Rail to Trail Conversions in Railroad Abandonment Proceedings

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TABLE OF CONTENTS

The desirability of trails for recreational and conservation purposes is indisputable. Trails among other things constitute relatively efficient and low cost facilities for a large number of

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popular forms of recreation, including hiking, bicycling, cross-country skiing and horseback riding.[1] In recognition of the value of trails, the National Trails System Act (Trails Act)[2] states a national policy in favor of establishing and expanding our national trails system. The Trails Act affirmatively states that "trails should be established (i) primarily near the urban areas of the Nation, and (ii) secondarily within scenic areas and along historic travel routes of the Nation, which are often more remotely located."[3] The importance of trails in addressing our current and future recreational needs was recently reaffirmed by the President s Commission on American s Outdoors (PCAO), which specifically called for the establishment of "greenways" within "easy walking distance" of the Nation s population.[4]

Railroad rights-of-way (ROW) frequently make excellent trails. Indeed, the Executive Summary of the PCAO's report singles out ROW as one of the four principal means of creating new "greenways."[5] Many about-to-be-abandoned ROW are located in urban areas. Conversion of these properties to trail use would greatly enhance urban recreational opportunities as well as supply transportation corridors for commuters desiring to walk or bicycle to work. Other ROW in rural areas are in scenic areas and their conversion to trail use would meaningfully complement existing rec

1. Trails represent major opportunity and yet practicable and low-cost method of satisfying the demand for outdoor recreation for our citizens. By their nature, they afford low-concentration, dispersed type of recreation that is much sought after today. Trails are the means to some of the most beneficial kinds of exercise and enjoyment of nature—walking, hiking, horseback riding, and cycling. Trails enable people to reach prime areas for hunting, fishing and camping; they lead to areas prized by students of nature and history; they are used by scientists, artists, and photographers; they help to satisfy the craving many people have for solitude and the beauty of untrammeled lands and waters.

S. Rep. No. 1233, 90th Cong., 2d Sess. 1-2 (1968). Trails also support "the conservation of undeveloped land, fragile ecosystems, endangered species and land [in] its natural state. Preserving these areas is also important because they support wildlife. In addition, trails can provide significant benefits to agriculture by assisting in the control of wind and water erosion. *See* M. Holsteen, The Planning Process Utilized in the Conversion of Abandoned Railroad Rights-of-Way for Recreational Purposes, 18 (M.A. Thesis, Kansas State Univ. 1985).

2. 16 U.S.C. § 1241 (1982).

3. 16 U.S.C. § 1241(a) (1982).

4. PCAO, AMERICANS AND THE OUTDOORS, EXECUTIVE SUMMARY (Jan. 1, 1987).

5. *Id.* ("Thousands of miles of abandoned rail lines should become hiking, biking and bridle paths.") *See also* PCAO, FINAL REPORT—AMERICAN OUTDOORS: THE LEGACY, THE CHALLENGE, § 3 Pt. 3 (recommends greenways along abandoned rail corridors).

reational resources. Still other ROW may be the only means of access by the public to public lands in many western states.[6]

Conversion of ROW will serve economic interests as well. Rail trails may in many instances provide significant economic benefits to adjacent businesses. In addition, an adjacent or nearby trail, like a park, may enhance the value of surrounding property [7] Conversion of ROW into trails fosters another purpose: the conservation of transportation corridors for future railroad use, generally known as "rail banking." Indeed, in recognition of the many interests served by rail-to-trail conversion, the Trails Act has long provided that the Interstate Commerce Commission, which regulates railroads, must cooperate with the Secretary of the Interior "in order to assure, to the extent practicable, that any [abandoned or about-to-be ROW] having values suitable for trail purposes may be made available for such use."[8]

All too frequently efforts to convert a railroad ROW to trails use are initiated long after railroad use of the ROW has been abandoned. In such circumstances, the linearity of ROW has almost certainly been lost, with adjacent property owners claiming various parcels inside the ROW through reversion, adverse possession, purchase, lease, or donation. In order to convert the ROW to trail use, the trails advocate must buy out all parcel holders, which may be impossible absent some power of eminent domain.[9] Even with eminent domain powers, the process can be tedious, costly and difficult.

Fortunately there is an institutional vehicle to conserve the linearity of about-to-be abandoned ROW That vehicle is the ICC, the oldest federal regulatory agency and the agency currently entrusted with railroad regulatory duties. Railroad abandonments

6. *Cf. Public Lacks Access to Much Public Land*, Wall St. J., Jan. 2, 1986, at 1, col. 1.

7 The only study to date on this question indicates that recreational trail enhances the value of adjacent property by up to 6%. *See* Seattle Engineering Department, Executive Summary, THE EFFECT OF THE BURKE-GILMAN TRAIL UPON PROPERTY VALUES OF ADJACENT NEARBY PROPERTIES AND UPON THE PROPERTY CRIME RATE IN THE VICINITY OF THE TRAIL (Sept. 1986) (on file with the COLUM. J. ENVTL. L.).

8. 16 U.S.C. § 1248(b) (1982). The ICC has done little or nothing to carry out this duty, let alone to carry it out "to the extent practicable. *See* National Park Service, RAILS-TO-TRAILS GRANT PROGRAM, AN EVALUATION OF ASSISTANCE PROVIDED UNDER PUBLIC LAW 94-210 TO ASSIST IN THE CONVERSION OF ABANDONED RAIL AND RIGHTS OF WAY TO PARK AND RECREATION USE, 19 (August 1985) [hereinafter National Park Service].

9. Tiedt, *From Rails to Trails and Back Again: A Look at the Conversion Program*, PARKS AND RECREATION 43 (April 1980).

fall squarely within ICC's regulatory jurisdiction.[10] In the ordinary course, ICC regulates abandonments chiefly to assure that the interests of shippers, the principal users of the railroad ROWs in question, are protected. If ICC finds that the shippers inter ests are adequately resolved, or are outweighed by the railroad's economic interests, the Commission may grant the railroad's application to abandon. However even if abandonment is permissible, ICC has certain obligations, especially since the advent of the National Environmental Policy Act (NEPA),[11] to protect the public interest in recreational and other alternative uses of the railroad ROW

The two statutes most germane to trail conversion at ICC are Section 809(c) of the Railroad Revitilization and Regulatory Re form (4R) Act[12] and Section 8(d) of the Trails Act.[13] Section

10. The principal ICC authorizing statute germane to railroads is the Revised Interstate Commerce Act, 49 U.S.C. § 10101 adopted in 1978, which recodified many of the amendments to the Interstate Commerce Act wrought by the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. 94-210, 90 Stat. 31-150. President Reagan has proposed to abolish the ICC. *See* OMB, MAJOR POLICY INITIATIVES FY 1987 at 93. The President, however, proposes to transfer certain of ICC' regulatory duties, including its regulation of abandonments, to the Department of Transportation. *Id.*

11. 42 U.S.C. § 4321 (1982). NEPA unquestionably applies to railroad abandonment proceedings. *See* Harlem Valley Transp. Ass n v. Stafford, 500 F.2d 328, 335 (2d Cir. 1974). One of the chief requirements of NEPA is that an environmental impact statement (EIS) be prepared prior to decision of any major federal action with significant environmental impacts. Although the EIS requirement is generally applicable to the ICC, the agency has, to date, never prepared final EIS on rail abandonment, generally proceeding under much less comprehensive environmental analysis. The Commission recently decided to prepare an EIS in Baltimore & O.R.R.—Abandonment of the Georgetown Subdiv. located in Montgomery County, Maryland and the District of Columbia (unpublished), ICC Docket No. AB-19 (Sub. No. 112) (corrected decision served May 27 1986); *see also* 51 Fed. Reg. 24,332-34 (1986).

12. 49 U.S.C. § 10906 (1982). Sections 809(a) and (b) of the 4R Act are also of some interest. Section 809(a) required the Secretary of Transportation, in consultation with the Secretary of Interior and others, to prepare report to the President and Congress on the conversion of railroad ROW The eventual report observed that as much as 40,000 miles of ROW would be abandoned over the next decade, that about one-third would be "potentially available for alternate uses, and that the ROW constitute unique resources which cannot be replaced if lost, particularly in urban settings. *See* National Park Service, *supra* note 8, at 19. Subsection (b) required the Secretary of Interior, in consultation with the Secretary of Transportation, to "provide financial, educational, and technical assistance to local, State, and Federal government entities for programs involving the conversion of abandoned railroad ROW to recreational and conservational uses, in such manner as to coordinate and accelerate such conversion, where appropriate. Subsection (b) also authorized making grants for up to ninety percent of the cost of planning, acquiring, or developing ROW project. Pub. L. 94-210, Title VIII, 90 Stat. 144 (1976), *as amended by* Pub. L. 94-555, Title II, 90 Stat. 2630 (1976). The ninety percent figure was lowered to eighty percent by Section 403 of Pub. L. 96-448, 94 Stat. 1945. Only five million dollars

809(c) specifically authorized ICC to issue an order in an abandonment proceeding barring a railroad from disposing of a right-of-way for up to 180 days following the effective date of an authorization to abandon, unless the property had first been offered on reasonable terms for public use. Although obviously intended to be helpful, the new provision hardly rippled the stream of lost trail conversion opportunities. This situation was (and is) all the more regrettable given the fact that large amounts of railroad ROW continue to be abandoned each year In fiscal year 1983, for example, ICC granted applications for abandoning 2454 miles of track out of the 3702 miles for which applications were received. The loss in fiscal year 1984 was 3083 miles out of 3878.[14] These figures may not even include hundreds of additional miles lost through various exemptions ICC grants to the general requirement for abandonment applications.

In response to the continued loss of trail and recreational opportunities, Congress again addressed the question of railroad ROW conversion in 1983, this time amending the Trails Act to better "address the problems of using railroad rights-of-way for trail purposes,"[15] and emphasizing an approach not dependent on federal funds.[16] In particular Section 8(d) was added to the Trails Act in 1983 to better facilitate rails-to-trails conversions. Each of the three sentences of the new provision is devoted to a different purpose. The first sentence reiterates the obligation of the Interior Department, the Transportation Department and the ICC under Section 809 of the 4R Act to encourage rail-to-rail conversions. The second sentence preempts state property law

was appropriated for this program. The program conducted pursuant to this authorization focused on already abandoned ROW Approximately 130 applications were received for the available funds. Harnik, *I've Been Walking on the Railroad*, ENVTL. ACTION 24 (March 1983). Because of funding limitations, however, the Interior Department ultimately could only assist in nine of the applications. Harnik, *supra*. *See also* National Park Service, *supra* note 8, at 6-7 The effort as applied in these nine instances was viewed as highly successful. Harnik, *supra*; National Park Service, *supra* note 8, at 9-10.

13. 16 U.S.C. § 1247(d) (Supp. 1985).

14. ICC, 1984 ANNUAL REPORT 107 (1985). There were 252,588 miles of road owned at the beginning of federal regulation of abandonments in 1920. At the end of 1962, the figure dropped to 215,090 miles, loss of approximately 1000 miles per year. *See* M. CONANT, RAILROAD MERGERS AND ABANDONMENTS 113 (1982 reprint of 1964 ed.) There are approximately 145,000 miles of road at the current time, with the average annual net loss equal to about 3000 miles since 1962.

15. 129 CONG. REC. H1169 (daily ed. March 15, 1983) (remarks by Rep. Seiberling, floor manager for the 1983 Amendments).

16. Harnik, *supra* note 12, at 27

allowing railroad easements to lapse upon abandonment when the ROW is employed for "interim" trails use subject to future rail use. The third sentence provides that if an agency or trail user group agrees to assume financial, legal, and managerial responsibility for interim trail use, ICC "shall impose terms and conditions for interim use" and "shall not permit abandonment or discontinuance inconsistent or disruptive of such use."

There are obviously many tools available at ICC to encourage the conversion of ROW into trails. Unfortunately ICC is generally perceived as an extremely reluctant warrior in its implementation of its various responsibilities with respect to fostering alternative uses of abandoned ROW including trail use. For example, the Department of Interior's National Park Service has indicated that "[t]he Commission's record in assisting parties seeking to convert an abandoned right-of-way to another use is dismal."[17] ICC's reluctant attitude toward trail conversions has lead the agency into an extremely narrow construction of its authority construction so narrow that it would appear to violate both the language and intent of some of the key statutes involved. Before turning to this problem, it is first appropriate to set the stage by reviewing some basic procedural obstacles to invoking relief before ICC.

I. PARTICIPATORY RIGHTS OF PROPONENTS OF ALTERNATIVE USES IN ICC ABANDONMENT PROCEEDINGS

From the point of view of an interested party there are two critical procedural aspects of any administrative proceeding: notice and an opportunity to participate. This principle certainly applies at ICC. Unfortunately however the notice given to proponents of alternative public use, such as trails use, of projected railroad ROW abandonments is extremely limited. In addition, there may be sharp constraints placed by the Commission on the rights of non-shippers, such as proponents of trail use, to participate in abandonment proceedings.

17 National Park Service, *supra* note 8, at 19 (also details Department of Interior' unsuccessful efforts to persuade ICC to revise its regulations in order to facilitate trail conversions). Dismay with ICC extends beyond the National Park Service. Representatives of at least one local government have specifically criticized "ICC's unwillingness to deal with the recreational reuse issue. M. Holsteen, *supra* note 1, at 15.

A. *Ordinary Abandonments*

1 Notice Provisions

Notice is vital to a party seeking to invoke its remedies with respect to alternative uses before the ICC. Without notice, the party cannot exercise its participatory rights. Moreover since many proponents of alternative use must devise their plans, obtain approvals, and arrange financing (all of which are potentially time-consuming matters), timely and assured notice given as far in advance of ICC deadlines as possible is virtually a necessity Unfortunately notice is not necessarily timely and is anything but assured, much less given far in advance of ICC action in an abandonment proceeding. Proponents of alternative public uses ac cordingly must be prepared to scramble.

Under 49 U.S.C. § 10904, a railroad planning to abandon ROW or to discontinue railroad service ordinarily must apply to the ICC for a certificate of abandonment or discontinuance. The first possible opportunity for notice that an application is coming is inclusion of a line on a railroad's "system diagram map." This map must identify all components of the railroad's system subject to abandonment or for which the railroad plans to file an application to abandon under 49 U.S.C, § 10903.[18] The statute requires that a line be included in the diagram map for "at least 4 months before the application is filed."[19] Under the Commission s regulations, notice of designation of a line into "category 1" (i.e., notice that abandonment is contemplated for the line),[20] is supposedly "served upon the Governor the public service commission and the designated State agency[21] of each State within which the carrier operates or owns a line of railroad."[22] In addition, the carrier must publish notice (in the form of a map and description) in a newspaper of general circulation in each relevant county and post a copy of the notice at relevant terminals.[23]

18. 49 U.S.C. § 10904(e) (1982).

19. *Id.*

20. 49 C.F.R. § 1152.10(b)(1) (1985).

21. *See* Ex Parte 274 (Sub. No. 10), Environmental Notices in Abandonment and Rail Exemption Proceedings, 1 I.C.C.2d 11 (1984). A list of the individuals at state agencies (other than state public service commissioners) who are to receive this notice is published at 49 Fed. Reg. 45,671 (Nov. 19, 1984).

22. 49 C.F.R. § 1152.12(b) (1985).

23. *Id.* § 1152.12(c). The effective date of this notice runs from the date the carrier files an affidavit of compliance with these requirements with the Commission. *Id.* § 1152.12(d).

The first general notice of an intent to abandon is the required filing of a "Notice of Intent" by the railroad with the Commission in a format specified by ICC regulations.[24] The Notice must be filed at least fifteen but not more than thirty days prior to the filing of an abandonment application.[25] The railroad must serve by mail this Notice of Intent to significant users of the line, certain identified agencies, and state and railroad employee union officials.[26] The railroad must also post the Notice of Intent at relevant stations and publish the Notice at least once for three consecutive weeks in a newspaper of general circulation in each county in which any part of the involved line is located.[27] Unlike an amendment to a system diagram map, a Notice of Intent is mandatory for all lines for which an application to abandon may be filed. There is, however no general Federal Register notice. Moreover ICC in late 1984 stopped its practice of affording informal notice to known proponents of alternative use of the filings of Notice of Intent.[28] An agency or group interested in trails conversion will therefore only be assured of receiving word of a filing if it makes appropriate arrangements to be contacted, presumably by the designated Agency in, or the Governor of the State in question.

The actual abandonment applications may be filed with even more limited notice than the Notice of Intent. The railroad must serve a copy of its application upon the Governor the State Public Service Commission, and the designated State agency of each state in which a portion of the line about to be abandoned is located. In addition, a copy must be served on ICC's Section of Rail Services Planning. A copy is also to be made available at rel-

The Commission regulations bar the agency from issuing an abandonment certificate until at least four months after this affidavit if filed, but only in the event that an application for abandonment is opposed by "a significant user, State, or political subdivision of State. *Id.* § 1152.13(d). In short, there are no assurances that railroad will add an about-to-be abandoned line to its system diagram map or that the agencies or groups interested in possible trail conversions will ever learn of such an addition even if one oc curs. Moreover, inclusion of line in the Category 1 designation on system diagram map is not precondition for abandonment under the Commission' "notice of exemption regulation.

24. 49 C.F.R.§ 1152.20(a)(1) (1985).

25. *Id.* § 1152(b)(1).

26. *Id.* § 1152.20(a)(2).

27 *Id.* § 1152.20(a)(3)-(4).

28. Memorandum from James Bayne (ICC) to Distribution (Dec. 28, 1984) (service lists for abandonment proceedings).

evant stations.[29] There again is no policy of publishing such notices in the Federal Register If one somehow gets notice, one can request more information from the applicant for abandonment. ICC's regulations require the railroad to promptly supply a copy of the application "to any interested person proposing to file a written comment or petition to investigate."[30] Under ICC's regulations, all interested parties have thirty days from the filing of an application to abandon in which to find out about the application, to obtain a copy and to file "protests" and "comments."[31] It should be noted that under ICC rules, any protest or comment must be *received* by ICC on the thirtieth day [32] This gives a proponent of alternative public use very little time to prepare its position, thus exacerbating the problem caused by the haphazard notice given of proposed abandonment. Moreover the turnaround time to obtain the application to abandon, not to mention to obtain other information germane to alternative uses, effec tively cuts the thirty day comment period by a substantial percentage.[33]

2. ICC Action on Comments and Protests

The distinction between "protests" and "comments" is an important one, for the participatory rights of "protestors" are much greater than those of mere "commenters" under ICC's regulations. "Protests" are undefined in the regulations but are gener ally understood to mean objections to abandonment by shippers on the line. "Comments" are general comments that any inter ested party can file.

ICC supposedly determines whether to initiate an investigation pursuant to the comments and protests received.[34] However if no "protest" is received within thirty days from the date of the

29. 49 C.F.R. § 1152.24(a), (c) (1985).

30. *Id.* § 1152(d). Although the Commission regulations prescribe relatively detailed requirements for abandonment applications, these are generally met with what amount to boilerplate representations. *Id.* § 1152.22-.23.

31. 49 C.F.R. § 1152.25(c) (1985).

32. ICC will treat protest or comment which is mailed as timely filed only if it is postmarked three days *before* the due date. *Id.* § 1152.25(d).

33. The Commission has detailed procedural and substantive requirements for all comments or protests. For example, signed original and two copies must be filed. *Id.* § 1152.25(c)(2). A copy must be served on the railroad at the time of filing, and certificate of service must so state. *Id.* § 1152.25(c)(3). Substantive requirements are detailed in *Id.* § 1152.25(a).

34. 49 C.F.R. § 1152.25(a)(3) (1985).

filing of the application to abandon, ICC's regulations provide that the Commission must permit the abandonment or discontinuance within forty-five days of the filing.[35] If a protest is filed within thirty days,[36] the Commission must, within the same forty-five days, decide whether an investigation is necessary [37] If no investigation is necessary ICC is to decide the question within seventy-five days.[38] If an investigation ensues, [39] the investigation must be completed within 135 days, and an initial decision must be tendered within 165 days after the date the abandonment application is filed.[40] This decision is final in thirty days unless administratively appealed. If appealed, a final decision must be issued within 255 days.[41]

The Commission s regulations further reinforce the distinction between protestors and commenters with respect to rights to appeal. In particular the Commission purports to cut off all rights of administrative appeal in non-protested proceedings: "Appeals to the initial decision in non-protested proceedings or non-investigated (protested) proceedings will not be entertained."[42]

In addition, the Commission states that in unprotested proceedings, the "only subsequent pleadings permitted are petitions to vacate the certificate of abandonment."[43] ICC's regulations further suggest that this device is only to be used "[i]n the event

35. *Id.* § 1152.26(a). The Commission has delegated its authority to issue abandonment certificates and decisions where no protest is received within 30 days to the Chairman of the Commission. *Id.* § 1011.5(a)(8). The Chairman has in turn delegated her authority to the Director of the Office of Proceedings. *Id.* § 1011.7(c)(3)(i).

36. The Commission regulations specify procedure for "protestors" to file verified statements in investigated proceedings, and also afford the Commission discretion to hold an oral hearing, principally for the purpose of cross-examination. 49 C.F.R. § 1152.25(d)(6)-(7) (1985).

37 *Id.* § 1152.25(c)(1).

38. *Id.* § 1152.25(c)(2).

39. If an investigation is conducted, parties filing written comments or protests may participate in the investigated proceeding. *Id.* § 1152.25(a)(3)(ii).

40. 49 C.F.R. § 1152.25(c)(3).

41. *Id.* The Commission has recently taken the position that because they do not entail penalty, the various statutory and regulatory deadlines referenced above may be postponed, if necessary, to prepare an environmental impact statement under Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332 (2)(C). *See* Baltimore & O.R.R.—Abandonment of the Georgetown Subdiv. located in Montgomery County, Md. and the District of Columbia (unpublished), ICC Docket No. AB-19 (Sub. No. 112) (corrected decision served May 27 1986).

42. 49 C.F.R. § 1152.25(e)(2)(i) (1985).

43. *Id.* § 1152.25(e)(2)(i)(B).

of procedural defects such as loss of a properly filed protest [or] the failure of the applicant [to provide required notice]."[44]

These procedural limitations seem on their face to mean that a "mere" commenter—perhaps an agency seeking a public use condition—may never trigger an investigation and may never appeal. This substantially reduces the hearing rights of proponents of trail use or other alternative public uses in ICC abandonment proceedings who merely file "comments." A proponent of public use commenter who wishes to better assure that ICC is obligated to investigate his concerns in the event his requests are not granted (or who wishes to better assure his right to administrative appeal) would be wise to request that he be treated as a protester and that his comments be treated as a protest for all ICC investigational, hearing, and appeal purposes.[45] In addition, he should specifically request an investigation on any factual matter ICC is inclined on the pleadings to resolve in a fashion contrary to the position advocated in his pleadings.[46]

3. ICC's Determination

In all cases in which abandonment or discontinuance is permitted or required, the Commission must find that "the present or future public convenience and necessity" supports such a result.[47] The Commission may allow abandonment or discontinuance

44. *Id.* § 1152.25(e)(8).

45. ICC has treated public uses commenters as "protestants" upon their request in two proceedings currently (January 1987) under investigation: Baltimore & O.R.R., *supra* note 41; Missouri-Kansas-Texas Railway Co.—Abandonment from Machens to Sedalia, Missouri, ICC Docket AB-102 (Sub. No. 13).

46. "[T]he right of opportunity for hearing does not require procedure that will be empty sound and show, signifying nothing. The precedents establish, for example, that no evidentiary hearing is required where there is no dispute on the facts and the agency proceeding involves only question of law. Citizens for Allegan County, Inc. v. FPC, 414 F.2d 1125, 1128 (D.C. Cir. 1969), *quoted* in National Classification Committee v. United States, 779 F.2d 687 693 (D.C. Cir. 1985) (ICC proceeding). Thus commenter is presumably entitled to non-summary hearing only when there is factual dispute or lack of necessary information (or conceivably where oral argument on point of law would be helpful). A factual dispute might arise concerning matters such as (a) whether particular ROW is appropriate for trail conversion, (b) whether genuine public interest justification exists for purposes of Section 809(c), or (c) the impact of the proposed abandonment on the environment or historical preservation concerns is severe or may be mitigated by appropriate conditions. If pleadings are carefully prepared, public agencies and trails groups should be able to obviate such factual disputes by demonstrating the validity of their position in their initial filing through affidavits, verified statements, or appropriate exhibits.

47 49 U.S.C. § 10903(a) (1982); 49 C.F.R. § 1152.26(a)(1) (1985).

"with modifications" or upon "conditions that the Commission finds are required by public convenience and necessity "[48]

B. *Exempt Abandonments*

Roughly one-third of all abandonments are not covered by applications for abandonment. The provisions for public notice and the opportunities for participation by agencies or groups inter ested in trails conversions are even more restricted in such "exempt" situations than in the ordinary abandonment context.

ICC has purported to exempt certain abandonments from the customary abandonment procedures prescribed in its regulations where the right-of-way has not been used for local rail purposes for two years or more.[49] The Court of Appeals for the District of Columbia recently invalidated the Commission regulations allowing exempt abandonments in the context of the two-year out of service scenario.[50] However the Commission recently reinstituted its regulations without taking public comment.[51] Another context in which ICC customarily grants an exemption is instances in which the railroad demonstrates that shippers' interests are protected (normally by obtaining shipper consent).[52]

There are two procedures for obtaining an exempt abandonment. The first is the "notice of exemption" procedure, applicable to two-year out of service abandonments. Under this procedure, a railroad must notify the Public Service Commission in affected States "[a]t least 10 days prior to filing a notice of ex

48. 49 U.S.C. § 10903(b)(1)(A)(ii) (1982). If the Commission decides to issue an abandonment certificate, it must publish notice in the Federal Register. 49 C.F.R. § 1152.27(b) (1985). Such publication constitutes notice to any persons who intend to offer financial assistance in order to assure continued rail service. More specifically, under 49 U.S.C. § 10905 (1982), any person (usually shipper or state agency) may offer to subsidize or to purchase rail line within 10 days of notice of abandonment or discontinuance. *Id.* § 10905(c)(ii) (1982). If negotiations fail to achieve an agreement, either party may request that the Commission establish the conditions and the amount of compensation. *Id.* § 10905(g)-(h) (1982). If subsidy or purchase is arranged, the ROW will continue to be operated for railroad purposes.

49. 49 C.F.R. § 1152.50(b) (1985). The line in question may have been used for overhead" or "through traffic and still qualify for treatment as an exempt abandonment.

50. Illinois Com. Comm v. Interstate Commerce Commission, 787 F.2d 616, 627-628 (D.C. Cir. 1986).

51. *See* Exemption of Out of Service Lines, 2 I.C.C.2d 146 (served Nov. 21, 1986). The Commission' action has been appealed. *E.g.*, Illinois Commerce Commission v. Interstate Commerce Commission, C.A. No. 86-1687 (pet. for rev. filed Dec. 15, 1986).

52. *See* 49 C.F.R. § 1152.50(c) (1985) (noting that two year out-of-service abandonments are not the exclusive grounds on which to seek an exemption).

emption with the Commission."[53] No other advance notice is required. The railroad then files a "verified notice of exemption" with the Commission.[54] ICC, through its Office of Proceedings, automatically publishes a notice in the Federal Register within twenty days of the railroad's filing.[55] The exempt abandonment is effective thirty days after the Federal Register publication unless ICC grants a stay pending reconsideration.[56] The second procedure is initiated by filing a "petition for exemption" under 49 U.S.C. § 10505.[57] There are no specific regulations governing the handling of such petitions.[58]

ICC's action on a railroad's notice of the exemption or exemption petition is largely *ex parte*. It is almost wholly bereft of any opportunity for comment by agencies or groups espousing alternative uses (except to the extent ICC makes special provisions for comment on a case-by-case basis with respect to exemption petitions). Until recently it was also without any specified provisions for consideration of environmental effects.[59]

Interested parties have ten days from the date of publication of the notice of exemption in the Federal Register in which to request that the authorization to abandon be stayed.[60] They have

53. *Id.* § 1152.50(d)(1) (1985). An example is Notice of Exemption of Rahway Valley R.R. to Abandon 2.15 Miles, in Union County, New Jersey, ICC Docket No. AB211-1X, (filed Nov. 14, 1985).

54. 49 C.F.R. § 1152.50(d)(2) (1985).

55. *Id.* § 1152.50(d)(3).

56. *Id.*

57 An example of such petition is Chicago and N.W Transp. Co.—Petition for Exemption—Abandonment at Sioux City, Iowa, Woodbury County, ICC Docket No. AB-1 (Sub. No. 155X) (filed Nov. 15, 1985).

58. 49 C.F.R. § 1152.4(e)(5) (1985) authorizes ICC to waive any of its regulations relating to notice of intent to abandon or applications to abandon. 49 C.F.R. Part 1117 provides for petitions for relief not otherwise covered by ICC regulations. *See also* Modification of Procedure for Handling Exemptions Filed Under 49 U.S.C. 10505 (not printed), ICC Ex Parte 400, served Dec. 29, 1980, 45 Fed. Reg. 85,180 (1980) (outlining ICC' basic approach).

59. On January 3, 1986, ICC amended its regulations to require railroads to file and to serve environmental and energy notices along with notices of exemption or petitions for exemption. 51 Fed. Reg. 196, *amending* 49 C.F.R. §§ 1105.11 & 1152.50(d)(2) (1985). These amendments became effective on February 3, 1986. The Energy and Environmental (E&E) Section has recently noted that the abbreviated notice in exempt rail proceedings has "been shown to inhibit or to prevent compliance with relevant environmental review laws. E&E Section Comments at 2 in *Class Exemptions for the Construction of Connecting Tracks under 49 U.S.C. § 10901*, Ex Parte No. 392 (Sub. No. 2). The E&E Section has advocated that railroads provide 30 days pre-notification to both the Section and State Historic Preservation Officers of intent to file for an exempt abandonment. *Id.* at 5.

60. 49 C.F.R. § 1152.50(d)(3) (1985).

twenty days after publication in which to file a petition for reconsideration.[61] In short, any agency organization, or individual who wishes to invoke statutory remedies to obtain a rails-to-trails conversion must request a stay of the abandonment authorization within ten days, and a reconsideration, complete with all the nec essary showings, within a twenty day period. Notice and comments in proceedings under a petition for exemption are at the discretion of ICC. Such very limited opportunities to participate are the only chances for consideration of alternative uses with respect to approximately one-third of the abandonments which take place each year [62]

C. *Conrail Abandonments*

Conrail abandonments are regulated under a variation of abandonment procedures specified by the Northeast Rail Service Act of 1981 (NERSA).[63] A Conrail abandonment begins with the filing of a "notice of insufficient revenues."[64] All such notices must have been filed prior to November 1, 1985.[65] At any time after ninety days have elapsed, Conrail may file an application for abandonment of any line covered by such a notice.[66] The Commission is required to grant the application within ninety days after the date the application was filed unless an offer of financial assistance is received in that time.[67] If such an offer is received, it is in essence governed by ICC's ordinary procedures.[68] Conrail filed a plethora of notices of insufficient revenue prior to November 1 A final round of Conrail abandonment applications thus commenced on January 29 1986.

61. *Id.*

62. *Id.* § 1152.50(d)(4). Rails to Trails Conservancy recently entered settlement with Santa Fe Southern Pacific Corporation, Atchison, Topeka & Santa Fe Ry. Co., and Southern Pacific Transportation Co. (Sante Fe Southern Pacific Corp.—Control—Southern Pacific Transp. Co., ICC Finance Docket 30800, *et. al.*) obligating the latter two railroads to provide six months pre-notification of all abandonments pending ICC action on merger application and Santa Fe Southern to provide such notice if the merger is granted. This will ameliorate the notice problem for approximately twenty percent of the rail lines in the United States if the merger application is granted.

63. 45 U.S.C. § 748 (1982).

64. *Id.* § 748(c)(1).

65. *Id.*

66. *Id.* § 748(a)(2).

67 *Id.*

68. *Id.* § 748(d) (1982).

NERSA expressly provides that Conrail abandonments shall not otherwise be subject to ICC abandonment procedures. ICC has interpreted this to mean that Section 809(c)—the basic public use provision—is inapplicable in a Conrail abandonment.[69] The Commission originally took the same position with respect to Sec tion 8(d),[70] but has reconsidered this view [71] The bottom line is that Section 8(d) may be the only public use statute available for NERSA abandonments.

D *Rights of Parties Interested in Alternative Public Uses*

ICC has a general obligation to regulate railroads to protect the "public convenience and necessity"[72] As the Commission ac knowledged in the *Burlington Northern* case,[73] at least since the adoption of the National Environmental Policy Act (NEPA) in 1969 [74] ICC has been obligated to construe the meaning of public convenience and necessity more broadly than to apply to matters relating solely "to regulated transportation." More precisely NEPA compels ICC to consider environmental factors in discharging its duty to protect the public interest.[75] ICC, before any specific provision was enacted authorizing it to impose public use conditions, accordingly conditioned a rail abandonment to re-

69. Conrail Abandonments Under NERSA, 365 I.C.C. 472 (1982); Rail Abandonments—Use of Rights-of-Way as Trails (unpublished), Ex Parte 274 (Sub. No. 13) (served Feb. 20, 1985); 50 Fed. Reg. 7200 (Feb. 21, 1985).

70. Conrail Abandonment in Shelbyville County, Indiana, ICC Docket AB-167 (Sub. No. 702N) (served Feb. 27 1985).

71. *See* Rail Abandonments—Use of Rights-of-Way as Trails, Ex Parte No. 274 (Sub. No. 13) (served May 6, 1986) [hereinafter Rail Abandonments II]; 51 Fed. Reg. 16,851-53 (May 7 1986). The Commission in 3-2 vote rejected Conrail' petition to reopen consideration of the Commission May 6 decision insofar as it rendered Section 8(d) applicable to NERSA abandonments. Rail Abandonments—Use of Rights-of-Way as Trails (unpublished), Ex Parte 274 (Sub. No. 13) (served Sept. 15, 1986). The Commission rationale, however, leaves open the possibility that the agency may take the position that Section 8(d) is not applicable to NERSA abandonments if the provision is mandatory rather than discretionary on the part of the rail industry.

72. 49 U.S.C. § 10903 (1982).

73. Burlington N. R.R.—Abandonment Between Fremont and Kenmore, King County, Wash., 342 I.C.C. 446, 452 (1972).

74. 42 U.S.C. § 4321 (1982).

75. *Compare* Calvert Cliffs Coordinating Comm. v. AEC, 449 F.2d 1109, 1112 (D.C. Cir. 1971) *with* Public Service Co. v. NRC, 582 F.2d 7781 (1st Cir. 1978) (Atomic Energy Commission and Nuclear Regulatory Commission required by NEPA to take environmental impacts into account in regulating nuclear power reactors even though not expressly re quired to do so under the Atomic Energy Act). *See also* Section 102(1) of NEPA, 42 U.S.C. § 4332(1) (1982).

quire the railroad first to negotiate for ninety days with local agencies to sell a ROW at a price that is "just and reasonable, but not less than a purchase price ascertained in accordance with the principles controlling in condemnation proceedings."[76] ICC subsequently extended the period to 180 days and provided that if the parties could not reach a voluntary agreement, the matter was to be submitted to arbitration.[77] The moral of this story is that the Commission has relatively broad general powers to regulate rail abandonments to facilitate rails-to-trails conversion, and, especially after NEPA, the scope of these powers is not necessarily limited to the confines of specific statutes which the ICC administers. As already noted, two important new provisions have subsequently been added to the law strengthening ICC's power to assist in rails-to-trails conversions: Section 809(c) of the 4R Act and Section 8(d) of the Trails Act.[78]

II. LEGAL PROBLEMS ASSOCIATED WITH PLEADING SECTION 809(C)

A. *Minimum Pleading Requirements*

The Commission is reluctant to grant public use conditions because it believes that they may be burdensome to the railroads. Therefore it will usually deny any such request unless the request complies with ICC regulations specifying the minimum requirements for pleading Section 809(c).[79] The strictness of the Commission in demanding compliance with relatively stringent

76. Burlington N. R.R.—Abandonment—Between Fremont and Kenmore, King County, Wash. 342 I.C.C. 446, 457 (1972).

77 Burlington N. R.R.—Abandonment—Between Fremont and Kenmore, King County, Wash. (unpublished order), ICC Finance Docket No. 26638 (served April 4, 1973).

78. It should be noted that ICC takes the position that shippers rights, such as the protection afforded shippers through the offer of financial assistance procedures, take precedence over the public use procedures. "For example, even if public use condition were imposed for [a] segment, subsequent offer of financial assistance to acquire the line [for railroad purposes] which resulted in agreement would void the public use condition. However, once the railroad property is abandoned, private sale, no matter what the purpose, is subordinate to the public use statute. Chicago & N.W Transp. Co.—Abandonment—in Blackhawk County, Iowa (unpublished), ICC Docket No. AB-1 (Sub. No. 174) (served May 16, 1985) at 2 n.1 [hereinafter Abandonment—Blackhawk County, Iowa].

79. *See, e.g.*, Burlington N. Ry.—Abandonment—in Grays Harbor County, Wash. (unpublished), ICC Docket No. AB-6 (Sub. No. 207) (served Jan. 8, 1985) at 7 (rejects Game Department conditions). *See also* Abandonment in Blackhawk County, Iowa, *supra* note 78 (request of Waterloo and Cedar Falls for trails use rejected for lack of specificity).

pleading requirements may be disputed. However the prudent course is to comply carefully with the procedures specified.[80]

ICC's regulation for asserting Section 809(c) as amended in 1984 is relatively detailed. It applies both to ordinary abandonments[81] and to exemption proceedings.[82] ICC's amended regulation provides as follows:

> A request for a public use condition under 49 U.S.C. § 10906 must be in writing and set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the time period.[83]

The most frequently requested condition which the ICC will apply under Section 809(c) is a requirement that the railroad not sell specific portions of the ROW to a nonpublic buyer for 180 days from the effective date of an abandonment authorization in order to allow a public agency or public interest group time to negotiate with the railroad to purchase it for a public purpose, to initiate condemnation proceedings, or to take some similar type of action.[84] The agency or group should state why it seeks to acquire the property A specific use should be given, such as an addition to an existing park, a trail, a light rail (e.g., trolley) route, access to public lands, or the preservation of wildlife habitat. The Commission may reject a public use condition if it thinks the requestor s plans are tentative or speculative. The public agency or group should be specific; development plans or the equivalent should be submitted wherever possible, in order to assure that ICC does not reject the requested condition because the plans are speculative.[85] The requestor should also state and explain how the conversion of the property in question to alternative public

80. *See* BPI v. Atomic Energy Comm n, 502 F.2d 424 (D.C. Cir. 1974) (deference given to pleading requirements).

81. 49 C.F.R. § 1152.28 (1985).

82. *See id.* § 1152.50(d)(4).

83. *Id.* § 1152.28.

84. The condition sought is therefore ordinarily prohibition from disposing of the mile-long segment between milepost y and milepost for period of 180 days from the effective date of the decision approving the abandonment. The commenter must be specific about the location and the time period. Failure to be specific has resulted in denial of the request. *See, e.g.*, Abandonment in Blackhawk County, Iowa, *supra* note 78, at 3 (request by Utilities denied for lack of specificity).

85. Waterloo requested public use condition with respect to 1.8 miles of ROW for bicycle or pedestrian trails, sanitary sewer and water extensions, and electrical distribution. But because no development plans were submitted, ICC denied the request. Abandonment—Blackhawk County, Iowa, *supra* note 78, at 1-2.

use will benefit the public, such as enhancing recreational opportunities, preserving wildlife habitat, and so forth.[86] The requestor must state a specific period of days. Usually 180 days, the maximum permitted under Section 809(c), is requested. The requestor should indicate why the time period is required. Typical reasons include: to give the agency time to negotiate the purchase, to obtain necessary official approvals, or to obtain acquisition funds.[87]

B. *Arbitration Under Section 809(c)*

ICC has previously taken the position that it cannot order the transfer of about-to-be abandoned ROW for public use without compensation under its general powers or NEPA because to do so "would constitute a confiscation of private property for a public purpose without just compensation, and thus would be unconstitutional, and that such donation can be required only when a carrier has voluntarily proposed it. "[88] Section 809(c) by its own terms also seems to envision the payment of compensation to the railroad for its interests, if any in ROW devoted to public use. It is accordingly not surprising that the Commission requires a proponent of alternative use under Section 809(c) to compensate the railroad, or to obtain a voluntary donation. What is surprising is that the Commission has treated Section 809(c) as in essence totally voluntary on the part of the railroad. More specifically the Commission has repeatedly entered only negative orders under Section 809(c); that is, orders forbidding the railroad from selling the right-of-way for nonpublic use for 180 days after abandonment authorization. This creates a significant problem in cases where the railroad for some reason refuses to negotiate in good faith: all it need do to defeat the alternative public use (un-

86. *See* Abandonment—Blackhawk County, Iowa, *supra* note 78, at 3 (denial of Utilities request). The commentator should consider providing sufficient detail and attach supporting evidence (such as photographs, data, expert opinion, consultants reports, and especially affidavits) to be convincing.

87 *See* Burlington N. R.R.—Abandonment—in King County, Wash. (unpublished), ICC Docket No. AB-6 (Sub. No. 242) (served June 14, 1985) at 5. If several segments are sought for different uses, each must be justified separately. *See* Abandonment—Blackhawk County, Iowa, *supra* note 78, at 1-2.

88. Burlington N., Inc.—Abandonment Between Fremont and Kenmore, King County, Wash. (unpublished), ICC Finance Docket No. 26638 (served April 14, 1973), *citing* N. & W Ry. Abandonment, 193 I.C.C. 363, 368 (1933).

less the proponent of trail use has a power of eminent domain under state or local law) is to delay for 180 days.

Nothing in Section 809(c), however bars ICC from issuing an affirmative order such as an order requiring the railroad to transfer all right-of-way owned by it for public use within 180 days upon the payment of some measure of value. ICC has expertise in computing the value of a line upon abandonment; that is precisely what it does when it sets terms and conditions for mandatory transfer for continued rail service under 49 U.S.C. § 10905. In addition to direct Commission involvement in setting terms and conditions, there is at least one other form that an order compelling transfer for public use could take. That form, pioneered by ICC before the advent of Section 809(c), is the arbitration remedy In particular in *Burlington Northern, Inc.—Abandonment Between Fremont and Kenmore, King County, Washington*,[89] the Commission ordered that the matter of compensation for a ROW be submitted to binding arbitration at the request of either side if negotiations did not produce a purchase agreement within ninety days.

In *Chicago and North Western Transp. Co.—Abandonment—Between Clintonville and Eland, Wisconsin*, ICC nevertheless concluded that it had no power to require a carrier to sell its ROW for public purposes.[90] ICC's position is difficult to square with Section 809(c), which requires ROW to be offered as "reasonable terms." If ICC will not "require" a carrier on appropriate occasions to sell or to otherwise make available its ROW the requirement that the property be offered in "reasonable terms" is largely unenforceable. Nothing in the legislative history suggests that arbitration is somehow barred.[91] To the contrary Section 809(c) if anything codifies the importance of ICC cooperation in fostering alternative uses and does not curtail ICC's discretion in that regard. The ICC has extensive procedures for mandatory sale of an about-to-be-abandoned route to another rail operation. If involuntary

89. ICC Docket No. 26638 (unpublished) (served April 14, 1973).

90. 353 I.C.C. 975, 977 (1981). ICC argued that Chicago & N.W Transp. Co. v. United States, 627 F.2d 94 (7th Cir. 1980), supported its view. The cited case merely held that under the express terms of Section 10905, issuance of an abandonment certificate could not be stayed for more than 180 days due to subsidy offer. Requiring arbitration hardly violates any express terms of Section 10906.

91. *See* S. REP No. 499, 94th Cong., 2d Sess. 116, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 131; S. CONF. REP No. 595, 94th Cong., 2d Sess. 228, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 243.

compensation agreements are appropriate in certain cases in order to vindicate the public interest in continued rail transportation, they surely are appropriate to vindicate the public interest in suitable cases with respect to alternative public uses.[92]

Indeed, this result was expressly upheld in *Reed v. Meserve*, in which the Court of Appeals for the First Circuit held that the ICC could validly impose a condition on a railroad's abandonment which would give preference for purchase to a concern which would use the right-of-way to operate a scenic railroad.[93] In so doing, the Court of Appeals stressed the importance to national transportation policy of preserving railroad ROW "[E]ven a tiny scenic railroad," the Court said,

> might be thought to contribute much more to such [national transportation] objectives than uses that would require the tracks and right-of-way to be destroyed. To assemble a right-of-way in our increasingly populous nation is no longer simple. A scarcity of fuel and the adverse consequences of too many motor vehicles suggest that society may someday have need either for railroads or for the rights-of-way over which they have been built. A federal agency charged with designing part of our transportation policy does not overstep its authority when it prudently undertakes to minimize the destruction of available transportation corridors painstakingly created over several generations.[94]

The First Circuit s holding is obviously applicable to compulsory sales of abandoned ROW for other corridor-preserving purposes, such as recreational trails.

III. LEGAL PROBLEMS ASSOCIATED WITH SECTION 8(d)

A. *Reversionary Interests*

A significant problem facing any proponent of a rail to trail conversion is that of reversionary interests.[95] Railroads may hold

92. Commissioner Lamboley in separate comment in Rail Abandonments II, *supra* note 71, appeared to question whether the Commission lacked power to require carrier to enter into an agreement under 49 U.S.C. § 10906 and to leave open the remedy available in the event that "the property has [not] been offered on reasonable terms'

93. Reed v. Meserve, 487 F.2d 646 (1st Cir. 1973), *aff'g*, 353 F Supp. 141 (D.N.H. 1973).

94. 487 F.2d at 649-50; *see also* ICC v. Ry. Labor Executive Ass'n, 315 U.S. 373 (1942) (Supreme Court requires ICC to consider displaced workers and, if necessary, attach conditions protecting their interests to the abandonment certificate).

95. *See* Tiedt, *supra* note 9, at 45 (problem of reversionary interests frustrating implementation of rails-to-trails efforts).

many different kinds of interests in their ROW These interests range from fee simple to easements. ROW segments held in fee simple in theory present few title problems for purposes of a trail conversion. Although the railroad may transfer title only under a quit claim deed, it in theory may convey title to such segments relatively free from encumbrances. This is of course desirable in that the linear integrity of the ROW which is so vital for trail purposes, is preserved.

Unfortunately railroads do not hold title to many and perhaps most, ROWs in fee simple.[96] To the contrary many and perhaps most ROWs may be subject to some form of reversionary interest under which title automatically transfers to adjacent property owners in the event that the railroad ceases to use the ROW for transportation (or more precisely railroad transportation) pur poses. The exact nature of reversionary interests is a complex subject which depends not only on the language employed in the underlying title documents, but also on each state s property law and (especially in the case of western railroads) several federal statutes. The discussion here will necessarily be very general.

A common type of interest held by railroads which creates a reversion is the so-called "railroad easement," in which the railroad owns only a right to use the ROW for railroad purposes. Ordinarily railroad easements are treated as lapsing once a railroad abandons rail service.[97] Once the easement lapses, the ROW reverts automatically to the adjacent property owners.[98] This obviously threatens the linear integrity of the ROW for pur poses of a trail and complicates acquisition efforts. Most railroad ROW west of the Missouri is held by railroads in the form of easements.

The states appear to be split concerning whether public trails use preserves a railroad easement against adjacent property owners. In *McKinley v. Waterloo Railroad Co.* [99] the Iowa Supreme Court held that an easement for railroad use lapsed upon abandonment and was not preserved by conversion of the ROW into a public trail (in this case, the highly successful Cedar Valley Nature

96. In Kansas railroads cannot acquire fee title to railroad ROW *See* Note, *Railroad Right of Way: The Real Property Interest in Kansas*, 25 Washburn L.J. 327 (1986).

97 *See, e.g.*, McKinley v. Waterloo R.R. Co., 368 N.W.2d 131 (Iowa 1985).

98. *Id.*

99. *Id. See also* Schnabel v. County of Dupage, 101 Ill. App. 3d 553, 428 N.E.2d 671 (1981).

Trail between Waterloo and Cedar Rapids, Iowa). Similarly the Washington Supreme Court held that trail or other public use does not preserve a railroad right-of-way easement and that a state statute so providing was unconstitutional under that state s constitution.[100] On the other hand, *Rieger v. Penn Central Corporation*[101] ruled as a matter of state law that railroad easements do not lapse if the ROW is converted to trails use. A similar result was reached by the Minnesota Supreme Court in *Washington Wildlife Preservation v. Minnesota*.[102] In sum, in certain states, trail use without more will defeat the lapse of a railroad easement; in others it may not.

This raises a question concerning whether the ICC can some how influence the outcome in a fashion favorable to trail conver sion. The Commission s consistent past position has been that it lacks authority to affect reversionary interests under Section 809(c). As concisely stated in *Chicago and Northwestern Transportation Company—Abandonment—in Blackhawk County, Iowa*:[103]

> The Commission does not regulate the post-abandonment of the property A public use condition does not *require* the railroad to sell the land for those purposes. The condition merely disallows disposal of the property for a nonpublic use for up to 180 days unless it has first been offered, on reasonable terms, for sale for public use. If the railroad does not hold clear title to the property and it would revert to adjacent land owners after abandonment, the imposition of a public use condition will not defeat such reversion. The reversion rights of the parties are the subject of state property law· we have no authority to protect those reversionary interests or affect them in any way Thus, whether the landholders reversionary interests would be protected in the face of governmental interest in acquiring the land for public use is a question for the State courts to decide.

The Commission s position in *Chicago and Northwestern* is no longer valid. Section 8(d) of the Trails Act provides that if a ROW is transferred for interim trails use subject to possible future rail use, the ROW will not be treated as abandoned "for pur poses of any law " It is clear that this portion of Section 8(d) is

100. Lawson v. Washington, 107 Wash. 2d 444, 730 P.2d 1308 (Wash. 1986).

101. No. 85-CA-11, decided May 21, 1985 (Ct. App. Greene County, Ohio).

102. 329 N.W.2d 543 (Minn. 1983).

103. ICC Docket No. AB-1 (Sub. No. 174) (unpublished) (decided May 16, 1985) at 4. *See also* Hayfield N. R.R. v. Chicago & N.W Transp. Co., 467 U.S. 622, 634 (1984) (noting ICC position that it cannot affect disposition of rail property after abandonment certificate granted).

intended to preempt any state law allowing railroad easements and similar such property rights to revert to adjacent property owners upon abandonment of a ROW in all those cases in which a ROW is employed as a trail subject to possible reinstitution of rail use. Since the adoption of Section 8(d) in 1983, ICC clearly has the statutory authorization to postpone reversionary interests, so long as Section 8(d) is constitutional.

ICC has concluded that Section 8(d) in fact preempts state property law allowing automatic reversion of railroad right-of-way easements upon abandonment of actual rail use.[104] Indeed, the Commission has expressly declared that "the main purpose of the amendment is to remove a reversion as an obstacle that hinders or prevents the successful conversion of entire linear rights-of-way to recreational use when the rights-of-way have been oper ated under easements for trail purposes."[105] In view of Section 8(d) s railroad regulatory purposes, the Commission has concluded that:

> abutting landowners have no proprietary interests that require protection or compensation. Since the amendment provides that interim trail use under [Section 8(d)] shall not constitute abandonment of rights-of-way for railroad purposes, the railroad easement continues and reversionary interests do not mature.[106]

The Commission s conclusion that Section 8(d) does not constitute a taking of reversionary interests seems manifestly correct. ICC enjoys exclusive regulatory authority over rail abandonments covered by the Interstate Commerce Act.[107] Under the Supremacy Clause, it follows that state laws relating to reversions of railroads ROW are preempted to the extent that they conflict with ICC's regulation.[108] Abandonments cannot occur until authorized by the Commission.[109] Adjacent property owners claiming an interest in a right-of-way which matures upon abandonment have no interest to exercise until the Commission authorizes abandonment. The only ground on which to attack Section 8(d) as it affects reversion is to argue that it is not di-

104. *See* Rail Abandonments II, *supra* note 71, at 6, 8-9.
105. *Id.* at 7
106. *Id.* at 9.
107 Chicago & N.W Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 323 (1981).
108. New Orleans Terminal Co. v. Spencer, 366 F.2d 160, 164-66 (5th Cir. 1966).
109. *E.g.*, Louisiana & Ark. R.R. v. Brickham, 602 F Supp. 383, 384 (M.D.La. 1985).

rected to a constitutionally legitimate regulatory purpose.[110] The second sentence of Section 8(d) fosters a legitimate railroad regulatory purpose: preserving ROW for future railroad transportation use.[111] The means of financing this preservation—interim public trail use—not only serves the basic rail regulatory interest itself but also assists in meeting public recreational needs. A taking ordinarily does not arise in situations in which there is a legitimate public purpose and the regulation in question is reasonable.[112]

The Supreme Court's decision in *United States v. Locke*[113] is also instructive. The Court there considered the constitutionality under the Fifth Amendment of a statute providing for the extinguishment of unpatented mining claims in the event of a failure to meet an annual filing requirement. The Court rejected the claim that the extinguishment was a taking without compensation. "Even with respect to the vested property rights," the Court said,

> a legislature generally has the power to impose new regulatory restraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties.[114]

It is additionally difficult to view the modification wrought by Section 8(d) on reversionary interests as sufficiently contrary to the expectations of adjacent property owners so as to constitute a taking.[115] In most instances, the adjacent owners conveyed the railroad its ROW interests under the assumption that public transportation use of the property in question would be perpetual, with compensation accordingly. Moreover it seems equally

110. Louisiana & Ark. R.R. v. Brickham, 602 F. Supp. at 384; *see also* Michigan Dep't of Transp. v. ICC, 698 F.2d 277, 279-80 (6th Cir. 1983) (federal law preempts state law on abandonments).

111. *See* Reed v. Meserve, 487 F.2d 646, 649-50 (1st Cir. 1973), *aff'g*, 353 F. Supp. 141 (D.N.H. 1973).

112. *See, e.g.*, Griffin v. United States, 537 F.2d 1130, 1138-39 (Temp. Emer. Ct. App. 1976).

113. 105 S.Ct. 1785 (1985).

114. 105 S.Ct. 1797-98, *citing* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Turner v. New York, 168 U.S. 90, 94 (1897). The Court continued: "[L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations, *quoting* Usery v. Turner Elkhorn Mining Co. 428 U.S. 1, 16 (1976).

115. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124-25 (1978).

fair to say that use of a railroad ROW for trail purposes is generally no more intrusive, and frequently less intrusive, than use for railroad purposes.[116] Under these circumstances, the modification of reversionary interest wrought by the second sentence arguably constitutes a lawful exercise of government power

B. *ICC's Interpretation of Section 8(d) to Apply Only Upon the Voluntary Agreement of the Railroad*

ICC has been slow in implementing Section 8(d). The Commission originally postponed any decisions concerning the application of Section 8(d) pending a rulemaking on the subject.[117] ICC's rulemaking was initiated in February 1985. The Commission originally construed the key third sentence of Section 8(d) to provide that if a party agrees to assume future economic, legal and management responsibilities for an operation of a ROW as a trail, the ROW must be transferred to the party without payment to the railroad.[118] The Commission reversed its view in issuing its final regulations. ICC currently takes the position that the Section merely authorizes the trails proponent to negotiate to purchase the ROW in question.[119] As a corollary the Commission has declined to prescribe a regime to determine just compensation. Instead, the Commission has construed the statute to apply only where the railroad indicates that it will enter into a voluntary agreement with the trail proponent. The Commission's new Section 8(d) regulations, which are based on this construc

116. Tiedt, *supra* note 9, at 47 In Kansas Electric Power Co. v. Waller, the court held that railroad easement did not revert when rail use was supplanted by gasoline driven rubber tired busses. The court reasoned that the change in method of transportation was for the public; the benefit and burden on adjacent land owners was not increased. 51 P.2d 1002, 1004 (Kan. 1935).

117 *See, e.g.*, Chicago & N.W Transp. Co.—Abandonment—Between Kelley and Slater, Iowa (unpublished), ICC Docket AB-1 (Sub. No. 163) (served April 11, 1985) at 5; Denver and R. G. W R.R.—Abandonment—In Utah, Sanpete and Sevier Counties, Utah (unpublished), ICC Docket AB-8 (Sub. No. 8) (served May 24, 1985) at 45; Chicago & N.W Transp.—Abandonment—In Polk, *et al.*, Counties (unpublished), ICC Docket AB-1 (Sub. No. 159) (served Sept. 12, 1984); Chicago & N.W Transp.—Abandonment Exemption—In Kossuth County, Iowa (unpublished), ICC Docket AB-1 (Sub. No. 179X) (served Aug. 2, 1985) at 2-3; Burlington N. R.R.—Abandonment—In Mills and Pottawattamie Counties, Iowa (unpublished) ICC Docket AB-6 (Sub. No. 257X) (served May 3, 1985).

118. Rail Abandonments II, *supra* note 71.

119. *Id.*, Burlington N. R.R.—Abandonment—Between Rosalia and Spring Valley, Wash. (unpublished), ICC Docket AB-6 (Sub. No. 258) (served April 17 1986) at 4, *citing* Vermont and Vt. Ry.—Discontinuance of Service Exemption—In Chittenden County, Vermont (unpublished), ICC Docket AB-265 (Sub. No. IX) (served Feb. 7 1986).

tion, provide for the issuance of a Certificate of Interim Trail Use or Abandonment (CITU) or in exempt proceedings, a comparable Notice of Interim Trail Use or Abandonment (NITU) in the event that a railroad consents to negotiate the application of Sec tion 8(d).[120] In accordance with its construction, the Commission has refused to apply Section 8(d) where the railroad has refused its consent even where an electrical utility wished to secure a right-of-way for possible future rail use (to serve a power plant site) and the affected counties, supported by the state Department of Natural Resources, expressed interest in interim trail use.[121]

The Commission s construction of the statute to require a railroad's voluntary agreement raises a variety of problems. For ex ample, at least one railroad initially refused to enter into a voluntary agreement for fear that it "would retain a residual common carrier obligation on the line" which might result in an obligation on its part to "bear the expense of line restoration."[122] ICC has addressed this concern by firmly declaring that the issuance of a "CITU" or "NITU" terminates common carrier responsibilities and, although the right-of-way must remain available for future rail use, actual reconstruction and reinstitution of rail ser vice would require a certificate of public convenience and necessity [123] More problematic are seemingly arbitrary refusals by railroads even to attempt to negotiate an agreement under Sec tion 8(d).[124]

120. 51 Fed. Reg. 16,851 (1986).

121. Chicago & N.W Transp. Co.—Abandonment—Guthrie and Dallas Counties, Iowa (unpublished), ICC Docket AB-1 (Sub. No. 192) (served Jan. 8, 1987).

122. Letter from Peter Lee (Burlington Northern) to James Bayne (ICC), April 25, 1986, in ICC Docket AB-6 (Sub. No. 258). The Commission has moved to allay this concern. In denying request for partial stay of its new regulations pending judicial review, the Commission expressly stated that trail use under Section 8(d) will not result in any residual common carrier duties. "Since trail use can occur only when the public convenience and necessity require or permit abandonment of service, all certificates for trail use will authorize the railroad to discontinue service. Once carrier consummates authority to discontinue service, operations may only be resumed after an application to operate is approved under, or exempted from, 49 U.S.C. 10901. Rail Abandonment—Use of Rights-of-Ways as Trails (unpublished), Ex Parte 274 (Sub. No. 13) (served Aug. 19, 1986) at 7

123. Rail Abandonments—Use of Rights-of-Way as Trails (unpublished), Ex Parte No. 274 (Sub. No. 13) (served August 7 1986).

124. *See*, Iowa Terminal R.R.—Abandonment Exemption—In Cerro Gordo and Floyd Counties, Iowa (unpublished), ICC Docket AB-269 (Sub. No. IX) (served Sept. 5, 1986), and Motion for Stay and Petition for Reconsideration, filed on behalf of Cerro Gordo County Conservation Board, *et al.*, Sept. 19, 1986.

Another set of problems with the Commission s interpretation is glaringly evident in the case of railroad easements which automatically terminate upon abandonment. Railroads clearly have no property interest in real estate subject to reversion. In the event that a line is transferred for continued rail service under the mandatory provisions of 49 U.S.C. § 10905, the Commission typically does not require the payment of compensation for railroad right-of-way easements.[125] Yet ICC's construction of Section 8(d) in essence authorizes railroads to exact compensation in return for the application of Section 8(d) to property in which, but for ICC's construction, they manifestly would have no interest and for which they would not receive compensation upon mandatory transfer for rail use. Section 8(d) was intended to facilitate public trail use of ROW and to preserve ROW for possible future rail use. It is hard to square this intent with an ICC construction giving railroads a new compensable interest which must be satisfied as a condition to invoking the statute.

The Commission s interpretation of Section 8(d) to apply only at the discretion of the railroad conflicts with the compulsory language of the statute. The provision states that the Commission "shall impose" terms and conditions to implement trail use if a trails proponent agrees to assume financial, management and tax responsibilities. "Shall" when used in a statute is ordinarily mandatory [126] The law as written does not empower the Commission to give the railroad what amounts to veto power over its application.[127] The legislative history similarly speaks of a trail transfer in mandatory terms:

125. *E.g.*, Iowa Terminal R.R. Co.—Abandonment—Cerro Gordo and Floyd Counties, Iowa (unpublished), ICC Docket AB-269 (Sub. No. IX) (served Jan. 12, 1987) ("No value was assigned to the ROW because most of the line is subject to reversionary interests.") *See also* Illinois C.G.R. Co.—Abandonment—in Christ, Macon and Shelby Counties, Illinois (unpublished), ICC Docket AB-43 (Sub. No. 136) (served Aug. 4, 1986).

126. *E.g.*, Association of American R.R.s v. Costle, 562 F.2d 1310, 1312 (D.C. Cir. 1977) (" shall' is the language of command in statute"). *See also* Northern Colorado Water Conservatory District v. FERC, 730 F.2d 1509, 1517 (D.C. Cir. 1984); Moon v. United States Department of Labor, 727 F.2d 1315, 1318-19 (D.C. Cir. 1984).

127 ICC' interpretation also arguably renders portions of the statute largely meaningless in that trails proponent always had the right to negotiate with the railroad for trails use. Certainly Section 809(c) encompasses at least that right. But construction rendering all or portion of Section 8(d) meaningless is contrary to applicable canons of statutory construction. "[A] legislature is presumed to have used no superfluous words. Tabor v. Ulloa, 323 F.2d 823, 824 (9th Cir. 1963), *quoting* Platt v. Union Pacific R. Co., 99 U.S. 48, 58 (1878); United States v. Blasius, 397 F.2d 203, 207 n.9 (2d Cir. 1968); Cooperative Grain & Supply Co. v. Commissioner of Internal Revenue, 407 F.2d 1158, 1162

> If interim use of an established railroad right-of-way consistent with the National Trails System Act is feasible, and if a State, political subdivision, or qualified private organization is prepared to assume full responsibility for the management of the right-of-way for any legal liability, and for the payment of any and all taxes that may be levied or assessed against such right-of-way—that, is, to save and hold the railroad harmless from all of these duties and responsibilities—then the route will not be ordered abandoned.[128]

In comments before ICC, the United States Department of Transportation,[129] the Association of American Railroads[130] and Conrail[131] have taken the position that compulsory application of Section 8(d) to require the conversion of abandoned ROW to interim trail use is a taking without just compensation and therefore unconstitutional under the Fifth Amendment. The attack on Sec tion 8(d) s constitutionality as applied to the railroads is the principal force driving the Commission to the view that the statute is voluntary on the part of the railroad.[132] The question of Section 8(d) s constitutionality has two dimensions: first, assuming arguendo that mandatory application of Section 8(d) may constitute a taking from the railroads in some instances, whether ICC has authority to provide a mechanism to establish the constitutionally required compensation as it does for mandatory transfer for continued rail use; and second, whether mandatory application of Section 8(d) in fact constitutes a taking from the railroads in the absence of compensation.

ICC's conclusion that Section 8(d) should be applicable only at the discretion of the railroads does not follow from the proposition that an uncompensated application of the section would be a "taking." Section 8(d) speaks in mandatory terms—it requires the Commission to order a transfer if certain conditions are met. It follows that if an uncompensated transfer upon attainment of those conditions were a taking, then the Commission must pro-

(8th Cir. 1969); Orloff v. Cleland, 708 F.2d 372, 376 (9th Cir. 1983); 2 A. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.06 at 104 (Sands 4th ed. 1984).

128. H. REP No. 28, 98th Cong., 1st Sess. 8-9, *reprinted in* 1983 U.S. CODE CONG. & ADMIN. NEWS 112, 119-20.

129. Comments of the United States Department of Transportation in ICC Docket Ex Parte No. 274 (Sub. No. 13) (March 29, 1985).

130. Comments of the Association of American Railroads, ICC Docket Ex Parte No. 274 (Sub. No. 13) (March 25, 1985).

131. Comments of Consolidated Rail Corporation, ICC Docket Ex Parte No. 274 (Sub. No. 13) (March 25, 1985).

132. *See* Rail Abandonments II, *supra* note 71, at 6.

vide a mechanism, such as arbitration or a valuation proceeding, to establish the necessary compensation. The Commission unquestionably has experience and expertise in valuing railroad right-of-way This is precisely its function under 49 U.S.C. § 10905 for transfers for continued rail use. ICC's response is to plead lack of authority [133] This assertion, however contradicts the mandatory language of the third sentence of Section 8(d). Authority to establish a mechanism certainly seems within the Commission s general powers as interpreted in *Reed v. Meserve.* Moreover such a procedure is consistent with the Commission s own action in *Burlington Northern, Inc.—Abandonment Between Fremont and Kenmore, King County, Washington.* ICC argues that it lacks such authority under 49 U.S.C. § 10906, and that Congress either should have amended § 10906 or used language expressly authorizing ICC to "condemn" a line for rail banking pur poses.[134] The short answer is that § 10906 need not be read to confine the Commission s authority [135] In any event, § 10906 need not be amended to accomplish the result sought, since Congress has spoken clearly on what ICC may do—Congress need not speak verbosely

Second, and independently ICC's basic assumption that mandatory uncompensated application of Section 8(d) constitutes a taking from the railroad seems impossible to maintain. First, it is logically inconsistent with the Commission s position on rever sionary interests. The property interest being regulated for the public benefit (use of the ROW after cessation of rail service) is identical regardless of whether it is owned by the adjacent land owner or the railroad. The reason for the regulation is in both cases the same. If, as ICC claims, the owner of a reversionary interest is entitled to neither protection nor compensation in the face of the public trail use, it follows that the railroad is entitled to neither protection nor compensation. To recall an old cliche, what is good for the goose is good for the gander

133. *Id.* at 6-7

134. *Id.*

135. The Commission concluded that it lacked authority to set terms under § 10906 in Chicago & N.W Transp. Co.— Abandonment, 363 I.C.C. 975 (1981). That construction has never been subjected to judicial review and it seems inconsistent with the provision basic approach of codifying the result reached in Burlington N., Inc.—Abandonment Between Fremont and Kenmore, King County, Wash., 342 I.C.C. 446, 452 (1972).

This same conclusion may be reached via a review of the literature on takings. Such a review is on its face analytically cumbersome, if for no other reason than that the Supreme Court "quite simply has been unable to develop any set formula for determining when 'justice and fairness require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.'"[136] Whether a taking has occurred "depends largely upon the particular circumstances in that case."[137] This requires "essentially ad hoc, factual inquiries" in each instance in which a taking is alleged.[138] There are three discrete situations in which Section 8(d) may be applied to affect a railroad's interests: cases where the ROW was acquired through federal land grants; cases where the ROW is otherwise subject to reversionary interests; and cases where the railroad owns the ROW in fee. These will be reviewed in turn.

1 Public Land Grants

From 1850 to 1871, Congress subsidized railroad construction through transfer of public lands.[139] This in many instances involved outright grants of land to individual railroads.[140] Commencing in 1871, Congress altered this policy culminating in the General Railway Rights-of-Way Act of 1875 (1875 Act).[141] The 1875 Act granted "[t]he right-of-way through the public lands of the United States" for railroad purposes "to the extent of one hundred feet on each side of the central line of such road." The Supreme Court has interpreted both the 1875 Act and comparable language in earlier statutes to reserve the minerals underlying the ROW to the United States as owner of the underlying

136. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). *See also*, Yuba Goldfields, Inc. v. United States, 723 F.2d 884 (Fed. Cir. 1983) ("the law of just compensation is hardly model of clarity, *citing* Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S.C.L. REV. 1, 2 (1970)); Sax, *Takings and the Police Power* 74 YALE L.J. 36, 37 (1964).

137 Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124, *citing* United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).

138. *Id. See also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

139. Idaho v. Oregon Short Line R.R., 617 F Supp. 207 210 (D. Idaho, 1985); *see* R. RIEGEL, THE STORY OF THE WESTERN RAILROADS FROM 1852 THROUGH THE REIGN OF THE GIANTS (1926).

140. Idaho v. Oregon Short Line R.R., 617 F Supp. 207 210.

141. 43 U.S.C. § 934 (1982).

lands.[142] Courts have generally concluded that Congress in adopting the 1875 Act (and presumably earlier similar statutes) "did not intend to convey to railroads a fee interest in the underlying lands" encompassed by the ROW.[143] To the contrary Congress granted "an interest suitable for railroad purposes—a right-of-way which, by definition, carried with it the right of exclusive use and occupancy of the land."[144]

Congress subsequently adopted Sections 912, 913 and 136 of Title 43 of the United States Code to condition the disposal of its retained interest in the railroads right-of-way previously granted. These sections authorize conversion of railroad right-of-way derived from public land grants to "public highway purposes." As one district court has stated, "Sections 912, 913 and 136 evince an intent to ensure that railroad rights-of-way would continue to be used for public transportation purposes, primarily for highway transportation."[145]

Section 912 is especially germane here. Section 912 authorizes a public agency to "embrace" ROW (or sites granted for railroad structures) derived from public land grants for public highway purposes at any time "within one year after the date" that railroad use has ceased, or been abandoned or forfeited.[146] This embracement is without compensation to the railroad because it is a donation of a retained interest of the United States.

Section 912 is important for two reasons. First, the term "public highway" in that provision is broad enough in itself to encompass the establishment of a public trail[147] over the entire ROW subject to the abandonment, evidently independent of any order or action of ICC other than possibly that agency's prior authoriza-

142. Great N. R.R. v. United States, 315 U.S. 262, 270-72 (1942) (1875 Act); United States v. Union Pacific R.R., 353 U.S. 112 (1957) (1862 Act).

143. *See* Idaho v. Oregon Short Line R.R., 617 F Supp. at 212; Allard Cattle Co. v. Colorado & S. Ry. Co., 516 P.2d 123, 125 (Colo. App. 1973).

144. Idaho v. Oregon Short Line R.R., 617 F Supp. at 212.

145. *Id.*

146. In the event that the ROW is not embraced in public highway, the interest in general reverts to the persons (or their assignees or successors in title or interest) to which the United States has granted the legal subdivision or their successors (i.e., the adjacent property owners), or, in that event that the ROW transverses municipality, to the municipality. *See* 43 U.S.C. § 912 (1982).

147 Stegman v. City of Fort Thomas, 273 Ky. 309, 116 S.W.2d 649, 651 (1938) ("a street use only by pedestrians is public highway"); White v. Meadow Park Land Co., 240 Mo.App. 683, 213 S.W.2d 123, 125 (1948) (chief criterion of public highway is that it is transportation route available to the public at large).

tion to the railroad to abandon. Second, if Congress disposition of residual federal interests in railroad ROW derived from public land grants embodied in Section 912 is valid, it follows that Sec tion 8(d), which is more modest in terms of its application than Section 912, is also valid as applied to public land grant ROW [148]

2. Other Reversions

The second instance in which a "mandatory transfer" by the railroad clearly does not amount to a taking involves ROW to which a reversionary interest applies generally [149] It is well established that a railroad is not entitled to compensation for interests which would otherwise revert to someone else upon cessation of rail use.[150] It follows that a transfer of such interests pursuant to the third sentence of Section 8(d) does not amount to a taking from the railroad.

3. Cases Involving Greater Interests

Preservation of a ROW against the claim of a railroad owning the property in fee presents for ICC the most difficult case. But it really is not so difficult upon examination. One can begin with the hornbook proposition that regulation to foster a valid governmental interest does not constitute a taking merely because it re-

148. In comments filed with ICC (*see* Comments of the United States Department of Transportation, ICC Docket Ex Parte No. 274 (Sub. No. 13) (March 29, 1985)) the Department of Transportation relies on Kansas City Southern R.R. v. Arkansas Louisiana Gas Co., 476 F.2d 829, 833 (10th Cir. 1973), for the proposition that railroad ROW "cannot be appropriated in whole or in part except upon the payment of compensation. [I]t is entitled to the protection of the Constitution. It can only be taken by the exercise of the powers of eminent domain. The Commission adopts this view. But *Kansas City Southern* actually holds that the railroad ROWs in question, all of which were granted by the federal government, were in the nature of easements for railroad purposes and that the servient estate was owned by the abutting landowners. The Tenth Circuit ruled that gas company placing pipelines under the ROW had not interfered with the railroads, except perhaps for actual costs ($50 per pipeline) of adding the pipelines to the railroads' maps. 476 F.2d at 835. This case suggests that application of Section 8(d) to all railroad ROW subject to reversion will *not* result in taking from the railroad. Moreover, the alleged "taking" in *Kansas City Southern* had nothing to do with railroad regulatory purposes. In contrast, Section 8(d) fosters legitimate railroad regulatory purpose: rail banking. The cited decision thus is not even germane to situations in which the railroad owns the fee.

149. Railroads frequently hold title to nonfederally granted ROW only by railroad ROW easement. For example, most states hold that railroads only receive an easement when they acquire ROW by condemnation. *See, e.g.*, Quick v. Taylor, 113 Ind. 540, 16 N.E. 588 (Ind. 1888).

150. *See supra* note 125.

sults in a diminution of property value or rights.[151] "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every change in the general law "[152] Indeed, courts have uniformly rejected the position that mere diminution of property value pursuant to reasonable regulation is a taking, even if the diminution is substantial.[153] In *Andrus v. Allard,* for example, a conservation statute actually prohibiting the sale of lawfully acquired property was held not to constitute a taking.[154]

The Court has indicated that two factors have special significance in taking inquiries: first, "[t]he economic impact of the regulation on the claimant and, particularly the extent to which the regulation has interfered with distinct investment backed expectations" and, second, "the interference with property can be characterized as a physical invasion by government."[155] The economic burden of interim trails use under the third sentence of Section 8(d) necessarily is a factual inquiry which would have to be evaluated on a site specific basis. Application of Section 8(d) to forestall railroad divestiture of parcels *not* required for possible future rail (or interim trail) use would not appear to be reasonably associated with a substantial public purpose,[156] and thus might arguably constitute a taking. Narrowing the application of Section 8(d) to only those portions of the ROW necessary and appropriate for possible future rail (or current trail) use will presumably permit the railroad to dispose (if it otherwise can meet applicable state and local land use restrictions) of essentially all developable parcels in urban areas and large blocks of agricultur ally useful land in rural areas. This would serve to minimize the economic burden of Section 8(d) on the railroad and to obviate a possible constitutional problem.[157]

151. Griffin v. United States, 537 F.2d 1130, 1138-39 (Temp. Emer. Ct. App. 1976).

152. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

153. *See, e.g.*, Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (75% diminution in value caused by zoning law); Hadacheck v. Sebastion, 239 U.S. 394 (1915) (87.5% diminution in value); Goneb v. Fox, 274 U.S. 603, 608 (1927) (portion of parcels must be left undeveloped).

154. 444 U.S. 51 (1979) (eagle feathers).

155. Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

156. *See id.* at 127 *citing* Goldblatt v. Hempstead, 369 U.S. 590 (1962).

157 In addition, although not necessarily contemplated by Section 8(d), the economic burden on the railroad could be further minimized by permitting the railroad to retain all its rights in the ROW other than the right to forestall or to interfere with reasonable interim trail use or the right to preclude future rail use. This would allow the railroad to

In addition, while the ROW is banked under Section 8(d), the railroad incurs *no* on-going costs for the trail use in question. Specifically a public agency or qualified private organization must pick up managerial, legal and tax responsibilities for the interim trail use for the section to be mandatory [158] Moreover the railroad could enjoy the right under Section 8(d) to use the ROW in the future for rail purposes, or to sell it to others for those purposes. In *Penn Central Transportation Company v. City of New York*, the Supreme Court upheld a local limitation on further development of Grand Central Station imposed for historic preservation purposes.[159] Section 8(d) hardly seems more burdensome than the limitation upheld in that decision.

The question as to "the character of the governmental action" is more worrisome. *Loretto v. Teleprompter Manhattan CATV Corp.* holds that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."[160] "When faced with a constitutional challenge to a permanent physical occupation of real property " Justice Marshall wrote, "this Court has invariably found a taking."[161] When the government action, the Court said, "is a permanent physical occupation of property our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has minimal economic impact on the owner "[162] Thus, whether an application of the third

rent the ROW to public utilities, or to sell easements to utilities (railroad ROW are frequently ideal corridors for electrical, fiber optic, gas, water, or telephone transmission facilities), so long as the interests the railroad rents or sells do not interfere with interim trail or future rail use. On the other hand, it bears noting that Section 8(d) envisions the interim trail operator assuming tax, legal, and managerial responsibilities for the ROW This seems to anticipate that the trail operator will enjoy the right to whatever economic benefits may be derived from compatible corridor use. However, nothing prevents the railroad and the interim trails user from entering into an arrangement which may differ from the third sentence of Section 8(d). It is also noteworthy that should trails use cease, the railroad can dispose of the ROW without restriction.

158. These and other rights mitigating the burden "are to be taken into account in considering the impact of the regulation. Penn Central Transp. Co. v. City of New York, 438 U.S. at 137

159. *Id.*

160. 458 U.S. 419, 426 (1982).

161. *Id.* at 427 *citing* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundation of "Just Compensation Law*, 80 HARV. L. REV. 1165, 1184 (1967); 2 J. SACKMAN, NICHOLS' LAW OF EMINENT DOMAIN 6-50, 6-51 (rev. 3d ed. 1980); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 460 (1978).

162. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35.

sentence of Section 8(d) constitutes a taking may hinge largely on whether that application is characterized as a permanent physical invasion.

Under Section 8(d), someone, usually a public agency is actually building a structure (a trail) on the ROW and inviting public use of that structure for an arguably indefinite period. Under this analysis, one would squarely confront a taking concern, under *Loretto*. There is a substantial question, however whether the "invasion" is permanent because it is manifestly subject to reconstruction of the ROW for railroad purposes in the future and in any event will survive only if the ROW is devoted to trail purposes.

Even more significant, it is unclear that a physical invasion analysis of this sort is applicable to federal railroad regulatory policy or to entities, such as railroads, subject to "common carrier" obligations to provide service to the public under reasonable terms and conditions. A railroad is "not a strictly private enterprise. "[163] In the words of Justice Frankfurter "unlike a department store or a grocery a railroad cannot, of its own freewill, discontinue a particular service to the public because an item of its business has become unprofitable."[164] The kind of government action involved under Section 8(d) is comparable to many other judicially approved regulatory impositions on use of railroad assets over the past quarter century or more. More pointedly it is the general view that a railroad operating under ICC regulation is not inevitably entitled to just compensation under the Constitution for use of its lines and may be required to accept nothing or even to operate temporarily at a loss in order to discharge its public service obligations under federal law [165] In the *New Haven Inclusion* Cases,[166] the Court specifically indicated that a railroad may be required temporarily to continue operating

163. Kalmbach, *The Rededication of Lightly Used or Abandoned Rail Rights of Way to Other Use*, 7 TRANS. L.J. 99, 124 (1975).

164. Alabama Public Service Comm n v. S. Ry. Co., 341 U.S. 341, 353 (1951).

165. *See, e.g.*, Gibbons v. United States, 660 F.2d 225, 229 (7th Cir. 1981); Lehigh & New Eng. Ry. v. ICC, 540 F.2d 71, 83 (3d Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977). One explanation for this result is that railroads "have achieved their market position, and perhaps their monopoly position, by virtue of government intervention that allowed them to assemble the necessary interests in land. If the railroads could operate in wholly unregulated fashion, then original shareholders could appropriate the economic surplus [derived due to government assistance] for themselves, in violation of the public use requirement that demands its even distribution. R. EPSTEIN, TAKINGS 274-275 (1985).

166. 339 U.S. 392 (1970).

even at a loss. These constitutional holdings have not been affected by the 4R Act. Indeed, the Supreme Court has indicated that the statute does not impose a federal rule requiring "the economically optimal use of rail assets." The Court has in fact indicated that a railroad may lawfully be barred from abandoning a ROW as long as "the costs of continued operation are lifted from the carrier "[167] This in essence is exactly what Section 8(d) does. The new provision protects railroads from actual losses for all ROW preserved from abandonment through interim devotion to trail use. Although the statute does not guarantee a railroad its "opportunity costs" (i.e., optimal return on real estate to which it otherwise has marketable title), it does relieve the carrier of the costs of continued operation.

Viewed in another light, preserving the ROW for possible future rail use through interim use as a trail is merely the mechanism to pay the costs of continued operation. It is irrelevant that the money to neutralize the railroad's costs is achieved by interim use of the ROW for trail purposes as opposed to a direct infusion of cash into the railroad. In either event, the ROW is used and is conserved for public transportation, and the railroad is kept whole. Indeed, the most that the owner of a rail carrier suffers as a result of interim trails use "is a postponement of [its] remedy of abandonment," but "no compensation is necessary" for such a postponement.[168] Moreover taking issues raised by ICC actions should ordinarily be resolved on a system-wide basis.[169] The regulation of certain ROW under Section 8(d) will have negligible impact on a railroad viewed on a system-wide basis. In short, Sec tion 8(d) as applied to the railroad system as a whole appears to be nothing more than a reasonable regulation of the railroad's use of its property in the public interest—a reasonable regulation intended to foster preservation of ROW within that system for railroad transportation purposes consistent with common carrier obligations of the railroad. The burden, if any posed by this kind of regulation is less onerous to the railroad than obligations which ICC has imposed, and the Supreme Court has upheld, in the past.

167 Hayfield N. R.R. v. Chicago & N.W Transp. Co., 467 U.S. 622, 635 (1984).

168. *See* Lehigh & New Eng. Ry. v. ICC, 540 F.2d at 84.

169. *Cf.* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978) ("taking" jurisprudence views property unit as whole and does not divide it into discrete segments for purposes of analysis of impact).

4. Just Compensation

Even if Section 8(d) effects a taking, it is difficult after the *Regional Rail Reorganization* Cases to argue that the taking is without just compensation.[170] In those cases, parties with interests in the Penn Central Transportation Company brought suits attacking the constitutionality of the Regional Rail Reorganization Act (Rail Act),[171] contending that the Act violated the Fifth Amendment by taking the railroad's property without just compensation. The Supreme Court began by observing the "general rule" that "if there is a taking of property for which there must be compensation under the Fifth Amendment, the [Federal] Government has impliedly promised to pay that compensation and has afforded a remedy for its recovery by a suit in the Court of Claims."[172]

The Court held that the possibility of resort to the Court of Claims, now the Claims Court, under the Tucker Act[173] provides an adequate remedy at law for any taking that might occur under the Rail Act. "We hold," the Court said, "that while the Rail Act might raise serious constitutional questions if a Tucker Act suit were precluded, the availability of the Tucker Act guarantees an adequate remedy at law for any taking which might occur."[174]

This position has been repeatedly endorsed by the Supreme Court. For example, in *Ruckelshaus v. Monsanto*,[175] the Court up-

170. Regional Rail Reorganization Cases, 419 U.S 102 (1974).

171. 45 U.S.C. § 701 (1982).

172. Regional Rail Reorganization Cases, 419 U.S. 102, 126-27 *quoting* United States v. Causby, 328 U.S. 256, 267 (1946) and Yearsley v. Ross Construction Co., 309 U.S. 18, 21 (1940). As the Court noted, the taking must be authorized for the Court of Claims remedy to be available. *See* Regional Rail Reorganization Cases, 419 U.S. at 126-7 n.16. If there is taking under Section 8(d), it is clearly authorized by the statute, which, as noted, speaks in compulsory rather than discretionary terms.

173. 28 U.S.C. § 1491 (1982). The Tucker Act currently provides as follows: "The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

174. Regional Rail Reorganization Cases, 419 U.S. at 149. It is also noteworthy that the Court rejected the view that the Tucker Act is inadequate because Congress may not appropriate the money involved. The Court also rejected the contention that the Tucker Act remedy was too late, observing that "[i]nterest on just-compensation award runs from the date of the taking. Finally, the Court rejected the suggestion that the Tucker Act remedy is inadequate because valuations of railroad property may be complex. *Id.* at 148 n.35.

175. 104 S.Ct. 2862 (1984).

held data disclosure requirements imposed under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), noting that "[t]he Fifth Amendment does not require that compensation precede the taking. Generally an individual claiming that the United States has taken his property can seek just compensation under the Tucker Act. "[176] In short, if the Tucker Act is available to provide compensation for any taking under Section 8(d) of the Trails Act, the third sentence of that provision is not unconstitutional.

The question whether the Tucker Act is available to cure an otherwise unconstitutional taking turns on whether Congress has affirmatively "*withdrawn* the Tucker Act grant of jurisdiction to hear a suit involving the [legislation in dispute]."[177] Nothing in the Trails Act, Section 8(d) of that Act, or the relevant legislative history even remotely suggests that Congress intended to withdraw the Tucker Act remedy for any takings which might arise under Section 8(d) One must accordingly infer an intent to withdraw Tucker Act jurisdiction. But this amounts to inferring a partial repeal of the Tucker Act and "repeals by implication are disfavored."[178] It follows under the *Regional Rail Reorganization Cases* that even if there is a taking under the third sentence of Sec tion 8(d), the taking is not without just compensation and the statute is constitutional.[179]

176. *Id.* at 2880.

177 Regional Rail Reorganization Cases, 419 U.S. at 126 (emphasis in original); Ruckelshaus, 104 S. Ct. 2862, 2881.

178. Ruckelshaus, 104 S. Ct. 2862, 2881.

179. *See also* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 94 n.39 (1978) (Price-Anderson Act, 42 U.S.C. § 2210, "does not withdraw the existing Tucker Act remedy" and the Tucker Act could remedy any otherwise unconstitutional taking due to the Price-Anderson Act); United States v. Riverside Bayview Homes, 106 S.Ct. 455, 459-60 (1985) (Tucker Act cures any unconstitutionality of Corp of Engineers regulation of use of wetlands under Section 404 of Clean Water Act, 33 U.S.C. § 1344). There is one final question. That is whether ICC should interpret Section 8(d) narrowly so as to avoid constitutional difficulties. The Supreme Court answered this question in the negative in United States v. Riverside Bayview Homes, *supra*, at 460:

> the possibility that the application of regulatory program may in some instances result in the taking of individual pieces of property is no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those cases where taking has occurred. Under such circumstances, adoption of narrowing construction does not constitute avoidance of constitutional difficulty; it merely frustrates permissible applications of statute or regulation.

The *Riverside Bayview* opinion notes that it may be "sensible" to construe statute narrowly "where it appears that there is an identifiable class of cases in which application of statute will necessarily constitute taking. *Id.* at 460 n.5. But as already indicated, there is no

Conclusion

As recently confirmed by the President s Commission on Amer ican Outdoors, abandoned railroad ROW can contribute in a meaningful way to meeting the deficit in outdoor recreational facilities with which our growing population is increasingly confronted. Unfortunately there are many obstacles to preserving these rights-of-way for public purposes. Some of these obstacles can in theory be surmounted by the timely invocation of remedies before ICC. Relying on ICC action, however can be problematic. For example, ICC's provisions for notice and public participation make timely invocation of remedies difficult. This situation is fur ther complicated by the Commission s hesitation and reluctance in granting these remedies, and by the Commission s evident willingness to find constitutional problems in doing so. Neverthe less, the remedies which ICC arguably has the power to grant would be extremely helpful, and in many cases vital, for successful rail-to-trail conversions. Their importance should be enough incentive for agencies, organizations and individuals to seek their invocation.

obvious identifiable set of instances in which application of Section 8(d) "will necessarily or even probably constitute taking. As the Supreme Court has indicated, "[t]he approach of adopting limiting construction is thus unwarranted. *Id.*