interim trail use of railbanked corridors "shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes."[44]

Relying on the principle of federal preemption, the courts have uniformly rejected efforts by trail opponents to attack railbanking orders indirectly through challenges to an interim trail manager's ownership or use of a railbanked corridor.[45] Principles of federal preemption also bar efforts by local governments to acquire by condemnation any portion of corridor that has not be abandoned for any other use, including trail use.[46]

Nor will the courts enforce state or local laws that might operate to interfere with the trail manager's ownership or right to use the corridor.[47] State court actions brought by adjacent landowners seeking "quiet title" to a railbanked corridor can be removed to federal court and then dismissed for lack of jurisdiction.[48] Federal preemption is the basis for lawsuits brought by trail managers to eject or enjoin adjacent landowners from encroaching on or interfering with interim trail use of a railbanked corridor.[49]

Lawsuits seeking to prevent trail use based on allegations that railbanking works as a "taking" are also barred.[50] (Lawsuits seeking compensation from the United States based on such "takings" allegations may be brought, but only under the federal Tucker Act; **see Railbanking and "Takings", below**).

However, the Railbanking Act does not preempt the authority of state or local governments to enact reasonable regulations concerning the management of railbanked rail-trails.[51] Different courts have reached different conclusions about what constitutes a reasonable regulation. For example, one court found that a local ordinance enacted to protect wetlands that requires the manager of a rail-trail to explore alternatives to constructing a trail on the rail bed is preempted.[52] A court has also held that railbanked rail-trails need not comply with local zoning ordinances.[53] On the other hand, the Kansas Supreme Court held that a state law imposing management responsibilities on the managers of railbanked trails—including providing trash receptacles and cleanup of trash and litter, providing law enforcement along the trail, and maintaining and installing fencing between the trail and adjoining property—was not preempted.[54]

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[43] 49 U.S.C. § 10501(b).

[44] 16 U.S.C. § 1247(d).

[45] *See, e.g., Dave v. Rails to Trails Conservancy,* 863 F. Supp. 1285 (E.D. Wash. 1994), *aff'd,* 79 F.3d 940 (9th Cir. 1996).

[46] *City of Lincoln v. Surface Transportation Board,* 414 F.3d 858 (8th Cir. 2005).

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

[48] *Grantwood Village v. Missouri Pacific Railroad Co.*, 95 F.3d 654 (8th Cir. 1996), *cert. denied*, 519 U.S. 1149 (1997); *Victor Oolitic Stone Co. v. CSX Transp., Inc.*, 852 F. Supp. 721 (S. D. Ind. 1994); *Schneider v. Union Pacific R. Co.*, 864 F. Supp. 12 (D. Neb. 1994).

[49] *Palmetto Conservation Foundation v. Smith*, 642 F.Supp.2d 518 (D.S.C. 2009).

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

[51] *Bd. of Comm'rs v. Kanza Rail-Trails Conservancy, Inc*., 255 P.3d 1186, 1198-99 (Kan. 2011).

[52] *Friends of the East Lake Sam. v. City of Sammamish*, 361 F.Supp.2d 1260 (W.D. Wash. 2005).

[53] *Township of Bingham v. RLTD Railroad Corp.*, 576 N.W.2d 731 (Mich. App. 1998).

[54] *Miami County Bd. of Commissioners v. Kanza Rail–trails Conservancy Inc.,* 292 Kan. 285, 255 P.3d 1186 (Kan. 2011).

Permissible Uses of Railbanked Corridors

The STB has consistently taken the view that a trail sponsor is not limited to trail use but may make any use of a railbanked corridor that is consistent with trail use.[55] For example, the STB has specifically acknowledged the appropriateness of using a railbanked corridor for highway and transit purposes in addition to (but not instead of) trail uses.[56] The STB has also allowed other "dual uses of trails," including uses "of the right-of-way as both a trail and a utility corridor ... "[57]

The courts have also recognized that the interim trail manager has broad authority to manage trail use of a railbanked corridor. This includes the right to limit access to the trail by adjacent landowners,[58] the right to exclusive use of portions of the right-of-way beyond the width of the trail,[59] and rights to use the corridor's surface, subsurface and aerial space for utility or transit purposes.[60]

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[55] *Rail Abandonments—Use of Rights-of-Way As Trails—Supplemental Trails Act Procedures*, Ex Parte No. 274 (Sub-No. 13), 1989 WL 238631 at *5 n.10 (decided May 18, 1989) ("If the rail carrier's interest allows different uses (such as underground cable) we see no reason why a trail operator should not be able to do the same. The reversionary property owner's position has not changed.").

[56] *The Baltimore and Ohio R. Co.—Abandonment and Discont. Of Ser.—in Montgomery County, MD and the Dist. of Columbia*, ICC Docket No. AB-19 (Sub-No. 112), 1990 WL 287371, *2 (Service Date March 2, 1990).

[57] *Kansas Eastern RR, Inc.—Abandonment Exemption—in Butler and Greenwood Counties, KS*, STB Docket No. AB-563 (Sub-No. 1X), 2006 WL 1516602, *3 (Service Date June 1, 2006); *T and P Railway—Abandonment Exemption—In Shawnee, Jefferson and Atchison Counties, KS*, STB Docket No. AB-381 (Sub-No. 1X), 1997 WL 68211, *5, *7 n.16 (Service Date Feb. 20, 1997), *rev'd on other grounds*, *Becker v. Surface Transp. Bd.*, 132 F.3d 60 (1997).

[58] *Trevarton v. State of South Dakota,* 817 F.3d 1081 (8th Cir. 2016).

[59] *Hornish v. King County,* --- F.Supp.3d ----, 2016 WL 1588346 (E.D. Wash. 2016), *appeal pending,* Case No. 16-35486 (9th Cir., filed June 9, 2016).

[60] *Kaseburg v. King County,* --- F.Supp.3d ----, 2016 WL 4440959 (W.D. Wash. 2016), *appeal pending,* Case No. 16-35768 (9th Cir., filed Sept. 23, 2016).

Reactivation of Rail Service

The fundamental premise of the Railbanking Act was that once a rail corridor is placed in railbanking status, the railroad is entitled to reinstitute freight rail service on the line without the necessity of a full-blown application to construct a new railroad. As such, the STB will vacate the railbanking order at the request of a railroad.[61]

The terms and conditions under which any rail property is returned to the railroad is generally governed by state law.[62] For that reason, many trail managers address the terms and conditions under which the railroad will compensate the interim trail manager in the event of rail service reactivation in their interim trail use/railbanking agreements.

The STB has made clear that the abandoning railroad retains the right to reactivate freight rail service as part of its "residual common carrier obligation."[63] The abandoning carrier may transfer its reactivation rights to another carrier.[64] In addition, any third-party railroad operator may petition the STB to vacate a railbanking order so as to reactivate freight rail service on the line. However, a reactivation request may be denied if the STB determines that the railroad is not a "bona fide" petitioner because it lacks sufficient financing and fails to demonstrate sufficient shipper demand to warrant the proposed reactivation.[65]

Railbanking and "Takings"

While legal challenges to the ownership or use of railbanked trails are preempted by the railbanking law, aggrieved landowners are not left without a remedy; they may still file a "takings" claim against the United States under the Fifth Amendment to the U.S. Constitution, which requires the government to pay "just compensation" if it "takes" private property for a public use.[66]

Compensation claims arising from the Railbanking Act are filed pursuant to the Tucker Act, which designates a specialized federal court—the U.S. Court of Federal Claims—to resolve "takings" claims against the United States.[67] In addition, under the "Little Tucker Act," claimants seeking compensation less than $10,000 from the federal government can be heard by the federal district court.[68]

The initial difficulties of the judiciary in resolving whether the Railbanking Act "takes" private property were exemplified by the *Preseault* case, noted above, which unsuccessfully challenged the Railbanking Act on its face as a "taking" of their ownership interest in a Vermont railroad corridor. The efforts of the Preseaults to secure compensation have resulted in no less than eight reported court decisions in the state and federal courts. The U.S. Court of Appeals for the Second Circuit, as well as the Claims Court and a three-judge panel of the U.S. Court of Appeals for the Federal Circuit, all initially ruled that the Railbanking Law did not result in a taking of any property interest.[69] These decisions, however, were subsequently reversed by the full Federal Circuit, sitting *en banc*, and a new decision

[61] 49 C.F.R. §§ 1152.29(c)(3), 1152.29(d)(3).

[62] *Georgia Great Southern Division, South Carolina Central Railroad Co., Inc.—Abandonment and Discontinuance Exemption—Between Albany and Dawson, In Terrell, Lee and Dougherty Counties, GA*, No. AB-389 (Sub-No. 1X), 2003 WL 21132515 (STB May 9, 2003).

[63] *Norfolk & W. Ry.—Aban. Between St Marys and Minster in Auglaize Cnty., Ohio*, 9 I.C.C. 2d 1015 (1993).

[64] *See, e.g., RJ Corman Railroad Co./Pennsylvania Lines, Construction and Operation Exemption—Line of Norfolk Southern Railway, in Clearfield County, PA*, FD No. 35143 STB served June 5, 2008).

[65] *See, Ballard Terminal Railroad Co. L.L.C., Acquisition and Operation Exemption—Woodinville Subdvision, in King County, WA,* FD No. 35731 (STB served Dec. 30, 2014).

[66] *See Preseault v. ICC,* 494 U.S. at 11-12.

[67] 28 U.S.C. § 1491(a)(1).

[68] 28 U.S.C. § 1346(a)(2).

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

was issued by a plurality of the court, along with a concurring and a dissenting opinion.[70]

The plurality decision in the *Preseault* case held that the application of the Railbanking Law under the facts of that case resulted in a physical occupation of the underlying property, which is a category of government action that constitutes a *per se* taking. As a result, the only issue in the case was whether, under Vermont state property law, the railroad held an easement interest that had been abandoned—a question answered in the affirmative by the Court. The decision, however, made clear that the federal government, and not the trail manager, was solely responsible for the payment of any compensation owed. Moreover, the sole remedy available to the claimant is payment of just compensation; trail use cannot be halted or disrupted.

As a plurality rather than a majority decision, the Federal Circuit's decision in *Preseault* has no precedential value and is in conflict with the analysis of the Second Circuit. Moreover, the analysis of the plurality decision has come under substantial scholarly criticism.[71] However, because the Federal Circuit is the only federal appellate court designated to hear appeals involving "takings" claims against the federal government, absent review by the U.S. Supreme Court, the analysis of the Federal Circuit's plurality decision in *Preseault* establishes the applicable jurisprudence for judicial review of takings cases involving the Railbanking Act.

As the Supreme Court explained in the 1990 *Preseault* case, "under any view of takings law, only some rail-to-trail conversions will amount to takings ... Others are held as easements that do not even as a matter of state law revert upon interim use as nature trails."[72] Subsequent "takings" cases therefore focus on whether claimants can establish, under the applicable state law, a property interest in the railroad corridor that would have become possessory but for the application of the Railbanking Act.

There are now a number of "takings" cases pending in courts around the country and in the U.S. Court of Federal Claims. Many of the cases have been certified as class actions on behalf of all persons claiming a compensable interest in the railbanked corridor. One case has been certified as a statewide class action.[73] The U.S. Court of Appeals for the Federal Circuit has resolved appeals in several of these cases.[74] The Federal Circuit has also clarified that the six-year statute of limitations for filing takings claims begins to run when the first railbanking order is issued by the STB rather than when a railbanking/interim trail use agreement is reached.[75]

The liability of the United States in these cases was significantly expanded in 2010, when a panel of the Federal Circuit held that mere issuance of the NITU was a *per se* taking by way of a physical occupation of Plaintiffs' property, even though no interim trail use agreement was reached, no trail use occurred, and therefore no physical occupation of Plaintiffs' property occurred.[76] The panel expressed the view that it was bound by the Circuit's analysis in the prior decision establishing the issuance of the NITU as the date that the six-year statute of limitations for filing a "takings" claim begins to run. The United States has recently

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

[71] Allen, R. A. (2003). Does the Rails-to-Trails Act Effect a Taking of Property? *Transportation Law Journal, 31*(1), 35-68.; Wright, D. C. (2001). Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court's Fifth Amendment Takings Jurisprudence. *Columbia Journal of Environmental Law, 26*(2), 399-481.

[72] *Preseault v. ICC*, 40 U.S. at 924.

[73] *Schneider v. United States,* No 8:99CV315 et al. (D. Neb. Aug. 29, 2003).

[74] *See, e.g., Chevy Chase Land Co.. v. United States*, 158 F.3d 574 (Fed. Cir. 1998), *cert. denied,* 531 U.S. 957 (2000) (finding no taking under applicable principles of Maryland Law); *Toews v. U.S.A.,* 376 F.3d 1371 (Fed. Cir. 2004) (finding liability based on California law).

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

[76] *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010), *reh'g and reh'g en banc denied*, 646 F.3d 910 (2011).

asked the full Federal Circuit to revisit this ruling.[77]

The current state of the law in the "takings" cases has incentivized the filing of "takings" claims involving the railbanking law, resulting in substantial payments by the United States to the claimants and to their attorneys.[78] However, a judgment in favor of the landowners in a "takings" case does not overturn the STB's railbanking order that facilitates the rails-to-trails conversion, nor does it affect the trail managers' continued ability to use the corridor for trail purposes. The sole remedy available to these claimants is compensation for the "fair market value" of the land occupied by the railbanked rail corridor.

Disputes Over Ownership of Rail-Trails

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

Determining the nature of the ownership interest acquired by a railroad often requires a parcel-by-parcel inquiry, under which the language of the railroad deeds is examined and viewed against the applicable common and statutory law, including both current law and the laws in place at the time of the original acquisition. Each state applies its own rules of construction.[79]

Resolution of questions over the ownership of a rail-trail typically involves the following legal issues:[80]

- **What is the nature of the interest acquired by the railroad?** A railroad might acquire one of at least seven common property interests: fee simple absolute, fee simple determinable, fee simple subject to condition subsequent, a general easement, a limited easement, a lease or a license.

- **What state laws apply?** In the case of conditional fees (called defeasible fees) that may be subject to divestment or reversion upon the occurrence of a specified event, such as cessation of rail service, state law may extinguish any possibilities of reverters or other conditions on a base fee that are not formally recorded through "marketable title" laws.

- **What are the applicable principles of deed construction?** In many cases, railroad deeds do not clearly denominate the interest as either a "fee simple" or an "easement" interest, but instead refer simply to a grant of land, with or without a reference to a "right-of-way." There is considerable conflict in the case law as to the construction of such deeds as conveying a fee or easement.[81] Some courts have held that the term "right-of-way" could be either a fee or an easement, and thus resort to rules of construction or extrinsic evidence to aid in discerning the parties' intent.

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[77] *Caquelin v. United States,* Case No. 16-1663 (Fed. Cir., filed March 4, 2016).

[78] Scarcella, M. (2011). DOJ Suffers Defeats in Rails-to-Trails Cases. *The National Law Journal*. Retrieved from https://bit.ly/natl-law-jrn.

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

[80] Wright, D. C., & Hester, J. M. (2000). Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries. *Ecology Law Quarterly*, 27(2), 351-466.

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

- **How was the corridor acquired?** The typical railroad generally acquired its property interests in its corridor through one of four methods: private grant from individuals resulting from negotiations with willing landowners, condemnation proceedings when they were not, federal grants for portions traversing federal lands, or by prescription (adverse possession) where no deed or other ownership document exists. In many states, the manner of acquisition determines the property interest acquired by the railroad.

- **What state law principles govern abandonment?** Where the railroad has acquired an easement over the land, a determination must be made whether the easement has been abandoned. In most states, non-use of an easement, alone, is not sufficient but must be coupled with other affirmative actions, including removal of tracks and ties or piecemeal sales of a railroad corridor.[82]

- **The word "abandoned" has a different meaning under federal and state law.** The STB has the exclusive authority to regulate the abandonment of railroad service.[83] STB abandonment authorization is permissive only; a railroad must still take steps to effectuate that permission.[84] A railroad may fully "abandon" its corridor when the STB has granted the railroad permission to terminate its common carrier obligation to provide rail service on the line and when the railroad consummates that authority.[85] Once the STB has authorized an abandonment, the corridor may or may not be considered "abandoned" under state law depending on the applicable state law factors governing abandonment.

- **Scope of a railroad easement.** Abandonment of a railroad easement may be inferred where the corridor is put to uses that are outside the scope of the easement. Alternatively, in some states, trail use is considered to be within the scope of a railroad easement. This is sometimes known as the "shifting public use policy," under which the railroad easement is deemed broad enough to encompass other types of transportation or public highway uses.[86] Other states have rejected such a policy.[87]

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

[83] S*ee Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981).

[84] *See, e.g., Gulf M. & O. RR.,* 128 F. Supp. 311 (N.D. Ala. 1954), *aff'd,* 225 F2d 816 (5th Cir. 1955), *cert denied,* 350 U.S. 932 (1956). The exception is in Indiana, where a state statute expressly provides that railroad easements terminate upon issuance of an ICC certificate of abandonment, regardless of the terms of the conveyance. *See Penn Central Corp v. United States R Vest Corp*, 955 F2d 1158, 1160 (7th Cir. 1992).

[85] 49 C.F.R. § 1152.50(e).

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

[87] *Schnabel v. County of DuPage*, 429 N.E.2d 671 (Ill. App. 1981); *Pollnow v. State Dep't of Natural Resources*, 276 N.W.2d 738 (Wisc. 1979); *Lawson v. State of Washington*, 730 P.2d 1308 (Wash. 1986).

Federally Granted Rights-of-Way

Many of the railroad corridors in the United States, particularly corridors in the West and Midwest, were assembled with land grants made by the United States government in the 19th century to open up the Western frontier.[88] The early federal grants for railroad construction relied upon individual grants to railroads (or federal grants to a state in trust to employ for the rail line for which the grant was made).

In 1852, Congress adopted a general right-of-way statute, granting a right-of-way across public lands 100 feet in width to "all rail and plank road, or Macadamized turnpike companies...."[89] Under the 1852 Act, the roads were to be begun within 10 years and finished within 15 years thereafter. Moreover, if the road was abandoned, the 1852 Act provided that "said lands hereby granted ... revert back to the general government."[90] In 1875, Congress adopted the Railroad Right of Way Act of 1875, codified at 43 U.S.C. §§ 934-39 ("1875 Act"), granting a right-of-way through public lands.[91]

There has been much litigation over the nature of the interest conveyed by the federal government to the railroads and, particularly, the disposition of federally granted rights-of-way (FGROW) upon cessation of railroad use. In 1922, Congress passed 43 U.S.C. § 912 to dispose of the federal government's retained interests in all FGROW in case of abandonment. Under this statute, any federally granted parcel in a railroad corridor continues to exist as a railroad right-of-way, usable only for railroad or other public highway purposes, until Congress adopts a statute transferring the title[92] or until there is a judicial declaration of abandonment, whichever first occurs.[93] If there is a judicial declaration of abandonment, § 912 provides on its face that the title vests in the person or entity owning the legal subdivision traversed by the FGROW in question, unless (a) the FGROW is in a municipality, in which case it goes to the municipality, or (b) a state or local government establishes a public highway on the FGROW parcel within one year of the judicial declaration of abandonment, in which case the government's interest is transferred to the state or local government. The Courts have determined that 43 U.S.C. § 912 controls disposition of the Civil War-era grants[94] and the pre-Civil War state-mediated grants.[95]

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[88] *See* Gates, P. W., & United States. (1968). *History of Public Land Law Development*. Washington: For sale by the Supt. of Docs., U.S. Govt. Print. Off.; Root, T.E. (1987). *Railroad Land Grants From Canals to Transcontinentals: 1808-1941*. Chicago: Natural Resources Law Section, Monograph Series, No. 4, American Bar Association.

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

[90] Id. § 3. There were various extensions of the time deadlines in the 1852 statute until it was eventually supplanted by the 1875 Right of Way Act, discussed infra.

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

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

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

[94] *See, e.g., Vieux v. East Bay Regional Park District,* 906 F.2d 1330 (9th Cir. 1990), *cert. denied,*498 U.S. 967 (1990); *King County v. Burlington Northern*, 885 F. Supp. 1419 (W.D. Wash. 1994).

[95] *See, e.g., Mauler v. Bayfield County,* 204 F. Supp.2d 1168 (W.D. Wis. 2001), aff'd, 309 F.3d 997 (7th Cir. 2002) (applying § § 912-13 to state-mediated pre-Civil War federal railroad grants in Wisconsin); *City of Maroa v. Illinois Central R.R.,* 229 Ill.App.2d 503, 592 N.E.2d 660 (App. 4th Dist.), *appeal denied,* 146 Ill.2d 631, 602 N.E.2d 456 (1992) (applying § 912 to 1850 state-mediated Illinois Central grant); *Marlow v. Malone,* 315 Ill. App.3d 897, 734 N.E.2d 195 (App. 4th Dist. 2000) (same).

In 1988, Congress modified the dispositional scheme of 43 U.S.C. § 912 as part of the National Trails System Act Amendments of 1988.[96] The Trails Act Amendments of 1988 provides that unless a public highway is established on FGROW per 43 U.S.C. §§ 913 or 912 within one year of a judicial declaration of abandonment, the federal interest in FGROW "shall remain in the United States."[97]

Litigation in the "takings" context began to challenge some of the underlying assumptions about the application of 43 U.S.C. § 912 and 16 U.S.C. § 1248(c) to federal grants under the 1875 Act, which facilitated the construction of many of the railroads built west of the Mississippi River. In 2005, the Federal Circuit determined that adjacent landowners whose land was patented from the federal government under the Homestead Act also acquired the federal government's rights to railroad corridors that had been acquired through federal land grants, and therefore 43 U.S.C. § 912 had no applicability.[98] This created a conflict between the Federal Circuit and the Tenth Circuit, which had reached a contrary decision.[99] The U.S. Supreme Court agreed to review this conflict.

In 2014, the Supreme Court adopted the Federal Circuit's reading of the 1875 Act and 43 U.S.C. § 912, holding that the United States retained no interest in 1875 Act rights-of-way where the adjacent lands had been previously conveyed.[100] The Supreme Court believed its decision to be controlled by a prior decision holding, for purposes of subsurface rights, that rights-of-way acquired through federal lands under the 1875 Act are easements that are terminated by the railroad's abandonment, and that the United States does not retain any "reversionary interest" in the rights-of-way.[101]

The Supreme Court's 2014 decision has so far had limited impact on rail-trails. First, the ruling only applies to rail-trails whose corridor was originally acquired by the railroad under the 1875 Act. In addition, the ruling does not directly impact railbanked corridors, which will protect trail managers from direct challenges. Managers of non-railbanked corridors may have a strong defense where the challenges are not brought within the applicable limitations period, which varies dependent on state law.

Conclusion

The law on rails-to-trails conversions is continually evolving as the number of rail-trails increases. Rails-to-Trails Conservancy has materials and resources on its website and provides other services to assist governmental and non-governmental organizations in sorting through the various legal, political and communications issues that may arise during the course of a rails-to trails conversion.

[96] 16 U.S.C. § 1248(c)-(g).
[97] 16 U.S.C. § 1248(c).
[98] *Hash v. U.S.A.*, 403 F.3d 1308 (Fed. Cir. 4, 2005).
[99] *See Marshall v. Chicago & Northwestern Transp. Co*., 31 F.3d 1028 (10th Cir. 1994).
[100] *Marvin M. Brandt Revocable Trust v. United States,* 134 S.Ct. 1257 (2014).
[101] *Great Northern Railway Co. v. United States,* 315 U.S. 262 (1942).