

2019 Passenger Rail Seminar Railbanking Panel Outline

- A. Interim Trail Use – a/k/a Railbanking – overview¹
1. Section 8(d) of the National Trail Systems Act (codified at 16 U.S.C. § 1247(d)) provides for preservation of railroad corridors through interim use as recreational trails pending future reactivation of railroad service.
 2. Congress established the Rails-to-Trails program under the Trails Act in 1983 in order to (1) encourage the development of recreational trails and (2) preserve the nation’s network of rail corridors from abandonment and loss for public use and benefit. *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 17-18 (1990).
 3. Section 1247(d) allows railroads and legally responsible parties to voluntarily agree to allow for interim trail use of a railroad right-of-way, subject to future reconstruction of rail lines and restoration of rail service. *See* 16 U.S.C. § 1247(d).
 4. The Surface Transportation Board (“STB”) has jurisdiction over railbanked rights-of-way, and STB procedures govern the railbanking process. *See* 49 C.F.R. § 1152.29. State and local regulation of railbanked lines, including state-law-based property rights and contractual arrangements, that interfere with future reactivation of the line are preempted. *Sunflower Rails-Trails Conservancy, Inc. – Petition for Declaratory Order – Sale of Railbanked Right-of-Way*, STB Docket No. FD 36034 (Service Date Feb. 23, 2017). Railbanking can therefore serve as an important tool for preserving railroad rights-of-way for public use, including recreational and transit purposes.
 5. Some of the benefits of railbanking to public entities include: (1) corridors are preserved intact for public use; (2) negotiation with a single party (railroad) for property acquisition (3) accommodation of other uses consistent with railbanking, including public transit; (4) typically lower acquisition price than outright purchase.
 6. Some of the benefits of railbanking to railroads include: (1) preservation of the railroad’s right to reactivate the line; (2) compensation for an otherwise underutilized asset; (3) relieves railroad of the obligation and liability for aging railroad infrastructure; (4) fostering goodwill with communities.
- B. Examples of railbanking proceedings for future potential or actual transit purposes²

¹ For more overview information, *see* Andrea C. Ferster, RAILS-TO-TRAILS CONVERSIONS: A LEGAL REVIEW (2017), available at: <https://www.railstotrails.org/resource-library/resources/rails-to-trails-conversions-a-legal-review/>.

² Dockets accessible at: <https://www.stb.gov/stb/index.html>.

1. Dallas Area Rapid Transit, STB Docket Nos. AB-1050X, AB-585 (Sub-No. 4X), and AB-33 (Sub-No. 288X).
2. Maryland Transit Administration Purple Line. *See Montgomery County v. Bhatt*, 446 Md. 79, 130 A.3d 424 (Md. Ct. App. 2016).
3. Utah Transit Authority, STB Docket No. AB-33 (Sub-No. 195X).
4. City of Alameda, California, STB Docket No. AB 1090X.

C. Legal implications of railbanking

1. The U.S. Supreme Court has determined that railbanking is constitutional. *See Preseault*, 494 U.S. at 4-5 (Section 1247(d) does not violate the Fifth Amendment or Commerce Clause).
2. The continuation of STB jurisdiction over railbanked lines results in federal preemption of conflicting state and local laws. The STB's jurisdiction displacing state and local regulations is broad. *See City of Auburn v. STB*, 154 F.3d 1025, 1030 (9th Cir. 1998) ("It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations," quotations and citations omitted).
3. Railbanking shields the corridor from the assertion of reversionary or other property interests that may be claimed by adjacent property owners or others who assert a conflicting property interest in the line. *Jie Ao and Xin Zhou – Petition for Declaratory Order*, STB Docket No. FD 35539 (Service Date June 6, 2012) (STB jurisdiction over railbanked line preempted adverse abandonment claim by adjacent landowner); *Montgomery County v. Bhatt*, 130 A.3d at 436 (use of railbanked corridor for trail purposes had been established pursuant to federal regulation and therefore consistent with intent to retain the property interest).
4. Railbanking may result in a federal taking of the real property of underlying property owners under state law, who may be entitled to compensation from the U.S. government. *See Preseault v. United States*, 100 F.3d 1525, 1552 (Fed. Cir. 1996) (en banc) (plurality). However, a finding that the United States is liable for payment of just compensation to the underlying landowner does not affect the validity of the interim trail use itself, does not require the trail sponsor to be liable to the claimant, and does not entitle landowners to re-possess or use the corridor.
5. Railbanking is not available where a railroad has consummated an abandonment of the line, since fully abandoned rail rights-of-way are beyond the jurisdiction of the STB in most circumstances. *See Birt v. STB*, 90 F.3d 580, 585 (D.C. Cir. 1996); *Maryland Transit Administration—Abandonment Exemption—In Somerset Cty., MD*, STB Docket No. AB 590

(Sub-No. 1X) (Service Date May 14, 2015) (line that state sought to railbank had already been abandoned).

D. Permitted interim uses of railbanked rail corridors

1. Uses of a railbanked corridor other than strictly for trail purposes is permitted; the important condition is that nothing be done to prohibit future reactivation of the line. *See Sunflower Rails-Trails Conservancy*, STB Docket No. FD 36034 (Service Date Feb. 23, 2017).
2. The STB and courts have not objected to use of a railbanked corridor for transit purposes. *See Roaring Fork R.R. Holding Auth. – Abandonment Exemption – In Garfield, Eagle and Pitkin Counties, Co.*, STB Docket No. AB-547X (Service Date Oct. 16, 1998) (permitting railbanking where sponsor intended to use right-of-way for transit purposes).

E. Procedures for railbanking

1. Railbanking a line requires that an abandonment proceeding be pending. *See* 49 C.F.R. § 1152.29.
2. A proposed interim trail user or “sponsor” must file a Certificate or Notice of Interim Trail Use (“CITU” or “NITU”), followed by a “Statement of Willingness to Assume Financial Responsibility” for the line (“SWAFR”) within a certain period of time from initiation of the abandonment process by the railroad. *See* 49 C.F.R. § 1152.29. By signing the SWAFR, the interim trail user obligates itself to be responsible for the management of the trail, including any tax or other legal liability that may arise, thereby relieving the abandoning railroad of these burdens. If the interim trail user is immune from liability, it is required to provide an unqualified indemnity to the railroad.
3. The full process for railbanking is as follows:
 - a) Railroad files for abandonment.
 - b) Proposed interim trail “user” or “sponsor” files a request for the STB to issue a NITU/CITU and submits its SWAFR, establishing its capacity to serve as interim trail sponsor.
 - c) Railroad agrees to negotiate.
 - d) STB issues NITU/CITU and may impose conditions primarily to ensure that environmental or historic preservation obligations are fulfilled.
 - e) Railroad and trail sponsor negotiate a trail use agreement specifying the terms of the transaction (including assumption of liability by the

interim trail sponsor and obligation to preserve the right-of-way for the future reactivation of freight rail service).

- f) Interim trail sponsor and railroad jointly file a notice of consummation of the trail use agreement with the STB.
 - g) The corridor is now officially railbanked and trail construction can begin.
 - h) Sources: 49 C.F.R. § 1152.29. *See also National Trails System Act and Railroad Rights-of-Way*, STB Docket No. EP 702 (Service Date Apr. 30, 2012) (Final Rule requiring trail use negotiating parties to jointly notify the Board when an agreement has been reached, and other changes).
4. Pending rulemaking: Recent regulatory changes proposed by the STB upon request of the Rails-to-Trails Conservancy would (1) establish a one-year negotiating period for the railroad and trail sponsor to reach a trail use agreement, instead of the current 180-day negotiating period; (2) permit up to three one-year extensions of the initial period; and (3) permit additional one-year extensions if the trail sponsor and the railroad agree and good cause is shown. *See Limiting Extensions of Trail Use Negotiating Periods*, STB Docket No. EP 749 (Sub-No. 1) and *Rails-to-Trails Conservancy – Petition for Rulemaking*, STB Docket No. EP 753 (Service Date June 6, 2019). The STB is reviewing public comments on the proposed rule.
5. Railbanking terminates if either (1) the line is reactivated, in which case STB jurisdiction continues, or (2) the trail use agreement is terminated, in which case the line is abandoned and STB jurisdiction is terminated unless a new interim trail sponsor is substituted.
6. Reactivation by the abandoning railroad subject to the trail use agreement does not require additional STB authorization beyond a request to vacate the applicable NITU/CITU. Another railroad may also seek to reactivate the line but would need to seek authorization pursuant to the STB’s regulatory procedures. *See* 49 C.F.R. part 1150.