



STB Ex-Parte No. 690

**TWENTY-FIVE YEARS OF RAIL BANKING: A REVIEW AND
LOOK AHEAD**

**Supplemental Written Testimony of:
The National Association of Reversionary Property Owners
(NARPO)**

August 7, 2009

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NARPO's supplemental comments¹ will focus on the need for a new regulation requiring notice to adjoining land owners to ensure that the statute is administered in a manner consistent with the Due Process Clause of the Fifth Amendment of the United States Constitution. A proposed draft notice of rulemaking is attached so that the Board can see the specifics of such a regulation in a practical format. *See* Exhibit 1. In addition, these supplemental comments will provide a brief discussion of the Constitutional principles underlying the rationale for payment of damages in the Rails-to-Trails taking.

**I. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT
REQUIRES THAT NOTICE BE GIVEN TO ADJOINING LANDOWNERS
IN A MANNER THAT PERMITS LANDOWNERS THE PRACTICAL
ABILITY TO ENFORCE THE RIGHTS THEY HAVE.**

**A. Many Landowners Have Property Rights that Are Taken When a Line is
Converted to a Trail.**

Sometimes a railroad owns fee title to the property in a railroad right of way so that a conversion to a trail does not result in a taking. *Preseault v. Interstate Commerce Commission*, 494, U.S. 1, 16 (1990) ("*Preseault I*"). However, more often a railroad

¹ During the July 8, 2009, hearing, the Board stated that the record would remain open for 30 days so that interested parties could provide supplemental comments.

does not own fee title to the right of way and a trail conversion does result in a taking for which compensation is due under the Fifth Amendment to the United States Constitution through the Tucker Act.

In the landmark *Preseault I* decision, Justice O'Connor explained why this is so:

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

Id. at 22-23 (emphasis added and citations omitted). Subsequently, in an *en banc* decision, the Federal Circuit (which has exclusive jurisdiction over Tucker Act appeals) concluded that the occupation of the Preseault's property by a trail "constituted a taking of their property for which the Constitution requires that just compensation be paid." *Preseault v. United States*, 100 F.3d 1525, 1552 (Fed.Cir. 1996) ("*Preseault II*").² In the subsequent damages trial, the court awarded the Preseaults \$234,000 in compensatory damages plus interest. Of this amount, at the most, \$24,000 was for the property underlying the trail and, at least, \$210,000 was for the decrease in the value of Preseault's remaining property caused by the trail. Thus, in this fully litigated case, the Court determined that the trail did great damage to the adjoining owners' property values.

² The stated holding was supported by a substantial majority of the *en banc* court. The existence of a concurring opinion does not weaken the precedential value of the decision. *Compare*, June 25, 2009 written testimony of Rails-to-Trails Conservancy at 7, with *Toews v. United States*, 376 F.3d 1371, 1380 n.6 (Fed. Cir. 2004) ("Since there was a written concurrence by two of the majority judges, the Government throughout its brief insists on referring to the opinion of the *en banc* court in *Preseault* as a "plurality" opinion, presumably to weaken its precedential value. Even a cursory reading of the concurrence shows that there was no disagreement on any of the issues, as well as on the result. Whether denominated as a 'concurrence' or as 'additional views,' an appellation used in other cases under similar circumstances, the holding of the case reflects the considered view of a substantial majority of the court.").

Although it does not matter for Constitutional purposes when due process is at issue, the ratio of compensable to non-compensable property rights in adjoining landowners on any given right of way are relatively great. Admissions against interest are some of the most credible pieces of evidence in a lawsuit. A study commissioned by the Association of American Railroads in connection with proposed leases to telecommunications carriers concluded that reversionary interests in the landowners dominate on rights of way:

Right-of-way titles are in many cases old and poorly documented. Communications carriers have been accepting this as a business risk, but they have not yet focused on the larger problem of title *quality*. Many conveyances were not fee-simple transfers but easements, often limited to “surface” rights or “for railroad use.” As a legal matter, this means that access for non-interfering uses like a transmission line is controlled not by the railroad but by a reversionary or underlying rights holder—typically, the adjacent landowner. Also, if railroad operations are later abandoned any derivative interest, such as a right of occupancy extended by the railroad to a communications carrier, lapses.³

As would be expected, the existence of reversionary rights varies from parcel to parcel, line to line and state to state. Opinions upholding adjoining landowners’ rights are legion.⁴ There are, of course, also cases where the railroad has a fee interest and the adjoining landowner is found to not have had superior rights.

Additionally, while trail proponents rely on a small handful of state court decisions for the notion that “shifting use” favors conversion of railroad easements into

³ The Use or Sale of Railroad Rights-of-Way for Fiber-Optic Communications, The Report of a Study Conducted for Railinc Corp., March 15, 1983.

⁴ *Toews*, 376 F.3d at 1376, 1377-79 (conversion of railroad easement to trail use is a taking); *Preseault II*, 100 F.3d at 1544, 1549 (same); *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005) (same with regard to federal right of way grant easements); *Schneider v. United States*, 2008 WL 160921 (D. Neb., Jan. 15, 2008) (same); *Hash v. United States*, 2008 WL 818347 (D. Idaho, March 24, 2008) (same with regard to federal- and state-created easements); *Glosemeyer v. United States*, 45 Fed. Cl. 771 (2000) (same with regard to state-created easements); *Schmitt v. United States*, 2003 WL 21057368 (S.D. Ind. 2003) (same); *Lawson v. State*, 730 P.2d 1308 (Wash. 1986) (*en banc*) (conversion to trail use is an impermissible taking); *Schnabel v. County of DuPage*, 428 N.E.2d 671 (Ill. App. 1981) (trail use is not same as railroad use); *Pollnow v. State Dep’t of Natural Resources*, 276 N.W.2d 738 (Wis. 1979) (same).

trail use, the Federal Circuit has outright rejected the trail proponent's view. In *Toews v. United States*, 376 F.3d at 1379, the Federal Circuit faced the question of whether land owners adjoining a trail in California were entitled to compensation. The Government argued that no compensation was required because California had adopted the so-called shifting use doctrine. The Federal Circuit agreed that California had adopted the doctrine, but found that not even under application of a shifting public use doctrine could a right of way created for railroad purposes be reasonably "stretch[ed]" to include recreational trails:

[I]t is clear that under the rule as it is applied in California a public transportation easement defined as one for railroad purposes is not stretchable into an easement for a recreational trail and linear park for skateboarders and picnickers, however desirable such uses may be for these linear strips of land. The Government has the legal power and is thus free to impose such new uses upon the fee interests held by the adjacent landowners. But the private property interests taken are not free; the Government must pay the just compensation mandated by the Constitution.

Id. at 1376.

When pressed, even Professor Wright, who is extensively employed as an expert witness on behalf of rail and trail interests, admitted in her testimony that sometimes the adjoining landowners do own the underlying fee. In fact, her written comments do not deny this, but instead urge a change in the law.

Of course, one cannot simply sweep away established property rights without either providing compensation or violating the Fifth Amendment. That was the whole point of the Supreme Court's decision in *Preseault I*. Counsel for NARPO has broad experience with analyzing deeds of adjoining landowners in Tucker Act cases. In the settlement of those cases, counsel for landowners and the government examine each deed

to reach agreement on the nature of the interest. Disputes are resolved by the trial court. The results vary from state to state, as would be expected. Taken as a whole, the majority of the time the adjoining landowner is found to have a fee interest in the land, burdened by an easement, for which conversion to a trail must be compensated under the Tucker Act.⁵ In fact, *no* federal court presiding over a rails-to-trails takings case that has determined the railway parcels were easements, and then grappled with the issue of whether just compensation was due, has ruled against the landowner. In all such cases, the lower federal courts, affirmed by the Federal Circuit if up on appeal, have all concluded that just compensation was due.⁶

B. A Landowner Has Six Years from the Board's Service of the First NITU or CITU in Which to File a Takings Claim.

The Federal Circuit has held that “a Fifth Amendment taking occurs when, pursuant to the Trails Act, state law reversionary interests are effectively eliminated in connection with a conversion of a railroad right-of-way to trail use.” *Caldwell v. United States*, 391 F.3d 1226, 1228 (Fed. Cir. 2004). In the *Caldwell* decision, the three-member panel of the Federal Circuit determined that the six-year statute of limitations for bringing a Tucker Act claim began to run on the issuance of a NITU. In so holding, it reversed a Federal Court of Claims ruling that the taking was fixed only on the signing of a trail use

⁵ See Footnote 4, *supra*, citing *Hash*, *Schneider*, and *Schmitt*. Counsel has additional cases not published but in which the same holds true.

⁶ See Footnote 4, *supra*. Trail proponents frequently rely on the decisional law, *Chevy Chase Land Co. v. United States*, 158 F.3d 574 (Fed. Cir. 1998) (certification order); *Chevy Chase Land Co. v. United States*, 733 A.2d 1055 (1999) (answer); *Chevy Chase Land Co. v. United States*, 230 F.3d 1375, 1999 WL 1289099 (C.A. Fed., 1999) (non-precedential) (final disposition), for a contrary understanding. But *Chevy Chase* was limited to a Maryland state court analyzing questions under Maryland law, which was then appropriately rubber-stamped by the Federal Circuit *who had deferred to that court on the merits* by certifying material questions, and under no circumstances did *Chevy Chase* rise to the level of reworking the proper takings analysis under the *Preseault* principles or the principles of federal takings law governing a rails-to-trails takings cases as set out by the Federal Circuit in *Preseault II* and *Toews*.

agreement. The *Caldwell* panel recognized that negotiations may fail and the line might yet be abandoned, but, it stated, at least a temporary taking occurred with the issuance of the NITU. *Id.* at 1234. While NAPRO shares the concern expressed by one Commissioner during the hearing about the practical implications of starting the statute of limitations clock with merely the issuance of the NITU, nonetheless that is the current, black-letter law as stated by the Federal Circuit, which has exclusive jurisdiction over Tucker Act cases. As the Board well-knows, in many if not most cases, a CITU or NITU sees many 180-day extensions—sometimes spanning several years—before a trail-use agreement is actually implemented. Thus, adjoining landowners may lose their only avenue for compensation before they have actual notice that a trail is being established and reversionary interests are effectively eliminated.

C. Due Process Requires Direct Mail Notice to Adjoining Landowners Whose Names and Addresses Are Available From a Review of Public Tax Records and it Falls Upon the Board to Ensure Notice be Made.

The Fifth Amendment requires that when property interests *might* be subject to a taking, due process mandates proper notice of that potential taking. Accordingly, while it falls to the Federal Circuit, and the lower courts, to preside over just compensation issues, the Board is the sole federal body with plenary jurisdiction over the implementation of the Trails Act,⁷ and is the only arm of the federal government therefore who has the responsibility to ensure that due process is satisfied.

When property is taken by the government “due process requires the government to provide ‘notice reasonably calculated, under all the circumstances, to apprise interested

⁷ *Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 320, 101 S.Ct. 1124, 1131 (U.S.Iowa,1981); 16 U.S.C. § 1247(d); 49 CFR § 1152.29.

parties of the pendency of the action and afford them the opportunity to present their objections.” *Jones v. Flowers*, 547 U.S. 220, 229 (2006) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Courts have had many opportunities to consider what notice is required under the Fifth Amendment (which also applies to property taken by state action through the Fourteenth Amendment). *Mullane* is the case on which all subsequent analysis is based.

In *Mullane*, New York banking law permitted a trustee to receive a binding judicial decree on a trust accounting that terminated every right that a beneficiary otherwise would have against a trustee for improper management. *Id.* at 313. The state statute required prior notice of the proceeding only by publication in a newspaper. The Supreme Court found that the proceeding was one where beneficiaries “*may* be deprived of property rights [potential claims for mismanagement] and hence notice and hearing must measure up to the standards of due process.” *Id.* (emphasis added). It is important to note that due process required notice to interested parties in advance without any showing that any interested party actually had a claim upon which they would prevail. The essence of due process is that the right to notice comes in advance of the adjudication of any substantive rights or claims.

In *Mullane*, the Supreme Court reviewed the general requirements for due process notice and concluded later that notice must be reasonably calculated to reach interested parties and that newspaper notice did not meet the standard when the names and addresses needed for direct mail notice were reasonably available. The Court stated,

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their

objections. The notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied. *The criterion is not the possibility of conceivable injury*, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.

But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other feasible and customary substitutes.

Id. at 314 (citations and internal quotations omitted; emphasis added).

The Supreme Court found publication notice sufficient only for those current beneficiaries whose addresses were unknown. *Id.* at 317. For other current beneficiaries, direct mail notice was required. *Id.* at 319. With respect to publication notice, the Supreme Court observed that published notice is merely a "feint" and insufficient to satisfy due process standards:

It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. . . . Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint.

Id. at 315. In subsequent cases, the Supreme Court has determined that due process required governmental authorities seeking to take property or to take action that would

affect property must give direct mail notice to interested parties whose names are disclosed in the public record. *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956) (mailed notice before property taken in condemnation action because “[i]t cannot be disputed that due process requires that an owner whose property is taken for public use must be given a hearing in determining just compensation. The right to a hearing is meaningless without notice.”), *Schroeder v. City of New York*, 371 U.S. 208, 212 (1962) (owner of riparian land 25 miles below planned diversion of river entitled to direct mail notice because “the general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question.”), *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798-800 (1983) (mortgage holder whose name appeared in public record entitled to direct mail notice of pending tax sale).

Thus, to satisfy the Due Process Clause of the Fifth Amendment, landowners adjoining a rail line for which a NITU has been filed must be given notice by mail. All are “interested parties” who “*may* be deprived of property rights.” *Mullane*, 339 U.S. at 313-14 (emphasis added), *see also*, *Houser v. United States*, 9 Cl. Ct. 35, (1985) (due process required direct notice to individuals whose names appeared in public record even though government believed it had superior title to land needed for a dam and court believed government was likely to prevail). The names and addresses of adjoining land owners are readily found in the public record so direct mail notice is required. Further, the content of the notice must satisfy the requirement that “the notice must be of such

nature as reasonably to convey the required information.” *Mullane*, 339 U.S. at 314. In this case, that means the notice must inform adjoining landowners of the following:

(1) a Notice of Interim Trail Use has been filed and the docket in which it has been filed;

(2) that the NITU has effectively eliminated any reversionary interest they might have in the rail corridor; and

(3) that they have six years from the NITU to file suit in Federal Court against the United States under the Tucker Act for compensation.

The notice must be timed to provide landowners “a reasonable time . . . to make their appearances.” Congress has decreed that six years is a reasonable time to bring a Tucker Act claim. The Federal Circuit has decreed that the six years begins to run with the filing of a NITU. It follows that the notice to adjoining landowners must be sent shortly after the filing of an NITU.

In 1986, when it issued final regulations to implement the Trails Act, the Board concluded that “adjoining landowners have no proprietary interests that require protection or compensation.” 2 I.C.C. 591, 600 (1986). It is, therefore, not surprising that the Board did not require notice to be provided to adjoining landowners consistent with the Due Process Clause. In its 1990 Policy Statement (issued before *Preseault I* was decided by the Supreme Court) the Board recognized that “Compensation is available to holders of reversionary property interests.” 1990 WL 287255 *3 (STB, Ex Parte No. 274-13B, Jan. 29, 1990). But, at the same time, it concluded that the Claims Court (and not the Surface Transportation Board) “has the expertise to decide takings questions and is in the best position to do so.” *Id.* Respectfully, however, the Board must not conflate the duties of

one venue to preside over compensation questions, with the duty of this venue to preside over the due process notice requirements when a NITU or CITU is issued.

As recognized by the Board, its role is to administer the Trails Act. In that role, it promulgates regulations requiring, *inter alia*, the information needed to process Trails Act requests, notification to interested parties of the railway line discontinuance, and it issues CITUs and NITUs. Given the recognized reality that NITUs or CITUs can constitute a taking of property, and the clear Constitutional requirement that taking property requires *both* due process and compensation, the Board must act to require notice to adjoining landowners so that all the requirements of the Fifth Amendment are satisfied. In so doing, it would fall in line with other agencies that have appropriately promulgated rules requiring actual notice to all owners who *may* be subject to a taking of their property.⁸

Although the Claims Court is best suited to determine title and compensation issues, the Claims Court would have no jurisdiction over notifying potential claimants that a claim has accrued. Only the Board can act to provide the required due process notice of the potential taking by promulgating simple regulations that would require the rail carrier to effectuate notice within a reasonable time from the issuance of the first NITU or CITU.

⁸ See e.g., *Benchmark Resources Corp. v. United States*, 64 Fed. Cl. 526, (2005) (Tucker Act statute of limitations tolled where due process *and regulation* violated because no direct mail notice was given to landowners affected by a decision that property was not suitable for surface mining; authority requiring notice in condemnation cases was persuasive authority of level of notice required by due process in instant case).

II. TRAILS DECREASE THE VALUE OF ADJOINING PARCELS.

During the oral testimony, the Board inquired about the difference in view between NARPO and the Trails Conservancy over whether trails enhanced or diminished property values. We have reviewed the 2003 house publication referenced in the Conservancy's comments. As suspected, it deals mostly with the benefits to the larger community from a trail and *not* the properties immediately adjacent to the trails.

One Board member questioned whether the shift in property value caused by the trail was not already incorporated into the sale price of the property, thus eliminating the need to compensate the owner. Respectfully, the Federal Circuit has presided over this same reasoning, as argued by the United States in the seminal takings case, *Preseault II*, and rejected this line of reasoning under Constitutional principles. When a purchaser of a property burdened by a railroad easement bought that property, he paid for that property based on that burden. Under settled law, as a property owner he was entitled to the benefit of the abandonment of the railway easement when that easement was extinguished; namely, he was entitled to have his full rights restored. Under settled law, the conversion of the railway easement to recreational trail use goes beyond the scope of the original easement and that conversion doesn't merely delay a Constitutional right to one's own property, it *defeats* that right for which compensation is due.

And that compensation is due has been repeatedly established by plaintiffs in different cases where it has been shown that an easement was at issue. In some instances they may be entitled to merely the value of the part taken—the right of way itself; in other cases there are damages to the residual estate, for which greater compensation is due. That issue is determined on a case-by-case basis, but there has been no case where

easements have been taken from the established landowner and where no compensation is due.

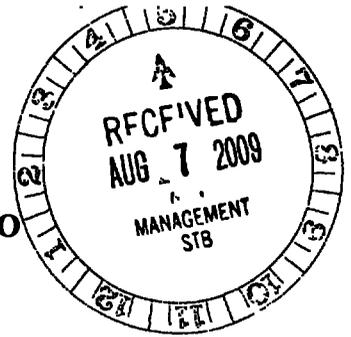
III. PROPOSED REGULATION

Attached is a proposed draft regulation that implements NARPO's proposed notice program, that places a two-year period in which to reach a trail-use agreement, and that requires notification be given to the Board if a trail use agreement is consummated or relinquished. NARPO made additional suggestions for revisions in regulations in its initial written testimony that continue to be necessary. They are not included in this draft proposed regulation because there exist a number of different ways the Board might choose to implement them.

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PROPOSED REGULATION, SUBMITTED BY NARPO



TO BE INSERTED AFTER PREAMBLE:

For the reasons set forth in the Preamble, the following three Sub-Parts, 1152.29(h), 1152.29(i), and 1152.29(j), shall be added to Title 49, Subtitle B, Chapter X, Subchapter B, Part 1152, of the Code of Federal Regulations:

SUB-PART 1152.29(h)—NOTICE TO ADJOINING LANDOWNERS FOLLOWING CITU OR NITU

Authority: 16 U.S.C. § 1247(d)

49 CFR § 1152.29(h)

§ 1152.29(h) Notice to Adjoining Landowners Following CITU or NITU

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Upon the first issuance of any CITU or NITU by the Board, the owner rail carrier shall effectuate due process mailed notice, describing the impact the CITU or NITU may potentially have upon the rights of the owners of property lying adjacent to, or traversed by, the subject line (“Adjoining Landowners”) as follows:

- (1) The names and addresses of the Adjoining Landowners shall be identified by researching in or consulting with each county’s tax office in which the subject line is situated. Every reasonable effort shall be made to identify all landowners on each side of the subject line from beginning to end points of the proposed rail banking;
- (2) Mailed notice to the Adjoining Landowners shall be postmarked no later than thirty (30) days from the service date of the CITU or NITU;
- (3) The mailed notice shall be in the following form in at least 12 point typeface

Notice of Potential Taking of Your Private Property
By Order of the Surface Transportation Board,
United States Department of Transportation;
In the matter of No. AB _____ (Sub. No. _____)

(Insert Date which shall be same as Postmarked Date of mailing)

(Name of owner carrier) hereby gives notice that on _____ (insert the service date of the first CITU/NITU), the Surface Transportation Board (“Board”) issued an order which may affect your property interests if you are the owner of property adjacent to or underlying a certain railroad right of way. That order is titled _____
() (select the correct order and acronym: Certificate of Interim Trail Use or

Abandonment (“CITU”) / Notice of Interim Trail Use or Abandonment (“NITU”). The _____ (select correct acronym: CITU/NITU) permits _____ (name of owner carrier) and a qualified trail sponsor, _____ (insert name of interested party/ies who have indicated willingness to be a trail user), to convert the railroad right of way into an interim recreational trail, and to preserve that line for possible future railroad use (“rail banking”). That right of way is located between _____, _____, _____ (name of City, County, State) and _____, _____, _____ (name of City, County, State), and runs through United States Postal Service ZIP Codes _____ (list all Zip Codes).

If your property is adjacent to the right of way, your property interests *may* have been taken for public use, and you may be entitled to compensation under the Fifth Amendment to the United States Constitution. Whether you are entitled to compensation will depend in part on whether the right of way was an easement or whether you otherwise have a reversionary interest in the right of way. If your property interests have been taken, then your remedy would be to bring a takings claim against the United States. Under current law, the issuance of the _____ (select correct acronym: CITU/NITU) is a triggering event under the applicable statute of limitations period to bring any takings claim for this rail-trail conversion. The statute of limitations for a takings claim is six years; therefore, if your property interests were taken, you have six years from _____ (fill in the service date of the CITU/NITU) in which to file a claim.

The wording in this Notice was formulated by the Board, and was sent to you based on reasonable efforts to identify the adjoining property owners of the subject right of way, as is required under the Code of Federal Regulations, 49 CFR § 1152.29(h).

You will need to consult with a lawyer if you have any questions; and,

(4) The mailed notice shall be sent by first class U.S. mail. The mailing envelope shall state (on the front or back) the following in bold 16 point typeface

**By Order of the Surface Transportation Board
Notice of Government action that may affect property rights
and entitle you to compensation**

(5) The owner rail carrier shall notify the Board that it has effectuated mailed notice to Adjoining landowners within ten (10) business days of so doing.

SUB-PART 1152.29(i)—LIMITATIONS PERIOD IN WHICH TO FINALIZE A TRAIL USE AGREEMENT

Authority: 16 U.S.C. § 1247(d)

49 CFR § 1152.29(i)

§ 1152.29(i) Limitations Period in Which to Finalize a Trail Use Agreement.

(1) Notwithstanding the terms under Sub-part 1152.29(g), and irrespective of any 180-day extensions that may be granted under 1152.29(g), if, after 2 years from the date of service of the first CITU or NITU permitting the interim trail use and rail banking, a trail-use agreement has not been formalized and consummated between the parties, then the authority to enter into a trail-use agreement will automatically expire and no further extensions of the CITU or NITU, or a re-opening of the CITU or NITU, shall be permitted;

(2) Upon the two-year expiration date for authority to enter into a trail-use agreement, the railroad carrier shall have 180 days to file a notice of consummation of abandonment, under the terms detailed in Sub-part 1152.29(e)(2); and,

(3) In the event that neither a trail-use agreement is consummated nor abandonment of the line is consummated, any and all authority for trail use or abandonment issued under the CITU or NITU is revoked, and a new proceeding would have to be instituted if the railroad wants to abandon the line.

SUB-PART 1152.29(j)—NOTIFICATION OF CONSUMMATION OR RELINQUISHMENT OF TRAIL USE AGREEMENT

Authority: 16 U.S.C. § 1247(d)

49 CFR § 1152.29(j)

§ 1152.29(j) Notification of Consummation or Relinquishment of Trail Use Agreement

(1) If, pursuant to a CITU or NITU, the parties consummate a trail use agreement so that a trail user has assumed full responsibility for management of the subject right of way as contemplated under 1152.29(a)(2), the trail user shall so notify the Board in writing by electronic filing within ten (10) business days of such consummation;

(2) The notification of consummation of the trail use agreement shall be in the following form and shall include the applicable document(s) between the parties that consummated the trail use agreement:

In the matter of No. AB _____ (Sub. No. _____); **Notice of Consummation of Trail Use Agreement.**

(Name of trail user) gives notice that on _____ (date of consummation of the trail-use agreement between parties) _____ (name of railroad carrier) and _____ (Name of trail user) finalized a trail use agreement, wherein the subject railway line on that date has been dedicated to interim recreational trail use and rail banking, as contemplated under 16 U.S.C. § 1247(d).

A copy of the parties' document(s) formalizing the trail use agreement is hereby attached

(Name of trail user) can be reached through the following means:

- Office phone number (mandatory)
- Office facsimile number (if available)
- Mailing address (mandatory)
- Web site (if available)
- Email address (if available)

(Name of trail user) understands that it has an ongoing obligation to update and notify the Board of any changes to the above contact information. (Name of trail user) also understands that if, for any reason, it relinquishes or otherwise acts to remove itself from its responsibilities as set out in 1152.29(a)(2), it will notify the Board in writing at the earliest opportunity but no later than ten (10) business days of this action, informing the Board that it no longer can/wishes to meet its obligations under this regulation and that it seeks to terminate trail use;

(3) The obligation to notify the Board under the above terms in 1152.29(j)(2), applies to any subsequent trail user who assumes responsibility for the right of way, as set out under 1152.29(f)(1); and,

(4) If, for any reason, the trail user becomes defunct, abrogates, relinquishes, or otherwise acts to remove itself from its responsibilities for the management of the trail, as set out in 1152.29(a)(2), and has not located a new trail user who is willing to assume financial responsibility for the trail as permitted under 1152.29(f), the trail user must notify the Board of such in writing at the earliest opportunity but no later than ten (10) business days from the relinquishment of its responsibilities. In such notification, the trail user shall state that it no longer can/wishes to meet its obligations under this regulation and that it seeks to terminate trail use, as set out under 1152.29(d)(2). Any such notice shall include a copy of the applicable CITU or NITU and/or include the AB and Sub. No. for reference.