

UNITED STATES OF AMERICA

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SURFACE TRANSPORTATION BOARD

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PUBLIC HEARING

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TWENTY-FIVE YEARS OF RAIL : Ex Parte  
 BANKING: A REVIEW AND LOOK : No. 690  
 AHEAD :  
 \_\_\_\_\_ :

1<sup>st</sup> Floor Hearing Room  
395 E Street, S.W.  
Washington, D.C.

Wednesday,  
July 8, 2009

The above-entitled matter came on  
for hearing, pursuant to notice, at 9:00 a.m.

BEFORE:

FRANCIS P. MULVEY, Acting Chairman  
CHARLES D. "CHIP" NOTTINGHAM, Vice  
Chairman

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ALSO PRESENT:

PANEL I:

MARIANNE FOWLER, Rails-to-Trails  
Conservancy

CHARLES H. MONTANGE, Madison County  
Transit

PANEL II:

EDWARD R. HAMBERGER, Association of  
American Railroads

PETER J. SHUDTZ, CSX Transportation,  
Inc.

ERIC S. STROHMEYER, CNJ Rail  
Corporation

PANEL III:

KATHLEEN KAUFFMAN, National  
Association of Reversionary Property  
Owners

DANAYA C. WRIGHT, University of  
Florida, College of Law

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P R O C E E D I N G S

(9:02 a.m.)

1  
2  
3 CHAIRMAN MULVEY: Good morning and  
4 welcome to the Board's hearing entitled  
5 "Twenty-five Years of Rail Banking: a Review  
6 and a Look Ahead."

7 We are holding this hearing to  
8 provide an opportunity to consider past  
9 experience and think about the future of "rail  
10 banking" implementation. Specifically we have  
11 gathered today to examine the impact,  
12 effectiveness, and future of rail banking  
13 under Section 8(d) of the National Trail  
14 System Act.

15 To set the stage, I would like to  
16 spend a few moments on the origin of Section  
17 8(d). The time was 1983, and the freight  
18 railroad industry had struggled through years  
19 of financial hardship. Although the railroads  
20 had abandoned many thousands of miles of  
21 track, the process of rationalizing the  
22 railroad was slow and the carriers were still

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1           burdened with substantial excess capacity.

2                         With the passage of the Staggers  
3 Rail Act in 1980, freight railroads were able  
4 to abandon unprofitable Rail lines with  
5 greater ease and to rationalize their systems  
6 in other ways as well. The rail abandonments  
7 that followed passage of Staggers helped ease  
8 the financial hardships faced by the freight  
9 rail industry.

10                        But the numbers of miles of rail  
11 line being abandoned caused concerns of  
12 another sort. Congress saw that valuable  
13 corridors that might one day be restored to  
14 rail service under changed circumstances were  
15 being permanently removed from the nation's  
16 rail network.

17                        Once removed from the rail  
18 network, buildings and other structures  
19 erected on former railroad rights-of-way could  
20 preclude the return of rail service.

21                        So in 1983, Congress acted passing  
22 the Section 8(d) of the National Trail System

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1 Act to create a program to allow the  
2 preservation of railroad corridors for future  
3 railroad use. Congress called the program  
4 "rail banking" and allowed rail corridors that  
5 would otherwise be abandoned to be used in the  
6 interim as recreational trails.

7 Over the past quarter century, the  
8 Board has worked hard to satisfy the mandate  
9 that Congress charged us with in Section 8(d),  
10 preserving rail corridors for future Rail use.  
11 Through the Trails Act and the Board's  
12 implementing regulations, interested parties  
13 have the opportunity to negotiate a voluntary  
14 agreement to use railroad rights-of-way that  
15 would otherwise be abandoned as recreational  
16 trails.

17 The trail sponsor must agree to  
18 assume responsibility for managing the trail,  
19 for paying the property taxes for the right-  
20 of-way, and for any liability in connection  
21 with trail use.

22 In turn, the rail carrier may

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1 salvage its track and discontinue service on  
2 the line. If the parties are able to reach a  
3 Trails Act agreement, the right of way can be  
4 used as a trail until, and if ever, a rail  
5 carrier decides to restore rail service on the  
6 line or the trail user terminates trail use  
7 under the Board's regulations.

8 The Agency has issued a large  
9 number of decisions authorizing trail use  
10 negotiation periods, and many of these  
11 negotiations have resulted in trail use  
12 agreements between railroads and interim trail  
13 sponsors. To date, nine cases have emerged in  
14 which the railroad has reactivated rail  
15 service on a rail-banked line.

16 As I explain this, it seems quite  
17 straightforward, but like many things in life,  
18 complexities have a way of arising. In the  
19 notice announcing this hearing, Vice Chairman  
20 Nottingham and I discussed some of the  
21 thornier issues confronting us in the area of  
22 rail banking and have posed a number of

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1 questions on which we are eager to hear your  
2 views.

3 We are fortunate today to have  
4 present stakeholders who represent a wide  
5 range of viewpoints, including railroads,  
6 trail sponsors, and landowners.

7 I will close this with a  
8 clarification of our purpose in calling this  
9 meeting. Some have expressed concern that the  
10 Board is considering ending the rail banking  
11 program. We are not, and indeed, we can not.  
12 Rail banking was established by statute and  
13 will remain available to willing and eligible  
14 parties.

15 What we seek to understand today  
16 is how rail banking affects various interest  
17 groups and whether the Board's implementation  
18 of the Trails Act has been effective. Before  
19 I turn to Vice Chairman Nottingham for his  
20 opening remarks, I want to mention a few  
21 procedural notes.

22 We will keep this docket open for

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1 30 days to allow those who wish to to submit  
2 follow up materials or information. Regarding  
3 the testimony itself, as usual we will hear  
4 from all the speakers on the panel prior to  
5 questions from the Board Members.

6 Speakers, please note that the  
7 timing lights are in front of me, and when you  
8 see a yellow light, that means you have one  
9 minute remaining, and the red light means your  
10 time has expired. Please do your best to keep  
11 within the time you have been allotted.

12 I assure you that we have read all  
13 of your statements and comments, and there is  
14 no reason to read those verbatim here.

15 After hearing from the entire  
16 panel, we will rotate with questions from the  
17 Vice Chairman and myself until we have  
18 exhausted all of our questions.

19 Additionally, just a reminder to  
20 everyone to please turn off your cell phones.

21 And I now would like to turn it  
22 over to Vice Chairman Nottingham for his

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1 opening remarks.

2 VICE CHAIRMAN NOTTINGHAM: Thank  
3 you, Acting Chairman Mulvey.

4 I would also like to welcome  
5 everyone to the hearing this morning. We're  
6 here today to take a look back at our  
7 experience since Congress amended the National  
8 Trail System Act in 1983 to permit the  
9 preservation of rail corridors through interim  
10 trail use, or "rail banking," and to look  
11 ahead at issues surrounding the future of rail  
12 banking.

13 Rail banking has been an important  
14 part of the regulatory landscape for rail line  
15 abandonment since 1983. Since the Board was  
16 created in 1996 to succeed the Interstate  
17 Commerce Commission, the agency has granted on  
18 average about 30 notices or certificates of  
19 interim trail use per year, permitting a  
20 railroad to negotiate with potential trail  
21 sponsors for interim trail use of a line  
22 targeted for abandonment.

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1           In cases where an interim trail  
2 use agreement is reached, rail banking serves  
3 the dual purposes of permitting a public use  
4 of the right-of-way as a trail, while at the  
5 same time preserving for possible future rail  
6 service a rail corridor that, once abandoned,  
7 could be difficult or impossible to  
8 reassemble.

9           In our hearing notice, we identify  
10 a number of questions to guide us as we look  
11 ahead to the future of rail banking, and I  
12 appreciate the efforts of the witnesses today,  
13 as well as those who submitted written  
14 comments, to address those issues, such as:  
15 whether the Board should consider establishing  
16 some sort of notice provision when interim  
17 trail use agreements are reached or require  
18 submission of the agreements themselves;

19           Who should bear the cost of  
20 replacing bridges and otherwise restoring a  
21 rail corridor when rail service is restored;

22           And what effect has rail banking

1 had on trail users, on reversionary property  
2 owners, and on the ability to restore rail  
3 service on the railbanked line?

4 I am pleased that we have  
5 appearing before us today witnesses from the  
6 major stakeholder group with an interest in  
7 rail banking: railroads, trail sponsors, and  
8 adjacent property owners, who can help us  
9 address these questions and more.

10 I have reviewed the written  
11 testimony submitted by today's speakers, as  
12 well as the written submissions from parties  
13 who are not speaking today, and I look forward  
14 to a lively discussion this morning.

15 Thank you.

16 CHAIRMAN MULVEY: Thank you, Vice  
17 Chairman Nottingham.

18 With that I'll call up our first  
19 panel. Panel I, trail user interests, and  
20 that will be Marianne Fowler of the Rails-to  
21 Trails Conservancy, and representing Madison  
22 County Transit, Charles H. Montange.

1 MS. FOWLER: Do we just start?

2 VICE CHAIRMAN NOTTINGHAM: Ms.  
3 Fowler, do you want to begin?

4 MS. FOWLER: Okay. Thank you,  
5 sir.

6 I'm Marianne Fowler, Senior Vice  
7 President, Federal Relations for Rails-to-  
8 Trails Conservancy.

9 And Rails-to-Trails is pleased to  
10 offer this testimony on the occasion of the  
11 25th anniversary of Section 8(d), Rail Banking  
12 and the National Trail System Act, and I want  
13 to thank the Board for having us here today.  
14 We are honored to be participants in this  
15 diverse array of stakeholders, people with  
16 interest in the rail banking statute.

17 Before I begin though, I would  
18 like to draw the Board's attention to the  
19 monitors, which if that button works right --  
20 yes, there we go -- what you will see, as you  
21 may have guessed, are pictures of rail trails  
22 that are rail banked under Section 8(d). We

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1 thought it important to bring the trails to  
2 the hearing, and so they are their own witness  
3 this morning.

4 Rails-to-Trails Conservancy is a  
5 national, nonprofit conservation organization  
6 founded in 1985. We are headquartered in  
7 Washington, D.C., with field offices in  
8 California, Florida, Pennsylvania, and Ohio.  
9 Our mission is to create a nationwide network  
10 of trails from former rail line connecting  
11 corridors, to build healthier places for  
12 healthier people.

13 RTC has over 100,000 members and  
14 supporters nationwide. Over the last 25  
15 years, we have taken a leading role of the  
16 defender, user, and advocate of the Trails  
17 Act. And over as many years, RTC has  
18 developed and managed a comprehensive database  
19 of information.

20 Part of that information is  
21 available to the public through  
22 [www.trailinc.com](http://www.trailinc.com), a free access Website with

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1 detailed maps, with trail overlays designed to  
2 help trail users find rail trails based upon  
3 locale, allowed uses, surface type, historic  
4 features, nearby amenities, et cetera.

5 The database also includes more  
6 esoteric information, such as the numbers of  
7 rail banking orders that have been issued by  
8 this Board and subsequent actions taken as a  
9 result of these orders. The database houses  
10 thousands of records relating to rail  
11 quarters, open trails, and trails in  
12 development. It is kept up to date on a  
13 weekly basis, and it is probably, to the best  
14 of our knowledge, it's the most comprehensive  
15 and perhaps the only national database of  
16 information about rail trails in existence.

17 We provide this background by way  
18 of establishing RTC's credibility to speak  
19 knowledgeably and authoritatively to the  
20 questions that you have posed in the call.

21 So under those questions, the  
22 success of the Trails Act corridor conversion

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1 rates. The numbers in RTC's database tell the  
2 story of success and unrealized potential. On  
3 the success side, since the program's  
4 inception, you have issued 698 rail banking  
5 orders. Of these corridors subject to rail  
6 banking requests, only 301 have been  
7 successfully rail banked, representing just  
8 over 5,000 miles. Ninety-two are currently in  
9 negotiation. One hundred and fifty-nine were  
10 abandoned when rail banking negotiations  
11 failed.

12 Of the rail banked corridors, 120,  
13 representing about 2,700 miles, are presently  
14 open to the public for use as trails, and 72  
15 corridors, representing just over another  
16 1,000 miles are currently under development.

17 As a result of rail banking, the  
18 corridors preserved for future use also  
19 provide multiple benefits to the communities  
20 in which they are located. The Pine Creek  
21 Rail Trail in Pennsylvania entertained 138,000  
22 users in 2006, generating \$5 million in

1 expenditures in the community from those using  
2 the trail.

3 Boston's Minute Man Trail, for  
4 example, serves a more urban area, has over a  
5 million users each year, many of whom have  
6 incorporated the trail into their daily  
7 commute.

8 The statute has given us treasures  
9 that range from the Cowboy Trail in Nebraska,  
10 which at 320 miles is the nation's longest  
11 rail trail, to the High Line, an elevated  
12 industrial corridor in midtown Manhattan,  
13 which opened just a few weeks ago.

14 Everyone's trail is special.  
15 Everyone's trail is the best.

16 The 159 corridors as rail banking  
17 negotiations fell short were subsequently  
18 abandoned, totaling 2,974 miles. To put these  
19 numbers in a larger perspective, our figures  
20 show that over 832 corridors have been  
21 approved for abandonment in the past 25 years,  
22 representing 9,105 miles, and your figures may

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1 actually be better on that than ours. These  
2 miles, of course, have been lost from the rail  
3 system that's regulated by the federal  
4 government and is probably not subject to  
5 conversion, although some of them, 163 of  
6 those corridors have been saved as rail  
7 trails. They're just non-rail banked rail  
8 trails.

9 So 5,000 miles save, 9,000 lost.  
10 If we were playing baseball, .358 average  
11 would be exceptional, but we're playing with  
12 our nation's future and the loss of two-thirds  
13 of what could have been saved does not really  
14 constitute success.

15 Eight (d) has performed  
16 wonderfully as a trail building tool. Its  
17 effectiveness as an instrument of corridor  
18 preservation demands improvement.

19 So what should the Board do to  
20 facilitate rail banking? Well, part of the  
21 answer to that question goes back to the  
22 original decision in 1986 when the ICC chose

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1 to adopt the interpretation that rail banking  
2 was a discretionary activity, and that that  
3 tact left the preservation of the nation's  
4 built system solely to the discretion of prior  
5 railroads. This hands off approach -- oops,  
6 my name tag fell over. We would not want to  
7 lose track of who I am. I wouldn't want to  
8 lose track of who I am.

9 CHAIRMAN MULVEY: We know who you  
10 are.

11 (Laughter.)

12 MS. FOWLER: Anyway, the way we  
13 deal with rail banking stands in stark -- or  
14 you all deal with rail banking stands in stark  
15 contrast to the Office of Financial  
16 Assistance, the longstanding provision on  
17 which the ICC transfers rail corridors from  
18 railroads to railroads, and that's a mandatory  
19 process.

20 In the absence of any regulatory  
21 mandate to participate in rail banking, many  
22 railroads decline to rail bank corridors based

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1 on misplaced concerns about potential residual  
2 liability, the lure of windfall profits  
3 through private sales, an unwillingness to  
4 leave a corridor intact that might someday be  
5 reactivated by a competitor, or for no  
6 apparent reason at all.

7 So bold railroads even use the  
8 threat of rail banking to make piecemeal  
9 corridor sales to adjacent landowners, even in  
10 cases where the adjacent landowner already  
11 owned the underlying fee.

12 Now, these reasons, we didn't make  
13 these up. These are reasons that railroads  
14 have told us over the years that's why they  
15 have not rail banked.

16 The methodology for evaluating the  
17 cost of the rail corridor for our trail  
18 manager is also different in the rail banking  
19 process from the OFA process, leading to some  
20 very high prices which are just something not  
21 reachable by public or private organizations  
22 that would want to preserve a corridor.

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1           So we think there's some modest  
2 steps that the Board could take that could  
3 encourage or facilitate rail banking. First,  
4 the time period between notice of abandonment  
5 and effective date of abandonment is  
6 frequently too short for public agencies to  
7 respond. Since exempt abandonment procedures  
8 apply to lines that have already been out of  
9 service for two years, there is no need for  
10 such an expedited time frame, particularly  
11 since this rush may well preclude rail banking  
12 and interim trail use. These time frames  
13 should, therefore, be lengthened.

14           Second, the STB should reexamine  
15 the required language for filing statements of  
16 willingness in the breadth of interim trail  
17 managers' required assumption of liability.  
18 This language, for example, has prevented the  
19 State of Florida from participating in rail  
20 banking due to state statutory limitations of  
21 the state's ability to assume liability. So  
22 there's got to be a disconnect between the

1 federal and the state law there.

2 Third, it's our experience that  
3 180 days is almost never a sufficient amount  
4 of time to negotiate a rail banking agreement.  
5 Sometimes you can't even get anybody on the  
6 phone in 180 days. It requires multiple  
7 extensions as a hardship on potential trail  
8 managers, particularly for private  
9 organizations who have to pay that \$350 fee  
10 every time an extension is made.

11 So instead a one-year time frame  
12 might be more appropriate for trail use  
13 negotiations.

14 Fourth and perhaps not so modest a  
15 proposal, to best protect our rail corridor  
16 infrastructure from future deterioration, the  
17 Board should make 16 USC 1247(d) mandatory  
18 rather than discretionary.

19 Next question: should a notice or  
20 a copy of the Trails Act be submitted to the  
21 Board?

22 Scrutiny of the rail banking

1 statistics that are provided by RTC reveal  
2 that status of 109 corridors is unknown, and  
3 these are rail banked corridors. And so a  
4 requirement that a Trails Act agreement be  
5 filed would help in keeping track of those and  
6 help us to have better, more complete  
7 information and, therefore, evaluate the  
8 program more effectively, and a document of  
9 record might also be helpful in addressing the  
10 issues that arise by the time of reactivation.

11 Who should bear the cost to  
12 restore a rail corridor for rail service,  
13 including replacing any bridges that might  
14 have been removed during interim trail use?

15 The railroad, of course. Since  
16 the witness who succeeds me will address this  
17 question in detail, I'll just make two quick  
18 points. One is that many corridors proposed  
19 by the railroads for abandonment subsequently  
20 rail banked as trails are the very ones that  
21 are most vulnerable to such natural forces as  
22 flooding and erosion. Cost of constant repair

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1 led to loss of economic viability and to the  
2 railroad's decision to cut its losses and seek  
3 abandonment.

4           Once converted to trail use, those  
5 elements continue to undermine the corridor  
6 and its construction. Restoration toward a  
7 standard necessary to accommodate trail use is  
8 one thing; to a level to sustain the tonnage  
9 of a train quite another. To require a trail  
10 manager upon reactivation to bear the cost  
11 that the railroad itself was unwilling to  
12 shoulder is just too unfair.

13           Secondly, the rail banking  
14 provisions of the Trails Act were adopted by  
15 Congress as a long-term strategy for corridor  
16 preservation. Structures deteriorate,  
17 technologies and design change. Pursuit of a  
18 policy holding trail managers responsible for  
19 maintaining railroad features to a standard  
20 necessary to accommodate rail use at a future  
21 time leads to absurdity.

22           Imagine 50 years hence when a

1 train second deck magnetically levitates above  
2 a rail based carriage. This wondrous train is  
3 way too high to fit through the somewhat  
4 dilapidated, perhaps more than somewhat  
5 dilapidated 19th Century tunnel. Would anyone  
6 seriously suggest that it is the trail  
7 manager's responsibility to anticipate and pay  
8 for future railroad facilities?

9 How have some reversionary  
10 property owners been affected by rail banking?  
11 There's been much sound and fury over the  
12 purported impact of rail bank orders on the  
13 putative property rights of adjacent  
14 landowners or the so-called reversionary  
15 property owners. These adjacent landowners  
16 point to a questionable and most importantly  
17 non-precedential decision, the Preseault case,  
18 which found that in some cases interim trail  
19 use imposes an additional easement on the rail  
20 corridor for which the underlying law owner is  
21 entitled to compensation.

22 However, it is important to note

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1 that the courts have never found that the use  
2 of these corridors for rail banking in any way  
3 imposes these so-called reversionary  
4 interests.

5 In other words, the state or  
6 political subdivision acquired a quarter and  
7 simply banked it unused and undeveloped for  
8 the foreseeable future while in the meantime  
9 wholly excluded adjacent property owners from  
10 the land. These property owners would have no  
11 cause to complain about a taking of their  
12 property since rail banking is unquestionably  
13 a permissible use of railroad easement.

14 The court's interpretation of the  
15 law has provided an economic windfall to  
16 adjacent property owners and an even greater  
17 one to the class action legal counsel who  
18 represents them who richly profited from the  
19 compensation litigation.

20 As a result of interim trail use,  
21 underlying property owners receive a payment  
22 from the United States government to

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1       compensate for the additional use trail  
2       easement in the corridor while at the same  
3       time they now have access to the corridor from  
4       which they would otherwise have been excluded,  
5       and they retain the underlying fee interest in  
6       the corridor and the right to repossess the  
7       property if interim trail use ceases without  
8       any reactivation of service.

9               The benefits to adjacent  
10       landowners does not end here. Study after  
11       study has demonstrated that trails increase  
12       the value of adjacent property, more than  
13       similar property not adjacent to a trail, and  
14       protect the homes from flood damage by  
15       absorbing excess water.

16               Adjacent property owners,  
17       including some of the most vocal opponents of  
18       the trail are the most avid users, with the  
19       attendant-- oops, that's that yellow light.

20               So they have many benefits. In  
21       conclusion, we have an extraordinary  
22       investment out there in our built rail system.

1 Congress gave us the National Trail System  
2 Act, and the Trails Act is the tool to  
3 accomplish the goal with which to protect it.

4 The Surface Transportation Board  
5 and RTC have been partners in this endeavor,  
6 and the statute has become a forging policy  
7 which has not only given us the 2,700 miles of  
8 rail bank trails, but has also created an  
9 atmosphere in which we've had many other rail  
10 trail conversions so that we now have 15,347  
11 miles of open public rail trail nestled in  
12 former rail corridors and more to come.

13 Between us we've done well, but on  
14 balance not well enough. We look forward to  
15 a stronger partnership and stressing as we  
16 tackle the old problems that we have  
17 identified here today -- does that mean you  
18 turn off the microphone?

19 CHAIRMAN MULVEY: No, no.  
20 Continue.

21 MS. FOWLER: Okay. The new ones  
22 that will arise as we urban relocations and

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1 rail trails opportunities, and as now we've  
2 got the reactivation and the even newer ones  
3 that we haven't thought of yet, but we will  
4 because we must become better stewards of our  
5 trail state.

6 Thank you.

7 CHAIRMAN MULVEY: Thank you very  
8 much, Ms. Fowler.

9 Mr. Montange.

10 MR. MONTANGE: Mr. Chairman, good  
11 morning. My name is Charles Montange, and Mr.  
12 Vice Chair. I have the honor today to testify  
13 on behalf of Madison County Transit, which  
14 runs the public bus system for Madison County,  
15 one of the Illinois suburbs of St. Louis.

16 Mr. Cain, the Executive Director  
17 with whom I worked on rail banking and rail  
18 trails and preservation of right-of-way for  
19 mass transit for the past 20 years, asked me  
20 to specifically note to the Board that Madison  
21 County Transit is also responsible for urban  
22 mobility in the St. Louis area generally as it

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1 runs the van and carpooling system, organized  
2 van and carpooling system for the whole metro  
3 area and is, in general, very committed to  
4 what he calls green transportation and,  
5 accordingly, used the subject of this hearing  
6 as extremely important not only to his agency,  
7 but to the St. Louis metro area generally.

8 MCT has extensive experience in  
9 proceedings before this agency involving rail  
10 abandonments and rail trails. I have even  
11 more extensive experience, as some on the  
12 Board know, especially at least one of those  
13 ladies behind you. I've been at this since  
14 practically the inception of the statute.

15 I'm here today, however,  
16 specifically on behalf of Madison County  
17 Transit, which has a considerable interest in  
18 rail banking as it has participated in six  
19 different proceedings that we could count over  
20 the past week, five of which were successful  
21 in acquiring trails and acquiring trails' rail  
22 bank corridors, and all five of which actually

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1 have trail development on them at this time.

2 I want to thank the Board for  
3 having this hearing. This is the first  
4 hearing, actual oral hearing, I have been to  
5 on the rail banking statute or in a rail  
6 banking proceeding since, I think, 1988 when  
7 the CSX or the Chessie system was abandoning  
8 the Georgetown Branch here in town. And at  
9 that time there was an oral hearing on the EIS  
10 that then the ICC required for the system, for  
11 the Georgetown Branch, and I think this is the  
12 first time since then that there's ever been  
13 a hearing on rail banking and the trail  
14 statute. So I think this is a welcome action.

15 I'm not sure what happened to my  
16 chair, but I'm going to substitute.

17 CHAIRMAN MULVEY: A little lever,  
18 you pull up on that and then you pull it back  
19 up again.

20 MR. MONTANGE: Maybe I kicked it  
21 with my foot.

22 CHAIRMAN MULVEY: You have to be

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1 careful with your leg or you'll sink down.

2 MR. MONTANGE: Oh, well. If it  
3 will happen, it'll happen to me.

4 This is the first comprehensive  
5 review also, I believe, that the federal  
6 regulatory agencies have undertaken of the  
7 statute since roughly 1990 when the ICC issued  
8 a policy statement in ex parte 274. The  
9 policy statement at that time was directed at  
10 the initial implementation of rail banking,  
11 that is, how the agency construed the rail  
12 banking statute at the time of abandonment.  
13 That's primarily oriented toward the  
14 acquisition of the about to be abandoned  
15 corridor for continued public use of some sort  
16 that's preservation.

17 Not much has changed since that  
18 policy statement. I see no real reason to ask  
19 for a diversion from that policy statement or  
20 the policies that the old ICC was  
21 implementing, with one possible exception to  
22 which Marianne, my old colleague from RTC days

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1 --

2 MS. FOWLER: Old?

3 MR. MONTANGE: -- alluded to. I'm  
4 older, and that is that if the Board is  
5 genuinely interested in exploring ways to  
6 enhance use of rail banking at the time of  
7 abandonment and you lose the opportunity after  
8 abandonment has occurred, about the only  
9 thing, the only adjustment I can reasonably  
10 think of to go in the direction of enhancing  
11 its use would be to look at some kind of  
12 mandatory application of it.

13 That would be difficult given the  
14 position of other interest groups, but at  
15 least in some circumstances, such as in cases  
16 where a rail bank trail exists, you have a  
17 segment that is currently in rail use  
18 connecting to the rest of the built rail  
19 system, and that segment that's in use then  
20 comes up for abandonment for whatever reason  
21 the railroad refuses to negotiate trails  
22 agreement that can result in a severance of

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1 your rail bank section from the rest of the  
2 main line, and it seems to me to be incredibly  
3 unfair if that were to disqualify the severed  
4 section from continued rail banking  
5 preservation.

6 And in circumstances like this,  
7 the Board needs to develop some kind of policy  
8 so that it doesn't put those rail bank  
9 segments that exist or rail bank in good faith  
10 by the railroad at the time put those at risk  
11 because opponents of rail banking will  
12 frequently argue that a severed section is no  
13 longer eligible for rail banking on grounds  
14 that it can't be reactivated because of the  
15 severance.

16 So at least in those circumstances  
17 you might like to at least give some thought  
18 there.

19 The bulk of the thrust of the  
20 Board's other specific questions relating to  
21 the Trails Act seem to me to relate to  
22 reactivation issues. If you are going to

1 reactivate rail service on a rail bank  
2 corridor, how should you go about it? What  
3 should happen?

4 I'm going to speak from the point  
5 of view of a transit agency, which is Madison  
6 County transit. We acquire these things for  
7 two basic purposes in mind. One of the  
8 principal purposes is there's a light rail  
9 system in St. Louis, and Madison County  
10 Transit being interested in green  
11 transportation wants to preserve corridors for  
12 an extension of that service into Madison  
13 County.

14 If you look at the maps that I  
15 furnished as exhibits, you'll see that many of  
16 our rail trails look like they're a fan or set  
17 of fingers spread out from the St. Louis metro  
18 area. We expect that many of these would be  
19 ideal rail trail -- what would be ideal light  
20 rail corridors.

21 In addition to that, because the  
22 Madison County Transit is a green

1 transportation agency, they're extremely  
2 interested in trails. Why? Because they have  
3 a bus-bike system. They want to encourage  
4 people to get to their bus stops.

5 Most people don't want to walk  
6 more than three or four blocks to get to a bus  
7 stop. So if they're trying to get folks to  
8 your bus system, you either have to put a  
9 parking lot in and have people drive to it or  
10 else get them to walk or bike. Many folk, if  
11 they're going to get on a bike, would prefer  
12 to have a dedicated bikeway because they feel  
13 safer. It's very simple.

14 And if you think I will walk 15  
15 minutes to a bus stop, in 15 minutes you can  
16 go, oh, six blocks maybe. That would be  
17 maxing you out, especially in an urban area.  
18 On a bike you can go a mile or two. Even  
19 someone who's not very used to biking can get  
20 a mile or two on that. So it spreads out the  
21 number of folk that would use their bus  
22 system.

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1                   And in addition to all of that, it  
2 provides open space, recreation, and all the  
3 other benefits that are typically associated  
4 with preserving an old rail bank or old  
5 corridor.

6                   Many of our corridors are, as I've  
7 indicated, rail bank, but many aren't, and  
8 indeed, many of the Madison County Transit  
9 trails are not even on an old railroad right-  
10 of-way. They operate stuff on a university  
11 campus, and they also have an extensive system  
12 over on the Mississippi River levy.

13                   Anyway, it's a matter of great  
14 concern to Madison County Transit how rail  
15 reactivation is handled, and let me put it  
16 this way. When we buy one of these corridors  
17 from either Norfolk Southern or Union Pacific,  
18 we pay consideration for them. After we pay  
19 consideration, Madison County Transit invests  
20 its own funds or gets grants from public  
21 agencies, including the federal government, to  
22 put in a trail, transit nodes, parking lots,

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1 bus stops on these things, and in addition, if  
2 we ultimately get to the stage of light rail,  
3 we'll spend a fortune putting in a light rail  
4 system.

5 If Madison County Transit loses  
6 that investment upon freight rail  
7 reactivation, it would be catastrophic. If  
8 the law is that the owner, the rail banking  
9 owner, of a railroad right-of-way has no right  
10 to compensation before freight rail service is  
11 reactivated, then rail banking loses its  
12 luster rapidly for an entity like ours, and we  
13 think for many other at least urban rail trail  
14 owners. We would probably be getting out of  
15 the rail banking business just as fast as we  
16 possibly could.

17 Now, as I've indicated in our  
18 written testimony, we're very concerned about  
19 a case that came out, I believe, in 2004  
20 called Georgia Great Southern. That has been  
21 interpreted by some as indicating that a rail  
22 bank rail corridor can be restored for service

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1 without any compensation whatsoever, without  
2 any compensation whatsoever to the rail  
3 banking owner.

4 That is extremely distressing to  
5 an entity like us. Now, I point out that  
6 especially on light rail, which is very  
7 expensive, the old ICC at almost the same time  
8 it came out with that policy statement came  
9 out with a decision in the Georgetown Branch  
10 case saying light rail is compatible with rail  
11 banking. So you can put light rail on a rail  
12 bank corridor.

13 Well, it's not compatible with  
14 rail banking if we can lose the whole system.  
15 Instead it's like a set-up. Anyone who claims  
16 that they want to reactivate service could  
17 divest us of our investment, and that would  
18 allow kind of a shakedown situation, if you  
19 will. Somebody charge a regulatory rent so we  
20 could continue our use.

21 So we ask that the Board be very  
22 attentive to that particular issue.

1                   Now, I want to address one other  
2 subject because Marianne told me she was  
3 expecting me to, and that is what happens with  
4 respect to bridges, other structures on the  
5 right-of-way.       Who is responsible for  
6 restoration?

7                   If I might, I'll just conclude on  
8 that.

9                   Abandonment authorization and a  
10 rail banking authorization operate exactly the  
11 same way in respect to salvage of rail  
12 structure on the premises. They authorize the  
13 removal of rail and bridges, for that matter.  
14 It just happens that in general a trail owner  
15 likes to preserve a rail bridge.

16                   But many of those bridges are in  
17 very deteriorated condition when they're  
18 received by the -- one of the reasons the line  
19 is abandoned is because bridges take a lot of  
20 money to maintain and restore. So they come  
21 to the -- the trails aren't frequently in bad  
22 condition at all, but the key point is the

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1 abandonment authorization or rail banking and  
2 abandonment, 9-2, also authorized abandonment,  
3 anticipates a salvage.

4           Once that goes into place then it  
5 follows that there should be no obligation on  
6 the rail banker per se to restore a structure  
7 for rail reactivation, and that's all the more  
8 so if we're not going to be paid.

9           So you know, we're not enslaved to  
10 a short line railroad or even one of the main  
11 lines. Once an agreement is struck, the deed  
12 is issued, the obligation of restoration  
13 should be on whoever holds the current common  
14 carrier obligation for the right-of-way. I  
15 say that sort of categorically.

16           Now, I would like to close on a  
17 couple of notes. We fully concur that  
18 railroad corridor are a natural -- akin to a  
19 natural and a national resource. They're very  
20 hard to assembly in a populated area, very  
21 hard to assemble. Once lost they can be lost  
22 forever. About the only current way to

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1 preserve them or the most inexpensive current  
2 way to preserve them to get you any kind of  
3 current use at all is through trail use, and  
4 rail banking is ideal for that purpose.

5 In terms of how to handle this in  
6 the future, I'll note that the rail banking  
7 statute kind of came into its own only in the  
8 very late '80s or I'd argue after the Supreme  
9 Court's Preseault decision in 1990. Before  
10 that time, here's a book called Right-of-way,  
11 a Guide to Abandoned Railroad Corridors, put  
12 out by this old gentleman here who died in  
13 1989, and in his retirement he got infatuated  
14 with old rail corridors from an historic and  
15 trail use point of view. He did a compilation  
16 of some 84,000 miles of abandoned railroad  
17 corridor, lost forever since the height of the  
18 build rail system around the time of the 1920s  
19 until roughly 1989.

20 Now, since then I think one of the  
21 witnesses said there's probably been another  
22 15,000 miles known to be abandoned. Of the

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1 84, 85,000 miles, he documents rail banking  
2 was effectively not available and almost all  
3 of this is lost, probably lost forever.

4 What we're dealing with is the  
5 tail of the dog, and we're trying to close the  
6 barn door after the horse is out. So the bet  
7 things you could do is try to optimize now.  
8 We're kind of down to the stems; the branches  
9 of the tree are all trimmed. You're down to  
10 the stems. We would urge the Board to do  
11 everything it can to enhance use, the  
12 preservational use of this statute. Look for  
13 ways to encourage people to preserve these  
14 rights-of-way for future use and to be mindful  
15 that the future rail use should not be viewed  
16 narrowly as a freight rail use, but also  
17 include our light rail and passenger rail  
18 options.

19 I mean, that really is becoming  
20 increasingly federal policy as we become far  
21 more concerned about climate change and our  
22 dependence on foreign sources for oil.

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1 Thank you very much.

2 CHAIRMAN MULVEY: Thank you very  
3 much, Mr. Montange.

4 I'll start with a few questions.  
5 First of all, in the interest of full  
6 disclosure, I myself as a trail user. I do  
7 use the Capital Crescent Trail. I bike into  
8 work. I haven't done so far this year, but I  
9 intend to begin doing that again. So I have  
10 taken advantage of the program.

11 However, I'm also mindful of the  
12 purpose of the program, and the purpose of the  
13 program is to preserve the rights-of-away for  
14 possible reestablishment of freight railroad  
15 use if, indeed, circumstances change. So  
16 there's a reason why we're trying to preserve  
17 these corridors, and we are making good use of  
18 them while they are rail banked.

19 Ms. Fowler, you suggest that trail  
20 sponsors not be compelled to pay for those  
21 activities that will be required to restore  
22 rail service over a rail bank line.

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1 Theoretically why should trail sponsors not be  
2 required to do this?

3 And if so, should there be some  
4 limit in changes that rail sponsors are  
5 allowed to make during the interim trail use?

6 It seems to me that there are some  
7 changes that, as you said, make sense and have  
8 to be done because of the condition of the  
9 bridges or what have you, which probably  
10 should not be compensated for, but if there  
11 are other major changes which are done simply  
12 in the interest of the trail and not in the  
13 interest of the restored railroad, shouldn't  
14 the trail sponsor be required to undo those?

15 MS. FOWLER: It's difficult for me  
16 to answer that in the hypothetical. You know,  
17 in thinking of what kind of -- other than  
18 major structures which are subject to the  
19 deterioration for the time, the huge  
20 preponderance of activity is that trail  
21 managers sticks to the rail corridor. There's  
22 both an effect and a practicality to doing

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1 that.

2 Sometimes you have to reroute  
3 because there might be pollutants, and so  
4 you'd have to seek an alternate route, you  
5 know, around a polluted site, but of course,  
6 that pollution was caused by the railroad, and  
7 since it is quite possible that that original  
8 corridor might deteriorate somewhat.

9 Sometimes also as urbanization  
10 occurs and suburbanization, the pressures on  
11 a trail will cause some breakdown of the  
12 corridor and state DOTs will come in and  
13 change crossings and what have you. So I'm  
14 not sure that the right to the responsible  
15 party is the trail manager, but perhaps the  
16 entity that caused the incursion, and maybe  
17 there should be some sort of -- to get at what  
18 you're dealing with, there should be some sort  
19 of -- if you're going to make a major change  
20 to a rail corridor, there has to be some sort  
21 of agreed upon, maybe supervised process.  
22 That's the way to do it.

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1                   CHAIRMAN MULVEY: Well, I said in  
2 my opening statement that this seems very  
3 straightforward, but then there's all of these  
4 complexities that can arise. Another way of  
5 saying that, the devil is always in the  
6 details.

7                   Is it possible that a lot of these  
8 issues can be resolved between the trail  
9 sponsor and the railroad in the trail use  
10 agreements and there could be plausible  
11 agreements that spell out clearly who is  
12 responsible for what and so that we don't have  
13 the disagreements over who should pay to  
14 restore the bridges? So, that could all be  
15 spelled out in the trail use agreements?

16                   And I address that to both you and  
17 Mr. Montange.

18                   MS. FOWLER: I think that we can  
19 go a long way in that direction, and I think  
20 trail use agreements do tend to be more  
21 detailed and complicated now. I know they're  
22 negotiating one in Pennsylvania right now

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1 where a bridge is actually a subject of great  
2 disagreements, one of the hardest things to  
3 work out between the abandoning railroad and  
4 the -- it's actually a land trust group.

5 So, yes, I think that agreement  
6 can be used as a vehicle for that, but even  
7 so, 50 years from now what made sense now does  
8 not make sense then.

9 CHAIRMAN MULVEY: Mr. Montange.

10 MR. MONTANGE: I think it's a very  
11 good question. I will tell you what I -- I'll  
12 give you my general approach when I'm advising  
13 a rail banker owner, and that is to behave as  
14 if he or she or it is a railroad. I really  
15 think that the best approach the Board can  
16 take, in general, on this is to treat the rail  
17 banker as a railroad, but without a common  
18 carrier obligation, current common carrier  
19 obligation.

20 So you have certain obligations  
21 that flow from the fact that you're a railroad  
22 or you're treated a certain way at the STB if

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1 you're a railroad, and you're also treated a  
2 certain way if you have a common carrier  
3 obligation, so to sort that out and kind of  
4 figure out kind of where things lie.

5 So if you're the rail banker owner  
6 of the railroad, you've got what amounts to a  
7 line where salvage has been allowed, but you  
8 still have the squarest obligation you've got  
9 to keep the corridor intact.

10 So what I tell people is don't  
11 sell anything. You know, you are alienating  
12 stuff that at your risk could result in what's  
13 called the severance, and although the Board  
14 has no direct decision that I'm aware of where  
15 they've ever derail banked a corridor because  
16 of severance, they certainly held that out as  
17 a possibility in the dicta.

18 So you don't want to do anything  
19 with the corridor that would result in a  
20 severance. I'd tell people don't put a new  
21 county jail in the middle of the corridor  
22 because that could be considered as severance.

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1 You've devoted it to something that's just not  
2 a biotic or transportation use at all.

3 But what does a railroad do with  
4 its corridor? Well, it will allow streets to  
5 be located on it. Many of them will allow a  
6 trail to be located on it. Many will put  
7 parking lots on it, especially in urban areas.

8 Those kind of uses, yeah, they  
9 sort of flow. They commonly are not  
10 understood as a significant interference with  
11 the rail use.

12 Then I advise them that if the  
13 county or state highway department approach  
14 you and they say, "You've got to get rid of  
15 this big, old bridge because we want to widen  
16 our two-lane road to be a new six or eight  
17 lane interstate. You're just a bunch of trail  
18 users. Let us take out this bridge. It will  
19 cost us a fortune to restore it for rail use,"  
20 I said, "Well, I don't know what the Board is  
21 going to do there. I advise you to get the  
22 state highway department to agree that if a

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1 railroad is ever restored and someone tries to  
2 tag you with liability, that you require the  
3 state highway department to bear that cost and  
4 not assume it yourself."

5 And that is generally what Madison  
6 County Transit tries to do with Illinois DOT  
7 because we're hit up with this kind of stuff  
8 all the time. But realize that Madison County  
9 Transit can afford to hire people like me or  
10 Fritz Kahn or someone else around here that  
11 could say to them, "You'd better watch out."

12 A lot of folk out there, they  
13 don't know what Washington, D.C. federal  
14 regulatory practice is, and certainly the STB  
15 has no best practices guide out right now that  
16 is advising folk on what they ought to or  
17 ought not to do.

18 In general then my view on stuff  
19 like bridges is that because the abandonment  
20 authorization allows the removal of  
21 structures, and that's commonly understood to  
22 include bridges, that the fact that a bridge

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1 is removed pursuant to an abandonment or rail  
2 banking, the same thing, should not result in  
3 liability either on the part of the railroad  
4 that salvaged the bridge in the first place  
5 or, if the rail banker salvaged the bridge, on  
6 his liability either. The responsibility to  
7 restore those kind of things should rest with  
8 the person who gets the current common carrier  
9 obligation or reactivates it, just as if you  
10 were doing new rail construction.

11 If it's new rail construction, the  
12 underlying owner of a parcel that's going to  
13 have a bridge doesn't have to build the bridge  
14 for the railroad. The railroad builds the  
15 bridge for the railroad. So that's how I  
16 would handle that.

17 But in terms of how the corridor  
18 itself is used, my advice to my client -- and  
19 I would think it would be consistent with the  
20 Board's view -- would be don't do what a  
21 railroad wouldn't do.

22 Now, having said that, some

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1 railroads will certainly sell off, and they  
2 don't have to go to the Board for approval,  
3 surplus edges on the corridor. They'll sell  
4 off the underlying fee and preserve a railroad  
5 easement. Heavens, I've been instances  
6 recently where some of the railroads even  
7 purport to sell the whole thing and don't  
8 reserve a railroad easement without getting an  
9 abandonment authority, and those are very  
10 troubling.

11 Certainly, if you're going to let  
12 a railroad go free, well, they'd be able to  
13 sell off its underlying interest in total  
14 without any kind of sanction. Then that  
15 narrows the -- I mean, why should more be  
16 required of the rail banker owner? In  
17 general, the railroad probably should be  
18 keeping at least a railroad easement and its  
19 basic structures intact until it gets  
20 effective abandonment authority, and  
21 similarly, a rail banker should be at least  
22 keeping the corridor intact sufficient to

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1 operate a trail and a railroad until it either  
2 de-rail banks the thing or until there's rail  
3 reactivation of some sort.

4 I don't know. That's sort of a  
5 general view of how I think this thing should  
6 probably shuffle out that's fail to all.

7 MS. FOWLER: It does occur to me  
8 that if there were more specific details of  
9 what should and must be preserved or would be  
10 preserved in a railroad agreement, that would  
11 actually give the trail manager some  
12 protection against other powers or entities in  
13 the state, like the state DOT or what have  
14 you, who are pursuing their own interest of  
15 wanting to take a bridge down.

16 They would have to find ways of  
17 doing that, but if it were compatible with  
18 protecting both the trail integrity as well as  
19 future railroad integrity.

20 On the other hand, you know, we  
21 had this sort of crazy mayor down in Texas who  
22 put a heliport right in the middle of the rail

1 trail, and I don't know what you can do about  
2 things like that. I mean, he's not in office  
3 anymore, and that is a community that's not  
4 particularly economically viable, and they  
5 were left with a heliport in violation of the  
6 law. So there you have it.

7 MR. MONTANGE: One other note. On  
8 bridges, for example, you have highway  
9 crossovers of rail, rail crossover of highway.  
10 In general, the Board has taken a kind of  
11 hands off position on crossings generally. So  
12 you've got river bridges. You've got highway  
13 bridges. You've got railroad bridges. All of  
14 them have a kind of different sort of feel,  
15 and it's hard to come up with a general rule.

16 I've negotiated many trails use  
17 agreements on behalf of the rail banker owner,  
18 and I don't recall of any instance where we  
19 ever thought that the rail banker owner would  
20 have an obligation to restore a bridge,  
21 although in general it's in the interest of  
22 the rail banker owner to do so wherever

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1 possible. Wherever they can get away with it,  
2 we like to do it because if the bridge will  
3 support an 80 ton locomotive or coal train,  
4 it's going to support whatever a trail user  
5 puts on it.

6 The main threat to these things  
7 tends to be washout problems at rivers and  
8 state highway departments. So if you were to  
9 do something, maybe make the state highway  
10 department or county highway department liable  
11 for restoration, that would help scare them  
12 off, honestly. It's kind of like that.

13 CHAIRMAN MULVEY: Would it be  
14 useful or helpful for the Board to work with  
15 trail owners and railroads or through the  
16 rulemaking process or to develop some sort of  
17 prototype or some sort of sample Trails Act  
18 agreement and say these are the things that  
19 need to be addressed or that should be  
20 addressed or that are recommended to be  
21 addressed in the Trails Act agreement so that  
22 some of these issues would be resolved in the

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1 agreement and would not be so contentious or  
2 do you think that it's just too complicated to  
3 come up with a prototype?

4 MS. FOWLER: As long as the  
5 prototype were not mandatory but were  
6 suggestive, that maybe you violated the  
7 prototype at your own risk, and also as long  
8 as there was good public input into developing  
9 the prototype so that we would have a body of  
10 prospective, I think that could be very  
11 helpful.

12 You know, we try to provide  
13 templates and prototypes to people with rail  
14 banking trails. As matter of fact, we  
15 sometimes fill them out and what have you. So  
16 the more consistency we can get I think the  
17 better it is.

18 CHAIRMAN MULVEY: When you have  
19 developed those on your own, have you worked  
20 with the railroads to develop those or have  
21 they been basically developed by the Rails-to-  
22 Trails Conservancy for people trying to

1 develop a trail?

2 MS. FOWLER: Mostly with the  
3 Rails-to-Trails Conservancy with people trying  
4 to develop a trail.

5 CHAIRMAN MULVEY: I was sort of  
6 thinking of one that took into account all  
7 parties, both parties.

8 MS. FOWLER: Yes, I think that  
9 would be very good, yes.

10 MR. MONTANGE: The issue of an  
11 agreement is a tough one, I think. From my  
12 point of view in dealing with railroads, I see  
13 them as the people in the most powerful  
14 bargaining position because it'd kind of -- if  
15 you have ever read the science fiction book  
16 Dune, it's how Paul Muad'Dib ultimately wins,  
17 is he's able to destroy something. It's not  
18 that he can beat the empire. It's that he can  
19 destroy everything, and ultimately when you  
20 want to apply the rail banking statute, it's  
21 generally in a situation where if you -- I did  
22 it again -- if you don't get the agreement,

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1 then the whole corridor is going to fall  
2 apart.

3           So you're under considerable  
4 pressure by the railroad to do what they say,  
5 and it is difficult in that kind of situation  
6 to imagine that some of the Trails Act  
7 agreements -- also, you have to also  
8 understand that the railroad property  
9 departments generally are interested in huge  
10 deals, and especially with the larger carriers  
11 don't want to waste a lot of time on some four  
12 miles and palavering over the details of  
13 something that they don't want to really deal  
14 with because they get their commissions and  
15 get their salary by maximizing the amount of  
16 money they get for the railroad.

17           So it's a difficult situation. I  
18 think that perhaps a way to approach it,  
19 certainly there are private agreements that  
20 deal with many of the subjects, like rail  
21 reactivation, and there are rail banking  
22 agreements that do deal with that, talk about

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1 what should happen at least in bare bones  
2 fashion, but maybe develop a set of  
3 presumptions on what should happen that could  
4 be altered by agreement so that it's on the  
5 table.

6 The other issue you have is, as I  
7 said, the horse is out of the barn. First,  
8 the horse is out of the barn on many of these,  
9 but most of these things have been lost  
10 already. The amount of abandonments that  
11 we're going to see in the future is going to  
12 taper off even more. So most of the rail  
13 banking agreements, to the extent they have  
14 now been reached are in place and they won't  
15 have the benefit of a set of best practices or  
16 guidance from the Board.

17 In retrospect, it would be nice if  
18 rail banking had been available in 1928 and  
19 ICC had worked out all this stuff for us so  
20 we'd have it in place by now, but one wants to  
21 be careful of retroactive application, too.

22 CHAIRMAN MULVEY: Thank you.

1 Vice Chairman Nottingham, any  
2 questions?

3 VICE CHAIRMAN NOTTINGHAM: Thanks,  
4 Chairman Mulvey.

5 I had just a couple questions.  
6 Ms. Fowler, thank you for being here and thank  
7 you for all your good works.

8 MS. FOWLER: You're welcome.

9 VICE CHAIRMAN NOTTINGHAM: I want  
10 to make sure I understand your testimony. You  
11 made the point, I believe, that on the  
12 discretionary versus the mandatory aspect of  
13 rail banking.

14 MS. FOWLER: Yes.

15 VICE CHAIRMAN NOTTINGHAM: The  
16 idea whether, if I understand it correctly,  
17 your point is that railroads when they seek to  
18 abandon rail property should be required to  
19 enter into a trails agreement, whether or not  
20 they think it's a good idea or in their best  
21 interest or not. Is that a fair --

22 MS. FOWLER: Yes, because that's

1 the mechanism that Congress has established  
2 for preserving the corridor. I think that  
3 that's the primary value here.

4 One way of preserving the corridor  
5 is for a short line to take over operation.  
6 That preserves the corridor. So as we go down  
7 that chain, then the next option is rail  
8 banking. That preserves the corridor.

9 So it's not so much that they're  
10 being forced to make a trail. It's that that  
11 is the means for preserving the corridor that  
12 Congress has identified.

13 VICE CHAIRMAN NOTTINGHAM: Did  
14 Congress mandate that railroads enter into  
15 trail agreements? If so, our current policy  
16 is against the law. I need to know that.

17 MS. FOWLER: Well, as I understand  
18 it, this is before, not being as old as Mr.  
19 Montange seems to think I am; this was before  
20 I joined the Rails-to-Trails Conservancy, and  
21 so Chuck can maybe shed more light on this.

22 But my understanding is that

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1 initially the ICC was inclined to think that,  
2 yes, Congress had meant the rail banking to be  
3 a mandatory, you know, following that line.  
4 If the major carrier wanted to abandon, if no  
5 other rail line wanted to carry on the  
6 railroading function or use of the corridor,  
7 then if there was a willing trail manager,  
8 that that would occur.

9           There was huge, you know, sort of  
10 backlash, if you will, from the railroad  
11 industry for that interpretation of Congress'  
12 law, and that's when the ICC came out with  
13 that interpretation. It was challenged in  
14 court, and eventually the courts ruled that  
15 the SEC's interpretation was a reasonable one,  
16 not the only possible one under the  
17 construction of the law, but was a reasonable  
18 interpretation.

19           So where does that leave you in  
20 terms of congressional intent? Certainly  
21 every time we looked at the possibility of  
22 going back to Congress to strengthen the law,

1 it seemed not to be at the top of Congress'  
2 list of priorities and not to have much chance  
3 of passing. I mean, members of Congress were  
4 interested, but you never want to particularly  
5 introduce something that you don't think can  
6 make its way through.

7 So that's where it has been left.

8 VICE CHAIRMAN NOTTINGHAM: I would  
9 just say as one Commissioner that my read of  
10 the statute is Congress did not mandate that  
11 railroads enter into trail agreements, and  
12 they did that very purposefully in a  
13 consistent manner with most of the other major  
14 what I'll call natural resource preservation  
15 statutes that exist, whether it be historic  
16 preservation, which certainly has some  
17 mandatory components to it, but open space and  
18 scenic easements, all very important social  
19 goods that we try to and Congress has tried to  
20 promote, but typically not so much in a  
21 mandatory, but I'll give you an example.

22 One of the thresholds for

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1       qualifying for protection as an historic  
2       property, as I'm sure you know, is that the  
3       property be 50 years of age or older. If  
4       property owners out there felt that the law  
5       was going to be changed to mandate that every  
6       piece of property that turned 50 was going to  
7       be encumbered with historic preservation  
8       restrictions on reconstruction or  
9       redevelopment, that would be a huge seachange.  
10      It would also trigger, I'm guessing, some  
11      private behavior about what people do when  
12      their property gets 48, 49 years, and it could  
13      be historically significant at that point,  
14      destined for great things, but the owner wants  
15      to take advantage of his or her property  
16      rights and decides to take down the property  
17      or something.

18                        So I just would say I think the  
19      law is pretty clear that railroads are not by  
20      statute required to enter into it, and that  
21      that's consistent with many, if not most, of  
22      the historic preservation open space, scenic.

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1 I'd say this as somebody who as  
2 head of the Virginia Department of  
3 Transportation dramatically increased  
4 investments primarily out of the enhancement  
5 grant program in trails, in Civil War  
6 battlefield scenic easements, and we were  
7 pioneers. We were one of the first states to  
8 ever put major money through the enhancement  
9 program into Civil War battlefield  
10 preservation. People before that thought that  
11 might not be legal or doable, and we did it,  
12 and we weren't challenged.

13 So I say this as an advocate. I  
14 think you get better results when a social  
15 good is voluntarily pursued as opposed to  
16 mandated. Our challenge is to juggle multiple  
17 social goods here at the Board, the social  
18 good of mobility and freight and passenger  
19 rail corridors, which have done a lot of good  
20 things for our country historically and will  
21 in the future, whether you look at trying to  
22 reduce our carbon footprints and get people

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1 less dependent on oil and gas, and the social  
2 good, of course, of trails.

3 And I'm a trail user myself and  
4 used a trail to get to work just last week.  
5 So I say this as a supporter of trails, but  
6 any feedback on this? Mr. Montange, any?

7 MR. MONTANGE: Well, the argument  
8 that the Commission would at least have the  
9 power under the statute for mandatory use is  
10 because the statute and I think its final  
11 sentence says "shall order rail banking," not  
12 "may" but "shall," in the event that someone  
13 is willing to assume the various liabilities  
14 the statute provides.

15 However, three courts of appeals  
16 have upheld the old ICC interpretation, and I  
17 think you could ask your Office of General  
18 Counsel what the legal position of the Surface  
19 Transportation Board would be under those  
20 circumstances in the event of a change of the  
21 law.

22 However, I think what Marianne and

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1 to some degree Madison County Transit were  
2 saying is if you're looking for ways to  
3 enhance the preservation of corridor under the  
4 rail banking statute, about the only thing at  
5 the initial inception of the rail banking  
6 statute that its application that we can think  
7 of, I can think of and she can think of is  
8 probably in the area of looking at more  
9 mandatory application or broadening the  
10 ability of the trail, the rail banker to do  
11 something against what the threat of trail  
12 destruction is.

13 As I said, there's a bit of an  
14 uneven, from my point of view, bargaining  
15 position since the railroad can just say we're  
16 going to walk. You know, unless you meet our  
17 compensation demands, goodbye, because we're  
18 interested in getting as much out of you as we  
19 can.

20 And that's a threat to a national  
21 resources, but having said that --

22 VICE CHAIRMAN NOTTINGHAM: Can I

1 just jump in on that thought --

2 MR. MONTANGE: Sure, yeah.

3 VICE CHAIRMAN NOTTINGHAM: --

4 before you move on?

5 Isn't that the case though any  
6 time there's negotiation between a property  
7 owner and somebody who would like to become a  
8 property owner or property user. In other  
9 words, the property owner in our country has  
10 the option typically to say, "Well, never  
11 mind. I need to think about this a little  
12 longer."

13 MR. MONTANGE: Yes, yeah. You  
14 could argue that, Mr. Vice Chairman. I would  
15 counter with one notion, and that is that a  
16 railroad is a regulated entity and has been by  
17 this Board and its predecessors. I mean, the  
18 ICC was the original federal regulatory agency  
19 and has had abandonment jurisdiction since  
20 what, 1920? And they got that because it was  
21 so hard for the railroads to get abandonment  
22 as I understand it from the state. They're

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1 usually under some state charters that  
2 virtually precluded them shy of bankruptcy of  
3 getting rid of lines.

4 And so, you know, it isn't the  
5 same as if, say, I had an Iowa farm and I  
6 wanted to have a conservation easement on it,  
7 but I wanted to be compensated and I want to  
8 negotiate that compensation or I had a  
9 historic building in Virginia horse country  
10 and someone wanted that to be preserved and  
11 you'd want to negotiate compensation. That's  
12 a private land, a completely private  
13 landowner. It's not railroad property.

14 VICE CHAIRMAN NOTTINGHAM: Can I  
15 explore that a little bit with you?

16 MR. MONTANGE: Sure.

17 VICE CHAIRMAN NOTTINGHAM: Because  
18 we do hear this from time to time. If I hear  
19 you correctly, you're saying in different  
20 words than I'll put it that property owned by  
21 private railroads in the United States,  
22 they're private property, but they're a lesser

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1 type of private property than private property  
2 that would be generally otherwise recognized.  
3 It's some kind of a hybrid or a quasi private  
4 property that maybe the Fifth Amendment  
5 takings clause or other laws relating to the  
6 property don't fully cover. Is that --

7 MR. MONTANGE: No, I would say  
8 that it's not that. I would say that it is  
9 property that has traditionally been regulated  
10 to reach public ends. That's not to say that  
11 the public wouldn't have to compensate in  
12 order to reach those ends.

13 VICE CHAIRMAN NOTTINGHAM: Kind of  
14 like my front yard. If I didn't mow it for  
15 three months and the neighbors called the  
16 local authorities, I mean, in other words is  
17 there much property in our country that's  
18 complete not regulated?

19 MR. MONTANGE: Well, I think that  
20 we're dealing with a different cast of  
21 characters on that. Interesting for rail  
22 corridor, if you don't want to mow your rail

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1 corridor, there's frequently not much the  
2 local public authorities can do about it  
3 because of preemption under either FRA regs or  
4 your regs.

5 VICE CHAIRMAN NOTTINGHAM: In some  
6 cases it's actually less regulated.

7 MR. MONTANGE: Yes, it certainly  
8 is. That's one of the benefits that flow from  
9 STB regulation on stuff like that. So, you  
10 know, it cuts both ways.

11 But what the Board is about is  
12 insuring that transportation -- you're  
13 responsible for our transportation system.  
14 Let's face it. To some degree your  
15 jurisdiction is narrow, but there's no reason  
16 not to take into account within that  
17 narrowness other public benefits that flow  
18 from rail corridor preservation, and in the  
19 case of 16 USC 1247(d), that's not a statute  
20 that's part of the Termination Act or was part  
21 of the old revised Commerce Act. I don't  
22 think you're constrained under the Trails Act

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1 to just the rail policy declared in the  
2 Termination Act.

3 You can look at other things and  
4 think about other things there in addition to  
5 the fact that it would be a hard argument for  
6 me to make that regulated rail property,  
7 subject to common carry obligations is the  
8 same as some guy living in St. Louis who  
9 doesn't mow his lawn.

10 VICE CHAIRMAN NOTTINGHAM: Do you  
11 agree that if we were to construe the act or  
12 if Congress were to change the statute to make  
13 trail use agreements mandatory in abandonment  
14 scenarios that there would be some cases where  
15 a railroad who otherwise would abandon and  
16 otherwise might be open to negotiating a  
17 trail, might look at the situation and just  
18 say, "No, we're going to hold onto that land.  
19 It's too much. There are too many risks, too  
20 many variables, and so you actually might deny  
21 trail users that ultimate benefit.

22 MR. MONTANGE: I think that there

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1 would be too many variables for me to project  
2 that kind of -- to really answer.

3 VICE CHAIRMAN NOTTINGHAM: It's  
4 possible though, right? You've got to admit  
5 it's possible.

6 MR. MONTANGE: Well, whenever one  
7 is faced with a system in human beings, just  
8 about anything is possible. Let's face it.  
9 It's kind of quantum mechanical.

10 VICE CHAIRMAN NOTTINGHAM: Right.  
11 People will act in their self-interest where  
12 they can, and --

13 MR. MONTANGE: Yeah. I think it's  
14 in the self-interest of railroads to try to --  
15 they view their self-interest right now, and  
16 many of them have worked very hard on these  
17 things, and I'm not denying at all that some  
18 of these guys are genuinely interested in  
19 preserving the corridor frequently because  
20 their local staff use the thing for trails,  
21 too, or their kids use it to get to school.  
22 So they're very happy as staff people to

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1 participate in these kinds of transactions,  
2 but let's face it. They're interested in  
3 maximizing the amount of money and minimizing  
4 the amount of liability on the part of the  
5 railroad.

6 So they're looking at an equation  
7 where they have to say to themselves how do I  
8 carry out my obligation to our shareholders  
9 either by reducing our taxes, by reducing our  
10 liability for tort, because they typically  
11 salvage a bridge because you don't want some  
12 kind jumping off it, right, or falling off of  
13 it. It's an attractive nuisance in some  
14 states after abandonment.

15 And how do we get the most out of  
16 the corridor? Can we sell it to the local  
17 highway department for a new highway? Can we  
18 sell it to a town for a trail? Can we sell it  
19 to adjoining landowners?

20 So their equation is how can we  
21 best do that, and sometimes, as I've alluded  
22 to, my experience is that the transaction is

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1 so small it's just hard to get base time. You  
2 know, they'll contract it out to a disposal  
3 firm which makes money by breaking it up, and  
4 those guys you can hardly talk to them about  
5 a deal that we're offering.

6 So you have all kinds of  
7 situations out there in the world.

8 VICE CHAIRMAN NOTTINGHAM: Like  
9 you say, under my hypothetical where if we did  
10 interpret the law to be mandatory, I do  
11 believe personally that there would be  
12 situations where railroads who otherwise would  
13 abandon and otherwise would be open to at  
14 least considering a trail scenario would  
15 decline to go down that path, no pun intended.

16 In that scenario then the next, I  
17 guess, way to achieve the social good of more  
18 rail trail conversion would be to somehow  
19 bypass the abandonment process and require  
20 railroads to fork over the land.

21 Do you support that? Would you  
22 support that?

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1 MR. MONTANGE: Let me approach it  
2 in a way that you'll maybe think completely  
3 differently. In some ways I think the issue  
4 now of mandatoriness is almost moot. I go  
5 back to my point that the horse is out of the  
6 barn. It's a little late to close the door.  
7 Honestly, my concern right now is more to  
8 preserve quarters that are already being  
9 preserved, as much so as trying to create  
10 conditions under which we can get a higher  
11 batting average, in Marianne's terms.

12 I think that if reactivation type  
13 issues are not handled properly, there will be  
14 a tremendous incentive on the part of the  
15 entity I'm representing here today and many  
16 other agencies that are acquiring these with  
17 an eye toward using them for light rail or  
18 putting an expensive trail investment in not  
19 to do that. Why would they invest if they're  
20 going to lose all of their money?

21 In fact, it may be contrary to  
22 local law for them to put an investment in

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1 property that they can be divested of for  
2 free. So the fear I have and where I think if  
3 I were to make a recommendation to you which  
4 I would prioritize in thinking about how to  
5 maximize use of the statute right now is to  
6 look at reactivation and think in terms of  
7 what the interest holders on the rail banker  
8 side of the fence are looking at as opposed to  
9 future rail abandonments.

10 In the case of mandatory  
11 application, I'll be very realistic and  
12 suggest that it's not just a case of  
13 either/or, either discretionary or mandatory.  
14 There are certain circumstances, I believe,  
15 where you have a possible severance situation  
16 where the Board maybe should think about doing  
17 something so that the rail banker has a means  
18 to protect itself against severance of its  
19 facility from the built rail system and the  
20 loss of the whole rail bank corridor as a  
21 result because it's not their fault if someone  
22 else in the middle decides they're just going

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1 to abandon and for whatever reason deed it to  
2 the local city councilman's brother-in-law for  
3 his parking lot for his Honda dealership or  
4 something.

5 You know, you want to think about  
6 what you do in situations where you've got  
7 people in a pickle that's consistent with the  
8 basic purpose of the statute to preserve these  
9 rights-of-way for alternative public uses and  
10 for possible future rail reactivation.

11 MS. FOWLER: I didn't understand  
12 the answer, Mr. Vice Chairman, the scenario.  
13 First of all, let me say I think if rail  
14 banking were mandatory rather than  
15 discretionary, you might find that railroads  
16 were more inclined to rail bank because so  
17 often railroads tell us that the reason they  
18 don't is because it's often the case when  
19 abandonment first comes up, part of the shock  
20 of a community of having its rail service  
21 jerked away from it is that they had  
22 instinctive negative reaction toward any other

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1 use of that corridor, and they think that it's  
2 because some of the people who want to trail  
3 are responsible for the abandonment. So  
4 there's, you know, antagonism toward the  
5 trail.

6 So railroads often tell us that,  
7 you know, the public relations issues are just  
8 too dicey. They don't want to take the grief  
9 from the community, that they're the ones who  
10 make the decision to rail bank, but if it were  
11 a required procedure, they would have that  
12 cover, which is they could say, "Call your  
13 Congressman. Don't get angry at us. This is  
14 something that we have to do," or, "Call Mr.  
15 Vice Chairman and tell him how aggravated you  
16 are."

17 But the second scenario after that  
18 that you postulate, I didn't quite understand  
19 what that was.

20 VICE CHAIRMAN NOTTINGHAM: Well,  
21 you raise a couple of good points, and I'll  
22 answer questions. One is that a major

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1 obstacle to trails, and we've seen this as we  
2 monitor these projects, is very often local  
3 government or local community resistance to  
4 trails. Often it does not get appreciated.  
5 People often assume the reason there are on  
6 trails is because some obscure agency in  
7 Washington must have exported it or something.

8 Very often when I read the local  
9 papers and the clips which the Internet is so  
10 helpful to us in monitoring these days, it's  
11 local communities and towns who can't agree  
12 amongst themselves, which is I realize a tough  
13 challenge on its own.

14 To answer your question, I agree  
15 with you that if trail use agreements were  
16 mandatory, once a railroad actually decided to  
17 abandon, they would be more likely to enter  
18 into negotiations because it would be the law.  
19 They'd have to, and you're right. They'd also  
20 be able to tell local governments who might be  
21 in opposition, "Look. We must."

22 But my point was that you may see

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1 some railroads do otherwise, would abandon  
2 opting not to abandon, not to expose  
3 themselves to the process, which would be a  
4 shame for trail users, I think, long term, but  
5 that's just my own personal view. I can't  
6 cite any -- it's hard to prove a negative.  
7 It's a hypothetical, but I appreciate the  
8 panel's time.

9 I've been taking up a lot myself.  
10 So I'm going to yield back to the Chairman.

11 CHAIRMAN MULVEY: Well, thank you.

12 Just a couple of other questions.  
13 Ms. Fowler, you requested more time between  
14 the notice of abandonment and the effective  
15 date of the abandonment authority. Others  
16 have argued that this would add uncertainty to  
17 the process rather than help it in creating a  
18 trail. Are there any other ways where  
19 potential trail sponsors could prepare  
20 themselves for potential rail banking  
21 opportunities rather than expending the time  
22 beyond what it's allowed now?

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1 MS. FOWLER: Actually, in the new  
2 proposed -- Chairman Oberstar's proposed  
3 reauthorization bill, which would sub-allocate  
4 the transportation enhancements and what that  
5 means is that local communities would have a  
6 guaranteed stream of money, knowing that it  
7 was available to them.

8 The reason that it takes so much  
9 time is that coming up with the resources from  
10 the time you first hear about an amendment to  
11 when you come up with the resources that you  
12 feel confident that you could move forward  
13 with a real commitment to preserve a corridor  
14 and enter into a rail making agreement, that  
15 just takes time, and one of the reasons it  
16 takes time is because you don't know if you've  
17 got any money.

18 So the sub-allocation of one of  
19 the main sources of the money for rail banking  
20 could make a difference. We have tried with  
21 our early warning system to let communities  
22 know in advance as soon as possible, you know,

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1 by monitoring the registrar and all of this  
2 kind of stuff.

3 At one point we used to do an  
4 analysis of system diagram maps to see which  
5 lines were going to up for abandonment, but  
6 then it turned out that railroads didn't  
7 really use those, and so that didn't make much  
8 difference.

9 Perhaps something that is just how  
10 much time do you have from the -- you know,  
11 it's all about time and putting together  
12 resources. Some of these abandonments, you  
13 know, particularly the ones that are abandoned  
14 through the exemption process which occurs  
15 more and more often, you know, it can be just,  
16 you know, 30 days or 59 days or what have you.  
17 They vary depending on the circumstances.

18 I think it's something that should  
19 be addressed, and we have people on our staff  
20 that deal with this on a day-to-day basis, and  
21 you know, if you decide to go in that  
22 direction, we have people who would like to

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1 work with you.

2 CHAIRMAN MULVEY: One final  
3 question for the group from me, and that is we  
4 talk about the public use of the trails and  
5 the purpose of the trails program to begin  
6 with was to preserve the system of rails, the  
7 railway network, for reestablishing rail  
8 freight service. But today, a public use is  
9 also anything that would help get people off  
10 the highways and reduce congestion, et cetera.

11 So instituting passenger rail,  
12 light rail or for that matter commuter rail,  
13 which would be heavy rail, but light rail,  
14 should that be a purpose that is different  
15 from becoming a trail? Should passenger rail  
16 use be treated differently from a banked rail  
17 that went to just a biking and hiking trail,  
18 and that once it was made into a light rail  
19 use with all of the investment in it, et  
20 cetera, should there be some procedure for  
21 taking them out of the rail bank program, that  
22 once it's made into a light rail corridor,

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1 then it's a light rail corridor and cannot be  
2 returned to freight rail use?

3 Freight rail and light rail are  
4 really incompatible because of the size, the  
5 weight of the equipment, et cetera, on these  
6 things for the most part.

7 MR. MONTANGE: The old ICC  
8 addressed this. I believe there's only one or  
9 two instances in which the Surface  
10 Transportation Board and the ICC have  
11 addressed that. The first instance was with  
12 respect to the Georgetown Branch, now the  
13 Capital Crescent Trail and which the local  
14 community interest opposed, argued that there  
15 should not be any kind of light rail on the  
16 corridor because it would be incompatible not  
17 only with the trail, they argued. The local  
18 adjacent neighborhood was arguing. It's not  
19 the trail community.

20 They argued it was incompatible  
21 with the trail, but they also argued it was  
22 incompatible with the restoration of freight

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1 service. The ICC responded to the restoration  
2 point by saying that it's not incompatible  
3 because light rail operates on the same gauge  
4 in the United States as freight rail, and I  
5 think in theory, I've looked at quite a few of  
6 these systems for clients because I represent  
7 a number in addition to Madison County  
8 Transit, a number of other urban rail banking  
9 parties, and when they review this stuff they  
10 say the idea when talking to rail engineers is  
11 you can have timed separation of the two uses.

12 So you can have freight at night  
13 when you're not operating. There are times  
14 you are not operating your light rail, and  
15 then light rail during the day. So you get  
16 the time separation and you can use the same  
17 gauge.

18 Now, in terms of weighted  
19 equipment, that's always a concern, and you  
20 may have limitations. There are limitations  
21 on the existing freight rail system to some  
22 degree. You have speed limitations. In some

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1 places they're just not able to operate a  
2 huge, whole train that goes down through an  
3 area. So there might be incompatibility.

4 But the key issue for us is this.  
5 A light rail system or a commuter rail, any  
6 kind of commuter rail system is an expensive  
7 proposition to put in, and our key issue on  
8 reactivation is we don't want to be divested  
9 of that interest. The pedal should be to the  
10 metal if someone wants to operate freight  
11 there to get a deal with the entity that owns  
12 the right-of-way so that both of the systems  
13 can be operated compatibly. It makes no sense  
14 to say take from -- if the light rail ever  
15 went in on the Capital Crescent Corridor  
16 between Bethesda and Silver spring, and by the  
17 way, the Bethesda Metro stop has a knock-out  
18 panel designed to accommodate that and always  
19 has. So that's been in the cards forever, if  
20 Maryland DOT will ever come up with the money  
21 so they can do it.

22 But it makes no sense to say to

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1           Montgomery County if it ever got a light rail  
2           system in there for \$100 million to tear all  
3           of that out or remove it or get out of Dodge  
4           because someone wants to ship ten carloads of  
5           furniture or ten carloads of cars to the Honda  
6           dealership down the pike.

7                         So you know, you need to take that  
8           kind of stuff into account, but the rail  
9           property interest held by the rail banking  
10          owner should be taken into account and the  
11          public interest should be taken into account.  
12          Even though this agency has a limited purview  
13          in that it focuses on freight use, once should  
14          always remember that 16 USC 1247(d) is not  
15          part of the Termination Act, and the purview  
16          of the agency should take into account the  
17          interest that that statute represents.

18                        So something needs to be worked  
19          out that protects the light rail. For that  
20          matter, if all we did with the thing was a  
21          trail, we would still want to have protection  
22          of that interest. It's just that the thing

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1 gets up an order of magnitude in cost or two  
2 orders of magnitude when you go to a light  
3 rail system.

4 And Madison County Transit is very  
5 serious about this, although there's not a  
6 current plan because we're in a recession and  
7 they've having trouble funding the St. Louis  
8 light rail system as it is. That's not going  
9 to -- hopefully that's not going to be the  
10 condition in the next decade.

11 So, you know, that's the reason I  
12 say I think the focus of the Board if it wants  
13 to encourage rail banking should be on  
14 handling those kinds of issues on reactivation  
15 and honestly at Madison Country Transport we'd  
16 love to see rail go in. We'd love to see  
17 light rail because that means the economy is  
18 expanding. Our population is expanding, and  
19 we're getting people into green  
20 transportation. All of those things are  
21 wonderful. We'd just prefer that some more  
22 minor use not get in the way of that then.

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1                   And in the interim, we would  
2 prefer that the trail uses be protected so  
3 that the corridor remains available for that  
4 light rail use. That's one of the reasons we  
5 acquired it.

6                   CHAIRMAN MULVEY: Thank you.

7                   I have no other questions.

8                   VICE CHAIRMAN NOTTINGHAM: A  
9 couple of quick ones, Mr. Acting Chairman.  
10 Thank you for your patience.

11                   Just to follow up on that, Mr.  
12 Montange, I agree with you that under the  
13 light rail scenario it would be kind of  
14 practically difficult and somewhat infeasible,  
15 not technically or scientifically infeasible,  
16 but practically speaking to put a local  
17 government in or a light rail operator in a  
18 position of investing the kind of money you  
19 need to invest to build out that system and  
20 then say, "And by the way, any time the owner  
21 of the underlying rail transportation  
22 interest, the freight railroad, wants to take

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1 this back, we're out of luck. We're just  
2 taking this risk. I mean, to me wouldn't that  
3 be handled though maybe outside of the Trails  
4 Act at some point where you realize this land  
5 is no longer talking about rail banking and  
6 we're talking about conversion? We're talking  
7 about putting it into a different type of very  
8 long-term use, and that would presumably just  
9 require some compensation to the railroad.  
10 You know, it's important to have a light rail.  
11 We're going to buy you out of your interest,  
12 or the railroad just donating it or, you know,  
13 giving it up.

14 But to say, wink, wink, nod, nod,  
15 this is rail banked, but if anyone ever dares  
16 exercise their rights under rail banking of  
17 reclaiming it, you know, there will be huge  
18 problems.

19 MR. MONTANGE: I would say this  
20 again. I think the rail banker owners should  
21 be treated the same way as the railroad that  
22 owned it, and that the Board in no instance

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1 that I'm aware of -- you guys allow transfer  
2 of rail property in two circumstances. One is  
3 voluntary acquisitions. You have all kinds of  
4 provisions for that, and in a voluntary  
5 acquisition, somebody gets a notice of  
6 exemption to acquire. Short Line buys a  
7 segment from, say, CSX or BN. They'll file a  
8 notice of exemption for acquisition. The  
9 Board doesn't get involved in figuring out  
10 compensation because it's a voluntary; it's a  
11 ticket to the dance. You don't have to dance.

12 So the BN or NS or CSX, whoever is  
13 selling the property is satisfied with  
14 whatever compensation arrangement they work  
15 out with the short line, which may be almost  
16 a donation to the short line, but then they  
17 get money from the tariffs that the short line  
18 will be generating for them.

19 You know, whatever it works out it  
20 works out. In those instances where you  
21 require a mandatory transfer of property and  
22 those with the offers of financial assistance

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1 or feeder line applications or mandatory use  
2 of property is under your alternative service  
3 regulations for emergency service or for  
4 temporary alternative service when it's rarely  
5 used, but in those instances where it is used,  
6 either the parties have to work out voluntary  
7 compensation for the railroad property owner  
8 or else this Board will set compensation. I  
9 know that because I've had to go through that  
10 in the last couple of years.

11 The only instance that I'm aware  
12 of where there's been this issue of whether  
13 rail property can be transferred for free is  
14 on rail reactivation, and to the extent that  
15 that's what the Georgia Great Southern's case  
16 holds, that's the unusual situation.

17 So it's not a question of the rail  
18 banking owner obstructing rail service. The  
19 rail banking owner should be treated like a  
20 railroad property owner, and you guys don't  
21 take railroad property and give it to another  
22 without compensation. That's just not what

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1 the STB has ever done before.

2 Now, having said that, sure, there  
3 are going to be instances when adjoining  
4 property owners will oppose the trail going  
5 in, and they may well oppose a light rail  
6 system going in, and they may well oppose a  
7 freight rail system going in. That's the  
8 Georgetown Branch here in town, but that's a  
9 different issue.

10 Sure, people are going to use any  
11 kind of thing their lawyers or they can dream  
12 up to oppose whatever they are opposed to, but  
13 the key for purposes here for a regulatory  
14 agency like this is what do you do. It's not  
15 so much balancing the issue, interest, but  
16 carrying out the intent of Congress to try to  
17 preserve these corridors and to maximize the  
18 benefits from that or obtain the goals that  
19 Congress set out for you.

20 And I think that to do that, to  
21 maximize use of the corridor, the best  
22 approach is to treat the rail banker owner as

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1 if it's like a railroad, and, yes, you can  
2 order transfer of that property, but you  
3 should do so compensating the owner for its  
4 investment in that property and then work out  
5 some mechanism for that so that if they don't  
6 reach a voluntary reactivation agreement, you  
7 may have to intervene and say, well, it must  
8 be done. You either work out this or we're  
9 going to have you arbitrate the compensation  
10 issues or we'll apply our equivalent of the  
11 base statute to it, but you have to come up  
12 with something that actually protects those  
13 interests in order to actually foster this  
14 statute in its continued use.

15 VICE CHAIRMAN NOTTINGHAM: Thank  
16 you.

17 Respectfully I'll say I don't  
18 think I agree with your concept of sort of  
19 dual ownership or I'm having this vision of  
20 you go down to the county courthouse and you  
21 look up who the owner of the rail line or  
22 former rail line is and it says, you know, XYZ

1 Railroad and it says also ABC trail. I mean  
2 to me, I'd have to really understand how that  
3 comports with sort of our notions of property  
4 ownership and rights.

5 MR. MONTANGE: yes, I think that  
6 Georgia Great Southern is the real problem  
7 there. If you go down to the county  
8 courthouse, there will be a deed. In 99.-  
9 something percent of rail banking cases the  
10 railroad transfers the property by deed, quit  
11 claim deed. All of our interests are  
12 transferred. So you go to the county  
13 courthouse. The owner is Madison County  
14 Transit of Madison County Transit's quarters.  
15 It's not Norfolk Southern or N&W or IT or  
16 Illinois Central or Union Pacific or any of  
17 the predecessor entities. It is Madison  
18 County Transit.

19 This right of rail reactivation is  
20 a regulatory disposition of the common carrier  
21 obligation, which is a different matter and  
22 that is handled by the Board. But you have

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1 raised a broader issue, Mr. Vice Chairman, and  
2 that is that it is difficult many times to  
3 work out to the satisfaction particularly of  
4 state courts what the actual role of the STB  
5 is and how that federal interaction relates to  
6 state property law.

7 That is something that we struggle  
8 with repeatedly.

9 VICE CHAIRMAN NOTTINGHAM: Right.

10 MR. MONTANGE: But that's a  
11 broader subject.

12 VICE CHAIRMAN NOTTINGHAM: I think  
13 we're all mindful of kind of the progression  
14 or the relationship between railroad right-of-  
15 way, trail under the Trails Act. We have a  
16 lot of precedent and success stories there.

17 Then you take it to light rail,  
18 and then you get towards -- you're closer to  
19 your ultimate analogy of, you know, the county  
20 jail or let's say it's the new parking lot for  
21 the light rail. Light rail is actually  
22 somewhere over there, but they need some extra

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1 land. They need to intrude on the trail. So  
2 it's not really light rail, but it's property  
3 to help light rail or then it's property to  
4 help some other public good.

5 So where that line draws and where  
6 we sort of say, you know, what, we're no  
7 longer really under the Trails Act here.  
8 We're under another scenario, I mean, where  
9 public goods can be achieved and we can work  
10 this out, but let's not kid ourselves and say  
11 it's under the Trails Act.

12 MR. MONTANGE: Well, basically the  
13 Trails Act treats continued trail use as if it  
14 were continued freight rail use, and for  
15 purposes of state and local law. I mean,  
16 let's forget about the Trails Act for a moment  
17 and just take a regulated freight rail  
18 corridor. L.A., the L.A. bought a lot of that  
19 from Atchison and from Southern a decade or 15  
20 years ago for light rail and commuter rail  
21 development and left the common carrier  
22 obligation for freight with the freight

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1 railroad, but gradually those things have been  
2 abandoned, and they're being converted in many  
3 instances into a passenger light rail system  
4 within California.

5 And you could also operate freight  
6 rail and light rail, passenger rail in the  
7 same corridor. That's done. Heavy commuter  
8 rail on freight corridor in the Northeast.

9 The only reason I think people are  
10 looking for exclusive passenger corridors is  
11 sometimes to move these things out so you can  
12 get faster rail service. But there's on  
13 reason that you can't in the abstract operate.

14 The European do it all the time.  
15 They'll have freight and light rail on, going  
16 big Swiss Railroads, little Swiss Railroads.  
17 They'll all have freight rail cars traveling  
18 over those things or parked alongside it.  
19 They'll put them out when the tourists and the  
20 local residents aren't using the rail to get  
21 up to those chalets.

22 VICE CHAIRMAN NOTTINGHAM: Thank

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1 you.

2 CHAIRMAN MULVEY: There is a  
3 considerable difference, however, in the  
4 weight of those trains, the impact of crashes  
5 and the like, and the amount of freight  
6 traffic on those lines compared to the United  
7 States.

8 MR. MONTANGE: There is, indeed,  
9 and I don't want to belittle the safety  
10 concerns at all.

11 VICE CHAIRMAN NOTTINGHAM: I did  
12 have one last comment and question for Ms.  
13 Fowler.

14 MS. FOWLER: Yes.

15 VICE CHAIRMAN NOTTINGHAM: you  
16 mentioned something of great interest to me,  
17 sub-allocation, which to many people might  
18 sound like a hyper technical jargon, but for  
19 those of us who have worked on the federal aid  
20 highway program and the enhancement program  
21 and all the different programs under the  
22 federal aid highway program, whether it be the

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1 congestion mitigation, air quality allocation  
2 or the enhancement grant.

3 I just will say I understand the  
4 local government's especially historic support  
5 for sub-allocation of pretty much everything  
6 and anything possible that flows out of  
7 Washington. I will just say my experience  
8 running a state DOT, the third largest state  
9 DOT in the country at the time, we spent a lot  
10 of time trying to modernize our accounting and  
11 bookkeeping, and I learned that we had a large  
12 amount of money, millions of dollars sitting  
13 from past years' enhancement grant allocations  
14 out to --

15 MS. FOWLER: Yes, you did.

16 VICE CHAIRMAN NOTTINGHAM: --  
17 local governments, and we did something while  
18 I was there that had never been done before.  
19 We sent a very nice, courteous letter to all  
20 of the holders of those grants saying, you  
21 know, we notice the grants haven't been used  
22 in over three years or I forget the exact

1 time, but it was a significant period of time.  
2 Please let us know if you intend to use the  
3 grants that you applied for and received. If  
4 so, just give us some indicia of your  
5 progress; show us that you have a plan.

6 And I was amazed. Dozens and  
7 dozens and dozens of localities wrote back  
8 quite promptly and said, "Thank you. It's  
9 good to hear from you. Take the money back.  
10 This project has gotten bogged down. We've  
11 run into regulatory problems. We've run into  
12 environmental problems. We've run into local  
13 controversy. We thought the streetscape was  
14 a no-brainer, but when all the shops on Main  
15 Street heard that they were going to be put  
16 out of business for six months while we tore  
17 up the sidewalk we realized that maybe we  
18 shouldn't have applied for that grant."

19 Long story short, we recouped  
20 millions of dollars and put it out to local  
21 governments and trail operators and  
22 battlefield preservation groups that had real

1 and actionable plans to advance the public  
2 interest, and so I just would say beware of  
3 sub-allocation. Make sure there are some  
4 safeguards because we can sub-allocate a lot  
5 of money and never see the benefit.

6 MS. FOWLER: Well, two things.  
7 Number one, this is accompanied by efforts to  
8 streamline the ability to implement small  
9 scale, low impact projects. Part of the  
10 problem with the enhancements program, as you  
11 know, is that spending the money was often  
12 held to exactly the same standards. To put in  
13 a bike rack, you had to go through the same  
14 procedure as if you were building an  
15 interstate clover leaf. It was just quite,  
16 quite absurd.

17 So that's one thing. This sub-  
18 allocation is accompanied by expedited  
19 implementation plans. But you raise a very  
20 good point. I might want to speak to Chairman  
21 Overstar about what does a state do if it  
22 finds that there is a huge backlog of money

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1 not being spent, that there might be some way  
2 for the state to pull that money back and  
3 reallocate it. So that's a very good  
4 suggestion.

5 Could I just make one point in the  
6 discussion about the rail trail passenger  
7 rail-freight rail?

8 VICE CHAIRMAN NOTTINGHAM: Yes.

9 MS. FOWLER: Currently we have  
10 examples where the rail banking statute says  
11 you have to have a trail there. It does not  
12 speak to passenger or light rail, but if the  
13 locality wants to put in light rail and keep  
14 the rail banking statute intact, as long as  
15 they keep the trail intact in tandem with the  
16 light rail, in other words, the rails with  
17 trails, they've not violated the provisions of  
18 the rail banking statute and can proceed.

19 And we are actually looking to  
20 that as the need for light rail grows in this  
21 country and our corridors that currently have  
22 trails in them become increasingly in demand

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1 that this combination of rails with trails  
2 will be a way to accommodate both needs, but  
3 also will create, as Mr. Montange described,  
4 very efficient systems because trails parallel  
5 to rails increase the catch basin for the  
6 system itself, and so we have the two modes  
7 working in tandem, and that left some fields  
8 really good.

9 VICE CHAIRMAN NOTTINGHAM: I have  
10 no further questions for this panel, Mr.  
11 Chairman.

12 CHAIRMAN MULVEY: Well, thank you  
13 very much. We appreciate your testimony. It  
14 was very helpful, very informative and very  
15 useful. Thank you very much, Ms. Fowler.  
16 Thank you very much, Mr. Montange. A safe  
17 trip back.

18 Our next panel are railroad  
19 interests representing the Association of  
20 American Railroads, Edward Hamberger; the CSX  
21 Transportation, Peter Shudtz; and CNJ Rail  
22 Corporation, Eric Strohmeier.

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1                   So, gentlemen, please be seated,  
2                   and we will begin with Mr. Hamberger.

3                   Again, please be mindful of the  
4                   times. And you over on the far right, no not  
5                   --

6                   MR. HAMBERGER: This is actually  
7                   the left from where I'm sitting.

8                   CHAIRMAN MULVEY: Okay. I wasn't  
9                   suggesting you were at the far right. Will  
10                  the gentleman proceed, Mr. Hamberger?

11                  MR. HAMBERGER: Mr. Chairman, Mr.  
12                  Vice Chairman, thank you for the opportunity  
13                  to present the views of the Association of  
14                  American Railroads pertaining to the rail  
15                  banking program administered by the Board  
16                  under Section 8(d) of the Trails Act.

17                  The AAR believes, in short, that  
18                  the voluntary rail banking program under the  
19                  Trails Act as administered by the Board over  
20                  the past 25 years has been a success for both  
21                  carriers and trail users and effectively  
22                  implements Congress' farsighted objectives.

1           The rail banking program allows  
2 the carrier through voluntary agreement with  
3 a trail sponsor who assumes financial and  
4 managerial responsibility to agree to the  
5 conversion of a rail corridor to interim  
6 recreational trail use. During this interim  
7 period and until the line is actually  
8 abandoned, any reversionary property rights  
9 that would otherwise arise are preempted.

10           The program is often attractive to  
11 carriers because it provides them with a  
12 potentially useful long-term option to  
13 abandonment of the currently unused line for  
14 which no foreseeable rail use sits. The  
15 program provides a means for preserving the  
16 corridor intact for potential future  
17 reactivation of rail service while providing  
18 incentives to establish an interim  
19 recreational trail use that's actually a very  
20 balanced approach.

21           And Mr. Montange mentioned the  
22 Dune trilogy, and of course, he is, therefore,

1 very much aware that the Bene Gesserit  
2 Sisterhood recognized the existence and worked  
3 hard to maintain a balance in the universe,  
4 and I would submit to you today that rather  
5 than the destructive force that he referenced,  
6 that this balance of maintaining the use or  
7 potential use of the rail line with incentives  
8 to provide trail use is a balance that the  
9 Bene Gesserit themselves would applaud.

10 The success of the rail banking  
11 program in preserving rail lines that would  
12 otherwise be abandoned and converting them to  
13 interim trail use is confirmed by its  
14 widespread use. Ms. Fowler talked eloquently  
15 about this subject in the previous panel, and  
16 I will not repeat her comments, but I will  
17 associate myself with them.

18 The AAR believes that the success  
19 of the rail banking program is due in large  
20 measure to its effective administration by the  
21 Board. The Board's regulations are  
22 straightforward, do not impose undue

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1 procedural burdens, and appropriately reflect  
2 the ministerial nature of the Board's role  
3 under the Trails Act, that of facilitating the  
4 negotiation of voluntary interim trail  
5 agreements.

6 The Board's regulations  
7 effectively implement the program that  
8 Congress intended and should be kept in place.

9 In response to your specific  
10 questions, the AAR would not object to a Board  
11 requirement that the parties provide the Board  
12 with a notice when a Trails Act agreement has  
13 been successfully negotiated. Such notice  
14 could certainly be deemed useful by the Board  
15 in monitoring the program.

16 The AAR believes, however, that  
17 there should not be any Board requirement that  
18 a copy of the interim trails agreement be  
19 submitted to it. As the Board recognizes,  
20 such agreements are private agreements that  
21 fall outside of your regulatory jurisdiction  
22 and could contain concessions by the parties

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1 on either side that would not otherwise be  
2 offered in other interim trail negotiations.  
3 Collection and potentially public  
4 dissemination of the agreements could add  
5 unnecessary complications in the negotiation  
6 process.

7 Our one suggestion for improvement  
8 to the rail banking program is that the board  
9 informally encourage, but not require parties  
10 to anticipate in their agreements potential  
11 issues that may arise, and, Mr. Chairman, as  
12 usual, you've identified one way to address  
13 the issue of reinstating rail use, and that  
14 should be an issue of whether and what amount  
15 of compensations, if any, is due to either  
16 party should the carrier exercise its right to  
17 restore rail service at any time. This would  
18 avoid potential problems at the outset.

19 In the absence of specific terms  
20 in the agreement, the AAR would consider that  
21 the party proposing to reactivate rail service  
22 should bear the cost to restore the corridor

1 for rail service use.

2 The Board also solicited comment  
3 on the future of rail banking in an era of  
4 constrained infrastructure. We submit that so  
5 long as the future holds economic  
6 uncertainties for any particular industry or  
7 enterprise, the rail banking program will  
8 continue to serve a useful purpose. The  
9 changes in shipping patterns and demand for  
10 various products change, and therefore the  
11 potential for the need for rail banking  
12 opportunities is there, and we believe that  
13 the public interest is well served by  
14 providing the opportunity for the economic and  
15 environment benefits of rail transportation to  
16 be provided for a time when it might be needed  
17 in the future.

18 CHAIRMAN MULVEY: You're getting  
19 very experienced with this, Mr. Hamberger.

20 Mr. Shudtz.

21 MR. SHUDTZ: Yes. Good morning  
22 and thank you for this opportunity to be heard

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1 by CSX.

2 We're here to help celebrate the  
3 25 years of trails use, and many of us in this  
4 room actually enjoy the Georgetown Branch,  
5 which I was happy to have worked upon with the  
6 many others in this room. The Capital  
7 Crescent Trails are another piece of trail  
8 success.

9 CSXT, of course, supports the  
10 comments of AAR and all of the good purposes  
11 that the Trails Act supports, and today we'd  
12 like to address the most recent trail success,  
13 the High Line in New York City, which is a  
14 trail that has just been developed and was  
15 just opened on June the 9th of this year, and  
16 we're going to talk about the High Line  
17 through using the Conservancy Friends of the  
18 High Line slides that we asked them to prepare  
19 for us.

20 And as you can see, the High Line  
21 is a city park of the City of New York. This  
22 is an aerial description of the location of

1 the High Line. It's the west side of the  
2 Borough of Manhattan, extending from the meat  
3 packing district to the Javits Center.

4 Now, everything has a history.  
5 This slide depicts what railroading and horse  
6 drawn carriages were like on Tenth Avenue in  
7 the 1920s, and you can see the railroad is  
8 quite there. It's called Death Avenue because  
9 of all of the complexity of operation.

10 As you can see here we had various  
11 state laws requiring us to have horses in  
12 front of the New York Central locomotives as  
13 they went down the street.

14 Public processes took us to  
15 building a very nice elevated structure as  
16 you'll see here, and this is the High Line  
17 when New York City had a great deal of  
18 industrial activity going on on the west side  
19 of Manhattan.

20 I know both Chairman Mulvey and  
21 myself are native New Yorkers and don't quite  
22 remember back this far, but over time, the

1 heavy industry of the west side of Manhattan  
2 declined, and the High Line became a little  
3 seedy, so to speak, and went through an  
4 abandonment process, and as part of this  
5 process, some friends of the High Line were  
6 formed, and they started dealing with the  
7 various public and elected officials, and this  
8 is a quick time line of the High Line itself.

9           And most importantly for this  
10 proceeding, the CITU process got underway in  
11 2002, and the Board issued its CITU, which  
12 enabled this park to be formed. Of course, it  
13 would not be a park without a ground breaking.  
14 There are many popular figures that attended  
15 this as elected officials, and the  
16 construction started, and you can see  
17 essentially they took it all the way back down  
18 to the bed and rebuilt up some pictures of  
19 some of the construction work going on.

20           The bridge, all of the paint was  
21 removed and was repainted, the viaduct that's  
22 a mile and a half long, and there are some

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1 more pictures. If anyone is familiar with the  
2 City of New York and the public park system,  
3 that's the official color of the city parks.

4 This is a demonstration of the  
5 care that went into installing new beds here  
6 for the trail, and these are some of the  
7 plants you'll see later. Various plantings  
8 going on, and the friends of the High Line  
9 were very concerned to insure that the rail  
10 history of this park and trail was recognized.  
11 So all through the beds and trails they  
12 actually re-employed old rail from the High  
13 Line. Another example is some of the quality  
14 construction. This shows that there are  
15 various accesses along the High Line,  
16 obviously stairwells and elevators.

17 And it wouldn't be a ground  
18 breaking without many elected officials.  
19 You'll recognize quite a few of these folks in  
20 the picture, Councilman Nadler, Mayor  
21 Bloomberg. That's Diane von Furstenberg  
22 there, one of the great donors of the

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1 reconstruction, and here's a picture of the  
2 final product.

3 I am also going to mention in a  
4 moment about kind of creative additional  
5 usages, that this is a hotel that's been built  
6 over the High Line, everything to clearances  
7 to insure reactivation, and pictures of public  
8 usages here.

9 You recall the Death Avenue  
10 beginning slide with the fellow on the horse?  
11 Well, they actually built this kind of  
12 amphitheater there and enjoyed it.

13 Just a few more pictures very  
14 quickly. Some of the development going on in  
15 the Whitney Museum, residential development  
16 and my final slide here is just to show you  
17 the amount of activity on the High Line. This  
18 is in the first ten days, and over the holiday  
19 weekend, my friends tell us that they had over  
20 45,000 people on the High Line using the  
21 trail.

22 And the High Line's Website is

1 identified here and the Friends of the High  
2 Line have asked me to make it available so  
3 that anyone who likes maps of the High Line,  
4 as well as membership applications --

5 (Laughter.)

6 MR. SHUDTZ: -- I have them here.

7 Thank you very much. I'm sorry to  
8 have run over.

9 CHAIRMAN MULVEY: That's fine, Mr.  
10 Shudtz.

11 As a native New Yorker or former  
12 native New Yorker, I think New York City very  
13 much appreciates the investment in the High  
14 Line and what a beautiful addition it is to  
15 the New York City park system.

16 Mr. Strohmeier.

17 MR. STROHMEYER: Good morning, Mr.  
18 Chairman and Mr. Vice Chairman. On behalf of  
19 SNJ Rail Corporation, the Board has heard me  
20 testify on numerous occasions about loss of  
21 the system around the fringe, and of course,  
22 rail banking is a mechanism for preserving

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1 portions of the system, and so we felt the  
2 need and desire to come down here and testify  
3 today.

4 In addition, we've worked on  
5 numerous projects, numerous abandonment  
6 proceedings. You've heard my testify  
7 previously, and so we'd like to talk a little  
8 bit about the rail banking provisions and sort  
9 of focus with a little bit of a bent on  
10 reactivation.

11 We've heard about preserving them,  
12 but we haven't heard the process of putting  
13 them back into the national rail system. In  
14 fact, the Board hasn't given an extensive  
15 amount of thought up until now on how do we go  
16 about doing that.

17 And one of the things that we  
18 wanted to address previously is in the nine  
19 previous cases, a critical element that we  
20 want the Board to focus on is that you have  
21 yet to declare a line being reconverted from  
22 a rail bank corridor back into a rail corridor

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1 new construction, and we hope that the Board  
2 in any decision that you do with regard to  
3 this proceeding holds those precedents as  
4 well.

5 The potential implication of  
6 having to go through a full blown 10.901  
7 construction application where you're  
8 intending on using the previously rail bank  
9 corridor, we think we can not only defeat the  
10 purpose of what the statute was intended to do  
11 was to preserve that, but it would also just  
12 add tremendously on the amount of cost  
13 associated. In the recent Elgin Juliet and  
14 Eastern case, which went through a full blown  
15 environmental review process, I think I heard  
16 the figure somewhere of 21 or \$22 million has  
17 been spent on just that portion alone.

18 If you were to impose new  
19 construction provisions on previously rail  
20 banked corridors, it would send the cost  
21 through the ceiling, and so we ask that the  
22 Board be mindful of that as you contemplate,

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1 you know, these potential future  
2 considerations.

3 The second question is there's  
4 been significant discussion about whether or  
5 not the trails agreement should be previously  
6 submitted to the Board. I actually have a  
7 concern only in so much as I think the trail  
8 agreements should be submitted to the Board  
9 for a determination.

10 As we have heard and as the Board  
11 is aware in the case that I was recently  
12 involved in in AD-193.21(x), which was the  
13 case in Vicksburg, Mississippi, the trail user  
14 in that case was the City of Vicksburg that  
15 ultimately acquired the line through the  
16 trails agreement, but as the Board is aware,  
17 the right-of-way was conveyed in its entirety  
18 to the city.

19 What isn't quite clear in that  
20 particular case is how do you activate rail  
21 service. As you know, there was not one but  
22 two potential shippers down along that line.

1 The existing shipper was able to relocate his  
2 facility to a trans-load facility up from his  
3 facility at less cost than acquiring the line,  
4 but the question had always come up how do I  
5 get the service back if I want the service  
6 back, and therein, you know, we did a little  
7 bit of brainstorming before we made the  
8 decision in that case to withdraw the OFA.

9 And the question had come up what  
10 kind of agreement does KCS have in place to  
11 allow for the reactivation of the line, and as  
12 the Board is aware, when rail property is  
13 conveyed, certain rail assets are conveyed,  
14 the Board usually does a determination in  
15 advance of that consistent with your State of  
16 Maine cases and Wisconsin DOT to make sure  
17 that the carrier who acquired the line didn't  
18 acquire too much control.

19 And we like the Board to at least  
20 consider that in the possibility of moving  
21 forward that you may want to look at those  
22 issue to see whether or not the railroads are,

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1 in essence, conveying too much that prohibit  
2 the restoration of the rail line. If you  
3 don't look at the agreement, you don't know,  
4 and so that was one of the issues that we  
5 wanted the Board to also look at.

6 And the third and final issue, and  
7 given the time I'll hopefully try to wrap this  
8 up here quickly, was the possibility of if you  
9 cannot reach a voluntary agreement with the  
10 underlying residual commentary or owner using  
11 the AB-103.21(x) case scenario provisions that  
12 we like to discussion about possibly utilizing  
13 the provisions of 49 USC 10907 to compel the  
14 sale of those residual rights.

15 And I'm available for any  
16 questions.

17 CHAIRMAN MULVEY: Thank you.

18 I remind the panelists that we  
19 have a 10901 case before us right now where we  
20 are going to try and resolve the issues as to  
21 what are the responsibilities under rail  
22 banking versus new construction. That's the

1 so-called R.J. Coleman case that is before us  
2 right now. So we really can't discuss it in  
3 any kind of detail, but some of those issues  
4 which you raise will be resolved when we  
5 finally issue our results in the R.J. Coleman  
6 case.

7 So let me start out with a couple  
8 of questions. Mr. Shudtz, I understand that  
9 CSX, unlike the other railroads, has a  
10 subsidiary which operates trails. Is that  
11 called the Georgetown and High Line Railway  
12 Company? It's a separate --

13 MR. SHUDTZ: Yes.

14 CHAIRMAN MULVEY: -- subsidiary of  
15 CSX?

16 MR. SHUDTZ: Yes.

17 JUDGE MASON: And, Mr. Hamberger  
18 as well, does any other railroad have this  
19 besides CSX?

20 MR. HAMBERGER: I'm not familiar.

21 CHAIRMAN MULVEY: I didn't think  
22 so. I believe you're the only one that does

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1 that.

2 Yes, sir, Mr. Montange.

3 MR. MONTANGE: (Speaking from an  
4 unmiked location.)

5 CHAIRMAN MULVEY: Okay. So  
6 there's a short line that does, but you're the  
7 only Class 1 that has the subsidiary here.

8 MR. MONTANGE: Right.

9 VICE CHAIRMAN NOTTINGHAM: Mr.  
10 Chairman, if you could, the stenographer kind  
11 of signaled to me that he had difficulty  
12 picking up testimony that might have been  
13 volunteered from the audience. I don't know  
14 if you just want to clarify that for the  
15 record.

16 Thank you.

17 CHAIRMAN MULVEY: Right. He  
18 mentioned that there was a short line  
19 railroad, the AK Railroad, that also has a  
20 short line railroad but also has a subsidiary  
21 property, and AK operates a trail as part of  
22 it. It's a for profit company, and so it has

1 both a railroad operation as well as a  
2 subsidiary that runs a trail. But the point  
3 was that only the CSX of the Class 1 railroads  
4 has a trail operating subsidiary.

5 VICE CHAIRMAN NOTTINGHAM: And  
6 that was Mr. Montange.

7 CHAIRMAN MULVEY: Mr. Montange who  
8 testified earlier, yes.

9 Mr. Shudtz.

10 MR. SHUDTZ: Yes. We performed  
11 that as an aid to, you know preserving cargos  
12 for trails use, recognizing that sometimes it  
13 takes a considerable period of time to work  
14 out arrangements and for people to get the  
15 funding necessarily to support trails. We  
16 have been, I think, very cooperative in trails  
17 use over the years, and I think you mentioned  
18 earlier about the time it take, and we  
19 appreciate the Board's extension of the time  
20 that it customarily gives the parties to  
21 include their voluntary agreements.

22 You know, we look forward to those

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1 extensions so that people can secure their  
2 funding and move forward. The subsidiary was  
3 designed as an aid to protect the right-of-way  
4 in times when it takes a long time to work out  
5 agreements.

6 CHAIRMAN MULVEY: As a matter of  
7 fact, whenever two parties are in negotiations  
8 and both parties come before us asking for  
9 extension, we generally accommodate those  
10 requests because both parties are indicating  
11 that they are moving towards reaching an  
12 accord, moving towards resolving their  
13 differences, and we want to be accommodating,  
14 and we want to help to bring about a mutually  
15 beneficial resolution.

16 There's a number of times though,  
17 and it has been alleged by the Rails-to-Trails  
18 Conservancy and others that the railroads  
19 refuse to participate in a negotiation, it's  
20 a voluntary program, and railroads don't want  
21 to participate in the creation of a trail.

22 Could you, Mr. Hamberger or Mr.

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1 Shudtz or Mr. Strohmeier, spell out some of  
2 the circumstances under which a railroad would  
3 say, "Well, a trail might be a nice public  
4 benefit, but we don't want to be involved in  
5 that"?

6 MR. HAMBERGER: Well, I think the  
7 previous panel beat this around a little bit,  
8 and that is what is the ownership right of a  
9 private sector railroad for a private piece of  
10 land on which it is operating and is its right  
11 to come into this Board, ask for an  
12 abandonment. If there is an OFA, then another  
13 carrier can come in and maintain the rail use,  
14 which is a very high priority.

15 If not, then of course, if there  
16 is a great local demand for trails use, then  
17 the city or the county can exercise its right  
18 of eminent domain to establish such a trail,  
19 and finally, if none of that occurs, the  
20 railroad is free to then negotiate the sale of  
21 its property.

22 So you know, one has to take a

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1 look at all of the options on the table, and  
2 Ms. Fowler slipped in the word "windfall  
3 profits." I don't consider it a windfall  
4 profit when one sells a piece of property for  
5 more than one paid for it.

6 So, you know, it is a series of  
7 considerations, and maintaining the right-of-  
8 way for future use is one of those, but  
9 certainly there are times when you can foresee  
10 that that may not be the case, and it is your  
11 fiduciary obligation to your shareholders to  
12 maximize what you can for that private piece  
13 of property.

14 CHAIRMAN MULVEY: Mr. Shudtz, do  
15 you have anything to add?

16 MR. SHUDTZ: Just some practical  
17 considerations. You know, as long as we owned  
18 the property, we were, of course, responsible  
19 to the public communities for its upkeep and,  
20 of course, there's always liability concerns  
21 with bridges and things of that nature. So  
22 in some instances if we don't see a likelihood

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1 of successfully concluding a trail, we may not  
2 wish to enter into a long period of  
3 negotiation.

4 But, again, we're very desirous of  
5 looking for ward to our properties being  
6 reused for other purposes, private and public,  
7 and as Mr. Hamberger just said, you know,  
8 trail use is a public use, but there are other  
9 public uses of the properties.

10 For example, in New York State we  
11 are required after we conclude the abandonment  
12 process to make our properties available to  
13 the state and local subdivisions, and they  
14 have a right of purchase. This is common also  
15 in Massachusetts and other places.

16 So the governmental authorities  
17 like to have the opportunity to reuse the  
18 properties for maybe roadways or parks or  
19 other public purposes. So the whole event of  
20 process is a piece of this puzzle of kind of  
21 reuse of the property.

22 MR. STROHMEYER: The only thing

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1 that I would add on that is if I was sitting  
2 in the position of an abandoning carrier I  
3 would be seeking to maximize whatever return  
4 that I could get.

5 In the KCS case that I cited  
6 earlier, it was quite obvious to Kansas City  
7 Southern that they were seeking the, you know,  
8 maximum price that they could get for their  
9 real estate, and I certainly wouldn't be  
10 advocating the position that would begrudge  
11 them, you know, their fair consideration.

12 I happen to also work, speaking of  
13 the High Line, if the Board may recall, there  
14 was a feeder line application by the 40-plus  
15 Organization in that proceeding back in 2001-  
16 2002. I had been asked to actually conduct a  
17 study. The group advocating the feeder line  
18 didn't like the conclusions that I reached  
19 because gentrification was occurring at such  
20 a rapid pace in the Cheslea section of  
21 Manhattan. I thought it was kind of a silly  
22 waste of time, energy, and money when the loss

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1 that these industrial buildings were being  
2 converted into were going for sky high real  
3 estate values. It was like you're not going  
4 to put a warehouse in that portion of  
5 Manhattan. It's just the nature of the beast.

6 And I'm very grateful that CSX  
7 actually chose to go the way that they did and  
8 preserve the corridor for some future use  
9 because I think they probably would have made  
10 more money had they not gone that way just by  
11 the nature of the beast. They would have had  
12 some demolition costs, but with the way new  
13 York City real estate exploded shortly  
14 thereafter, their decision to do what they did  
15 was actually quite noble.

16 CHAIRMAN MULVEY: What came up  
17 earlier was this issue of a contract, a  
18 prototype contract, and Mr. Hamberger, would  
19 the AAR be interested in working with a group  
20 at the RTC to develop some sort of boiler  
21 plate Trails Act agreement that would clarify  
22 who's responsible for bearing the cost of

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1 replacing bridges and making other necessary  
2 repairs on rail services that are going to be  
3 restored over a rail bank line?

4 MR. HAMBERGER: We have not  
5 specifically discussed that in preparation for  
6 this hearing, but I would certainly recommend  
7 to our members that they would participate in  
8 such an activity.

9 CHAIRMAN MULVEY: Mr. Shudtz,  
10 would that be something that the CSX would be  
11 interested in working with these trail groups  
12 to come up with some sort of boilerplate  
13 language that would try to address all of  
14 these issues that seem to come up as to who  
15 bears the responsibility and liability, et  
16 cetera?

17 MR. SHUDTZ: Yes, we're always  
18 willing to work with folks. We've had  
19 conversations, of course, over the years with  
20 the Rail-to-Trails Conservancy. My point of  
21 emphasis here is the voluntary nature of the  
22 transactions and the need to insure that the

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1 railroads are not encumbered with the property  
2 over long periods of time, and that we're not  
3 preventing other public and private uses of  
4 the property through a mandatory rail banking  
5 and extended periods.

6 CHAIRMAN MULVEY: I raise this  
7 question of the public character of rail  
8 corridors. They are private property, but as  
9 Mr. Montange pointed out before, they are  
10 private property charged with a public use and  
11 public regulation and the like.

12 I'm not a lawyer, but I do go back  
13 and remember the cases like Nebbia v. New York  
14 and some of the other ones, I think, that  
15 dealt with this issue of private companies  
16 charged with a public interest.

17 And trails operations certainly  
18 represents a public good. Is there something  
19 to be said to that, that the railroad rights-  
20 of-way are, in fact, a public good that need  
21 to be preserved above and beyond restoration  
22 of rail service, but can be converted into

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1 other things like trails for public use and  
2 that's a good use and a fair use of that  
3 property, but with just compensation?

4 MR. HAMBERGER: Well, I think you  
5 have to go through the abandonment process to  
6 get to the final end of that, as Mr. Montange  
7 did accurately portray, it is a regulated  
8 piece of property, and that's why we have to  
9 come here to get free of the common carrier  
10 obligation, but then once that occurs if there  
11 is plenty of time in that process for others  
12 to come in and with OFA and, you know,  
13 preserve it or transform it into other public  
14 uses with appropriate financial assistance.

15 But if you get through to the  
16 abandonment, then it should be free and clear,  
17 it seems to me.

18 CHAIRMAN MULVEY: Thank you.

19 Vice Chairman Nottingham.

20 VICE CHAIRMAN NOTTINGHAM: Thank  
21 you, Chairman Mulvey.

22 I did want to comment Mr.

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1 Hamberger for not only completing his  
2 testimony right on time today, but delivering  
3 a book review and report in addition as a  
4 bonus.

5 I have to confess though I --

6 MR. HAMBERGER: It's a great  
7 trilogy.

8 VICE CHAIRMAN NOTTINGHAM: -- have  
9 a third grader at home. I'm helping him with  
10 his summer reading. If you're trying to  
11 connect with this Commissioner, I recommend  
12 you try to allude to books like James and the  
13 Giant Peach or The Big, Friendly Giant.  
14 That's just a free tip for all of you  
15 practitioners out there.

16 And one reason we have -- probably  
17 not the only reason, Mr. Chairman -- that we  
18 have 30 days to supplement the record, if  
19 anybody else wants to contribute to Mr.  
20 Hamberger and Mr. Montange's dueling book  
21 reviews, I think it's now wide open. So we  
22 look forward --

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1 MR. HAMBERGER: Revenge of the  
2 Giant Peach is where he said -- no, that's the  
3 Friendly Giant where he says, "Am I right or  
4 am I left?"

5 VICE CHAIRMAN NOTTINGHAM: I think  
6 you're right. We'll have to have another  
7 hearing for that.

8 I did want to commend the CSX and  
9 all the folks in New York City and Friends of  
10 the High Line for completing and opening what  
11 truly is an amazing contribution to New York  
12 City and to the trail network and the whole  
13 concept of recreation and converting rail  
14 right-of-way to new and greatly appreciated  
15 public use. I think it's just outstanding.

16 I do want to say there were some  
17 STB and ICC staff -- and I'll probably be  
18 omitting some -- but there are some that we  
19 know of who are still with us who worked quite  
20 hard to make that day possible --

21 MR. HAMBERGER: Yes, indeed.

22 VICE CHAIRMAN NOTTINGHAM: -- and

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1 some of the nitty-gritty legal stuff that  
2 turns up that needed to.

3 I wanted to recognize Evelyn  
4 Kitay, Vicki Rutson and Alan Weinstein, in  
5 particular. And we followed the press. I  
6 will say it wasn't any personal pride because  
7 all of the hard work happened before I came to  
8 the Board, but I asked around and nobody at  
9 the Board actually knew that the opening was  
10 happening until he read about it. We have  
11 some people who probably would have on their  
12 own time loved to have gone up there and been  
13 part of the celebration.

14 But I say that just for the trail  
15 advocates. If you do think that the Board was  
16 actually helpful -- and please know we do try  
17 to monitor these things and we do enjoy the  
18 opportunity to celebrate successes as well.  
19 We missed that one, but I can't wait until the  
20 next time I'm in Manhattan, which I think will  
21 be in August on my own nickel to go up there  
22 and navigate the crowd.

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1           Hopefully they don't have the  
2           17,500 people there when I'm there, but if so,  
3           that's all the more successful.       But  
4           congratulations on that.

5           The issue of removal of rail  
6           bridges in the context of a trail operation,  
7           in the context of having a trail in operation,  
8           we have seen and we continue to see a whole  
9           range of fact scenarios from bridges being  
10          deemed by some public entity like the state  
11          DOT to be so old and so decrepit that there's  
12          a public safety risk and it certainly would be  
13          unfair to charge, I think, to charge the trail  
14          operator in that kind of scenario with the  
15          cost of dismantling the bridge.

16          I could say it might be equally  
17          unfair post abandonment to charge the railroad  
18          with the cost of dismantling the bridge, but  
19          certainly I think some clarity could be in  
20          order there.   I guess as one Commissioner I  
21          would just be looking for sort of some kind of  
22          public -- some documentation of a real public

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1 need to dismantle. I don't think we've had  
2 many cases like this, but I always worry about  
3 over zealous dismantling of bridges.

4 If a trail group determined it was  
5 in their interest to fend off the resumption  
6 of rail service, would they be tempted to  
7 arbitrarily remove bridges just to make it  
8 really expensive to resume rail service? I'm  
9 concerned about that scenario and others. But  
10 I would be open to suggestions.

11 I'm also very interested in trying  
12 to, I guess, improve the Board's -- I  
13 understand it takes time to execute these  
14 agreements, and I don't want to have any  
15 arbitrary deadline, but I will say when I see  
16 when the third, fourth, fifth, sixth seventh  
17 extension crosses my desk, the longer I'm at  
18 the Board I just kind of wonder what's going  
19 on here.

20 We never really get to see because  
21 I don't think we ask of it; we never really  
22 see much in the way of -- they all look the

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1 same. They all say, "We're still working on  
2 it. We'll get back to you. We need 180 more  
3 days."

4 I never really know if somebody  
5 really is working on it. I mean is there some  
6 -- and so I'd be interested in just a little  
7 more gentle pressure or let the Board help.  
8 You know, hey, folks, can we help move this  
9 along? We know it's voluntary, but how long  
10 is -- you know, this is hanging out there.

11 And with that some notice, too, I  
12 think, of when agreements are consummated. It  
13 would be just, I think, orderly and in the  
14 spirit of kind of good oversight if we just as  
15 an agency just knew that there was an  
16 agreement consummated. I don't think we need  
17 the terms or the confidential agreement or  
18 anything but just the fact knowing which ones  
19 are still out there unresolved and which ones  
20 are actually consummated would be of interest  
21 to me.

22 But I throw that out to any of the

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1 witnesses. Mr. Hamberger, do you want to go  
2 first and then Mr. Shudtz?

3 MR. HAMBERGER: I'm going to defer  
4 to counsel from CSX.

5 MR. SHUDTZ: Yes, I think the good  
6 news, the multiple extensions, is that people  
7 are still talking in a voluntary context and  
8 are hopeful of reaching conclusion. I know  
9 our experience has been that many times it's  
10 the securing of the funding necessary to  
11 create the park and all the public interests  
12 that have to be addressed.

13 So the Board's tolerance of the  
14 extensions were involuntarily sought by both  
15 parties is an aid to including a trail.

16 As far as advising of a  
17 consummation of the agreement, I think that's  
18 a helpful item for the Board's record keeping  
19 and for the parties to know, other parties in  
20 the proceeding to know that an agreement has  
21 been struck.

22 I know we often do that ourselves

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1 just voluntarily just so the record is clear.

2 VICE CHAIRMAN NOTTINGHAM: Mr.  
3 Shudtz, could that be done in your view just  
4 by some regulatory action by the Board to  
5 start requiring a notice of consummation?

6 MR. SHUDTZ: I would think in the  
7 CITU certificates themselves, you just specify  
8 that upon the completion of the agreement the  
9 parties shall notify the Board.

10 VICE CHAIRMAN NOTTINGHAM: That's  
11 all I have for this panel.

12 Mr. Strohmeier, anything you  
13 wanted to contribute on any of those points?

14 MR. STROHMEYER: Nothing at this  
15 time.

16 VICE CHAIRMAN NOTTINGHAM: Thank  
17 you.

18 CHAIRMAN MULVEY: Well, thank you  
19 very much. Once again, very, very useful,  
20 very, very helpful, and thank you for coming  
21 today.

22 VICE CHAIRMAN NOTTINGHAM: Thank

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1 you.

2 CHAIRMAN MULVEY: We'd like now to  
3 have our final panel come up today. This is  
4 the panel representing reversionary property  
5 interests. Well, it's listed as other  
6 interested parties.

7 We have the National Association  
8 of Reversionary Property Owners. Speaking for  
9 them is Kathleen Kauffman, and Danaya C.  
10 Wright from the University of Florida's Levin  
11 School of Law.

12 Thank you both for coming today,  
13 and we'll begin with you, Ms. Kauffman.

14 MS. KAUFFMAN: Thank you, Mr.  
15 Chairman.

16 Good morning. My name is Kathleen  
17 Kauffman. I'm a partner with the firm of  
18 Ackerson, Kauffman, Fex here in the District  
19 of Columbia.

20 CHAIRMAN MULVEY: Do you want to  
21 speak directly into the mic a little bit  
22 because it's hard to hear sometimes?

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1 Thank you.

2 MS. KAUFFMAN: Does that work? Is  
3 that good?

4 CHAIRMAN MULVEY: Yes.

5 MS. KAUFFMAN: Okay. My firm  
6 represents landowners in disputes over  
7 ownership of railroad rights-of-way. Their  
8 practice includes several class actions and  
9 individual suits where we represent landowners  
10 in Tucker Act suits against the United States  
11 to recover compensation when a trail results  
12 in the taking of property.

13 It is gratifying, as listening to  
14 the Board's comments and to the prior  
15 panelists, including the railroads, to  
16 recognize the importance of property rights  
17 and the importance of our system of law that  
18 protects those property rights, whether they  
19 be the property rights of the railroad or the  
20 property rights of the reversionary interests  
21 of the adjoining landowners.

22 One of my firm's most noteworthy

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1 cases, my firm represented Paul Preseault in  
2 the damages action that followed the Supreme  
3 Court's and the federal circuit court's  
4 decision that the trail created through his  
5 property constituted a governmental taking  
6 that must be compensated under the U.S.  
7 Constitution.

8 In other actions we represent  
9 landowners in suits against telecommunications  
10 companies, use active railroad rights-of-way  
11 without permission from adjoining landowners  
12 who retain the rights to the fee.

13 Finally, we are also retained in  
14 eminent domain proceedings, another way of  
15 creating public uses such as parks and trails  
16 where, for instance, a governmental agency  
17 seeks to condemn property for a park or a  
18 stadium.

19 Today I'm here representing the  
20 National Association of Reversionary Property  
21 Owners whose written testimony has been  
22 submitted by its Executive Director, Richard

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1 Welsh.

2 NARPO's written testimony details  
3 for the Board the winners and the losers under  
4 the Trails Act. The biggest winners are the  
5 railroads, and I don't think that's a  
6 difficult proposition at the end of the day  
7 today in listening to the testimony that has  
8 come before. They have the discretion and the  
9 option to either take the deal or walk away  
10 from the table. They are there with their  
11 property rights demanding full economic value  
12 for those property rights or they will pass on  
13 the deal.

14 At the same time, they often take  
15 large, charitable tax deductions for their  
16 trouble in that instance.

17 The trail proponents are also  
18 obviously winners. They want a trail, and as  
19 a result of the legislation they can get a  
20 trail in a very streamlined process.

21 My organization or the  
22 organization I represent is not here -- as the

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1 Chairman indicated at the beginning, this  
2 hearing is not about whether there should be  
3 a Trail Act or there should not be a Trail  
4 Act. That's not the purpose of the  
5 recommendations NARPO gave to the Board.

6 The purpose is to say how the  
7 Trail Act can be more fairly administered so  
8 that the interests of all of the parties, the  
9 trail, the railroads with property interest,  
10 and the reversionary owners who also have  
11 property interests can be fairly and  
12 adequately accommodated in that process.

13 It is important to look at your  
14 regulatory ability in this area because the  
15 major losers in this process are the property  
16 owners who adjoin the land. That is the  
17 reason trails are welcome only when they are  
18 in someone else's property. The trails drive  
19 down property values for adjoining owners and  
20 increase crimes against their property and  
21 their person. The trails are sometimes  
22 beautifully managed. They are sometimes

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1 poorly managed, and the trails group sometimes  
2 become defunct.

3           Although many adjoining  
4 landowners, most, in fact, in our experience,  
5 are entitled to compensation because the trail  
6 is a taking of their property rights, the  
7 system is stacked against them. Statutes of  
8 limitations may run even before they know a  
9 trail will be put in place. That is the down  
10 side of the unlimited extensions after a  
11 notice of interim trail use goes in.

12           It is one thing to be put on  
13 notice when the plows come through and the  
14 blacktop is put down that some trail is being  
15 put down next to your property. It is another  
16 thing to know that it is the filing of that  
17 notice of interim trail use that begins the  
18 ticking clock on statute of limitations for  
19 the only remedy these adjoining landowners  
20 have, which is a suit under the Tucker Act.

21           Even if the landowners become  
22 aware of their rights before the statute of

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1 limitations runs and brings suit under the  
2 Tucker Act, as has been specifically  
3 recognized to be their right by the Supreme  
4 Court and they have successfully done in many  
5 instances, these suits are very expensive to  
6 litigate. Attorney's fees and expenses can be  
7 recovered at the end, but the suits can take  
8 a decade or more, and property owners may have  
9 to pay millions in fees and expenses before  
10 the case is done.

11 Another loser is the taxpayer  
12 because if the adjoining landowners do bring  
13 suit under the Tucker Act, then taxpayers must  
14 pay for compensation and attorney's fees even  
15 though no legislative body decided that the  
16 cost for that particular trail at that  
17 particular time was affordable or worth the  
18 cost.

19 The federal government under the  
20 Tucker Act pays the adjoining landowners. The  
21 parties at the table negotiating the trail use  
22 agreement are the railroad who is there to get

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1 money for its maybe 50 percent rights on that  
2 rail. The trail group is looking to raise  
3 money to make it as nice as they can, but the  
4 economic costs of compensating the adjoining  
5 landowners is not in that room and is not on  
6 the shoulder of either of the parties who are  
7 negotiating that trail agreement.

8 It is a lovely thing to have a  
9 lovely trail. For the community as a whole,  
10 our National Association of Reversionary  
11 Property Owners does not say that it's not a  
12 public use, that is, a proper means for which  
13 property can be taken. But the way this  
14 system works dislocated the decision making  
15 process and the economic process because the  
16 adjoining landowner's recourse is against the  
17 federal government, and under the Tucker Act,  
18 whereas the people making the decision to  
19 enter into that trail agreement or not, for  
20 them the cost of compensating the adjoining  
21 landowners is a totally free good.

22 And as a result, it is not the

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1 sort of decision making that we traditionally  
2 do in the system before property is taken for  
3 a public use.

4 In addition, of course, the  
5 federal taxpayers not only compensate in  
6 Tucker Act suits, but they also allocate  
7 approximately a billion dollars out of the  
8 federal gas tax for bike trails.

9 It is helpful to contrast what we  
10 do to create a park and what we do to create  
11 a trail. If a city or state wants a new park,  
12 they go through a well established  
13 condemnation process to get the necessary  
14 rights. Before establishing the park, they  
15 determine whether money exists to acquire  
16 rights and to operate the park.

17 After the park is established,  
18 it's managed and policed by local governmental  
19 entities. Adjoining landowners can petition  
20 local authorities over poor maintenance or  
21 security issues. None of these safeguards are  
22 in place for trails.

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1                   It could be if the trail group is  
2 a unit of New York City, then the only  
3 distinction between the creation of that park  
4 and the creation of some other park in New  
5 York is the fact that the adjoining landowner  
6 compensation, the actual owners of the  
7 underlying fee, that is put to the side and is  
8 kept out of the process.

9                   But in other cases there are more  
10 distinctions because the trail group is not  
11 necessarily New York City. The trail group  
12 may be a group who spent years putting  
13 together a minimum amount of money and a lot  
14 of hope and wish and prayer that it was all  
15 going to come together, and then goes defunct  
16 or does not have the money necessary to  
17 maintain it and keep it secure and well  
18 policed.

19                   NARPO's written testimony proposes  
20 five concrete steps the STB can take today to  
21 make the Trails Act fair and just for adjacent  
22 property owners and taxpayers.

1                   Number one, adjoining landowners  
2                   must be notified of the abandonment and the  
3                   potential for the notice of interim trail use.  
4                   Under a 2004 federal circuit decision, the  
5                   statute of limitations begins to run when the  
6                   notice of interim trail use is issued. The  
7                   STB must establish a rule that eliminates the  
8                   Tucker Act Catch-22 so actions are not barred  
9                   by the statute of limitations before adjoining  
10                  landowners even know a trail is going in.

11                  In its 1990 decision in Preseault  
12                  v. ICC, the Supreme Court recognized that many  
13                  railroads do not own their rights-of-way  
14                  outright but rather hold them under easement  
15                  or similar property interest. It avoided the  
16                  question of whether the Trails Act violated  
17                  the Fifth Amendment takings clause because it  
18                  found that the Tucker Act provided an adequate  
19                  process for obtaining compensation.

20                  Obviously, the Tucker Act is not  
21                  an adequate process if a claimant's rights are  
22                  foreclosed before he or she has reasonable

1 notice of the potential cause of action. In  
2 other contexts where the Supreme Court has  
3 considered what process is due a citizen  
4 before he or she is deprived of property  
5 rights, the Court has held that reasonable  
6 notice is required.

7 In the case of property, notice by  
8 direct mail to those whose names are available  
9 in the public record is required.

10 Second, railroads should be  
11 required to file evaluation maps and land  
12 schedules when the notice of interim trail use  
13 is issued. These schedules will provide  
14 landowners with guidance on title. As the  
15 Supreme Court noted in Preseault, many  
16 railroads do not own the right-of-way  
17 outright. In my firm's Tucker Act class  
18 actions, with one exception, the adjoining  
19 landowners are found to have title superior to  
20 the railroad and, therefore compensable  
21 interest if the trail goes through between 50  
22 and 80 percent of the time.

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1           The railroads have, as the panel  
2 knows, valuation maps. Those valuation maps  
3 contain land schedules. They are easily  
4 available to the railroad. They are less  
5 easily available out in College Park to  
6 somebody adept at the archives system, but  
7 they are not available to citizens in Nebraska  
8 or Ohio or Arizona who know that there has  
9 been a railroad next to their property for 100  
10 years and have a very difficult time knowing  
11 whether they are on a portion of the railroad  
12 where, in fact, their property has the  
13 reversionary interest or on a portion where  
14 the railroad has free title.

15           This Board in the past or the ICC  
16 in the past has required that the railroads  
17 catalogue their interest, required that that  
18 be made available to the Board so that the  
19 Board knows what the mix of private and  
20 railroad interest is, and part of the process  
21 of making the Trail Act fair to adjoining  
22 landowners whose sole ability to get

1 compensation for their private property is  
2 through a Tucker Act action. Part of the  
3 process of making this act more fair for all  
4 of the interested parties at the table is  
5 requiring that those valuation maps and those  
6 land schedules be filed within the STB docket  
7 when the NIT is issued.

8 Three, the STB should issue a  
9 maximum of four 180-day extensions so the  
10 parties have no more than two years to  
11 consummate a trail use agreement. One of the  
12 items of agreement among all of the panelists  
13 from all of the various interests has been  
14 that the STB needs to have a public  
15 notification that the process actually came to  
16 an end and that there was a trail use  
17 agreement consummated.

18 Think of what is fair to the  
19 landowner with reversionary interests in  
20 Nebraska or in Minnesota or in North Dakota.  
21 In Washington, D.C. a notice of interim trail  
22 use is filed. If the Board adopts what we

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1 think is a crucial recommendation and notice  
2 goes out, they will know that there's an STB  
3 docket. They will know that that STB docket  
4 may have an impact on their personal property  
5 rights.

6 If they hire a lawyer, they will  
7 find out they don't get to be at that table  
8 where the railroad tries to get maximum  
9 compensation for their property rights.

10 But to know whether or not this  
11 trail is going to go through, they need to  
12 know whether or not the trail agreement has  
13 been consummated, and that seems to be not  
14 disputed by anybody.

15 But then the question also must be  
16 how long do you need to sit in that farmhouse  
17 in North Dakota to try and wonder whether your  
18 farm is going to be bisected not by a railroad  
19 with a freight train that comes by once a day  
20 where you've got a crossing agreement, but  
21 instead by an entirely different public use.  
22 It's a public use, but it's an entirely

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1 different public use.

2 And the National Association of  
3 Reversionary Property Owners submits that two  
4 years is enough time to find out whether your  
5 railroad tracks going through your property  
6 are going to stay or they're going to go and  
7 whether they are going to be replaced with an  
8 entirely different public use.

9 Fourth, the STB should be notified  
10 of the contact information for the trail  
11 manager on the consummation of the trail use  
12 agreement. The consummation of the trail use  
13 agreement may be the end of the story for the  
14 STB. It may be the end of the story for the  
15 railroad, but it is the beginning of the story  
16 for those adjoining landowners who now need to  
17 deal not only with beautiful, beautiful parks  
18 which made their cameo here today, but with a  
19 lot of not so beautiful parks, with trails  
20 that the funding was too shoestring on, where  
21 the maintenance is not what it should be,  
22 where the security is not what it should be,

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1 and with some of these groups, particularly  
2 when they go defunct, the landowner is stuck  
3 looking for who do they contact. So is the  
4 trail manager?

5 And the Board needs to require  
6 that when there is a consummation of a trail  
7 use agreement there is a public notice filed  
8 in the STB, that notice include the name of  
9 the trail manager, and if that trail manager  
10 changes, that that also be a subject of public  
11 notice.

12 Fifth, the STB should provide a  
13 simple process to seek relief from derelict  
14 trail managers, and if that simple process  
15 does not result in a resolution of the issue,  
16 it should issue a statement of non-  
17 jurisdiction if the issues cannot be resolved  
18 at the STB level so landowners can pursue the  
19 issues in their local courts.

20 I wanted to make a comment -- and  
21 those are the recommendations in the written  
22 testimony that was submitted. I wanted to

1 make one further comment on the question of  
2 whether or not the conversion of trail use  
3 should be mandatory. I would submit that if  
4 you look at the economic consequences of  
5 mandatory conversion to trail use, the  
6 American Association of Railroads was not  
7 interested in that because they have private  
8 property. They own it.

9 If they don't like the agreement  
10 they get from the trail group, they want to be  
11 able to go and sell their property however it  
12 is they want to be able to sell their  
13 property.

14 Well, the members of the National  
15 Association of Reversionary Property Owners  
16 have those same interests, and if there is  
17 mandatory rail banking, mandatory trails, then  
18 what you will do is create a huge unfunded  
19 liability for the federal government because  
20 each and every one of those adjoining  
21 landowners would then have a right under the  
22 decisions of the federal circuit and the

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1 Supreme Court to go in for compensation.

2 So we would urge that it not be  
3 mandatory going into the future.

4 Thank you.

5 CHAIRMAN MULVEY: Thank you very  
6 much, Ms. Kauffman.

7 Ms. Wright.

8 MS. WRIGHT: Yes, thank you.

9 I am an outsider here. I don't  
10 represent anyone. I'm a professor of law who  
11 has spent the last 15 years studying in this  
12 area. In particular, I focus on legal rights  
13 of railroads to their property in their rail  
14 corridors. I studied the federally granted  
15 rights-of-way, and I've obviously spent some  
16 time studying the rail banking statute itself.

17 If I represent anyone, it's the  
18 sort of unnamed, unidentified public who  
19 value, I think, or should value probably more  
20 than they think they value coherent, rational,  
21 and equitable laws. That's what law  
22 professors do. We spend a lot of time

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1 thinking about what's the right law here.

2 And I realize that the Surface  
3 Transportation Board's jurisdiction over the  
4 common carrier obligations and liabilities are  
5 different than the state law property rights  
6 that my colleague here has been speaking  
7 about, and my goal here is to correct the  
8 number of statements that were made in the  
9 testimony of NARPO and also to put the legal  
10 challenges to rail banking and railroad  
11 property into an historical perspective.

12 As you know, in the 19th Century  
13 from the 1840s to around the turn of the  
14 century a railroad could mean the difference  
15 between economic viability and economic  
16 stagnation for a community. For that reason  
17 nearly everyone wanted railroads in their  
18 communities, and they sought to woo them with  
19 countless incentives.

20 More importantly, courts and  
21 lawmakers strongly supported the rights of  
22 railroads particularly in their property

1 rights to land in their corridors. State  
2 after state gave railroads eminent domain  
3 powers, and state courts protected the  
4 property rights of these railroads against  
5 adverse possessors or adjacent landowners who  
6 tried to limit the uses the railroads could  
7 make of the land that had been conveyed to  
8 them.

9 But the honeymoon soon ended. By  
10 the turn of the 20th century, railroad abuses  
11 of all sorts had led numerous states to limit  
12 the property rights railroads could acquire by  
13 eminent domain and many courts began a  
14 concerted effort to limit the railroad's  
15 property rights, to punish them for setting  
16 discriminatory freight rates, entering pooling  
17 agreements, manipulating stock prices, those  
18 sorts of things.

19 Many railroads faced tremendous  
20 pressures to consolidate and shed unproductive  
21 lines in the 1890s and again in the 1930s.  
22 Many railroads were not built. These

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1 political and economic realities led the  
2 regulatory reform movement against the  
3 railroads, which of course resulted in the  
4 creation of the Interstate Commerce Commission  
5 in 1887 and the nationalization of the  
6 railroads during World War I.

7 The legal effects of this period  
8 was the development of a body of case law and  
9 common law rules that narrowly limited the  
10 property rights of railroads, reversing the  
11 19th Century presumptions in favor of railroad  
12 property rights and giving adjacent landowners  
13 property rights in abutting corridors that  
14 were nowhere described in their own deeds.

15 In modern terms, these cases,  
16 these 20th Century cases, resulted in what we  
17 would deem to be unconstitutional shifts of  
18 property rights from railroads and the public  
19 to private landowners. And I want to  
20 emphasize the public. I strongly support the  
21 idea that the railroads and the landowners are  
22 not the only parties at the table and should

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1 not be the only parties at the table.

2 This conflict between the 19th  
3 Century pro railroad cases, as I call it just  
4 for shorthand, in the early 20th Century,  
5 anti-railroad cases has provided the legal  
6 framework for most of these rail banking and  
7 rail property disputes, but as a property  
8 professor, I am deeply troubled by the anti-  
9 railroad cases from the 20th Century and the  
10 exceptions they have created to standard, well  
11 reasoned property doctrines.

12 For instance, it's a standard rule  
13 that one cannot claim property rights by  
14 challenging the weakness of one's neighbor's  
15 title, but only on the strength of one's own.  
16 This principal is jettisoned in these railroad  
17 cases, and I should say has been exploited by  
18 the adjacent landowners in many of these  
19 lawsuits.

20 A second is that the law construes  
21 ambiguities against the grantor of property.  
22 This rule, too, is ignored by many courts in

1 the railroad context only.

2 A third is that the law abhors  
3 forfeiture and will not interpret ambiguous  
4 language to create reversionary rights unless  
5 the language is explicit. This, too is a rule  
6 that applies everywhere except in the railroad  
7 property context.

8 A fourth is that rail property is  
9 unique in class action suits or inappropriate  
10 mechanisms for trying title to property.  
11 Another long time rule is ignored.

12 I mention these examples, and I  
13 can give more, to explain why I think these  
14 anti-railroad cases of the 20th Century are,  
15 quite frankly, wrong. For over 900 years, the  
16 common law rules of property have evolved  
17 slowly and carefully -- and I have to say I  
18 rather enjoy the 16th century. It was a very  
19 nice century -- to protect the interests of  
20 those in possession and those with the best  
21 and most equitable claims.

22 Yet over a very short period these

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1 rules were cast aside to provide results  
2 oriented decisions to punish railroads for  
3 their widespread abuses in other areas.

4 The problem with this shortsighted  
5 rulemaking by countless state courts is that  
6 these rules quickly get expanded to undermine  
7 the property rights of all.

8 Another problem is that that they  
9 are expensive and time consuming to correct,  
10 yet they are being corrected. The litigation  
11 over the past 25 years has resulted in  
12 numerous state courts analyzing their history  
13 of deconstruction rule interpretation and  
14 reversing many of these anti-railroad rules.  
15 Minnesota is a perfect case. Iowa is another  
16 case; Maryland.

17 When they have placed their  
18 precedents into historical context, they have  
19 seen that the better rules are ones that do  
20 not create exceptions for railroad deeds that  
21 are not based on punishing the railroads for  
22 this behavior and that harmonize property

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1 rules across a broad spectrum of landowners.  
2 They also acknowledge public rights in  
3 railroad corridors.

4 Some states have not made that  
5 shift and merely mimic the anti-railroad rules  
6 from the recent past, but those states are  
7 discovering that the exceptions that are being  
8 perpetuated are leading to quite serious  
9 unintended consequences, conflicts among  
10 property rules, tension and land uses and a  
11 general weakening of property rights  
12 protections for all.

13 The spate of recent railroad  
14 property cases is actually resolving many of  
15 these conflicts and forcing states to come to  
16 grips with the quite exceptional rules they  
17 adopted in the early 20th Century.

18 Moreover, there are relatively few  
19 cases in the grand scheme of things if you  
20 think about it. In the first 25 years of  
21 railroad construction, there were far more  
22 cases than we have today disputing railroad

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1 property rights, and while the cases today may  
2 seem expensive and bitter, I believe we're  
3 making progress.

4 So I want to assure the Board that  
5 the legal challenges are not unusual. They  
6 are progressing toward more stable and  
7 coherent rules that will protect the property  
8 rights of everyone.

9 I would like to take a quick  
10 moment to address a number of erroneous points  
11 made by NARPO. First, the claim is that  
12 railroads acquired most of their property  
13 rights as easements is simply untrue. I have  
14 examined over probably 3,000 and my students  
15 and I have examined over 7,000 railroad deeds  
16 from the 19th Century, and I can attest that  
17 over 80 percent of those from States like  
18 Pennsylvania, New York, Ohio, Indiana, Kansas,  
19 Missouri, Iowa, Idaho and Washington are  
20 clear, unambiguous fee simple absolute deeds  
21 in the railroads. Most of the remaining 20  
22 percent were intended to be fee simple deeds,

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1 but contain what would later become in this  
2 later period of case law ambiguous elements,  
3 like use of the term "right-of-way."

4 In the 19th Century, when these  
5 deeds were granted, the parties understood  
6 that fee interests were being conveyed and the  
7 courts for the most part supported that. And  
8 the courts applied basic common law property  
9 rules of construction to protect the title of  
10 the railroads, which were the parties in  
11 possession who had paid valuable consideration  
12 for that land.

13 And I have to say I am not paid by  
14 the railroad. This is my belief that this is  
15 an area of law where courts really need to do  
16 some serious thinking.

17 Second, the vast majority -- and I  
18 don't have specific data on this, but from  
19 what I have looked on a somewhat anecdotal  
20 basis -- well over 90 percent of adjacent  
21 landowners do not acquire any rights to  
22 abutting railroad corridor lands when they

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1 acquire their property. Most of their deeds  
2 exclude the railroad corridor land from land  
3 being conveyed to them, and they should not be  
4 able to claim property rights simply because  
5 they adjoin land that may have a clouded  
6 title, especially when that land is infused  
7 with the public interest.

8 They do not pay to purchase the  
9 land underlying the railroad corridor, and  
10 they have not paid taxes on that land.

11 Moreover, where railroads have  
12 taken a tax deduction for donating corridor  
13 land, those deductions have not gone  
14 unchecked. The Internal Revenue Service has  
15 challenged many of the claims and ultimately  
16 settled the appropriate tax disputes by  
17 examining the railroad's title to the lands  
18 being donated, and I can say that because I  
19 have been part of that.

20 The Department of Justice is not  
21 protracting litigation. They're defending the  
22 public Treasury against claimants who hear the

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1       clink of a cash register when they see a  
2       public trail being built. As you know, the  
3       Supreme Court in Preseault did not hold that  
4       all rail banking and interim trail use would  
5       be compensable. Quite the contrary, the  
6       federal courts determined that whether  
7       compensation due is on a case-by-case matter  
8       based on intricacies of different state law.

9               So arguing the legal issues are  
10       complex and are slowly being resolved is one  
11       of my goals, but my second is to assure you  
12       that rail banking is a success, that the  
13       difficulties of reactivation can be resolved  
14       relatively easily. I support the suggestion  
15       made by Richard Timmons of the American Short  
16       Line Railroad Association of creating a  
17       committee to study possible future regulation,  
18       changes to facilitate the primary goal of rail  
19       banking which is corridor -- I have one more.  
20       Thank you.

21               But we must not forget that as  
22       land becomes more scarce and resources more

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1 limited, we should put land to its highest and  
2 best use whenever possible. It may be that  
3 recreational trails are higher and better uses  
4 in some instances, and this goes back to Mr.  
5 Montange's point earlier: would we destroy a  
6 popular trail like the Capital Crescent Trail,  
7 especially that had light rail on it, to  
8 reestablish freight service for one shipper?

9 This Board can offer significant  
10 leadership on how we can develop rules to  
11 balance the competing interests and protect  
12 the public's rights in these national assets.

13 And I look forward to the Board's  
14 guidance in establishing regulations to help  
15 balance these interests so I can move on to  
16 something else, my scholarship.

17 Thank you.

18 CHAIRMAN MULVEY: Thank you very  
19 much.

20 Just a couple of questions. Ms.  
21 Kauffman, how do you reconcile your claim that  
22 the existence of a trail reduces the property

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1 values for adjacent property owners with the  
2 Conservancy's point that, in fact, property  
3 values next to trails actually are higher?

4 Do you have -- and I guess the  
5 question is also going to be addressed to Ms.  
6 Fowler too -- are there any studies that have  
7 been done that prove one way or the other what  
8 the impact on property values from the  
9 presence of a trail is?

10 MS. KAUFFMAN: Yes, Your Honor.  
11 Yes, Mr. Chairman. In the written testimony  
12 of the National Association of Reversionary  
13 Property Owners, you were referred to one  
14 study which I believe is available on a public  
15 Website, and I believe was done in the State  
16 of Washington. It's on page 3 of the written  
17 testimony. The results of the study, the  
18 effect of environmental zoning and amenities  
19 on property values in Portland, Oregon --

20 CHAIRMAN MULVEY: Land Economics,  
21 is that the one?

22 MS. KAUFFMAN: Yes.

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1 CHAIRMAN MULVEY: The 2004?

2 MS. KAUFFMAN: The property values  
3 next to trails and cemeteries indicated a 5.4  
4 percent yearly decrease in property values.

5 Now, that's different than being  
6 in the vicinity of a trail. I think the  
7 difference might be analogous to it's great to  
8 live in a neighborhood with good schools, but  
9 not necessarily great to own the house next to  
10 the playground, and I think you need to be  
11 careful when you're looking at property value  
12 research to look at research focused on  
13 exactly adjacent landowners versus the effect  
14 on the neighborhood in general.

15 In addition, there is a study in  
16 Minnesota which I think is more useful if I  
17 submit a short written follow-up to the  
18 Chairman. It's available online. It's named  
19 "Effect of Off-street Bike trails on home  
20 values in Hennepin County, Minnesota," and it  
21 again showed a decrease in values for the  
22 particular adjacent landowners.

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1                   CHAIRMAN MULVEY:    In many cases  
2                   the landowners were not the owners of the land  
3                   at the time the railroad was built, and that  
4                   the land has passed into many, many hands  
5                   several times.

6                   How do you distinguish between  
7                   people who have bought the lands and, one  
8                   would assume paid a discounted amount for the  
9                   land because it was on an abandoned right-of-  
10                  way which could be converted to a trail,  
11                  versus somebody who had the land in the family  
12                  for all the time since the railroad was built  
13                  back in the 19th Century?  Should we make a  
14                  distinction between people who bought the land  
15                  afterwards from people whose family had the  
16                  land at the time the railroad was built?

17                  MS. KAUFFMAN:  Well, Mr. Chairman,  
18                  I would say with respect, and possibly from  
19                  where you sit happily, that is an issue under  
20                  the Tucker Act for landowners to prove up with  
21                  they prove the amount of value they lost when  
22                  the trail went through.

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1           I think Professor Wright is too  
2 modest when she describes herself as strictly  
3 an academic. In fact, we often appear on  
4 opposite sides of cases with Professor Wright.  
5 You know, she was paid to examine all of those  
6 deeds in Ohio, and actually that's a current  
7 case right now coming out of the Penn Central  
8 bankruptcy that we on opposite sides of.

9           Within the Tucker Act cases, what  
10 happens is there is a class action brought of  
11 all the adjoining landowners. In most of the  
12 states there's a center line presumption that  
13 says regardless of what your deed says, you  
14 own to the center line, and that is in part  
15 because the law doesn't want little strips and  
16 pieces of property going around without anyone  
17 who owns it.

18           So all of the class members then  
19 come in, and they have the opportunity through  
20 the process to either have it shown that their  
21 title, the current title they own through  
22 their chain of title gives them compensable

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1 rights underlying the right-of-way or doesn't.  
2 Some of them win, some of their lose in that  
3 process.

4 My firm has experience in actually  
5 working the Tucker Act class actions through  
6 to the end when all of the winners and losers  
7 have been called, and in Iowa, because of the  
8 state court decision -- and the state law on  
9 deed interpretation has a major impact here --  
10 in Iowa a lot of people lost because of state  
11 law, and that's what the law says, and there  
12 was due process, and that's how we go forward.

13 In other states, including Indiana  
14 where the law is very favorable to landowners,  
15 and Ms. Wright was involved in the litigation  
16 we did in Indiana as well; in other states, 50  
17 to 80 percent of the time the adjoining  
18 landowners doing a simple state law based deed  
19 analysis are found to have had compensable  
20 reversionary interest.

21 And then the question is: what's  
22 the value? And at that point appraisers come

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1 in and say this was the value before the  
2 trail; this was the value after. It's a  
3 pretty simple standard analysis that you would  
4 go through any time a governmental entity  
5 takes a piece of property and then is faced  
6 with compensating the landowners under the  
7 Fifth Amendment.

8 So the Board is not going to have  
9 to decide how to value those interests. The  
10 mechanism for getting value for those  
11 interests is the Tucker Act mechanism, and  
12 there is a process that is followed in those  
13 cases to make those decisions.

14 I think the important issue for  
15 the Board is to make sure that the Board's  
16 piece of the process is fairly administered so  
17 that those landowners have the ability to get  
18 into federal court and find out whether their  
19 deed is one of the deeds where Danaya Wright's  
20 view of deed construction is going to hold  
21 sway or whether it is going to be one where  
22 they are found to have a reversionary

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1 interest.

2 It will vary from property to  
3 property. It's going to vary from state to  
4 state.

5 CHAIRMAN MULVEY: The interest of  
6 NARPO though is for the property owners to be  
7 fairly compensated; is that true, rather than  
8 preclude the development of a trail?

9 MS. KAUFFMAN: Well, the testimony  
10 of NARPO that they have submitted in response  
11 to your request for this hearing is all  
12 focused on making the process more fair for  
13 adjoining landowners, and that is the  
14 testimony that they've asked me to come here  
15 and present to you today.

16 I'm not in a position to tell the  
17 Chairman what NARPO might -- you know, whether  
18 they would be against the Trail Act or for the  
19 Trail Act. That is, as the Chairman pointed  
20 out, not the focus of this hearing and,  
21 therefore, not the focus of the testimony I'm  
22 here to present.

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1                   CHAIRMAN MULVEY:     Well, I did  
2 notice in the testimony that there was  
3 reference to crimes that are committed on  
4 trails; that when you put a trail through  
5 somebody's property, of course, you make that  
6 accessible to the public at large, and not  
7 everyone in the public at large is equally a  
8 good citizen and that there are crimes  
9 committed on these trails.

10                   MS.     KAUFFMAN:           And it's  
11 particularly a problem in these long, linear  
12 parks, you know. On the High Line Trail for  
13 a mile and a half through Manhattan, very  
14 dense population, lots of eyes on the  
15 property; that's going to be one thing. You  
16 have 350 miles of trail through Nebraska going  
17 by farmhouses, going by homes, going by  
18 businesses. It is just a natural fact of our  
19 society that security issues will arise there,  
20 and it's going to be an issue for adjoining  
21 landowners.

22                   CHAIRMAN MULVEY:     Wouldn't they

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1 also arise on farm-to-market roads which also  
2 go through rural areas and through farmland,  
3 et cetera? I mean, they are also places where  
4 these kinds of things could happen beyond just  
5 a trail.

6 MS. KAUFFMAN: It is absolutely  
7 the case, and I don't think the National  
8 Association of Reversionary Property Owners  
9 means to imply that the only place crime  
10 happens is on a trail.

11 I think, however, that there are  
12 unique factors of trails that you are not  
13 going to have. When you have a street, you  
14 have other cars on the street. You have other  
15 houses looking on the street. Depending upon  
16 the area, you might have street lights; you  
17 might have sidewalks; you might have lots of  
18 the community action that is going to serve to  
19 keep crime down.

20 If you have 350 miles going  
21 through rural area without any of those even  
22 normal rural area road factors -- and I have

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1 a farm in Minnesota, and you know every car on  
2 that road, and you wave to every car on that  
3 road, and you know, when that must be a rental  
4 car because you haven't seen that car before.

5 You're just not going to get that  
6 on a long, long linear trail, and it's going  
7 to have a factor that has an impact on crime.

8 CHAIRMAN MULVEY: Ms. Wright, you  
9 note that the level of implementation of the  
10 Trails Acts and rail banking varies widely by  
11 state. What distinguishes a state that  
12 actively facilitates rail banking from those  
13 that do not in terms of policy, funding, et  
14 cetera? Is there any kind of pattern?

15 MS. WRIGHT: There's quite a  
16 number of differences. Some states will  
17 actively acquire the corridors. Well, first  
18 they'll monitor abandonments. They might have  
19 them on their master plans or trail rec parks'  
20 master plans. They'll monitor them. They  
21 will actually acquire, negotiate with the  
22 railroads and acquire this land, and then they

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1 will be active in obtaining grants to help  
2 develop the land, to develop the trail.

3 Other states take this not only a  
4 hands off approach. If a private entity wants  
5 to go out and negotiate a Trails Act  
6 agreement, fine, but don't come to the Parks  
7 Department or the DOT for assistance.

8 Some states it's very common that  
9 a lot of state Parks Departments don't have  
10 eminent domain powers, but the DOTs do, and so  
11 if you're in a state where trail acquisition  
12 is primarily funneled to your Parks  
13 Department, you severely hamstring the ability  
14 of the Parks Department by not giving eminent  
15 domain power to possibly, you know, fix any  
16 gaps in a corridor.

17 State of Indiana I remember had a  
18 rule that said that you had to develop the  
19 trail to the same specifications as you would  
20 a highway. So it's fine to have a trails and  
21 greenways office that you might even be  
22 encouraging acquisition of trails, but then to

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1 turn around and require that it meet those  
2 requirements.

3 So there's a whole handful of  
4 differences. Other states simply promote --  
5 I mean, there's also a number of ways in which  
6 states that have interpreted their property  
7 laws in a way that is more supportive of the  
8 integrity of the corridor and the possibility  
9 of shifting that use from a railroad to  
10 another public use; you recognize these as  
11 public highways, multi-use corridors, and that  
12 trail use is not an additional burden, for  
13 instance.

14 In those states, the state law,  
15 the state courts and the state common law have  
16 evolved rules that will facilitate; at least  
17 I should say reduce hopefully the litigation  
18 which then frees up more money to build the  
19 trail.

20 So I mean, there's a whole host of  
21 ways in which state laws differ.

22 CHAIRMAN MULVEY: Vice Chairman

1 Nottingham.

2 VICE CHAIRMAN NOTTINGHAM: Thank  
3 you, Acting Chairman Mulvey.

4 Ms. Kauffman, I think you present  
5 a very real legal conundrum that personally I  
6 think deserves some STB attention. The fact  
7 that we very well not only could have but have  
8 had proposed or potential trail agreements in  
9 play but not consummated for more than six  
10 years, yet the federal court of claims is  
11 increasingly apparently looking at six years  
12 from the date of our publishing of the notice  
13 of interim trail use --

14 MS. KAUFFMAN: Exactly. It's a  
15 real Catch-22.

16 VICE CHAIRMAN NOTTINGHAM: -- as  
17 the operative date for whether or not someone  
18 can even bring a Tucker Act claim to redeem or  
19 receive the benefit of one of our core civil  
20 rights in the Bill of Rights, the Fifth  
21 Amendment takings clause is a pretty serious  
22 conundrum that we're in.

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1           You know, I guarantee you if those  
2 damages to the successful Tucker Act  
3 plaintiffs came out of the STB budget, we'd be  
4 all over coming up with a solution to that  
5 situation. The fact that it's out of nobody's  
6 budget, it's an annoyance to the Justice  
7 Department. It doesn't really come out of  
8 Justice's budget, it's my understanding. So  
9 it's just out there.

10           If we required, because we've had  
11 testimony already that we could require  
12 through some fairly simple rulemaking  
13 activity, and I think we could, notice of  
14 consummation of a trail agreement to be filed  
15 with the Board, that we in turn could  
16 acknowledge receipt of that through some kind  
17 of notice; that could be potentially the  
18 operative start time for the six-year Tucker  
19 Act statute of limitations, could it not?

20           MS. KAUFFMAN: It could. It quite  
21 possibly should, but that's not what the  
22 federal circuit determined, and you know, I

1 think --

2 VICE CHAIRMAN NOTTINGHAM: Well,  
3 in fairness, because there is no such notice.

4 MS. KAUFFMAN: right.

5 VICE CHAIRMAN NOTTINGHAM: They  
6 picked the only notice they could find is my  
7 understanding.

8 MS. KAUFFMAN: And part of the  
9 dislocation you've indicated, you know, the  
10 federal government who is going to pay the  
11 Tucker Act doesn't sit down year to year and  
12 say, "Yes, it's worth the public money to have  
13 this bike trail going through."

14 The compensations going on in the  
15 Tucker Act, you're doing what is within your  
16 purview to regulate. If it is within your  
17 purview to control the start of the statute of  
18 limitations and have that start be the  
19 consummation of the trail agreement, that  
20 would help and if there was notice to the land  
21 owners, that would help us out of the Catch-  
22 22.

1           What I am not sure about is  
2 whether this -- and perhaps it's something we  
3 need to look into and provide supplemental  
4 filing on it -- of whether this board can be  
5 the authority to define when that statute of  
6 limitations starts running or whether that is  
7 still something the federal circuit is going  
8 to decide. Sometimes those jurisdictional  
9 issues take five, six, seven years to  
10 determine.

11           You know, I just took Amtrak up to  
12 New York for the Fourth of July, and every  
13 time you get on the train and off they say,  
14 "Mind the gap," and one of the things I was  
15 thinking about for these property owners  
16 coming in is my word to this Board is, "Mind  
17 the gap," because this is not the usual  
18 rational way in which we go about public use  
19 in compensating citizens in this country.

20           So if there is the authority for  
21 you to define when that statute of limitations  
22 starts and if it is the consummation of the

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1 trail agreement and if the adjoining  
2 landowners who I think under due process  
3 rights have a right to actual direct notice of  
4 that; if we can bundle that all together, that  
5 would be excellent.

6 If we can't do that, then we need  
7 to move the notice process back and still be  
8 mindful of unlimited extensions on the notice  
9 of interim trail use because that just leaves  
10 all those property rights in limbo.

11 VICE CHAIRMAN NOTTINGHAM: I would  
12 suggest just as one Commissioner, not on  
13 behalf of the entire Board by any means, but  
14 that this Board would never be the guardian  
15 of the Tucker Act and the agency or entity  
16 that sets statute of limitations policy under  
17 the Tucker Act, but we are the guardian or  
18 custodian of some very important components of  
19 the Trails Act, and the whole process of going  
20 through the notice of the beginning of trail  
21 negotiations very easily could become the  
22 publisher of a notice documenting the

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1 completion.

2 So imagine if every town or county  
3 or local government who announced a public  
4 hearing to think about and ponder building a  
5 park or a jail or school had that beginning of  
6 that thought process count as the taking  
7 event. And then how do you value?

8 In other words, your clients, what  
9 they have to do now, I assume, is in advance  
10 of the consummation of the trail agreement  
11 potentially file a lawsuit and then be open to  
12 the claim, well, who's taking your property.  
13 There's no trail.

14 MS. KAUFFMAN: Exactly.

15 VICE CHAIRMAN NOTTINGHAM: That's  
16 a tough case to win, right? And you lose the  
17 case and hear later that the trail is  
18 consummated, and then you're told that you're  
19 shut out of court because six years went past  
20 from the time of the first notice.

21 MS. KAUFFMAN: Mr. Vice Chairman,  
22 I welcome your solution to it.

1                   VICE CHAIRMAN NOTTINGHAM:     The  
2                   claims court could.  It would be within their  
3                   purview, I would suggest, if we were to take  
4                   such an action to take notice of that and say,  
5                   "Wow, there is now a more operative, a more  
6                   valid trigger to the statute."

7                   MS. KAUFFMAN:  And under --

8                   VICE CHAIRMAN NOTTINGHAM:  There  
9                   may not have been before, but there is now.

10                  MS. KAUFFMAN:  And under Chevron,  
11                  deference is due to your interpretation of the  
12                  statute, which you are responsible for  
13                  regulating.

14                  VICE CHAIRMAN NOTTINGHAM:  Well, I  
15                  know that from our distant vantage point  
16                  sitting here in Washington, D.C., these six  
17                  and eight and 12 and 15 foot strips that run  
18                  across our country may not be the most  
19                  valuable Tucker Act awards out there, but to  
20                  me it's a matter of principle that people,  
21                  whether it's an inch or six inches or six  
22                  miles of land, that there be a fair process

1 for someone to bring a claim.

2 And if they've got a claim, great.  
3 If they don't, they should lose. That's what  
4 our system is about.

5 I do have a question for Ms.  
6 Wright, Professor Wright. Thank you for being  
7 here, as well.

8 I appreciated your tour through  
9 the history books a little bit, and it  
10 occurred to me, it reminded me a little bit of  
11 Justice Scalia's concurring opinion in the  
12 Preseault Supreme Court decision out of the  
13 Vermont case in the Second Circuit, where he  
14 emphasized, and I think the Court generally,  
15 even though it was a concurring opinion,  
16 emphasized that property rights are really  
17 creatures that are born out of state law, and  
18 they can vary from state to state, and there's  
19 no real system of federally conferred property  
20 rights in our tradition.

21 And that can evolve, as you  
22 pointed out. There could be periods of time

1 where state action and state policy can  
2 enhance certain types of property rights and  
3 also do the opposite of enhancing, can dilute  
4 or devalue certain property rights.

5 Do you have anything to say about  
6 this ongoing commentary we have here at the  
7 Board, and sometimes we hear it in the halls  
8 of Congress and elsewhere that railroad  
9 property rights are de facto because it's  
10 railroad, that if the railroad is involved  
11 that there's somehow just de facto a lesser  
12 form of property rights, or would you suggest  
13 it's more important to look at each deed and  
14 do the research because in some cases it can  
15 be the most protected type of private property  
16 rights deserving the fullest protections or  
17 something less than that, depending on what's  
18 in the record?

19 MS. WRIGHT: I think we need to  
20 think of it in two different contexts. When  
21 we're talking about an adjacent landowner and  
22 the railroad, two ostensibly private entities

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1 doing basic deed interpretation the way any  
2 two neighbors would be doing deed  
3 interpretation, the rules should be the same;  
4 the rules of deed interpretation should be the  
5 same. The problem is they're not.

6 And part of the reason they're not  
7 has to do with a very complicated history.  
8 But another reason that states have seen it to  
9 be permissible to create different rules is  
10 because the railroads are these quasi-public  
11 entities that have eminent domain powers.  
12 They've been given tax deductions. States  
13 invested heavily in stocks to build these  
14 railroads when they originally came through,  
15 and so when we're talking about a deed  
16 interpretation rule, I think the rule should  
17 be the same.

18 But when we're talking about other  
19 potential stakeholders in an intact corridor  
20 that was constructed with significant amounts  
21 of public welfare, that the public's rights to  
22 reuse these corridors for utility purposes,

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1 for light rail, for trails, for other public  
2 transportation purposes to me seem just  
3 absolutely without question a factor that  
4 should be taken into account.

5 And the problem is adjacent  
6 landowners and railroads, neither one, have a  
7 real incentive to bring the public right to  
8 the table. They're not going to bring someone  
9 in representing the general public into  
10 litigation, and so that's really why I'm here,  
11 is to try to speak for the general public and  
12 to recognize that as a result of extensive  
13 long-term regulation of the railroads this  
14 property is property infused with a public  
15 trust.

16 And we recognize this with public  
17 trust lands. We don't allow wetlands. We  
18 don't allow, you know, land right adjacent to  
19 waterways, in waterways that are trust lands  
20 to be privatized.

21 So I think that when we're talking  
22 about eminent domain power, tax deductions

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1 given to railroads that then purchase  
2 property, that this property is infused with  
3 the public interest, and many states are  
4 moving along in that line and recognizing  
5 that.

6 VICE CHAIRMAN NOTTINGHAM: In your  
7 research, are there federal courts of appeals  
8 or U.S. Supreme Court decisions that actually  
9 arrive at the conclusion that because  
10 something is owned by a railroad that that's  
11 sort of the end of the inquiry; that it's  
12 therefore the property is entitled to a less  
13 degree of private property rights?

14 MS. WRIGHT: Absolutely,  
15 absolutely. I mean, all you can think of --  
16 I mean, you're a lawyer. You know, the  
17 infamous Lochner era and the notorious history  
18 of Lochner era cases, and yet the vast  
19 majority of cases during the progressive era  
20 where the courts were not supposedly  
21 protecting these very robust property rights  
22 were railroad cases where they held, you know,

1 of course you can regulate railroad rates. Of  
2 course you can tell railroads that they can't  
3 privatize this land or they can't restrict  
4 elevators, you know, shippers who want to put  
5 elevators over rail lines to access waterways  
6 and things like that.

7 So actually there's a tremendous  
8 amount of case law from that period that  
9 recognizes that railroads are in a different  
10 situation because of this common carrier  
11 public, quasi-public character.

12 We wouldn't be asking these  
13 questions if we were talking about a  
14 Department of Transportation because a DOT,  
15 the state purchases the roadways. They use  
16 eminent domain. They use the public money to  
17 purchase it, and that land is now public land.  
18 It's publicly owned. It's held in the public  
19 trust.

20 These quasi-railroad lands are, i  
21 think, closer to those highway lands than to  
22 just the farm out in Minnesota.

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1 VICE CHAIRMAN NOTTINGHAM: Thank  
2 you.

3 Ms. Kauffman, you had a comment on  
4 that line?

5 MS. KAUFFMAN: I did. I spend  
6 most of my time litigating these issues  
7 against telecommunications companies who have  
8 paid money to the railroads and not to the  
9 underlying fee owners, suing railroads who  
10 have tried to sell back to adjoining  
11 landowners the land they already own.

12 In another litigation where  
13 Professor Wright and I are often on opposite  
14 sides, this is, I have to say, the first time  
15 that I have heard railroads' rights being  
16 described as lesser than the rights of other  
17 people. What I usually hear coming from the  
18 other side is, sure, we only have an easement,  
19 but an easement in the hands of a railroad is  
20 tantamount to a fee.

21 So we're going to act as if our  
22 easement is just a fee. It is comforting for

1 me to hear that the railroad doesn't get  
2 enhanced rights. When they have an easement  
3 deed, they've got an easement deed, and they  
4 don't get to go around saying it's tantamount  
5 to a fee.

6 The other comment I wanted to make  
7 was that going back to our Constitution and  
8 also touching on the fact that our property  
9 law coming over from England was really some  
10 of the first law that got developed. Much of  
11 the law that followed came after we developed  
12 property law because it was so important to  
13 us, is that there are many reasons why a  
14 government might decide that there is a public  
15 need and there's a public use for a piece of  
16 property.

17 Nothing in the Fifth Amendment to  
18 the Constitution keeps the government from  
19 saying there is a greater need; there is a  
20 higher need; there is a public need. So even  
21 though you, Mr. and Mrs. Landowner, don't  
22 really want to give up your property, we're

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1 taking it.

2 That is permitted by our  
3 Constitution. We get as a government to act  
4 in the public interest.

5 What we don't get to do is say  
6 there is a greater public need. So we're  
7 taking your property and we're not  
8 compensating you for it. That's what we don't  
9 get to do.

10 VICE CHAIRMAN NOTTINGHAM: I  
11 understand. I'll wrap up momentarily, Mr.  
12 Chairman, if it's okay.

13 I did want to just clarify.  
14 Professor Wright, you did mention, point out  
15 that in your study most of the property  
16 accumulated over the decades and centuries by  
17 railroads was actually purchased in fee  
18 simple, complete full ownership, no  
19 reversionary.

20 But would you at least agree that  
21 a significant number of parcels out there were  
22 purchased under terms of something less than

1 fee, for example, reversionary?

2 MS. WRIGHT: Absolutely, yes.

3 VICE CHAIRMAN NOTTINGHAM: And  
4 would you agree that that was probably not an  
5 accident? In other words, the railroad  
6 lawyers didn't just mess up and sign the wrong  
7 form. There was at least one party, the  
8 railroads, certainly had smart lawyers like  
9 Abraham Lincoln and others working for them in  
10 the past, but they probably did that for a  
11 reason, that they wanted to pay more for the  
12 property or pay less for the property than fee  
13 simple would be.

14 MS. WRIGHT: I don't think they  
15 paid more or less for the property.

16 VICE CHAIRMAN NOTTINGHAM: You  
17 don't think they paid less for the property  
18 because they got a reversionary clause?

19 MS. WRIGHT: No, I really don't.

20 VICE CHAIRMAN NOTTINGHAM: Why  
21 would they give up the reversionary clause?  
22 I'm just curious. Why wouldn't they just grab

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1 --

2 MS. WRIGHT: No one ever thought  
3 the railroads would go away. They didn't  
4 think it mattered. They really didn't think  
5 it mattered.

6 VICE CHAIRMAN NOTTINGHAM: Just  
7 had to make the landowner feel a little  
8 better?

9 MS. WRIGHT: That's right. That's  
10 right. They were far more concerned with the  
11 railroad not being built, and so there were a  
12 lot of clauses that if they weren't built  
13 within a certain period of time they land  
14 would be forfeited and come back, but no one  
15 ever thought the railroads would leave. These  
16 were --

17 VICE CHAIRMAN NOTTINGHAM: I mean,  
18 look at our history. Look at canals. I mean,  
19 George Washington was convinced that canals  
20 would be the greatest, longest, biggest impact  
21 transportation development ever. I mean even  
22 in the 1800s people had already an

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1 understanding that today's great new mode  
2 might not be tomorrow's. I don't think  
3 railroad lawyers have ever been accused of  
4 being overly naive even by their biggest  
5 critics.

6 (Laughter.)

7 MS. WRIGHT: Well, there are a few  
8 in the room. So I'm certainly not going to --

9 VICE CHAIRMAN NOTTINGHAM: That  
10 they just developed reversionary purchase  
11 agreements because they would make the  
12 property owners feel better. That's the first  
13 I've heard that. I think they did it --  
14 that's fair to assume they did it to save some  
15 money because they can get that for a little  
16 less, and maybe they did it in a tricky way.  
17 they might have winked and said, "Oh, but  
18 don't worry. We're going to -- it's less than  
19 you'd like for your property, but don't worry.  
20 You could get it back."

21 In other words, so they paid  
22 something less than you'd like for your

1 property, but don't worry. You could get it  
2 back.

3 In other words, so they paid  
4 something less, and to me that has some legal  
5 meaning, and it means that the reversionary  
6 owner actually retained something.

7 MS. WRIGHT: I have no doubt there  
8 are certainly deeds in which the word  
9 "easement" is used. I have not seen a  
10 railroad deed from the 19th Century that used  
11 the word "easement." They use the word, you  
12 know, "give, grant, bargain, sell and convey,"  
13 or "grant, bargain, convey and release the  
14 land," a strip of land.

15 VICE CHAIRMAN NOTTINGHAM: "For so  
16 long as."

17 MS. WRIGHT: "For so long" or  
18 "over, through and across my land." It's not  
19 described very well. There's all sorts of  
20 ambiguities in these deeds.

21 But if we realize that in the  
22 1840s and 1850s when the first sort of spate

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1 of construction was happening, there wasn't  
2 even a concept of a railroad easement. The  
3 idea that one would purchase only a surface  
4 right or use right was pretty unknown.  
5 Because the railroads had to have exclusive  
6 access to this corridor. They had to be able  
7 to exclude the landowners, and so everybody  
8 understood that what was generally being  
9 acquired was the land. You know, they had to  
10 be able to fence it and control access to it.

11 Later, especially when we get into  
12 about the 1880s when we have 70,000 miles of  
13 new track laid in that decade, you begin to  
14 see a real shift, and by this time railroads  
15 have sort of figured out what they're doing.  
16 They've had 30 years to do it. Their deeds  
17 are a little bit better in the sense that they  
18 often tried to get releases or contracts, and  
19 then they would come back and execute a deed  
20 that would have more explicit descriptions.

21 They often used the term "right-  
22 of-way." "We're acquiring right-of-way."

1                   VICE CHAIRMAN NOTTINGHAM:    If I  
2                   could jump in, thank you for yours.  I would  
3                   suggest that the whole reason we came up with  
4                   -- and I say "we" -- the whole reason some  
5                   smart folks in England and Scotland and  
6                   Ireland developed something that became known  
7                   as railroads was coal mining, and coal mining  
8                   was where we really started to expand the  
9                   understanding of surface rights, mineral  
10                  rights.

11                  So the law of property had  
12                  actually gotten pretty sophisticated on things  
13                  like surface rights, rights that are less than  
14                  100 percent of fee simple, and the whole  
15                  reason we had railroads was that it was a much  
16                  easier way to get coal out of the ground, and  
17                  then that developed from there.

18                  But, Ms. Kauffman, do you have  
19                  anything to contribute to this?

20                  MS. KAUFFMAN:    No, I was just  
21                  thinking of fee simple as the bundle of  
22                  rights.  I mean, to say it's a bundle of

1 rights says that they are separate, separable  
2 in time or in space.

3 I've seen a lot of railroad deeds  
4 that say "easement." So but, again, going  
5 back to the fact that thankfully for this  
6 Board you're not going to have to plow through  
7 those easements. That's the federal circuit  
8 that has to plow through the easements, but it  
9 is important to recognize that that process  
10 needs its due time, and the playing field  
11 which is set primarily by this Board needs to  
12 be one that permits that process to go  
13 forward.

14 VICE CHAIRMAN NOTTINGHAM: Thank  
15 you.

16 I have no further questions, Mr.  
17 Acting Chairman.

18 CHAIRMAN MULVEY: Well, thank you.

19 I would just add a couple of small  
20 points here. Remember when this country was  
21 founded originally, it was life, liberty and  
22 pursuit of property. Well, no, but then

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1 people thought better of that and ultimately  
2 at that time also relatively few people were  
3 property endowed, and we have progressed since  
4 that. So it's pursuit of happiness.

5 And there's also, I think, a  
6 broader understanding of the public good and  
7 public property as well. So in terms of the  
8 analogy to the canals, which the Vice Chairman  
9 made, I would remind him that Mr. Washington  
10 was dead 20 years before the Erie Canal was  
11 finished. I agree with your interpretation of  
12 history, Ms. Wright; that I don't think  
13 anybody at the time with 270,000 miles of  
14 railroads in the 1880s thought the railroads  
15 would ever go away. I don't think it was  
16 sloppy work on the part of the railroad  
17 lawyers who the Vice Chairman correctly says  
18 are probably the brightest lawyers of the  
19 time.

20 But nonetheless, the expectation  
21 was this was not going to be a problem. So I  
22 think you've got a good reading of history.

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1                   VICE CHAIRMAN NOTTINGHAM:    Mr.  
2    Acting Chairman, could I just respond?

3                   CHAIRMAN MULVEY:    Yes, okay.

4                   VICE CHAIRMAN NOTTINGHAM:    I do  
5    agree that my passing knowledge of General  
6    Washington and President Washington is you're  
7    correct.  He never got to enjoy a canal, but  
8    his family would tell you and his ancestors  
9    they sure wished they had all the money he  
10   laid out to help buy some of the land and  
11   investment in the land companies in  
12   preparation of the canal system coming.  He  
13   was I call him our first transportation  
14   leader.  He was a surveyor, a path finder.  
15   That's what he loved to do, and he stumbled  
16   from that into the military and into  
17   government.  But we need to always claim him  
18   as a transportation person because we don't  
19   have enough great leaders in history, but --

20                   CHAIRMAN MULVEY:    And as a great  
21   Virginian.

22                   VICE CHAIRMAN NOTTINGHAM:    We can

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1 have a whole other hearing on that perhaps,  
2 but that's all I have.

3 CHAIRMAN MULVEY: Well, and as a  
4 great Virginian as well, and let me thank all  
5 of the panelists today for their coming and  
6 testifying. It has been very, very helpful  
7 and very, very useful.

8 I also want to thank the Board  
9 staff for the hard work they put in in putting  
10 together this hearing.

11 And thank you all and have a safe  
12 trip home. Thank you.

13 (Whereupon, 12:20 p.m., the  
14 hearing in the above-entitled matter was  
15 concluded.)

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**CERTIFICATE**

This is to certify that the foregoing transcript  
in the matter of: Public Hearing

Before: Francis Mulvey

Date: July 8, 2009

Place: Washington, DC

represents the full and complete proceedings of the  
aforementioned matter, as reported and reduced to  
typewriting.

  
Eric Hendrixson

