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Thomas A. Jones

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Jones: Converting America's Abandoned Railroads into Nature Trails

RAILS TO TRAILS: CONVERTING AMERICA'S ABANDONED RAILROADS INTO NATURE TRAILS

INTRODUCTION

As America becomes more populated, people escape urban pressures through bicycling, horseback riding and hiking. To this end, several old railroad beds have been converted to trails. In 1987, over ten million Americans used over 2,400 miles of such trails in thirty-one states.¹

In 1920, the nation's railway system reached its peak of 272,000 miles; however, the system has been losing track since that time.² Approximately 141,000 miles are now in use, but it is predicted that another 3,000 miles will be abandoned every year through the end of this century.³ Many would like to see the abandoned railway lines converted to trails suitable for bicycling, horseback riding and hiking. The Rails-to-Trails Conservancy seeks to stop the piecemeal sale of old railbeds that cover tens of thousands of miles in every state, and to develop the land for trails.⁴

Opponents consist primarily of farmers and other adjacent landowners.⁵ They claim that the nation's railroads obtained easements for their lines and that the right of passage was granted *only* for the limited purpose of running their trains.⁶ They also claim that when the railroad line is abandoned, the easement disappears and the land reverts to the adjacent landowners.⁷

In *Pollnow v. State Dep't of Natural Resources*,⁸ the State of Wisconsin Department of Natural Resources bought a railroad right-of-way from a railroad company to provide a recreational trail.⁹ Pollnow bought the land adjacent to the right-of-way subject to an easement for the railroad right-of way.¹⁰ The court held that the railroad could not convey the easement to the state for use as a recreational trail after the railroad had abandoned the line.¹¹ The court noted: "We make no

¹ The Christian Science Monitor, Aug. 16, 1988, at 17. President Bush recognized the need for peace and quiet when he stated that: "I want to increase the recreational opportunities provided by the great American outdoors. And in that task, I will pay special attention to the condition and management of our parks. I will look for ways to link our cities with greenways along abandoned railroad tracks and refresh them with urban parks." TRAILBLAZER, Dec. 1988 at 1, col. 1.

² Crain's Chicago Business, June 20, 1988, at 27.

³ *Id.*

⁴ Los Angeles Times, July 21, 1986, § 1, at 3, col. 2. The Rails-to-Trails Conservancy is a Washington-based national group. The Christian Science Monitor, Aug. 16, 1988, at 17.

⁵ N.Y. Times, Aug. 18, 1987 at A14, col. 1.

⁶ *Id.* at col. 3.

⁷ *Id.*

⁸ 88 Wis. 2d 350, 276 N.W.2d 738 (1979).

⁹ *Id.* at 353, 276 N.W.2d at 740.

¹⁰ *Id.* at 354, 276 N.W. 2d at 740.

¹¹ *Id.* at 367, 276 N.W. 2d at 746.

holding as to the power of the Congress or the state legislature to preserve the rights of the public in existing rail corridors for multiple public uses, including transportation, conservation or recreation.”¹²

Overview of the Trails Act

Congress enacted the Trails Act in 1968 to establish a nationwide system of nature trails.¹³ Originally, the Trails Act did not include a provision for converting abandoned railroad rights-of-way to trails.¹⁴ Consequently, if a railroad right-of-way was abandoned for railroad purposes, then there may have been no land in the area available for trail use.¹⁵ In 1983, Congress enacted the Trails Act Amendments, codified at 16 U.S.C. § 1247(d).¹⁶ In *Illinois Commerce Comm'n v. I.C.C.*,¹⁷ the court explained that § 1247(d) is regarded as a “railbanking” statute because it allows established rights-of-way to be later reactivated as working railroads.¹⁸ In an analysis of § 1247(d), the Interstate Commerce Commission (Commission) concluded that § 1247(d) would improve the quality of the human environment and would utilize alternative energy resources by creating regular trails and preserving railroad corridors along railroad rights-of-way.¹⁹

In *Illinois Commerce Comm'n*, the court held that the first sentence of § 1247(d) instructs the Commission to encourage states and private interest groups to

¹² *Id.*

¹³ *National Wildlife Fed'n v. I.C.C.*, 850 F.2d 694, 697 (D.C. Cir. 1988).

¹⁴ *Id.* at 697.

¹⁵ *Rail Abandonments - Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591 (1986) (hereinafter *Rail Abandonments*).

¹⁶ 16 U.S.C. § 1247(d) (1986 & Supp. IV) in pertinent part states:

The Secretary of Transportation, the Chairman of the Interstate Commerce Commission, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976, shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with [the National Trails System Act 16 USCS §§ 1241 et seq.], if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Commission shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this [Act 16 USCS §§ 1241 et seq.], and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

¹⁷ 848 F.2d 1246 (D.C. Cir. 1988), *cert. denied*, 1989 LEXIS 155, 109 S. Ct. 783 (1989).

¹⁸ *Id.* at 1261.

¹⁹ *Rail Abandonments*, 2 I.C.C.2d at 612.

establish recreational trails along abandoned rail lines.²⁰ The court explained that the second sentence provides that if a line is preserved in such a manner, then the line shall not be treated as abandoned.²¹ Consequently, the right-of-way does not revert to the owner when railroad use ceases.²² In *Nat'l Wildlife Fed'n v. I.C.C.*,²³ the court held that the third sentence requires the Commission to give a certificate for interim trail use (CITU) once a railroad and a qualified trail operator have reached an agreement for such use.²⁴

Some argue that the statute violates the contract clause²⁵ because it impairs the contract between the original grantor of the easement and the railroad. In addition, the statute allegedly offends the fifth amendment²⁷ because private land is taken for

²⁰ 848 F.2d at 1261 (citation omitted).

²¹ *Id.* (citation omitted). The court explained that rights-of-way obtained through easements would otherwise revert to their owners when railroad use ceased. *Id.*

²² *Id.*

²³ 850 F.2d 694 (D.C. Cir. 1988). The decision also set forth property law terms that may be helpful at this juncture. The court stated that:

Some of these rights-of-way consist of fee simple interests that may be transferred or used by the railroad for non-railroad purposes once the Commission authorized abandonment of rail service; these rights-of-way are not affected by the takings clause aspect of this case. Other rights-of-way are specifically limited to railroad use and may revert to the original owner (or a successor interest) if railroad use is discontinued. While these more limited interests, which do implicate the takings clause, take a variety of forms, the two most common types are the fee simple determinable and the easement. If the right-of-way is a fee simple determinable, title to the underlying land vests in the railroad and the grantor (or successor) retains only a reversionary interest (known as a "possibility of reverter"). (citation omitted) If the right-of-way is an easement, the owner of the servient tenement retains title to the underlying land and may be entitled to use the right-of-way in any manner that does not interfere with the railroad's use. (Citation omitted).

Id. at 703.

²⁴ *Id.* at 700. In *Glosemeyer v. Missouri-Kansas-Texas R.R. Co.*, 685 F. Supp. 1108 (E.D. Mo. 1988), the court described what the Commission requires regarding an abandonment as follows:

[W]hen the ICC finds that a railroad right-of-way is appropriate for abandonment under 49 U.S.C. § 10903 and when a qualified public or private entity offers to maintain the right-of-way for interim trail use, the ICC issues a CITU. The CITU permits the railroad to discontinue rail service, cancel tariffs and salvage track and other equipment. . . . It further provides the railroad and the prospective interim trail user 180 days to negotiate an interim trail use agreement. . . . If no agreement is reached, "then the CITU will convert into an effective certificate of abandonment, permitting the railroad to abandon the line immediately. . . . "If, however, an agreement is reached, the ICC will permit interim trail use and hold in abeyance its authorization to abandon the right-of-way. . . . Should the trail user thereafter seek to terminate its use of the right-of-way, it must file a "petition to reopen the abandonment proceeding" so that the ICC may issue a certificate of abandonment to the railroad and to the trail user.

Id. at 1116-17 (citing *Rail Abandonments*, 2 I.C.C.2d at 608).

²⁵ U.S. CONST. art. I, § 10, cl. 1. The contract clause specifies that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." *Id.*

²⁶ See *Glosemeyer v. Missouri-Kansas-Texas R.R. Co.*, 685 F. Supp. 1108 (E.D. Mo. 1988).

²⁷ U.S. Const. amend. V. The pertinent part of the fifth amendment states that "nor shall private property be taken for public use, without just compensation." *Id.*

public use without compensation.²⁸ Finally, the statute allegedly violates the commerce clause because it prevents reversion of the property to its owner though the railway has been abandoned and is no longer being used for interstate commerce.²⁹ Recent court decisions pertaining to these issues have upheld the statute, as are discussed below.³⁰

ANALYSIS

Impairment of Contract Obligations and the Due Process Clause

Contract rights are very closely related to "allocative efficiency and the growth of commerce."³¹ Therefore, contract rights require special protection.³² The lack of debate at the Constitutional Convention (regarding the contract clause) may indicate that the Framers viewed the contract clause as a fundamental provision of the Constitution.³³

In *Glosemeyer v. Missouri-Kansas-Texas R.R. Co.*,³⁴ the Missouri-Kansas-Texas Railroad Company (M-K-T) filed an application with the Commission to abandon approximately 200 miles of a railroad right-of-way.³⁵ The Missouri Department of Natural Resources (DNR) filed a protest to M-K-T's application with the Commission in which DNR invoked § 1247(d), and requested that the Commission issue a CITU to DNR according to § 1247(d).³⁶ The plaintiffs-landowners claimed that their right-of-way agreements with M-K-T's predecessors in interest created contractual rights in the plaintiffs.³⁷ The plaintiffs argued that M-K-T's decision to abandon its line would have caused their reversionary interests³⁸ in the right-of-way to vest under state law if § 1247(d) had not been invoked.³⁹ In sum, the plaintiffs claimed that § 1247(d) prevented them from exercising their right to fee simple ownership over the rights-of-way.⁴⁰ The court held that plaintiffs had no valid claim under Article I, Section 10⁴¹ because § 1247(d) is a federal statute, and the

²⁸ See *Preseault v. I.C.C.*, 853 F. 2d 145 (2nd Cir. 1988).

²⁹ U.S. CONST. art. I, § 8, cl. 2. The purpose of the commerce clause is "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

³⁰ See, *Glosemeyer and Preseault*.

³¹ Clarke, *The Contract Clause: A Basis for Limited Judicial Review Of State Economic Regulation*, 39 U. MIAMI L. REV. 183, 186 (1985).

³² *Id.* at 186.

³³ *Id.* at 189.

³⁴ 685 F. Supp. 1108 (E.D. Mo. 1988).

³⁵ *Id.* at 1110-11.

³⁶ *Id.* at 1111.

³⁷ *Id.* at 1118.

³⁸ A reversionary interest is defined as follows: "The interest which a person has in the reversion of lands or other property. A right to the future enjoyment of property, at present in the possession or occupation of another. The property that reverts to the grantor after the expiration of an intervening income interest." BLACK'S LAW DICTIONARY 1186 (5th ed. 1979).

³⁹ *Glosemeyer*, 685 F. Supp. at 1111.

⁴⁰ *Id.* at 1118.

⁴¹ *Id.*
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contract clause only applies to state legislation.⁴²

However, the court found that a fifth amendment due process clause analysis would be appropriate if § 1247(d) unconstitutionally impaired a private contractual right.⁴³ The court explained that the plaintiffs must prove two established requirements.⁴⁴ First, they must prove that § 1247(d) substantially impaired their contractual rights or obligations.⁴⁵ The plaintiffs must then overcome a presumption of constitutionality and demonstrate that the legislature acted in an “arbitrary and irrational way.”⁴⁶ The court held that the plaintiffs could not meet this test because Congress acted rationally when it elected to delay railroad abandonments and to encourage interim trail use in an effort to further its “railbanking” purpose.⁴⁷

Taking Clause of the Fifth and Fourteenth Amendments

In *Glosemeyer*, the plaintiffs produced a deed that was executed by the predecessors in interest of M-K-T and of one plaintiff.⁴⁸ The plaintiffs claimed that the deed indicated that the right-of-way was conveyed “for the purpose of a [R]ailroad and for no other purpose,” and that the railroad only is to “have and hold” the right-of-way “for the purpose of establishing, constructing and maintaining a [R]ailroad on the said lands . . . conveyed . . .”⁴⁹ Therefore, the plaintiffs argued that § 1247(d) represented a temporary regulatory taking of their property⁵⁰ because it postponed the vesting of their reversionary interests in the disputed right-of-way but did not provide them with an adequate remedy at law.⁵¹

The *Glosemeyer* court held that the pertinent part of the fifth amendment provides that “. . . private property [shall not] be taken for public use, without just compensation.”⁵² The court explained that the Supreme Court has interpreted the amendment as placing a *condition* on the taking of private property rather than *prohibiting* such a taking.⁵³ In addition, its purpose is “to secure compensation” if such interference occurs.⁵⁴ The fifth amendment requires only that a “reasonable,

⁴² *Id.* (citations omitted).

⁴³ *Id.*

⁴⁴ *Id.* (citing *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 472 (1985)).

⁴⁵ *Id.*

⁴⁶ *Id.* at 1118-19.

⁴⁷ *Id.* at 1119.

⁴⁸ *Id.* at 1111.

⁴⁹ *Id.*

⁵⁰ In *Kansas City Southern Ry. Co. v. Arkansas-Louisiana Gas Co.*, 476 F. 2d 829,833 (10th Cir. 1973), the court held that a railroad right-of-way constituted property under the fifth amendment. *Id.* at 833 (citing *Territory of New Mexico v. United States Trust Co.*, 172 U.S. 171, 183 (1898)).

⁵¹ *Glosemeyer*, 685 F. Supp. at 1119.

⁵² 685 F. Supp. at 1119. In *National Wildlife Fed'n*, the court explained that the participation of private organizations did not alter the public purpose of the interim nature trails because “it is only the taking’s purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.” 850 F.2d at 703 (note 12) (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 244 (1987)).

⁵³ *Id.* (citing *First English Evangelical Lutheran Church v. Los Angeles City*, 107 S.Ct. 2378, 2385, (1987)).

⁵⁴ *Id.*

certain and adequate provision for obtaining compensation” exist when the taking occurs.⁵⁵

Compensation is usually sought in the United States Claims Court under the Tucker Act⁵⁶ when property owners allege that the United States has taken their property.⁵⁷ The *Glosemeyer* plaintiffs argued that Congress had withdrawn the Tucker Act remedy by not including a provision for compensation in § 1247(d).⁵⁸ The court noted that if § 1247(d) and the Tucker Act are “capable” of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.⁵⁹ The court held that the omission was not a factor because Congress had “impliedly promised” to pay just compensation through the Tucker Act if the actions of the government constituted a taking.⁶⁰ In sum, the court held that the failure of Congress to address the compensation issue could not be construed to represent an unambiguous intention on the part of Congress to withdraw the Tucker Act remedy.⁶¹ Thus, the court dismissed the plaintiffs’ taking claims as premature because the plaintiffs had failed to avail themselves of the Tucker Act remedy.⁶²

In *Preseault v. I.C.C.*,⁶³ the state of Vermont leased a right-of-way to Vermont Railway, Inc.⁶⁴ The State of Vermont and Vermont Railway, Inc. filed a notice with the Commission which indicated Vermont’s intention to enter into an interim trail use agreement with the City of Burlington pursuant to § 1247(d).⁶⁵ The Commission approved the agreement between the State of Vermont and the City of Burlington for interim trail use per § 1247(d).⁶⁶ Property owners of land adjacent to railroad rights-of-way claimed that § 1247(d) was unconstitutional because it constituted a taking without just compensation.⁶⁷ The owners claimed that the Commission had taken away their reversionary right to the property.⁶⁸

Unlike the *Glosemeyer* court, the *Preseault* court, took a different approach to

⁵⁵ *Id.* at 1119-20 (quoting Regional Rail Reorganization Act Cases, 419 U.S. 102, 124-25 (1974) (citations omitted)).

⁵⁶ 28 U.S.C. § 1491. The pertinent part of the Tucker Act provides that:

The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Glosemeyer, 685 F. Supp. at 1120 n. 11.

⁵⁷ *Id.* at 1120 (citing *Rucklehaus v. Monsanto Co.*, 467 U.S. at 1016) (citations omitted).

⁵⁸ *Id.* The Court rejected another argument regarding the right-of-way being part of a historic trail. *Id.* at 1121.

⁵⁹ *Id.* at 1120-21 (quoting Regional Rail Reorganization Act Cases, 419 U.S. at 133-34) (citations omitted)).

⁶⁰ *Id.* at 1121.

⁶¹ *Id.*

⁶² *Id.* (citation omitted).

⁶³ 853 F. 2d 145 (2nd Cir. 1988).

⁶⁴ *Id.* at 147.

⁶⁵ *Id.* at 147-148.

⁶⁶ *Id.* at 148.

⁶⁷ *Id.* at 150.

⁶⁸ *Id.*

the owner's taking of property claim. The *Preseault* court explained that railway carrier, who own railroad rights-of-way in fee simple, are not prevented from transferring the property or using it for a non-railroad purpose.⁶⁹ However, such carriers may discontinue service over the route only with the Commission's authorization.⁷⁰ On the other hand, if rights-of-way are specifically limited to railroad use, then encumbered title reverts to the original owner when the railroad use is abandoned.⁷¹ The court then explained that state law would normally determine the property owner's retained interest when the owner's land is subject to a railroad right-of-way.⁷² The court also explained that state law would determine what circumstances may cause a reversion.⁷³ However, when state property law concerns railroad rights-of-way, state property law is subject to the Commission's plenary authority to regulate railroad abandonments.⁷⁴

The court held that railway property is subject to the Commission's jurisdiction until the Commission issues a certificate of abandonment, and that state law may not cause a reverter of the property.⁷⁵ The court then rejected the argument that the statute constituted a taking because the Commission has plenary and exclusive authority to decide whether it is proper to permit a railway carrier to abandon a route in view of all of the circumstances.⁷⁶ No reversionary interest would vest unless the Commission determined that abandonment was appropriate.⁷⁷ Thus, § 1247(d) did not postpone the landowners' reversionary interest anymore than the Commission's continuing jurisdiction would if abandonment was improper.⁷⁸ Because Congress recently delegated to the Commission the responsibility for preserving railway corridors for future railway use, the court held that the Commission retained jurisdiction over railroad rights-of-way when the land would serve a "railroad purpose."⁷⁹ The court then explained that it did not matter whether the railroad use was immediate or in the future.⁸⁰ The court believed that Congress's creative effort in preserving existing railway corridors for the nation's future railroad needs would be stifled if the court had to distinguish between immediate or future railroad use.⁸¹

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 150-51. In *National Wildlife Fed'n*, the court held that reversion generally depends upon abandonment by the railroad and "in order to establish that a railroad has abandoned its right-of-way easement, it is necessary to prove actual relinquishment and the intention to abandon the use of the premises." 850 F.2d at 703 (quoting *Schnabel v. County of DuPage*, 101 Ill. App. 3d 553, 558, 428 N.E.2d 671, 676 (1981)).

⁷² *Id.* (citations omitted).

⁷³ *Id.* (citing *National Wildlife Fed'n v. I.C.C.*, 850 F.2d at 701).

⁷⁴ *Id.* (citing *Chicago & Northwestern Transp. Co. v. Kalo Brick & Title Co.*, 450 U.S. 311, 320 (1981)).

⁷⁵ *Id.*

⁷⁶ *Id.* at 151.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* See the following section entitled "Commerce Clause Claims" which reviews the court's reasoning that preserving railway corridors is a permissible congressional goal under the commerce clause.

⁸⁰ *Id.*

⁸¹ *Id.*

However, in *National Wildlife Fed'n*, the District of Columbia Circuit Court of Appeals analyzed whether owners are entitled to compensation when the preemptive effect of § 1247(d) upon state laws has defeated the property interests of the reversionary owners.⁸² The court first explained that the Commission's interpretation of § 1247(d) must include considering how the property rights of reversionary owners have been effected.⁸³ One factor is the character of the government's action.⁸⁴ The court cited a Supreme Court case, *Loretto v. Teleprompter Manhattan CATV Corporation*.⁸⁵ In *Loretto*, a New York statute required owners of rental housing units to allow cable T.V. equipment to be installed on their property.⁸⁶ The Supreme Court held that a taking had occurred.⁸⁷ The Court found that government action which causes a permanent physical occupation of real property constitutes a taking "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."⁸⁸ The *National Wildlife Fed'n* court cautioned that the effect of trail use on the reversionary owner's property rights would also depend on what those rights are according to state law.⁸⁹

The court distinguished cases where trail use did not extinguish a railroad easement, from cases where a change in use from rails to trails constituted an abandonment.⁹⁰ For example, in *Lawson v. State of Washington*,⁹¹ the court held that a change in use from rails to trails constituted an abandonment where the easement was limited to railroad purposes only.⁹² The *Lawson* court held that a state statute similar to § 1247(d) was unconstitutional because it authorized acquisition of existing reversionary interests without payment of just compensation.⁹³

⁸² 850 F.2d at 705. The court noted that § 1247(d) preempts contrary state property laws due to Article VI of the Constitution. *Id.* The pertinent part of Article VI provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the Supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

⁸³ *Id.* The court had previously rejected another argument of the Commission. *Id.*

⁸⁴ *Id.* at 706. The Commission should also consider "the economic impact of the regulations" and "its interference with reasonable investment backed expectations." *Id.*

⁸⁵ 458 U.S. 419 (1982). A recent commentary claimed that the *Loretto* Court arrived at a wrong decision because the minor taking did not offend the flexible principles of fourteenth amendment due process. Strong, *On Placing Property Due Process Center Stage in Takings Jurisprudence*, 49 OHIO ST. L.J. 591, 602 (1988). The commentary argued that the strict rule of the taking clause was inappropriately applied to the facts of the case. *Id.* at 602-03.

⁸⁶ 458 U.S. at 423.

⁸⁷ *Id.* at 441.

⁸⁸ *Id.* at 434-35. The Supreme Court has also held that a permanent physical occupation occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3145 (1987).

⁸⁹ 850 F.2d at 706.

⁹⁰ *Id.* (citations omitted).

⁹¹ 107 Wash. 2d 444, 730 P.2d 1308 (1986).

⁹² *Id.* at 451, 730 P.2d at 1312 (citation omitted). Under Washington common law, such rights-of-way automatically revert to the reversionary interest holders when the railroad abandons the rights-of-way. *Id.* at 452, 730 P.2d at 1313.

⁹³ *Id.* at 453, 730 P.2d at 1313.

In *National Wildlife Fed'n* the Commission attempted to distinguish § 1247(d) from the statute in *Lawson* which did not provide for any resumption of rail service at a later date.⁹⁴ The court observed that the Commission does not require that resumption of rail service along a particular right-of-way be likely or even possible, before authorizing conversion to trail use.⁹⁵ Therefore, the court held that the rights of landowners who have an interest in railroad property may not be "frustrated indefinitely in order to preserve the possibility, however slight, that rail service may be resumed in the future."⁹⁶

The court disagreed with the Commission's rules that the application of § 1247(d) may never constitute a taking of the reversionary interest of property owners where their land is subject to a railroad right-of-way.⁹⁷ The court held that a taking of private property may occur where the right-of-way was strictly limited to railroad use and where restoration of future rail service was not foreseeable.⁹⁸ The court then remanded the case to determine whether a taking of private property had occurred.⁹⁹ In addition, the court instructed the Commission to determine whether some mechanism for compensation should be facilitated.¹⁰⁰

The *National Wildlife Fed'n* decision appears to be consistent with *Glosemeyer* and *Preseault* in that rail conversion generally does not constitute a taking of private property. The *Nat'l Wildlife Fed'n* decision simply held that if there is a taking of personal property, then the Commission should determine whether to modify its rules, and whether it should devise special procedures to process a property owner's claim for compensation.¹⁰¹

The *Glosemeyer* court also found no taking of the plaintiff's property without just compensation under the fourteenth amendment.¹⁰² The court explained that the

⁹⁴ 850 F.2d at 707.

⁹⁵ *Id.*

⁹⁶ *Id.* at 708. The court compared interim trail use to temporary impositions that fell on the regulation side of the narrow line that separates reasonable regulations from compensable takings. *Id.*

⁹⁷ *Id.* The Commission's rules in regard to § 1247(d) were the following:

- (a) Section 1247(d) does not give the [ICC] the power to condemn railroad rights-of-way for interim trail use and rail banking;
- (b) Railroads and prospective interim trail users may voluntarily enter into agreements to use rights-of-way;
- (c) Interim trail use under section 1247(d) is subject to reactivation of rail service by the owner of the right-of-way and subject to the interim user continuing to take full responsibility for liability in connection with trail use, and for managing and paying taxes on the rights-of-way; and
- (d) Section 1247(d) preempts state laws that would otherwise result in extinguishment of easements for railroad purposes and reversion of rights-of-way to abutting landowners.

Glosemeyer, 685 F. Supp. at 1116 (citing *Rail Abandonments*, 2 I.C.C.2d at 597).

⁹⁸ *Id.* at 708.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

plaintiffs failed to show how a state, acting under a lawful federal statute, may have taken property without just compensation.¹⁰³ The court also explained that the plaintiffs failed to seek compensation through appropriate state procedures.¹⁰⁴

Commerce Clause Claims

In *Preseault*, property owners argued that § 1247(d) was an invalid exercise of the commerce clause power.¹⁰⁵ The court held that there must be a rational basis for a congressional determination that the regulated activity affected interstate commerce.¹⁰⁶ The court found that Congress enacted the statute to preserve rail corridors for later railroad use and permit public recreational use of trails.¹⁰⁷ The court viewed these uses as legitimate congressional goals under the commerce clause.¹⁰⁸ The court also explained that § 1247(d) could not be successfully challenged if “the means chosen by [congress are] reasonably adapted to the end permitted by the Constitution.”¹⁰⁹ The court held that § 1247(d) was reasonably adapted to the described purposes because the section preserves rights-of-way for future rail use when the railroad might otherwise abandon a line.¹¹⁰ The court held that § 1247(d) was also reasonably adapted to the described purposes because, in the interim, § 1247(d) protects the railroad from liability and requires the trail user to maintain the right-of-way.¹¹¹

In *Glosemeyer*, the court reviewed prior congressional legislation to determine whether Congress validly exercised its commerce clause power.¹¹² The court held that Congress had rationally decided to postpone railroad abandonments by encouraging interim trail use in order to further its “railbanking” purpose.¹¹³ Prior congressional legislation included 48 U.S.C. § 10903 in which a railroad is permitted to cease operations or abandon a railway only if the railroad has obtained the approval of the Commission.¹¹⁴ In addition, 49 U.S.C. § 10905 provides guidelines to provide persons a chance to purchase or subsidize a line for continued operation to prevent a discontinuance or an abandonment.¹¹⁵ The court noted that Congress had previously enacted 49 U.S.C. § 10906 to encourage adaptation of abandoned railroad lines for public uses.¹¹⁶ The court explained that Congress had enacted the Railroad

¹⁰³ *Id.*

¹⁰⁴ *Id.* (citing *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 190 (1985) (citation omitted)). The court also rejected the plaintiffs’ remaining state law claims. *Id.* at 1122.

¹⁰⁵ 853 F.2d at 149.

¹⁰⁶ *Id.* (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964) (citation omitted)).

¹⁰⁷ *Id.* at 150.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 149 (quoting *Heart of Atlanta Motel, Inc.*, 379 U.S. at 262 (citation omitted)).

¹¹⁰ *Id.* at 150.

¹¹¹ *Id.*

¹¹² 685 F. Supp. at 1113.

¹¹³ *Id.* at 1117-18.

¹¹⁴ *Id.* at 1113.

¹¹⁵ *Id.* at 1114.

Revitalization and Regulatory Reform Act of 1976¹¹⁷ because of its concerns over railroad abandonments and the effect on the interstate rail network.¹¹⁸ Consequently, the court held that § 1247(d) was designed to assist prior congressional efforts regarding railway abandonment and its effect on the interstate rail network.¹¹⁹

Congress realized that such efforts did not establish a "process through which railroad rights-of-way which are not immediately necessary for active service can be utilized for trail purposes."¹²⁰ Because state law usually requires abandoned rights-of-way to revert to the owners of the fee simple underlying the railroad right-of-way, the railroad is prevented from conveying the right-of-way for a non-railroad purpose.¹²¹ Through § 1247(d), Congress avoided this problem because "[t]he key finding of [1247(d)] is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes."¹²² Thus, the Glosemeyer court held that Congress had acted rationally when it enacted § 1247(d).¹²³

In *Lawson*, Justice Utter, the sole dissenter, provided additional reasoning regarding why a change in use from rails to trails does not constitute an abandonment. He explained that parties to a private easement are presumed to have considered "a normal development under conditions which may be different from those existing at the time of the grant."¹²⁴ Justice Utter believed that the majority confused a change in the *kind* of transportation with a change in the *purpose* for the transportation.¹²⁵ He pointed out that some citizens would use the trails to commute to work just as the railroad had been used for business and social purposes.¹²⁶ Consequently, the nation's severely pressed transportation system would be relieved of some pressure.¹²⁷ Justice Utter also observed that although the mix of human purposes had changed, the purposes themselves have not changed.¹²⁸ Therefore, this change was insufficient to justify declaring the easement abandoned, with a resultant windfall to the adjacent landowners.¹²⁹ Justice Utter also compared the disputed rights-of-way to easements in gross.¹³⁰ An easement is in gross when the benefit from the use of another's land extends, not to the holder's land, but to the easement

¹¹⁷ Pub. L. No. 94-210, 90 Stat. 31 (codified as amended at 45 U.S.C. §§ 801-855).

¹¹⁸ 685 F. Supp. at 1114.

¹¹⁹ *Id.* at 1117.

¹²⁰ *Id.* (quoting H.R. REP. NO. 98-28, 98th Cong., 1st Sess. 1, 8, reprinted in U.S. 1983 CODE CONG. & ADMIN. NEWS, at 112, 119).

¹²¹ *Id.* (citations omitted).

¹²² *Id.* (quoting H.R. REP. NO. 98-28, 98th Cong., 1st Sess. 1, 8, reprinted in 1983 U.S. CODE CONG. & ADMIN. NEWS, at 112, 119).

¹²³ *Id.* at 1117-18.

¹²⁴ 107 Wash. 2d at 465, 730 P.2d at 1319 (Utter, J., dissenting) (quoting *Logan v. Brodrick*, 29 Wash. App. 796, 800, 631 P.2d 429 (1981)).

¹²⁵ *Id.* at 466, 730 P.2d at 1320.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 467, 730 P.2d at 1320 (Utter, J., dissenting).

¹²⁹ *Id.*

¹³⁰ *Id.* at 467, 730 P.2d at 1320 (Utter, J., dissenting).

holder.¹³¹ Freely transferable easements in gross have played an important commercial and social role in America.¹³² Furthermore, Justice Utter believed that the disputed rights-of-way should also continue to play an important commercial and social role in connecting various parts of the surrounding community.¹³³

Mandatory v. Voluntary Transfer of Rights-of-Way

Although the *Glosemeyer* and *Preseault* decisions have held that § 1247(d) is constitutional, rail-to-trail advocates have suffered some setbacks. In *National Wildlife Fed'n* (NWF), the court upheld the Commission's interpretation that § 1247(d) does not require that a right-of-way be transferred for use as a trail when the railroad has declined to enter into a transfer agreement.¹³⁴ The Commission's proposed regulations originally required that the Commission order interim trail use after a state agency agreed to accept complete responsibility for a right-of-way.¹³⁵

The court first noted that the Commission's interpretation of § 1247(d) must be based on a permissible construction of the statute because Congress had not directly addressed the issue of whether a right-of-way must be transferred.¹³⁶ Because the third sentence of § 1247(d) states that the Commission "shall not permit abandonment or discontinuance inconsistent or disruptive of" interim trail use, NWF claimed that the Commission must provide for interim trail use despite the railroad's wishes.¹³⁷ Such an interpretation would have a damaging economic impact on the railroad industry. For example, industry analysts believe that as much as fifty percent of the income from some railroads presently comes from real estate investment and development.¹³⁸

The Commission responded that the phrase "such transfer or use" in § 1247(d) applies when the trail advocate has already acquired the right to interim use of the right-of-way "pursuant to donation, transfer, lease, sale or otherwise in a manner consistent with [the Trails Act]." ¹³⁹ Because these terms represent voluntary trans-

¹³¹ Note, *The Easement in Gross Revisited: Transferability and Divisibility Since 1945*, 39 VAND. L. REV. 109, 110 (1986) (citing 3 R. POWELL & P. ROHAN, *THE LAW OF REAL PROPERTY* § 405, at 34-22 (1984)).

¹³² *Id.* at 137.

¹³³ 107 Wash. 2d at 467, 730 P.2d at 1321 (Utter, J., dissenting).

¹³⁴ 850 F.2d at 701. The court noted that the "Act clearly requires the Commission to allow for trail use in case of voluntary agreement." *Id.* at 700.

¹³⁵ *Washington State Dept. of Game v. I.C.C.*, 829 F.2d 877, 878 (9th Cir. 1987) (citing 50 Fed. Reg. 7200 (Feb. 21, 1985)). The Commission later determined that it would order trail use if the railroad and potential trail user first negotiated an interim trail use agreement. *Id.* at 878.

¹³⁶ 850 F.2d at 699 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984)).

¹³⁷ *Id.* The third sentence also states that the government or private trail operator agrees to "assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use . . ." *Id.*

¹³⁸ N.Y. Times, March 12, 1988, § 1 at 7, col. 1. The article stated that federal figures reveal that much of the abandoned track has been developed by real estate subsidiaries of the railroads or has gone to rail holding companies. *Id.*

¹³⁹ *National Wildlife Fed'n*, 850 F.2d at 700.

actions, the Commission argued that § 1247(d) only requires the Commission issue a certificate for interim trail use when a voluntary agreement between a railroad and a qualified trail operator has been reached.¹⁴⁰ The court believed that the Act does not clearly command the Commission to force a railroad into a transfer.¹⁴¹ The court held that the noticeable absence in § 1247(d) of an explicit condemnation power also supports the Commission's interpretation of the statute because another section of the same statute expressly authorizes condemnation proceedings.¹⁴² Therefore, the court held that the Commission's interpretation was "entirely reasonable."¹⁴³ The court examined the brief legislative history of § 1247(d), but held that it could not conclusively resolve the question of whether § 1247(d) authorizes the Commission to order that a right-of-way be transferred when a railroad had declined to enter into a transfer agreement.¹⁴⁴

In *Washington State Dept. of Game v. I.C.C.*, the Department of Game claimed that the Commission must order interim trail use when a state agency has agreed to accept all managerial, financial and legal responsibility for interim trail use of the right-of-way.¹⁴⁵ The Commission granted the railroad's application for abandonment because the Department of Game and railroad failed to reach a voluntary agreement.¹⁴⁶ The court stated that one passage of the House Report supported the implication that the Commission *must* order the transfer in spite of the railroad's interest in the idea.¹⁴⁷ On the other hand, language in the House Report only described *encouraging* interim trail use development.¹⁴⁸ The court noted that the legislative history did not resolve the statute's ambiguity.¹⁴⁹ The court believed that a mandatory construction would achieve more trail use;¹⁵⁰ however, the court favored the voluntary construction because railroads would be encouraged to consider interim trail use when an agency has agreed to accept complete responsibility.¹⁵¹ Thus, the court held that the voluntary approach of the Commission was reasonable because it satisfied the general purposes of the Trails Act.¹⁵² The court

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* Section 1246(g) of the same act expressly authorizes condemnation proceedings without the owner's consent to acquire private lands under the appropriate circumstances.

¹⁴³ *Id.* at 700.

¹⁴⁴ *Id.* at 701. The court also rejected NWF's extrinsic arguments for setting aside the Commission's interpretation. *Id.* at 701-02.

¹⁴⁵ 829 F.2d at 878. The cost of converting railbeds to trails may range from \$12,000 to \$50,000 per mile; however, maintenance costs are minimal. The Christian Science Monitor, Aug. 16, 1988, at 18, col. 1.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 880. The passage cited states that the route will not be ordered abandoned if interim trail use is suitable, and that a qualified public or private organization must step forward and accept full responsibility. *Id.* (citing 1983 U.S. CODE CONG. & ADMIN. NEWS, 112, 119-20 (1983)).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* Section 1247(d) requires an interim trail user to take on complete financial and legal responsibility for the right-of-way. *Id.*

¹⁵² *Id.* at 881. The court also referred to the decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. at 866, where the Supreme Court held: "When a challenge to an agency construction of
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also rejected several minor arguments of the Department of Game.¹⁵³

Recently, in *Conn. Trust for Historic Preservation v. I.C.C.*,¹⁵⁴ the Commission decided to allow a railroad to abandon approximately 14 miles of branch rail line.¹⁵⁵ The Connecticut Trust for Historic Preservation petitioned for review of the Commission's decision.¹⁵⁶ The court denied the petition for review.¹⁵⁷ The court simply held that § 1247(d) clearly does not bestow upon the Commission such broad power to order trail use.¹⁵⁸

Ohio and the Conversion of Rails to Trails

Only one Ohio case has addressed the conversion of rails to trails. The state successfully acquired a railroad's right-of-way for use as a recreation trail as a matter of statutory right in *Rieger v. Penn Central Corp.*¹⁵⁹ In *Rieger*, a portion of the railway line ran through the plaintiffs' property.¹⁶⁰ The railroad had removed its ties and tracks and sold land in the vicinity to persons who did not plan to put the land to public use.¹⁶¹ Consequently, the plaintiffs claimed that the railroad demonstrated its intention to abandon the right-of-way.¹⁶² The court noted that Ohio case law indicated that proof of non-use is insufficient to prove that a right-of-way was abandoned.¹⁶³ The court held that the facts did not indicate that the railroad had intended to abandon the right-of-way.¹⁶⁴

The plaintiffs also contended that the railroad abandoned the right-of-way because the recreational trail would exceed the scope of the original easement.¹⁶⁵ For

a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail." *Id.* at 882.
¹⁵³ *Id.* at 881.

¹⁵⁴ 841 F.2d 479 (2nd Cir. 1988).

¹⁵⁵ *Id.* at 480.

¹⁵⁶ *Id.* The petitioners argued that § 1247(d) allows the Commission to order interim trail use. *Id.*

¹⁵⁷ *Id.* at 484.

¹⁵⁸ *Id.* at 482 (citations omitted).

¹⁵⁹ No. 85-CA-11, slip op. (Ct. App. Greene County, Ohio, May 21, 1985). The court noted that Section 1519.02 states in pertinent part:

Trail right-of-way acquisition, improvement, maintenance and supervision. The Director of natural resources may acquire real property or any estate, right, or interest therein for the purpose of establishing . . . any state recreational trail. The Director may appropriate real property or any estate, right, or interest therein for trail purposes only along a canal, watercourse, stream, existing or abandoned road, highway, street, logging road, *railroad* . . . particularly suited for nonmotorized vehicular recreational use.

Id. at 11.

¹⁶⁰ *Id.* at 2.

¹⁶¹ *Id.* at 5.

¹⁶² *Id.* The court noted that the railroad had not used the right-of-way since 1981. *Id.*

¹⁶³ *Id.* at 6 (citing *Justice Railway Co. v. Ruggles*, 7 Ohio St. 1 (1857)). Most courts agree that proof of non-use is not by itself sufficient to prove that a railroad right-of-way was abolished. Annotation, *What Constitutes Abandonment of a Railroad Right-of-Way*, 95 A.L.R.2d 469, 471 (1962).

¹⁶⁴ *Id.* at 7.

¹⁶⁵ *Id.* at 8.

example, the plaintiffs claimed that a recreational trail would substantially increase the burden on their servient estate.¹⁶⁶ The court held that such a change in public use is permitted "because the general purpose to which the easement was and is applied, are the same; to wit, the purposes of a *public way* to facilitate the transportation of persons and property. Means and appliances are different, but the objects are similar; and the legislation of the State has always favored both."¹⁶⁷

The *Rieger* court explained that Ohio courts had not yet addressed whether use of a railroad right-of-way as a public recreational trail would constitute an abandonment.¹⁶⁸ The court held that a recreational trail would serve a public purpose just as the railroad had served a public purpose.¹⁶⁹ Thus, the court held that the conveyance for use as a recreational trail did not represent an abandonment of the right-of-way for public travel.¹⁷⁰

The *Rieger* court was silent on the issue of increased mischief that could occur due to the conversion. Law enforcement agencies report that there has not been an increase in the crime rate in localities with converted trails.¹⁷¹ In addition, littering along trails is unlikely because trail users are arguably conscious of the environment.¹⁷² Finally, noise of a trail is minimal as compared to the noise of an active railroad.¹⁷³

CONCLUSION

Congress recognized society's need to have more access to trails in order to escape from urban pressures. Congress also recognized that the nation's railway

¹⁶⁶ *Id.* In *Lawson*, the court argued that trail use could extinguish an easement if it materially increased the burden on the subservient estate. 107 Wash. 2d at 464, 730 P.2d at 1319 (Pearson, J., concurring and dissenting) (citing 25 Am. Jur. 2d, *Easements and Licenses*, § 72 (1966)).

¹⁶⁷ *Id.* at 9 (quoting *Hatch v. Cincinnati & L.R. Co.*, 18 Ohio St. 92, 122 (1864)).

¹⁶⁸ *Id.* at 11

¹⁶⁹ *Id.* at 10. The court quoted the reasoning of the Minnesota Supreme Court:

The holder of an easement is not limited to the particular method of use in vogue when the easement was acquired, and other methods of use in aid of the general purpose for which the easement was acquired are permissible.

The right of way in this case will be used by hikers, bikers, cross-country skiers and horseback riders. The right of way is still being used as a right of way for transportation even though abandoned as a railroad right of way. Recreational trail use of the land is compatible and consistent with its prior use as a rail line, and imposes no greater burden on the servient estates. The use is a public use, which is consistent with the purposes for which the easement was originally acquired. State and federal statutes encouraging the conversion of railroad rights-of-way to recreation trails also support our holding."¹⁷⁰

Id. (quoting *State by Washington Wildlife Preservation of Minnesota*, 329 N.W.2d 543, 547, *cert. denied*, 463 U.S. 1209 (1983)).

¹⁷⁰ *Id.* at 12. The court briefly mentioned that § 1247(d) encourages states to establish recreational trails as Chapter 1519 of the Ohio Revised Code does. *Id.* at 11.

¹⁷¹ The Christian Science Monitor, Aug. 16, 1988, at 17.

¹⁷² *Id.*

¹⁷³ 107 Wash. 2d at 465, 730 P.2d at 1320 (Utter, J., dissenting).

system was shrinking; however, such transportation may be necessary at a future date. Congress has discovered a reasonable solution in § 1247(d). Section 1247(d) properly prevents the easement from being abandoned during the period the right-of-way is used for trail purposes because the purpose of a railroad and a trail is to provide public transportation.

However, the courts caution that landowners should not be indefinitely prevented from obtaining their reversionary interests. Therefore, a conversion from rails to trails would arguably constitute an abandonment when the conveyance was only contingent upon rail use and where future rail use was not foreseeable. The absence of a § 1247(d) remedy is not a factor because the Tucker Act provides a remedy for just compensation when a taking occurs. Section 1247(d) is also somewhat limited because it does not *require* a reluctant railroad to enter into a trail agreement. A voluntary transfer appears reasonable considering the otherwise potential economic impact on the railroad industry. Therefore, § 1247(d) appears to be constitutional in all respects.

The results of § 1247(d) appear to be quite favorable. The trails do not place any additional burden on the easement as compared to the railroads. In addition, the trails will continue to play an important commercial and social role in connecting various parts of the surrounding community. In summation, the creation of public trails and preservation of railroad corridors should improve the quality of the human environment.

THOMAS A. JONES