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Testimony of Alan Front
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Regarding the Impact, Effectiveness, Future of the Rail Banking Program Pursuant to
Section 8(d) of the National Trails System Act
Before the Surface Transportation Board
(STB Ex Parte No. 690)
July 8, 2009

Introduction

Thank you for the opportunity to offer this testimony on behalf of The Trust for Public Land (TPL) to examine the impact, effectiveness, and future of rail banking under Section 8(d) of the National Trails System Act.

Since 1972, TPL has worked in communities across the country assisting national, state, and local public agencies, private landowners, and concerned citizens working to protect our country's heritage of natural, cultural, recreation and other vital resource lands. Our work runs the spectrum of conservation initiatives. These initiatives include creating community gardens to help revitalize urban neighborhoods; preserving working forests with public and private partners; maintaining wildlife corridors and enhancing public recreation opportunities in state parks; acquiring critical inholdings in the magnificent landscapes that lie within federal boundaries; and acquiring rail corridors for use as recreational trails.

In total, TPL has completed more than 4,000 land conservation projects that together have protected some 2.5 million acres in 47 states. Roughly one-third of these special places were conserved either through outright federal acquisition of lands or easements, or through federal assistance to state and local governments. Given the importance of nonfederal public dollars for conservation, since 1994 TPL has helped states and localities craft and pass over 463 ballot measures, generating almost \$31 billion in new conservation-related funding.

The Trust for Public Land and Rail Banking

Converting rail corridors into trail corridors is particularly gratifying for us. No other project type has a more immediate and powerful effect on the quality of life in our communities. Rail corridors are uniquely and strategically located in our communities, and they have driven development and growth for almost two centuries. Conversion of these corridors to trails conveniently and immediately connects us to the places we live, work, and play; the surrounding natural environment; and even to each other in a way that no automobile highway or railroad can. Healthier lifestyles are jumpstarted with the provision of walking and biking trails along former rail corridors. Every rail-trail project TPL has worked on has been met with strong business, civic, and political support.

Since 1980, TPL has partnered with nearly 30 communities across the county to safeguard miles of rail corridors. Many of these efforts have involved rail banked corridors that were conveyed and developed into beloved community trails. At the same time, and as an overall goal of the federal rail banking program, these popular rail banked trails also preserve the opportunity for future rail service by protecting the integrity and

contiguity of the corridor. Had the rail banking program not been available, the acquisitions would most certainly have been more expensive and time consuming – if not impossible. Rail carriers often need to dispose of corridors that do not have, or are not projected to have, active users. These types of corridors are deemed surplus, a liability, and are unprofitable to the rail carrier. When a rail carrier seeks abandonment authority from the Board and obtains approval for such abandonment, the corridor is subjected to state real estate laws, often resulting in the reversion of fee or easement interests in corridor sections to adjacent ownerships. In such cases, the corridor is literally lost overnight.

Rail banking has provided tremendous benefits to both rail carriers and trail managers. Rail carriers deliberately contemplate the probability of future rail service as part of their decision to willingly rail bank. If a perceived possibility of reactivation exists, the rail carrier has nothing to lose by rail banking, as it is relieved of management and liability during the interim use. Moreover, in many cases rail carriers receive a payment for transferring the corridor and are able to invest funds elsewhere. Finally, the main tenet of the rail banking program, providing a no-fault alternative use of the corridor, has resulted in the preservation of hundreds of corridors throughout the country with interim alternative uses.

Some of the success of the rail banking program is likely attributable to the fact that railroad companies can negotiate at arms length with potential trail managers. Since rail banking is voluntary for the railroad companies, all available incentives should be utilized to induce railroad companies to participate, thereby fulfilling the STB's charge to preserve rail corridors. Indeed, just as this Board has opined in *Iowa Southern R. Co. – Exemption – Abandonment*, 5 I.C.C.2d 496, 503 (1989) that it is beyond the purview of the Board to know under what terms a private interim trail use agreement is struck, we believe this is an important incentive and should be maintained. Further, it is appropriate for the STB to require a letter from the railroad and the interim trail manager affirming the consummation of a rail banking agreement.

It is important to note that all of TPL's conservation real estate work is with willing sellers thereby easily following the voluntary nature of the rail banking program. In TPL's experience, the rail banking program has been highly effective and well managed, and has successfully furthered contemplated program objectives including trails, roads, utilities, transit and other public-benefit linear land uses. In fact, all rail banking projects TPL has completed were intended for recreational trails as the primary use and to date none has been reactivated.

Additional Observations

-In TPL's dealings with the State of Florida, we have experienced an agency with a designated greenways and trail office, which is unable to meet the strict form language the Board requires from a potential interim trail manager to authorize interim trail use agreement discussions. Specifically, many public agencies are exempt from paying taxes or can claim sovereign immunity related to indemnifying the common rail carrier. Some

flexibility of the wording of the initial request from a proposed interim trail manager should be encouraged to reflect the specific circumstances.

-The required indemnification of the common rail carrier by the interim trail manager arguably includes any liability from public exposure to undiscovered hazardous materials already in place at the time of conveyance to the interim trail manager despite diligent industry standard investigations to discover such contaminants. Such indemnity provides an attractive impetus for a railroad company to choose to rail bank a corridor, but we do not believe the rail carrier should be relieved of this particular liability, or that interim managers should be required to bear that burden.

-TPL's practice in past rail banking projects is to work with railroad companies to contractually obligate the conveying railroad to make a payment to the interim trail manager for the market value of the property at the time of the reactivation. TPL supports the responsibility of the conveying rail carrier to bear the cost of restoring the corridor for rail service. During the interim trail use, the rail carrier was not liable for the cost of maintenance, taxes, or legal responsibility thus saving significant dollars, in addition to potentially also receiving money at transfer to an interim trail manager. We also believe that the conveying rail carrier should reimburse the depreciated value in any trail-related improvements invested by or on behalf of the interim trail manager, in the event there is a petition approved by the Board to reactivate. We recognize that these terms could serve as a disincentive to reactivate a rail corridor, but without such assurances, we also limit the incentives to a potential interim trail manager and increase the likelihood the corridors will be abandoned eliminating the possibility of reactivation.

The Trust for Public Land appreciates the opportunity to share our opinions and will continue to invest its resources to protect our nation's natural, cultural, and recreational heritage. We are thankful for the Board's recognition of the importance of the rail banking program in providing an important public-benefit asset. We urge you to weigh carefully the benefits of the program against its unintended consequences and find ways to improve the effectiveness of the program. Thank you for help and support, and for your consideration of our requests.

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