

# LOCOMOTIVES V. LOCAL MOTIVES: THE COMING CONFLICT, STATUTORY VOID, AND LEGAL UNCERTAINTIES RIDING WITH REACTIVATED RAILS-TO- TRAILS

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*Study after study projects that the United States economy will come to rely more and more on freight rail in the twenty-first century. Few would have predicted the industry's reemergence 30 years ago when Congress, alarmed at the mass exodus from railroad and the resulting anemic rail infrastructure due to abandonment, began passing laws that culminated in 1983 with a rail-banking amendment to the National Trail System Act of 1976. The new statute streamlined the transfer of these rail corridors to private groups for safekeeping in the event railroads once again needed to reactivate the corridors. Since then, parks departments, nonprofits, and local transportation authorities have taken full advantage of the available "linear parks," nationally amassing some 21,000 miles of former freight corridors now used as trails or converted for local use as light passenger rail.*

*Courts, federal officials, and scholars have thoroughly explored the legal questions raised by landowners during the rails-to-trails program's initial legal maelstrom; but surprisingly, little discussion has addressed the legalities of reactivation, which, after all, is the whole premise for the rails-to-trails program. Data tracking freight rail's reemergence suggests corridor-starved rail companies will soon begin reactivating their old lines. But local communities have come to rely on these rail-banked corridors for their transportation and recreational needs. This paper attempts to start a conversation about the legalities of reactivation before offering to trail groups strategies for preserving recreational use even after the freight trains return, an arrangement called rails-with-trails. It also proposes new laws at the state and federal level that might further encourage rails-with-trails.*

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Introduction.....	483
I. History of Rails-to-Trails.....	486
A. Rail’s Decline & Congressional Solutions .....	488
B. Constitutionality: Uneasy Easements.....	492
C. Reactivation as a Factor in Compensation.....	493
II. A Future of Rail: Use Projections .....	495
A. Rail Infrastructure Shortage on National Level.....	496
B. Rail Infrastructure Shortages at the State Level.....	496
C. Energy Boom: Crude Oil Transport.....	498
III. Rail-banking & Reactivation Procedures.....	499
A. Rail-Banking Proceedings .....	500
B. Reactivation Proceedings.....	502
C. Who May Reactivate.....	504
IV. Trail-Group Opposition: Disputing Reactivation .....	506
V. Rails-with-Trails: A Grand Compromise.....	509
VI. The Regulatory & Statutory Void.....	510
A. Rail-Banked, Jr. ....	511
B. Rails-with-Trails: Increasing State Involvement .....	513
C. Rails-with-Trails: A Call to the STB—or Congress .....	515
Conclusion .....	517

## INTRODUCTION

Rising about 30 feet above the bustle of Manhattan’s Lower West Side on a ribbon of concrete and steel, the leafy park space of the High Line pierces through more than a mile of one of the most densely populated neighborhoods in the United States.<sup>1</sup> The High Line’s hulking concrete substructure was once a freight rail corridor sitting on an easement dating back to the 1920s.<sup>2</sup> At first, the freight trains regularly groaned along the

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1. *Visit the High Line*, FRIENDS OF THE HIGH LINE, <http://www.thehighline.org> (last visited Jan. 26, 2015); *see also* U.S. CENSUS BUREAU, 2010 CENSUS BRIEFS: POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010, at 10 (2011) (showing population density by county in 2010).

2. *About the High Line*, FRIENDS OF THE HIGH LINE, <https://www.thehighline.org/about> (last visited Jan. 26, 2015).

corridor. But as the decades passed, demand for freight rail began to decline.<sup>3</sup> Daily rail service became weekly. Weekly became monthly. Monthly became biannually, and so on. Finally, in the 1970s, the last freight car came and went, leaving the corridor dilapidated and abandoned for more than a generation until a community group, Friends of the High Line, saw recreational potential in a 1.45 mile stretch of the structure and approached local officials about converting it into a public park under a federal program called Rails-to-Trails.<sup>4</sup> In 2009, the unique “linear park,” as they are called, opened to the public and has since drawn approximately 3.7 million visitors each year,<sup>5</sup> many of which are presumably only vaguely aware of the corridor’s freight-rail beginnings.<sup>6</sup>

Imagine the following scenario: CSX Transportation, Inc., the railroad company that transferred the right-of-way to the City of New York decades after ceasing freight service over it, suddenly finds itself in need of the corridor and, acting under a federal rail-banking law, reactivates the corridor, dismantles its landscaping, demolishes its amphitheaters, and reinstates freight rail operations along it—all exactly as Congress intended.

This sort of scenario is perhaps farfetched for this particular stretch of former freight corridor, but this Comment argues that such reactivations of corridors-turned-parks should become increasingly common as economic realities demand more railroad shipping,<sup>7</sup> putting railroad companies’ needs on a collision course with local initiatives that have employed the unused corridors as public parks or, in some instances, as extensions of local light-rail networks for commuters.<sup>8</sup> Freight companies’ interests once aligned

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3. *Id.*

4. National Trails System Act, 16 U.S.C. § 1247(d) (2012).

5. Kate Lindquist, *Destination High Line: What It Means to Be One of the World’s Top Landmarks*, FRIENDS OF THE HIGH LINE, <http://www.thehighline.org/blog/2012/02/22/destination-high-line> (Feb. 22, 2012).

6. N.Y.C. Dep’t of Parks & Recreation, *First Section of High Line Park Opens To The Public*, DAILY PLANT (June 11, 2009), <http://www.nycgovparks.org/parks/the-high-line/dailyplant/21962//>; Lisa W. Foderaro, *High Line Offers a Walk on the Wild Side*, N.Y. TIMES (June 9, 2013), [http://www.nytimes.com/2013/06/10/nyregion/high-line-offers-a-walk-on-the-wild-side.html?\\_r=0](http://www.nytimes.com/2013/06/10/nyregion/high-line-offers-a-walk-on-the-wild-side.html?_r=0).

7. Daniel Machalaba, *The Future of Rail: Freight Railroads Have Made a Strong Comeback in Recent Years. Can They Stay on Track?*, WALL ST. J. (May 23, 2011), <http://online.wsj.com/news/articles/SB10001424052748703834804576301230350030512> (concluding that railroads could soon enjoy a “comeback and are poised to become busier places in the years ahead. Forecasts for freight growth are substantial, prompting railroads to plan capacity additions”); see also TEX. DEP’T OF TRANSP., TEXAS RAIL PLAN 1–12 (2012), available at <http://ftp.dot.state.tx.us/pub/txdot-info/rail/plan/ch1.pdf> (“According to the Association of American Railroads (AAR), one gallon of diesel fuel moved one ton of freight an average of 235 miles in 1980; by 2009, one gallon moved one ton of freight an average of 480 miles, a 104% improvement.”).

8. The Rails-to-Trails Conservancy estimates that America’s 20,000-plus miles of rails-to-trails corridors draw about 100 million trail users each year. *History of RTC and the Rail-Trail*

with the public's, initially at least when federal law, now commonly called the "rail-banking" provision of the National Trails System Act of 1976,<sup>9</sup> gave both railroad companies and the trail-creating entities what they wanted: railroads shed the tax and tort liability of unused land while retaining near-unfettered authority to reactivate the rights-of-way; trail enthusiasts and local governments obtained readymade strips of land well suited for pedestrian and passenger light-rail traffic,<sup>10</sup> subject to only a farfetched possibility of later surrendering the corridors back to the railroads.<sup>11</sup> Everybody won, until now.

The coming decades will see railroads once again become a fulcrum of the American economy.<sup>12</sup> And with that boom in railroad use could come a shortage of corridors, meaning railroad companies will increasingly return to the Surface Transportation Board ("STB"), the federal agency that administers rail-banking, and invoke their right to reactivate.<sup>13</sup> Although reactivation has occurred only 11 times since the program took off with the rail-banking statute of 1983<sup>14</sup>—meaning only a small fraction of the more

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*Movement*, RAILS-TO-TRAILS CONSERVANCY, <http://www.railstotrails.org/ourWork/trailBasics/railTrailHistory.html> (last visited Jan. 26, 2015).

9. 16 U.S.C. § 1247(d).

10. Aaron Kraut, *Trail Supporters Run To 'Save The Trail' As Purple Line Nears*, BETHESDA NOW (May 29, 2013), <http://www.bethesdanow.com/2013/05/29/trail-supporters-run-to-protect-the-trail/>. It should be noted at the outset that not all reinstatement of "rail" service necessarily constitutes reactivation in the context of this article. Freight-rail service can be distinguished from light-rail, or passenger, service such as the scenario cited above in Bethesda, Maryland. Specifically, many local governments utilized the trail program to put light commuter rail networks on the rail-banked land. Passenger lines are nonetheless still subject to freight reactivation under the rail-banking statute. *See e.g.*, *Balt. & Ohio R.R., Metro. S. R.R. & Washington & W. Md. Ry. Co.—Abandonment & Discontinuance of Serv.—in Montgomery Cnty., Md., & D.C.*, No. AB-19 (Sub-No. 112), 1990 WL 287371, at \*2 (Interstate Commerce Comm'n Mar. 2, 1990) (stating that "[t]he reuse of a right-of-way for a public purpose concurrently with a trail use has previously been found consistent with the Trails Act").

11. Rails-with-trails receives extensive discussion *infra* Part VI, but the concept is precisely as its name suggests: the reactivation of a railroad line alongside an existing trail. *See generally* RAILS-TO-TRAIL CONSERVANCY, *Trail-Building Toolbox*, <http://www.railstotrails.org/build-trails/trail-building-toolbox/> (last visited Jan. 29, 2015).

12. *See, e.g.*, Machalaba, *supra* note 7 (explaining that rail activity could possibly double by the mid-point of the century, 2035–2040).

13. *See infra* Part VI (arguing that states have failed to fill in the legislative gap by ignoring reactivation and that the STB or Congress should implement a second regulatory scheme to accommodate the coexistence of light passenger rail-with-trail and freight rail on reactivated railroad corridors).

14. E-mail from Dennis Watson, Media Officer, Surface Transp. Bd., to Matthew J. McGowan, author (Nov. 5, 2013, 12:37 CDT) (on file with author) (explaining the discrepancy between the importance of the low reactivation rate and its being overlooked by legal scholarship). For one of the few discussions that touches on the legal aspects of reactivation, *see* Scott Andrew Bowman & Danayna H. Rosenberg, *Charitable Deductions for Rail-Trail Conversions: Reconciling the Partial Interest Rule and the National Trails System Act*, 32 WM. & MARY ENVTL. L. & POL'Y REV. 581 (2008), available at <http://scholarship.law.wm.edu/wmelpr/vol32/iss3/2> (explaining the history of the National Trails System Act of 1983).

than 700 rail-banked corridors have seen resumed freight operations<sup>15</sup>—the frequency of reactivation seems poised to explode.

Although freight rail plays an increasingly vital economic role in modern America, the same is true about nature trails and light passenger rail. The once-aligned interests would turn against one another as railroad companies' need to reactivate conflicts with the possessory needs of trail stewards and local governments that have poured resources into developing the corridors, which play crucial roles in these communities. Fortunately, these uses need not all be mutually exclusive. Much room remains for compromise, and this Comment attempts to start the conversation on how to get there.

First, it begins with a brief legal history of the rails-to-trails initiative before going on to show why reactivation, a once-remote scenario despite its being the basis for federal rail-banking laws in the first place, could become much more common.<sup>16</sup> The following sections then turn to the legal machination of reactivation, an administrative process at the STB,<sup>17</sup> before sounding an alarm to trail groups only now entering into negotiations with railroad companies that they should safeguard certain contractual rights to the corridors at the outset. This Comment also addresses methods by which groups that have already converted railroad corridors might compromise with reactivating railroad companies to retain trails-*with*-rails. Finally, this Comment concludes by calling on state and federal lawmakers to enact new laws that, in addition to promoting rail-banking generally, also help to facilitate such trails-*with*-rails compromises.

## I. HISTORY OF RAILS-TO-TRAILS

Flat, dismantled, and up to 100 feet wide, corridors of former freight railroad rights-of-way patchwork the country in disconnected segments

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15. The Rails-to-Trails Conservancy estimated that, as of summer 2009, some 698 rail-banking orders had been issued. Transcript of Public Hearing at 16, *Twenty-Five Years of Rail Banking: A Review and Look Ahead* (Surface Transp. Bd. July 8, 2009) (Ex Parte No. 690), *available at* <http://www.stb.dot.gov/TransAndStatements.nsf/transcriptsandstatements?openview> (testimony of Marianne Fowler, Rails-to-Trails Conservancy).

16. *See generally* H.R. REP. NO. 98-28 (1983), *reprinted in* 1983 U.S.C.C.A.N. 112 (presenting an example of the rails-to-trails initiative growing in exposure); *see also* U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-00-4, SURFACE TRANSPORTATION: ISSUES RELATED TO PRESERVING INACTIVE RAIL LINES AS TRAILS 11 (1999) (quoting a railroad official who noted that the “rights-of-way [the company] agreed to bank were banked under the assumption that the conversion to trails would be permanent”).

17. *See* 49 C.F.R. § 1152.29(a) (2012) (stating that the STB provides much of the regulatory requirements of rail-banking).

ranging in length anywhere from a mile or two to a few hundred miles.<sup>18</sup> Local communities and the public in general typically cherish their role as nature trails.<sup>19</sup> Officials in some densely populated areas took advantage of rail-banking by adopting the abandoned corridors and putting them to use within their local passenger transportation network.<sup>20</sup> These converted corridors, however, did not take their present form quietly.

All those hundreds of miles of rail-banked corridors now used as trails or light-rail lines came at tremendous cost to taxpayers. The 1983 law that made rail-banking possible sparked furious backlash by adjacent landowners who argued the rail-banking process violated the Fifth Amendment's prohibition of uncompensated governmental takings by depriving them of a future reversionary right in the right-of-way.<sup>21</sup>

The Supreme Court upheld the rail-banking law's constitutionality as a valid exercise of commerce power, but it went on to note that landowners may seek just compensation under the Tucker Act.<sup>22</sup> Today, some 20 years after the Supreme Court's landmark holding on rail-banking, courts and scholars have extensively explored most legal aspects of the initial rails-to-trails conversion—and, in fact, the Supreme Court again addressed rail-banking in 2014.<sup>23</sup> The next round of legal salvos, those fired over the

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18. Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 *ECOLOGY L.Q.* 351, 404 (2000).

19. Many studies have shown general community-wide support of various rails-to-trails corridors. See, e.g., Bhavana Kidambi, *Assessing the Impacts of Converted Rail-Trails in North Texas Communities: Learning From the Stakeholders' Perspectives* 58 (Dec. 2011) (unpublished Master's dissertation, University of Texas at Arlington), available at [http://dspace.uta.edu/bitstream/handle/10106/9597/Kidambi\\_uta\\_2502M\\_11147.pdf?sequence=1](http://dspace.uta.edu/bitstream/handle/10106/9597/Kidambi_uta_2502M_11147.pdf?sequence=1)) (determining that many nearby landowners, even those who initially opposed rails-to-trails in their communities, grew to appreciate the trails). The report gauged the regional value of six North Texas trails through interviews with more than a dozen "stakeholders" from municipalities, neighborhood associations, and trail-building groups. *Id.* at v. (concluding that "[t]he findings of the research reveal that although each of the five factors assessed weigh differently, the stakeholders all affirm the positive impacts of rail-trail conversions in North Texas. The study also reveals, that while rail-trails may have specific tribulations, stakeholders value the adaptation and point out that the benefits to the environment outweigh the problems.").

20. Charles Montange, *Conserving Rail Corridors*, 10 *TEMP. ENVTL. L. & TECH. J.* 139, 153 n. 76 (1991).

21. See, e.g., Helen Thompson, *Railroaded: Hiking in a Country Setting? Great, But Not in My Back Yard, Say Rural Citizens*, *TEX. MONTHLY* 76, 78 (Mar. 1992), available at <http://www.texasmonthly.com/content/railroaded>) (quoting landowner, "Most people around here who need to jog or walk can go to the mall. We won't be able to sleep at night; our cattle will be in danger; we won't have any privacy").

22. *Preseault v. I.C.C.* (*Preseault I*), 494 U.S. 1, 5 (1990) (plurality opinion) ("We also hold that the statute is a valid exercise of congressional power under the Commerce Clause.").

23. *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1257 (2014). The case issues and facts, although intriguing on the question of railroad easements initially granted on federal land, do not fall within the scope of this article.

reactivation of these hard-won nature trails, however, has thus far only loomed in the background—but the implications of reactivation have nonetheless cropped up in takings litigation.

The following section briefly explains the history of the rails-to-trails initiative and the takings lawsuits it sparked, a legal narrative punctuated by reminders that reactivation is the sole driver of all the hubbub.

### A. *Rail's Decline & Congressional Solutions*

American railroad use entered an era of decline that culminated in the 1960s as shippers (and passengers) increasingly opted for trucks, cars, and airplanes for their logistical needs.<sup>24</sup> Railroad companies that had obtained rail corridors over the past half-century began submitting applications to the Interstate Commerce Commission (“ICC”), the STB’s precursor, seeking permission to abandon the unused lines unnecessarily burdening them with tax and legal liability.<sup>25</sup> Traditional abandonment proceedings were relatively straightforward. Upon receiving a request to abandon a line, the ICC would first determine whether cessation of service along it would not harm public interest.<sup>26</sup> Once it made that determination, the agency would issue a discontinuance order giving the company one year to commence whatever actions necessary to cancel service.<sup>27</sup> If, upon the expiration of that year window, the services had not recommenced, the agency’s discontinuation order became a finalized certificate of abandonment.<sup>28</sup>

By the 1970s, the ICC was granting discontinuation requests at a rate that alarmed Congress as America’s rail infrastructure shrank from its peak

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24. John C. Spsychalski, *Rail Transport: Retreat and Resurgence*, 553 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 43 (1997) (“Between the dawn of the 1960s and the mid-1970s, rail carriage labored under siege and suffered retreat on virtually all major fronts. The primary force behind this siege and retreat was relentless, growing competition from road, air, water, and pipeline transport.”).

25. See Bowman & Rosenberg, *supra* note 14, at 588–89 (noting that rail-banking permits railroads “to escape tort liability to trespassers on unused corridors and the environmental liability from a century of heavy industrial railroad use”).

26. 49 C.F.R. § 1152.29(a)(2).

27. Danaya C. Wright, *Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court’s Fifth Amendment Takings Jurisprudence?*, 26 COLUM. J. ENVTL. L. 399, 446 (2001) (“Under the federal abandonment law, once a certificate of discontinuance is granted affirming that the public convenience and necessity do not require continued rail services, the railroad has one year to complete abandonment proceedings by taking whatever steps it desires to terminate services. It need not sell any real estate, nor does it have to remove tracks and ties. In most cases the salvage value will encourage such actions, but they are not required by the STB. If the railroad decides at the end of a year that it has no future interest in the discontinued line, the discontinuance certificate will be converted to an abandonment certificate and the railroad will no longer be liable to the shipping and traveling public along the abandoned route; it cannot be forced to resume active rail services later.”).

28. *Id.*

of 270,000 miles in 1920 to 141,000 miles in the 1970s.<sup>29</sup> Federal lawmakers responded in 1976 with the Railroad Revitalization and Regulatory Reform Act (“4-R Act”), a law authorizing the ICC to grant railroad companies permission to divest themselves of possessory interest in the rights-of-way while retaining the reversionary right to reactivate years down the line.<sup>30</sup> It was a prophylactic measure aimed at preserving the corridors in case freight demand returned in the future.

The 4-R Act directed the ICC to suspend abandonment requests for lines that might serve non-rail public interests, such as “mass transportation, conservation, energy production or transmission, or recreation.”<sup>31</sup> Administratively, that early law directed the agency to, upon receipt of an abandonment request from railroad companies, suspend the abandonment for up to 180 days if it believed the corridor would serve those public interests.<sup>32</sup> Third-parties interested in using those corridors for interim uses were invited to petition the agency to grant it stewardship authority over the right-of-way until—and this was always also a big “if”—the railroad chose to return service to the line.<sup>33</sup>

But the first congressional attempt fell short of corridor preservation due to its failure to contend with state property laws that terminated the rights-of-way before the interim transfer took place.<sup>34</sup> As Congress soon learned, the mere specter of abandonment triggered state property laws that shattered railroad companies’ often fragile interests in these corridors.<sup>35</sup> Many—perhaps, some say, even *most*<sup>36</sup>—railroad companies never actually

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29. Andrea C. Ferster, Commentary, *Rails-to-Trails Conversions: A Review of Legal Issues*, 58 PLAN. & ENVTL. L. 3, 4 (2006).

30. Wright, *supra* note 27, at 434.

31. 49 U.S.C. § 10905 (2012).

32. *Id.*

33. Curtis A. Morgan et al., *Preservation and Reuse of Abandoned Rail Corridors: Legal and Policy Issues*, 2012 PROC. OF THE ASME JOINT RAIL CONF. 523, 527.

34. *See Preseault I*, 494 U.S. at 6–8 (stating that Congress prevented property interests from reverting under state law by deeming interim trail use more similar to discontinuance than abandonment).

35. *Id.* at 8.

36. Richard Welsh, *Federal Rails To Trails Act: 18 Years of Hell for 62,000 Property Owners*, NAT’L ASS’N REVERSIONARY PROP. OWNERS (July 1, 2001), <http://home.earthlink.net/~dick156/hell.htm> (estimating that 85 percent of railroad rights of way sit on easements). NARPO’s numbers are certainly subject to dispute. One rails-to-trails scholar insists the organization’s estimate that some 80% of rail corridors are easements is erroneous. Transcript of Public Hearing at 170–71, *Twenty-Five Years of Rail Banking: A Review and Look Ahead* (Surface Transp. Bd. July 8, 2009) (Ex Parte No. 690), *available at* <http://www.stb.dot.gov/TransAndStatements.nsf/transcriptsandstatements?openview> (testimony of Danaya C. Wright.) (arguing before the STB that “the claim is that railroads acquired most of their property rights as easements is simply untrue. I have examined over probably 3,000 and my students and I have examined over 7,000 railroad deeds from the 19th Century, and I can attest that over 80 percent



owned the land on which their lines ran, meaning they held no fee, only century-old rights-of-way or easements.<sup>37</sup> Thus, the 4-R Act did not go far enough because the railroad companies' constructive intent to abandon—as evidenced by the ICC's discontinuation order—immediately extinguished the carrier's interest in the right-of-way and the ICC's oversight authority, which triggered the landowners' reversionary interest under state property law.<sup>38</sup> In other words, upon filing abandonment requests with the ICC, railroad companies showed intent to forfeit their interests in the underlying land.<sup>39</sup> Under most states' property law, manifestation of that intent alone meant legal abandonment of railroad use and immediate termination of the right-of-way.<sup>40</sup> Thus, despite some successful trail conversions under the 4-R Act, the law failed to protect railroad companies from individual quiet-title actions by landowners who believed their reversionary rights were violated.<sup>41</sup> This understandably soured railroad companies' willingness to take advantage of the 4-R Act.

With this flaw in mind, Congress enacted 1983's rail-banking statute,<sup>42</sup> an amendment to the National Trails System Act that carried out the aims of the 4-R Act.<sup>43</sup> The new law sought to preserve would-be abandoned corridors by expressly preempting state law through nullification of landowners' abandonment claims upon transfer to non-railroad entities. It reads, in part, as follows:

Consistent with the purposes of [the Railroad Revitalization and  
Regulatory Reform Act], and *in furtherance of the national policy*

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of those from States like Pennsylvania, New York, Ohio, Indiana, Kansas, Missouri, Iowa, Idaho and Washington are clear, unambiguous fee simple absolute deeds in the railroads").

37. See Emily Drumm, *Addressing the Flaws of the Rails-to-Trails Act*, KAN. J. L. & PUB. POL'Y 158, 158 (1999) ("Estimates hold that 85% of all railroad tracks are mere easements on property (as opposed to fee simple) actually owned by adjoining landowners, easements that would revert back to the owners upon abandonment were it not for the Act."). Although "rights-of-way" and "easements" are both terms of art, this paper refers to the corridors as both interchangeably. See, e.g., *W. Union Tel. Co. v. Pennsylvania R.R.*, 195 U.S. 540, 570 (1904) (concluding that a "railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement").

38. Morgan et al., *supra* note 33, at 526.

39. *Preseault I*, 494 U.S. at 6–7.

40. See generally Cecilia Fex, *The Elements of Liability in a Trails Act Taking: A Guide to the Analysis*, 38 *ECOLOGY L.Q.* 673 (2011) (providing a background of rails-to-trails litigation and railbanking).

41. Bowman & Rosenberg, *supra* note 14, at 589 ("Railroads and trail groups have had to defend each individually deeded or acquired parcel of land comprising the corridor from attacks by adjacent landowners who feel that abandoned corridors should be merged into their own back yards.").

42. 16 U.S.C. § 1247(d).

43. National Trails System Act Amendments of 1983, Pub. L. No. 98–11 sec. 208, 97 Stat. 42, 48 (1983) (codified as amended at 16 U.S.C. § 1247(d) (2000)). For the legislative history of the 1983 Act, see H.R. REP. NO. 98–28 (1983).

*to preserve established railroad rights-of-way for future reactivation of rail service . . . in the case of interim use of any established railroad rights-of-way . . . if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use 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. If a[n] [entity, private or public] is prepared to assume full responsibility for management [and assume tort and tax liability] . . . then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.*<sup>44</sup>

In effect, the statute “specifically holds that these easements will remain valid during an interim trail use period because the corridor is being used for railroad purposes; it is being preserved for possible future rail reactivation. A number of courts have recognized that corridor preservation constitutes a legitimate railroad use.”<sup>45</sup> Railroads, by operation of the statute, retained their full rights in the corridor, less only a possessory interest. And trail groups—whether state parks departments, municipalities, or private groups of trail enthusiasts—now had the option to negotiate with railroad companies to obtain stewardship rights to the trails on behalf of public use, subject only to the express provision that they stand aside if and when railroad companies returned some day to reactivate the corridors.<sup>46</sup>

Railroad companies eagerly embraced this strengthened statutory ability to shield themselves from tax and tort liability without relinquishing any permanent rights in the corridor.<sup>47</sup> So long as the trail groups promised not to interfere with the resumption of railroad service, federal authorities would refrain from dictating any further provisions in the deal between the railroad carriers and the trail sponsors.<sup>48</sup> Following 1983’s amendment, the issuance of ICC rail-banking orders—called Notice of Interim Trail Use (“NITU”)—also meant that, administratively, the agency preserved its

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44. 16 U.S.C. § 1247(d) (internal citations omitted) (emphasis added).

45. Bowman & Rosenberg, *supra* note 14, at 588.

46. *Id.*

47. Morgan et al., *supra* note 33, at 527 (noting that “the value and advantage of a preserved rail corridor when compared with a brand new alignment is evident: individual property negotiations are avoided, environmental processes are streamlined, and major structures will have been kept intact”).

48. *Id.*

jurisdiction over the corridor.<sup>49</sup> Meanwhile, trail groups obtained a trail right-of-way, railroad companies kept a right to re-enter, and “state law property rights were held in a limbo on that ground.”<sup>50</sup>

The law’s creation of recreational parks garnered tremendous popular support, making it almost an afterthought that the law was in fact an infrastructure-preservation measure masquerading as a recreational one. Congress merely employed linear parks as, in a sense, property-interest placeholders to overcome the prohibitive headache of undergoing new eminent domain proceedings and forced easements necessary to cobble together a railroad right-of-way.<sup>51</sup> The 1983 amendment did the trick administratively, but landowners continued demanding redress.

### B. Constitutionality: Uneasy Easements

Rail-banking prompted burdened landowners to assert their reversionary interest in the idle rights-of-way, which the federal law preempted, because most states’ common laws—absent contrary language in the original granting instrument—would have otherwise terminated the easement. These landowners found their land burdened by another easement—at least that is how they would soon argue it under state law.<sup>52</sup>

The Supreme Court upheld rail-banking as facially constitutional in *Preseault v. I.C.C.*,<sup>53</sup> a case out of Vermont involving a railroad right-of-way dating back nearly 100 years.<sup>54</sup> A unanimous Court upheld the amended law as a valid exercise of commerce power.<sup>55</sup> Notably, the Court disregarded plaintiffs’ allegations that lawmakers’ stated railroad-preservation purpose was a sham because, the challengers argued, economic realities showed little likelihood of any future trail reactivations.<sup>56</sup> In the end, the Court remanded on the takings liability

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49. Fex, *supra* note 40, at 678.

50. *Id.*

51. Wright & Hester, *supra* note 18, at 435.

52. *Preseault I*, 494 U.S. at 22 (O’Connor, J., concurring) (“Although the Commission’s actions may pre-empt the operation and effect of certain state laws, those actions do not displace state law as the traditional source of the real property interests.”).

53. *Id.* at 5.

54. These details come from a later Federal Circuit Court decision on remand, a holding in which the facts received much more extensive discussion. *Preseault v. United States (Preseault III)*, 100 F.3d 1525, 1535 (Fed. Cir. 1996).

55. *Preseault I*, 494 U.S. at 17.

56. *Id.* at 18 (plaintiffs claimed “the rail banking rationale is a sham. If Congress really wished to address the problem of shrinking trackage, it would not have left conversions to voluntary agreements between railroads and state and local agencies or private groups”). Many scholars continue to question congressional motives behind enacting the rail-banking law. *See, e.g.*, JAMES V. DELONG, PROPERTY MATTERS: HOW PROPERTY RIGHTS ARE UNDER ASSAULT — AND WHY YOU SHOULD CARE

question because, it reasoned, the Tucker Act provided the plaintiffs an opportunity to seek just compensation.<sup>57</sup> Lower courts, deferring to applicable state laws, would thus determine takings liability and compensation amounts on a case-by-case basis.<sup>58</sup>

The ruling set off a torrent<sup>59</sup> of often bitter and protracted rails-to-trails takings lawsuits, many class actions, filed at a rate almost in lockstep stride with the proliferation of the trails themselves.<sup>60</sup>

### *C. Reactivation as a Factor in Compensation*

Takings litigation breaks down into two general stages: (1) courts determine whether a taking occurred in the first place and, upon determining that a taking has in fact occurred, they (2) determine how much money the government owes the landowner.<sup>61</sup> The Federal Claims Court places little emphasis on the possibility of a rail reactivation when it determines whether the trail conversion, in and of itself, constitutes a taking because such consideration

is a matter of speculation about the distant future, based on uncertain economic and social change, and a change in government policy by managers not yet known or perhaps even born. Such speculation does not provide a basis for denying protection to existing property rights under the Constitution.<sup>62</sup>

In rails-to-trails litigation, state property law most often supports a liability finding upon which the Federal Claims Court assesses compensation as “the difference in the value [to plaintiffs] before and after

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268 (1997) (“The right-of-way is railbanked, against the possibility of future need. No one really believes this, and it is amusing to imagine the reaction of hikers and bikers if the government tried to take the trails back for railroad use. The banking idea was a convenient fiction to justify keeping the rights-of-way.”).

57. *Preseault I*, 494 U.S. at 13.

58. *Id.*

59. *Id.* at 11. For a detailed explanation of just how pervasive these takings suits have become, see, e.g., *Litigation and its Effect on the Rails-to-Trails Program: Hearing Before Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 107th Cong. 23 (2002) (statement of Danaya C. Wright, expert testimony).

60. See, e.g., *National & State Trail Statistics*, RAILS-TO-TRAILS CONSERVANCY, <http://www.railstotrails.org/ourWork/trailBasics/trailStats.html> (last visited Jan. 26, 2015) (estimating the current number of trails and mileage, as well as the amount and mileage of current projects).

61. Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 *ECOLOGICAL L.Q.* 307, 310 (2007) (noting that, although direct physical takings litigation rarely involves much dispute over the initial question of liability, in general takings cases involve “two key issues: Was the property taken, and, if so, how much compensation should the property owner receive?”).

62. *Toews v. United States*, 376 F.3d 1371, 1381 (Fed. Cir. 2004).

the taking.”<sup>63</sup> Here, at this point in the litigation process, courts factor reactivation as a value-reducing new burden placed on the aggrieved landowner. Stated differently, reactivation potential does have some bearing on the second question of *how much* the government must compensate landowners for the trails.<sup>64</sup> The persistent threat of reactivation serves to reduce the value of a parcel because it is now not only subject to the presence of hikers, bikers, joggers, and intra-city rail lines, but also to the possibility that freight trains could rumble through once again.<sup>65</sup>

In exchange for just compensation, the government obtains a new easement over the land but does not receive a deed to the corridor.<sup>66</sup> Presumably, based on the compensation amount’s reflection of the potential for future rail resumption, this new easement includes both trails *and* rails use. The railroad company, on the other hand, retains a future right to reactivate the line, an unvested interest that itself is fully alienable.<sup>67</sup> Finally, the adopting entity obtains a right-of-way access to the span of the trail.<sup>68</sup>

As discussed in detail below, that possessory right to access is fully subservient to the resumption of railroad service, and STB decisions reflect a general attitude of erring on the side of permitting reactivation.<sup>69</sup> The agency’s orders have delved deeper into the nuances of property law in a

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63. McCann Holdings, Ltd. v. United States, 111 Fed. Cl. 608, 614 (2013).

64. See generally Childers v. United States, 112 Fed. Cl. 617 (2013) (calculating just compensation for landowners who brought Fifth Amendment taking actions against the federal government).

65. *Id.* at 641, 644 (granting plaintiffs efforts to consider “negatively impacted property values [resulting from] the possibility that the railroad corridor could be reactivated” because “a knowledgeable buyer would likely have considered the potential reactivation of transit on the corridor and factored that into the price he was willing to pay for the subject properties”).

66. *Id.* at 628 (“In a rails-to-trails case, the imposition of a recreational trail creates a new easement for a new purpose across the landowner’s property, which constitutes a taking entitling the landowners to just compensation.”); see also Jenna Greene, *Rail-to-Trails Program Costly to Taxpayers*, NAT’L L. J. (Sept. 2, 2013), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202617646798&thepage=3> (“The irony is that the U.S. doesn’t even get a deed. At the end of the day, [the claimants] still get to keep the property.”).

67. See, e.g., Owensville Terminal Co.—Abandonment Exemption—in Edwards & White Cntys., Ill., & Gibson & Posey Cntys., Ind., No. AB-477 (Sub-No. 3X), 2005 WL 2292012, at \*1 (Surface Transp. Bd. Sept. 20, 2005) (“It is well settled that the abandoning carrier’s right to cut off the interim trail use arrangement and to reinstitute rail service can be conveyed to a third party.”).

68. Trail groups also have the option to unilaterally file with the STB to vacate the NITU. See, e.g., V And S Ry., Inc.—Abandonment Exemption—in Barber, Cnty., Kan., AB-603 (Sub-No. 1X), 2007 WL 1141517 (Surface Transp. Bd. Apr. 18, 2007) (granting a trail group’s request to vacate the NITU on a segment of right-of-way).

69. See, e.g., Owensville Terminal Co.—Abandonment Exemption—in Edwards & White Cntys., Ill., & Gibson & Posey Cntys., Ind., 2005 WL 2292012, at \*1 (“An interim trail use arrangement is subject to being cut off at any time by the reinstatement of rail service.”); see also E-mail from Dennis Watson, *supra* note 14 (explaining how upon reactivation by the STB, some rail lines may not have actually restarted service).

select few reactivations that involved a dispute.<sup>70</sup> Courts, meanwhile, have yet to address disputes arising from reactivations, which are becoming increasingly more likely.

## II. A FUTURE OF RAIL: USE PROJECTIONS

In 2009 Warren Buffett, widely regarded as perhaps America's savviest investor, orchestrated one of the most expensive buyouts in the history of his multi-billion-dollar investment firm, Berkshire Hathaway, when he cut a check for \$34 billion for Burlington Northern Santa Fe, a freight railroad company.<sup>71</sup> When asked about his obvious faith in the freight-rail industry, the "Oracle of Omaha" responded, "It's a business that has real economic advantages. If you look at fuel costs, drivers' wages on the highway—as long as more goods move from place to place in this country, rails are going to get their share, and it should be a very profitable business."<sup>72</sup> His gamble appears to be paying off. The company has since nearly doubled in value, thanks to ever-growing demand for freight rail transport.<sup>73</sup>

Although highly uncommon throughout the first 30 years of the rail-banking program, reactivation is set to become a much more frequent occurrence as the freight-rail industry rebounds and all that soaring demand overwhelms the now-skeletal network of remaining corridors,<sup>74</sup> prompting the freight industry to ease bottlenecks by opening new lines.

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70. See, e.g., Ga. Great S. Div., S.C. Cent. R.R.—Abandonment & Discontinuance Exemption—Between Albany & Dawson in Terrell, Lee, & Dawson Cntys., Ga., No. AB-389 (Sub-No. 1X), 2003 WL 21132515 (Surface Transp. Bd. May 16, 2003).

71. Zack O'Malley Greenburg, *Warren Buffett Is Still Bullish On Rail—And Keystone*, FORBES (Mar. 3, 2014), <http://www.forbes.com/sites/zackomalleygreenburg/2014/03/03/warren-buffett-is-still-bullish-on-rail-and-keystone/>.

72. *Id.*

73. *Id.* See also Joann Muller, Zack O'Malley Greenburg & Christopher Helman, *All Aboard: Why America's Second Rail Boom Has Plenty Of Room To Run*, FORBES (Jan. 22, 2014), <http://www.forbes.com/sites/joannmuller/2014/01/22/americas-second-rail-boom/> ("The industry, so recently an aging also-ran in the age of superhighways, is now a fountain of superlative figures: Industry wide, revenues have surged 19% from \$67.7 billion to \$80.6 billion since 2009, creating 10,000 new jobs at railroad companies and countless thousands in related industries—and paying out \$21 billion in wages last year alone, up nearly \$1 billion. As the U.S. population swells, the Federal Railroad Administration projects that the tonnage of freight shipped by the U.S. rail system will increase 22% by 2035.").

74. Lindsey Hovland, *Derailed: How Government Interference Threatens to Destroy the Rail Industry—and How to Get Back on Track*, 40 TRANSP. L.J. 49, 60 (2013) ("The most significant issue facing freight railroads today is the need for additional capacity.").

*A. Rail Infrastructure Shortage on National Level*

The data are unequivocal: although it fell from favor over the second half of the last century, rail—particularly freight rail—once again appears poised to play a central role in the twenty-first century. The Federal Railroad Administration expects population growth to increase the tonnage of goods shipped on American railroads by 22% between 2010 and 2035.<sup>75</sup> By 2050, when the United States population is projected to reach 420 million, total tons shipped will be up 35% over their 2010 levels.<sup>76</sup> Freight carriers shipped less than 10 billion tons of materials in 1993, but by mid-century they are expected to transport 17 billion tons annually.<sup>77</sup>

These estimates have prompted many transportation experts to sound alarms that the nation's shrunken rail infrastructure will soon fail to meet its needs.<sup>78</sup> They are warning that freight rail demand is expected to exceed supply in coming decades. The Congressional Budget Office, after synthesizing a number of studies, noted that only 170,000 miles of railroad tracks remain in the United States and arrived at the following conclusion:

At the same time, the number of train-miles has grown, especially in recent years. That has led to a greater intensity of use of tracks. . . . Such growth helps explain why some tracks are becoming increasingly congested, a factor that has contributed to concern about the railroads' ability to meet future demand. As the number of trains per mile of track has increased, the average speed—a measure that experts often use as an indicator of railroads' performance—has declined; it is now lower than it has been since the early 1980s . . . .<sup>79</sup>

*B. Rail Infrastructure Shortages at the State Level*

Even at the state level, projections paint a picture of a rail-heavy future, both in freight movement and, perhaps to a lesser extent, passenger service

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75. FED. R.R. ADMIN., U.S. DEP'T OF TRANSP., NATIONAL RAIL PLAN: MOVING FORWARD 6 (2010) [hereinafter NATIONAL RAIL PLAN].

76. *Id.*

77. *Id.*

78. CONGRESSIONAL BUDGET OFFICE, FREIGHT RAIL TRANSPORTATION: LONG-TERM ISSUES 8 (2006), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/70xx/doc7021/01-17-rail.pdf>.

79. *Id.*

between dense population centers.<sup>80</sup> But, again, the infrastructure will likely fail to satisfy the increased demand.

Take, for instance, Texas, home to the nation's largest railroad network.<sup>81</sup> Approximately 11,000 miles of tracks traverse the state, representing about 8% of the national railroad infrastructure.<sup>82</sup> That number represents a 37% decline from peak mileage of over 17,000 in the 1930s.<sup>83</sup> Just since 2005, Texas rail operators abandoned some 146 miles of corridor.<sup>84</sup> In juxtaposition, between 1991 and 2006 the amount of freight tonnage transported in Texas grew from roughly four million carloads to more than ten million, a 146% increase spurred at least in part by the creation of the North American Free Trade Agreement.<sup>85</sup>

The Texas Department of Transportation ("TxDOT") estimates that freight and passenger rail will contribute significantly to the Texas economy, but the state is facing capacity constraints.<sup>86</sup> Freight demand was projected to exceed capacity beginning in 2013, and TxDOT estimates that keeping up with demand could cost more than \$600 million over the next 20 years.<sup>87</sup> A TxDOT report also urges state officials to drastically enhance

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80. Conceivably, long-distance intercity passenger rail could also reactivate rail-banked corridors. For a general discussion of freight/passenger rail-sharing arrangements, *see, e.g.*, Justin J. Marks, Comment, *No Free Ride: Limiting Freight Railroad Liability When Granting Right-of-Way to Passenger Rail Carriers*, 36 *TRANSP. L.J.* 313, 316 (2009). For present purposes, passenger ridership is nonetheless somewhat outside the scope of this Comment, but passenger rail projections perhaps further demonstrate the general resurgence in the popularity of rail. Currently, roughly 15 long-distance, city-to-city passenger rail routes exist in the United States, an entirely inadequate offering for a population that appears to be awakening to the various benefits of railroad transport, particularly in comparison to air travel. *MIDWEST HIGH SPEED RAIL ASS'N & NAT'L ASS'N OF R.R PASSENGERS, LONG DISTANCE TRAINS: A FOUNDATION FOR NATIONAL MOBILITY 3* (2013). Ridership numbers comport with these assessments of a changing cultural outlook when it comes to passenger rail. In 2012, for instance, Amtrak boasted its highest ridership rates in history, or more than 31 million passengers during that fiscal year, a 3.5% increase over 2011 that drove revenues above \$2 billion. *See, e.g.*, Eric Jaffe, *Why Amtrak Keeps Breaking Ridership Records and Will Continue To Do So*, CITYLAB (Oct. 19, 2012), <http://www.citylab.com/politics/2012/10/why-amtrak-keeps-breaking-ridership-records-and-will-continue/3643/> (discussing increased ridership on Amtrak). Even the executive branch has tuned in to public demand. The White House devoted \$8 billion toward a high-speed rail network in the American Recovery and Reinvestment Act of 2009. U.S. DEP'T OF TRANSP., *VISION FOR HIGH SPEED RAIL IN AMERICA 11* (2009).

81. TEX. DEP'T OF TRANSP., *TEXAS RAIL PLAN 1-1* (2010), *available at* <http://www.txdot.gov/inside-txdot/division/rail/texas-rail-plan/final.html>.

82. *Id.* at 3-13 — 3-14.

83. *Id.* at 3-26.

84. *Id.* at 3-29.

85. *Id.* at 3-7.

86. *Id.* at 7-1.

87. *Id.* at 7-16.



the state's passenger inter-urban rail network, which could potentially implicate rail-banked corridors.<sup>88</sup>

### C. Energy Boom: Crude Oil Transport

Meanwhile, a surge in freight rail demand is also occurring as American energy producers, frustrated by gluts arising from inadequate pipeline capacity (assuming the infrastructure is locally available at all), are relying more and more heavily on railroad corridors to move their freshly extracted resources to Texas refineries along the Gulf of Mexico.<sup>89</sup> Explosive growth in Bakken Formation shale oil production in the Dakotas and to the north in Canada has sparked steep spikes in demand for freight-rail transport.<sup>90</sup> For instance, in 2008 freight-rail carriers transported about 9,500 carloads of oil from production sites to refineries.<sup>91</sup> By 2012, that number rose to a staggering 233,698 carloads and in 2013, to more than 407,000.<sup>92</sup> The industry transported almost 230,000 carloads of crude oil in the first six months of 2014 alone.<sup>93</sup>

And even if the strained railroad infrastructure does not buckle under increased transport,<sup>94</sup> in terms of safety, the current routes through

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88. See *id.* at 7-26 (“Passenger rail services and facilities will complement municipalities creating more livable, sustainable urban activity centers. . . . As passenger rail traffic increases, new, higher speed rail services will be launched on separated, dedicated rights-of-way.”).

89. Russell Gold & Chester Dawson, *Dangers Aside, Railways Reshape Crude Market Shipping Crude by Rail Expands as New Pipelines Hit Headwinds and Train Companies Reap Revenue*, WALL ST. J., (Sept. 21, 2014), <http://online.wsj.com/articles/dangers-aside-railways-reshape-crude-market-1411353150> (“Today, about 939,000 barrels of oil a day are riding the rails, about 11% of the total pumped in the U.S., according data [sic] from the federal Surface Transportation Board, chugging across plains and over bridges, rumbling through cities and towns on their way to refineries on the coasts and along the Gulf of Mexico. If all the railcars loaded with crude on one day were hitched to a single locomotive, the resulting train would be about 17 miles long.”).

90. AM. ASS'N OF R.R.S, MOVING CRUDE OIL BY RAIL 3 (2014).

91. *Id.*

92. *Id.*

93. *Id.*

94. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-740, FREIGHT TRANSPORTATION: DEVELOPING NATIONAL STRATEGY WOULD BENEFIT FROM ADDED FOCUS ON COMMUNITY CONGESTION IMPACTS 19 (2014), available at <http://www.gao.gov/assets/670/665972.pdf> (“One reason for the increase in crude oil being shipped by rail is the limitation of the nation's pipeline capacity to handle current oil production. In March 2014, we found that most of the system of crude oil pipelines in the United States was designed primarily to move crude oil from the South to the North; emerging crude oil production centers in Western Canada, Texas, and North Dakota have strained the existing pipeline infrastructure, and in some areas pipeline capacity has been inadequate.”); see also MOVING CRUDE, *supra* note 90, at 3 (“[I]n places like North Dakota that have seen huge increases in crude oil production, the existing pipeline network lacks the capacity to handle the higher production. Railroads have the capacity and flexibility to fill this gap.”).

population centers are becoming disfavored.<sup>95</sup> Stirred by a string of major derailments that have killed scores of people, federal transportation officials and advocacy groups have begun urging railroad companies to reroute crude oil rail services away from population centers.<sup>96</sup> These requirements could divert crude oil shipments away from city centers and instead put them along the outskirts of suburban areas, where railroad companies might avail themselves of rail-banked corridors.

In a sense, the resurgence of the freight-rail industry is the result of happenstance, a fortuitous blend of economic, technological, and natural resource developments that only an oracle on par with Buffett could have predicted in 1983. Yet, Congress apparently had an inkling because this unmistakable rebirth of the industry is exactly the sort of scenario that prompted rail-banking in the first place. It stands to logic that railroad companies will take advantage of that legal mechanism to accommodate increased tonnage and frequency.

Just how, exactly, that reactivation will take place remains somewhat murky, thanks in large part to the rarity of reactivations. The STB has touched on the topic, however, in a select few decisions that require an understanding of how the rail-banked corridors were created in the first place.

### III. RAIL-BANKING & REACTIVATION PROCEDURES

The rail-banking regulatory scheme limits STB's role to a ministerial one.<sup>97</sup> A division within the U.S. Department of Transportation, the STB oversees the rails-to-trails program as part of its broader mission to regulate and adjudicate the American railroad industry, including an active role in

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95. Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains, 79 Fed. Reg. 45016-01, 45029 (proposed Aug. 1, 2014) (stating that crude oil transport authorizations must "where technically feasible, require rerouting to avoid transportation of such hazardous materials through populated and other sensitive areas."); *see also It Could Happen Here: The Exploding Threat of Crude by Rail in California*, NAT. RESOURCES DEF. COUNCIL, <http://www.nrdc.org/energy/ca-crude-oil-by-rail.asp> (last revised June 18, 2014) ("More crude oil was transported by rail in North America in 2013 than in the past five years combined, most of it extracted from the Bakken shale of North Dakota and Montana. In California, the increase in crude by rail has been particularly dramatic, from 45,000 barrels in 2009 to 6 million barrels in 2013. As 'rolling pipelines' of more than 100 rail cars haul millions of gallons of crude oil through our communities, derailments, oil spills and explosions are becoming all too common. Between March 2013 and May 2014, there were 12 significant oil train derailments in the United States and Canada. As oil companies profit, communities bear the cost.").

96. Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains, 79 Fed. Reg. at 45029.

97. *Goos v. I.C.C.*, 911 F.2d 1283, 1295 (8th Cir. 1990).

shepherding line abandonment, a core mission.<sup>98</sup> Its regulations extensively cover matters regarding initial rail-banking but contain no rules explicitly dealing with the reactivation of these corridors.<sup>99</sup>

The following section explains the rail-banking process administratively, from the intent to abandon to reactivation. The process of creating the rail-banked trail is important for two reasons: first, reactivation issues are, for the most part, only understandable within the context of the initial rail-banking; second, groups seeking to adopt these corridors must understand the administrative mechanics of rail-banking if they hope to safeguard non-freight uses upon reactivation, or even thwart it after learning of reactivation proceedings. Thus, a short overview of the process follows.

### A. Rail-Banking Proceedings

When a rail carrier—that is, one that sells “common carrier railroad transportation” in the “general system of rail transportation”<sup>100</sup>—wishes to abandon a corridor, it must first seek approval from the STB, which is statutorily prohibited from permitting any abandonment that could inconvenience the public.<sup>101</sup> Interested trail groups may then alert the STB, through a Statement of Willingness, that they are entering negotiations with the would-be-abandoning railroad.<sup>102</sup>

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98. *About STB: Overview*, SURFACE TRANSP. BD., <http://www.stb.dot.gov/stb/about/overview.html> (last visited Jan. 26, 2015).

99. This lack of reactivation regulation likely stems from the initial law’s own neglect of reactivation. *See generally* 49 U.S.C. § 10102 (noting at least how there is no definition for the word “reactivation” in the definition section). *See, e.g.*, Richard Henick, *Rails-to-Trails: Everyone Benefits, Don’t They?*, 10 TEMP. ENVTL. L. & TECH. J. 75, 79–80 (1991) (“The effect of § 1247(d) today is to allow interim use of the land as recreational trails, while retaining the possibility of use for railroad purposes at some undetermined future date. In fact, under the Trails Act, there is no specific provision for the actual resumption of rail service at all, thus effectively authorizing interim trail use for an indefinite period.”).

100. 49 U.S.C. § 10102 (defining “rail carrier” as “a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation”).

101. *Id.*; *see also* Fex, *supra* note 40, at 678 (providing a background of rails-to-trails litigation and rail-banking). For a discussion of the breadth of federal authority, *see* Reed v. Meserve, 487 F.2d 646, 649 (1st Cir. 1973) (“The phrase ‘public convenience and necessity’ is not, of course, infinitely elastic. The ICC may not ignore the effects of its decisions on interstate commerce or competition for traffic. The phrase ‘must be given a scope consistent with the broad purpose of the Transportation Act of 1920 to provide the public with an efficient and nationally integrated railroad system.’”) (internal citations omitted) (quoting I.C.C. v. Ry. Labor Execs. Ass’n, 315 U.S. 373, 376 (1942)).

102. 49 C.F.R. § 1152.29(a)(2).

Upon receiving written notice of the negotiations, the STB issues a NITU.<sup>103</sup> The agency retains the discretion to issue the NITU only “[i]f the carrier is willing to negotiate an agreement, and the public convenience and necessity permit abandonment.”<sup>104</sup> Once issued, the NITU creates a 180-day window during which the abandonment is postponed but the railroad may proceed regardless by canceling its service and dismantling its tracks.<sup>105</sup>

If the parties reach an agreement within that timeframe, the railroad and trail group then jointly file the following with the agency: (1) a copy of the NITU; (2) an express trail group acknowledgement that it assumes responsibility for the trail; (3) an express acknowledgment by the trail group that it will cede to railroad use if future reactivation is approved; and (4) the date of the trail’s transfer from the railroad to the group.<sup>106</sup> If negotiations fail, the abandonment proceeds, state property laws take hold, and the STB loses its jurisdiction over the line.<sup>107</sup>

Prior to issuing a rail-banking decree, the STB’s only role in the final approval is to ensure it receives from the trail group an assurance that the agreement contains the above statutorily derived provisions. Any additional provisions within the agreement do not go to the STB for review.<sup>108</sup> Upon satisfaction of its requirements, the agency issues an order establishing interim trail use that preserves the STB’s continued jurisdiction over the trail indefinitely, thus keeping the corridor eligible for reactivation.<sup>109</sup>

Notably, trail groups should be sure to finalize an agreement with a railroad company as soon as possible after the issuance of a NITU, because even though the STB is generally permissive of negotiation extensions, the STB’s loss of jurisdiction typically triggers automatic termination of the

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103. *Id.* at § 1152.29(d)(2). The STB might also grant a Certificate of Interim Trail Use (“CITU”), depending on whether the railroad is seeking to abandon via traditional processes or through an expedited proceeding. The distinction is irrelevant because both filings have identical legal effect, at least in the rail-banking context, so this Comment lumps both authorizations into the NITU category. *See also* Fex, *supra* note 40, at 679–80 (“Because the CITUs are issued pursuant to petitions filed under the abandonment process, which is typically more onerous, NITUs are more common in the Trails Act takings cases.”).

104. 49 C.F.R. § 1152.29(b)(1)(ii).

105. *Id.* at § 1152.29(d)(2); *see also* Gregg H. Hiramawa, *Preserving Transportation Corridors for the Future: Another Look at Railroad Deeds in Washington State*, 25 SEATTLE U. L. REV. 481, 488–89 (2001) (providing a relatively straightforward account of the rail-banking process administratively).

106. 49 C.F.R. § 1152.29(f)(1).

107. *Id.* at § 1152.29(e)(2).

108. For an instance of the STB rightfully declining to ratify a trail agreement, *see* Md. Transit Admin. v. Surface Transp. Bd., 700 F.3d 139, 144 (4th Cir. 2012).

109. *See* Wright & Hester, *supra* note 18, at 455–56 (“[Rail-banking] is a presumptive showing of intent not to abandon.”).

easement.<sup>110</sup> After all, “adverse consequences may flow from loss of ICC jurisdiction to corridor preservation efforts” because “as with the King’s horses and men in the Humpty Dumpty nursery rhyme, ICC cannot put a corridor back together again once it has been scrambled.”<sup>111</sup>

Some commentators have speculated that the trail group presumably must in fact open a trail on the corridor, but it seems likely that the railbed left after the removal of tracks—regardless of any additional signage, fencing, etc.—alone would satisfy that requirement.<sup>112</sup> The STB has also permitted trail groups to repurpose the corridors for a variety of other uses “so long as [they] do not interfere with possible future freight rail use.”<sup>113</sup> For trail groups, this permits a variety of “creative possibilities” like trolleys or other forms of passenger light rail so long as they parallel the trails themselves and do not interfere with preservation of rail service.<sup>114</sup> As noted above, many local governments have seized these public-transit opportunities and assumed possession of corridors that are then equipped with light-rail tracks and linked to surrounding transportation networks.<sup>115</sup>

### B. Reactivation Proceedings

When the need arises to resume rail operations along any length of the rail-banked corridor, a railroad carrier—regardless of whether it was the corridor’s original carrier—asks STB officials to vacate the NITU.<sup>116</sup> In most cases, the STB promptly vacates it.<sup>117</sup> Once the STB vacates the NITU, the railroad company must<sup>118</sup> then rebuild tracks and resume operations.<sup>119</sup>

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110. See Wright, *supra* note 27, at 447 (“As mentioned above, the railbanking statute serves to continue federal jurisdiction over the corridor and to prevent abandonment under state law even though the traditional elements of abandonment might be met under some states’ laws when the corridor is converted to a recreational trail.”).

111. Montange, *supra* note 20, at 156.

112. *Id.* at 155.

113. *Id.*

114. *Id.* This scenario, the addition of light passenger rail alongside the trail, is discussed more fully *infra*, Part VI.

115. Local governments are subject to the same restrictions as private groups, meaning that reactivating the corridors will force the removal of the passenger service, at least it would absent some sort of compromise or contractual agreements with the reactivating railroad company.

116. See Fex, *supra* note 40, at 678 (offering a breakdown of the regulatory process behind railbanking).

117. Owensville Terminal Co.—Abandonment Exemption—in Edwards & White Cntys., Ill., & Gibson & Posey Cntys., Ind., 2005 WL 2292012, at \*2.

118. Once railroads reactivate railroad corridors connected to the national rail network, they once again become subject to federal regulation as common carriers. 49 U.S.C. § 10501(a)(2) (requiring STB oversight of any rail operations between two places within a state along corridors connected to the interstate network; between states or a state and a territory; between territories; within a territory; between states but through a foreign country; and between a state and a foreign country). Common

Trail-group input is conspicuously absent from the administrative process, even if the entities have grounds to dispute reactivation because, for instance, the railroad violated its rail-banking agreement in some aspect of reinstating service. Regardless, trail holders suddenly must relinquish a tract of land that, in the time since conversion, has cost vast sums to develop while becoming a beloved aspect of a community.<sup>120</sup> The coming years could see that very scenario unfold as technological gains and road congestion turn passengers' and shippers' attention to railroads, which in turn will look toward all those miles of rail-banked corridors to alleviate infrastructure bottlenecks.<sup>121</sup>

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carrier status requires that railroads must resume rail service along those corridors if public demand for such service exists. *See Gen. Foods Corp. v. Baker*, 451 F. Supp. 873, 875–76 (D. Md. 1978) (holding that “[d]iscontinuation of rail service can cause great harm, and railroads are held to a higher standard of responsibility than most private enterprises. They may not, on their own authority, refuse to maintain service when it becomes inconvenient to do so or because profits are declining. A railroad may not make a unilateral decision to abandon a line, but must apply to the Interstate Commerce Commission for a certificate”) (internal citations omitted); *see also* 49 U.S.C. § 11101 (2012) (providing rules for rail carrier service and rates). If a carrier fails to apply for an abandonment proceeding, it could face STB sanctions for a host of requirements attendant to that status, ranging everywhere from employment standards to heightened tort liability, and expose itself to liability for the economic harms borne by would-be shippers caused by its refusal to reinstate rail operations. *See, e.g., GS Roofing Products Co. v. Surface Transp. Bd.*, 143 F.3d 387, 394 (8th Cir. 1998) (holding a railroad liable for damages that shippers incurred due to unavailability of rail services because the railroad “failed to restore service within a reasonable time”). Thus, railroad companies that reactivate a line must reinstate rail services, lest they face liability to surrounding businesses that might rely on their freight line. Their alternative, of course, is to again seek abandonment authorization from the STB, which could then trigger another rail-banking cycle. Railroad companies do have another option, one the STB has granted at least once in the past. BG & CM R.R.—Exemption from 49 U.S.C. Subtitle IV, BG & CM R.R.—Acquisition & Operation Exemption—Camas Prairie Railnet, Inc., No. 34399 & No. 34398, 2003 WL 22379168, at \*1 (Surface Transp. Bd. Oct. 17, 2003). That option entails the company’s filing for a new NITU that would name itself as the interim trail sponsor. *Id.* The STB granted such a request in 2003 for a fifty-mile stretch of Idaho trail a local company sought to reactivate only seasonally. *Id.* In doing so, the company received a right to use the right-of-way without any common-carrier obligations. *Id.*

119. 49 C.F.R. § 1152.29(a)(3) (requiring that putative trail groups “acknowledg[e] that interim trail use is subject to . . . possible future reconstruction and reactivation of the right-of-way for rail service”).

120. *See, e.g., THE MIDDLE GA. REG’L DEV. CTR., CENTRAL GEORGIA RAIL-TO-TRAIL FEASIBILITY STUDY* 24 (2007) (estimating that the cost of constructing a 33 mile rail-trail in Georgia would average out to about \$100 per foot for an overall total cost of \$17.5 million. That figure does not include the costs of actual acquisition from the railroad.).

121. *See Machalaba, supra* note 7 (concluding that railroads could soon enjoy a “comeback and are poised to become busier places in the years ahead. Forecasts for freight growth are substantial, prompting railroads to plan capacity additions”); *see also* Bowman & Rosenberg, *supra* note 14, at 625 (“With the current national rail system relatively sleek and efficient, limited to a handful of major carriers, the rate of abandonments has decreased, indicating that we are unlikely to see a significant increase in the railbank. However, the slimness of the system means that we may see more reactivations as transportation pressures increase.”).

*C. Who May Reactivate*

The initially abandoning railroad does retain a reactivation right that it may sell to third parties with STB approval.<sup>122</sup> The STB has dubbed this future interest “a residual common carrier obligation” retained when the railroad hands over the right-of-way to the trail sponsor.<sup>123</sup> Moreover, trail-to-rail reactivation may occur at the behest of *any* railroad, not just the one that initially sought to abandon or that purchased the right from the abandoning company, so long as it proves its status as a bona fide operator with the resources to actually reinstate rail service.<sup>124</sup> If another, non-reactivation-interest-holding carrier wishes to reactivate the line, it must first show the holder of that right has refused to do so and continued dormancy of the corridor will inconvenience the public.<sup>125</sup>

STB officials denied such a request in 2011.<sup>126</sup> A railroad carrier, GNP, sought to reactivate a nine-mile stretch of rail-banked corridor in Washington that another railroad company had rail-banked years before.<sup>127</sup> King County, as one of several trail sponsors along the stretch slated for reactivation, had earlier acquired from the originally abandoning railroad the right to reactivate.<sup>128</sup> The county and other sponsors objected to GNP’s reactivation request.<sup>129</sup> King County ultimately defeated reactivation by showing the STB that the would-be reactivating carrier had recently entered involuntary bankruptcy proceedings and likely would have lacked the financial resources to recommence rail operations along the line.<sup>130</sup> The STB declared that the potential bankruptcy belied GNP’s assertions that it was a bona fide carrier.<sup>131</sup>

122. See, e.g., *Iowa Power, Inc.—Constr. Exemption—Council Bluffs, Ia.*, 8 I.C.C.2d 858, 867 (Dec. 11, 1990) (“Moreover, in this case a non-carrier (not the abandoning railroad) seeks to restore active rail service. Given the fact that the abandoning carrier voluntarily agreed to the interim trail use (and rail banking), prior to our modification of a NITU or CITU, we find that the abandoning carrier, if available, should at least concur in the non-carrier’s proposal.”).

123. *Norfolk & W. Ry. Co.—Abandonment Between St. Marys & Minster in Auglaize Cnty., Ohio*, 9 I.C.C.2d 1015, 1018 (Oct. 15, 1993).

124. *GNP Rly., Inc.—Acquisition & Operation Exemption—Redmond Spur & Woodinville Subdivision, BNSF Ry. Co.—Abandonment Exemption—in King Cnty., Wash., BNSF Ry. Co.—Abandonment Exemption—in King Cnty., Wash.*, FD 35407, 2011 WL 2421150 (Surface Transp. Bd. June 15, 2011).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at \*1 (“In the September 2009 Decision, the Board granted King County’s request to acquire BNSF’s rights and obligations, including the right to reinstate rail service in the future.”).

129. *Id.*

130. *Id.*

131. *Id.*

In addition to insolvency concerns, the STB also questioned GNP's assertions that several manufacturers along the stretch had expressed interest in contracting with the railroad to ship its freight.<sup>132</sup> Those it cited as potential clients also lacked the necessary facilities to move their products by rail.<sup>133</sup> Also, GNP had recently entered into an agreement with local authorities that it would specifically *not* conduct freight-rail operations along the very stretch it sought to reactivate.<sup>134</sup>

Two years later, the STB denied another proposed reactivation on that same corridor by a third-party railroad due to similar, but even less specifically documented, concerns about solvency.<sup>135</sup> The STB cited the unprofitability of the carrier's nearby operations, which were subsidized by other lines.<sup>136</sup> Moreover, high property values in the area also cast doubt on whether the operator could afford the up-front costs of acquiring additional necessary rights-of-way following the board's permission to do so.<sup>137</sup>

Also related to reactivation processes, the STB issued a decision in 2009 that would not require that reactivating railroad companies complete an additional Environmental Impact Study, pursuant to the National Environmental Policy Act applied to the STB in 49 U.S.C. § 10901.<sup>138</sup> Although the STB's regulations require such a study in the case of new or extended rail corridors, it remained unclear prior to this decision whether the requirements also applied to reactivations.<sup>139</sup> This ruling should only further encourage future reactivation by removing the sometimes-prohibitive costs of such studies, which can exceed \$20 million.<sup>140</sup>

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132. *Id.*

133. *Id.*

134. *Id.*

135. Ballard Terminal R.R.—Acquisition & Operation Exemption of Woodinville Subdivision, BNSF Ry. Company—Abandonment Exemption—in King Cnty, Wash., FD 35731, 2013 WL 3962853 (Surface Transp. Bd. Aug. 1, 2013).

136. *Id.*

137. *Id.*

138. R.J. Corman R.R./Pa. Lines Inc.—Constr. & Operation Exemption—in Clearfield Cnty., Pa., No. 35116, 2009 WL 2221010, at \*1 (Surface Transp. Bd. July 27, 2009); *see also* Maureen E. Eldredge, *Who's Driving the Train? Railroad Regulation and Local Control*, 75 U. COLO. L. REV. 549, 560 (2004) (explaining the National Environmental Policy Act process pursuant to 49 U.S.C. § 10901).

139. *See, e.g.*, Transcript of Public Hearing at 119–21, Twenty-Five Years of Rail Banking: A Review and Look Ahead (Surface Transp. Bd. July 8, 2009) (Ex Parte No. 690), *available at* <http://www.stb.dot.gov/TransAndStatements.nsf/transcriptsandstatements?openview> (testimony of Eric Strohmeier, CNJ Rail Corp.) (discussing the additional costs associated with the application requirements for reactivations).

140. *Id.* at 121.



## IV. TRAIL-GROUP OPPOSITION: DISPUTING REACTIVATION

Reactivation has in at least two instances prompted trail groups to dispute reactivation attempts.<sup>141</sup> The popularity of the rail-banked trails—and the sometimes hefty financial investment required for trail conversion<sup>142</sup>—suggests opposition could become common in future reactivations.<sup>143</sup> But judging from the language and tone of STB decisions on the matter, trail groups may want to take heed that the agency is highly deferential to the reactivation of rail service and will ardently refuse to address what, if anything, the railroad must convey to the trail group in compensation for the now-defunct trail.<sup>144</sup> Trail groups thus may want to be careful to create contractual, private remedies for themselves during initial negotiations with the railroads prior to the establishment of the trail. Even the non-fulfillment of those, however, will not weigh at all in the STB's consideration of whether to vacate the interim use.<sup>145</sup>

The STB drove home the point in resolving a dispute out of Georgia in 2003.<sup>146</sup> A trail group petitioned the agency seeking an order forcing the reactivating railroad, Georgia Great Southern, to compensate it for the fair-market value of the roughly 14-mile corridor the company sought to reactivate.<sup>147</sup> The group claimed that it had purchased the right-of-way through an outright sale seven years earlier and thus the railroad, which

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141. Ga. Great S. Div., S.C. Cent. R.R.—Abandonment & Discontinuance Exemption—Between Albany & Dawson in Terrell, Lee, & Dawson Cntys., Ga., 2003 WL 21132515, at \*3 (“In short, an interim trail use arrangement is subject to being cut off at any time by the reinstatement of rail service. If and when the railroad wishes to restore rail service on all or part of the property, it has the right to do so, and the trail user must step aside.”).

142. See, e.g., THE MIDDLE GA. REG’L DEV. CTR., *supra* note 120, at 24 (estimating that the cost of constructing a 33 mile rail-trail in Georgia would average out to about \$100 per foot for an overall total cost of \$17.5 million. That figure does not include the costs of actual acquisition from the railroad).

143. Bowman & Rosenberg, *supra* note 14, at 594 (discussing how “there are those instances when a railroad wants to reactivate, and the trail group opposes it, that their interests diverge. Although this has not occurred often, it can be a bitter and expensive process if the parties do not understand the rights that each possesses”).

144. The STB takes a straightforward, almost mechanical, approach to reactivation. See, e.g., Owensville Terminal Co.—Abandonment Exemption—in Edwards & White Cntys., Ill., & Gibson & Posey Cntys., Ind., 2005 WL 2292012, at \*1 (“Where an application to construct (or acquire as is the case here) and operate a rail line over the right-of-way is authorized [under STB regulations] the Board will reopen the abandonment proceeding and vacate the NITU. BG&P has complied with the requirements . . . regarding a request to vacate the NITU. Therefore, vacation of the NITU will be granted so that rail service can be restored on the line.”).

145. Ga. Great S. Div., S.C. Cent. R.R.—Abandonment & Discontinuance Exemption—Between Albany & Dawson in Terrell, Lee, & Dawson Cntys., Ga., 2003 WL 21132515, at \*4.

146. See generally *id.* (discussing how the STB will not consider a private, contractual arrangement for a trail group to buy a right-of-way in their decision to reactivate the rail line).

147. *Id.* at \*4.

sold it at a discount and claimed the sale as a tax write-off, owed it market value for seizing the group's interest in the land.<sup>148</sup>

The agency demurred, refusing to dictate anything about the terms of the reactivation because “the Trails Act does not speak to compensation, either by a railroad to an interim trail sponsor for reactivation of rail service, or by an interim trail sponsor to a railroad to use the property on an interim basis as a trail.”<sup>149</sup> Any terms beyond the limited specific provisions of the statute—or, specifically, that trail sponsors assume certain liabilities for the corridor and that they acknowledge the potential for reactivation—exist only in the “voluntary agreement of the parties,” and the STB does not “oversee, review, approve, or interpret the terms of the parties’ trail use agreements. Such issues are for a court to address.”<sup>150</sup>

For trail groups, perhaps the most stirring takeaway from this decision is the fragility of their default interest in the corridor. Even groups that *purchase* rights-of-way from railroads at rail-banking do not have any absolute rights to indefinite use of the trail.<sup>151</sup> Thus, prospective trail sponsors should secure certain guarantees from the railroad before expending time and money in the creation of trails.<sup>152</sup> The Rails-to-Trails Conservancy, the nation's most ardent rail-banking advocacy group, admonishes prospective trail groups to do exactly that.<sup>153</sup> Specifically, the nonprofit counsels:

[P]rudent trail managers must anticipate that contingency in order to protect their substantial investment in the acquisition and

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148. *Id.*

149. *Id.* at \*5.

150. *Id.*

151. *See, e.g.*, Transcript of Public Hearing at 121–22, Twenty-Five Years of Rail Banking: A Review and Look Ahead (Surface Transp. Bd. July 8, 2009) (Ex Parte No. 690), available at <http://www.stb.dot.gov/TransAndStatements.nsf/transcriptsandstatements?openview> (testimony of Eric Strohmeier, CNJ Rail Corp.) (discussing with STB officials a case in which a right-of-way was conveyed to a city “in its entirety” and “what isn’t clear in that particular case is how do you reactivate rail service? . . . But the question had always come up of, ‘How do I get the service back if I want to get the service back?’” Strohmeier went on to note that the STB has historically restored the line regardless in those situations).

152. The Association of American Railroads urges the STB to encourage such provisions within the agreements. Its CEO, Edward R. Hamberger, has asked the board to “informally encourage, but not require, parties in their agreements to identify potential issues that may arise.” He went on to note that one of these included issues is reactivation and whether the railroad should compensate trail groups upon restoring rail service. Transcript of Public Hearing at 111, Twenty-Five Years of Rail Banking: A Review and Look Ahead (Surface Transp. Bd. July 8, 2009) (Ex Parte No. 690), available at <http://www.stb.dot.gov/TransAndStatements.nsf/transcriptsandstatements?openview> (testimony of Edward Hamberger, Ass’n of Amer. R.R.).

153. *See* Ferster, *supra* note 29, at 6 (noting that conservancy groups should secure guarantees from railroads before expanding their trails and incurring expenses).

development of the trail and associated facilities in the event of rail service reactivation. Of particular importance is the need to establish terms and conditions such as compensation and future rights to railbank, since the STB regards its role in the event of a petition to vacate a railbanking order as being ministerial in nature.<sup>154</sup>

Even in circumstances where the railroad is in breach of those private agreements, at least in the STB's eyes, the railroad may reactivate the line regardless of its obligations to the trail groups.<sup>155</sup>

Railroad companies' vacation requests are of growing concern for small entities that have acquired railroad rights-of-way and, especially when those entities are city and county governments, plan to use their newly acquired corridors to build light rail transportation routes.<sup>156</sup> This potential conflict places the burden on courts to "take into account the dual purposes of the federal statute and attempt to devise a solution that serves both ends."<sup>157</sup> Railroad companies, under this more pro-trail approach, should be required to pay fair market value of the trail or, at the very least, reimburse the trail groups for the costs incurred in the conversion.

These sorts of issues are likely to arise in disputed future reactivations. Opposition to reactivation might be fierce. So, too, might be those on the other side calling for expanded railroad use. As one study points out, the complexity of reactivation battles only grow more dizzying when one considers the additional interest groups that might enter the fray, including mass transportation or environmental activists with their own stake in the new lines.<sup>158</sup> After all, "rail line service restorations do not take place in a vacuum. Environmental and recreation groups are often among the more vocal supporters of the rail mode, given its environmental and fuel consumption advantages."<sup>159</sup> The study suggests a compromise: rails-with-trails.<sup>160</sup>

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154. *Id.*

155. Ga. Great S. Div., S.C. Cent. R.R.—Abandonment & Discontinuance Exemption—Between Albany & Dawson in Terrell, Lee, & Dawson Cntys., Ga., 2003 WL 21132515, at \*5.

156. Montange, *supra* note 20, at 153 n. 76.

157. Bowman & Rosenberg, *supra* note 14, at 594.

158. NAT'L COOP. HIGHWAY RESEARCH PROGRAM, TRANSP. RESEARCH BD., NCHRP SYNTHESIS 374: PRESERVING FREIGHT AND PASSENGER RAIL CORRIDORS AND SERVICE 11 (2007).

159. *Id.*

160. *Id.*

## V. RAILS-WITH-TRAILS: A GRAND COMPROMISE

Trail groups might have another option: the reestablishment of rail service parallel to the trails, both remaining on the right-of-way after reactivation, a simultaneous use of the land called rails-with-trails.<sup>161</sup> According to the Rails-to-Trails Conservancy (“RTC”), the model has gained significant popularity beginning in the early 2000s.<sup>162</sup> By 2013, these types of trails represented nearly 10% of rail-trails, and their prevalence was “growing rapidly.”<sup>163</sup> That same year, the RTC catalogued some 161 rails-with-trails across 41 states, a “significant increase” over a similar count ten years earlier when 100 fewer were in existence across 20 states.<sup>164</sup> Another 60 rail-with-trail projects across the country were in various stages of development at the time of this Comment’s writing.<sup>165</sup>

Nevertheless, rails-with-trails remains a viable option for reactivated freight lines (or even interstate passenger lines thereon). This section begins with a discussion of rails-with-trails in the rail-banking context, arguing that trail groups should, at the very least, seek to preserve the trails alongside reactivated lines in the event they fail to stave off reactivation entirely.

The need for sound right-of-way agreements in rail-banking discussions, however, is just as—or even more—acute in the rails-with-trails context. Rail operators are particularly “hostile” to proposed rails-with-trails reactivations “because they seldom generate revenue, may carry significant liability risks, and may serve to limit or at least complicate future efforts to add rail capacity through new, parallel second main tracks, or passing sidings.”<sup>166</sup> Long-range carriers, in particular, oppose the retention of trails paralleling the rail lines after reactivation.<sup>167</sup> Some have gone so far as to issue “public policy or guidance documents that explicitly discourage rail-with-trail development in their corridors.”<sup>168</sup> These

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161. *Balt. & Ohio R.R., Metro. S. R.R. & Washington & W. Md. Ry. Co.—Abandonment & Discontinuance of Serv.—in Montgomery Cnty., Md., & D.C.*, 1990 WL 287371, at \*2 (“The reuse of a right-of-way for a public purpose concurrently with a trail use has previously been found consistent with the Trails Act.”).

162. RAILS-TO-TRAILS CONSERVANCY, *AMERICA’S RAILS-WITH-TRAILS: A RESOURCE FOR PLANNERS, AGENCIES AND ADVOCATES ON TRAILS ALONG ACTIVE RAILROAD CORRIDORS* 4 (2013).

163. *Id.*

164. *Id.*

165. *Id.*

166. NAT’L COOP. HIGHWAY RESEARCH PROGRAM, *supra* note 158, at 12.

167. *Id.*

168. RAILS-TO-TRAILS CONSERVANCY, *AMERICA’S RAILS-WITH-TRAILS*, *supra* note 161, at

companies base their rail-with-trail aversion to possible interference with “future expansion,” safety hazards, trespass, and tort liability.<sup>169</sup>

Short line carriers, although still wary, have appeared more amenable to the continuation of trail activities along the corridors.<sup>170</sup> However, many have adopted standardized requirements that trail sponsors must meet before these carriers agree to permit continued trail use.<sup>171</sup> The line in question must be a low-frequency, low-speed operation.<sup>172</sup> Most salient for trail groups who hope to negotiate for such a scenario, these requirements include a statutory scheme that is “compatible with joint use between trails and railroads.”<sup>173</sup> Moreover, trail operators—in addition to compensating the carrier through sale or lease for the continued trail—must pay the necessary costs to maintain liability insurance.<sup>174</sup>

The takeaway is similar to that of standard, trail-abolishing reactivations: rails-with-trails proponents should negotiate for these provisions when their leverage is highest—that is, when the railroad company is eager to disentangle itself from tax and tort liability without having to permanently surrender a corridor that could prove useful in the future. Additionally, trail groups should heed the advice of the United States Department of Transportation and, in the event a rail-with-trail is authorized, ensure that railroad officials are intimately involved at every stage of the design and implementation process. As one North Texas trail builder reported, the railroad industry is “formal” and is keen to play an active role in the trail’s creation.<sup>175</sup>

## VI. THE REGULATORY & STATUTORY VOID

Efforts to expand rails-with-trails will lose momentum if state and federal laws fail to address the challenges that most frequently frustrate them—not least of which being the lack of incentive for railroads to agree to the trails—and continue to treat reactivation in general as though it were nothing more than a congressional subterfuge to promote more parks.<sup>176</sup> These initiatives are the best option to serve the greatest number of

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169. U.S. DEPT. OF TRANSP., RAILS-WITH-TRAILS: LESSONS LEARNED: LITERATURE REVIEW, CURRENT PRACTICES, CONCLUSIONS 28 (2002), available at [https://www.fhwa.dot.gov/environment/recreational\\_trails/publications/rwt/railswithtrails.pdf](https://www.fhwa.dot.gov/environment/recreational_trails/publications/rwt/railswithtrails.pdf).

170. *Id.* at v.

171. *Id.* at 29.

172. *Id.*

173. *Id.*

174. NAT’L COOP. HIGHWAY RESEARCH PROGRAM, *supra* note 158, at 12.

175. U.S. DEPT. OF TRANSP., *supra* note 169, at 28.

176. *See, e.g.,* DELONG, *supra* note 56, at 268 (discussing state and federal court responses to challenges to rails-with-trails initiatives).

interests, whether economics, environmentalism, or recreation. All parties benefit from rails-with-trails, but the silence about them on the state and federal levels could prove deleterious to their continued adoption.

Following a general discussion of states' roles in rail-banking, this section argues that rails-*to*-trails are sometimes statutorily addressed by the states, but those same states have failed to fill in the legislative gap by ignoring reactivation, particularly as rails-*with*-trails, where they have the most authority to act. Lastly, this section then goes on to argue that the STB (if it has the authority, which is arguable) or Congress should implement a second regulatory scheme to accommodate the coexistence of light passenger rail-with-trail and freight rail on reactivated railroad corridors.

#### *A. Rail-Banked, Jr.*

Many states have officially embraced rail-banking as an alluring means toward both recreational and economic goals. Some have enacted statutes specifically endorsing and regulating the program. Pennsylvania,<sup>177</sup> Minnesota,<sup>178</sup> Tennessee,<sup>179</sup> Indiana,<sup>180</sup> California,<sup>181</sup> Louisiana,<sup>182</sup> and Maryland<sup>183</sup>, for example, have all enacted statutes aimed at promoting the establishment of new trails. Altogether, roughly 30 states have passed “mini-rail-banking” statutes, though few of these laws explicitly name railroad corridor preservation as their purpose.<sup>184</sup>

These state statutes take a variety of forms. Some promote trail growth, such as Wisconsin's statute that authorizes the state's parks department to acquire would-be abandoned railroads directly, regardless of whether a

177. 32 PA. STAT. ANN. § 5614 (West) (authorizing state parks department “to participate in abandonment proceedings with the Interstate Commerce Commission for the purposes of acquiring available railroad rights-of-way for use as interim trails or railbanking as set forth in section 8(d) of the National Trails System Act”).

178. MINN. STAT. ANN. § 222.63 (West) (“A state rail bank shall be established for the acquisition and preservation of abandoned rail lines and rights-of-way, and of rail lines and rights-of-way proposed for abandonment in a railroad company's system diagram map, for future public use including trail use[.]”).

179. TENN. CODE ANN. § 11-11-111 (West) (“The department shall review all formal declarations of railroad right-of-way abandonments by the interstate commerce commission, for possible inclusion into the state trails system.”).

180. IND. CODE ANN. § 8-4-5-6-1 (West) (“A recreational trail may be authorized under this chapter on any part of a corridor that has rail traffic with the consent of the rail traffic operator and owner after consideration of appropriate and safe design and operation.”).

181. CAL. PUB. RES. CODE §§ 5070–5077.8 (West)

182. LA. REV. STAT. ANN. § 56:1781.

183. MD. CODE ANN., NAT. RES. § 5–1010 (West) (authorizing state transportation officials to acquire corridors and “request interim use of the property for public recreational use”).

184. RICHARD R. POWELL & MICHAEL ALLAN WOLF, POWELL ON REAL PROPERTY, § 78A.11[3] (Michael Allan Wolf ed., LexisNexis Matthew Bender 2014).

private entity has stepped forward.<sup>185</sup> A Michigan law grants volunteer trail builders “the same immunity from civil liability as a [parks] department employee” during work outings.<sup>186</sup> Others protect the interests of adjacent landowners, such as Kentucky’s statute creating a presumption that individuals working on or using the trail, but who stray onto the landowner’s property, are trespassers, shielding landowners from tort liability for errant trail users entering their property.<sup>187</sup>

Generally speaking, according to one scholar, state rail-banking falls into five categories: (1) statutes hailing rail preservation as an opportunity to create linear parks and providing for it in master plans; (2) statutes permitting trail conversions, including some that make abandoned corridors the preferred site of new trails; (3) statutes forcing abandoning railroad companies to give a certain amount of notice so that putative trail groups have time to file for rail-banking; (4) statutes authorizing state departments to acquire rail-banked corridors; and (5) statutes providing the framework for government acquisition while also securing, or tweaking, state private property rights.<sup>188</sup>

Although the STB’s plenary authority to regulate reactivations largely preempts any interfering state attempts to do the same, states nonetheless have a variety of avenues to better safeguard their own converted trails in the event of reactivation. Most notably, states stand in a particularly unique position to further rails-with-trails programs, yet all but a small handful of states have failed to legislate the matter—even though STB officials have explicitly left it to state capitols to establish guidelines ensuring the safety of rail-with-trail corridors, noting that the agency “do[es] not police trail use agreements. The appropriate remedy for safety problems lies with State and local authorities.”<sup>189</sup>

Once again, Texas serves a fitting example of the state-level disconnect between policy and law. On the one hand, the Texas Parks & Wildlife Department expressly committed, among other trail initiatives, in its strategic plan<sup>190</sup> to “[p]ursue funding for acquisition of land, conservation

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185. WIS. STAT. ANN. § 85.09 (West).

186. MICH. COMP. LAWS ANN. § 324.72105a (West).

187. KY. REV. STAT. ANN. § 511.090 (West).

188. POWELL & WOLF, *supra* note 184, at § 78A.11[4].

189. Balt. & Ohio R.R., Metro. S. R.R. & Washington & W. Md. Ry. Co.—Abandonment & Discontinuance of Serv.—in *Montgomery Cnty., Md., & D.C.*, 1990 WL 287371, at \*3.

190. See TEX. PARKS & WILDLIFE DEP’T, LAND AND WATER RESOURCES: CONSERVATION AND RECREATION PLAN 24 (2013), available at [https://tpwd.texas.gov/publications/pwdpubs/media/pwd\\_pl\\_e0100\\_0687\\_2013.pdf](https://tpwd.texas.gov/publications/pwdpubs/media/pwd_pl_e0100_0687_2013.pdf) (explaining how Texas Parks & Wildlife Department will “maintain, restore and protect healthy terrestrial ecosystems on public lands”).

easements, and the purchase of development rights from willing sellers.”<sup>191</sup> Texas, on the other hand, is calling for the continued conversion of railroad tracks that it—as home to the nation’s most railroad miles and end-destination oil refineries—will likely need in the coming years, but it has failed to enact any statutes pertaining to the establishment of rails-with-trails. Although rails-with-trails initiatives can and have gone forward without state statutory oversight, these local laws help smooth such efforts.<sup>192</sup> In addition to the five broad categories of identified state laws that promote rail-banking in the first place, another category is warranted but lacking: those that provide guidance for the implementation of rails-with-trails.

### *B. Rails-with-Trails: Increasing State Involvement*

The RTC is calling on states to pass new laws that preserve, or at least provide guidelines for, nature trails on rail-banked lines upon their reactivation.<sup>193</sup> The group is also calling for more research into safety guidelines for rails-with-trails designs.<sup>194</sup> Such guidelines are lacking, leaving trail groups and already-reluctant railroads in the lurch.<sup>195</sup> But safety guidelines should only be a small first step. More assertive, more sweeping, and more innovative rails-with-trails legislation is needed at the state level. Some states, however, are already leading the way.

Such legislation would likely include, in part, rather straightforward provisions, such as the rails-with-trails language in Pennsylvania’s own local rails-to-trails statutory scheme with multiple provisions aimed at augmenting and working in tandem with federal rails-to-trails initiatives, even going so far as to establish an entire office within its parks department devoted to coordinating the program’s statewide success.<sup>196</sup> The rails-with-trails portion of the law directs the state’s transportation department to

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191. *Id.*

192. Texas, for instance, has already seen the creation of a rail-with-trail. *See, e.g.,* Jake Lynch, *Rail-Trail Sparks Bike Boom in Denton, Tex.*, RAILS-TO-TRAILS CONSERVANCY (Dec. 9, 2011) (“A rarity in the field of corridor abandonments, but not without precedent, rail service was reactivated in June of this year. . . . The rail-to-trail has now become a rail-*with*-trail.”).

193. RAILS-TO-TRAILS CONSERVANCY, *AMERICA’S RAILS-WITH-TRAILS*, *supra* note 162, at 9–10.

194. *Id.* at 9.

195. *Id.*

196. 32 PA. STAT. ANN. § 5613 (West); *see also* IND. CODE ANN. § 8-4.5-6-1 (West) (providing that “[a] recreational trail may be authorized under this chapter on any part of a corridor that has rail traffic with the consent of the rail traffic operator and owner after consideration of appropriate and safe design and operation”).



contemplate the feasibility of leaving trails intact after reactivation and that it must do so if “feasible as determined by the department.”<sup>197</sup>

Rail-with-trail-specific Recreational Use Statutes (“RUS”) offer another trail-group-friendly option for states. RUS provisions, which exist in some form in every state, all but completely shield from liability certain types of private individuals who open their land to the public.<sup>198</sup> Maine specifically provides in its RUS that applicable premises “includes railroad property, railroad rights-of-way and utility corridors to which public access is permitted.”<sup>199</sup> In 2010, Virginia similarly included railroad rights-of-way into the scope of its RUS.<sup>200</sup> Part of the elegance of this tactic is its breadth. These statutes not only protect the railroad companies—thus thawing their cool-heeled approach to rails-with-trails—but they also might protect trail groups. Maine’s RUS, for instance, applies to “holder[s] of an easement or occupant[s] of premises.”<sup>201</sup>

Even absent language applying the statute to both railroads and trail groups, courts have interpreted them to apply to both.<sup>202</sup> A Washington appellate court held in 2012 that a city, equivalent to a trail operator in present context, stood immune from a wrongful death suit under a RUS worded to include “owner and possessors.”<sup>203</sup> The plaintiff, the estate of a bicyclist struck dead by a train at the intersection of a city trail and a freight line, claimed the statute did not shield the city because it did not “own” the crossing.<sup>204</sup> Although not the dispositive issue in the end, the court reasoned that the statute’s language barred unintentional tort liability “arising out of use of the land.”<sup>205</sup>

Moreover, state action need not come from lawmakers. Policymakers can also promote rail-with-trail efforts through simple decrees, such as the 2013 policy pivot at the Massachusetts Department of Transportation (“MassDOT”). Responding to a municipal official seeking to implement a rail-with-trail, the department’s director announced:

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197. 32 PA. STAT. ANN. § 5619 (West).

198. RAILS-TO-TRAILS CONSERVANCY, AMERICA’S RAILS-WITH-TRAILS, *supra* note 161, at 13.

199. ME. REV. STAT. tit. 14, § 159-A (West); *but cf.*, *e.g.*, WYO. STAT. ANN. § 1-39-106 (West) (“A governmental entity is liable for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, recreation area or public park.”).

200. VA. CODE ANN. § 29.1-509 (West).

201. ME. REV. STAT. tit. 14, § 159-A.

202. *Estate of Haykin v. City of Bellingham*, No. 67713–6–I, slip op. at 4 (Wash. App. Oct. 15, 2012).

203. *Id.*

204. *Id.* at 4–5.

205. *Id.* at 4.

While MassDOT has consistently supported the appropriate development of rails with trails, we have considered their implementation on a case-by-case basis. This method of analysis has, unfortunately, caused unnecessary difficulties and tended to result in little to no progress for proposed rails with trails. Going forward, therefore, MassDOT will as a matter of policy permit the construction of shared-use paths along active or planned railroad rights-of-way provided appropriate fencing separates the two uses.<sup>206</sup>

These sorts of state-backed decisions benefit rails-with-trails in three ways: (1) they facially permit more rails-with-trails projects; (2) they convey to the public an official state imprimatur on the construction of new trails; and (3) they send to railroad companies a message of strong official state trail endorsement.

At the very least, local lawmakers should open state-owned corridors to trail use. The state-owned Alaska Railroad Corporation is expressly authorized to open its routes to parallel trails so long as the proposed trails will meet safety standards and not interfere with nearby utilities.<sup>207</sup> As a balancing measure, the statute also requires that a trail group indemnify the corporation.<sup>208</sup>

The vast majority of states, thus far silent on the matter, could learn from these examples of trail-friendly laws. Such legislation is indispensable in the preservation of trails upon railroad reactivation. Trail groups may still grouse about reactivation, but at least they keep the trail.

### *C. Rails-with-Trails: A Call to the STB—or Congress*

More trail-friendly guidance must come from the federal level as well, because the STB's limited ministerial role in rail-banking and reactivation leaves it without authority to go much beyond its current regulatory scheme, other than to unofficially encourage railroads to take a more pliable stance on rails-with-trails proposals.

The more important and more directly trail-preserving task before the agency is the preservation of rail-banked corridors put to light-rail use,

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206. Letter from Richard A. Davey, Mass. Dep't of Transp. Secretary and CEO, to Stephen Smith, Exec. Dir. of Se. Reg'l Planning & Dev. Dist. (April 3, 2013), *available at* <https://www.railstotrails.org/resourcehandler.ashx?id=4419>.

207. ALASKA STAT. ANN. § 42.40.420 (West).

208. *Id.*

which remain subjected to freight-rail reactivation at any time.<sup>209</sup> An urban planner outlined the problem to the STB in 2009 when asked by commissioners if the agency should require the rail-banking of *all* proposed abandonments. He responded:

Right now the issue of mandatory-ness is almost moot. I go back to my point that the horse is out of the barn. Someone was late to close the door. Honestly, my concern right now is to preserve corridors that are already being preserved . . . . I think that if reactivation-type issues are not handled properly, there will be a tremendous incentive on the part of the entity I'm representing here today, and many other agencies that are acquiring these and using them with an eye toward using them for light rail or putting in an expensive trail investment in, not to do that. Why would they invest if they're going to lose all of their money? . . . [T]he fear I have and where I think if I were to make a recommendation . . . is to look at reactivation and think in terms of what the interest holders on the rail-bankers side of the fence are looking at, as opposed to rail abandonments.<sup>210</sup>

This solution would presumably entail a separate regulatory scheme for interim trail use that includes light passenger rail. Such a new scheme might push the limits of the STB's authority and thus would necessarily fall on congressional shoulders in the form of another NTSA amendment. Such an amendment might grant the agency authority to not only administer rail-banking but also to subsequently remove reactivation eligibility from a corridor targeted for light-rail service.

But, some believe, such a scheme could remain within the STB's purview.<sup>211</sup> The STB has already held that light-rail interim use is consistent with rail-banking—that is, it does not interfere with preservation for returning freight rail—but light rail tracks could actually, in some circumstances, be compatible with freight rail cars.<sup>212</sup> A “time separation of the two uses” whereby passengers travel by day and freight by night, would

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209. Montange, *supra* note 20, at 153 n. 76.

210. Transcript of Public Hearing at 77–78, *Twenty-Five Years of Rail Banking: A Review and Look Ahead* (Surface Transp. Bd. July 8, 2009) (Ex Parte No. 690), available at <http://www.stb.dot.gov/TransAndStatements.nsf/transcriptsandstatements?openview> (testimony of Charles Montange, Ass'n of Amer. R.R.).

211. *Id.* at 89.

212. *Id.* at 87.

further help make the two uses compatible.<sup>213</sup> If compatible, and assuming the STB would have the authority to coordinate mixed-use passenger-freight on the reactivated lines, the agency might have the authority to do so within the rail-banking law's broad directive that the program facilitate the "restoration or reconstruction for railroad purposes."<sup>214</sup>

If the STB would have to overstep its authority in regulating rails-with-trails, Congress should act instead, adding a clause to the NTSA granting the STB authority to exempt reactivations involving passenger rail. Both passenger and freight rail have gained policy relevance in recent years and will likely continue to do so.<sup>215</sup> From the local perspective, not everyone will be satisfied with rails-with-trails, but it remains the most attractive compromise.

#### CONCLUSION

When Congress conceived rail-banking, it did so amidst a frantic struggle to save the rapidly declining railroad infrastructure. Perhaps lawmakers then would not have predicted that, only a generation later, the railroad industry would have rebounded. Congress, however, foresaw such a scenario and acted accordingly, even at great expense in the form of landowner compensation.<sup>216</sup>

Thousands of miles of rights-of-way now sit securely within federal protection under the stewardship of trail groups. Over the past 30 years, local communities have come to embrace their trails and passenger light-rail lines, so they likely will not forfeit them without a fight—or at the very

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213. *Id.* Shared use is compatible in the long-distance intercity passenger rail context. Marks, *supra* note 80, at 315 ("There are four categories of freight/passenger property sharing. First, is 'Shared Track and Mixed Operation: transit trains and freight trains are separated by headway intervals measured in minutes in an operating schedule.' The second type is 'Shared Track and Time-Separated Operations: both transit and freight trains utilize the same track but are separated by time windows.' The final two types of sharing arrangements are shared right-of-way and shared corridor. The term 'shared right-of-way' means that the freight and passenger tracks are less than twenty-five feet apart from one another. If the tracks are more than twenty-five feet, but less than 200 feet, apart, then the term of art is a 'shared corridor.'"). In some cases, like a network in Denver, Colorado, light rail is also apparently compatible with freight operations. *Id.* at 320–21.

214. 16 U.S.C. § 1247(d).

215. Transcript of Public Hearing at 112, *Twenty-Five Years of Rail Banking: A Review and Look Ahead* (Surface Transp. Bd. July 8, 2009) (Ex Parte No. 690), available at <http://www.stb.dot.gov/TransAndStatements.nsf/transcriptsandstatements?openview> (testimony of Charles Montange, Ass'n of Amer. R.R.) ("The changes in shipping patterns and demand for various products change, and therefore the potential for the need for rail banking opportunities is there, and we believe that the public interest is well served by providing the opportunity for the economic and environment benefits of rail transportation to be provided for a time when it might be needed in the future.").

216. *Litigation and its Effect on the Rails-to-Trails Program: Hearing Before Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, supra* note 59, at 23.

least a protest. The writing is on the wall: the trains are coming and reactivation legally will be no quieter than the initial rail-banking.

Lawsuits will ensue. Tempers will flare. Pro-recreation and pro-mass-transportation policies will conflict with economic realities.

But there is still time for prophylactic measures. With the right laws passed by lawmakers and the right steps taken now by trail groups to secure their interests in the corridors, compromise will ease the tension and appease most interest groups. In other words, local motives can indeed be furthered as America re-embraces locomotives.