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Florida State University Journal of Land Use and Environmental Law

Volume 5
Number 2 *Spring 1990*

Article 7

April 2018

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Olson, Eric C. (2018) "How Preseault, Glosemeyer, and National Wildlife Federation Stopped Rail to Trail Conversations Under Section 8(d) of the National Trails System Act Dead in Its Tracks," *Florida State University Journal of Land Use and Environmental Law*: Vol. 5 : No. 2 , Article 7.
Available at: https://ir.law.fsu.edu/jluel/vol5/iss2/7

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HOW *PRESEAULT*, *GLOSEMEYER*, AND *NATIONAL WILDLIFE FEDERATION* STOPPED RAIL TO TRIAL CONVERSIONS UNDER SECTION 8(d) OF THE NATIONAL TRAILS SYSTEM ACT DEAD IN ITS TRACKS

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I. INTRODUCTION

The United States provides virtually limitless opportunities for recreation. This is in large part due to established federal policy which recognizes, promotes, and incorporates, to the extent practicable, recreation as an objective in the management of federal lands and natural resources.[1] Unfortunately, the continued expansion of recreational resources has declined in recent years, a victim of spending cuts to reduce the budget deficit.[2] Yet Americans' thirst for recreational activities and outlets continues unabated.[3] To meet this need the federal government has shifted its emphasis from traditional and expensive programs of land acquisition and management to lower cost alterna-

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1. *See generally* The National Park Service Organic Act, 16 U.S.C.A. § 1a (West 1988); Land and Water Conservation Act, 16 U.S.C.A. § 4601-4 (West 1988); Multiple-Use, Sustained-Yield Act, 16 U.S.C.A. § 528 (West 1988); The Wilderness Act, 16 U.S.C.A. § 1131(a) (West 1988); Wild and Scenic Rivers Act, 16 U.S.C.A. § 1271 (West 1988); Alaska National Interest Lands Conservation Act, 16 U.S.C.A. § 3101 (West 1988); Federal Land Policy and Management Act, 43 U.S.C.A. § 1701(a)(8) (West 1988).

2. REPORT AND RECOMMENDATIONS TO THE PRESIDENT OF THE UNITED STATES, PRESIDENT'S COMMISSION ON AMERICA'S OUTDOORS 45 (Dec. 1986). The Land and Water Conservation Fund, the primary tool of the federal and state governments to fund vital park land acquisitions, is authorized to spend up to $900 million annually. The high water mark of land acquisition came in 1978 when Congress appropriated $805 million. Since 1978 the Fund has been "on a sharp decline." *Id.* at 199-200.

The President's Commission estimated that between the National Park Service and U.S. Forest Service there was a need of more than $1 billion for facilities rehabilitation. *Id.* at 192. Between 1975 and 1985, the Natural Resources and Environment Account of the federal budget increased from $7.3 billion to $13.3 billion. When inflation adjustments are accounted for, however, this represents a net loss in spending levels. *Id.*

3. *Id.* at 47.

tives.[4] One such alternative that has supplied inexpensive recreational activities for thousands across the country is the fledgling "rails to trails" program, authorized by the National Trails System Act. This program converts railroad rights-of-way into recreational trails. To date, 202 trails totalling 2,694 miles in thirty-two states have been established.[5] The trails are used for a variety of purposes including biking, hiking, and skiing. "Rails to trails" also satisfies Congress' desire for low cost, highly efficient recreational resources. The viability of the "rails to trails" program to serve the future recreational needs of the American public while adhering to Congress' low cost objectives is currently in jeopardy, however.

In 1983, Congress amended the National Trails System Act (Act)[6] amid little public debate or controversy.[7] Section 8(d)[8] of the 1983 Amendments was a new provision to the Act which promoted the temporary conversion of railroad rights-of-way into recreational trails. The purpose of section 8(d) was twofold: first, it was to preserve intact railroad rights-of-way for potential future reactivation; and second, it was to provide valuable recreational opportunities until such time as the railroad operation resumed.[9]

The success of the "rails to trails" conversion program rests almost exclusively on a congressional finding set out in the text of section 8(d). This finding states that interim trail use of established railroad

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4. *Id.* at 102-05. One concept which was especially well received by the President's Commission was the development of an elaborate network of greenway parks, corridors of private and public recreation lands, providing people with access to open spaces close to home. The use of abandoned rail lines for recreational trails is one example of a greenway. The President's Commission identified six major goals of greenways: (1) to provide access to open spaces with a wide variety of uses close to home; (2) to conserve elements of American landscape; (3) to build public and private partnerships; (4) to foster the growth of civic pride; (5) to diversify and strengthen the local economy; and, (6) to link rural and urban areas with a ribbon of park land. *Id.*

This concept was even more appealing to the President's Commission and the federal government because greenways "do *not* mean new federal lands or federal land use control. Our concept is not to propose a federal initiative. Greenways will be put in place by local communities." *Id.* (emphasis in original).

5. Telephone interview with Ms. Beth Dillon, Project Manager, Rails to Trails Program, National Park Service (Apr. 21, 1989) [hereinafter Dillon Interview]. It should be noted that trails established under section 8(d) make up only a small portion of the total system. Three are currently in operation, several more are in stages close to completion. *Id.*

6. 16 U.S.C. §§ 1241-1251 (1982 & Supp. 1987).

7. National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 48 (1983).

8. 16 U.S.C. § 1247(d) (1982 & Supp. 1987).

9. S. Rep. No. 98-1, 98th Cong., 1st Sess. 10 (1983). *See also* 129 Cong. Rec. H1169 (daily ed. Mar. 15, 1983) (statement of Rep. Seiberling); Glosemeyer v. Missouri-Kansas-Texas R.R., 685 F. Supp. 1108, 1117 (E.D. Mo. 1988); Preseault v. ICC, 853 F.2d 145, 150 (2d Cir. 1988).

rights-of-way shall not be treated as an abandonment of their use for railroad purposes.[10] Congress believes that its policy of preserving railroad corridors for future use is a valid railroad purpose[11] even though they are currently used for recreational purposes. The result of this interpretation is that the Interstate Commerce Commission (ICC) retains jurisdiction over the railroad rights-of-way and state property law is preempted.

Landowners with property abutting railroad rights-of-way slated for conversion to recreational trails have challenged the constitutionality of section 8(d) and the regulations promulgated under this section.[12] The abutting landowners' primary claim is that the application of section 8(d) and the ICC regulations effect an unconstitutional taking of their reversionary interest in the railroad right-of-way. The landowners contend that the taking stems from the conversion of the right-of-way to recreational use based on the pretense of potential future reactivation of rail service. Absent this railbanking feature there would be no railroad purpose and ICC jurisdiction would terminate. At this point, state property law would apply and result in the reversion of the right-of-way to the abutting landowner since the railroad purpose has concluded.

One district court and two circuit courts have had the opportunity to consider the constitutionality of section 8(d) and have reached widely divergent conclusions. The Second Circuit in *Preseault v. ICC*[13] upheld the constitutionality of the section 8(d) "rails to trails" program, recognized railbanking as a valid railroad purpose subject to the continuing ICC jurisdiction, and maintained that the mere postponement of a reversionary interest could not result in a taking.[14] The D.C. Circuit in *National Wildlife Federation v. ICC*,[15] however, recognized the validity of railbanking as a railroad purpose in the abstract, yet insisted that a taking may occur where only a minimal chance of future reactivation of rail service exists.[16] In this case, the D.C. Circuit held that the postponement of the reversionary interest, indefinitely and perhaps permanently, might result in a compensable taking.[17] The Eastern District of Missouri in *Glosemeyer v. Missouri-*

10. 16 U.S.C. § 1247(d) (1982 & Supp. 1987).
11. *Id.*
12. Preseault v. ICC, 853 F.2d 145 (2d. Cir. 1988); National Wildlife Fed'n v. ICC, 850 F.2d 694 (D.C. Cir.1988); Glosemeyer v. Missouri-Kansas-Texas R.R., 685 F. Supp. 1108 (E.D. Mo. 1988).
13. 853 F.2d 145 (2d Cir. 1988).
14. *Id.* at 151.
15. 850 F.2d 694 (D.C. Cir. 1988).
16. *Id.* at 708.
17. *Id.*

Kansas-Texas Railroad Co., caused further confusion with its analysis which concluded that the question of unconstitutional takings under section 8(d) is premature until a suit is filed in the claims court under the Tucker Act.[18]

The progress of the federal "rails to trails" program will be significantly impeded until the definitive resolution of the section 8(d) controversy. It requires little imagination to envision the reluctance of rail carriers and trail managers to successfully negotiate an interim trail use agreement only to be confronted with a takings suit filed by an abutting landowner. Even if a court rejects an abutting landowner's takings claim, the expense associated with defending the case substantially defeats the primary objective of the "rail to trails" program—the development of low cost recreational resources.

This note traces the legislative and administrative history surrounding the "rails to trails" program with special emphasis on the Railroad Revitalization and Regulatory Reform Act of 1976, the National Trails System Act Amendments of 1983, and the ICC regulations which implement the "rails to trails" program.[19] This note also evaluates the strengths and weaknesses of the arguments presented in *Preseault*, *National Wildlife Federation*, and *Glosemeyer*. Finally, this note recommends the revision of the System Diagram Maps (SDM's) to require the identification of lines which, if abandoned, will be railbanked. This proposal optimizes the opportunity to continue developing valuable interim-use, recreational trails while according the proper respect and deference for private property rights.

II. RAILROADS, INTERSTATE COMMERCE, AND PROPERTY LAW—A PRIMER

From cradle to grave, the life of a railroad is regulated extensively by the plenary and exclusive authority of the ICC. Even the right to abandon railroad service must be approved by the ICC.[20] The Revised Interstate Commerce Act[21] and applicable ICC regulations[22] specify

18. 685 F. Supp. 1108, 1120 (E.D. Mo. 1988).

19. The subject of railroad regulation of abandonments under federal and state law entails complex rules and procedures. This note only deals with the paradigmatic railroad abandonment—one in which a railroad holds, for railroad purposes only, an easement or reversionary interest in the right-of-way over private property. The discussion focuses on the Interstate Commerce Act, which is the federal law that regulates the abandonment procedure and state law which defines the underlying property interests of railroads and abutting property owners subsequent to the abandonment.

20. Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 313 (1981).

21. 49 U.S.C.A. §§ 10903-10906 (West 1988).

22. 49 C.F.R. § 1152 (1987).

the procedure that must be followed in order to secure approval of an abandonment application.

Railroads are required to maintain current System Diagram Maps (SDM's) which identify all rail lines within a company's system.[23] This map must denote all lines or portions of lines which are, or which the carrier believes may potentially be, the subject of an abandonment application.[24]

If a railroad has determined that it no longer desires to continue railroad service on a particular line which has been previously identified on the SDM's as being under consideration for abandonment,[25] it must notify a lengthy list of interested parties that it intends to file an abandonment application.[26] The notice must be mailed to these parties no less than fifteen, nor more than thirty days prior to the filing of the abandonment application.[27] Once the notice has been issued, the carrier files an application with the ICC requesting abandonment of the line identified in the notice.[28] The regulations specify the information to be contained in the application.[29] Such information includes, but is not limited to, condition of properties, service provided, revenue and cost data, rural and community impact, environmental impact, and passenger service.[30] Interested persons may become parties to the proceeding by registering written comments or protests with the ICC within thirty days of the filing of the application.[31] The public participants must disclose in their comments their reasons for involve-

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23. 49 U.S.C.A. § 10904(e)(2) (West 1988); 49 C.F.R. § 1152.10(a) (1987).

24. 49 U.S.C.A. § 10904(e)(2)(A) (West 1988); 49 C.F.R. § 1152.10(b)(1)-(3) (1989). The SDM's require separate color-coded identification for lines that will be the subject of abandonment applications within three years of the SDM issuance (Category 1), lines which are presently being studied for abandonment (Category 2), and lines where abandonment applications are pending (Category 3). *Id.* § 1152.10(c)(1)-(3) (1989). The SDM's must be sent to the ICC, governors of affected states, and published in newspapers of general circulation. *Id.* § 1152.12. The carrier is responsible for maintaining the continuing accuracy of the SDM's. Each SDM listing a Category 2 line must be updated annually to reflect any changes in that line's status. *Id.* § 1152.13. The ICC requires new SDM's by June 30 of each year. *Id.* § 1152.13(c)(1).

25. *Id.* at 1152.13(d). The ICC is unable to issue an abandonment certification unless the line under review has been identified on the SDM's as a Category 1 line for at least four months prior to the filing of the application. *Id.*

26. 49 U.S.C.A § 10904(a)(3) (West 1988); 49 C.F.R. § 1152.20 (1987). The recipients of the notice of intent include, but are not limited to, significant users of the line, the governors of affected states, the state public service commission, the U. S. Department of Transportation, the U.S. Department of Defense, the U.S. Department of the Interior, and Amtrak. *Id.* § 1152.20(a)(2)(i)-(xii).

27. *Id.* § 1152.20(b).

28. *Id.* § 1152.22.

29. *Id.*

30. *Id.* § 1152.22(a)-(j).

31. 49 U.S.C.A § 10904(c)(1) (West 1988); 49 C.F.R. § 1152.25(a)(1) (1987).

ment.[32] In many cases the interested persons will be shippers or other significant users located in the community in which service is proposed to be terminated.[33] Employees of the railroad line in the affected area can also protest the proposed termination of service.[34] There has also been increasing involvement from trail advocates asserting other public uses for the railroad rights-of-way.[35]

Once all information relating to a particular abandonment has been compiled by the ICC,[36] the Commission makes its determination. It may either grant the abandonment application,[37] grant the application with modifications and require compliance with conditions necessary for public convenience and necessity,[38] or deny the application.[39] The touchstone used by the ICC to decide an abandonment case is whether it is permitted or required by public convenience or necessity.[40]

In reaching its decision the ICC weighs the benefits to the railroad derived from terminating an unprofitable line against the impact that the abandonment would have on the economy and people previously served by the railroad.[41] Situations where the ICC will reject an abandonment application can arise in isolated rural communities where there is an insufficient amount of rail commerce for the carrier to earn a profit yet the community has no other reasonable means of transportation available. On the other hand, rail lines located in communities where alternative forms of transportation are readily available are more likely to have their abandonment applications approved.

After a railroad has filed for an abandonment and the ICC has granted its application, the authority of the ICC over the railroad and its property ceases.[42] It is at this point that state law defines the property interests of the railroad and the abutting property owners.[43]

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32. *Id.* § 1152.25(a)(1)(ii).
33. *Id.* § 1152.25(a)(1)(ii)(C).
34. *Id.* § 1152.25(b).
35. *Id.* § 1152.25(a)(2)(vi).
36. The ICC is authorized to conduct an investigation to determine the proper disposition of the rail line based on the information received in the application and public comments. 49 U.S.C.A. § 10904(c)(1), (3) (West 1988); 49 C.F.R. § 1152.25(a)(3)(i) (1987).
37. 49 U.S.C.A. § 10903(b)(1)(A)(i) (West 1988).
38. *Id.* § 10903(b)(1)(A)(ii).
39. *Id.* § 10903(b)(1)(B). The ICC may also grant a discontinuance which permits the carrier to stop service temporarily while reserving the right-of-way and ability to resume operation in the future. Unlike an interim trail use agreement under section 8(d), with a discontinuance the rail carrier retains management responsibility and legal liability for the line. *Id.* § 10903(a)(2).
40. *Id.* § 10903(a); *see also* 49 C.F.R. § 1152.26(a) (1989); 4-R Act Legislative History, *infra* note 48, at 40.
41. Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 321 (quoting Purcell v. U.S., 315 U.S. 381, 384 (1942)).
42. Hayfield N. R.R. v. Chicago & N.W. Transportation Co., 467 U.S. 622, 633 (1984).
43. *Id.* at 634; Glosemeyer v. Missouri-Kansas-Texas R.R., 685 F. Supp. 1108, 1117 (E.D. Mo. 1988).

III. The Railroad Revitalization and Regulatory Reform Act of 1976

The initial congressional foray into railbanking and interim recreational use of railroad rights-of-way was section 809 of the Comprehensive Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act).[44] This provision required the ICC to consider other public uses of a railroad right-of-way upon a filing for abandonment.[45] Prior to section 809, the ICC was not barred from considering public uses of railroad rights-of-way in abandonment proceedings, though it seldom occurred in practice.[46]

In order to provide the appropriate context of the 4-R Act and the beginnings of the "rails to trails" movement, it is necessary to set the backdrop and comment briefly on the poor economic health of the once dominant and powerful railroad industry.[47] In the early 1900's, railroads were the primary method of transportation for goods and people, and the United States' rail network formed one of the finest transportation systems in the world.[48] In 1916, the United States railway system totalled 254,000 miles.[49] Toward the end of World War II, however, competition from airplanes and trucks steadily increased. As the railroads' market share of the shipping business decreased, it was forced to close unprofitable lines. By 1976, the U.S. rail network had been reduced to under 200,000 miles.[50]

In 1976, the American Association of Railroads predicted that twenty percent of the remaining track needed to be abandoned over the next decade in order to compete with other transportation systems.[51] Today, the ICC grants an average of 216 abandonments per

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44. Pub. L. No. 94-210, 90 Stat. 31 (recodified at 49 U.S.C.A. § 10906 (West 1988)); National Wildlife Fed'n v. ICC, 850 F.2d 694, 697 (D.C. Cir. 1988).

45. 49 U.S.C.A. § 10906 (West 1988).

46. *Railroads 1975: Hearings before the Senate Commerce Comm.*, 94th Cong., 1st Sess. 687 (1975) (statement of the Hon. George M. Stafford, Chairman of the ICC. "The Commission has long taken the position that its power under Section 1(20) of the Interstate Commerce Act to condition abandonment approvals enables it to impose conditions designed to enhance public uses of abandoned rail properties . . . .").

47. Congress first recognized the faltering health of the railroad business and the effect of wholesale abandonments on the interstate rail network in the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (codified at 45 U.S.C. §§ 701-797); *see also* Glosemeyer v. Missouri-Kansas-Texas R.R., 685 F. Supp. 1108, 1115 n.6 (E.D. Mo. 1988).

48. S. Rep. No. 499, 94th Cong., 2d Sess. 2 [hereinafter 4-R Act Legislative History].

49. *Id.* at 44.

50. *Id.*

51. U.S. Dep't of Transp., Availability and Uses of Abandoned Railroad Rights of Way 3 (1977).

year resulting in an average annual reduction of 3,000 miles.[52] The most current figures suggest that approximately 140,000 miles of railroad track remain in operation today.[53]

Even this expeditious pace of abandonment was criticized by the railroads as being too sluggish. The slow pace was the direct result of ICC regulations that required a finding of public convenience and necessity before it would grant the railroad's application for abandonment. As described above, there were occasions when unprofitable rail lines were required to continue their operation for lack of alternative transportation systems in isolated markets. Management's inability to respond quickly to market conditions with cost-effective measures due to ICC regulations was often cited as a reason for the railroads' poor financial performance.[54]

The urgency of the railroad industry's economic situation was brought home to Congress in the mid-1970's when nine railroad lines went bankrupt and several others were in a "precarious financial condition."[55] Thrust into action, Congress responded with the massive Railroad Revitalization and Regulatory Reform Act of 1976.[56] The title hints at the overall purpose of the legislation which was to restore the financial stability of the United States' railway system and ensure railroads continued viability in the private sector of the economy.[57]

Section 809 is found in the Local Rail Service Continuation Title[58] of the 4-R Act. Subsection (a) directed the Secretary of Transportation to conduct a study of the availability and uses of abandoned railroad rights-of-way.[59] Subsection (b) required the Secretary of the Interior to provide financial, educational, and technical assistance to federal, state, and local government entities interested in developing programs to utilize abandoned railroad rights-of-way for recreational and conservational purposes.[60] Subsection (c) was the heart of section 809; it added a public use condition to the ICC abandonment procedure set forth in the Interstate Commerce Act. The text of subsection (c) states:

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52. ICC, ANNUAL REPORT 39 (1980); ICC, ANNUAL REPORT 37 (1981); ICC, ANNUAL REPORT 38 (1982); ICC, ANNUAL REPORT 39 (1983); ICC, ANNUAL REPORT 40 (1984); ICC, ANNUAL REPORT 42 (1985).

53. Dillon Interview, *supra* note 5.

54. 4-R Act Legislative History, *supra* note 48, at 17.

55. *Id.* at 3.

56. Pub. L. No. 94-210, 90 Stat 31.

57. Pub. L. No. 94-210, § 101(a), 90 Stat. 31, 33 (1976).

58. Pub. L. No. 94-210, §§ 801-810, 90 Stat. 33, 125-46 (1976).

59. *Id.* § 809(a).

60. *Id.* § 809(b).

> In any instance in which public convenience and necessity permit abandonment . . . the Commission shall make a further finding whether such properties are suitable for use for other public purposes, including roads or highways . . . energy production or transmission, or *recreation*. If the Commission finds that the properties proposed to be abandoned are suitable for other public purposes, it shall order that such rail properties not be . . . disposed of except in accordance with such reasonable terms and conditions as are prescribed by the Commission, including . . . a prohibition on any such disposal, for a period not to exceed 180 days after the effective date of the order permitting abandonment unless such properties have first been offered, upon reasonable terms, for acquisition for public purposes.[61]

In subsection (c) Congress officially recognized the potential public value of abandoned railroad rights-of-way for a variety of functions, including recreation. Perhaps part of the public benefit resulting from the retention of these corridors was the realization that the acquisition of such linear tracts under present property values would entail large sums of capital. The most important recognition made by Congress in this subsection, however, was the tension between short and long-term economic revitalization of the railroad industry. Even though the 4-R Act facilitated the abandonment procedure for railroads, Congress was reluctant to authorize the industry's rapid divestment of all presently unprofitable rail lines. Thus, while Congress did not want the railroad industry to continue to internalize all losses from the operation of branch lines, it also did not want the rail system to be so irreparably reduced in size that it would not be able to respond to future transportation needs.[62]

The inclusion of the public use provision of section 809(c) preserved rail corridors for other functions which could easily be transformed back to rail service at a later date if the economics so warranted. Therefore, Congress hoped to preserve essential trackage in a fashion that would not further threaten the economic condition of the industry.[63]

IV. SECTION 8(d) OF THE NATIONAL TRAILS SYSTEM ACT AMENDMENTS OF 1983

Despite the incorporation of the public use provision into the ICC abandonment procedure following the enactment of the 4-R Act, little

61. *Id.* § 809(c) (emphasis added).
62. 4-R Act Legislative History, *supra* note 48, at 44.
63. *Id.*

progress was made in pursuit of the established federal policy of utilizing railroad rights-of-way for other appropriate public purposes. The ICC was pegged as a foot-dragging bureaucratic agency, reluctant to insist on public use conditions unless the parties in interest were supportive. The railroads alleged that they did not have the legal interest to convey since their property interest was expunged with the abandonment certification. The railroads were also unhappy that even if public uses would be applied to a right-of-way, the responsibility of management and administration of the trail and legal liability would remain with the rail carrier.

Congress expressed its dissatisfaction with the pace of railroad right-of-way conversion by passing section 8(d)[64] of the National Trails System Act Amendments of 1983.[65] The purpose of section 8(d) was to facilitate the implementation of the established federal policy of protecting railroad corridors for potential future reactivation. This was accomplished by providing an important and inexpensive interim recreational use for the right-of-way.[66] The text of section 8(d) states:

> The Secretary of Transportation, the Chairman of the Interstate Commerce Commission, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976, shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs.
>
> Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with the National Trails System Act, 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 State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Commission shall

64. 16 U.S.C. § 1247(d) (1982 & Supp. 1987).
65. Pub. L. No. 98-11, 97 Stat. 48.
66. 16 U.S.C. § 1247(d) (1982 & Supp. 1987).

> impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this Act, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.[67]

Section 8(d) appeared to eliminate at least two obstacles which had previously impeded the conversion of railroad rights-of-way. First and most importantly, it expressly stated that conversion to recreational use when a line is railbanked is not an abandonment of railroad purposes. This addressed the railroad's concern that they did not have a legal interest to convey for public use purposes. Second, the amendment shifted the liability and management responsibilities from the carrier to the trail manager. This device not only reduced the expense of entering section 8(d) arrangements for the railroad, but also it induced the railroads to enter them. By concluding a section 8(d) agreement, railroads could eliminate unprofitable lines temporarily, salvage the tracks, ties and other fixtures, impose liability and management responsibilities on the trail manager, and retain the option to resume service in the future. For a businessperson, section 8(d) may be a no-lose proposition.

As the D.C. Circuit noted in *National Wildlife Federation v. ICC*,[68] there is precious little legislative history that discusses the motivation of Congress in enacting section 8(d).[69] The scant legislative history, however, suggests that Congress wanted to accelerate the development of trails under the provisions of the 4-R Act.[70]

Congress singled out the second sentence of section 8(d) as the key to the success of the "rails to trails" program. This sentence expressly stated that interim recreational trail use will not constitute an abandonment of the right-of-way for railroad purposes if the route can be reactivated in the future.

> The key finding of this amendment is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for

67. *Id.* Section 8(d) appears in the Code as an unbroken single paragraph. It has been separated into its three component sentences above to facilitate explanation and analysis.

68. 850 F.2d 694, 701 (D.C. Cir. 1988).

69. *See* H.R. Rep. No. 28, 98th Cong., 1st Sess. 8; S. Rep. No. 1, 98th Cong., 1st Sess. 9. [hereinafter Section 8(d) Legislative History]. *See also* 129 Cong. Rec. H1169 (daily ed. Mar. 15, 1983) (statement of Rep. Seiberling).

70. Section 8(d) Legislative History, *supra* note 69, at 9; *see also* 129 Cong. Rec. H1169 (daily ed. Mar. 15, 1983) (statement of Rep. Seiberling).

As early as 1975, legislation had been introduced to convert railroad rights-of-way into bicycle paths. Advocates of the bill included Henry Diamond, Chairman of the Citizens Advisory Committee on Environmental Quality, who touted the low cost and high efficiency of linear parks in terms of people served per acre. *Railroads 1975, Hearings before the Senate Commerce Comm.*, 94th Cong., 1st Sess. 747 (1975).

> future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes. This finding alone should eliminate many of the problems with this program. The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use. This amendment would ensure that potential interim trail use will be considered prior to abandonment.[71]

In order to qualify for a section 8(d) conversion to interim trail use, Congress required the interim trail manager, whether it be a state or local agency or a qualified private interest, to assume full responsibility for the management of the right-of-way, for all legal liability, and for the payment of any taxes.[72] There is no requirement that either the railroad or trail manager come forward with any proof of the potential for future reactivation of the rail line.[73] Nowhere in the statute or legislative history does it require the validation of the railbanking purpose which justifies the denial of the abandonment application.

V. Interstate Commerce Commission Abandonment Procedure

In 1986, the ICC published revised regulations and final rules which implemented and explained the effect of section 8(d) on the abandonment process.[74] As a result of the textual ambiguity of section 8(d)[75] and the paucity of legislative history,[76] the ICC had virtually unfettered discretion to design a regulatory regime to implement this congressional directive.[77] It has been these regulations and the underlying section 8(d) which have led to the controversies in *Preseault*, *National Wildlife Federation*, and *Glosemeyer*.

The final rules reinforce the Congressional mandate that interim trail use for railbanking purposes will not be considered an abandonment of the right-of-way for railroad purposes. The ICC regulations construe the amendment as "preempt[ing] State laws that would otherwise result in extinguishment of easements for railroad purposes and reversion of rights-of-way to abutting landowners."[78] The ICC also

71. Section 8(d) Legislative History, *supra* note 69, at 9.

72. 16 U.S.C. § 1247(d) (1982 & Supp. 1987).

73. *See* National Wildlife Fed'n v. ICC, 850 F.2d 694, 707 (D.C. Cir. 1988).

74. 49 C.F.R. § 1152.29 (1989); *see also* Final Rules—Rail Abandonments—Use of Right of Way as Trail, 2 I.C.C. 2d 591 (1986) [hereinafter 1986 ICC Final Rules].

75. 2 I.C.C. 2d at 592.

76. National Wildlife Fed'n v. ICC, 850 F.2d 694, 701 (D.C. Cir. 1988).

77. *Id.*

78. *Id.*

interpreted the amendment as prohibiting the condemnation of railroad rights-of-way for interim trail use and railbanking, requiring railroads and trail users to negotiate voluntary agreements concerning interim use of railroad rights-of-way, and subjecting the trail use to reactivation of rail service while imposing legal liability and taxpaying responsibility on the trail manager during the period of interim trail use.[79]

Pursuant to section 8(d), the ICC adopted a different approach to the certification of a rail line for abandonment. First, prospective trail managers must file a comment during the abandonment proceeding indicating their interest and ability to become an interim trail manager.[80] When the ICC makes a determination that the public convenience and necessity permit or require abandonment, the ICC must then conduct a separate analysis to evaluate the potential of the rail corridor as an interim trail.[81] A notice of findings of potential public uses, including interim trail use, is published by the ICC at the conclusion of their interim trail use evaluation.[82] If the ICC determines that interim trail use is feasible, the railroad must notify the ICC within ten days of its intention to negotiate an interim use agreement with a trail manager.[83] If the railroad is not inclined to enter into a trail use agreement the abandonment certification will be issued.[84] If the railroad intends to enter an agreement, however, a dual purpose Certificate of Interim Trail Use (CITU) will be issued by the ICC.[85]

The CITU provides the railroad and trail user 180 days to negotiate a trail use agreement.[86] If an agreement is concluded within 180 days, the second part of the CITU, which would permit full abandonment of the rail line, will not become effective.[87] If no agreement can be reached within the 180 days, however, the rail line is able to immediately convert the CITU into an abandonment certificate.[88]

VI. Section 8(d) of the "Rails to Trails" Program and the Taking Issue

Within a three month period in 1988, three federal courts issued decisions on the constitutionality of section 8(d) and the ICC regula-

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79. *Id.*

80. 49 C.F.R. § 1152.29(a) (1989). A sample statement of Willingness to Assume Financial Responsibility is provided in the regulations. *Id.*

81. 1986 ICC Final Rules, *supra* note 74, at 609.

82. *Id.*

83. 1986 ICC Final Rules, *supra* note 74, at 609-10.

84. *Id.*

85. 1986 ICC Final Rules, *supra* note 74, at 610.

86. *Id.*

87. *Id.*

88. *Id.*

tory regime that had been established to implement the "rails to trails" program. These cases, *Preseault v. ICC*,[89] *National Wildlife Federation v. ICC*,[90] and *Glosemeyer v. Missouri-Kansas-Texas Railroad Co.*[91] are variations of an identical theme.

Preseault and *Glosemeyer* involved an abandonment proceeding, during which a railroad had negotiated an agreement for interim trail use with a state or local agency pursuant to section 8(d). As a result of these negotiations, a CITU was issued by the ICC and the abandonment certification was denied. The landowners protested the issuance of the CITU, contending that the denial of their reversionary interest in the railroad right-of-way amounted to an unconstitutional deprivation of their property contrary to the Fifth Amendment of the United States Constitution.[92] The railroads and public agencies countered that the interim trail use of the railroad right-of-way was constitutional and consistent with the goals of section 8(d) of the National Trails System Act. In *National Wildlife Federation* the landowner challenged the constitutionality of the ICC regulations promulgated under section 8(d) as applied to her specific situation where the potential for rail reactivation was remote.

In spite of the similarities of these cases, each court reached a different conclusion applying seemingly incongruous legal theories. Each court's reasoning seems incapable of being reconciled with the others. At the risk of oversimplification, it might be suggested that the *Preseault* court held that there could never be a taking under section 8(d), the *National Wildlife Federation* court maintained that there may be a taking in certain situations, and the *Glosemeyer* court concluded that it could not resolve the takings question because it was premature.

A. *Preseault v. ICC*

The Preseaults were North Burlington, Vermont residents and abutting property owners to a line owned by Vermont Railway.[93] In 1975, Vermont Railway discontinued service on the line which traversed the Preseault's property. Ten years later the Preseaults filed a petition to force the ICC to issue the abandonment certification for this stretch

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89. 853 F.2d 145 (2d Cir. 1988).
90. 850 F.2d 694 (D.C. Cir. 1988).
91. 685 F. Supp. 1108 (E.D. Mo. 1988).
92. The fifth amendment states in relevant part "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.
93. Preseault v. ICC, 853 F.2d 145, 147 (2d Cir. 1988).

of rail line.[94] In response, Vermont Railway filed with the ICC a notice seeking a class exemption[95] from abandonment for out of service lines. Vermont Railway also indicated its intention to enter into an interim trail use agreement with the City of Burlington under the terms of section 8(d).[96] The ICC issued the exemption along with the CITU requested by Vermont Railway and denied the Preseault's petition for abandonment certification.[97] As a result, the Preseault's brought suit challenging section 8(d) under the takings clause and the commerce clause[98] of the U.S. Constitution.[99]

The Second Circuit affirmed the validity of the ICC order. The opinion not only rebuffed the Preseault's constitutional challenges, but also commended Congress for designing a program which was a "remarkably efficient and sensible way" to preserve rail corridors for future use and provide interim recreational use of the right-of-way.[100] In its analysis of the takings question, the court reiterated the exclusive and plenary authority of the ICC to determine the appropriateness of an abandonment.[101] The court stated that in section 8(d), Congress had required the ICC to preserve rail corridors for future reactivation.[102] Since the ICC based its decision to deny the abandonment on the permissible railbanking/interim trail use provisions of section 8(d) and as a result maintained its jurisdiction over the line, the court found that there could be no taking because no interest had vested in the Preseault's.[103]

The court did not agree with the Preseault's claim that the indefinite postponement of a reversionary interest amounted to a taking.[104]

94. *Id.* Prior to filing an abandonment petition with the ICC, the Preseaults sought a declaration of abandonment from the Vermont court system. The Vermont Supreme Court affirmed the dismissal of the suit for lack of jurisdiction, citing the ICC's exclusive authority to regulate abandonments. *Id.* *See also* Trustees of the Diocese v. State, 145 Vt. 510, 496 A.2d 151 (1985).

95. *Preseault*, 853 F.2d at 148; *see also* 49 C.F.R. § 1152.50 (1989). Under 49 U.S.C. § 10505, the ICC has the authority to exempt from regulation abandonment proposals for lines that have been out of service for at least two years. 1986 ICC Final Rules, *supra* note 74, at 610.

96. *Preseault*, 853 F.2d at 148.

97. *Id.*

98. Both the *Preseault* and *Glosemeyer* courts considered landowners' commerce clause challenges to section 8(d) and dismissed them summarily. The courts have found railbanking to be a legitimate objective of the federal government and consistent with Congress' power to regulate interstate commerce. The courts went on to find the issuance of interim trail use certificates reasonably related to achieve the ends permitted by railbanking. *Id.* at 149-50; *Glosemeyer v. ICC*, 685 F. Supp. 1108, 1117-18 (E.D. Mo. 1988).

99. *Preseault v. ICC*, 853 F.2d 145, 148 (2d Cir. 1988).

100. *Id.* at 150.

101. *Id.* at 151.

102. *Id.*

103. *Id.*

104. *Id.*

It did not inquire into the likelihood of future reactivation nor did it distinguish between immediate railroad use and future railroad use when determining ICC jurisdiction.[105] Indeed, the court noted "[t]o distinguish between future railroad use and immediate railroad use would serve no purpose but to stifle Congress' creative effort to exercise foresight by preserving existing corridors for the future railroad needs of our country."[106]

In *Preseault*, the Second Circuit limited its review of the ICC actions resulting in the issuance of the CITU and the denial of the abandonment for Vermont Railway.[107] Even though the CITU was premised on the recognized federal policy of railbanking, the court did not inquire into the feasibility of this line being reactivated. One might speculate that the Second Circuit left the task of predicting future reactivation potential up to the ICC.

B. *National Wildlife Federation v. ICC*

In contrast to the *Preseault* court's blanket deference to the ICC and its glowing praise of railbanking, the D.C. Circuit was not nearly so magnanimous in *National Wildlife Federation v. ICC*.[108] This suit was a consolidation of two cases, both challenging the promulgation of the 1986 ICC regulations and final rules implementing section 8(d).[109] The first case was brought by the National Wildlife Federation which contended that the congressional intent and language of section 8(d) required the mandatory conveyance of railroad rights-of-way if a qualified agency steps forward and volunteers to become the trail manager.[110] The second case was brought by a Washington land-

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105. *Id.*

106. *Id.*

107. *Id.* at 148. The Preseaults only challenged the constitutionality of section 8(d), not the ICC regulations. Indeed, they concede that the statute required the result that the ICC reached. *Id.*

108. 850 F.2d 694 (D.C. Cir. 1988).

109. *Id.* at 696.

110. *Id.* at 699. The court rejected this claim of the National Wildlife Federation holding that neither the express statutory language nor the legislative history evinced a congressional intent to require transfers between rail carriers and qualified trail managers. In the absence of clear legislative intent to the contrary, the court deferred to the "voluntariness" interpretation of the ICC which required a willingness on the part of the rail carrier to enter into section 8(d) agreements. The court found this interpretation to be reasonable and entitled to substantial deference. *Id.* at 702; *see also* Washington State Dep't of Game v. ICC, 829 F.2d 877, 879 (9th Cir. 1987).

In the notice of proposed rulemaking, the ICC agreed with the National Wildlife Federation that section 8(d) required transfers to qualified and willing trail managers irrespective of the rail carrier's interests. The ICC backed off from this position to its current interpretation as found in the 1986 ICC final rules in response to concerted opposition from the Department of Transpor-

owner, Mrs. Beres, whose waterfront property contained a 200-foot railroad right-of-way between the water and her residence.[111] She contended that the application of the 1986 ICC final rules against her would result in an unconstitutional taking of her reversionary interest.[112]

The ICC noted Mrs. Beres' objection to the final rule but discarded it, relying on the congressional language in section 8(d) which stated that no abandonment of right-of-way for railroad purposes will result from interim trail use under section 8(d).[113] Therefore the railroad easement continued and the reversionary interests did not mature.[114] The court rejected this argument. While the ICC's analysis may have accurately described the effect of section 8(d) in the abstract, it was not responsive to the specific factual circumstances of Mrs. Beres.[115] The D.C. Circuit required some further showing by the ICC to justify the application of section 8(d) in a specific case.

The court questioned the ICC's lack of authority in the final rules to support its conclusion that an indefinite postponement, as opposed to outright termination of reversionary interests, is not a taking.[116] The court cited recent Supreme Court precedent to bolster its position that a taking need not be permanent and inferred that a takings claim may be especially persuasive "when the event that will trigger the reversion of the interest is imminent at the time of the appropriation."[117]

While the *Preseault* court was willing to accept at face value the decisions of the ICC regarding the issuance of CITU's and denials of abandonments, the *National Wildlife Federation* court directed the ICC to evaluate the impact of the section 8(d) regulations and final rules on the property rights of variously situated reversionary interest holders.[118] The effects of trail use on existing property interests, the court held, is "necessarily a case specific process."[119]

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tation, Association of American Railroads, Conrail, and the National Park Service. 1986 ICC Final Rules, *supra* note 74, at 598.

In modifying its position to provide for only voluntary transfers, the ICC acknowledged that forced transfers would surely yield greater numbers of rail trails but confessed that this was not the overarching goal of Congress in passing section 8(d). Rather, the ICC stated that the purpose was to eliminate reversion as an obstacle to the conversion process. *Id.*

111. *National Wildlife Fed'n*, 850 F.2d at 702.

112. *Id.*

113. *Id.* at 704.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *National Wildlife Fed'n v. ICC*, 850 F.2d 694, 705 (D.C. Cir. 1988).

119. *Id.* at 706.

The D.C. Circuit did not go so far as to suggest that the railbanking purpose espoused by Congress is categorically a sham, designed only to convert the right-of-way from railroad to recreational use while denying compensation to the property owner.[120] Indeed, the court referenced one case of a CITU issued to protect the railroad right-of-way for the potential future development of a coal fired power station.[121] The court was distressed, however, that there was no provision within section 8(d) rules for a finding of the likelihood of rail service resumption prior to the issuance of a CITU.[122] The court was clearly concerned that in instances where the likelihood of rail resumption was negligible, the issuance of the CITU would in fact amount to a taking because the railroad would never be reactivated and the abutting property owner's reversionary interest would be locked up in an interim use trail in perpetuity. For these reasons, the court remanded the 1986 ICC final rules to the ICC to address the question of whether a taking may occur in specific situations, especially where "the right-of-way is strictly limited to railroad use and the restoration of rail service in the future is not foreseeable."[123]

C. *Glosemeyer v. Missouri-Kansas-Texas Railroad Co.*

The court in *Glosemeyer*, put a new spin on the takings issue by holding that the takings question was premature since the Tucker Act required all takings claims to be raised in the United States Claims Court.[124] The plaintiffs in this case challenged the constitutionality of section 8(d), the ICC regulations, the ICC order applying section 8(d), and the regulations to the Missouri-Kansas-Texas right-of-way.[125] The court only had jurisdiction over the plaintiffs' constitutional challenge to section 8(d) because, under the Hobbs Act, the district courts are

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120. *Id.* at 707.

121. *Id. See also* Chicago & N.W. Transp. Co.—Abandonment Exemption—Guthrie and Dallas Counties, IA, ICC No. AB-1 (Sub. No. 192X) (served May 20, 1987). The court may have been inferring that it would prefer to see this sort of showing before the ICC could justify the issuance of a CITU under section 8(d).

122. *National Wildlife Fed'n* , 850 F.2d at 707. There is some substance to the notion that future reactivation is not a primary issue, or any issue at all, that is discussed when rail carriers and trial managers get together to negotiate a CITU. The railroad is relatively unconcerned because it reserves the right to reactivate the rail line at absolutely no expense. Therefore, it stands to lose little by negotiating the agreement, even if the potential for reactivation is minute. The trail managers have a strong interest in seeing that the rail service is never resumed, since that would ruin any investment of time and resources which they made in the recreational conversion.

123. *Id.* at 708.

124. Glosemeyer v. Missouri-Kansas-Texas R.R., 685 F. Supp. 1108, 1121 (E.D. Mo. 1988).

125. *Id.* at 1111.

without authority to consider the validity of ICC regulations.[126] Only federal circuit courts of appeal are vested with that jurisdiction.[127]

In *Glosemeyer*, the defendant, Missouri-Kansas-Texas Railroad filed an abandonment application with the ICC in September 1986, for approximately 200 miles of railroad right-of-way between Machens and Sedalia, Missouri.[128] In October 1986, the Missouri Department of Natural Resources filed a protest with the ICC and requested that the ICC issue a CITU pursuant to section 8(d).[129] In April 1987, the ICC issued the CITU and rejected the abandonment application.[130] Landowners who claimed a reversionary interest in the railroad right-of-way challenged the issuance of the CITU on a variety of federal and state constitutional and statutory grounds.[131] Their strongest argument was that the CITU issuance had worked a taking of their reversionary interest without compensation.

The court rejected the landowner's claim because they sought equitable relief in the form of a declaration that section 8(d) was unconstitutional, instead of pursuing what the court believed to be an available remedy at law.[132] That remedy at law is the Tucker Act which subjects the United States to the jurisdiction of the claims court. The Tucker Act states in relevant part: "The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department . . . ."[133]

The court recited recent Supreme Court takings cases in support of the position that the statute will not be found unconstitutional even though compensation will not be paid in advance of or contemporaneously with an alleged taking.[134] The court held that the Constitution merely requires a "reasonable, certain and adequate provision for obtaining compensation"[135] be in existence at the time of the taking. This provision is the Tucker Act.[136] Accordingly, as long as a suit may be brought under the Tucker Act, there is no equitable relief which

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126. 28 U.S.C. § 2341 (1982 & Supp. 1987).
127. *Glosemeyer*, 685 F. Supp. at 1112.
128. *Id.* at 1110-11.
129. *Id.* at 1111.
130. *Id.*
131. *Id.*
132. *Id.*
133. 28 U.S.C.A. § 1491 (West 1988).
134. Glosemeyer v. Missouri-Kansas-Texas R.R., 685 F. Supp. 1108, 1119 (E.D. Mo. 1988).
135. *Id.*
136. *Id.*

can be granted that would enjoin the government from taking private property for public use if duly authorized by law.[137]

Once it was determined that a takings claim had to be brought under the Tucker Act prior to any suit which seeks to declare a statute unconstitutional, the court next had to determine whether Congress intended to withdraw the Tucker Act when it enacted section 8(d).[138] If Congress had prohibited the landowner's access to the claims court for relief under section 8(d), then the equitable relief requested—declaring the statute unconstitutional—would have been appropriate. The court held that Congress did not intend to foreclose the Tucker Act remedy when it passed section 8(d).[139] It resolved this issue by applying basic rules of statutory construction. First, the court held that the proper inquiry is not whether there is an express affirmation that the Tucker Act is available, but rather whether there has been an express or implied withdrawal.[140] The court failed to find in the statute or legislative history any indication of congressional withdrawal of the Tucker Act remedy.[141] What the court discovered, and what the landowners construed as a Tucker Act withdrawal, was the absence of language in section 8(d) requiring just compensation to be paid if the government was found to have effected a taking.[142] The court dismissed this argument by deciding that the absence of language in the statute providing for just compensation meant either that Congress did not believe denial of an abandonment under section 8(d) would result in a taking or, if a taking did occur, the Tucker Act remedy would be available.[143] This judicial interpretation of section 8(d) and the Tucker Act satisfied another maxim of statutory construction which strongly favors the coexistence of two statutes over the conflict of two statutes.

D. *The Interstate Commerce Commission Notice of Policy Statement*

On February 24, 1989, the ICC issued a Notice of Policy Statement pursuant to the decision in *National Wildlife Federation*.[144] The ICC took notice of the disarray and lack of uniformity in the case law and

137. *Id.*
138. *Id.*
139. *Id.* at 1121.
140. *Id.* at 1120.
141. *Id.*
142. *Id.* at 1121.
143. *Id.*
144. 54 Fed. Reg. 8,011 (1989). [hereinafter 1989 ICC Policy Statement].

stated that its position was the one adopted by the Second Circuit in *Preseault*. This position, however, was rejected by the D.C. Circuit in *National Wildlife Federation*.[145] Beyond this the ICC did very little. The ICC refused to take positions on the merits of the different interpretations and it did not attempt to define the parameters of when a taking may occur as requested by the court in *National Wildlife Federation*.[146] It justified this position by noting the pending litigation in *Preseault* and *Glosemeyer* and that takings should be considered as a matter of course by the claims court.[147]

Curiously, the ICC failed to solidify its position which the Second Circuit had so effusively promoted in *Preseault*. The ICC also failed to respond with the analysis that the *National Wildlife Federation* court had requested about potential takings claims in cases where the likelihood of rail reactivation was remote. Instead, the ICC looked to *Glosemeyer* and retreated from any responsibility for takings determinations under section 8(d).[148] That job, the ICC noted, belonged to the claims court. "The Claims Court, not the ICC, has the expertise to decide taking questions."[149] The ICC concluded that if *Preseault* was decided correctly there would not be a section 8(d) taking. On the other hand, if *National Wildlife Federation* was decided correctly then the claims court was the appropriate avenue in which abutting landowners must seek relief. The claims court would consequently be responsible for the case by case analysis of state law, landowner property interests, and the facts of the particular case.[150]

After noting the varied judicial interpretations of section 8(d), and deferring further takings questions to the claims court, the ICC espoused an elaborate defense of the congressional vision of railbanking.[151] This discussion, located at the end of the policy statement after the Commission had just made a conscientious effort to extricate itself from the responsibility of interpreting the takings issue, seems unusual. If this section introduced the policy statement, it is conceivable that the ICC could have embarked on a strong reinforcement of its 1986 rules and the Second Circuit's *Preseault* decision. It could also have rebutted the D.C. Circuit's allegations in *National Wildlife Federation*. Unfortunately, its impact is rendered largely meaningless.

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145. *Id.*

146. *Id.* at 8,013.

147. *Id.* Because the response did not amend the Trails Act procedures and simply clarified the existing policy, the ICC did not classify this as rulemaking. As a result, there was no public comment and the decision took effect immediately. *Id.*

148. *Id.* at 8,012.

149. *Id.* at 8,013.

150. *Id.*

151. *Id.*

In brief, the ICC's defense of railbanking consisted of an attempt to defuse the most frequent argument levied by abutting landowners against the "rails to trails" program—that railbanking is a myth which was created by Congress solely to deprive landowners of their constitutionally protected property interests while developing recreational trials. In rebutting this argument the ICC rejected the claim that railbanking is a fiction. Indeed, it maintained that "the legitimacy of railbanking can be presumed in every case."[152] It found support for this position in the congressional approval of preservation of transportation corridors as important national resources.[153] It also rejected the suggestion that contingency plans should be prepared to affirm the potential for future reactivation.[154] In support of this position the ICC claimed that a railroad's interest in negotiating an interim use trail agreement should be sufficient to indicate the potential for future reactivation.[155]

VII. CONCLUSION

The various judicial interpretations of section 8(d) and the accompanying ICC regulations have offered little guidance to rail carriers, public agencies, abutting landowners, and trail advocates as to whether takings are an issue to be considered in designing a "rails to trails" program. Certainly some of the distinguishing features of *Preseault*, *National Wildlife Federation*, and *Glosemeyer* can be accounted for through the different factual patterns of the case or the claims for relief requested by the abutting landowners. In *Glosemeyer*, for instance, the abutting landowners sought a declaration that section 8(d) was unconstitutional instead of requesting compensation based on an unconstitutional taking. As a result, the court focused on the distinction between legal and equitable remedies instead of a direct consideration of takings. Part of the discrepancy between *Preseault* and *National Wildlife Federation* stems from that the abutting landowner's claim in the former was a challenge to the statute while the latter was a challenge to the ICC regulations. The *National Wildlife Federation* court recognized the validity of the railbanking purpose as espoused in the statute but objected to the "truncated" ICC analysis of takings in the regulations.[156]

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152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. National Wildlife Fed'n v. ICC, 850 F.2d 694, 705 (D.C. Cir. 1988).

The Second Circuit's approval of railbanking in section 8(d) combined with their finding that a taking will never occur through the postponement of a reversionary interest simply cannot be squared with the D.C. Circuit's implication that a taking may result when an interim trail agreement for a rail line, which has only a minimal chance of reactivation, is approved under section 8(d). Until this conflict can be resolved and the rights of the parties more clearly delineated, there is likely to be a chilling effect on further negotiation of interim trail use agreements under section 8(d).

A possible solution to this problem of uncertainty is found in the System diagram Maps (SDM's). The ICC requires that SDM's be prepared by every rail carrier showing lines which may be candidates for abandonment in the near future. The ICC further requires that the SDM's be constantly revised and updated. If there was a provision which mandated that the SDM's also include the demarcation of lines which, if abandoned, would be candidates for a railbank/interim trail use agreement under section 8(d), such a demarcation could serve as a conclusive presumption of the potential for reactivation and thereby foreclose an abutting landowner's takings claim. The identification of these lines to be railbanked would be subject to periodic revisions and amendments and would be determined by an interagency task force composed of members from the ICC, Department of Transportation, Department of Interior, and Department of Defense. The guiding principle of this task force would be to retain sufficient trackage under a railbank to guarantee that future transportation needs will be met.

There are several benefits in this proposal. First, it would immediately resolve the takings controversy and permit the "rails to trails" program to progress without the cloud of threatened litigation. Second, it would provide citizens and trail advocates with valuable advance notice, permitting them to design an effective grass roots organization. This would eliminate the currently existing frantic search for qualified trail managers when the rail line files for abandonment.[157] Third, a comprehensive analysis of rail lines for railbanking in the SDM's would provide an opportunity for the agencies to plan a network of rail lines which would protect future transportation needs and provide a spectacular interconnected nationwide network of

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157. Montange, *Conversion in Railroad Abandonment Proceedings*, 12 COLUM. J. ENVTL. L. 91 (1987). The current ICC procedure allows a "proponent of alternative public use very little time to prepare its position, thus exacerbating the problem caused by the haphazard notice given of proposed abandonment." *Id.* at 99.

recreational trails.[158] Finally, this proposed system would inject a measure of deference to the abutting property owner who currently is subjected to an ad hoc and relatively unstructured determination of railbanking feasibility. Identification on the SDM's for railbanking potential will allay landowner fears that the railroad right-of-way has been selected solely for its recreational value. It should also inform them that there is some basis for the belief that the line may be reactivated in the future.

This proposal is not flawless, however. There still exists the difficulty of precisely predicting future economic development which is necessary in determining which rail lines should be railbanked.[159] Another potential problem is the reticence of trail managers to negotiate an agreement if they understand that there really is a potential of reactivation.[160] Obviously, trail managers would prefer that a rail line never be reactivated because they will keep the right-of-way as a recreational trail and not lose their investment.

The revision of the SDM requirements to reflect lines that will be railbanked when they are abandoned will advance the recreational goals of Congress, preserve rail corridors for future reactivation, and provide abutting landowners with legitimate assurances that the recreational trails are being established to guarantee resumption of rail service. Congress intended section 8(d) to work in such a manner; this section should significantly improve the current "rails to trails" conversion program.

VIII. POSTSCRIPT

Shortly after the completion of this article, several major developments occurred which continued to shape and define the "rails to trails" program under section 8(d) of the National Trials System Act.[161] The most important of these developments was the United

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158. As it exists now, "rails to trails" exists primarily through the ability of local citizen groups, state agencies, and rail carriers to negotiate a section 8(d) CITU. There is no significant effort to integrate individual trails into a comprehensive national network.

159. Similarly, there is a problem in failing to accurately predict the locus of economic growth in areas where railbanking was not utilized.

160. In the 1986 ICC Final Rules, Minnesota noted its reluctance to volunteer as a qualified trail manager under a scenario where there is a strong likelihood of resumption of rail service. 1986 ICC Final Rules, *supra* note 74, at 598.

161. In April 1989, the United States Supreme Court granted the plaintiff's petition for certiorari in Preseault v. ICC, 109 S. Ct. 1929. In July 1989, the Eighth Circuit Court of Appeals affirmed the decision of the United States District Court for the Western District of Missouri in Glosemeyer v. Missouri-Kansas-Texas R.R., 879 F.2d 316 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 1295 (1990). And in February 1990, the Supreme Court affirmed the Second Circuit opinion in Preseault v. ICC, 110 S. Ct. 914.

States Supreme Court's affirmation of the Second Circuit's opinion in *Preseault v. ICC.*[162] While this decision resolved the split between the circuits concerning the proper analysis of the takings issue under section 8(d) of the Trails Act, it did not settle the controversy as to whether a taking may, under certain situations, be deemed to exist. For that reason the proposal suggested in this note to determine whether a taking has occurred remains a viable means of providing guidance to abutting landowners, potential trial managers, and railroads.

Justice Brennan, writing for a unanimous Court, affirmed the Second Circuit's opinion in *Preseault* without expressly adopting the circuit's reasoning.[163] Indeed, whereas the Second Circuit found that no takings claim could arise as long as the ICC retained jurisdiction over the proposed abandonment, Justice Brennan speculated that some rail to trail conversions could result in a taking.[164] Beyond this conjecture, however, Justice Brennan found that further analysis of the takings issue was unwarranted because of the availability of a remedy under the Tucker Act.[165] In this respect the Court's takings analysis more closely resembles the holding of the *Glosemeyer* court.

The Court first noted that takings claims are not appropriate where the government has provided an adequate process for obtaining compensation.[166] As in *Glosemeyer*, the Court then stated that the Tucker Act provides a remedy for abutting landowners in rail to trail conversions under section 8(d) absent some express, affirmative indication by Congress that this remedy had been withdrawn by the National Trails System Act.[167] The Court rejected the petitioner's argument that the language of the Trail Act inferred that the Tucker Act remedy had been withdrawn. "Congress did not exhibit the type of 'unambiguous intention to withdraw the Tucker Act Remedy' . . . that is necessary to preclude a Tucker Act claim."[168] Since the Tucker Act grants recourse through the claims court, the Court held that consideration of a takings claim was improvident.[169]

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162. 110 S. Ct. 914 (1990).

163. In a concurring opinion, Justice O'Connor writes, "Today the Court affirms the Second Circuit's judgment on quite different grounds." *Id.* at 926.

164. *Id.* at 918.

165. The Court quickly dispatched the petitioner's Commerce Clause arguments holding that railbanking was a legitimate exercise of congressional authority which promoted national recreation and transportation objectives. *Id.* at 924.

166. *Id.* at 921.

167. *Id.* at 922.

168. *Id.* at 922 (citation omitted).

169. *Id.* at 921.

In a concurring opinion, Justice O'Connor took the majority's analysis a step further by noting that those rail to trail conversions which result in takings will be determined by consultation with the relevant state real property interests. This position is not consistent with the Second Circuit's analysis which held that as long as the ICC retained jurisdiction, there could be no taking. While Justice Brennan never noted the illogic between his result and the Second Circuit's reasoning, Justice O'Connor squarely rejected the circuit's "unjustified interpretation of the ICC's exercise of federal power."[170]

As noted, the Supreme Court's holding in *Preseault v. ICC* settles the issue of the proper analysis of a takings claim under section 8(d). By simply redirecting the focus of the issue to the claims court under the Tucker Act, however, the Court has failed to provide insight into the considerations—except for Justice O'Connor's concurrence—which Justice Brennan noted may amount to a taking. Perhaps in the near future the claims court will be asked to decide what amount, if any, an abutting landowner is due under the Tucker Act for a section 8(d) conversion of a rail line into a recreational trail.

If and when the claims court is presented with this question, the proposal suggested in this article will prove helpful. By identifying on the System Diagram Map not only rail lines proposed for abandonment, but also the relative foreseeability of those lines' future reactivation, the ICC, potential trail managers, abutting landowners, railroad companies, and the claims court will be able to evaluate whether the line has been converted for some rail purpose or if the line was converted for purely recreational purposes. For those conversions which include a rail transportation function no compensation under the Tucker Act would be due. For those conversions made for purely recreational motivations, compensation to landowners would be justified under the Tucker Act.

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170. *Id.* at 928.