MITCHELL | HAMLINE School of Law

William Mitchell Law Review

Volume 16 | Issue 3 Article 11

1990

Smoke along the Tracks: The Constitutionality of Converting Rails-to-Trails under 16 U.S.C. § 1247(d). [Glosemeyer v. Missouri-Kansas-Texas R.R., 879 F.2d 316 (8th Cir. 1989)]

Roger M. Stahl

Follow this and additional works at: http://open.mitchellhamline.edu/wmlr

Recommended Citation

Stahl, Roger M. (1990) "Smoke along the Tracks: The Constitutionality of Converting Rails-to-Trails under 16 U.S.C. § 1247(d). [Glosemeyer v. Missouri-Kansas-Texas R.R., 879 F.2d 316 (8th Cir. 1989)]," *William Mitchell Law Review*: Vol. 16: Iss. 3, Article 11.
Available at: http://open.mitchellhamline.edu/wmlr/vol16/iss3/11

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.
© Mitchell Hamline School of Law

MH MITCHELL | HAMLINE School of Law OPEN ACCESS

mitchellhamline.edu

SMOKE ALONG THE TRACKS: THE CONSTITUTIONALITY OF CONVERTING RAILS-TO-TRAILS UNDER 16 U.S.C. § 1247(d)†

[*Glosemeyer v. Missouri-Kansas-Texas R.R.*, 879 F.2d 316 (8th Cir. 1989)]

INTRODUCTION 861
I. LEGISLATIVE BACKGROUND 864
  A. *Rail Banking Efforts Prior to Section 1247(d)* 864
  B. *The National Trails System Act of 1968* 868
  C. *The ICC's Implementing Rules* 871
II. *GLOSEMEYER V. MISSOURI-KANSAS-TEXAS R.R.* 874
  A. *Factual Background* 874
  B. *The Contracts Clause Challenge* 875
  C. *The Commerce Clause Challenge* 877
  D. *The Takings Clause Challenge* 879
    1. *Analyzing the Circuit Court's Analysis of the Takings Clause Challenge* 882
III. VIEWS FROM THE OTHER SIDE OF THE TRACKS 884
  A. National Wildlife Federation v. I.C.C. 884
  B. Preseault v. I.C.C. 885
    1. *The Second Circuit's Analysis* 886
    2. *The Supreme Court's Analysis* 887
    3. *The Takings Question* 890
IV. THE TAKINGS ISSUE AND A FRAMEWORK FOR ANALYZING § 1247(d) 891
  A. *Threshold Question: Property Owner's Interest Under State Law* 891
  B. *Traditional Takings Theory* 893
  C. *Applying the Framework to Analyze Section 1247(d) to* Glosemeyer 894
CONCLUSION 896

INTRODUCTION

Recently several groups of private landowners have challenged the constitutionality of Congress' 1983 amendment to the National Trails Act.[1] The amendment, at 16 U.S.C. § 1247(d),[2] enables rail-

† The author gratefully acknowledges the assistance of the Rails-to-Trails Conservancy, Washington, D.C., in preparing this article.

1. 16 U.S.C. §§ 1241–1251 (1988).
2. 16 U.S.C. § 1247(d) (1988).

Published by Mitchell Hamline Open Access, 1990

roads contemplating abandonment of a rail corridor, and state or private groups willing to assume certain responsibilities for that corridor, to cooperate in converting the rail corridor into a recreational trail.[3] Conflicts have arisen, however, when the rail corridors consist of easements or rights-of-way over private property. Under the terms of section 1247(d), the vesting of any reversionary interests in the rights-of-way held by property owners are postponed during the trail use.[4] While there are no trains going through, indeed there may no longer be track laid down, the rights-of-way are still considered as being used for "railroad purposes."[5] This aspect of section 1247(d) has provided much fuel for litigation, and *Glosemeyer v. Missouri-Kansas-Texas R.R.*[6] is a typical case.

In *Glosemeyer*, the owners of land subject to the railroad's rights-of-way brought suit alleging that their land was taken under section 1247(d) without the payment of adequate compensation, which the fifth amendment forbids. The Glosemeyers argued that the statute, in postponing the vesting of their reversionary rights in the right-of-way, was tantamount to a temporary regulatory taking.[7]

The disputed rights-of-way involved in *Glosemeyer* fell along approximately 200 miles of railroad line in central Missouri.[8] The line was operated by the Missouri-Kansas-Texas Railroad Company (MKT). The rights-of-way agreements were executed between the predecessors-in-interest of the present land owners and the predecessors-in-interest of MKT.[9] The language of one such agreement "indicates that the right-of-way was conveyed 'for the purpose of a Railroad, and for no other purpose' and that the railroad is only 'to have and hold' this right-of-way 'for the purpose of establishing, con-

3. *Id.* For the full text of section 1247(d), see *infra* note 43 and accompanying text.

4. *See infra* note 43 and accompanying text.

5. *Id.*

6. 879 F.2d 316 (8th Cir. 1989).

7. *See id.* at 323. Specifically, the court construed the Glosemeyers' arguments as follows:

> Plaintiffs argue that § 1247(d) effects a temporary regulatory taking of their reversionary interests in the right-of-way by postponing the vesting of these interests under state law. Plaintiffs argue that this constitutes a taking without just compensation in violation of the takings clause. Plaintiffs further argue that they have no adequate remedy at law and are therefore entitled to equitable relief, that is, enjoyment of their property free of the right-of-way or easement for railroad use. They argue the Tucker Act remedy is not available because § 1247(d) does not include any provision for compensation and because Congress did not appropriate any funds to acquire lands for the national trails system.

Id.

8. The rail line is located in central Missouri, with much of the railroad line following the northern bank of the Missouri River. *Id.* at 319.

9. Glosemeyer v. Missouri-Kansas-Texas R.R., 685 F. Supp. 1108, 1111 (E.D. Mo. 1988), *aff'd*, 879 F.2d 316 (8th Cir. 1989).

structing and maintaining a Railroad on the said lands . . . conveyed . . . .' "[10]

At some point before September 1986, MKT ceased providing rail service over the railroad line in question.[11] Subsequently, the Missouri Department of Natural Resources sought to convert the rail line to trail use.[12] While this conversion was being pursued, the adjacent landowners brought an action challenging the constitutionality of section 1247(d).[13] The plaintiffs asserted that in abrogating their reversionary rights, section 1247(d) contravened the contracts clause, the commerce clause, and the takings clause of the United States Constitution.[14]

Other landowners have made arguments similar to those made by

---

10. *Id.* (quoting language of agreement). The outcome of disputes over railroad rights-of-way must necessarily depend on the nature of the rights and interests created by the conveyance. As the District of Columbia Court of Appeals recently stated:

> Existing rights-of-way were created by voluntary conveyance or through condemnation proceedings. Some of these rights-of-way consist of fee simple interests that may be transferred or used by the railroad for non-railroad purposes. . . . Other rights-of-way are specifically limited to railroad use and may revert to the original owner (or a successor in interest) if railroad use is discontinued.

National Wildlife Fed'n v. I.C.C., 850 F.2d 694, 703 (D.C. Cir. 1988) (citation omitted).

Railroad rights-of-way consist of two common types: the fee simple determinable and the easement. *Id.* The difference between these two types of property interests is in the nature of ownership of the underlying lands and the manner by which the land returns to the original owner. As the District of Columbia Circuit observed:

> If the right-of-way is a fee simple determinable, title to the underlying land vests in the railroad and the grantor (or successor) retains only a reversionary interest (known as a "possibility of reverter"). If the right-of-way is an easement, the owner of the servient tenement retains title to the underlying land and may be entitled to use the right-of-way in any manner that does not interfere with the railroad's use.

Id. (citations omitted).

Other rights-of-way may have been created by state law or by a federal land grant. "In such cases, the interest retained by a property owner whose land is subject to a railroad right-of-way will depend upon the language of the instrument conveying, or of the state law creating, that right-of-way and on the applicable state law rules of construction." *Id.* (citations omitted). For example, according to the court in *National Wildlife*, 43 U.S.C. § 912 (1982) "allows a state or local agency to use abandoned rights-of-way that were granted by the federal government as 'public highways.' " *National Wildlife*, 850 F.2d at 703 n.14; *see also* Idaho v. Oregon Short Line R.R., 617 F. Supp. 207, 210 (D. Idaho 1985).

11. *Glosemeyer*, 685 F. Supp. at 1111.

12. *Id.*

13. Glosemeyer v. Missouri-Kansas-Texas R.R., 879 F.2d 316, 320 (8th Cir. 1989).

14. *See id.* at 318. Plaintiffs filed this suit following an ICC action permitting conversion of the railway to interim use as a trail. *Glosemeyer*, 685 F. Supp. at 1111; *see infra* note 69.

the plaintiffs in *Glosemeyer* in various other courts, including the United States Supreme Court.[15] While no court has yet held that section 1247(d) effectuates a taking, the treatment of the issue has been, for the most part, less than thorough.

In the years immediately following the enactment of section 1247(d), the actual amount of track that had been converted from rails-to-trails was small.[16] This trend, however, is changing. Converting rails-to-trails is an efficient and inexpensive means of increasing public recreation options. Accordingly, enthusiasm for the idea is growing. The Rails-to-Trails Conservancy estimates that, if all of the rails-to-trails conversion efforts began in 1989 are ultimately successful, total trail miles will be tripled.[17] In August 1989, the National Governors Association adopted a resolution to encourage rails-to-trails conversions in every state.[18]

As more and more rails-to-trails conversions are concluded, other cases like *Glosemeyer* will likely arise. As a result, a clear statement from the judiciary on whether section 1247(d) effects a public taking is urgently needed. This comment suggests how such a takings analysis should proceed, discusses the issues involved, and concludes with a potential framework for testing section 1247(d) under the takings clause.

I. Legislative Background

Extensive statutory and regulatory controls govern railbanking and interim trail use. These controls include Interstate Commerce Commission (ICC) statutes and rules, the National Trails System Act (NTSA), and case law. Presented below is an overview of the history and policy behind the most recent railbanking statute, section 1247(d).

A. Rail Banking Efforts Prior to Section 1247(d)

Congressional concern for preserving the means to provide a national system of rail service was at the heart of the Regional Rail Re-

15. *See, e.g.*, Preseault v. I.C.C., 853 F.2d 145 (2d Cir. 1988), *aff'd*, 110 S. Ct. 914 (1990); National Wildlife Fed'n v. I.C.C., 850 F.2d 694 (D.C. Cir. 1988).

16. *See On the Brink of the 90's*, 4 Trailblazer 1 (Oct.–Dec. 1989) ("As of mid-1989, the United States had 213 converted rail-trails in 33 states with a total length of 2721 miles . . . .").

17. *Id.* Approximately 231 rail-to-trail conversions were pending as of December 1989. If all of these attempted conversions are ultimately successful, an additional 5535 miles will be added to the current rail-trail system. *Id.*

18. *See Governors Endorse Rail-Trails*, 4 Trailblazer 11 (Oct.–Dec. 1989). The resolution, which follows a similar resolution adopted by the National League of Cities in December 1988, was proposed by Minnesota Governor Rudy Perpich. *Id.*

organization Act of 1973 (the "3-R Act").[19] The 3-R Act was enacted because of conditions in the Northeast and Midwest which threatened rail service to those areas.[20] Chief among these conditions was the collapse or bankruptcy of certain rail carriers,[21] especially Penn Central Transportation Company.[22] While the 3-R Act did not contain specific railbanking provisions, it did reveal Congress' willingness to enact legislation to preserve "essential rail

---

19. Regional Rail Reorganization Act of 1973, ch. 16, 87 Stat. 985 (1973) (codified as amended at 45 U.S.C. §§ 701-797 (1982)).

20. Under the policy declaration of the 3-R Act Congress stated:

> (1) Essential rail service in the midwest and northeast region of the United States is provided by railroads which are today insolvent and attempting to undergo reorganization under the Bankruptcy Act.
>
> (2) This essential rail service is threatened with cessation or significant curtailment because of the inability of the trustees of such railroads to formulate acceptable plans for reorganization. This rail service is operated over rail properties which were acquired for a public use, but which have been permitted to deteriorate and now require extensive rehabilitation and modernization.
>
> (3) The public convenience and necessity require adequate and efficient rail service in this region and throughout the Nation to meet the needs of commerce, the national defense, the environment, and the service requirements of passengers, United States mail, shippers, States and their political subdivisions, and consumers.
>
> (4) Continuation and improvement of essential rail service in this region is also necessary to preserve and maintain adequate national rail services and an efficient national rail transportation system.
>
> (5) Rail service and rail transportation offer economic and environmental advantages with respect to land use, air pollution, noise levels, energy efficiency and conservation, resource allocation, safety, and cost per ton-mile of movement to such extent that the preservation and maintenance of adequate and efficient rail service is in the national interest.
>
> (6) These needs cannot be met without substantial action by the Federal Government.

45 U.S.C. § 701(a) (1982).

21. *See* S. REP. No. 601, 93d Cong., 1st Sess. 1-2, *reprinted in* 1973 U.S. CODE CONG. & ADMIN. NEWS 3242, 3246-47. As stated by the report:

> Railroads operating in the Northeast and Midwest have suffered over the last several decades from generally declining markets, growing competition from other transportation modes, and increasing financial exhaustion. Efforts to correct the downward spiral, such as the 1968 merger of the Pennsylvania Railroad and the New York Central Railroad Company, were unsuccessful and accentuated rather than cured endemic weaknesses which were the product of complex and interrelated factors. A changing and more hostile economic environment for railroads in the Northeast and Midwest, changes in the character of the national economy generally, management and industry responses to changing conditions, and certain failures of public policy towards transportation all contributed to the situation. At the present time eight railroads operating in the Northeast and Midwest region are in railroad reorganization proceedings under the Bankruptcy Act, and several others are in precarious financial condition.

Id.

22. *Id.* at 3247. The Penn Central Transportation Company was the nation's largest railroad at the time. *Id.*

service."[23]

Similar concerns prompted additional major rail legislation in 1976, namely, the Railroad Revitalization and Regulatory Reform Act (the "4-R Act").[24] Increasing reliance by the rail industry on government subsidies was but one reason for the legislation.[25] The 4-R Act attempted to alleviate the problem of the rail industry's heavy dependence on federal money through a regulatory restructuring, including the creation of a national transportation program or agenda.[26] Significantly, the 4-R Act provided for the conversion to public purposes of rail corridors which would otherwise have been abandoned.

The 4-R Act required the Secretary of Transportation to prepare "a report on the conversion of railroad rights-of-way," including "an evaluation of the advantages of establishing a rail bank consisting of selected . . . rights-of-way, as a means of assuring their availability for potential railroad use in the future . . . ."[27] The 4-R Act also included provisions whereby the Department of the Interior and state

---

23. *See supra* notes 20–21. Congress' purpose in enacting the 3-R Act was to provide for:

> (1) the identification of a rail service system in the midwest and northeast region which is adequate to meet the needs and service requirements of this region and of the national rail transportation system;
>
> (2) the reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region;
>
> . . . .
>
> (5) assistance to States and local and regional transportation authorities for continuation of local rail services threatened with cessation; and
>
> (6) necessary Federal financial assistance at the lowest possible cost to the general taxpayer.

45 U.S.C. § 701(b) (1982).

24. Railroad Revitalization and Regulatory Reform Act of 1976, ch. 17, 90 Stat. 31 (1976) (codified as amended at 45 U.S.C. §§ 801–855 (1982)).

25. According to the General Accounting Office, about $1.5 billion had been obligated to assist railroads between 1969 and 1975. S. REP. No. 499, 94th Cong., 2d Sess. 3, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 14, 16–17. The Senate Report noted that railroads had "insufficient internal funds to maintain and upgrade railroad facilities . . . ." *Id.* at 17. This lack of private investment was the major cause for deferred maintenance and diminished service. *Id.*

26. *Id.* at 15. The report stated the purpose of the Act as follows:

> It is the purpose of this bill to promote the revitalization of the railroad industry in the United States. The bill would take steps to remedy the major problems of the railroads: an outmoded regulatory system; inadequate financial resources to improve and modernize rail facilities; inefficient use of present rail facilities; the need to improve intercity passenger transportation in the Northeast corridor; and the lack of a national transportation program to coordinate federal and state government efforts to develop and improve all transportation sources.

Id.

27. Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 31, 144–45 (1976).

and regional transportation agencies would provide assistance to governmental entities at all levels to develop suggestions regarding alternate conversion uses for discontinued railroad rights-of-way.[28]

Finally, the 4-R Act specifically required the ICC's involvement in the railbanking effort. Whenever the ICC approves an application for abandonment,[29] the Commission may also be requested to make a determination of suitability for public use under 49 U.S.C. § 10906.[30] If the ICC finds that a public purpose exists, it has broad power under the language of section 10906 to condition abandonment on continued public use.[31] Nevertheless, the ICC has adopted

28. *Id.* The provisions provide that "financial, educational, and technical assistance" information regarding the "availability of railroad rights-of-way," grants, and other technical assistance be provided "to local, State, and Federal governmental entities," and that funds be allocated to certain "other Federal programs." *Id.* at 145.

29. Under the Interstate Commerce Act, "Congress vested in the ICC 'exclusive' and 'plenary' authority over railroad abandonments." Glosemeyer v. Missouri-Kansas-Texas R.R., 685 F. Supp. 1108, 1113 (E.D. Mo. 1988) (quoting Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 320 (1981)), *aff'd*, 879 F.2d 316 (8th Cir. 1989). The district court in *Glosemeyer* stated that the procedures by which this authority is exercised involve an interplay of several sections of the Act. "Generally speaking, a railroad may only discontinue operations or abandon a railroad line if it obtains the approval of the ICC." *Glosemeyer*, 685 F. Supp. at 1113.

Section 10903 of the Interstate Commerce Act provides:

> (a) A rail carrier providing transportation subject to the jurisdiction of the [ICC] . . . may—
> (1) abandon any part of its railroad lines; or
> (2) discontinue the operation of all rail transportation over any part of its railroad lines; only if the [ICC] finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance . . . .

49 U.S.C. § 10903 (1982).

The specific procedures for requesting the ICC's approval to abandon a railroad line are set forth at 49 U.S.C. § 10904 (1982), *amended by* 49 U.S.C. § 10904(d)(2), (e)(3) (Supp. 1987). Essentially, the provision requires the railroad to file an "application for a certificate of abandonment" with the ICC. 49 U.S.C. § 10904(a)(1). The application must include "a statement indicating that each interested person is entitled to recommend to the Commission that it approve, deny, or take other action concerning the application." 49 U.S.C. § 10904(a)(2)(B). Additional provisions regarding the specific content and form of the application are set forth at 49 C.F.R. §§ 1152.20–24 (1989).

30. Specifically, the 4-R Act provides that "the Commission shall find . . . whether the rail properties that are involved in the proposed abandonment or discontinuance are suitable for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation." 49 U.S.C. § 10906 (1982).

31. Section 10906 provides:

> If the Commission finds that the rail properties proposed to be abandoned are suitable for public purposes, the properties may be sold, leased, exchanged, or otherwise disposed of *only under conditions provided in the order of the Commission.* The conditions *may* include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the

a narrow interpretation of the powers granted to it under section 10906. Specifically, the ICC will neither force an abandoning railroad to negotiate with a potential public user, nor will the ICC set a purchase price for the rail property.[32] The ICC has limited its role to only prohibiting the disposal of the property for private uses for the requisite 180 day period.[33] This narrow interpretation of section 10906, which contravenes the express intent of Congress,[34] renders the section virtually meaningless.

The ICC's interpretation of section 10906, reserving to itself a wholly passive role in public use conversions, means that entities wishing to acquire rail properties for public use are hardly better off than before section 10906 was enacted. Congress' response to this situation was to enact an alternative means of bringing about a railbank network and public use of abandoned rail properties—section 1247(d) of the National Trails System Act.[35]

B. *The National Trails System Act of 1968*

The National Trails System Act[36] was enacted in order to institute

---

order, unless the properties have first been offered, on reasonable terms, for sale for public purposes.

Id. (emphasis added).

As originally enacted, section 10906 contained additional language. Specifically, the last sentence of the original provision stated that the ICC had broad powers involving measures to facilitate a public sale, "including, *but not limited to*, a prohibition on any such disposal, for a period not to exceed 180 days." Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 31, 146 (1976) (emphasis added).

When the Interstate Commerce Act was revised and recodified in 1978, this language was deleted. The change, however, was not intended to change the substance of the law. *See* H.R. REP. No. 1395, 95th Cong., 2d Sess. 4, 9, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 3009, 3013, 3018. Rather, the recodification was meant only as a simplification of the Interstate Commerce Act. *Id.*

32. *See* Chicago & N.W. Transp. Co.—Abandonment—Between Clintonville and Eland, Wis., 363 I.C.C. 975 (1981). In *Chicago North Western*, the Wisconsin Department of Transportation (DOT) made an offer for a certain rail line being abandoned by Chicago & North Western. When negotiations failed to produce an agreement, the DOT turned to the ICC. Pursuant to section 10906, the DOT requested the ICC to "establish the amount of compensation and [to] set the terms for [the] transaction." *Id.* at 975.

The ICC refused to take such steps, viewing section 10906 as granting only the power to postpone abandonment for 180 days. This, the ICC felt, was the limit of its power in public use sales. To support this narrow reading of section 10906, the ICC relied on the absence of express language in the section to do what the DOT requested, unlike section 10905 which specifically grants the ICC power to take the steps being requested. *Id.* at 976–77.

33. *Id.* at 977.

34. *See supra* note 31.

35. *See infra* note 43 and accompanying text.

36. 16 U.S.C. §§ 1241–1251 (1988).

"a national system of recreation, scenic and historic trails."[37] In order to further accomplish this goal, NTSA prescribes "the methods by which, and standards according to which, additional components may be added to the system."[38] The legislation was prompted by a 1966 study conducted at the direction of President Johnson by the Bureau of Outdoor Recreation.[39] The study recognized "the value of providing simple trails to meet a multitude of outdoor recreation uses," and also "indicated that a trails program would provide inexpensive recreation opportunities for increasing numbers of people seeking to enjoy outdoor activities."[40] As a result, in response to this study, Congress' central purpose in enacting NTSA was the inexpensive establishment and maintenance of multi-use trails.[41] In order to better achieve this purpose, Congress amended NTSA in 1983 to include section 1247(d).[42]

---

37. 16 U.S.C. § 1241(b).

38. *Id.* The purpose of the Act is as follows:

(a) Considerations for determining establishment of trails

> In order to provide for the ever-increasing outdoor recreation needs of an expanding population and in order to promote the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation, trails should be established (i) primarily, near the urban areas of the Nation, and (ii) secondarily, within scenic areas and along historic travel routes of the Nation, which are often more remotely located.

(b) Initial components

> The purpose of this chapter is to provide the means for attaining these objectives by instituting a national system of recreation, scenic and historic trails . . . by prescribing the methods by which, and standards according to which, additional components may be added to the system.

16 U.S.C. § 1241(a)–(b).

The District of Columbia Court of Appeals has stated that by the National Trails System Act, "Congress reserved to itself the right to designate scenic and historic trails . . . ." National Wildlife Fed'n v. I.C.C., 850 F.2d 694, 697 (D.C. Cir. 1988).

39. H.R. REP. No. 1631, 90th Cong., 2d Sess. 2, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 3855, 3856.

40. *Id.*

41. These concerns are expressed in the legislative history:

> The national recreation trails should not involve a large Federal investment. Primary emphasis will be placed on the development of trails within existing public-use areas which are located in or near densely populated areas. These trails will not be limited to the same considerations which will be taken into account in qualifying a trail for designation as a national scenic trail. Their basic aim will be to provide the greatest outdoor recreation potential in the most desirable natural environment practicable. This may mean that some bicycle trails will be routed along uncongested back streets and unused roadways or that jogging trails might be developed on the periphery of small local parks. Trails for "tote goats" or trail bikes should be established where they will not unduly interfere with other uses in recreation areas.

Id.

42. National Wildlife Fed'n v. I.C.C., 850 F.2d 694, 697 (D.C. Cir. 1988).

Section 1247(d) provides:

> 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 [45 U.S.C. 801 et seq.] [sic], 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 this chapter, 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 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.[43]

Through this amendment to NTSA, Congress continued its effort to establish a policy for converting railroad rights-of-way to use as public trails.[44] However, as noted above, section 1247(d) was also intended to preserve existing but unused railroad rights-of-way for possible future rail use, reflecting Congress' realization that

43. 16 U.S.C. § 1247(d) (1988).

44. The Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act) contained the first provisions intended to encourage railroad rights-of-way conversion. Section 809 of the 4-R Act authorized the Secretary of the Interior to provide financial, educational and technical assistance for programs aimed at conservational and recreational uses of abandoned rights-of-way. The Act also authorized the ICC to delay the abandonment unless the property had been offered for sale for public purposes and required the Secretary of Transportation to prepare a report on alternative uses of abandoned railroad rights-of-way. Railroad Revitalization and Regulatory Reform (4-R) Act of 1976, Pub. L. No. 94-210, § 809, 90 Stat. 31, 144–45 (1976) (codified as amended at 49 U.S.C. § 10906 (1982)); *see also National Wildlife*, 850 F.2d at 697.

As originally enacted, NTSA did not contain a specific provision for the conversion of railroad rights-of-way to trails. However, the legislative history indicates that such use was at least contemplated. In a letter to the House Speaker, Secretary of the Interior Charles F. Luce listed several means by which the goals of NTSA were to be met in the metropolitan areas. Luce wrote, "Where appropriate, river and canal banks, utility rights-of-way, *abandoned railroad* or streetcar beds . . . will be utilized." 1968 U.S. CODE CONG. & ADMIN. NEWS 3863 (emphasis added).

railbanking efforts under section 10906 were falling far short of previous expectations.[45]

C. *The ICC's Implementing Rules*

Section 1247(d) works in inter-relationship with ICC implementing rules.[46] The implementing rules, promulgated by the ICC, describe the manner in which a section of railroad right-of-way is set aside for interim trail use when a railroad decides to abandon the right-of-way.[47] The rules provide that "any state, political subdivision, or qualified private organization" may file a request to acquire the right-of-way for trail use.[48] Before such use is granted, however,

45. The relevant legislative history reflects this realization by Congress:

> Section . . . [1247(d)] amends . . . the Act to encourage the development of additional trails in conjunction with the provisions of the Railroad Revitalization and Regulatory Reform Act of 1976. *This reflects the concern that previous congressional efforts have not been successful in establishing a process through which railroad rights-of-way which are not immediately necessary for active service can be utilized for trail purposes.* This appears to be true despite the fact that these efforts have also been 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.
>
> 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 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. If interim use of an established railroad right-of-way consistent with the National Trails System Act is feasible, and if a State, political subdivision, or qualified private organization is prepared to assume full responsibility for the management of such right-of-way, for any legal liability, and for the payment of any and all taxes that may be levied or assessed against such right-of-way—that is, to save and hold the railroad harmless from all of these duties and responsibilities—then the route will not be ordered abandoned.
>
> This provision will protect railroad interests by providing that the right-of-way can be maintained for future railroad use even though service is discontinued and tracks removed, and by protecting the railroad interests from any liability or responsibility in the interim period. This provision will assist recreation users by providing opportunities for trail use on an interim basis where such situation exists.

H.R. REP. No. 28, 98th Cong., 1st Sess. 8–9, *reprinted in* 1983 U.S. CODE CONG. & ADMIN. NEWS 112, 119–20 (emphasis added).

46. *See* 49 C.F.R. § 1152.29 (1989).

47. *Id.*

48. 49 C.F.R. § 1152.29(a). The relevant rule provides:

> If any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line proposed to be abandoned for interim trail use and rail banking pursuant to 16 U.S.C. 1247(d), it must file a comment (in a regulated abandonment proceeding) or a petition (in an exemption proceeding) indicating that it would like to do so.

the public or private entity must demonstrate that it is willing to assume full responsibility, financial and otherwise, for the right-of-way.[49] In addition to acknowledging these responsibilities, the potential user must agree to use the right-of-way "subject to possible future reconstruction and reactivation of the right-of-way for rail service."[50] A request will be denied for failing to meet any of these requirements.[51]

Where an abandonment proceeding is conducted pursuant to 49 U.S.C. §§ 10903–10904,[52] a request for interim trail use must be filed with the ICC "within the 30-day protest and comment period following the date the abandonment application is filed."[53] Additionally, approval of the request for interim trail use is subject to a determination that the Trails Act is applicable.[54] In other words, interim trail use must be within the scope of use for public purpose contemplated in section 1247(d) and the 4-R Act.[55] A request filed in a timely and correct fashion postpones, or holds in abeyance, the abandonment proceeding, provided that the rail carrier wishes to negotiate an agreement with the potential trail user.[56] When the rail carrier notifies the Commission that the parties will attempt to reach a settlement, the ICC issues a Certificate of Interim Trail Use (CITU).[57] If no agreement is reached, the CITU becomes a Certificate of Abandonment and the matter is closed.[58]

One of the most significant aspects of section 1247(d) and its cor-

---

Id.

49. 49 C.F.R. § 1152.29(a)(2). A petition must include a statement:

> indicating the user's willingness to assume full responsibility: For managing the right-of-way; for any legal liability arising out of the use of the right-of-way (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability); and for the payment of all taxes assessed against the right of way . . . .

Id.

50. 49 C.F.R. § 1152.29(a)(3).

51. 49 C.F.R. § 1152.29(b)(1)(ii)(A).

52. *See supra* note 29 for the relevant portions of the statute.

53. 49 C.F.R. § 1152.29(b)(1); *see also* 49 C.F.R. § 1152.25(c) (1989).

54. *See* 49 C.F.R. § 1152.29(b)(1)(i).

55. *See supra* notes 30, 45.

56. 49 C.F.R. § 1152.29(b)(1)(ii)(B).

57. As explained by the ICC:

> Under our procedures, a prospective trail user files a petition for interim trail use (stating that the trail operator agrees to be financially and managerially responsible for the right-of-way and that interim trail use is subject to rail banking, and providing a map of the right-of-way) within 10 days after a decision granting a section 10903 abandonment application . . . is published. If the carrier then notifies the Commission (generally within 10 days) that it is willing to negotiate an agreement, we issue a Certificate of Interim Trail Use (CITU) . . . .

Rail Abandonments—Use of Rights-of-Way as Trails—Supplemental Trails Act Procedures, *Ex parte* No. 274 (Sub-No. 13) (May 18, 1989).

58. Specifically, the ICC states in *Rail Abandonments*:

responding implementation rules is the manner in which the abandonment is held in abeyance.[59] While trains may no longer run along the track, indeed the track may even have been removed, the right-of-way is still considered to be under the jurisdiction of the ICC.[60] This aspect of section 1247(d) has provided much fuel for litigation. While all apparent railroad activity over the right-of-way has ceased, the statute nevertheless bars the vesting of any future interest, or extinguishment of any easement,[61] held by the owner of the underlying fee.[62] Many such interest holders assert that the lapse of time between cessation of rail use and actual return of the right-of-way is tantamount to a taking without just compensation. This was the argument made by the landowners in *Glosemeyer v. Missouri-Kansas-Texas Railroad.*[63]

> Each . . . CITU gives the carrier and the trail use proponent 180 days to negotiate a trail use agreement that satisfies the rail banking and liability conditions in the statute, and permits the carrier to discontinue operations, cancel tariffs, and salvage track and materials in a manner consistent with trail use. If no agreement is reached by the 180th day, then the . . . CITU converts into a . . . Certificate of Abandonment permitting the carrier fully to abandon the line. If a voluntary trail use agreement is reached, then full abandonment may not be accomplished under the . . . CITU until the trail use terminates (without restored rail service).

Id.

59. *See* H.R. REP. No. 28, 98th Cong., 1st Sess. 8, *reprinted in* 1983 U.S. CODE CONG. & ADMIN. NEWS 112, 119. "The key finding of . . . [section 1247(d)] is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes." *Id.*

60. As explained in a recent ICC decision:

> A railroad's decision to enter into a Trails Act agreement is similar to a carrier's decision to seek discontinuance rather than full abandonment authority for a particular line. Discontinuance authority, like rail banking, allows a railroad to cease operating a line for an indefinite time while preserving the rail corridor for the possible reactivation of rail service in the future. By contrast, once a carrier exercises the authority granted in a regular abandonment certificate the line is no longer part of the national transportation system.

Rail Abandonments—Use of Rights-of-Way as Trails (Feb. 10, 1989) (notice of policy statement).

61. *See supra* note 10.

62. The ICC has summarized the situation in the following manner:

> Many railroad rights-of-way are on land that the railroads do not own but rather hold under easements or other fee simple determinable interests . . . . Frequently, . . . these easements provide that, upon abandonment of rail operations, the property reverts to the abutting landowner. . . .
>
> The Trails Act was intended to allow transportation corridors subject to such easements to be used on an interim basis as recreational trails, while being preserved for possible future railroad use.

Rail Abandonments, (Feb. 10, 1989) (WESTLAW, FTRAN-ICC library); *see also supra* note 45.

63. 879 F.2d 316 (8th Cir. 1989).

II. *Glosemeyer v. Missouri-Kansas-Texas R.R.*

A. Factual Background

Prior to September 1986, the Missouri-Kansas-Texas Railroad Company (MKT) stopped providing rail service over approximately 200 miles of railroad line in central Missouri.[64] MKT then sought the ICC's permission to abandon the right-of-way.[65] Several parties, including the Missouri Department of Natural Resources (DNR), protested MKT's application. In October of 1986, the DNR invoked section 1247(d) and requested that the right-of-way be set aside for railbanking and trail use purposes.[66] Discussions between MKT and the DNR ensued, and on March 6, 1987, the ICC issued an order approving the preservation of the right-of-way through interim use as a trail.[67]

While MKT and the DNR were discussing the proposed interim trail use, owners of the land adjacent to the rights-of-way[68] filed an action challenging the constitutionality of section 1247(d), the ICC regulations generally, and the ICC's order of March 6, 1987.[69] The plaintiffs asserted that in abrogating their reversionary rights, section 1247(d) contravened the contracts clause, the commerce clause, and the takings clause of the United States Constitution.[70]

---

64. *See supra* note 8 and accompanying text.

65. *Glosemeyer*, 879 F.2d at 319. Pursuant to 49 U.S.C. § 10903, a railroad must obtain the ICC's permission to abandon any rail corridor. *See supra* note 29.

66. *Glosemeyer*, 879 F.2d at 319. The DNR cited "the geological, biological, historical, archaeological, and cultural values of the right-of-way" as grounds for its request. *Id.*

67. *Id.* at 320.

68. There were 144 landowners protesting the MKT rail-to-trail conversion. *Id.* at 318.

69. *Id.* at 320. The landowners initially filed their action in Missouri state court. The landowners sought to quiet title in their names, asserting that "their reversionary interests in the right-of-way would have vested in them under state law upon M-K-T's decision to abandon its line . . . ." Glosemeyer v. Missouri-Kansas-Texas R.R., 685 F. Supp. 1108, 1111 (E.D. Mo. 1988), *aff'd*, 879 F.2d 316 (8th Cir. 1989). The case was subsequently removed to the U.S. District Court for the Eastern District of Missouri. *Glosemeyer*, 879 F.2d at 320.

70. *Glosemeyer*, 685 F. Supp. at 1111–12. Plaintiffs asserted that section 1247(d), the ICC regulations, and the March 6, 1987 order together constituted:

> (1) an invalid exercise of the commerce clause power under Article I, Section 8 of the United States Constitution; (2) an impermissible impairment of the obligation of contracts under Article I, Section 10 of the United States Constitution; (3) a violation of due process under the fifth and fourteenth amendments of the United States Constitution; (4) a taking of property without just compensation under the fifth amendment of the United States Constitution; and (5) a violation of the various Missouri constitutional and statutory provisions.

Id.

Defendants' summary judgment motion was granted by the district court. On

B. *The Contracts Clause Challenge*

In *Glosemeyer*, plaintiffs argued that the federal rails-to-trails law unconstitutionally interfered with their rights-of-way agreements, thus depriving them of their reversionary interests.[71] This argument, based on the language of the contracts clause, was quickly disposed of by the United States Court of Appeals for the Eighth Circuit. The court stated that by its express language, the contract clause (article I, section 10) applies only to state, and not federal, legislation.[72] The court indicated, however, that impairments of contractual rights are also examinable under a fifth amendment due process analysis.[73] Under such an analysis, plaintiffs have the burden of showing that Congress, in enacting section 1247(d), " ' "acted in an arbitrary and irrational way." ' "[74] The court found that in this case the burden

appeal, plaintiffs again raised these constitutional issues. The Eighth Circuit, however, affirmed the decision of the district court. *Glosemeyer*, 879 F.2d at 318.

Note that use of the phrase "reversionary rights" by the plaintiffs here implies that the railroad's interest was a fee simple determinable. Language elsewhere, however, implies that the interest held was an easement: "once the right-of-way is no longer used for rail purposes, it automatically dissolves." *Id.* at 319–20. While there is quite obviously a difference between these two interests, the courts often refer to a landowner's interest as a "reversionary interest" in the rails-to-trails context. National Wildlife Fed'n v. I.C.C., 850 F.2d 694, 703 n.13 (D.C. Cir. 1988); *see also supra* note 10. For the sake of clarity, this practice will be followed here as well.

71. *Glosemeyer*, 879 F.2d at 321 ("Plaintiffs characterize[d] the grants of right-of-way . . . as contracts and argue[d] that § 1247(d) impairs their rights under these contracts by purporting to transfer their reversionary interests in the right-of-way to a third-party, that is, the designated interim trail user or, possibly, the public.").

72. *Id.* The contracts clause provides that "[n]o State shall . . . pass any . . . law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10; *see also* Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 732 n.9 (1984) (the contracts clause does not apply "either by its own terms or by convincing historical evidence, to actions of the National Government"); United States v. Conservation Chem. Co., 619 F. Supp. 162, 214 (W.D. Mo. 1985) (only state law is affected by the express terms of the contracts clause, and therefore, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) does not fall within its scope); *cf.* Peick v. Pension Benefit Guar. Corp., 724 F.2d 1247, 1263 (7th Cir. 1983) (The contracts clause, applicable only to the states, "was intended to prevent the various States from enacting debtor relief measures which unfairly interfered with the ability of creditors to collect debts during the economic depression which followed the Revolutionary War."), *cert. denied*, 467 U.S. 1259 (1984).

73. *Glosemeyer*, 879 F.2d at 321; *see also* Armstrong v. Fairmont Community Hosp. Ass'n, 659 F. Supp. 1524, 1533 (D. Minn. 1987) (Although the contracts clause does not apply to the federal government, "a flagrant impairment of contract by a federal governmental body would be forbidden by the due process clause of the fifth amendment."); Speckmann v. Paddock Chrysler Plymouth, Inc., 565 F. Supp. 469, 473 (E.D. Mo. 1983) (explaining that "the principles underlying [the contracts clause] apply to federal legislation only to the extent they are incorporated into the Fifth Amendment") (citation omitted).

74. *Glosemeyer*, 879 F.2d at 321 (quoting National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry., 470 U.S. 451, 472 (1985)) (further citation omitted).

had not been met by the plaintiffs.[75]

In making this determination, the Eighth Circuit adopted the fifth amendment due process analysis used by the district court. Under this analysis, the court must first determine whether the plaintiffs have met their burden of establishing that section 1247(d) alters contractual rights or obligations and, if so, whether this alteration is significant enough to violate the Constitution.[76] This is a threshold requirement, and plaintiffs must show such effects are substantial before the statute will be scrutinized.[77] If the threshold requirement is met, the statute is presumed to be constitutional unless plaintiffs can show that Congress acted in an " ' "arbitrary and irrational" ' " manner in enacting the statute.[78]

The Eighth Circuit agreed with the district court's application of this standard of due process analysis to the facts of this case. To begin with, the right-of-way grants were assumed, for the purpose of analysis, to be contracts, and also assumed to be substantially impaired by section 1247(d). Even with these assumptions, however, the court felt that the plaintiffs could not show Congress had acted irrationally in enacting section 1247(d). The court noted that rationality for fifth amendment purposes was essentially the same standard used under commerce clause analysis.[79] Holding that Congress had

75. *Id.* The Eighth Circuit stated: "We agree with the district court that 'Congress acted *rationally* in enacting § 1247(d) by electing to postpone railroad abandonments and to encourage interim trail use so as to further its railbanking purpose.' " *Id.* (quoting Glosemeyer v. Missouri-Kansas-Texas R.R., 685 F. Supp. 1108, 1119 (E.D. Mo. 1988), *aff'd,* 879 F.2d 316 (8th Cir. 1989)) (emphasis added).

76. *Id.* The district court stated that "plaintiffs must demonstrate both that § 1247(d) alters contractual rights or obligations and, if an impairment is found, that it is of constitutional dimension." Glosemeyer v. Missouri-Kansas-Texas R.R., 685 F. Supp. 1108, 1118 (E.D. Mo. 1988, *aff'd,* 879 F.2d 316 (8th Cir. 1989) (citation omitted).

77. *Glosemeyer*, 685 F. Supp. at 1118.

78. *Id.* at 1118-19 (quoting National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry., 470 U.S. 451, 472 (1985)) (further citations omitted). "The party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and "establish that the legislature has acted in an arbitrary and irrational way." " *Id.* (quoting National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry., 470 U.S. 451, 472 (1985)) (further citations omitted).

79. *Glosemeyer*, 879 F.2d at 321. Like the district court, the circuit court thought that the rationality test for due process purposes was "related to plaintiffs' commerce clause argument." *Id.*; *see also Glosemeyer*, 685 F. Supp. at 1119.

The commerce clause analysis consists of two parts. First, the court determines whether there is any rational basis for Congress' conclusion that "a regulated activity affects interstate commerce." Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981). Second, if such a basis is established, then the court must decide whether the means are "reasonably adapted" to bringing about the end sought. *Id.* (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 262 (1964)).

The standard of review here is very narrow, and "[t]he judicial task is at an end

a rational basis for enacting the rails-to-trails statute, the court refused to invalidate section 1247(d) on contract clause grounds.[80]

C. *The Commerce Clause Challenge*

The Eighth Circuit then addressed the plaintiffs' commerce clause argument.[81] Plaintiffs argued that section 1247(d) had no rational basis in railroad regulation,[82] the amendment being simply a means of obtaining recreational trails without the payment of just compensation.[83] To support this assertion, plaintiffs argued that there was little likelihood that many of the rail corridors proposed for rail banking would ever be reactivated because of the prohibitive cost.[84] Plaintiffs also argued that, since the abandoning railroad had ac-

---

once the court determines that Congress acted rationally in adopting a particular regulatory scheme." *Hodel*, 452 U.S. at 276.

80. *Glosemeyer*, 879 F.2d at 321; *see also Glosemeyer*, 685 F. Supp. at 1119.

81. Before doing so, however, the Eighth Circuit first addressed plaintiffs' argument that the district court had erroneously used a "rational basis" standard of review in its commerce clause analysis. *Glosemeyer*, 879 F.2d at 321. The district court had relied on the *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), narrow standard of review instead of the *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) strict scrutiny standard urged by plaintiffs. *Glosemeyer*, 879 F.2d at 321; *see supra* note 79 for the *Hodel* standard of review.

Nollan involved a regulatory takings issue. *Nollan*, 483 U.S. at 827. The Nollans owned beach front property in Ventura County, California. *Id.* Desiring to build a new, larger home on their land, they applied for a coastal development permit from the California Coastal Commission, as required by CAL. PUB. CODE §§ 30106, 30212, and 30600 (West 1986). *Nollan*, 483 U.S. at 828.

The Commission granted the permit on the condition that the Nollans in turn grant a public access easement across their beach. This condition was required as the Nollan's new home would block the view of the ocean. *Id.* This obstruction, the Commission felt, "would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit.' " *Id.* at 828–29 (citation omitted). The Court struck down in a five-to-four decision the public access condition imposed by the Commission as an uncompensated taking. *Id.* at 841–42.

In *Glosemeyer*, the Eighth Circuit distinguished *Nollan*, noting that it "involved land use regulation." *Glosemeyer*, 879 F.2d at 321. The court stated: "We think the district court correctly characterized § 1247(d) as part of the comprehensive federal scheme regulating railroads and thus subject to commerce clause analysis and the rational basis test." *Id.*

82. *See Glosemeyer*, 879 F.2d at 321–22.

83. *Id.* at 321 ("On the merits, plaintiffs argue that § 1247(d) lacks a rational basis because Congress's express legislative purpose, railbanking, is a sham.").

84. *Id.* at 321–22. The plaintiffs made a plausible argument here, noting that "because in most cases the track will have been salvaged, resumption of rail service would require the installation of a new roadbed and new track and the repair or reconstruction of bridges and would thus be prohibitively expensive." *Id.* at 322. Yet, this argument ignores how expensive it would be to reassemble an entire rail corridor from scratch. The costs of acquiring rights-of-way alone would be far more prohibitive than those costs detailed above. *See infra* notes 183–184 and accompanying text.

quired track along a parallel route, the rail corridor at issue would never be reactivated.[85]

In addition, plaintiffs maintained that, even if section 1247(d) had a "rational basis" in the railroad regulation, the means chosen were not "reasonably related" to that end.[86] Specifically, plaintiffs argued that section 1247(d) was "remarkably underinclusive": only 5% of all railroad rights-of-way abandoned are actually railbanked.[87] Plaintiffs also pointed out that section 1247(d) was ineffective because the railbanking mechanism is entirely voluntary; the ICC will not force rail carriers to enter into interim use agreements.[88] Nevertheless, the court refused to address these arguments, noting that such problems with the effectiveness of the law were concerns more appropriately directed to the attention of Congress.[89]

Once these arguments were disposed of, the Eighth Circuit's actual analysis of the commerce clause argument was straightforward. The court noted that a commerce clause analysis calls for a " 'relatively narrow' " scope of judicial review.[90] The court also noted that in this case the plaintiffs had not argued the activity regulated by section 1247(d) was beyond the scope of Congress' commerce clause powers.[91] Considering first the "rational basis" of section 1247(d), the court expressly agreed with the district court "that railbanking is

85. *Glosemeyer*, 879 F.2d at 322.

86. *Id.*

87. *Id.*

88. *Id.* Specifically, the court stated that "although railbanking is ostensibly of vital importance to the national welfare, certification for interim trail use is not mandatory and instead depends upon the voluntary cooperation of both the abandoning railroad and the prospective interim trail user." *Id.*; *see* Rail Abandonments—Use of Rights-of-Way As Trails, 2 I.C.C.2d 591 (1986) (ICC implementation rules for section 1247(d)); *see also* National Wildlife Fed'n v. I.C.C., 850 F.2d 694, 698 (D.C. Cir. 1988) (because section 1247(d) does not grant to the ICC any authority to condemn property, the final implementing rules contemplate "only voluntary arrangements between railroads and would-be trail operators").

89. *See Glosemeyer*, 879 F.2d at 322. The court noted that " '[t]he effectiveness of existing laws in dealing with a problem identified by Congress is ordinarily a matter committed to legislative judgment.' " *Id.* (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 283 (1981)).

90. *Id.* (quoting *Hodel*, 452 U.S. at 276). Judicial restraint is exercised in this area because of "the fact that the Commerce Clause is a grant of plenary authority to Congress." *Hodel*, 452 U.S. at 276. The Constitution provides that Congress shall have the power "[t]o regulate Commerce . . . among the several States," and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." U.S. CONST. art. I, § 8, cls. 3 & 18; *see also* Katzenbach v. McClung, 379 U.S. 294, 305 (1964) (while examining whether Congress could exert control over discriminatory business practices through its commerce clause powers, the Court noted that those powers were "broad and sweeping"); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824) (construing Congress' powers over the area of commerce as plenary).

91. *Glosemeyer*, 879 F.2d at 322.

not a mere sham for recreation or conservation uses."[92] The court held that the dual goals of the statute, preservation of rail corridors for future transportation use and present public recreational use, were " 'legitimate congressional goals under the commerce clause.' "[93]

Next, the court examined the question of whether section 1247(d) was reasonably adapted to meet the dual goals of the statute. The court held that the section was so adapted, agreeing with the Second Circuit that interim trail use was a " 'remarkably efficient and sensible way to achieve both goals.' "[94] Having thus held section 1247(d) constitutional under both the contract and commerce clauses, the court next turned to the takings clause challenge.

D. The Takings Clause Challenge

In addition to their other constitutional arguments, plaintiffs also argued that section 1247(d) contravened the takings clause of the fifth amendment.[95] Specifically, plaintiffs contended that the effect of section 1247(d), by postponing the vesting of their reversionary interest in the right-of-way, amounted to a temporary deprivation of property.[96] Further, because this deprivation of property was ef-

92. *Id.*

93. *Glosemeyer*, 879 F.2d at 322 (quoting Preseault v. I.C.C., 853 F.2d 145, 150 (2d Cir. 1988), *aff'd*, 110 S. Ct. 914 (1990)).

94. *Glosemeyer*, 879 F.2d at 322 (quoting *Preseault*, 853 F.2d at 150). The Second Circuit further lauded section 1247(d)'s effectiveness by stating:

> Section 1247(d) enables railroads that wish to discontinue service to help preserve rights-of-way for future rail use, when they might otherwise seek to abandon a line; it protects the railroad from liability in the interim; and it provides for maintenance of the right-of-way by the trail user during the interim.

Preseault v. I.C.C., 853 F.2d 145, 150 (2d Cir. 1988), *aff'd*, 110 S. Ct. 914 (1990).

95. *Glosemeyer*, 879 F.2d at 322. This was plaintiffs' main argument. The fifth amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V. Historically, the takings clause of the fifth amendment operated only to restrict the power of the federal government, not state governments. *See, e.g.*, Winonis Point Shooting Club v. Casperson, 193 U.S. 189, 191 (1904). Through selective incorporation of the Bill of Rights, however, the takings clause has been made applicable to the states through the fourteenth amendment. *See, e.g.*, Penn Central Transp. Co. v. New York City, 438 U.S. 104, 122 (1978).

96. *Glosemeyer*, 879 F.2d at 323; *see supra* note 7. There is no distinction drawn in the law between temporary and permanent takings. First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 318 (1987) (" '[T]emporary' takings which . . . deny a landowner all use of his property . . . are not different in kind from permanent takings, for which the Constitution clearly requires compensation."); *see also* Sun Oil Co. v. United States, 572 F.2d 786, 818 (Ct. Cl. 1978) ("The fact that a taking is temporary, as contrasted with a permanent taking, is of no consequence in the law of federal eminent domain."); R.J. Widen Co. v. United States, 357 F.2d 988, 996 (Ct. Cl. 1966) ("[t]emporary takings are recognized

fected without providing compensation, it was unconstitutional.[97] While compensation for takings would normally be provided under the Tucker Act,[98] plaintiffs maintained that this remedy was not available here since Congress had made no provision for such recourse under section 1247(d).[99]

Two distinct defenses were raised to rebut plaintiffs' arguments. First, the railroad, DNR, and various intervening environmental and recreational interest groups argued that section 1247(d) does not effectuate a taking.[100] Because state reversionary laws are subject to the ICC's plenary authority over railroad abandonments, these par-

---

in the law of federal eminent domain," such that the Constitution requires compensation).

97. *Glosemeyer*, 879 F.2d at 323.

98. 28 U.S.C. § 1491(a)(1) (1982). The Tucker Act provides:

> 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, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Id.

In a case such as the instant one, while the takings issue arises from an act of Congress, the takings claim is still " 'founded upon the Constitution.' " Glosemeyer v. Missouri-Kansas-Texas R.R., 685 F. Supp. 1108, 1120 n.11 (E.D. Mo. 1988) (quoting United States v. Causby, 328 U.S. 256, 267 (1946)) (further citations omitted), *aff'd*, 879 F.2d 316 (8th Cir. 1989).

An important point to keep in mind in relation to the Tucker Act is that the Act is "only a jurisdictional statute, . . . and does not create a substantive right to money damages." Hatzlachh Supply Co. v. United States, 444 U.S. 460, 465 n.5 (1980). Jurisdiction is also granted to the district courts, under the "Little Tucker Act," for claims which do not exceed $10,000. 28 U.S.C. § 1346(a)(2) (1982).

99. *Glosemeyer*, 879 F.2d at 323. The plaintiffs argued that "the Tucker Act remedy is not available because § 1247(d) does not include any provision for compensation and because Congress did not appropriate any funds to acquire lands for the national trail system." *Id.* Plaintiffs had argued unsuccessfully before the district court that since the Tucker Act remedy was unavailable, section 1247(d) constituted a taking without just compensation and thus was unconstitutional. *Glosemeyer*, 685 F. Supp. at 1120. Plaintiffs cited 16 U.S.C. § 1249(c)(1), in which Congress expressly refused to appropriate funds for the Lewis and Clark National Historic Trail. *Glosemeyer*, 685 F. Supp. at 1121. The Lewis and Clark Trail, established by Congress under the National Trails System Act, extends from west-central Illinois to the coast of Oregon. *See* 16 U.S.C. § 1244(a)(6) (1988). The trail passes through the same area of Missouri as the MKT interim trail. Plaintiffs incorrectly assumed that the MKT trail was part of the larger trail, and based their argument on this assumption. *Glosemeyer*, 685 F. Supp. at 1121.

The district court noted, however, that the Tucker Act remedy did not depend on Congress' appropriation of funds for section 1247(d). *Id.* Under the Tucker Act, the government "has impliedly promised to pay just compensation" when an authorized action constitutes a taking. *Id.* at 1120. Since the MKT right-of-way was shown to be separate from the Lewis and Clark Trail, the plaintiffs' argument failed. *Id.* at 1121.

100. *Glosemeyer*, 879 F.2d at 323.

ties argued that such laws take effect only when the ICC has determined that a rail abandonment can take place.[101] When a rail line is approved for interim trail use, that line is expressly not abandoned and continues to fall under the ICC's plenary authority.[102] Thus, the property rights of plaintiffs are no different than when MKT was actually running trains over the line, state property law being "irrelevant."[103]

A second defense was raised by intervenor United States. The government argued that even if section 1247(d) effected a taking, just compensation was available under the Tucker Act.[104]

The Eighth Circuit began its analysis of plaintiffs' takings clause argument by making two assumptions. First, the court assumed for the purpose of its analysis that a section 1247(d) rails-to-trails conversion of a right-of-way effects a taking.[105] Second, the court assumed that the plaintiffs' reversionary interests would vest if rail service over the right-of-way were discontinued and the right-of-way abandoned.[106]

Having assumed that a taking had occurred, the court determined whether just compensation would be available to plaintiffs. In general, compensation for takings resulting from the actions of the federal government is obtained under the Tucker Act.[107] However,

---

101. *See* 49 U.S.C. § 10903 (1982 & Supp. V 1987); *see also supra* note 29.

102. H.R. REP. No. 28, 98th Cong., 1st Sess. 8, *reprinted in* 1983 U.S. CODE CONG. & ADMIN. NEWS 112, 119. "The key finding of [§ 1247(d)] is that interim use of a railroad right-of-way for trail use . . . shall not constitute an abandonment of such rights-of-way for railroad purposes." *Id.* The text of section 1247(d) expressly provides this as well. *See supra* note 43 and accompanying text.

103. *Glosemeyer*, 879 F.2d at 323. Defendants argued that if the ICC does not end its jurisdiction over the right-of-way by declaring the right-of-way to be abandoned, state property law cannot be a relevant factor. *Id.*

104. The federal government's argument was based on the holding of the district court. The Eighth Circuit construed this holding as follows:

> [T]he district court did not decide whether the conversion of the right-of-way from rail use to interim trail use under § 1247(d) constituted a taking. Instead, the district court assumed for purposes of analysis that conversion of the right-of-way from rail use to interim trail use would effect at least a temporary taking of plaintiffs' reversionary interests in the right-of-way. The district court concluded, however, that § 1247(d) did not constitute a violation of the takings clause because plaintiffs had an available legal remedy—they could sue for damages under the Tucker Act in claims court.

Id.

105. *Glosemeyer*, 879 F.2d at 324.

106. *Id.* With this assumption came an important caveat. The Eighth Circuit noted that the reversionary interests were still "subject to the plenary authority of [the] ICC," thus, those interests could not vest "prior to [an] ICC-approved abandonment." *Id.* at 324 (citing National Wildlife Fed'n v. I.C.C., 850 F.2d 694, 703–04 (D.C. Cir. 1988)).

107. *Id.* " 'Generally, an individual claiming that the United States has taken his [or her] property can seek compensation under the Tucker Act . . . .' " *Id.* (quoting

plaintiffs had asserted that the Tucker Act was not available for takings effected by section 1247(d).[108] The Eighth Circuit responded to this argument by referring to the analysis used by the Supreme Court in *Ruckelshaus v. Monsanto*[109] on a similar, but different takings claim. First, the court stated that the Tucker Act is applicable to any takings claim resulting from the effect of a federal statute, unless Congress expressly withdraws applicability.[110] With respect to section 1247(d), Congress took no such action. Both section 1247(d) and its legislative history are silent on the relationship between section 1247(d) and the Tucker Act.[111]

As a result, the Eighth Circuit saw two alternatives: either the enactment of section 1247(d) did nothing to affect the jurisdiction of the Tucker Act, or it repealed part of the Act's jurisdiction by implication.[112] Repeals by implication, the court noted, are expressly "disfavored" at law.[113] Therefore, the court affirmed the district court's holding that recourse under the Tucker Act was available to the plaintiffs. Thus, with an available means of obtaining just compensation, the court concluded that section 1247(d) does not violate the takings clause of the fifth amendment.[114]

1. Analyzing the Circuit Court's Analysis of the Takings Clause Challenge

Two issues are involved in a takings question: whether a taking has occurred and, if so, whether just compensation is available to the affected property owner.[115] Where, as here, the constitutionality of

---

Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984)) (footnote omitted); *see also* supra note 98.

108. *See supra* note 99.

109. 467 U.S. 986 (1984). In *Monsanto*, the Monsanto Company had brought suit alleging that the data-disclosure provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a(c)(1)(D) (1978), effected a taking of certain trade secrets. *Id.* at 998–99.

110. *Glosemeyer*, 879 F.2d at 324. The Eighth Circuit stated:

> "In determining whether a Tucker Act remedy is available for claims arising out of a taking pursuant to a federal statute, the proper inquiry is not whether the statute 'expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy,' but 'whether Congress has in the [statute] *withdrawn* the Tucker Act grant of jurisdiction to the Court of Claims to hear a suit involving the [statute] 'founded . . . upon the Constitution.' "

Id. (quoting *Monsanto*, 467 U.S. at 1017) (emphasis in original) (further citations omitted).

111. *Id.* at 325.

112. *See id.*

113. *Id.* (quoting Regional Rail Reorganization Act Cases, 419 U.S. 102, 133 (1974)); *see also* Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442 (1987) ("Repeals by implication are not favored . . . .").

114. *Glosemeyer*, 879 F.2d at 325.

115. A third issue is whether the taking is for "public use" within the meaning of the fifth amendment. For the sake of this comment, the public use issue is assumed

a statute is challenged under the takings clause of the fifth amendment, the more relevant issue is compensation. This is so because the Constitution does not bar the taking of private property by the federal government (nor bar, through the fourteenth amendment, such takings by a state government).[116] Instead, the fifth amendment merely requires the federal government to pay just compensation for any takings that do occur.[117]

Finding that the Tucker Act provides a means to obtain compensation, the Eighth Circuit ruled section 1247(d) was constitutional.[118] But, the court did not determine whether in the first instance section 1247(d) effectuates a taking at all, as a number of defendants had argued.[119] It was not necessary for the court to address this issue, however, since the availability of compensation was the sole issue presented to the court. Yet, the takings question is nevertheless relevant to the compensation issue. If no taking is effected by a challenged statute, then the question of compensation is never reached. As a result, the question of whether a taking has occurred becomes a threshold issue for the question of compensation.[120]

In *Glosemeyer*, the Eighth Circuit chose to analyze the takings clause issue from the perspective of whether compensation was available, not whether a taking was effected. Both the District of Columbia and Second Circuit Courts of Appeal, as well as the Supreme Court, have examined section 1247(d) to determine whether it effectuates a tak-

---

to be answered in the affirmative. The Supreme Court has stated that "[t]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

116. The fifth and fourteenth amendments only prohibit government taking without the payment of just compensation. *See* U.S. CONST. amend. V. If the taking is for a public use, the power of the government to take is not an issue.

117. *See* First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 314–15 (1987). The Supreme Court stated in *First English*:

> As [the fifth amendment's] language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power. . . . This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.

Id. (citations omitted) (emphasis in original).

118. *Glosemeyer*, 879 F.2d at 325. The Supreme Court has adopted a similar method of analysis in addressing and dismissing a fifth amendment challenge to section 1247(d). *See* Preseault v. I.C.C., 110 S. Ct. 914, 921–24 (1990); *see also infra* notes 141–160 and accompanying text.

119. *Glosemeyer*, 879 F.2d at 323.

120. Characterizing the taking issue as a threshold issue is self evident and a matter of common sense. *See First English*, 482 U.S. at 316 ("[T]he Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution.").

ing. The approach of these courts provides a starting point for formulating a framework to analyze section 1247(d).

III. VIEWS FROM THE OTHER SIDE OF THE TRACKS

A. National Wildlife Federation v. I.C.C.

In *National Wildlife Federation v. I.C.C.*,[121] a landowner subject to an easement for railroad purposes only[122] challenged the effect of section 1247(d), particularly the ICC's implementing regulations.[123] The landowner argued that in holding her reversionary interest in abeyance during interim trail use, section 1247(d) effected a taking.[124] In response, the ICC argued that the specific intent of Congress was to keep the right-of-way under ICC authority.[125] Thus, no reversionary interest could vest under state law.[126] Moreover, the ICC argued that the reversionary interests were " 'simply postponed in the event of a trail use agreement,' " in accordance with the language and intent of the statute.[127] The ICC also contended that the supremacy clause of the Constitution preempts state law regarding reversionary interests.[128] While admitting the validity of these assertions,[129] the District of Columbia Circuit nonetheless felt that, far from settling the issue, the ICC's arguments merely outlined the issue to be decided—whether the regulations effected a taking.[130]

121. 850 F.2d 694 (D.C. Cir. 1988). The procedural background of *National Wildlife* is unusual. Two separate plaintiffs appealed adverse ICC rulings, with those appeals being consolidated on appeal. *Id.* at 699. The two plaintiffs, however, were advocating positions indirectly adverse to one another. The National Wildlife Federation (NWF) was seeking a ruling to make rail-to-trail conversions easier, while the landowner in question was seeking to strike down the whole section 1247(d) scheme as unconstitutional. *Id.* at 696.

122. *Id.* at 702.

123. *Id.* at 696, 702. Beres was challenging the constitutionality of the Trails Act Rules. *See supra* note 121.

124. *Id.* at 704.

125. The ICC reasoned that " '[s]ince the [amendment] provides that interim trail use under [section 1247(d)] shall not constitute abandonment of rights-of-way for railroad purposes, the railroad easement continues and reversionary interests do not mature.' " *Id.* (quoting Rail Abandonments—Use of Rights-of-Way As Trails, 2 I.C.C.2d 591, 600 (1986)); *see also supra* note 102 and accompanying text.

126. *National Wildlife*, 850 F.2d at 704.

127. *Id.* (citation omitted) (emphasis in original); *see also supra* note 102.

128. *Id.* at 705.

129. *Id.* The court stated:

> Preemption of state law is neither the issue nor the answer, however. No one doubts that Congress has the authority to provide that rights-of-way no longer needed for rail use be converted to trail use, nor that state property laws to the contrary must be displaced by Congress's exercise of that authority.

Id.

130. *Id.* at 704. The court formulated the issue as "whether the postponement of

Having made this determination, the court remanded the case to the ICC for reconsideration of the implementing regulations.[131] The court directed the need to address two issues on remand: (1) whether the rules amounted to a regulatory taking; and (2) what effect should be given, under the regulations, of limiting language within the reversionary instruments.[132]

B. Preseault v. I.C.C.

The facts of *Preseault v. I.C.C.*[133] are virtually identical to those of *Glosemeyer*.[134] The Preseaults owned land adjacent to a railroad right-of-way in Vermont. They and other adjacent landowners appealed an adverse ICC ruling, arguing that the working of section 1247(d) amounted to an unconstitutional taking of their reversionary interests in the right-of-way.[135]

---

a reversionary interest that would otherwise vest under state law constitutes a taking of private property for which just compensation must be made . . . ." *Id.*

131. *Id.* at 708.

132. *Id.* For example, the Beres instrument contained an express limitation that the easement only be used for railroad purposes. *See id.* at 702.

133. 853 F.2d 145 (2d Cir. 1988), *aff'd,* 110 S. Ct. 914 (1990).

134. Indeed, at one point it was thought that *Preseault* and *Glosemeyer* might be consolidated and both heard by the Court. *See Missouri Court Gives Go-Ahead to the "Big One"*, TRAILBLAZER July–Sept. 1989, at 5.

135. *Preseault,* 853 F.2d at 148. Specifically, the landowners claimed that title to the right-of-way reverted to them in 1975 and sought a declaratory judgment in the Vermont state court that the easement had been abandoned, and therefore extinguished. *Id.* at 147. The Vermont Supreme Court held that, since Vermont Railway only discontinued service over the line and had not yet been authorized by the ICC to abandon the line outright, the right-of-way was still under the ICC's plenary jurisdiction. *Id.* The state court was thus without jurisdiction to make any determination regarding the issue of abandonment. *Id.*

The landowners next filed a petition with the ICC "seeking a certificate of abandonment with respect to the rail line." *Id.* While this petition was being considered, Vermont gave notice to the ICC that the state intended to convert the line over to interim use as a recreational trail pursuant to section 1247(d). *Id.* at 147–48. The ICC subsequently approved the interim trail use arrangement and thus dismissed the landowners' petition. *Id.* at 148; *see* State of Vermont and Vermont Ry.—Discontinuance of Service Exemption, 3 I.C.C.2d 903, 908 (1987) ("Inevitably, interim trail use will conflict with the reversionary rights of adjacent land owners, but that is the very purpose of the Trails Act."). The landowners appealed the dismissal. *Preseault,* 853 F.2d at 148.

On appeal, the state of Vermont intervened claiming the state had acquired either an easement for public transportation purposes or outright title to the line in 1962, from the Rutland-Canadian Railway Company. *Id.* at 147. Thus, Vermont claimed that it held "title to the railroad right-of-way in fee simple or, in the alternative, that there would be no reversion while the right-of-way was still employed for a public purpose, even if the state's interest . . ." was only an easement. *Id.* The state's argument was not without precedent. *See, e.g.*, State, by Washington Wildlife Preservation, Inc. v. State, 329 N.W.2d 543 (Minn. 1983) (conversion in the use of a right-of-way from a railroad bed to a public recreational trail did not constitute an aban-

1. *The Second Circuit's Analysis*

The Second Circuit began its analysis of whether section 1247(d) effects a taking by first examining legislative history in order to determine the legislative intent behind the section. The court found Congress' purpose behind section 1247(d) to be the preservation of railroad rights-of-way for future use, authorizing in the interim use as recreational trails.[136]

In order to accomplish this purpose, the court found that the ICC has been given statutory authority to withhold the right to abandon lines over which a carrier has discontinued service. If no actual abandonment has occurred, the reversionary interests held by landowners can not be realized.[137] Instead the right-of-way continues, as before, to be subject to the ICC's plenary authority, held expressly for railroad purposes.[138] In such a case, the court concluded, no taking occurs.[139]

---

donment of the right-of-way for public travel since the public purposes for which the easement was acquired may change over time).

136. *Preseault*, 853 F.2d at 147. According to the decision of the Second Circuit in *Preseault*, Congress enacted section 1247(d) as part of the National Trails System Act Amendments of 1983 in order to overcome a specific problem. *Id.* Historically, railroad land has been held by easement. In some states the law provides that "once rail service is discontinued such easements automatically expire and the rights-of-way revert to adjacent property owners." *Id.* Obviously, this acts as a significant impediment to the preservation of rail corridors. *Id.* To counteract this problem, Congress enacted section 1247(d):

> in order (1) to preserve for possible future railroad use rights-of-way that are not currently in service and (2) to allow interim use of the rail corridors as recreational trails. When a rail corridor is "rail banked" for future use and made available for interim use as a trail under this statute state property laws are preempted and any reversionary interest in the corridor does not vest, even though rail service is discontinued.

Id.; *see also supra* note 45.

137. *Preseault*, 853 F.2d at 151. That this was the result desired by Congress under section 1247(d) is unequivocally clear from the legislative history of the National Trails System Act Amendments of 1983. The legislative history provides: "The key finding of [section 1247(d)] is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, *shall not constitute an abandonment of such rights-of-way for railroad purposes*." H.R. Rep. No. 28, 98th Cong., 1st Sess. 8, *reprinted in* 1983 U.S. Code Cong. & Admin. News 112, 119 (emphasis added); *see also supra* note 45.

138. *Preseault*, 853 F.2d at 151. This is also clear from the language of section 1247(d) itself. *See supra* note 43 and accompanying text. The Second Circuit stated that while landowners may call Congress' railbanking effort under section 1247(d) "utter fiction" and a "mere subterfuge" for an uncompensated taking, the court viewed section 1247(d) as "creative" and "a remarkably efficient and sensible way to achieve" the purpose sought by Congress. *Preseault*, 853 F.2d at 149–51.

139. *Preseault*, 853 F.2d at 151.

2. *The Supreme Court's Analysis*

On appeal, the Supreme Court affirmed the decision of the Second Circuit.[140] The Court did not, however, expressly adopt the reasoning of the Second Circuit in rejecting the Preseaults' constitutional challenge to section 1247(d). Instead, the Court followed the line of analysis it had previously used in *Ruckelshaus v. Monsanto Co.*;[141] the same analysis used by the Eighth Circuit in *Glosemeyer*.[142] Under this line of analysis, the fifth amendment is interpreted as not prohibiting takings, rather, it is interpreted as only requiring compensation in the event of a taking. As a result, the preeminent issue in a fifth amendment takings clause challenge is whether just compensation is available to the aggrieved party.[143]

The Court found that, as a general rule, the Tucker Act is the means by which just compensation is secured landowners for takings by the federal government.[144] Consequently, the Court held that since the plaintiffs had not first sought compensation under the Tucker Act before challenging the constitutionality of section 1247(d), the Court would not address their constitutional argument.[145] The Court characterized the critical issue involved in the case as whether the Tucker Act remedy applies to alleged takings under section 1247(d).[146] For the Tucker Act not to apply, the Court stated Congress must have unambiguously withdrawn jurisdiction in section 1247(d).[147]

---

140. Preseault v. I.C.C., 110 S. Ct. 914, 926 (1990).

141. 467 U.S. 986 (1984).

142. 879 F.2d 316 (8th Cir. 1989); *see supra* notes 109–114 and accompanying text.

143. *See Preseault*, 110 S. Ct. at 921. "If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the government' for a taking." *Id.* (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1018 n.21 (1984)) (citation omitted); *see also supra* notes 116–117 and accompanying text.

144. *Preseault*, 110 S. Ct. at 922. "The Tucker Act provides jurisdiction in the United States Claims Court for any claim against the Federal Government to recover damages founded on the Constitution, a statute, a regulation or an express or implied-in-fact contract." *Id.*

145. *See Preseault*, 110 S. Ct. at 921 (" 'taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act' ") (quoting Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 (1985)).

146. *Id.* at 922. "The critical question in this case . . . is whether a Tucker Act remedy is available for claims arising out of takings pursuant to the Amendments." *Id.*

147. *Id.* The Court stated:

> The proper inquiry is not whether the statute "expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy," but rather "whether Congress has in the [statute] *withdrawn* the Tucker Act grant of jurisdiction to the [Claims Court] to hear a suit involving the [statute] 'founded . . . upon the Constitution.' "

In making this determination, the Supreme Court rejected two arguments made by the aggrieved landowners that Congress had withdrawn Tucker Act jurisdiction from section 1247(d).[148] Neither the Trails Act Amendments themselves, nor their legislative histories, mention the Tucker Act. However, the plaintiffs argued that Congress did not mean for compensation to be available under the Tucker Act,[149] citing an uncodified portion of the amendments which expressly withheld appropriations for the acquisition of certain trails.[150] The Court, however, rejected this implication.

First, the Court stated the plaintiffs' position implied that only rail-to-trail conversions not requiring federal money were authorized by section 1247(d). But this distinction within the statute simply does not exist. The broad language of the rails-to-trails law, the Court reasoned, authorizes " 'interim use of *any* established railroad rights-of-way.' "[151] Second, the Court noted that it had "always assumed that the Tucker Act . . . [was] an 'implie[d] promis[e]' to pay just compensation which individual laws need not reiterate."[152]

Finally, the Court noted that it was not necessary to reach the

Id. (quoting Regional Rail Reorganization Act Cases, 419 U.S. 102, 126 (1974)) (emphasis and alterations in original); *see also supra* notes 107–108, 110 and accompanying text.

148. *Preseault*, 110 S. Ct. at 922. "[W]e conclude that the Amendments did not withdraw the Tucker Act remedy. Congress did not exhibit the type of 'unambiguous intention to withdraw the Tucker Act remedy[ ]' that is necessary to preclude a Tucker Act claim." *Id.* (quoting Ruckelshaus v. Monsanto, 467 U.S. 986, 1019 (1984)) (citation omitted). For a related view, see Glosemeyer v. Missouri-Kansas-Texas R.R., 879 F.2d 316, 324–325 (8th Cir. 1989); *see also supra* notes 107, 110 and accompanying text.

149. *Preseault*, 110 S. Ct. at 922. Plaintiffs argued that section 101 of the 1983 Amendments:

> limits the ICC's authority for conversions to those not requiring the expenditure of any funds and to those others for which funds had been appropriated in advance. Thus, any conversion that could result in Claims Court litigation was not authorized by Congress, since payment for such an acquisition would not have been approved by Congress in advance. Petitioners insist that such *unauthorized* government actions cannot create Tucker Act liability.

Id. (emphasis in original).

150. *Id.* Plaintiffs cited section 101 of the uncodified version of the Trails Act Amendments. These uncodified Amendments provide that "[n]otwithstanding any other provision of this Act, authority to enter into contracts, *and to make payments*, under this Act shall be effective only to such extent or in such amounts as are provided in advance in appropriation Acts." National Trails System Act Amendments of 1983, 97 Stat. 42, 42 (1983) (emphasis added).

151. *Preseault*, 110 S. Ct. at 922 (emphasis in original) (quoting National Trails System Act § 8(d), 16 U.S.C. § 1247(d) (1988)).

152. *Id.* (quoting Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 21 (1940)). In *Yearsley*, the Court held that "if the authorized [government] action . . . does constitute a taking of property for which there must be just compensation under the Fifth Amendment, the Government has impliedly promised to pay that compensation and

plaintiffs' interpretation of the uncodified provision of the Trails Act Amendments because "[s]ection 101 does not manifest the type of clear and unmistakable congressional intent necessary to withdraw Tucker Act coverage."[153] Rather, payments for takings to establish trails "would be made 'under' the Tucker Act, not the Trails Act, and would be drawn from the Judgement Fund, which is a separate appropriated account . . . ."[154]

The Court next addressed the plaintiffs' argument that "Congress' desire that the Amendments operate at 'low cost,' . . . indicates that Congress withdrew the Tucker Act remedy."[155] The Court rejected this interpretation of section 1247(d), stating "[w]e have previously rejected the argument that a generalized desire to protect the public fisc is sufficient to withdraw relief under the Tucker Act."[156] The Court noted that such a withdrawal could not be based on a general concern for limiting spending. The Court reasoned that Congress' concern about keeping spending at a minimum and its failure to mention the Tucker Act remedy need not reflect an intention to withdraw the remedy. Instead, together they could just reveal Congress' belief that section 1247(d) did not effect a taking, so that the Tucker Act remedy was irrelevant.[157] Alternatively, Congress may have simply (and rightly) assumed that the remedy was available.[158]

---

has afforded a remedy for its recovery by a suit in the Court of Claims." *Yearsley*, 309 U.S. at 21.

153. *Preseault*, 110 S. Ct. at 923. Instead of adopting the plaintiff's interpretation, the Court interpreted section 101 to mean "simply that payments made pursuant to the Amendments, such as funding for scenic trails, markers, and similar purposes, are effective only 'in such amounts as are provided in advance in appropriation Acts . . . .' " *Id.* (citations omitted).

154. *Id.*; *see also* United States v. Causby, 328 U.S. 256, 267 (1946) ("If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine.") (citation omitted). The "Judgement Fund" referred to in the opinion is codified at 31 U.S.C. § 1304(a) (1982), and provides:

> (a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when—
>
> (1) payment is not otherwise provided for.

Id.

155. *Preseault*, 110 S. Ct. at 923. The theme of developing inexpensive public recreational options runs through the entire National Trails System Act, not just the 1983 amendments. *See supra* note 41; *see also Preseault*, 110 S. Ct. at 923 n.7 (" 'committee recommended a revised text which eliminated most of the items which would require future Federal expenditures. . . . Additional recommendations reflect continuing efforts to encourage the expansion of trail recreation opportunities across the Nation at a low cost' ") (quoting 129 CONG. REC. 5219 (1983) (statement of Rep. Seiberling)).

156. *Preseault*, 110 S. Ct. at 923.

157. *Id.*

158. *Id.* The Court stated:

"Congress' failure specifically to mention or provide for recourse against

With this in mind, the Court surmised that Congress' goal of a low cost trail system "might reflect [a] rejection of a more ambitious program of federally owned and managed trails, rather than withdrawal of a Tucker Act remedy."[159] In any case, an unambiguous intention to withdraw Tucker Act jurisdiction did not necessarily follow from Congress' desire to establish trails at a low cost.[160]

3. *The Takings Question*

The approach to the fifth amendment issue taken in *Preseault* was similar to that taken in both *Ruckelshaus* and *Glosemeyer*. The issue presented in each of the cases was whether just compensation was available to the plaintiffs. Holding that compensation was available under the Tucker Act, both the Supreme Court in *Preseault*[161] and the Eighth Circuit in *Glosemeyer*[162] held section 1247(d) constitutional.

While both opinions appear unassailable, neither court has established an analytical framework or structure to examine whether the application of section 1247(d) could effectuate a taking. While this shortcoming is not directly relevant to the fifth amendment question of whether compensation is available, the takings issue will, nevertheless, eventually need to be addressed.[163] For, although the Supreme Court held in *Preseault* that the Tucker Act remedy is avail-

> the Government may reflect a congressional belief that . . . [the statute] effects no Fifth Amendment taking or it may reflect Congress' assumption that the general grant of jurisdiction under the Tucker Act would provide the necessary remedy for any taking that may occur. In any event, the failure cannot be construed to reflect an unambiguous intention to withdraw the Tucker Act remedy."

Id. (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1018–19 (1984)).

159. *Id.* at 924. The Court also noted that "[t]he statements made in Congress during the passage of the Trails Act Amendments might reflect merely the decision not to create a program of direct federal purchase, construction, and maintenance of trails, and instead to allow state and local governments and private groups to establish and manage trails." *Id.* (footnote omitted).

160. *Id.* The Court concluded that Congress' "low cost" language was not an indication of the " 'unambiguous intention' required by our prior cases" to withdraw Tucker Act jurisdiction. *Id.*

161. *Id.* The Court held that "petitioners' failure to make use of the available Tucker Act remedy renders their taking challenge to the ICC's order premature." *Id.* Accordingly, the Court declined to decide whether a taking had occurred.

162. *Glosemeyer v. Missouri-Kansas-Texas R.R.*, 879 F.2d 316, 325 (8th Cir. 1989). In *Glosemeyer*, the court stated that "whether § 1247(d) effects a taking of plaintiffs' property interests does not answer plaintiffs' constitutional challenge; rather, what is dispositive is whether plaintiffs can obtain compensation, which depends, in turn, upon whether plaintiffs can sue under the Tucker Act." *Id.* at 324 (citation omitted). After concluding that the Tucker Act remedy was available to the plaintiffs, the court held that "§ 1247(d) does not violate the takings clause." *Id.* at 325.

163. Since the Supreme Court has determined that plaintiffs must seek compensation under the Tucker Act, the takings claims must be pressed in either the Claims

able for takings under section 1247(d), the Court's holding did not establish a right to compensation under the Act.

IV. The Takings Issue and a Framework for Analyzing Section 1247(d)

As noted above, the Supreme Court in *Preseault* did not establish an analytical framework for determining whether the application of section 1247(d) effectuates a taking. Justice O'Connor, however, in her concurring opinion, which was joined in by Justices Scalia and Kennedy, did attempt to lay out just such a framework. While concurring in the majority opinion, Justice O'Connor wrote separately "to express my view that state law determines what property interest petitioners possess and that traditional takings doctrine will determine whether the Government must compensate petitioners for the burden imposed on any property interest they possess."[164]

Justice O'Connor's opinion focused on the manner in which the takings question should be resolved. She emphasized three factors: (1) that state law would determine the nature of the property owner's interest;[165] (2) that while the ICC's authority over rail abandonments was plenary,[166] this authority did not nullify a property owner's rights, nor prevent the fifth amendment from having effect;[167] and (3) that upon establishing that a landowner did have a property interest in a right-of-way, traditional takings doctrine would determine whether compensation need be paid.[168]

A. *Threshold Question: Property Owner's Interest Under State Law*

Under the analysis used by Justice O'Connor in *Preseault*, determining whether a landowner is entitled to compensation as the result of a rails-to-trails conversion first requires that the landowner have

Court or, if the amount in controversy does not exceed $10,000, in the district courts. *See supra* note 98.

164. *Preseault*, 110 S. Ct. at 926 (O'Connor, J., concurring).

165. *See id.* at 926–27 (O'Connor, J., concurring). Specifically, Justice O'Connor stated that "[d]etermining what interest petitioners would have enjoyed under . . . [state] law, in the absence of . . . [a rails-to-trails conversion under section 1247(d)], will establish whether petitioners possess the predicate property interest that must underlie any takings claim."

166. *Id.* at 927–28 (O'Connor, J., concurring).

167. *See Preseault*, 110 S. Ct. at 927 (O'Connor, J., concurring). " '[A] sovereign, "by *ipse dixit*, may not transform private property into public property without compensation. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." ' " *Id.* (O'Connor, J., concurring) (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1012 (1984)) (further citations omitted).

168. *See id.* at 928 (O'Connor, J., concurring). "Well-established principles will govern analysis of whether the burden . . . [section 1247(d)] impose[s] upon state-defined real property interests amounts to a compensable taking."

an abridged state law property interest.[169] This in essence constitutes a threshold determination.[170] A good example of a court addressing this threshold question is found in *State by Washington Wildlife Preservation, Inc. v. State.*[171] In *Washington Wildlife*, the Minnesota Supreme Court determined that where a railroad easement was for the purpose of public travel, and not expressly for railroad purposes only, a rail-to-trail conversion did not extinguish the easement.[172] The court held that the property remained subject to the easement,[173] trail use being consistent with the interests held by the landowners.[174] Consequently, the conversion did abridge a state law property interest of the owners.

Once the threshold question of whether a state law property interest has been abridged by a rails-to-trails conversion is answered, the

169. While the issues of takings and compensation are constitutional ones, grounded in the language of the fifth amendment, the relevant question is still whether there is a state law property interest being abridged. This is so, Justice O'Connor maintained, because property interests are created and defined under state law, not the Constitution. *Id.* at 926 (O'Connor, J., concurring). It is a " 'basic axiom that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." ' " *Id.* (O'Connor, J., concurring) (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984)) (further citations omitted).

170. *See supra* note 165; *see also* National Wildlife Fed'n v. I.C.C., 850 F.2d 694, 706 (D.C. Cir. 1988) ("In any individual case, the effect of trail use on the reversionary owner's property rights will depend, in part, on precisely what those rights are under relevant state law.").

171. 329 N.W.2d 543 (Minn. 1983), *cert. denied*, 463 U.S. 1209 (1983). *Washington Wildlife* involved a dispute between the Minnesota Department of Natural Resources (DNR) and owners of land adjacent to a railroad right-of-way. The DNR had purchased the right-of-way to convert it to trail use. The landowners, as Washington Wildlife Preservation, Inc., of Washington County, Minnesota, commenced a quiet title action "to insure that ownership of the abandoned right-of-way reverted to them and to protect natural resources intrinsic to the area." *Id.* at 544.

172. *Id.* at 546. Specifically, the court stated that "none of the deeds expressly limit the easement to railroad purposes, provide that the interest conveyed terminates if use for railroad purposes ceases, or provide that the easement would exist only for so long as the right-of-way was used for railroad purposes." *Id.*

173. *Id.* at 548. The supreme court noted that "[t]he state's use of the right-of-way as a recreational trail is within the scope of the interest it acquired. The right-of-way has not been abandoned; therefore, the adjoining landowners' rights, if any, to the property free of the easement have not yet matured." *Id.*

174. *Id.* at 547. Specifically, the supreme court stated:

> The right-of-way in this case will be used by hikers, bikers, cross-country skiers and horseback riders. The right-of-way is still being used as a right-of-way for transportation even though abandoned as a railroad right-of-way. Recreational trail use of the land is compatible and consistent with its prior use as a rail line, and imposes no greater burden on the servient estates. The use is a public use, which is consistent with the purpose for which the easement was originally acquired.

Id.

next issue under the analysis used by Justice O'Connor is to determine if the effect of section 1247(d) results in a taking.

B. *Traditional Takings Theory*

Before beginning her brief discussion of takings theory in *Preseault*, Justice O'Connor first clarified the position of the ICC. In response to the reasoning employed by the Second Circuit below, Justice O'Connor noted that the ICC's plenary authority over rail abandonments could not simply postpone or hold in abeyance valid state law property rights.[175] The question of whether a taking occurs under section 1247(d) is entirely separate from the question of the ICC's power over rail-to-trail conversions.[176]

Having established this, Justice O'Connor moved on to analyze the effect of a section 1247(d) rails-to-trails conversion on rights-of-way agreements under traditional takings law. While not endeavoring to set out a comprehensive analysis, or provide a formula for applying takings law,[177] Justice O'Connor did point out several relevant Supreme Court decisions on the subject of takings.[178] The purpose of her concurring opinion is best interpreted as giving a workable

---

175. Preseault v. I.C.C., 110 S. Ct. 914, 927 (1990) (O'Connor, J., concurring). The Second Circuit Court of Appeals had ruled in *Preseault* that the ICC's plenary authority over rail abandonments made a taking under section 1247(d) impossible, since the interim trail was still subject to that plenary authority. Preseault v. I.C.C., 853 F.2d 145, 151 (2d Cir. 1988), *aff'd*, 110 S. Ct. 914 (1990); *see supra* notes 136–139 and accompanying text. In response to this reasoning, Justice O'Connor stated:

> The Commission's actions may delay property owners' enjoyment of their reversionary interests, but that delay burdens and defeats the property interest rather than suspends or defers the vesting of those property rights. Any other conclusion would convert the ICC's power to pre-empt conflicting state regulation of interstate commerce into the power to pre-empt the rights guaranteed by state property law, a result incompatible with the Fifth Amendment.

Preseault, 110 S. Ct. at 927 (O'Connor, J., concurring) (citation omitted).

176. *Preseault*, 110 S. Ct. at 927 (O'Connor, J., concurring) ("The scope of the Commission's authority to regulate abandonments . . . is an issue quite distinct from whether the Commission's exercise of power over matters within its jurisdiction effected a taking . . . .").

177. The Court in general has never set out a formula for applying takings law. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) (no "set formula" exists for determining whether a compensable taking has occurred, rather Court will weigh several factors in making an ad hoc factual determination of the issue).

178. *See Preseault*, 110 S. Ct. at 928 (O'Connor, J., concurring). The cases pointed out by Justice O'Connor include: Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987) (government cannot deprive property owner of right to exclude without paying compensation); First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 318 (1987) (temporary burdening of property still compensable); Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (taking of a mere easement still requires compensation); United States v. Causby, 328 U.S. 256, 262 (1946) (property interest need not be a fee interest to require compensation).

structure for approaching the issue of section 1247(d) and takings, not to expound on the various takings principles themselves. Justice O'Connor concluded by again emphasizing that "a party may gain the benefit of these [takings] principles only after establishing possession of a property interest that has been burdened."[179]

C. *Applying the Framework to Analyze Section 1247(d) to* Glosemeyer

Justice O'Connor has set out the framework for addressing what up to this time has been the overlooked issue of whether section 1247(d) effects a taking at all. Applying this framework, however, is much more than a mere mechanical exercise. For, before applying this framework consisting of traditional takings law analysis, the threshold question of the nature of the landowner's interest in the property under state law must first be answered.

This threshold issue involves questions of policy and legislative intent. As the Second Circuit has pointed out, the primary purpose of section 1247(d) is to preserve railroad rights-of-way for potential use in the future.[180] The importance of preserving rights-of-way cannot be overstated or disregarded. At a time when both the price and supply of petroleum fuels is subject to "volatile" uncertainty,[181] Congress provided for the very real possibility that an extensive rail system might be needed to meet, in an efficient manner, the transportation needs of the future.[182] Additionally, Congress also foresaw the difficulty and expense of re-assembling such a system if the existing rights-of-way were allowed to revert back to landowners such as the Preseaults and the Glosemeyers.[183] If the government is

179. *Preseault*, 110 S. Ct. at 928 (O'Connor, J., concurring).

180. Preseault v. I.C.C., 853 F.2d 145, 151 (2d Cir. 1988), *aff'd*, 110 S. Ct. 914 (1990). The court stated:

> Preserving railway corridors for future railway use is a function that congress has recently delegated to the ICC. . . . For as long as it determines that the land will serve a "railroad purpose," the ICC retains jurisdiction over railroad rights of way; it does not matter whether that purpose is immediate or in the future. To distinguish between future railroad use and immediate railroad use would serve no purpose but to stifle congress's creative effort to exercise foresight by preserving existing corridors for the future railroad needs of our country.

Id.

181. Recent events illustrate how serious an effect world events can have on the price and supply of petroleum products. In the latter part of 1989, a refinery explosion in Texas, an arcane maritime law, and a spell of unusually frigid weather combined to cause fuel supplies to plummet and prices to skyrocket. *See* Sullivan, *Maritime Agency Blocked Fuel Shipment That May Have Eased Regional Shortage*, Wall St. J., Jan. 8, 1990, at A3, col. 2.

182. *See supra* note 45.

183. The First Circuit has stated Congress foresaw that:

> To assemble a right of way in our increasingly populous nation is no longer simple. A scarcity of fuel and the adverse consequences of too many motor

required to negotiate with landowners to regain the rights-of-way, the incentive would be great for landowners to hold out for more than the fair market value of the property. Alternatively, use of the government's powers of eminent domain requires "just compensation." In either case, transaction costs are high. Thus, Congress chose the more efficient means of preventing loss of the rights-of-way to begin with.[184] And the means chosen—interim trail use—and the incidental benefit of those means—increased outdoor public recreation options—are just that: a means to an end. Congress has clearly indicated that interim trail use exists *subject to any future use* by the railroad.[185]

The practical implications of Congress' intentions under section 1247(d) are significant as they relate to the specific facts presented in *Glosemeyer*. The language in the Glosemeyers' easement instrument indicated that the easement was expressly for railroad purposes only.[186] Based on this limitation, the Glosemeyers argued that recreational use was not within the scope of their easement, and therefore such use constituted a taking.[187] However, recreational use occurs only because of purposes related solely to railroad use. The objective sought in a rails-to-trails conversion is the preservation of the rail corridor for possible future use. This objective in turn requires a ruling that the interim trail use does not offend the scope of an easement that is expressly for railroad purposes. Once the trail use is determined to be within the scope of the easement, and to impose no burden beyond the terms of the easement, the takings question is resolved.[188]

Having examined the legislative history of section 1247(d) in order to determine legislative intent,[189] the Eighth Circuit in *Glosemeyer*, as the Minnesota Supreme Court did in *Washington Wildlife*, should have gone on to rule that interim trail use was consistent with the Glosemeyers' easement. Affording the Glosemeyers relief under a takings action would only serve to frustrate and contravene Con-

---

> vehicles suggest that society may someday have need either for railroads or for the rights of way over which they have been built. A federal agency charged with designing part of our transportation policy does not overstep its authority when it prudently undertakes to minimize the destruction of available transportation corridors painstakingly created over several generations.

Reed v. Meserve, 487 F.2d 646, 649–50 (1st Cir. 1973).

184. For a brief explanation of transaction costs and the problem of hold-outs, see J. DUKEMINIER & J. KRIER, PROPERTY 38–43 (2d ed. 1988).

185. *See supra* notes 43, 45 and accompanying text.

186. *See supra* note 10 and accompanying text.

187. *See supra* note 7 and accompanying text.

188. *See supra* notes 172–174 and accompanying text.

189. *See* Glosemeyer v. Missouri-Kansas-Texas R.R., 879 F.2d 316, 318–19 (8th Cir. 1989).

gress' express purposes in enacting section 1247(d).[190] The Glosemeyers' and other similar landowners objections to trail use should be directed to Congress, and not to the courts.

Conclusion

There can now be little doubt regarding the constitutionality of the federal rails-to-trails law, section 1247(d) of the National Trails System Act. As construed by both the Eighth Circuit in *Glosemeyer* and the Supreme Court in *Preseault*, if section 1247(d) is found to effectuate a taking, compensation will be available to the injured party under the Tucker Act.[191] The courts in neither case, however, address the question of whether section 1247(d) effects a taking at all.

Justice O'Connor's concurring opinion in *Preseault*, while not deciding specifically whether a taking occurs under section 1247(d), does provide a great deal of guidance on how that issue must be approached. Under the framework derived from Justice O'Connor's opinion, there must be two parts to any takings analysis of a rails-to-trails conversion. First, the court must determine the nature of the challenging landowner's property interest under state law. Second, assuming a valid property interest is found to be burdened by the rails-to-trails conversion, the nature and extent of that burden is examined under traditional takings law to determine whether the landowner is entitled to compensation.

Roger M. Stahl

---

190. *See supra* notes 43, 45 and accompanying text.

191. And how does this result effect the Glosemeyers' claim? First, the very nature of the claim will have to change. Second, since the constitutional issues have been settled, the Glosemeyers' sole claim will now be one for compensation. As a result, the claim will need to be brought before the Claims Court, or perhaps before the district court, once again.