Article

A Program Derailed: The Inefficiencies of the Federal Railbanking Process, and How to Get It Back on Track

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I. Introduction

Across the United States, recreational enthusiasts use rails-to-trails to partake in activities such as running, cycling, rollerblading, and simply strolling. As rail service has declined over the last century, Americans have searched for ways to use the inactive corridors left behind. Through a process known as railbanking, these rights-of-way may be converted to trails while being preserved for potential rail reactivation should the need arise in the future.

At first glance, this seems like a win-win.[1] The public enjoys recreational trails, and rail corridors are preserved, which lowers the costs of renewing rail service in the future. While the upside of these trails is immediately apparent, the current system of rail-trail conversion is plagued by less obvious but severe inefficiencies. This paper attempts to synthesize theories of law and economics, aggregate rail-trail trends, and

1. *See Litigation and Its Effect on the Rails-to-Trails Program: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 107th Cong. 32 (2002) (statement of Tom Murphy, Mayor, Pittsburgh, PA) [hereinafter *Hearing*].

anecdotal highlights of particular projects in order to point out fundamental flaws in the rail-trail conversion process, in addition to proposing solutions for these drawbacks.

Typically, property over which a railroad owns an easement reverts back to the landowner upon abandonment.[2] The landowner then regains the full bundle of property rights and may do what he or she wishes with his or her section of the abandoned corridor. In 1983, Congress responded to the ongoing wave of railroad abandonment by passing the Amendments to the National Trails System Act ("Rails-to-Trails Act"), allowing railroads to negotiate with a state or local government agency or a qualified private organization to convert the inactive right-of-way to a trail corridor.[3] Such conversion preserves the railway for potential reactivation, which precludes abandonment and subsequent reversion under state law.

A wave of lawsuits, including many class actions, has been filed asserting that the Rails-to-Trails Act, by precluding reversion of state property interests, effects a taking for which underlying landowners are owed just compensation under the Fifth Amendment.[4] Central to these cases is whether the railroad owned the corridor in fee simple or as an easement, whether trail use falls within the scope of the easement, and whether, as a matter of state law, the railroad would have been abandoned but for the Rails-to-Trails Act. After a period of uncertainty following the procedurally complicated case of *Preseault v. United States*,[5] it now appears that the courts (primarily the Court of Federal Claims) are consistently ruling in favor of plaintiffs, which means that the federal government is incurring costs that were largely unexpected when the Rails-to-Trails Act was initially passed.

This paper focuses on two primary issues in the current system of compensating landowners for rail-trail takings claims. First, the current system of adjudicating these claims is inefficient, causing attorney fees and interest to frequently constitute a substantial portion of overall compensation. As explained below, these costs could be reduced if the Department of Justice ("DOJ") adopted a less litigious strategy and focused more intently on settling cases early. However, while reducing the costs of individual claims, a more settlement-friendly DOJ might invite more claims and thus offset any cost savings with a greater number of payouts.

2. For more on fundamental property law of railroad easements, *see* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.4 cmt. f (2000).

3. National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 42 (1983) (codified as amended at 16 U.S.C. §§ 1241 to 1251).

4. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

5. Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996).

It is therefore hard to assess the effectiveness of current DOJ practices if one takes as the DOJ's primary goal a minimization of government costs.

The second and more fundamental problem involves inefficiencies stemming from cost externalization of takings liability. The trail acquirer pays the railroad for rights to the corridor. This upfront acquisition cost, even when combined with the later costs of actually constructing a trail, is not a full reflection of the rail-trail conversion cost. It fails to account for the costs associated with subsequently filed takings claims. This back-end cost is paid out of the federal government's Judgment Fund and is therefore unaccounted for when a local body is deciding whether to purchase rights to the corridor. This failure to internalize the full cost of rail-trail conversion arguably results in over-investment in rail-trails by deflating the cost side of the acquirer's cost/benefit analysis. The larger the ratio of landowner compensation to total rail-trail costs, the greater the externalization of total costs and the higher the likelihood that the trail in question is an inefficient allocation of resources.

As for reforms, from a litigation standpoint, the DOJ could petition the Supreme Court to review a Federal Circuit ruling that the Rails-to-Trails Act effects a taking. From a statutory standpoint, Congress could grant discretion to the Surface Transportation Board (the "STB") to prevent interim trail use.[6] Alternatively, Congress could amend the Rails-to-Trails Act to require the trail acquirer to reimburse the federal government for takings liability costs incurred.

While prior works in this field have discussed the elements of government liability and debated whether railbanking constitutes a compensable taking, none has explored the implications of the cost externalization associated with landowner compensation. While others have mentioned some of the reforms suggested below, the following analysis is unique in that the discussion is more detailed, parsing the statutory language and specifically suggesting how such language could be amended. Furthermore, two of the proposed reforms are directly linked to the novel goal (in this field) of avoiding excessive cost externalization.[7] This paper provides insights into the recent surge in rail-trail takings litigation over the last few years, along with detailed examples of specific rail-trail projects in order to illustrate the inefficiencies asserted. Lastly, this paper discusses the potential impact of the Supreme Court's decision

6. The STB is an agency within the United States Department of Transportation.

7. Another commentator, Rita Cain, has briefly touched on cost internalization but did so only to explain how the federal government could shield itself from liability. *See* Rita Cain, *Rails-to-Trails—Is the National Trails System Back on Track After Preseault?*, 23 URB. LAW. 63, 71-73 (1991). She did not, as this paper does, discuss how cost internalization can also result in a more efficient allocation of resources by better aligning costs and benefits with the party deciding whether to build a trail. For a further distinction of these points, *see infra* note 307.

in *Marvin M. Brandt v. United States* on the future of rail-trail takings claims.[8]

II. Background on American Railroads

The railway network of the United States has greatly contracted over the course of the twentieth century. After reaching a high-water mark of 272,000 miles in 1920, only 141,000 miles of track were still in use by 1990.[9]

Historically, railroads typically acquired their rights-of-way through one of four means: condemnation, private grant, state or federal grant, or prescription.[10] As for the types of property interests acquired, a railroad could obtain a fee simple absolute, a fee simple subject to a condition subsequent, a fee simple determinable, a perpetual or unlimited easement, a time-limited or use-limited conditional easement, or a license.[11] Based on the fact that the Federal Circuit and Court of Federal Claims have repeatedly ruled that trail use falls beyond the scope of various railroad easements as a matter of various states' laws, it appears that many easements are conditional on railroad use.[12] Interestingly, railroad easements are different than most other easements in that the railroad has the right of exclusivity; the railroad even has the right to exclude the underlying landowner.[13]

Determining the type of interest held is important in rail-trail takings cases. If the railroad owns its right-of-way in fee simple, for example, the abutting landowners have no viable takings claim when the right-of-way is converted to a recreational trail.[14] If the railroad controls the right-of-way as an easement conditional on railroad use, however, landowners have a strong claim.[15]

When considering the type of property interest held, courts look to conveyance of the right-of-way, which is usually but not always governed by state law.[16] Interestingly, some state statutes or constitutions contain

8. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014).

9. Preseault v. ICC, 494 U.S. 1, 5 (1990).

10. Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries*, 27 Ecology L.Q. 351, 376-77 (2000).

11. *Id. See generally*, Restatement (First) of Prop. §§ 14-17 (1936), *and* Restatement (First) of Prop. §§ 450, 512 (1944) (defining various property interests).

12. *See* cases cited *infra* note 129.

13. Wright & Hester, *supra* note 10, at 390.

14. Preseault v. United States, 100 F.3d 1525, 1552 (Fed. Cir. 1996) ("Obviously if the railroad owns the right-of-way in fee simple, there is no owner of a separate underlying property interest to claim the rights of the servient estate holder.").

15. *See id.* at 1533.

16. Federal law governs the property interest conveyed if the conveyance was made pursu-

provisions that give railroads only an easement in their rights-of-way, regardless of the language in the conveyance.[17] Some commentators argue that as railroads began to fail, the courts began to interpret their property interests more narrowly. In other words, there was an interpretative shift in favor of easements over more robust interests such as fee simple.[18]

Interpretation of railroad property interests often proves practically difficult for a number of reasons. First, many of the original conveyances were made over a century ago, and the property interests in many rail corridors have been subsequently transferred. As a result, tracing the original landholdings can be quite difficult.[19] Second, many railroad deeds did not use the terms "fee simple" or "easement."[20] Third, the term "right-of-way" creates some ambiguity. While the term often refers to easements generally, it is also used to refer to rail corridors generally. Thus, courts sometimes conflate usage of the term "right-of-way" in the latter sense with use of the term to denote an easement.[21]

III. Rails-to-Trails Trends

As the rate of railroad abandonment and discontinuance has increased over the second half of the twentieth century, trails have become a common alternative use for empty corridors.[22] The rail-trail movement had humble beginnings in the 1960s, with slow progress concentrated mainly in the Midwest.[23] By the mid-1980s, there were fewer than 200

ant to a federal land grant, such as the General Railroad Right-of-Way Act of 1875, 43 U.S.C. § 934 (2012). Federal grants were especially common in the American West, where the federal government still controls vast swaths of sparsely populated land. In the East, most railroads were acquired subject to state law, either through private negotiations or state grants.

17. Mark F. (Thor) Hearne, II, Lindsay Brinton & Meghan Largent, *The Trails Act: Railroading Property Owners and Taxpayers for More than a Quarter Century*, 45 Real Prop. Tr. & Est. L.J. 115, 136 (2010).

18. Wright & Hester, *supra* note 10, at 378-96.

19. *Id.* at 365.

20. *Id.* at 396.

21. *Id.* at 393-94; *see also* Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014) (holding that a "right-of-way" granted pursuant to the General Railroad Right-of-Way Act of 1875 conveys a mere easement).

22. Although the terms "abandonment" and "discontinuance" are sometimes used interchangeably, they have distinct meanings. Under abandonment, the railroad loses all rights to the right-of-way, and the STB's jurisdiction over the right-of-way terminates. Under discontinuance, the railroad ceases operating a line for an indefinite time during which the STB maintains jurisdiction and the right-of-way is preserved for potential reactivation. Preseault v. ICC, 494 U.S. 1, 5 n.3 (1990). Railbanking treats a line as if it is discontinued, although railbanking takes the additional step of transferring liability from the railroad to the trail acquirer. 16 U.S.C. § 1247(d) (2012).

23. *History of RTC and the Rail-Trail Movement*, Rails-to-Trails Conservancy, http://www.railstotrails.org/ourWork/trailBasics/railTrailHistory.html (last visited Sept. 8, 2015) [hereinafter *History of RTC*].

rail-trails in the United States.[24] According to the Rails-to-Trails Conservancy ("RTC"), a non-profit organization dedicated to promoting rail-trails, there are now 1,929 rail-trails covering a total of 21,958 miles.[25] An additional 727 rail-trail projects, expected to cover 8,100 miles, are currently in progress.[26] These current and prospective trails together constitute over ten percent of the total railroad mileage at the peak of the railroad era.[27] Every state in the Union contains at least three rail-trails, and three states (Pennsylvania, California, and Michigan) have over one hundred.[28] Fourteen of the nation's rail-trails are over one hundred miles long.[29]

RTC estimates that over 100 million people use rail-trails each year.[30] As the numbers indicate, rail-trails provide substantial recreational opportunities across the country.

IV. Statutory Framework

Rail-trails are statutorily governed by a confluence of two separate regulatory frameworks—railroad regulation and promotion of recreational trails. The federal government has long had a heavy hand in the regulation of railroads. With the Interstate Commerce Act of 1887, Congress tasked the Interstate Commerce Commission (ICC) with monitoring the railroad industry and ensuring compliance with newly instituted anti-monopolistic legislation.[31] The Transportation Act of 1920 required railroads to get approval from the ICC prior to discontinuing rail service or abandoning a rail line.[32] The agency oversaw railroad regulation for over one hundred years until 1991, when railroad regulatory authority was vested in the STB.[33] The STB maintains exclusive authority over the

24. Jeff Allen & Tom Iurino eds., *Acquiring Rail Corridors: A How To Manual*, Rails-to-Trails Conservancy (June 1, 1996), http://www.railstotrails.org/resourcehandler.ashx?id=2942.

25. National and State Trail Statistics, Rails-to-Trails Conservancy, http://www.railstotrails.org/our-work/research-and-information/national-and-state-trail-stats/ (last visited Jan. 2, 2016).

26. *Id.*

27. *See id.*; Dr. John-Paul Rodrigue, *Rail Track Mileage and Number of Class I Rail Carriers*, The Geography of Transport Systems, http://people.hofstra.edu/geotrans/eng/ch3en/conc3en/usrail18402003.html (last visited Sept. 9, 2015).

28. *United States*, Rails-to-Trails Conservancy, http://www.railstotrails.org/our-work/united-states/ (last visited Sept. 9, 2015).

29. *Id.*

30. *History of RTC*, *supra* note 23. It is unclear whether this number refers to unique users or whether it repeatedly counts individuals each time they use a trail.

31. Interstate Commerce Act of 1887, Pub. L. No. 49-41, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C.).

32. Transportation Act of 1920, ch. 91, 41 Stat. 456; *see also* Richard A. Allen, *Does the Rails-to-Trails Act Effect A Taking of Property?*, 31 Transp. L.J. 35, 41 (2003).

33. Andrea C. Ferster, Commentary, *Rails-to-Trails Conversions: A Review of Legal Issues*,

construction, operation, and abandonment of most interstate railroad lines.[34] The last of these, abandonment, is central to the issue of rail-trail takings.

On the trail side, the National Trails System Act of 1968 was a major piece of congressional legislation designed to promote recreational trails "[i]n order to provide for the ever-increasing outdoor recreation needs of an expanding population."[35] As originally enacted, this statute contained no provisions dealing with the establishment of rail-trails.

Congress' first step toward specifically promoting rail-trails came in 1976, with the passage of the Railroad Revitalization and Regulatory Reform Act (the "4-R Act").[36] Among other things, the 4-R Act aimed to promote the establishment of trails from railroads that would otherwise be abandoned.[37] The 4-R Act was somewhat limited in success in that it failed to address a fundamental problem with many potential rail-trail conversions. Once abandoned, the right-of-way would revert back to any landowner with underlying rights to it.[38] Such a reversionary interest could thus preclude public use in any way, including for trail purposes.[39] As a result, the 4-R Act was not "successful in establishing a process through which railroad rights-of-way . . . [could] be utilized for trail purposes."[40]

Congress addressed this problem and catalyzed the rail-trail movement in 1983 with the Amendments to the National Trails System Act ("Rails-to-Trails Act").[41] Through this act, Congress authorized the ICC to "railbank" inactive rail corridors—that is, to preserve them for potential reactivation while allowing interim recreational trail use.[42] Section 8(d), the crux of the Rails-to-Trails Act, states that:

> [I]nterim trail 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

58 PLAN. & ENVTL. L. 3, 4 (2006), *available at* http://www.railstotrails.org/resourcehandler.ashx?id=4612.

34. Cecilia Fex, *The Elements of Liability in a Trails Act Taking: A Guide to the Analysis*, 38 ECOLOGY L.Q. 673, 678 (2011).

35. 16 U.S.C. § 1241(a) (2012).

36. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976).

37. *Id.*

38. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1265 (2014).

39. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/RCED-00-4, SURFACE TRANSPORTATION: ISSUES RELATED TO PRESERVING INACTIVE RAIL LINES AS TRAILS 3 (1999), *available at* http://www.gao.gov/assets/230/228194.pdf [hereinafter GAO REPORT].

40. H.R. REP. NO. 98-28, at 6 (1983).

41. *See* 16 U.S.C. § 1247(d) (2012).

42. *Railbanking*, RAILS-TO-TRAILS CONSERVANCY, http://www.railstotrails.org/build-trails/trail-building-toolbox/railbanking/ (last visited Jan. 2, 2016).

> 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 [Surface Transportation] Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.[43]

By precluding abandonment, this provision prevents the underlying landowner from reclaiming the corridor. It also transfers liability from the railroad to the acquiring party. The act essentially allows a railroad, after receiving approval from the STB, to sell rights to the corridor while retaining what amounts to an option to repurchase it and resume rail service.[44]

Procedurally, railbanking occurs when the STB issues a Certificate of Interim Trail Use or Abandonment (CITU)[45] or Notice of Interim Trail Use or Abandonment (NITU) (collectively "ITU").[46] The STB issues the former under regular abandonment proceedings, while it issues the latter under the more common exempt abandonment proceedings. The terms of the NITU and CITU are the same.

> (d)(1) If continued rail service does not occur under 49 U.S.C. 10904 and 1152.27 and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a Notice of Interim Trail Use or Abandonment (NITU) [CITU covered by (c)(1)] to the railroad and to the interim trail sponsor for the portion of the right-of-way as to which both parties are willing to negotiate.[47]

Subject to certain conditions, the ITU permits the railroad to discontinue service, cancel any applicable tariffs, and salvage rail equipment 30 days after the ITU is issued.[48] If no trail use agreement is reached within 180 days of the issuance of the ITU, the railroad may fully abandon the line.[49] The parties may, however, petition the STB for time extensions.[50]

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43. 16 U.S.C. § 1247(d) (2012) (language amended to reflect the shift in regulatory authority from the ICC to the STB).

44. *See* Wright & Hester, *supra* note 10, at 357.

45. 49 C.F.R. § 1152.29(c) (2015).

46. 49 C.F.R. § 1152.29(d)(1).

47. *Id.* For a template for trail use agreements, *see Railbanking and Purchase Agreement Template,* RAILS-TO-TRAILS CONSERVANCY, http://www.railstotrails.org/resource-library/resources/railbanking-and-purchase-agreement-template/?tag=railbanking (follow "Download PDF" hyperlink) (last visited October 3, 2015).

48. 49 C.F.R. § 1152.29(c)-(d).

49. *Id.*

50. 49 C.F.R. § 1152.29(e)(2). For an example of such a granted motion, *see Motion to Extend the Time Period for Negotiation of an Interim Trail Use/Railbanking Agreement,* S.T.B. Docket No. AB-6-479-x (Nov. 25, 2013), *available at* http://www.stb.dot.gov/decisions/readingroom.nsf/UNID/1C282F9C6C9AC53485257C2E00522A7E/$file/43467.pdf.

These regulations state that the STB "*will* issue" an ITU so long as the railroad meets the STB's requirements for discontinued service and agrees to negotiate with the acquiring party.[51] ITU issuance is therefore mandatory as pertains to the STB and voluntary as pertains to railroads. The STB will not issue an ITU unless the railroad agrees to negotiate with the trail organization.[52] However, if the railroad agrees to negotiate and meets the requirements for discontinuance or abandonment, the STB has no discretion to deny the ITU.[53] As will be explained below, this structure invites major allocative inefficiencies.[54]

One of the ostensible purposes of railbanking is to preserve unused rail corridors for potential reactivation in the future.[55] "Like the difficulty of putting Humpty Dumpty together again, it would be virtually impossible to recreate our national rail corridor system after it was broken into hundreds of parcels of land."[56] Some claim that this supposed reason is merely a legal fiction and that the only purpose behind railbanking is the promotion of recreational trails.[57] As evidence, opponents point to the fact that the STB will not grant an ITU unless rail service is not foreseen,[58] as well as the fact that very few railbanked rights-of-way have been returned to active rail service.[59] Regardless of the true motivations behind the passage of the Rails-to-Trails Act, the Supreme Court has held that it is a valid exercise of Congress' Commerce Clause powers.[60]

Railbanking has been the source of hundreds of trails spanning thousands of miles.[61] To be sure, though, the rail-trail program is not wholly dependent on the Rails-to-Trails Act. As discussed *infra*, most

51. 49 C.F.R. § 1152.29(c)(1), (d)(1) (emphasis added).

52. *See infra* text accompanying notes 296-300.

53. *See infra* text accompanying notes 292-295.

54. *See id.*

55. *See* GAO REPORT, *supra* note 39, at 13-14.

56. Ferster, *supra* note 33, at 3; *see also Implementation of the Rails to Trails Act: Hearing Before the Subcomm. on R.Rs. of the H. Comm. on Transp. & Infrastructure*, 104th Cong. 35 (1996) (statement of Anthony R. Kane, Executive Director, Fed. Highway Admin.) ("I think our thought is just that preserving corridors for transportation use, whether it be motorized or not, just makes sense with the difficulty you have today, particularly within urban areas, of ever trying to amass any land in the future.") [hereinafter *Implementation Hearing*].

57. *See, e.g.*, Preseault v. ICC, 494 U.S. 1, 17 (1990); Rita Cain, *Unhappy Trails—Disputed Use of Railroad Rights-of-Way under the National Trails System Act*, 5 J. LAND USE & ENVTL. L. 211, 214-15 (1989); Emily Drumm, *Addressing the Flaws of the Rails-to-Trails Act*, 8 KAN. J.L. & PUB. POL'Y 158, 163 (1999).

58. Preseault v. ICC, 494 U.S. at 18.

59. GAO Report, *supra* note 39, at 14; *Hearing, supra* note 1, at 110 (statement of Linda J. Morgan, Chairman, Surface Transp. Bd.).

60. Preseault v. ICC, 494 U.S. at 1; *see infra* text accompanying notes 70-74.

61. *See United States*, *supra* note 28.

rail-trails are not the result of railbanked corridors.[62]

V. Constitutional Challenges

Railbanking is accompanied by legal controversy. There have been two primary constitutional challenges to this program. First, opponents have argued that the Rails-to-Trails Act violates the Commerce Clause.[63] The Supreme Court has rejected this claim.[64] A much more successful challenge has been a claim that railbanking effects a taking for which landowners are owed compensation under the Fifth Amendment. In order to properly understand the current state of takings doctrine as pertains to rail-trail conversions, it is important to examine the case law.

An analysis of rail-trail takings federal case law invariably begins with *Preseault v. United States*. This case, involving a rail-trail project in Vermont, resulted in five merit-based federal court decisions and played an instrumental role in guiding rail-trail takings jurisprudence.[65] Plaintiffs, the Preseaults, sought relief in federal courts for the railbanking of a corridor in which they claimed to have a reversionary interest.[66] They alleged that the Rails-to-Trails Act is unconstitutional on its face because: (a) it is not a valid use of congressional power under the Commerce Clause, and (b) it violates the Fifth Amendment by taking private property without just compensation.[67] The Second Circuit rejected both claims,[68] and the Preseaults appealed to the Supreme Court.[69]

A. Commerce Clause Challenge

Preseault was the death knell of Commerce Clause challenges to the Rails-to-Trails Act. Petitioners claimed that the act was an invalid use of congressional power, because the true intent of the act was to promote recreational trails as opposed to preserving rail corridors for future reactivation.[70] As evidence, petitioners cited the fact that the ICC may approve interim trail use only after finding that discontinuance of rail service accords with "present or future public convenience and necessity."[71] Trail conversion is therefore permitted only after rail service is

62. *See infra* text accompanying notes 244-46.

63. Preseault v. ICC, 494 U.S. at 10; U.S. Const. art. I, § 8, cl. 3.

64. Preseault v. ICC, 494 U.S. at 17-19.

65. Preseault v. ICC, 853 F.2d 145 (2d Cir. 1988), *aff'd*, 494 U.S. 1 (1990); Preseault v. United States, 27 Fed. Cl. 69 (Fed. Cl. 1992), *aff'd in part, vacated in part*, 66 F.3d 1167 (Fed. Cir. 1995), *vacated*, 66 F.3d 1190 (Fed. Cir. 1995), *rev'd en banc*, 100 F.3d 1525 (Fed. Cir. 1996).

66. Preseault v. ICC, 853 F.2d at 147.

67. *Id.* at 149-50.

68. *Id.* at 150-51.

69. Preseault v. ICC, 494 U.S. 1 (1990).

70. *Id.* at 17.

71. *Id.* at 18 (quoting 49 U.S.C. § 10903(d) (1982 ed.)).

deemed to be unnecessary for the foreseeable future. The Court unanimously held, under rational basis scrutiny, that the system set forth in the Rails-to-Trails Act passes muster under the Commerce Clause.[72] Given that preservation of rail corridors is a legitimate end, Congress need not pass extreme measures such as a prohibition of all abandonment or a system of mandatory railbanking regardless of railroad consent.[73] The statute is an appropriate use of "legislative judgment" to which the Court defers.[74]

Moreover, the majority opinion[75] states that even if petitioners are correct in claiming that the notion of railroad preservation is a sham, railbanking is still a valid use of Congress' Commerce Clause powers, because the act is "reasonably adapted to the goal of encouraging the development of additional recreational trails."[76] Given clear Supreme Court precedent, the Commerce Clause challenges to railbanking have been put to rest.

B. Takings Clause Challenge

Unlike with the Commerce Clause claim, the Supreme Court did not reach the merits of the Preseaults' takings claim. The Court instead held that this claim was not ripe, because petitioners had not exhausted the statutorily prescribed remedy—seeking compensation under the Tucker Act.[77]

While the Court did not rule on the merits of government liability, Justice O'Connor's concurring opinion was highly critical of the Second Circui8t's logic behind its merits-based rejection of the Preseaults' takings claim in the case below.

> The [Second Circuit] concluded that even if petitioners held the reversionary interest they claim, no taking occurred because 'no reversionary interest can or would vest' until the ICC determines that abandonment is appropriate. This view conflates the scope of the ICC's power with the existence of a compensable taking and threatens to read the Just Compensation Clause out of the Constitution.[78]

The Preseaults subsequently filed a Tucker Act claim in the Court of

72. *Id.* at 17-18.

73. *Id.* at 18-19.

74. *Id.* at 19.

75. Justice O'Connor wrote a concurring opinion, in which Justices Kennedy and Scalia joined. *Id.* at 3.

76. *Id.* at 18.

77. *Id.* at 17.

78. *Id.* at 23 (O'Connor, J., concurring) (quoting Preseault v. ICC, 853 F.2d 145, 151 (2d Cir. 1988)).

Federal of Claims.[79] That court applied the multi-factor test set forth in *Penn Central* and held that there was no compensable taking.[80] Because railroads were a heavily regulated industry when plaintiffs acquired the land at issue, plaintiffs acquired a heavily burdened property interest and had no reasonable investment-backed expectations that the right-of-way would not be subject to the subsequently enacted Rails-to-Trails Act.[81]

In a display of litigious perseverance, the Preseaults appealed this decision to the Court of Appeals for the Federal Circuit.[82] After a three-judge panel affirmed the Court of Federal Claims decision,[83] an en banc panel of the Federal Circuit reversed and held that the Rails-to-Trails Act did indeed effect a taking for which the Preseaults were entitled to just compensation.[84] Although there was no majority opinion, this ruling has proven pivotal in shaping the course of subsequent rail-trail takings claims.

To date, *Preseault* is the only rail-trail takings case to reach the Supreme Court, and the Court did not reach the merits of government liability. The current rail-trail takings doctrine has therefore been worked out almost entirely in the Federal Circuit, which hears all appeals from the Court of Federal Claims.[85] While the Federal Circuit's *Preseault* decision would prove pivotal in shaping rail-trail takings doctrine, its effect was slow to manifest itself in a rise of takings claims. Because there was no majority opinion, there was some doubt as to whether the ruling of government liability would be applied consistently going forward. Only recently has there been an uptick in rail-trail takings payouts.[86] This paper now turns to specific issues that frequently arise in rail-trail takings litigation, some of which were raised in *Preseault*.

VI. General Litigation Framework

The Tucker Act waives sovereign immunity and provides a mechanism by which plaintiffs can bring claims against the federal government

79. Preseault v. United States, 27 Fed. Cl. 69, 71 (Fed. Cl. 1992).

80. *Id.* at 95-96 (for the balancing factors mentioned, *see* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 123-24 (1978)).

81. *Id.* at 94-96.

82. Preseault v. United States, 66 F.3d 1167, 1169 (Fed. Cir. 1995).

83. *Id.* at 1169-70 (only the decision denying compensation was affirmed, the decision to apply state land law was vacated).

84. Preseault v. United States, 100 F.3d 1525, 1529, 1552 (Fed. Cir. 1996).

85. 28 U.S.C. § 1295(a)(3) (2012).

86. Nearly all of the rail-trail takings awards have been granted in the last three years. *See Judgment Fund Payment Search*, U.S. Dep't of Treasury, https://jfund.fms.treas.gov/jfradSearchWeb/JFPymtSearchAction.do (follow "Surface Transportation Board" hyperlink) (last visited Oct. 3, 2015).

in the Court of Federal Claims.[87] The act provides no substantive rights by itself and must serve in conjunction with a money-mandating regulation, statute, constitutional provision, or contractual claim.[88] In the case of rail-trail takings claims, the Fifth Amendment is the money-mandating provision.[89]

The Court of Federal Claims has exclusive jurisdiction for all federal takings claims over $10,000.[90] District courts have concurrent jurisdiction for claims not exceeding $10,000, pursuant to the Little Tucker Act.[91] For class actions, the $10,000 limit applies only to the individual claims of the class members.[92] There is no aggregate limit for concurrent district court jurisdiction, so long as each member's claim does not exceed $10,000.[93]

As a descriptive matter, most of the rail-trail takings cases to date have been filed in the Court of Federal Claims. Normatively, this is likely due to the more lucrative prospects of class actions in which there are no caps on the claims of individual class members.[94] Judgments against the United States made pursuant to the Tucker Act and Little Tucker Act are paid out of the Judgment Fund, which is managed by the Department of the Treasury.[95]

Many rail-trail takings cases are brought as class actions regarding particular trails. The Court of Federal Claims allows only opt-in classes, while district courts may certify opt-out classes as well.[96] Class actions create legal economies of scale and are typically conducted on a contingency basis. Because the ratio of legal costs to potential compensation

87. 28 U.S.C. § 1491(a)(1) (2012) ("The United States Court of Federal Claims 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.").

88. *See* United States v. Testan, 424 U.S. 392, 398 (1976).

89. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984).

90. *See* Greenhill v. Spellings, 482 F.3d 569 (D.C. Cir. 2007).

91. 28 U.S.C. § 1346(a)(2) (2012).

92. Kester v. Campbell, 652 F.2d 13, 15 (9th Cir. 1981); *see also* Bywaters v. United States, 670 F.3d 1221, 1225 (Fed. Cir. 2012).

93. *See* United States v. Bormes, 133 S. Ct. 12, 16 n.1 (2012) ("We have held that to require only the 'claims of individual members of the class do not exceed $10,000.'").

94. As an anecdotal example, in Jenkins v. United States, No. 09-503L, 2013 WL 5879057 (Fed. Cl. Oct. 25, 2013), a class action suit stemming from Iowa, 28 of the 68 claims were for more than $10,000. These claims, which naturally constituted a disproportionately large share of the total payout, could not have been adjudicated before the district court.

95. 31 U.S.C. § 1304 (2012). For more on the history of the Judgment Fund, *see* Vivian S. Chu & Brian T. Yeh, CONG. RESEARCH SERV., R42835, THE JUDGMENT FUND: HISTORY, ADMINISTRATION, AND COMMON USAGE (2013), *available at* https://www.fas.org/sgp/crs/misc/R42835.pdf.

96. *Hearing, supra* note 1, at 38 (statement of Thomas L. Sansonetti, Assistant Att'y Gen., Env't & Natural Res. Div.).

may be too high for individual plaintiffs, class actions incentivize more and smaller claims to be filed than would be filed in a system that did not allow for class certification.[97]

VII. Elements of Liability and Other Litigated Issues

The Federal Circuit's *Preseault* analysis focused on three crucial factors that still guide courts. First is the issue of whether the railroad holds the right-of-way in fee simple or as an easement.[98] If the railroad holds the right-of-way in fee simple, the underlying landowners hold no reversionary interest and therefore have no claim.[99] Second, if the right-of-way is held as an easement, the next inquiry is whether trail use falls within the scope of the easement.[100] If not, the underlying landowners have a viable claim.[101] Third, the underlying landowners have a viable claim, regardless of whether trail use falls within the scope of the easement, if the easement would have been abandoned under state law, with title reverting to the landowners, but for the federal requirement that the ICC approve abandonment.[102] As the *Preseault* court explained it:

> Clearly, if the Railroad obtained fee simple title to the land over which it was to operate, and that title inures, as it would, to its successors, the Preseaults today would have no right or interest in those parcels and could have no claim related to those parcels for a taking. If, on the other hand, the Railroad acquired only easements for use, easements imposed on the property owners' underlying fee simple estates, and if those easements were limited to uses that did not include public recreational hiking and biking trails ("nature trails" as Justice Brennan referred to them), or if the easements prior to their conversion to trails had been extinguished by operation of law leaving the property owner with unfettered fee simples, the argument of the Preseaults becomes viable.[103]

A. Property Interest in Right-of-Way

When considering the type of property interest held in a railroad right-of-way, courts must look to the law governing the establishment of

97. *See, e.g.*, Adkins v. United States, No. 09-503L, 2013 WL 5879057 (Fed. Cl. Oct. 25, 2013), where the parties stipulated to just compensation of a mere $175 for one of the claims. Such a claim would be utterly pointless outside of the class action context. *See also* Nels Ackerson, *Right-of-Way Rights, Wrongs, and Remedies: Status Report, Emerging Issues, and Opportunities*, 8 Drake J. Agric. L. 177 (2003).

98. Preseault v. United States, 100 F.3d 1525, 1535 (Fed. Cir. 1996).

99. *Id.* at 1533-34, 1536.

100. *Id.* at 1541.

101. *Id.* at 1542-43.

102. *Id.* at 1534, 1538, 1545.

103. *Id.* at 1533.

the railroad right-of-way.[104] This is usually a matter of state law but may be a matter of federal law for railroads established pursuant to federal land grants.[105] For example, the Federal Circuit in *Preseault* looked to Vermont law surrounding railroad deeds to determine that the railroad held the right-of-way as an easement, not in fee simple.[106]

The issue of property interests becomes especially complicated in class action suits, as this may implicate hundreds of separate right-of-way parcels, each governed by a different deed.[107] Sometimes the parties stipulate that the parcels are easements (never that they are held in fee simple, as this would nullify plaintiffs' claims), and sometimes they litigate.[108]

In March 2014, the Supreme Court handed down a decision regarding railroad property interests that could have a significant impact on rail-trails.[109] This 8-1 decision held that railroad rights-of-way granted pursuant to the General Railroad Right-of-Way Act of 1875 (the "1875 Act") were granted as easements.[110] When the railroad at issue was abandoned, the right-of-way reverted not to the federal government but rather to the abutting private landowners, who in 1976 had been granted a land patent "subject to those rights for railroad purposes as have been granted to the [railroad] Company, its successors or assigns."[111]

This case was a quiet title claim that did not pose a takings issue. Because the railroad at issue was not railbanked, this case did not concern the Rails-to-Trails Act either. Nonetheless, this case could have a far-reaching impact on rail-trails. Many railroads, particularly out West, were established pursuant to the 1875 Act.[112] For any abutting land over

104. *See id.* at 1556 (Clevenger, J., dissenting) ("Absent circumstances in which a federal land right is claimed, not here present, it is state law that creates the property rights to which Fifth Amendment rights attach.").

105. *See* Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257 (2014) (considering the property interest conveyed in rights-of-way granted pursuant to the 1875 Act).

106. Preseault v. United States, 100 F.3d at 1535-37.

107. *See Hearing*, *supra* note 1, at 38 (statement of Thomas L. Sansonetti, Assistant Att'y Gen., Env't & Natural Res. Div.) ("[W]hile a class action of 1000 individuals may technically constitute just one case, they in reality must be defended as if they were 1000 separate cases."); Fex, *supra* note 34, at 688.

108. For cases in which the fee/easement issue has been stipulated, *see* Longnecker Prop. v. United States, 105 Fed. Cl. 393 (Fed. Cl. 2012); Biery v. United States, 99 Fed. Cl. 565 (Fed. Cl. 2011); Macy Elevator, Inc. v. United States, 97 Fed. Cl. 708 (Fed. Cl. 2011). For cases in which this issue has been litigated, *see* Buford v. United States, 103 Fed. Cl. 522 (Fed. Cl. 2012); Amaliksen v. United States, 55 Fed. Cl. 167 (Fed. Cl. 2003); Hubbert v. United States, 58 Fed. Cl. 613 (Fed. Cl. 2003); Chevy Chase Land Co. v. United States, 37 Fed. Cl. 545 (Fed. Cl. 1997).

109. *Marvin M. Brandt*, 134 S. Ct. 1257 (2014).

110. *Id.* at 1265.

111. *Id.* at 1262.

112. *See BLM Issues Guidance on Uses of Railroads Rights-of-Way Land*, U.S. DEP'T OF INTERIOR (Aug. 12, 2014), http://www.blm.gov/wo/st/en/info/newsroom/2014/august/nr_08_12_2014.html; *What the Marvin M. Brandt Case Means for America's Rail-Trails*, RAILS-

which title has subsequently been transferred to a private party, railroad abandonment will result in a vesting of the private landowners' reversionary interests.[113] The government will therefore have to pay just compensation if it takes the land for any purpose, including trail use.[114]

For future takings claims brought in response to the railbanking of a right-of-way established pursuant to the 1875 Act, there is clear precedent regarding the initial property interest inquiry.[115] Specifically, abutting landowners have a reversionary interest in the right-of-way, because it is held as a mere easement.[116] However, the remaining issues—scope of the easement and abandonment—are the same as for non-1875 Act rights-of-way that are railbanked. On these issues there is still no Supreme Court precedent, but Federal Circuit precedent strongly favors plaintiff-landowners.[117] Exactly how much land is at stake under this decision is unclear, as there is no database on federally granted rights-of-way.[118] One plaintiff's attorney predicted that it would have little impact on his practice, as most of his firm's suits do not involve rail corridors granted pursuant to the 1875 Act.[119]

B. Scope of the Easement

While the issue of whether trail use falls within the scope of a railroad easement is often a matter of state law, neither the Court of Federal Claims nor the Federal Circuit has ever ruled that trail use is compatible.[120] While it is conceivable that the Court of Federal Claims may eventually rule for the government on this issue, the trend has been overwhelmingly in favor of plaintiffs.[121] Furthermore, the federal courts' treatment of this issue, unlike the property interest issue, seems to hinge

TO-TRAILS-CONSERVANCY (Mar. 17, 2014), http://www.railstotrails.org/trailblog/2014/march/17/what-the-marvin-m-brandt-case-means-for-america-s-rail-trails/.

113. *See Marvin M. Brandt*, 134 S. Ct. at 1265-66.

114. *See* Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996).

115. *Id.* at 1532-33 (quoting Preseault v. ICC, 494 U.S. 1, 16, 20 (1990)).

116. *Id.* at 1533-34.

117. *See id.*

118. *What the Marvin M. Brandt Case Means for America's Rail-Trails*, RAILS-TO-TRAILS CONSERVANCY (Mar. 17, 2014), http://community.railstotrails.org/blogs/trailblog/archive/2014/03/17/what-the-marvin-m-brandt-case-means-for-america-s-rail-trails.aspx.

119. Telephone Interview with Thomas S. Stewart, Member, Baker, Sterchi, Cowden & Rice, LLC (Feb. 10, 2014) (notes on file with author) [hereinafter Stewart Interview]. Mr. Stewart is now a member of Stewart, Wald & McCulley LLC.

120. *See* Preseault v. United States, 100 F.3d 1525, 1530, 1543 (Fed. Cir. 1996).

121. Not only is this issue a matter of state law, but Court of Federal Claims rulings are not binding on other Court of Federal Claims judges. This enhances the theoretical prospects that the government could win on this issue. *See* Telephone Interview with Anonymous Former Trial Attorney, Dep't of Justice, Env't & Natural Res. Div. (Apr. 16, 2014) (notes on file with author) [hereinafter Anonymous Former DOJ Attorney].

more on common sense than scrutiny of variable state law. In *Preseault*, the Federal Circuit held that Vermont law does not allow for trail use on an easement designated for railroad use, stating matter-of-factly:

> When the easements here were granted to the Preseaults' predecessors in title at the turn of the century, specifically for transportation of goods and persons via railroad, could it be said that the parties contemplated that a century later the easements would be used for recreational hiking and biking trails, or that it was necessary to so construe them in order to give the grantee railroad that for which it bargained? We think not[122]

The court rejected the shifting use doctrine, which holds that a railroad is essentially a perpetual public easement for which the actual use is not important as long as it serves the public.[123] By exceeding the scope of the easement, the State caused a reversion of the property interest to the Preseaults.[124] The ICC, by issuing a NITU pursuant to the Rails-to-Trails Act, caused the Preseaults' land to be taken.[125]

Eight years later, the Federal Circuit ruled that the same principle applies under California law, stating in *Toews*:

> [I]t appears beyond cavil that use of these easements for a recreational trail – for walking, hiking, biking, picnicking, frisbee playing, with newly-added tarmac pavement, park benches, occasional billboards, and fences to enclose the trailway – is not the same use made by a railroad, involving tracks, depots, and the running of trains. The different uses create different burdens.[126]

The *Toews* court went on to note the immateriality of the fact that trail use may be less burdensome than rail use.[127] The relevant point is that the two uses create different types of burdens.[128] In line with the Federal Circuit, the Court of Federal Claims has repeatedly held that recreational trail use lies beyond the scope of easements granted on condition of railroad use.[129] While this issue is ostensibly treated on a state-by-

122. Preseault v. United States, 100 F.3d at 1542 (Fed. Cir. 1996); *see also id.* at 1543 ("It is difficult to imagine that either party to the original transfers had anything remotely in mind that would resemble a public recreational trail.").

123. *Id.* at 1541.

124. *Id.* at 1554.

125. *Id.* at 1554 (Rader, J., concurring).

126. Toews v. United States, 376 F.3d 1371, 1376 (Fed. Cir. 2004) (affirming Court of Federal Claims decision finding a compensable taking where a railroad easement was converted to a recreational trail pursuant to the Rails-to-Trails Act).

127. *Id.* at 1376-77 ("Some might think it better to have people strolling on one's property than to have a freight train rumbling through. But that is not the point.).

128. *Id.* ("The landowner's grant authorized one set of uses, not the other. Under the law, it is the landowner's intention as expressed in the grant that defines the burden to which the land will be subject.").

129. *See* Geneva Rock Prods., Inc. v. United States, 107 Fed. Cl. 166 (Fed. Cl. 2012); Buford v. United States, 103 Fed. Cl. 522 (Fed. Cl. 2012); Beres v. United States, 104 Fed. Cl. 408 (Fed.

state basis, it appears that this is an across-the-board loser for the government.

C. Prior Abandonment

As an alternative ground for finding a taking, the *Preseault* court held that as a matter of state law the railroad had already been abandoned when the ICC issued the NITU.[130] Regardless of whether trail use falls within the scope of the easement, the land at issue would have reverted to the Preseaults in fee simple but for the federal requirement that the ICC approve abandonment.[131] While the federal government has the power to preempt conflicting state law regarding interstate commerce, it may not use such power as a means of defeating property rights held pursuant to state law.[132] Thus, while Congress was within its Commerce Clause powers to require ICC approval of abandonment, the federal government must pay just compensation for the ICC ruling that precluded the vesting of a property interest to which the Preseaults were entitled under state law.[133]

The Federal Circuit en banc panel rejected the Court of Claims' reliance on investment-backed expectations.

> The expectations of the individual, however well- or ill-founded, do not define for the law what are that individual's compensable property rights. This issue of title and ownership expectations must be distinguished from the question that arises when the Government restrains an owner's *use* of property, through zoning or other land use controls, without disturbing the owner's *possession.*[134]

Thus, the court implicitly rejected the application of *Penn Central* to rail-trail takings.[135] The court instead implicitly adopted the *Loretto* per se standard, saying, "The trial court erred in accepting the government's effort to inject into the analysis of this physical taking case the question of

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Cl. 2012); Longnecker Prop. v. United States, 105 Fed. Cl. 393 (Fed. Cl. 2012); Thomas v. United States, 106 Fed. Cl. 467 (Fed. Cl. 2012); Anna F. Nordhus Family Trust v. United States, 98 Fed. Cl. 331 (Fed. Cl. 2011); Dana R. Hodges Trust v. United States, 101 Fed. Cl. 549 (Fed. Cl. 2011); Farmers Coop. Co. v. United States, 98 Fed. Cl. 797 (Fed. Cl. 2011); The Ellamae Phillips Co. v. United States, 99 Fed. Cl. 483 (Fed. Cl. 2011); Macy Elevator, Inc. v. United States, 97 Fed. Cl. 708 (Fed. Cl. 2011); Capreal, Inc. v. United States, 99 Fed. Cl. 133 (Fed. Cl. 2011); Biery v. United States, 99 Fed. Cl. 565 (Fed. Cl. 2011).

130. Preseault v. United States, 100 F.3d at 1550.

131. *Id.*

132. *Id.* at 1537.

133. *Id.* at 1550.

134. *Id.* at 1540 (emphasis in original).

135. *Id.; see also* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 123-24 (1978).

the owner's 'reasonable expectations.'"[136] Under this logic, rail-trail takings are treated as physical, as opposed to regulatory, takings.

D. Federal Liability

In defending rail-trail takings claims in federal court, the DOJ has argued that the federal government should not be held liable for takings occurring in order to bring about local recreational trails.[137] The Federal Circuit rejected this argument in both *Preseault* and *Toews*, on the grounds that "the Government cannot . . . point its finger at the State and say 'they did it, not us.' . . . [T]he fact that the Government acts through a state agent does not absolve it from the responsibility, and the consequences, of its actions."[138] After all, the Rails-to-Trails Act (a federal statute) authorizes railbanking, and the STB (a federal agency) executes it.[139]

That the federal government is liable is not to say that state governments are not also liable for rail-trail takings. The Federal Circuit has acknowledged this possibility but left the question open.[140] Additionally, while most claims are filed against the federal government, some takings claims have been brought against states in state court in response to statutes that authorize rail-trail conversion.[141] Plaintiffs also sometimes bring quiet title suits in state court seeking declaratory relief.[142] Because most of the rail-trail takings action occurs in federal court, and because this paper focuses on the inefficiencies of the federal Rails-to-Trails Act, state court decisions are mostly beyond the scope of this paper. For a proposal that the federal government be indemnified for takings liability, see *infra* text accompanying notes 303-312.

E. Statute of Limitations and Claim Accrual

An important question regarding rail-trail takings is when claims accrue. The Federal Circuit did not address this timing issue in *Preseault*.[143] Interestingly, the Federal Circuit subsequently held that a taking is executed by the issuance of the ITU, not by a finalized trail use agreement or

136. Preseault v. United States, 100 F.3d at 1540; *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

137. Preseault v. United States, 100 F.3d at 1551.

138. *Id.*

139. *Id.*

140. *Id.* at 1531.

141. *See* Lawson v. State, 730 P.2d 1308, 1310 (Wash. 1986).

142. *See, e.g.*, State by Wash. Wildlife Pres., Inc. v. State, 329 N.W.2d 543 (Minn. 1983); Eldridge v. City of Greenwood, 503 S.E.2d 191 (S.C. Ct. App. 1998); Rieger v. Penn Cent. Corp., No. 85-CA-11, 1985 WL 7919 (Ohio Ct. App. May 21, 1985).

143. Preseault v. United States, 100 F.3d at 1552.

actual construction of a trail.[144] The six-year statute of limitations for Tucker Act claims begins when the STB issues the ITU,[145] and plaintiffs' claims become viable at the same time.[146] After all, "[t]he issuance of the NITU is the only *government* action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way."[147]

The fact that claims accrue and the statute of limitations commences when the ITU is issued is a double-edged sword for underlying landowners. The D.C. Circuit has held that the STB is not required to give notice of an ITU to abutting landowners.[148] There is no physical or tangible event that coincides with the issuance of an ITU,[149] so the statute of limitations for a takings claim may commence even though there is no way a reasonable landowner would be aware of it.

On the other hand, the fact that claims accrue when the ITU is issued can work in favor of landowners (and plaintiff's attorneys). That the corridor may later be abandoned, thus making the taking temporary, is immaterial to liability and matters only when assessing damages.[150] This situation enables landowners to bring successful takings claims without having to wait for trail construction or right-of-way transfer.[151] In a grand display of inefficiency, the federal government may be compelled to compensate landowners in cases where an ITU is issued but a trail is never established. In fact, that is exactly what happened in *Ladd v. United States*.[152]

Between 1984 and 2009, the STB issued 698 ITUs.[153] As of 2009, these had resulted in 301 railbanked corridors, while 92 corridors were still in negotiation.[154] This means that there were over 200 corridors for which plaintiffs would have a temporary physical takings claim even

144. *See* Barclay v. United States, 443 F.3d 1368 (Fed. Cir. 2006); Caldwell v. United States, 391 F.3d 1226 (Fed. Cir. 2004).

145. *See Barclay*, 443 F.3d at 1372; *Caldwell*, 391 F.3d at 1235-36.

146. Ladd v. United States, 630 F.3d 1015, 1024 (Fed. Cir. 2010) (rejecting the government's argument that the rule set forth in *Caldwell* and *Barclay* does not apply when the corridor has not yet been transferred).

147. *Caldwell*, 391 F.3d at 1233-34 (emphasis in original).

148. Nat'l Ass'n of Reversionary Prop. Owners v. Surface Transp. Bd., 158 F.3d 135, 144 (D.C. Cir. 1998).

149. *Ladd*, 630 F.3d at 1023-24.

150. *Id.* at 1025.

151. *Id.* at 1023.

152. *See id.* at 1024-25.

153. Transcript of Hearing at 16, Twenty-Five Years of Rail Banking: A Review and Look Ahead, Ex Parte No. 690 (S.T.B. July 8, 2009) (statement of Marianne Fowler, Senior Vice President, Rails-to-Trails Conservancy), *available at* http://www.stb.dot.gov/TransAndStatements.nsf/8740c718e33d774e85256dd500572ae5/b69b42474f5e558c852575f5005d8c5a/$FILE/EX%20PARTE%20NO.%20690%20TRANSCRIPT.pdf [hereinafter S.T.B. Hearing].

154. *Id.*

though the corridor was later abandoned and no interim trail use agreement was ever established. In such cases, there is zero upside in the form of recreational benefits to counteract the downside of government liability created by the issuance of an ITU.

F. Damages Calculations

There is some question as to how just compensation should be calculated. Plaintiffs advocate calculating compensation by determining the difference between the value of the land unencumbered by an easement and the value of the land encumbered by a permanent trail use easement with the possibility of railroad reactivation.[155] The government, on the other hand, has argued that the proper calculation is the difference in the value of land encumbered by a rail easement and the value of land encumbered by a trail use easement subject to possible rail reactivation.[156] Under this theory, the government would only have to pay nominal damages even if held liable. However, the Court of Federal Claims has consistently rejected this method of calculating damages. In *Raulerson v. United States*, for example, the court explained, "Because the easement would have reverted back to plaintiffs under state law, the fee simple value of plaintiffs' properties is the appropriate starting point in a damages analysis for just compensation."[157] The Court of Federal Claims has employed the same method in several other cases, yet the DOJ has repeatedly argued that the court should adopt its method.[158] As discussed in the following section, this is arguably an example of the DOJ's inefficient "scorched-earth litigation strategy."[159]

VIII. Costs of Litigation

When the *Preseault* saga finally concluded in 2002, fourteen years after the Preseaults first walked into federal court, the federal government awarded the Preseaults $1.45 million out of the Judgment Fund.[160] Of that sum, only 16% ($234,000) was compensation for the actual land.

155. Raulerson v. United States, 99 Fed. Cl. 9, 10 (Fed. Cl. 2011).

156. *Id.* at 11.

157. *Id.* at 12.

158. *See, e.g.*, Ingram v. United States, 105 Fed. Cl. 518, 541 (Fed. Cl. 2012); Whispell Foreign Cars, Inc. v. United States, 106 Fed. Cl. 635, 643 (Fed. Cl. 2012); *Geneva Rock Prods., Inc.*, 107 Fed. Cl. at 117; Howard v. United States, 106 Fed. Cl. 343, 353 (Fed. Cl. 2012); Ybanez v. United States, 102 Fed. Cl. 82, 85 (Fed. Cl. 2011); Toscano v. United States, 107 Fed. Cl. 179, 188 (Fed. Cl. 2012).

159. Hearne et al., *supra* note 17, at 170.

160. Preseault v. United States, 52 Fed. Cl. 667, 684 (Fed. Cl. 2002); *see also Hearing*, *supra* note 1, at 42 (statement of Nels Ackerson, Chairman, The Ackerson Group).

$318,000 was for interest, and $895,000 was for attorney fees.[161] *Preseault* raised novel issues at the time. One would have hoped that rail-trail court decisions would provide clarity surrounding these issues, thereby incentivizing settlement in subsequent cases. This would be expected to reduce the amount of interest and attorney fees relative to land-based compensation. In fact, a DOJ official expressed this hope in a 2002 congressional hearing.[162] Unfortunately, the current compensation structure is still plagued by inefficiencies, resulting in inordinately high interest and attorney fees.[163]

The inefficiency surrounding landowner compensation is partially due to statute and partially due to the DOJ's strategy of repeatedly litigating losing issues.[164] From a statutory standpoint, the DOJ is not authorized to compensate landowners pursuant to the Tucker Act unless and until litigation is commenced.[165] By waiting for landowners to file suit, the government incurs higher costs in the form of constantly accruing interest from the time the ITU is issued. Additionally, because litigation is necessary for compensation, attorney fees often end up constituting a substantial portion of total compensation sums. In *Hash v. United States,* for example, the government paid $2.25 million for a tract of land with a fair market value of less than $900,000.[166] In the words of a prominent rail-trail takings plaintiff's attorney, "Only the federal government is capable of devising a system in which taxpayers would pay more than $300,000 in attorney fees and costs in a dispute over a $19,000 piece of land."[167]

Nels Ackerson, another rail-trail plaintiff's attorney, has argued that

161. Preseault, 52 Fed. Cl. at 684; *see also Hearing, supra* note 1, at 42 (statement of Nels Ackerson, Chairman, The Ackerson Group).

162. *Hearing, supra* note 1, at 84-85 (statement of Thomas L. Sansonetti, Assistant Att'y Gen., Env't & Natural Res. Div.) ("[T]he *Preseault* case is the ice-breaker . . . . So it is one of the cases that has been very litigious on each of these points. But it's also going to provide, hopefully, some guidelines for the future that'll be—Some of the benchmarks are actually being set in this case.").

163. *See, e.g.*, Raulerson v. United States, 108 Fed. Cl. 675, 677 (Fed. Cl. 2013) (of the $33.5 million settlement, over $3 million consisted of prejudgment interest, and nearly $11 million was paid to attorneys pursuant to a contingency fee agreement).

164. Rail-trail cases are litigated by the Environment and Natural Resources Division of the Department of Justice. U.S. DEP'T OF JUSTICE, ENV'T & NATURAL RES. DIV., FY 2014 PERFORMANCE BUDGET CONGRESSIONAL SUBMISSION 7 (2014).

165. *See Hearing, supra* note 1, at 51 (statement of Nels Ackerson, Chairman, The Ackerson Group) ("Although the Department of Justice could be and should be offering settlement alternatives to litigation once a Tucker Act case has been filed, the fact is that under present law the Government cannot make such an offer before litigation is commenced. It can only wait to be sued and then either settle or litigate.").

166. Hash v. United States, 2012 WL 1252624 (D. Idaho Apr. 13, 2012).

167. Hearne et al., *supra* note 17, at 173 (referring to *Town of Grantwood Vill. v. United States*, 55 Fed. Cl. 481 (Fed. Cl. 2003)).

Congress should implement a compensation procedure that provides landowners with notice of an ITU and explains landowners' rights.[168] Ackerson mentions the fact that administrative procedures are typically in place for the condemnation of various other types of land seized via eminent domain powers.[169] The idea is that a more streamlined compensation procedure would reduce "protracted and expensive litigation" and allow landowners to more easily receive their constitutionally entitled payment.[170]

While a streamlined procedure may sound good in theory, it is important to remember that rail-trail takings are quite different than other forms of takings. In a typical physical takings case, title to the land is clear, and all parties know that the government must compensate the landowners.[171] The government often seizes the land either through voluntary transfer or eminent domain, either of which requires paying fair market value.[172] Sometimes there is a dispute over the valuation, but litigation is often avoided. In the case of rail-trails, unlike in most physical takings, there is often a dispute over the threshold inquiry of whether the government is liable. If the railroad owned the land in fee simple, for example, landowners are not entitled to compensation.[173] Given that liability is not necessarily clear cut, it is difficult to frame an administrative compensation procedure that does not involve litigation. An administrative approach would require a means of deciding which landowners are validly entitled to compensation, and the legal questions that determine entitlement may properly lie within the purview of the judiciary.

Furthermore, a downside to streamlining the compensatory structure is that it may increase the government's tab for rail-trail takings. Under the status quo, for every rail-trail that sparks takings claims, dozens of railbanked trails are built without generating a claim.[174] Plaintiff's attorneys pick and choose which cases to bring, deploying their scarce resources toward the most lucrative prospective cases. Because there are only a few firms that are heavily involved in rail-trail takings,[175] coupled

168. *Hearing*, *supra* note 1, at 45 (statement of Nels Ackerson, Chairman, The Ackerson Group).

169. *Id.*

170. *Id.*

171. *Id.* at 45.

172. *Id.* at 52.

173. *Id.* at 9, 66.

174. *See* Stewart Interview, *supra* note 119.

175. The firms that have accounted for the vast majority of the plaintiff-side representation in rail-trail takings cases are Baker, Sterchi, Cowden & Rice, LLC (based in Kansas City, MO), Stewart, Wald & McCulley LLC (based in Kansas City, MO and founded by three former partners at Baker, Sterchi, Cowden & Rice), Arent Fox, LLP (based in Washington, D.C.), and Ackerson Kaufman Fex (based in Washington, D.C.).

with the fact that landowners often are not even aware of potential claims, many viable claims are never filed. Presumably, a streamlined administrative approach would lower interest and attorney fees, thus lowering the payment for any given claim. However, by easing the process by which landowners seek compensation, the government would likely invite more claims. The extent to which these factors cancel each other out is an empirical matter, the answer to which one cannot ascertain unless the current compensation structure is changed.

Even if it may not be feasible or advisable to avoid a litigation-oriented compensation scheme, there are steps that the DOJ could take to cut down on litigation costs. Specifically, the DOJ could stop repeatedly litigating issues on which the courts seem almost certain to rule against the government. It is true that most rail-trail takings cases ultimately end in settlement as to the valuation of land, as litigating this issue entails tremendous costs in the form of expert appraisers.[176] These costs are especially large in class actions involving dozens if not hundreds of separate parcels.

While valuation is rarely litigated, there are several other issues over which the parties often seek summary judgment. On some of these issues plaintiffs invariably prevail. For example, the DOJ often argues that recreational trail use falls within the scope of the railroad easement, despite the fact that the Federal Circuit and Court of Federal Claims have repeatedly and consistently held otherwise.[177] Additionally, the Court of Federal Claims has consistently rejected the government's proposal to calculate damages by taking the difference between the land encumbered by a rail easement and the value of land encumbered by a trail use easement subject to possible rail reactivation.[178] Nonetheless, the government continues to litigate this issue.

Several rail-trail plaintiff's attorneys have expressed frustration with the DOJ's "scorched-earth litigation strategy."[179]

> Rather than fostering litigation, the Department should be developing settlement strategies that will fairly and efficiently place values on properties and offer prompt and efficient recoveries to landowners who accept Government offers. Where the Government has undertaken a program to take property for public use, the Department of Justice need not feel compelled to defend against the legitimate claims of every landowner who lawfully

176. *See* Anonymous Former DOJ Attorney, *supra* note 121.

177. *See supra* text accompanying notes 120-29.

178. *See supra* text accompanying notes 157-59.

179. Hearne, et al., *supra* note 17, at 170-73; *see also* Fex, *supra* note 34, at 676 (arguing that the DOJ is "sweep[ing] several decades of contrary law under the rug" by repeatedly arguing that recreational trail use is a railroad use).

seeks the just compensation that the Constitution requires.[180]

To the DOJ's defense, the scope of the easement issue is often a matter of state law.[181] Therefore, a ruling on liability for a rail-trail in one state does not apply to a rail-trail from another state.[182] However, as discussed in Part VII, the courts have ruled for plaintiffs every single time this issue has been litigated.[183]

In any event, while DOJ attorneys are placed in the unenviable position of facing unfriendly case law while trying to "keep from hemorrhaging money,"[184] the results support the claim that the DOJ is being overly litigious. Thomas Stewart, another plaintiff's attorney, recently claimed to be 24-0 on liability rulings.[185] A former DOJ trial attorney admitted that the agency has lost almost every rail-trail case it's handled.[186] With that track record, one could infer that the DOJ is going to court when it should be settling. By taking a more settlement-friendly approach, the government could reduce interest and attorney fees for individual cases, thereby more closely pegging the magnitude of the total payout to the market value of the land.

As with a streamlined compensation procedure, it is important to note the distinction between the effectiveness at the micro versus the macro level as pertains to the DOJ's litigiousness. It is conceivable that litigating losing issues could be in the best fiscal interests of the federal government. While litigation raises interest and attorney fees associated with individual claims, it may reduce the number of claims filed. The government must cover plaintiffs' attorney fees if plaintiffs are successful; therefore, claims are not necessarily deterred because the government is driving up costs for plaintiffs.[187] Rather, it is a matter of tying up limited litigious resources. There are only a few firms that are heavily involved in rail-trail takings.[188] By dragging cases out instead of settling early, the DOJ may be stemming the tide of takings lawsuits by entangling the few

180. *Hearing*, *supra* note 1, at 51 (statement of Nels Ackerson, Chairman, The Ackerson Group).

181. *Id.* at 96.

182. Anonymous Former DOJ Attorney, *supra* note 121.

183. *See supra* note 129.

184. Anonymous Former DOJ Attorney, *supra* note 121; both Thomas Stewart and the anonymous former DOJ attorney, who litigated several rail-trail cases, stated that these cases are unpopular among DOJ attorneys. Stewart Interview, *supra* note 119.

185. Paul Koepp, *'Rails-to-Trails' cases lead Kansas City lawyers to some big paydays*, KAN. CITY BUS. J. (Feb. 8, 2013, 5:00 AM), http://www.bizjournals.com/kansascity/print-edition/2013/02/08/rails-to-trails-cases-lead-kansas.html?page=all.

186. Anonymous Former DOJ Attorney, *supra* note 121.

187. *Id.*

188. *See supra* note 175.

plaintiff's attorneys in the field in protracted litigation.[189] If the government were to settle more willingly, it is conceivable that these plaintiff's attorneys would be able to file a greater number of suits. Although hard to verify empirically, the DOJ's obstinate approach to certain issues may in the long run be an effective means of protecting the government from "hemorrhaging money." It is therefore difficult to normatively critique the DOJ's approach if its primary goal is to minimize the amount of money paid by the federal government.

Even if the DOJ is not using its discretion as well as it could, its litigation strategy has nothing to do with the underlying nature of the railbanking program. The DOJ is tasked with stemming the tide of government payouts, not with writing or amending the Rails-to-Trails Act. As discussed in the following section, the more fundamental problem with railbanking lies in the fact that the Rails-to-Trails Act allows the trail acquirer to externalize landowner compensation costs to the federal government, which in turn has no capacity to shield itself from such liability.

IX. Cost Externalization of Landowner Compensation

A. Rails-to-Trails Funding

When analyzing the costs of rail-trails, it is important to understand the different types of costs involved, as well as the sources of funding. Costs can be broken down into three separate components—acquisition from the party (either the railroad company or an entity leasing the corridor to the railroad company) previously enjoying the rights to the corridor, construction, and landowner compensation. (As noted above, landowner compensation costs can be further divided into land value, interest, and attorney fees.) Landowner compensation costs stem from takings claims and apply only in cases where landowners bring challenges. These landowner compensation costs are borne entirely by the federal government via the Judgment Fund. The source of acquisition and construction funding is more complicated and is often characterized by a mix of private and government contributions.

Rail-trail projects received a large boost from the federal government in 1991, when Congress passed the Intermodal Surface Transportation Efficiency Act ("ISTEA").[190] This act made trail projects eligible for federal highway program funds. Although it expired in 1997, ISTEA

189. This proposition emphasizes the short term effects of the DOJ's current litigation strategy. In the long run, one would expect market forces to shore up any shortage in the supply of rail-trail plaintiff's attorneys.

190. Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914.

paved the way for similar statutes subsequently passed by Congress.[191]

The United States Department of Transportation's ("DOT") Federal Highway Administration ("FHWA") is the federal agency in charge of supervising federal surface transportation funding.[192] FHWA works closely with state departments of transportation to fund bicycle and recreational trail projects, including rail-trails.[193] One of several programs through which FHWA funds trails is the Surface Transportation Program ("STP").[194] The STP provides approximately $7 billion per year to states, of which ten percent is set aside for transportation enhancements.[195] Transportation enhancements must fall under one of twelve listed activities, one of which is rail-trails.[196] From 1992 to 2011, transportation enhancement funds provided $3.5 billion in pedestrian and bicycle projects.[197]

Transportation enhancement funds typically entail a matching requirement for states. In general, the federal share of funding for transportation enhancement projects may not exceed eighty percent.[198] The remaining twenty percent match must come from states or localities. Similar matching requirements apply to the Recreational Trails Program (RTP), which is also administered by the FHWA.[199] Under the RTP, some states self-impose a fifty percent matching requirement.[200]

Funding for rail-trail acquisition and construction is a collaborative process involving the federal government, state government, local governments, and often, private trail sponsors. The same cannot be said of the funding for landowner compensation, which is covered wholly by the federal government.

Under the current system, a trail organization or local governmental entity pays the railroad for the rights to the corridor.[201] This upfront acquisition price, even when combined with the later costs of actually constructing a trail, is not a full reflection of the rail-trail conversion cost. It fails to account for the uncertain costs associated with subsequently filed

191. Christopher Douwes, *Federal Transportation Funds Benefit Recreation*, FED. HIGHWAY ADMIN., https://www.fhwa.dot.gov/environment/recreational_trails/overview/benefits/#primary (last updated Sept. 25, 2015).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. 23 U.S.C. § 120 (2012); *see also* Douwes, *supra* note 191.

199. Douwes, *supra* note 191.

200. *Id.*

201. *See Frequently Asked Questions*, KENTUCKY RAILS TO TRAILS COUNCIL, www.kyrailtrail.org/faqs.html (last visited Oct. 17, 2015).

takings claims.[202] These costs are paid out of the federal government's Judgment Fund, and the federal government, through the STB, has no discretion to deny an ITU on the grounds of potentially large takings claims.[203] These compensation costs are therefore unaccounted for when the acquiring party is deciding whether to acquire a corridor and/or construct a trail. This cost externalization may promote over-investment in rail-trails by deflating the cost component of the purchaser's cost/benefit analysis. The greater the ratio of costs borne by the federal government, the more the acquiring entity can externalize its costs, and the more likely a rail-trail is to be an inefficient allocation of resources. Since one hundred percent of railbanking compensation costs are borne by the federal government, *ceteris paribus* the higher the ratio of compensation costs to overall costs, the greater the chances of an inefficient rail-trail conversion.

B. Judgment Fund Payments

As of October 2015, the Judgment Fund had paid over $100 million in landowner compensation for rail-trail takings.[204] There had been nearly one hundred discrete payments, although some of these appear to be for the same case.[205] Nearly all of the payments have been made in the last few years, which is an indication that the rail-trail takings wave is rapidly gaining momentum. 2013 was a particularly active year.[206] All but a handful of the successful claims were brought in the Court of Federal Claims.[207] The remainder were brought pursuant to the Little Tucker Act in district courts.[208]

C. Anecdotal Examples

1. Spanish Moss Trail

Take, as an example of massive cost externalization problems, the Spanish Moss Trail, a rail-trail project in South Carolina.[209] In 2008, the Beaufort-Jasper Water and Sewer Authority ("BJWSA") and the State of

202. It is true that not every rail-trail conversion results in takings claims. In fact, most do not. However, this section of the paper is dealing with aggregate trends. In the aggregate, landowner compensation is a significant component of rail-trail costs.

203. 49 C.F.R. § 1152.29 (2012) (qualifications for funding are unrelated to takings claims).

204. *Judgment Fund Payment Search*, U.S. Dep't of the Treasury, https://jfund.fms.treas.gov/jfradSearchWeb/JFPymtSearchAction.do (enter date range and select agency: "Surface Transp. Bd."; then follow "Generate Report" hyperlink) (last visited Oct. 17, 2015).

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *About*, Spanish Moss Trail, http://www.spanishmosstrail.com/overview/mission/ (last visited Oct. 17, 2015).

South Carolina entered into a trail use agreement regarding the 25-mile Port Royal Railroad Line.[210] In 2009, the parties applied to the STB for a NITU, which the STB issued.[211] BJSWA subsequently acquired the corridor from the State for $3 million.[212]

In 2011, BJSWA granted a surface easement to Beaufort County for 13.6 miles of the corridor, over which the Spanish Moss Trail project has commenced.[213] The total cost of trail construction is estimated at $12.4 million, with one-third coming from private funds and two-thirds coming from the public sector.[214] Funds stem from a variety of sources, including private foundations, a local hospital, Beaufort County, the City of Beaufort, and the Town of Port Royal.[215] Some of the local public funding is backed by federal funding for transportation enhancements.[216]

Several class action lawsuits have been filed against the federal government alleging that the STB's issuance of the NITU constituted a taking of plaintiffs' reversionary interests in the right-of-way. In 2013, the federal government settled *Raulerson v. United States*, a 260-member opt-in class action, for a whopping $33.5 million.[217] Several months later, it settled *Ingram v. United States*, a case stemming from the same rail line, for an undisclosed amount.[218] At least two other suits regarding this line were also filed—one against the federal government for landowners who failed to opt into the *Raulerson* and *Ingram* classes, as well as a suit against BJSWA for usurping subsurface rights through utility leases.[219]

Even excluding the non-*Raulerson* claims against the federal government, which have generated more compensation costs, the total costs of trail conversion—the sum of the acquisition price, construction costs, and landowner compensation—is estimated to be around $48 million; $3 million for acquisition,[220] around $12 million for construction,[221] and $33

210. Raulerson v. United States, 99 Fed. Cl. 9, 10 (Fed. Cl. 2011).

211. *Id.*

212. *See About*, *supra* note 209.

213. *Id.*

214. *Id.*

215. Erin Moody, *Construction to start Monday on next segment of Spanish Moss Trail*, BEAUFORT GAZETTE (Sept. 6, 2013), http://www.islandpacket.com/2013/09/06/2669913/construction-to-start-monday-on.html.

216. Char Devoursney, *Spanish Moss Trail Extended*, PATH FOUNDATION (Aug. 4, 2014), https://pathfoundation.org/2014/08/spanish-moss-trail-extended/.

217. Raulerson v. United States, 108 Fed. Cl. 675, 677 (Fed. Cl. 2013).

218. Joint Status Report, Ingram v. United States, No. 10-cv-00463-MBH (Fed. Cl. Jan. 6, 2014).

219. Erin Moody, *Lawsuit over Port Royal railroad easements settled for $33 million*, BEAUFORT GAZETTE (Jan. 28, 2013), http://www.islandpacket.com/news/local/community/beaufort-news/article33497244.html; Complaint at 10, 10 Frontage Road, LLC v. Beaufort-Jasper Water & Sewer Authority, No. 9:13-cv-00169-DCN (D.S.C. Jan. 17, 2013).

220. *Frequently Asked Questions*, SPANISH MOSS TRAIL, http://www.spanishmosstrail.com/overview/mission/about-2/ (last visited Oct. 18, 2015).

million for landowner compensation.[222] Even assuming that the local entities front all of the purchase and construction costs, which is not the case,[223] that is still only $15 million, or less than a third of total costs. If the benefits of the trail are worth more than $15 million, it will be worthwhile, from the acquiring party's perspective, to convert the rail to a trail.[224] However, unless the benefits of the trail are worth $48 million or more, the trail generates a net deadweight loss.[225] Thus, there is a wide range of utility values—anywhere from $15 million to $48 million—for which the Spanish Moss Trail will be an inefficient investment.

Another factor to consider is the time value of money, or in this case the time value of utility. While the federal government has already paid tens of millions of dollars in takings liability for the Port Royal Railroad line,[226] only five miles of the Spanish Moss Trail had been completed by the time of this writing.[227] The trail's master plan calls for phased construction over the course of six years.[228] Even if the trail is expected to generate massive utility, future utility must be discounted to a present value. All else equal, the longer the delay in construction, the lower the present value of the trail.[229]

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221. *Id.*

222. *See supra* text accompanying notes 217 & 219.

223. The USDOT subsidizes these projects. *See supra* notes 190-200.

224. When determining the utility derived from a trail, it is important to focus only on the incremental, or marginal, utility generated. Say a locality places 100 utils on an individual using public spaces to exercise for an hour. If 100 people use a trail for an hour each day, the trail is not necessarily generating 10,000 utils per day. This is because some of these people may have exercised elsewhere (i.e., on roads and sidewalks) even in the absence of the trail. Objectively quantifying the utility of a trail is admittedly difficult, but it is important to have the right conceptual framework before attempting to do so.

225. This is somewhat of an overgeneralization, as it ignores salvage and utilities value. According to Mr. Stewart, BJSWA salvaged the rail equipment for around $1 million and leased parcels of the corridor to two utility providers for around $500,000 each. *See* Stewart Interview, *supra* note 119. These actions create value beyond recreational trail use. Therefore, if the total value of salvaging, utility service, and recreational use exceeds $60 million, railbanking presents a net gain in this case. However, the salvage value and utility leases are miniscule compared to the total costs. Moreover, one of the suits stemming from the Port Royal Railroad line is a claim alleging that, because the rail corridor constitutes only a surface easement, BJSWA usurped the underlying landowners' subsurface property rights by granting easements for subsurface utilities. Complaint at 10, 10 Frontage Road, LLC v. Beaufort-Jasper Water & Sewer Authority, No. 9:13-cv-00169-DCN (D.S.C. Jan. 17, 2013). If plaintiffs win, this would reduce the value of the corridor as an element of utility infrastructure.

226. Raulerson v. United States, 108 Fed. Cl. 675, 677 (Fed. Cl. 2013).

227. See *infra* Figure 1 (only 3 of the 10 segments shown had been completed at the time of this writing).

228. *See About*, *supra* note 209.

229. Another way to conceptualize this point is to think of the approximately $36 million of purchase and compensation costs as accruing interest over the period during which the trail is being constructed. In order to be a sound investment, the trail will need to generate benefits worth $36 million *plus* the interest accrued.

Furthermore, rates of construction may serve as a rough proxy for the locality's perception of the ratio of the trail's marginal costs to marginal benefits. If the locality drags its feet in raising the funds necessary to construct the trail, this may be a sign that the benefits are not expected to substantially exceed the costs incurred by the locality. If the benefits barely exceed the local costs of purchase and construction, the benefits are much less likely to exceed the total costs of the trail—purchase, construction, *and* landowner compensation.

While the compensation structure intuitively leaves utility values for which a rail-trail may represent a net societal loss, it is difficult to objectively quantify utility generated. For one thing, the vast majority of rail-trails are publicly accessible at no charge, which prevents analysis of users' perceived utility. Even for trails that do require user fees, the revenues generated do not provide a full reflection of trail utility, as the local governments operating these trails charge below-market prices.[230] Yet another complicating factor to measuring utility is the likelihood of externalities. On the negative side, a trail may adversely impact abutting landowners by resulting in decreased privacy, increased noise, and littering.[231] Also, a trail may be a hotbed of crime.[232] On the utility-enhancing side, a trail may provide a range of positive externalities by, among other things, boosting nearby property values, increasing activity at nearby businesses, increasing the community's social capital, and increasing exercise levels among community members.[233] For these reasons, it is difficult to objectively value the utility of a rail-trail. Nonetheless, when, as with the Spanish Moss Trail, the purchasing entity incurs only a tiny fraction of overall costs, there is a very wide range of utility values for which the trail will be an inefficient allocation of resources. While any given trail may generate enough utility to offset takings liability, when aggregated across the dozens of trails giving rise to takings claims, there is a strong chance that some of these trails are net losers.

230. The 89-mile Raccoon River Valley Trail in Iowa is an example of a rail-trail that has user fees: $2 for a daily pass and $10 for an annual pass. Such fees generated between $22,000 and $45,000 for each of the fiscal years 2009-2013. *See* E-mail from Mike Wallace, Dir., Dallas Cnty. Conservation Bd., to author (Apr. 17, 2014, 09:49 EDT) (on file with author). Given that the trail cost several million dollars to acquire and construct, the local governments (Dallas, Guthrie, and Greene counties) are not receiving a net-positive fiscal investment. Rather, these counties hope that the fee revenue coupled with other community benefits are worth the investment.

231. ROGER L. MOORE ET AL., NAT'L PARK SERV., THE IMPACTS OF RAIL-TRAILS: A STUDY OF THE USERS AND PROPERTY OWNERS FROM THREE TRAILS ii (1992), *available at* www.nps.gov/ncrc/programs/rtca/helpfultools/impact_railtrail_final.pdf.

232. *See generally Urban Pathways to Healthy Neighborhoods: Focus on: Personal Safety*, RAILS-TO-TRAILS CONSERVANCY (Mar. 1, 2012), https://www.railstotrails.org/resource handler.ashx?id=5046.

233. *See Investing in Trails: Cost-Effective Improvements for Everyone*, RAILS-TO-TRAILS CONSERVANCY (Apr. 30, 2013), http://www.railstotrails.org/resourcehandler.ashx?id=3629.

2. Other Examples

While the Spanish Moss Trail has generated the largest rail-trail takings payment to date, it is by no means a one-off event. 2013 witnessed a prominent uptick in the number of rail-trail settlement claims paid out of the Judgment Fund,[234] followed by a massive rail-trail settlement in 2014 stemming from Washington State.

In 2009, the Port of Seattle and BNSF negotiated a transaction in which the Port acquired a 42-mile corridor from BNSF for $81 million.[235] Approximately 28 miles were railbanked, with King County serving as the interim trail user.[236]

The corridor at issue ran along highly valuable land bordering Lake Washington,[237] which presented a prime opportunity for a lucrative class action suit.[238] Thomas Stewart (the lead attorney in *Raulerson*) spearheaded a takings claim in *Haggart v. United States*, for which a settlement was approved in the monumental sum of $140.5 million in May

234. *Judgment Fund Payment Search*, U.S. DEP'T OF THE TREASURY, https://jfund.fms.treas.gov/jfradSearchWeb/JFPymtSearchAction.do (enter date range and select agency: "Surface Transp. Bd."; then follow "Generate Report" hyperlink) (last visited Oct. 17, 2015).

235. Keith Ervin, *Port of Seattle to pay BNSF $81M for Eastside rail line*, THE SEATTLE TIMES (Dec. 21, 2009, 4:25 PM), http://www.seattletimes.com/seattle-news/port-of-seattle-to-pay-bnsf-81m-for-eastside-rail-line/. The acquisition costs attributable to trail use alone are less than $81 million because only part of the acquired corridor will be converted to trail use. Other parcels are intended for light-rail use and utilities. A truer reflection of acquisition costs for trail use is the value King County and its municipalities pay to acquire a section of the corridor from the Port of Seattle.

236. *Railbanking & the Eastside Rail Corridor*, KING COUNTY (Feb. 20, 2013), http://www.kingcounty.gov/~/media/operations/erc-advisory-council/meetings/2013-02-20/D1RailbankingDescriptionFeb2013.ashx; *see also* Scott Gutierrez, *Lawsuit: Purchase of Eastside rail corridor was illegal*, THE SEATTLE POST-INTELLIGENCER (Aug. 30, 2010, 10:00 PM), http://www.seattlepi.com/local/article/Lawsuit-Purchase-of-Eastside-rail-corridor-was-895585.php.

237. *See infra* Figure 2.

238. It is important to note that trail use is not the only intended purpose for this corridor. Utilities and light-rail transit are also potential uses. Keith Ervin, *Port of Seattle to pay BNSF $81M for Eastside rail line*, THE SEATTLE TIMES (Dec. 21, 2009, 4:29 PM), http://www.seattletimes.com/seattle-news/port-of-seattle-to-pay-bnsf-81m-for-eastside-rail-line/. According to the Port's lawyers, acquiring the corridor "preserves a substantial and irreplaceable asset that will allow the Port of Seattle and other regional partners to address the region's growing transportation needs, provides a necessary link to an interstate railroad system, and provides an essential alternative transportation corridor in case of a natural or manmade disaster." Gutierrez, *supra* note 236. Thus, recreational trail use is not the only source of value that may rationalize the millions of dollars spent on acquiring the corridor and compensating landowners. However, in order for the corridor to be railbanked, the acquiring party must show "interest[ ] in acquiring or using [the] right-of-way . . . for interim trail use." 49 C.F.R. § 1152.29(a) (2014). In other words, interest, or at least ostensible interest, in trail use was a necessary condition for railbanking the corridor.

2014.[239] The magnitude of this settlement dwarfed all prior rail-trail takings payments. It should be noted that no judgment has yet been paid in regard to *Haggart*, as the settlement agreement was challenged by certain class members who contested the award of fees to class counsel and claimed that class counsel failed to provide adequate disclosures regarding the methodology for calculating the settlement amounts for individual class members. The Federal Circuit recently vacated the Court of Federal Claims' approval of the settlement and remanded for further consideration.[240] However, because this decision has no effect on the federal government's liability, there is reason to believe that the government will still end up paying a substantial sum pursuant to a subsequently negotiated settlement.

The Legacy Trail in Sarasota, Florida, provides yet another striking example of high landowner compensation costs that were unaccounted for in the trail use agreement. In 2003, Sarasota County partnered with the Trust for Public Land to acquire a 12.8-mile corridor from CSX for $11.75 million.[241] Another $30 million was spent developing the trail.[242] The project has been the source of several takings suits now totaling more than $10 million.[243] When negotiating the terms of the rail-trail project, local government administrators did not consider the possibility of subsequent takings claims. In the words of the county commissioner, "This whole [takings] thing is very strange. We didn't know a thing about it."[244] This statement reveals that not only do local bodies have no incentive to consider ex post landowner compensation costs; they are sometimes not even aware of such costs.

As evidenced by the recent spike in both number and size of rail-trail takings claims, it is time to address the shortcomings of the railbanking process. This need is further heightened by the recent Supreme Court decision in *Brandt*, which opens the government up to liability for rail-trails established on rights-of-way granted pursuant to the 1875 Act.[245] In fact, the RTC has released information in the wake of *Brandt* that high-

239. Order Granting Joint Motion for Approval of Settlement at 20, Haggart v. United States, No. 09-103L (Fed. Cl. May 21, 2014).

240. Haggart v. Woodley, No. 09-103 (Fed. Cir. Jan. 8, 2016).

241. Dale White, *County has muted enthusiasm for Legacy Trail expansion*, HERALD-TRIBUNE (Sept. 4, 2013, 5:42 PM), http://www.heraldtribune.com/article/20130904/ARTICLE/130909840.

242. *Id.*

243. McCann Holdings, Ltd. v. United States, 111 Fed. Cl. 608 (Fed. Cl. 2013); Childers v. United States, 112 Fed. Cl. 617 (Fed. Cl. 2013); *see also* Josh Salman, *Developer wins $3.2 million over Legacy Trail land*, THE HERALD-TRIBUNE (July 2, 2013, 6:15 PM), http://www.heraldtribune.com/article/20130702/article/130709899?p=2&tc=pg.

244. Salman, *supra* note 243.

245. Marvin M. Brandt Revocable Trust v. United States, 134 S. Ct. 1257, 1268 (2014).

lights the apathy toward externalized federal costs.[246] This organization claims that *Brandt* has "no effect" on railbanked trails.[247] While it is true that *Brandt* will not affect the title to railbanked corridors, it does impact the liability of the federal government for takings claims brought in response to railbanked corridors that were initially granted pursuant to the 1875 Act. To say that this ruling has "no effect" on railbanked trails is to act as though costs to the federal government are meaningless.[248]

D. The Problem with Externalizing Landowner Compensation Costs

One may argue that the issue of rail-trail cost externalization is not unique to landowner compensation. After all, the front-end acquisition and construction costs are often heavily funded by the DOT through transportation enhancement funding. Furthermore, Congress has been known to deliberately subsidize a wide range of local projects, so what is so alarming about the cost externalization occurring here?

First of all, landowner compensation for rail-trail takings is not a manifestation of congressional intent. Rather, it was an "unforeseen circumstance[ ]."[249] The record indicates that when Congress passed the Rails-to-Trails Act, the possibility of landowner compensation was not considered.[250] In fact, the Congressional Budget Office estimated the Rails-to-Trails Act to generate zero cost for the federal government.[251] "This has obviously not been the case."[252] Additionally, the tab for the federal government is accelerating at unforeseen rates. In 1990, there was one pending rail-trail takings case (*Preseault*) with one claimant. By 2002, there were 17 cases with approximately 4,500 claimants.[253] At that

246. *See What the Marvin M. Brandt Case Means for America's Rail-Trails*, Rails-to-Trails Conservancy (Mar. 17, 2014), http://community.railstotrails.org/blogs/trailblog/archive/2014/03/17/what-the-marvin-m-brandt-case-means-for-america-s-rail-trails.aspx [hereinafter *America's Rail-Trails*].

247. *The Supreme Court Decision: How Does It Affect Rail-Trails?*, Rails-to-Trails Conservancy (Mar. 11, 2014), http://www.railstotrails.org/trailblog/2014/march/11/the-supreme-court-decision-how-does-it-affect-rail-trails/.

248. On its website, the Rails-to-Trails Conservancy acknowledges that *Brandt* could expand the scope of rail-trail litigation, likely costing the federal government more. However, the report quickly glosses over these costs, saying, "We need to ensure that fear of lawsuits does not deter people from moving forward with trails that communities need and have a right to build." *America's Rail-Trails*, *supra* note 246.

249. *Hearing*, *supra* note 1, at 32 (statement of Thomas L. Sansonetti, Assistant Att'y Gen., Env't & Natural Res. Div.).

250. *Id.* at 9 (statement of Bob Barr, Chairman, Subcomm. on Commercial & Admin. Law).

251. *Id.*

252. *Id.*

253. *Id.* at 32 (statement of Thomas L. Sansonetti, Assistant Att'y Gen., Env't & Natural Res. Div.).

time, a DOJ official "conservatively estimate[d]" "total potential monetary exposure from the rails-to-trails takings litigation . . . to be $57 million, plus prejudgment interest."[254] As we now know, a settlement in *Haggart* alone may cost the federal taxpayer more than double this so-called conservative estimate. It is now estimated that there are 80 cases pending with approximately 8,000 claimants.[255] Plaintiff's attorneys estimate that federal liability could top half a billion dollars.[256]

In addition to the unanticipated magnitude of rail-trail subsidization via landowner compensation, there are other important distinctions between front-end federal funding and back-end takings payments. With front-end funding of transportation enhancements, the DOT has a congressionally limited budget and the discretion to allocate funding appropriately. This stands in stark contrast to landowner compensation through the Judgment Fund, as no federal agency has discretion to prevent interim trail use that may result in high compensation costs, and there is no budgetary cap on Judgment Fund payments.[257] Local governments and trail organizations often work hand-in-hand with the federal government in order to obtain funding for buying rail corridors and converting them to trails. As it pertains to acquisition and construction, the federal government does not offer an infinite stream of cash; the state and local governments usually provide a significant portion of such funding.[258] However, when it comes to takings claims, the local entities are wholly removed from the process, and the federal government is left paying the full tab under the Rails-to-Trails Act.

The literature is rich with efficiency-based arguments in favor of compensation as a means of forcing government to internalize the costs of its actions.[259] Compensation can act as a pricing mechanism, whereby

254. *Id.* at 37.

255. Jenna Greene, *Rails-to-Trails Program Costly to Taxpayers*, NAT'L L. J. (Sept. 2, 2013), http://www.nationallawjournal.com/id=1202617646798/RailtoTrails+Program+Costly™o+Taxpayers%3Fmcode=0&curindex=0&curpage=1.

256. *Id.*

257. *See Hearing*, *supra* note 1, at 3 (statement of Bob Barr, Chairman, Subcomm. on Commercial & Admin. Law) (explaining that all of the money spent by the government in these cases comes from the Judgment Fund, "providing Congress no real opportunity for budget or appropriations review each year").

258. *See supra* text accompanying notes 190-200.

259. *See, e.g.*, Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 420 (1977) (stating "When municipal officials are able to deflect the costs of a public measure to those who lack the right to vote in municipal elections (or who are vastly outnumbered at the polls), a rule requiring compensation, by shifting the costs back to the electoral majority, may help induce these officials to weigh more accurately the costs and benefits of alternative measures."); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1213-19 (1967); Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1665-79 (2006).

governments are forced to factor the costs of takings into their decision whether to take a certain action—in this case, whether to railbank a corridor.[260]

Granted, under the currently applicable rail-trail takings judicial doctrine, compensation is already required.[261] Therefore, government already incurs the costs of taking landowners' reversionary interests in railroad rights-of-way. However, such compensation is an uncertain and ex post cost that is borne by a branch of government that is wholly removed from the decision making process. Compensation costs are therefore incurred in a manner that promotes the externalization of costs away from the entity making the cost-benefit analysis of whether to acquire a right-of-way.

Some express skepticism as to how well government entities internalize monetary costs. Daryl Levinson, for example, provides an important caveat to the argument in favor of compensation as a means of forcing government to internalize costs.[262] He claims that one should not expect governmental bodies to internalize costs the same way a profit-maximizing firm would.[263] Whereas managers of a firm respond to monetary costs and benefits, government officials respond to political costs and benefits. The two sets of costs and benefits are not perfectly correlated.[264] In other words, government officials seek to get reelected or to boost their agency budgets. These goals do not always yield the same behavior as when one's goal is to maximize the fiscal bottom line.

Even if one adheres to Levinson's argument, the current rail-trail system can be improved. Levinson considers landowner compensation as a binary variable—either the government compensates for a taking or it does not.[265] He claims that forcing the government to compensate landowners may not limit inefficient takings more than a policy of no compensation.[266] This is based on the premise that uncompensated landowners will create a political stir and generate political costs for government officials, whereas compensation will satisfy the landowners while dispersing the costs across the tax base.

This is a plausible theory, but it does not address the fundamental problem at issue in rail-trail takings compensation. In this context, the

260. *See* Serkin, *supra* note 259, at 1634-35 ("There is an assumption—shared, it must be admitted, by property groups and their critics alike—that if the government had to pay for these regulations, it would be much less willing to act.").

261. McCann Holdings, Ltd. v. United States, 111 Fed. Cl. 608, 613 (Fed. Cl. 2013).

262. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 353-57 (2000).

263. *Id.* at 345.

264. *Id.* at 355-57.

265. *Id.* at 377.

266. *Id.* at 367.

primary issue is not whether there is a compensable taking, but rather who is paying for the taking. The relevant question thus becomes how large the tax base is across which landowner compensation costs are dispersed.

Currently, these costs are spread across the entire federal tax base. When landowners bring a successful takings claim for a rail-trail conversion, the only loser is the federal government. The landowners are compensated, and the locality benefits from having a recreational trail that is heavily subsidized by the federal government. The benefits are concentrated at the local level, whereas a hefty portion of the cost (all of the landowner compensation costs and part of the acquisition/construction costs) is dispersed among millions of federal taxpayers.[267]

Shifting part of this burden to the local level would greatly amplify the costs borne by the local populace, which, unlike the federal government, is in a position to influence the rail-trail conversion process. Additionally, one commentator has argued that "fiscal and political costs are surprisingly well aligned at the local level, where forcing the government to compensate will tend to create more efficient regulatory incentives."[268] Forcing local bodies to internalize these compensation costs would presumably raise the ratio of rail-trail local costs to local benefits, thus curbing the likelihood of an inefficient railbanking.[269]

X. Possible Solutions

Some argue that we should not worry about reforming railbanking, as rail-trail takings liability is a *de minimis* cost relative to the overall federal budget.[270] While landowner compensation certainly represents a tiny fraction of total federal spending, it does not follow that one should accept the current system's inefficiencies. Just because there may be more glaring examples of government inefficiency elsewhere does not mean that we should resign ourselves to inefficiency on this issue. Furthermore, apathy toward efficiency is typically not isolated to individual issues. If such apathy is applied writ large, a series of relatively small cost overruns will constitute a large sum when aggregated across a range of discrete government programs.

267. Public choice theory holds that such programs are prone to flourish despite their inefficiencies. For more on the idea that concentrated minority benefits will politically outweigh diffuse majority costs, *see generally* Daniel A. Farber & Philip P. Frickey, Law and Public Choice 40 (1991); Mancur Olson, The Logic of Collective Action 29 (1971).

268. Serkin, *supra* note 259, at 1628.

269. For a proposal to amend the Rails-to-Trails Act in order to achieve cost internalization, *see infra* Part X.B.2.

270. *Hearing*, *supra* note 1, at 68 (statement of Andrea C. Ferster, Gen. Counsel, Rails-to-Trails Conservancy).

Solutions to the railbanking process are in order, and this paper now turns to some of those possibilities.

A. Supreme Court Review

The Supreme Court of the United States has never reached the merits of government liability in the context of rail-trail takings. The Federal Circuit set the rail-trail takings wave in motion with *Preseault*,[271] and this same court hears all appeals of Court of Federal Claims decisions. Not everyone believes the Federal Circuit is correct in its conclusion that the Rails-to-Trails Act effects a taking. Some commentators have argued that rail-trail takings should be analyzed not under *Loretto's* per se standard, but instead under the *Penn Central* balancing factors.[272] Under this line of reasoning, some claim that the Rails-to-Trails Act does not effect a taking when the landowners have no reasonable investment-backed expectations in acquiring the right-of-way through reversion.[273] The Court of Federal Claims applied this reasoning in determining that railbanking did not constitute a taking of the Preseaults' land.[274] On appeal, the Federal Circuit three-judge panel rejected the Court of Federal Claims' *Penn Central* analysis in favor of *Loretto's* per se standard.[275] Nonetheless, this panel still held that there was no taking.[276] Like the Second Circuit opinion from 1988,[277] the Federal Circuit three-judge panel emphasized the fact that the ICC has exclusive jurisdiction over railroad abandonment.[278] If the ICC precludes abandonment through railbanking, the ICC retains jurisdiction and "no reversionary interest can or would vest."[279] Under this reasoning, landowners hold no possessory interests subject to a taking until the STB issues an ITU.[280] Justice O'Connor, in her concurring opinion in *Preseault*, criticized this logic as "threaten[ing] to read the Just Compensation Clause out of the Constitution."[281] However, her concurrence carries no precedential weight.

Aside from the overarching issue of whether railbanking generally

271. Preseault v. United States, 100 F.3d 1525, 1552 (Fed. Cir. 1996).

272. *See, e.g.*, Allen, *supra* note 32, at 54-55; Charles H. Montange, *Fixing the Unbroken in the Federal Railbanking and Trail Use Statute: A Rejoinder to "Unhappy Trails,"* 6 J. Land Use & Envtl. L. 53, 68-75 (1990).

273. *See, e.g.*, Allen, *supra* note 32, at 54-55; Montange, *supra* note 272, at 68-75.

274. Preseault v. United States, 27 Fed. Cl. 69, 94-96 (Fed. Cl. 1992).

275. Preseault v. United States, 66 F.3d 1167, 1174 (Fed. Cir. 1995); *see generally* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

276. Preseault, 66 F.3d at 1182-86.

277. Preseault v. I.C.C., 853 F.2d 145, 151 (2d Cir. 1988).

278. Preseault, 66 F.3d at 1170.

279. Preseault, 853 F.2d at 151.

280. *See* Preseault, 66 F.3d at 1171-72.

281. Preseault v. I.C.C., 494 U.S. 1, 23 (1990) (O'Connor, J., concurring).

effects a taking, another potential avenue of appeal concerns the Federal Circuit's decision in *Ladd*, reversing the Court of Federal Claims and holding that the government is liable once the ITU is issued, regardless of whether the corridor is ever transferred to the prospective acquirer.[282] Foreclosing such liability would at least reduce the number of viable claims and limit payouts to cases in which the liability is more likely to be partially offset by the benefits of a trail.

Due to the variety of commentators and court decisions conflicting with the Federal Circuit's doctrine, it is conceivable that there could be a paradigm shift in rail-trail takings jurisprudence if the Supreme Court ever rules on the merits of takings liability. However, because the Federal Circuit favors plaintiffs, the only way the Supreme Court would have an opportunity to review this conclusion is if the DOJ petitions for review. To date, the DOJ has yet to do so.

It seems that the DOJ has little to lose and much to gain by petitioning the Supreme Court to grant certiorari on the issue of rail-trail takings liability.[283] An unfavorable Supreme Court ruling would only solidify the doctrine that is already being applied and would therefore result in little additional harm. Furthermore, the costs of appeal would be dwarfed by the cost savings that the government would enjoy if it received a favorable ruling.[284] Given the obstinacy the DOJ has displayed in futilely relitigating the same issues in the Court of Federal Claims,[285] it is somewhat perplexing that the agency has not appealed to the Supreme Court, where the slate is still clean.

As a procedural matter, there are many elements within the DOJ that would have to be involved in order for the government to appeal all the way to the Supreme Court. The Environment and Natural Resources Division handles the trial work before the Court of Federal Claims and the federal district courts.[286] The Appellate Division takes over the appeals to the circuit courts (always the Federal Circuit when coming from the Court of Federal Claims), and the Solicitor General must approve of any effort to appeal to the Supreme Court.[287] With all of these moving parts and many other pressing legal matters before the federal government, a petition for certiorari may not be likely.

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282. Ladd v. United States, 630 F.3d 1015, 1023 (Fed. Cir. 2010).

283. *See Hearing*, *supra* note 1, at 47 (statement of Nels Ackerson, Chairman, The Ackerson Group) (highlighting the expensive losses the DOJ has borne arguing "railbanking" cases).

284. Even excluding *Haggart*, the federal government has already paid over $100 million in rail-trail takings compensation, with no end in sight. *See Judgment Fund Payment Search*, U.S. DEP'T OF TREASURY, https://jfund.fms.treas.gov/jfradSearchWeb/JFPymtSearchAction.do (follow "Surface Transportation Board" hyperlink) (last visited Oct. 3, 2015).

285. *See* discussion *supra* Part VII.B and text accompanying notes 157-59.

286. *See supra* note 164.

287. Anonymous Former DOJ Attorney, *supra* note 121.

B. Statutory Approaches

Since the government cannot expect a Hail Mary bailout by the Supreme Court, it is important to consider statutory and regulatory alternatives to resolving the flaws in rail-trail conversion. This paper proposes that Congress grant the STB discretion to deny a rail-trail conversion.[288] This would be useful in cases where landowner compensation costs are expected to be high enough to make railbanking ill-advised. Alternatively, Congress could amend the Rails-to-Trails Act to require the acquiring party to assume partial or full responsibility for the costs of subsequently filed takings claims.

1. Grant Discretion to the STB

The STB currently has no discretion to deny a rail-trail conversion. The Rails-to-Trails Act provides:

> 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 Board *shall* impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.[289]

The ICC has interpreted this language as prohibiting ICC discretion to consider the merits of trail use.[290] In *Goos v. ICC*, the Eighth Circuit upheld the ICC's interpretation.[291] The result is that the Rails-to-Trails Act essentially treats a voluntary trail use agreement as "per se desirable."[292]

In addition to the question of ICC discretion, there was for a while a question as to whether the ICC would apply railbanking to railroads on a

288. For a similar proposal, see Drumm, *supra* note 57, at 165. While recommending a shift toward STB discretion, Drumm's suggestion was based more on a fear of rail-trails being built in inappropriate places than a concern over excessive government takings liability. This is understandable given that this article was published in 1999, well before rail-trail takings claims became common.

289. 16 U.S.C. § 1247(d) (2012) (emphasis added). *See generally Implementation Hearing*, *supra* note 56, at 26-29 (statement of Dan King, Director, Office of Public Services, Surface Transp. Bd.). In response to a question regarding the STB's failure to consider the merits of proposed trail use, Mr. King stated, "That is a requirement of the statute, and we don't have any discretion whatsoever. If the provisions of the statute are in place there, we have to grant the condition. We have no authority to determine whether it's desirable or not desirable." *Id.* at 29.

290. Rail Abandonments—Use of Rights-of-Way As Trails—Supplemental Trails Act Procedures, 4 I.C.C. 2d 152, 156 (Dec. 2, 1987).

291. Goos v. I.C.C., 911 F.2d 1283, 1295-96 (8th Cir. 1990).

292. Drumm, *supra* note 57, at 165.

voluntary or mandatory basis.[293] In other words, would the ICC initiate railbanking if the railroad did not want to negotiate with the entity seeking to acquire rights to the rail corridor? The answer is no. In 1986, the ICC stated that it interpreted the Rails-to-Trails Act as not giving it the authority to issue an ITU in the absence of railroad consent.[294] The D.C. Circuit subsequently affirmed this interpretation as lawful.[295] STB regulations state the following:

> *If . . . a railroad agrees* [indicating the requirement of railroad consent] to negotiate an interim trail use/rail banking agreement, then the Board *will* [indicating lack of STB discretion] issue a Notice of Interim Trail Use or Abandonment (NITU) to the railroad and to the interim trail sponsor for the portion of the right-of-way as to which both parties are willing to negotiate.[296]

Thus, while the railroad is not required to sell its rights to an acquiring party, the STB has no discretion to block such negotiations so long as the acquiring party assumes responsibility for the corridor and the railroad otherwise meets the STB's requirements for abandonment. In fact, the STB "has no involvement in the negotiations between the railroad and the trail sponsor. It does not analyze, approve, or set the terms of the trail use agreements."[297]

The only federal agency with regulatory oversight over the rail-trail process thus has no control over which corridors are railbanked. The federal government therefore has no means by which it can limit its exposure to landowner takings claims. Furthermore, the acquiring party has little incentive to consider the costs of potential takings liability. After all, those costs are dispersed across all federal taxpayers, while the benefits of the trail are narrowly targeted at the local level.

A common-sense amendment to the current system would be to grant the STB discretion not to issue an ITU in instances where landowner compensation costs are likely to be inordinately high. The higher the property values over which the corridor runs, the more likely are landowners to bring a large takings claim. For example, in *Raulerson*, the railroad at issue ran across valuable lots near the South Carolina coast.[298] If empowered with discretion, the STB could have saved the federal gov-

293. *See* Allen, supra note 32, at 45.

294. Rail Abandonments—Use of Rights-of-Way As Trails (49 CFR Parts 1105 & 1152), 2 I.C.C. 2d 591, 596 (S.T.B. Apr. 16, 1986).

295. Nat'l Wildlife Fed'n v. I.C.C., 850 F.2d 694, 699-702 (D.C. Cir. 1988).

296. 49 C.F.R. § 1152.29(d)(1) (2012) (emphasis added).

297. *Hearing, supra* note 1, at 109 (statement of Linda J. Morgan, Chairman, Surface Transp. Bd.).

298. Raulerson v. United States, 108 Fed. Cl. 675, 677 (Fed. Cl. 2013); *see infra* Figure 1.

ernment over $33 million by declining to issue a NITU, thus precluding a takings claim.

2. Force the Trail Acquirer to Assume Liability for Takings Claims

Some commentators have advocated shifting the source of federal takings payments from the Judgment Fund to the federal agency responsible for effecting the taking.[299] The idea is that "the judgment fund, like other entitlements, functions as a blank check beyond congressional or agency control."[300] Judgment Fund payments do not provide "adequate financial disincentives to decisions that will result in compensation. . . . [A] requirement to pay takings claims from agency budgets will increase agency care and discourage agencies from taking action to infringe property rights."[301] As Roberts and Anderson point out, however, "takings can only be avoided if agencies have discretion to implement regulatory alternatives that will satisfy their legal obligations without effectuating a taking."[302] Given that the STB currently has no discretion to block a rail-trail conversion so long as the railroad meets the other requirements for abandonment, forcing the STB to bear the costs of landowner compensation would not alter the agency's behavior and would have no impact on rail-trail takings. If, on the other hand, the STB is given discretion to deny ITUs, a requirement that the STB bear the costs of rail-trail takings would potentially cause the agency to issue very few ITUs.[303]

While shifting financial responsibility away from the Judgment Fund to the discretion-lacking STB would be useless, it may be useful to shift some of the burden to the party acquiring the trail.[304] In *Toews*, the Fed-

299. *See* Charles Tiefer, *Controlling Federal Agencies by Claims on Their Appropriations? The Takings Bill and the Power of the Purse*, 13 YALE J. ON REG. 501, 502 (1996); Stacy Anderson & Blake Roberts, *Capacity to Commit in the Absence of Legislation: Takings, Winstar, FTCA, & the Court of Claims* 13 (Harvard Law Sch. Fed. Budget Policy Seminar, Briefing Paper No. 12, 2005).

300. Tiefer, *supra* note 299, at 516.

301. Anderson & Roberts, *supra* note 299, at 13.

302. *Id.*

303. I say "potentially" here because bureaucrats at the STB may not internalize costs in the same manner as executives at a private firm. *See* Levinson, *supra* note 262, at 348 (arguing that political actors respond to political incentives instead of financial incentives); *see also* WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 36-42 (Aldine-Atherton, Inc. 1971) (arguing that bureaucrats are motivated primarily by a desire to maximize the budgets of their respective agencies).

304. For a similar proposal, *see* Cain, *supra* note 57, at 223-24; Cain, *supra* note 7, at 72 ("[W]hen the property owners negotiate for compensation at the agreement stage, financial responsibility for acquiring the trail property is shifted from the federal government to the interested party: the trail operator."). With this statement, Cain provided insight into cost internalization back in 1991, before the Federal Circuit had even held that railbanking effected a taking of Preseault's land. This paper takes the cost internalization analysis a step further by describing how externalization may promote inefficient investment in rail-trails, in addition to

eral Circuit hinted at this possibility when it held that the federal government was liable but did not reach the question of "whether, as the grants are currently granted, a recipient under a section 8(d) grant has any contractual liability to the Federal Government for exceeding the terms of an existing easement."[305] The current language of Section 8(d) requires that the acquiring party "assume full responsibility for management of such rights-of-way and for any legal liability *arising out of such transfer or use*."[306] Since the taking is triggered by the STB's issuance of the ITU, which occurs before the actual transfer of the rail corridor to the interim trail user, it seems that landowner compensation is not a legal liability arising from the *transfer* of the right-of-way. Thus, railbanking does not currently require that the acquiring party assume responsibility for takings liability.

Congress could amend this provision in order to explicitly impose a contractual liability on the acquirer of the right-of-way to reimburse the Judgment Fund for a percentage of subsequent takings payments. This would force the acquiring party to internalize some or all of the landowner compensation costs by ensuring that the STB does not issue an ITU unless the acquiring party agrees to cover landowner compensation costs.[307]

If the acquiring party knew that it was on the hook for such compensation, it would be incentivized to negotiate with landowners on the front end for two reasons. First, upfront agreements with landowners would lower overall compensation costs by reducing attorney fees and interest accrued over the course of protracted takings litigation.[308] Second, such

repeating Cain's point that internalization lightens the federal government's fiscal burden. Additionally, this paper's proposal is somewhat different than Cain's. She suggests, without much explanation of how such a process would work, that landowners be included in the trail use agreement negotiations between the trail acquirer and the railroad. This paper, on the other hand, recommends amending the statutory language of the Rails-to-Trails Act to place the trail acquirer directly on the hook for takings liability costs.

305. Toews v. United States, 376 F. 3d 1371, 1382 (Fed. Cir. 2004).

306. 16 U.S.C. § 1247(d) (2012) (emphasis added).

307. As discussed *supra* text accompanying notes 264-68, Levinson asserts that government officials often do not internalize costs in the same manner that private actors do. Even assuming that government officials are terrible at internalizing monetary costs, forcing a more localized government entity to bear the landowner compensation costs would still be more efficient than requiring the federal government to do so. While the benefits will remain targeted at the local level, and landowners will remain indifferent (given that they are compensated either way), the costs will be dispersed among a much smaller group of citizens that live in the area and are in a position to influence local policy. When the federal government covers takings liability, there is no local downside to such liability aside from the locality's miniscule fraction of the federal tax base. When takings liability shifts to the locality, the local citizens face much higher per capita costs. Given that landowner compensation and the marginal benefits remain the same, this cost shift will almost certainly curb rail-trail investment on the margins.

308. On the other hand, the acquiring party could take a risk by not negotiating with land-

negotiations would likely help the organization gain a sense of the land values, in turn allowing the organization to gauge potential liability in the event a voluntary landowner agreement could not be reached.

Currently, there is no incentive for state and local governments to use their eminent domain powers to condemn land along railbanked corridors. Why would they pay landowners when the federal government will? If, however, the party acquiring the trail was forced to cover landowner compensation, it may incentivize the state or local government to get involved. Sometimes the acquiring party is a government entity. Even if not, the locality usually stands to benefit from a trail. The local government, as or in conjunction with the trail acquirer, could try to negotiate voluntary transfers of title. Depending on state and local law, the government could also use its eminent domain powers to condemn tracts for which voluntary transactions cannot be reached. While voluntary, front-end deals with landowners are most desirable, ex ante condemnation is still preferable to ex post takings claims in that they would likely be resolved more quickly, thus reducing the amount of interest and attorney fees associated with landowner compensation.

If the trail acquirer was forced to assume responsibility for takings liability, there would be little need to grant the STB discretion to deny an ITU, as proposed above. After all, the purpose of STB discretion would be to prevent massive outflows of federal dollars, which would be precluded by a measure forcing the trail acquirer to internalize landowner compensation costs.

C. Effects on Rails-to-Trails

Some may worry that forcing local entities to internalize the costs of rail-trail takings claims would greatly reduce the number of rail-trail projects that are consummated. One argument against railbanking reform is that Congress intends to heavily subsidize rail-trails. While it is true that Congress has authorized transportation enhancement funding, such funding is closely monitored by the DOT and distributed in conjunction with matching funds from the state and local governments.[309] Blindly bankrolling an indefinite number of takings claims without maintaining any blocking discretion is a rather different, and more inefficient, funding mechanism. There likely would be fewer rail-trails, but that is the efficient result of curbing over-investment.

Granting the STB discretion to deny an ITU would simply provide

owners and hoping that they do not file suit. After all, there are many railbanked trails that have not resulted in takings claims.

309. *See* Financing and Funding, Rails-to-Trails Conservancy, www.railstotrails.org/build-trails/trail-building-toolbox/acquisition/financing-and-funding/ (last visited Jan. 2, 2016).

the federal government with a screening mechanism to prevent having to pay inordinate landowner compensation. It would not force payments by local entities; it would simply weed out projects with unjustly large price tags. Alternatively, forcing the trail acquirers to assume partial responsibility for takings payments may or may not have a large tempering effect on rail-trail projects. Presumably, the higher the reimbursement requirement, the larger the tempering effect. If the trail benefits are expected to exceed costs, the community will still have an incentive to acquire the corridor, even if it has to bear takings liability.[310]

Some argue that local governments are more risk averse than the federal government.[311] Under this logic, forcing reimbursement by local governments could result in fewer rail-trails partially because of such risk aversion. As stated before, however, a reduction in rail-trails would likely also be attributable to efficiency-inducing cost internalization.

If Congress fears a reimbursement requirement would have an undesirably large tempering effect, it could alleviate some of these concerns by increasing funding for transportation enhancements. Unlike with takings liability, at least the federal government can play an active role in deciding how to allocate such funds.

Furthermore, the statistics on rail-trails indicate that railbanking accounts for well under half of the total rail-trail mileage in the country. As of 2006, there were over 13,300 miles of rail-trails in the United States,[312] only 2,500 (19%) of which were on corridors that had been railbanked.[313] Between 1984 and 2009, 301 rail corridors had been railbanked, and 92 were in railbanking negotiations.[314] Trails had already been constructed on 120 of the railbanked corridors, while 163 of the abandoned corridors were converted to trails without being railbanked.[315] Thus, of the rail-trails completed in this 25-year window, the majority were on non-railbanked trails. This suggests that a reduction or even an elimination of railbanking will not destroy the rail-trail program.

On a separate note—one that hits closer to the ostensible purpose of railbanking—some may claim that curbing the pace of railbanking would threaten future rail infrastructure by permanently removing corridors from the rail system. Such fears are misplaced. As discussed above, very few railbanked trails have seen renewed service, and the STB does not

310. For an argument that governments do not internalize benefits (and costs) like a private firm, *see* Levinson, *supra* note 262, at 348.

311. *See* Serkin, *supra* note 259, at 1667-73.

312. Ferster, *supra* note 33, at 3.

313. *Railbanking and Rail-Trails: A Legacy for the Future*, RAILS-TO-TRAILS CONSERVANCY (Jul. 2006), *available at* http://www.railstotrails.org/resourcehandler.ashx?id=3489.

314. S.T.B. Hearing, *supra* note 153, at 16.

315. *Id.* at 16, 18.

issue an ITU unless a line is already obsolete.[316]

XI. A Blessing in Disguise: The Rails-to-Trails Act's Inherent Limitations on Railbanking

Ironically, the Judgment Fund's best defense against takings liability is currently the limited efficacy of the Rails-to-Trails Act itself. As the statistics in Part X reveal, most rail-trails are created outside of the railbanking program. Why is this? In a 2009 report to the STB, the RTC gave a number of reasons for the limitations of railbanking.[317] First, the time frame in which a prospective trail acquirer must file an interim trail use statement is quite narrow. For regular abandonment proceedings, the statement must be filed within 45 days after the railroad files its abandonment application; for exempt abandonment proceedings, a petition must be filed either 10 or 20 days (depending on the type of exemption) after the notice of exemption is published in the Federal Register.[318] The RTC claims that this is often an insufficient amount of time to allow public agencies to get the approvals needed in order to initiate railbanking negotiations.[319] Second, the 180-day period in which such negotiations must be concluded is often too short, and the $350 required for a time extension may deter some prospective acquirers.[320] Third, some railroads simply refuse to negotiate, in which case the STB will not railbank the corridor.[321] The RTC has expressed a desire for the STB to apply the Rails-to-Trails Act on a mandatory basis.[322] Because takings claims accrue at the time the ITU is issued, regardless of whether the corridor is actually transferred or a trail is constructed,[323] this could have a disastrous impact on the federal government's scope of liability. Fortunately, there is no indication that the STB is considering this proposal.

The tight time windows established by the STB, as well as the voluntary nature of the Rails-to-Trails Act, may well curb the number of corridors being railbanked. Ironically, the STB's own regulations are hampering the impact of the Rails-to-Trails Act. This limits the number of railbanked corridors, which in turn limits the federal government's takings liability. While more finely tailored reforms would be ideal, it is important to note that under a different set of regulations, the Judgment Fund could be hemorrhaging money at an even more rapid rate.

316. *See supra* Part IV.
317. S.T.B. Hearing, *supra* note 153, at 18-22.
318. 49 C.F.R. § 1152.29 (2012).
319. S.T.B. Hearing, *supra* note 153, at 21.
320. *Id.* at 22.
321. *Id.* at 19-20.
322. *Id.* at 22.
323. *See supra* text accompanying notes 143-48.

XII. Conclusion

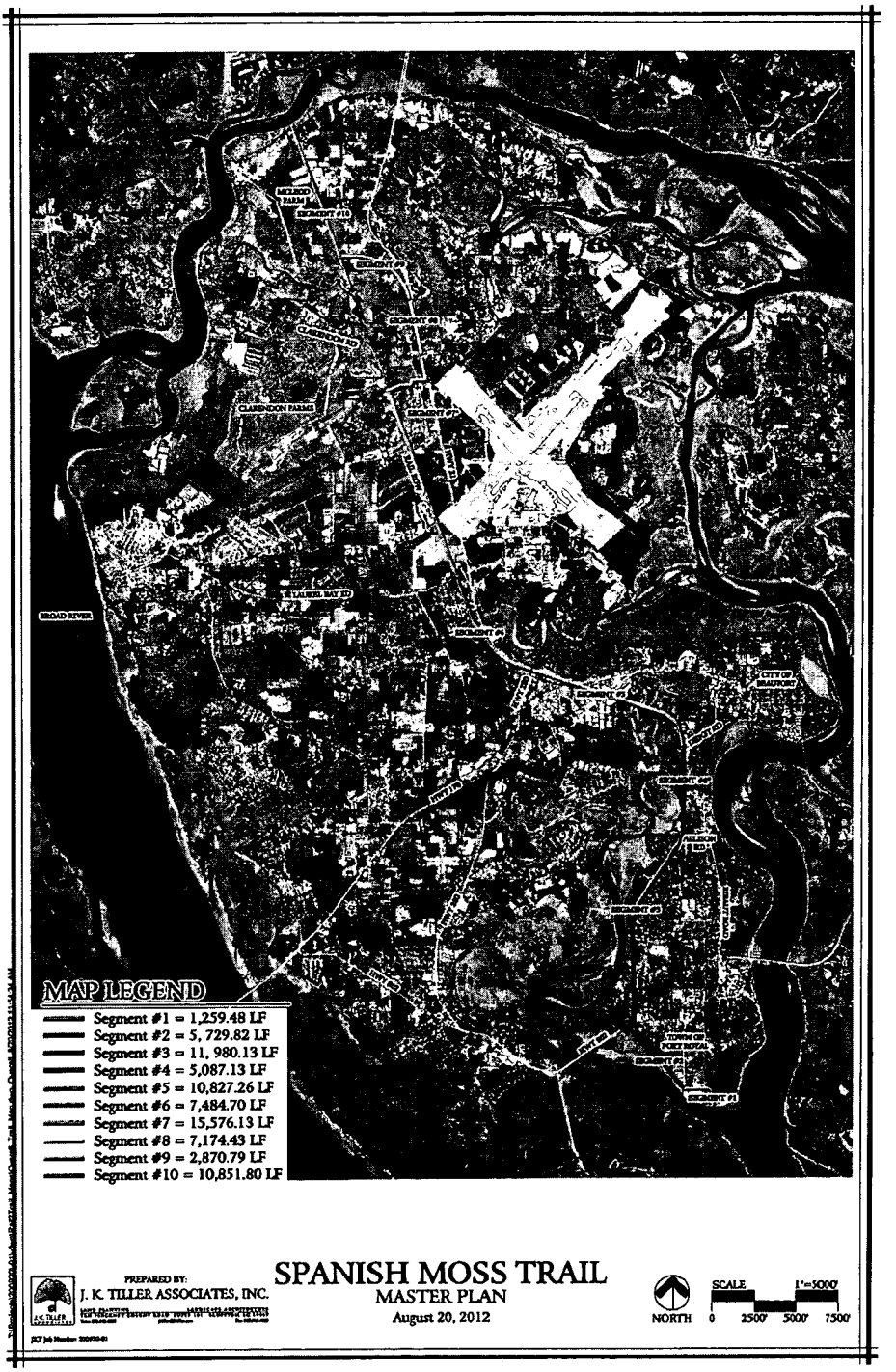
Rail-trails are an important component of America's recreational infrastructure. Unfortunately, the railbanking process, by which some rail-trails are converted, is plagued by inefficiencies. The DOJ's "scorched-earth litigation strategy"[324] generates inordinate costs in the form of interest and attorney fees. The agency's adoption of a more settlement-friendly approach would likely expedite claims, thereby reducing interest and attorney fees. On the flip side, a more settlement-friendly strategy may invite the filing of more suits. It is difficult to normatively critique the DOJ's current strategy if its goal is to limit the amount of money paid by the federal government.

A more glaring and fundamental problem with the current railbanking process is that the federal government has no ability to block a cost-unjustified ITU, the issuance of which makes a takings claim viable. The party acquiring the trail can piggyback off the federal government and has no incentive to consider the magnitude of such claims when deciding whether to seek a trail use agreement.

The most obvious step in addressing this problem is for Congress to grant the STB discretion to decline to issue an ITU. The STB could use such discretion to block rail-trail conversions over valuable property, that is, conversions that are likely to generate inordinately high takings payments. Another possible solution is to require the acquiring party to assume responsibility for subsequent takings payments prior to the STB's issuance of an ITU. This would force the acquiring party to internalize landowner compensation costs, thus resulting in a more wholesome cost-benefit analysis by the acquiring party. By changing the current process, Congress could ensure that the rail-trail program stays on track without generating unintended inefficiencies.

324. Hearne et al., *supra* note 17, at 170.

FIGURE 1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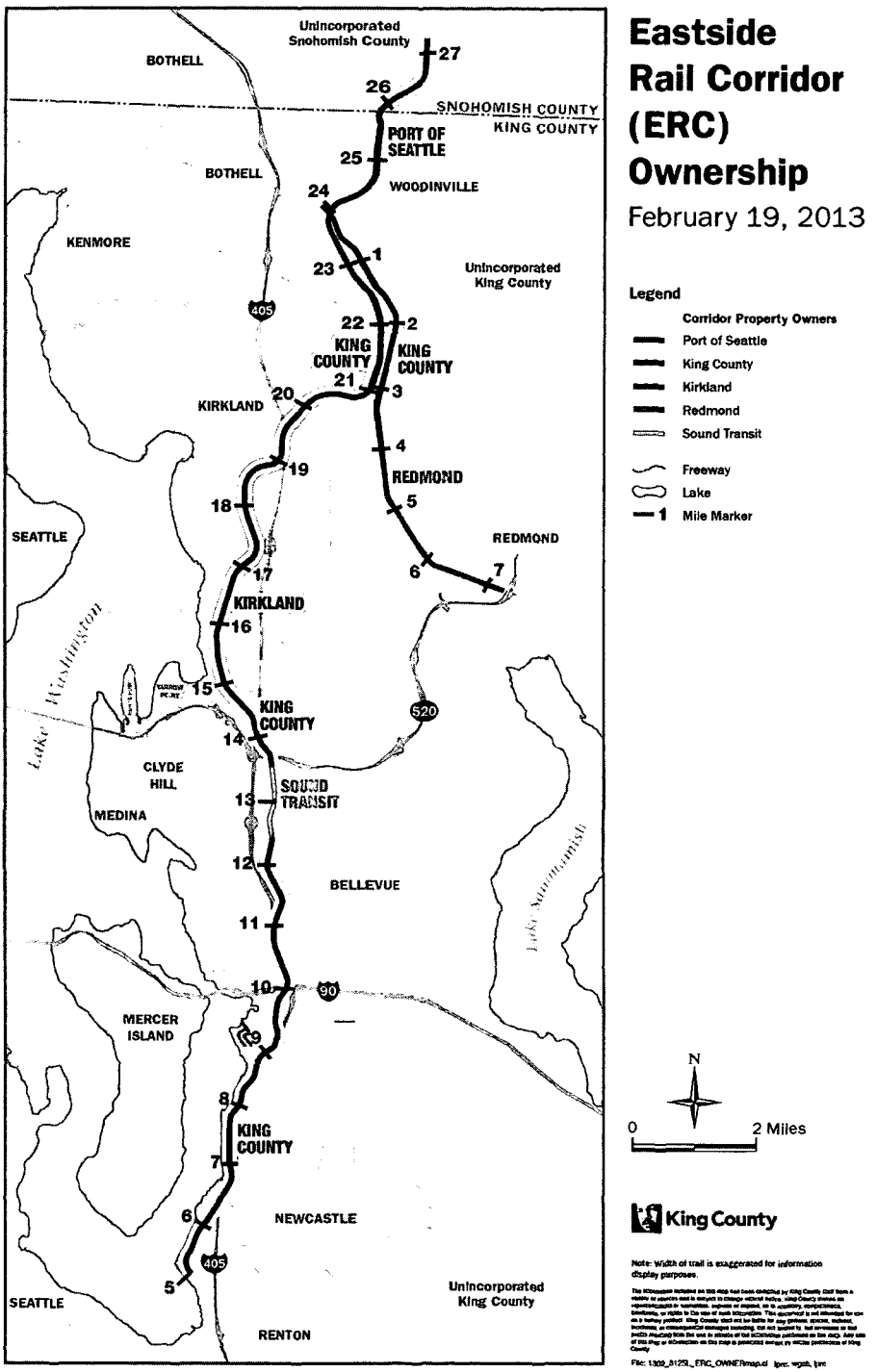
Segment #2 = 5, 729.82 LF
Segment #3 = 11, 980.13 LF
Segment #4 = 5,087.13 LF
Segment #5 = 10,827.26 LF
Segment #6 = 7,484.70 LF
Segment #7 = 15,576.13 LF
Segment #8 = 7,174.43 LF
Segment #9 = 2,870.79 LF
Segment #10 = 10,851.80 LF
PREPARED BY:
J. K. TILLER ASSOCIATES, INC.
SPANISH MOSS TRAIL
MASTER PLAN
August 20, 2012
NORTH
SCALE
1"=5000'
0
2500'
5000'
7500'

FIGURE 2


Eastside Rail Corridor (ERC) Ownership
February 19, 2013
Legend
Corridor Property Owners
Port of Seattle
King County
Kirkland
Redmond
Sound Transit
Freeway
Lake
1 Mile Marker
Unincorporated Snohomish County
BOTHELL
SNOHOMISH COUNTY
KING COUNTY
PORT OF SEATTLE
WOODINVILLE
KENMORE
Unincorporated King County
KING COUNTY
KIRKLAND
REDMOND
SEATTLE
CLYDE HILL
MEDINA
SOUND TRANSIT
BELLEVUE
MERCER ISLAND
NEWCASTLE
RENTON
Lake Washington
Lake Sammamish
520
90
405
N
0
2 Miles
King County