Committee on Resources

Testimony

Testimony of Nels Ackerson
The Ackerson Group, Chartered
Attorneys and Counsellors
1275 Pennsylvania Ave., N.W.
Washington, D.C.

Regarding H.R. 2438, "The Railway Abandonment Clarification Act"
Before the Subcommittee on National Parks, Forests, and Lands
Committee on Resources
U.S. House of Representatives
October 30, 1997

Thank you, Members of the Subcommittee, for inviting me to speak with you on this important legislation. It is always a privilege to participate in the nation's legislative process, and I am pleased to offer my thoughts on H.R. 2438. I will do so in a spirit of support for the Bill's worthy objectives and in the hope that my observations will be helpful.

H.R. 2438 addresses a subject that is in great need of congressional attention. I congratulate Representative Ryun for his leadership on this issue, and I congratulate this subcommittee for recognizing that this Bill deserves its careful attention. We have had a number of years of experience with the Rails-to-Trails Act. The public purposes of this Act remain as they were when Congress enacted the legislation nearly 15 years ago. However, our experience with the operation of the Act has identified unforeseen consequences for landowners and the public and has revealed serious flaws in the Act's implementation. The Bill before us is aimed at correcting flaws without prejudice to the objectives of the present law. In so doing, H.R. 2438 will help protect the fundamental rights of homeowners, farmers and others whose land is proposed for trail use.

THE PERSPECTIVE ACROSS THE RIGHT-OF-WAY

Before addressing the specific impact of H.R. 2438, I wish to focus the committee's attention on two distinct perspectives. For too long Rails-to-Trails policy makers have seen only the view *down* a railroad corridor and have envisioned a scenic recreational trail. So focused has been their gaze that they have not stopped for a moment by the fence line, where they could have seen an equally beautiful and compelling view *across* the right-of-way. Thus they have been blind to a critical perspective that the landowners see every day. That blindness, I believe, has created misconceptions of both facts and law. Those misconceptions in turn have generated a policy framework and administrative enforcement that are decidedly unfair to some of the persons who are most affected by the present law. A balancing of the interests of both those who look down the corridor and those who look across the corridor is needed.

I have the privilege of representing individually and in class actions tens of thousands of landowners, homeowners, families, retirees, small businesses, farm organizations, and others in states all across our nation. Like the author of H.R. 2438, many of my clients enjoy the outdoors and know the benefits of recreational trails. Many also are conservationists.

What distinguishes my clients from others is that they *own* the land on which railroads once operated their trains, and upon which trails are now operating or proposed. Most of my clients also own land alongside the right-of-way, but the important point is that they own the very railroad corridor land itself. They are not just *adjacent* landowners. They are ***the*** landowners. They own the strips of land that run through their farms or yards where trains once ran, every bit as much as any homeowner owns a back yard, driveway or deck.

Railroad companies and trails advocates often fail to look at any perspective on this issue except their own. Railroads

want to be paid for land they once used, regardless of whether they own it. Trails proponents see opportunities for recreational uses and often view my clients as greedy or disgruntled *neighbors,* rather than as ***the owners*** of the land that is to be taken for the trail.

The owners' perspective is quite different. Because it is their land, they not only look down the abandoned railroad corridor, but also across it. Looking across the right-of-way, they see the rest of their farm, reunited for a more efficient farming operation, now that the railroad has brought to an end the agreement that allowed the railroad to use it. They see a backyard in which their children can play in safety and privacy. Sometimes they see a strip of land that has become a sanctuary for wildflowers, berry bushes and wildlife, which they would like to preserve, free from asphalt surfaces and traffic. In short what they see is *their home, their farm, their land*.

Those who look only down the corridor not only miss a beautiful view of life, they also miss the fundamental point that we learned in kindergarten: You shouldn't take something that is not yours. The perspective down the corridor turns a blind eye to those who own the land. A trail proponent, in zeal to establish a recreational trail, may presume that the railroad rather than the real landowners should be approached and paid for the land. The railroad, of course, likely will be happy to oblige. Thus the real landowners are taken out of any involvement whatsoever in what happens to their land.

That is the perspective that has been fostered and maintained by the present law. That is why change of the kind proposed by H.R. 2438 is necessary.

MISCONCEPTIONS OF LAW AND FACT

Like a horse wearing blinders, policy makers whose perspective blinds them to the view across the trail can only lurch forward, dismissing everything on either side as irrelevant or misguided. This blindness has led to a number of misconceptions.

Misconception 1. Railroads really own the corridors after abandonment, and any other ownership claims are either wrong, speculative, unprovable or trivial.

The fact is that property ownership in railroad corridors is governed by established state property law. The deeds by which the railroads originally acquired the rights to use landowners' property for railroad purposes are enforceable documents just as any other deeds. In many cases, the railroads did not buy the land where they placed their tracks, but rather only obtained an easement or a right to cross the land for railroad purposes, rights which are extinguished when the railroad ceases to use the right-of-way for railroad purposes. The landowners have owned the land all along, and *they alone* retain the right to sell it. Upon abandonment of the railroad the landowners are relieved of the burden of the railroad easement and have full rights to use the land as they see fit, within the law. Proof of ownership should not be difficult in most cases. However, even if proof were difficult that would be no justification for taking the land from the landowner and giving it to the railroad to sell, without an opportunity for the landowner to prove ownership. Not only would that be unfair, it would be unlawful.

The law protects landowners' title against unjustified claims by railroads and those who claim to have received title from railroads. Just this past summer three very significant state supreme court decisions favorable to landowners were handed down in cases in which we represented the interests of landowners against Penn Central, Conrail and AT&T (claiming to have obtained fiber occupancy rights from Conrail). Assertions that landowners either do not own significant amounts of abandoned railroad land, or cannot prove it or have only trivial claims are just wrong.

Misconception 2. Replacing a railroad with a trail doesn't hurt anyone, and it creates no greater burden than the railroad did, so landowners' concerns should not be considered.

For many landowners, a railroad operating on a regular schedule on fixed tracks in the middle of the corridor is much less invasive of ownership rights than a trail open to the public for pedestrian, equestrian, cycling, snow-mobiling, three-wheeler or roller-blading traffic round the clock. When a trail is built, people will come. Farmers who have animals and legitimately use large machinery and chemicals near a railroad corridor may have their farm and business activities greatly curtailed by the presence of trail users, and their liability may increase to those who wander off of the

trail.

More basically, as a matter of property law the right to sell or lease the use of land belongs to the owner of the land, not to a railroad that had only an easement across the land or a right to a limited railroad use of the land. If the railroad never bought the land, it is fundamentally unfair -- and unlawful under state property law -- for the railroad to sell it. That right belongs to the landowner alone.

Misconception 3. Because the Rails-to-Trails law is constitutional, there is no taking when a railroad is converted to a trail.

The Supreme Court has held that the National Trails System Act does not violate the constitution, because when an ownership interest is taken under the Act the landowner may obtain compensation by filing an action in the Court of Federal Claims. Far from concluding that no compensable taking has occurred, the Supreme Court has held that a procedure is available for a landowner to obtain compensation. When the railroad owns the fee simple interest in the land, then its transfer of the land for a trail use is not a taking of anyone's land. However, if the railroad's right to the land under state law terminates upon the cessation of railroad use, then the trail conversion deprives the landowner of his or her full possessory rights in the land, and that clearly is a taking for which the Fifth Amendment Takings Clause requires the United States to compensate the landowner. In plain English, it is taking something that belongs to someone else.

Misconception 4. Federal regulatory procedures can better preserve corridors, protect owners, supervise trials, and enforce the law than state or local law.

The Surface Transportation Board has held that it has no discretion but to order trail use if a railroad and a trail sponsor agree to such use. Thus no determination is made that a railroad corridor is appropriate to preserve for future use before railbanking is ordered. Further, no determination is made that a trail is appropriate on a particular corridor, or that the federal government can afford to pay for the land if trail conversion constitutes a compensable taking for which the federal government is liable.

The STB also has held that it has no responsibility to determine the legitimacy of a trail sponsor, such as whether it is properly organized to do business, has any intention to operate a trail, or has the means and capabilities to manage a trail or to preserve a corridor for future railroad use. The STB will not look behind the bare assertion of a trail sponsor that it is "willing" to assume financial responsibility for a trail. Neither does the STB have investigative, supervisory, or enforcement staff or budget to conduct the kind of law enforcement that state and local governments would be expected to do under zoning, health, fire and safety laws, if federal law did not preempt state and local authority under the Rails-to-Trails Act.

Thus the STB has ordered railbanking where no conceivable future rail use has been suggested. The STB has refused to review a trail use order where the trail sponsor is really an arm of a salvage company that is selling ballast and bridge components, rendering trail use impractical. The STB has approved a "trail sponsor's" control of land while the railroad with which it has contracted negotiated sales of quitclaim deeds to the real landowners, deeds that have value only because the railroad can tie up the land through the STB's trail use authorization.

Finally, the STB has asserted that its limited budget and resources do not permit it to monitor abuses where trail sponsors or railroads do not comply with the STB's orders. Indeed, the STB's predicament is understandable, because it has been put in the position of replacing planning, zoning and building department functions for hundreds of counties and municipalities nationwide with an available enforcement staff that is probably smaller than that of a large town or small city. Thus, under present law and administrative procedures, irresponsible trail sponsors, even those created as a sham by a railroad or a salvage company, can operate in a lawless state, accountable to no one for much of their conduct.

RAILROAD LAND ABUSE

Our litigation on behalf of landowners has revealed a corporate culture in some of the nation's leading railroads that tolerates and even encourages deception and fraud against landowners. It is a cynical corporate culture that appears to

have reaped ill-gotten gains equaling hundreds of millions of dollars or more. Our files contain documentation where railroads have systematically demanded from landowners large sums of money to release so-called "interests" in land that railroad management knows the railroad does not own. In one case a railroad threatened to enter onto public property and remove a large stone monument to the war dead of the community if the railroad was not paid for land that it never owned, and which it had abandoned more than fifty years ago. An injunction proceeding was required to protect the monument and to get the railroad to acknowledge its lack of any basis for a claim of ownership.

In other cases railroads have collected hundreds of millions of dollars under secret agreements to transfer subsurface occupancy rights to telecommunications companies where the railroad has itself acknowledged that it does not have a legal right to control the subsurface rights. In still another case a major national railroad and a local government official colluded to inflate the stated value of a railroad corridor by more than 300 percent in order to obtain more ISTEA funds for a trail, with all of the money paid to the railroad for abandoned land that it did not own.

The patterns of corporate arrogance and deceit in land transactions by some major railroads are so pervasive that a former director of the National Park Service volunteered to testify in one of our cases that a pattern and practice of abuse existed in that railroad's dealings on matters that were addressed at nearly the highest levels within the United States Government. That national railroad, he said, always took as much as it could for as long as it could get it, without regard to any legal right. He testified that the railroad had a pattern of making deals at the highest levels that were broken by the real estate department that was charged with concluding the transaction.

Homeowners, farmers, small landowners, churches, little league clubs and even the nation's taxpayers have been bilked by railroad companies' land practices. Many of those people are my clients, and they are your constituents.

It is against this background that many landowners have viewed the Trails Act as yet another way that railroads can sell interests that they do not own on real estate that they never purchased, even after abandoning their common carrier obligations. Some members of this subcommittee may be aware that I made similar observations in testimony before another subcommittee of this Body a year ago. At that time I offered to present evidence of the railroads' abusive conduct from their own files, some of which I had with me. No railroad came forward to challenge my statements. I still have the files.

BALANCING LEGITIMATE INTERESTS UNDER THE RAILS-TO-TRAILS ACT

It is against this background that new legislation such as H.R. 2438 should be considered. From the perspectives of many railroads, the Rails-to-Trails Act has become a way to demand money legally for real estate that they never purchased and do not own. From the perspectives of some trail proponents, the end of establishing a recreational trail justifies the means of taking land from landowners without compensation to them and without considering their wishes, the wishes of the local communities, or the benefits of alternative land uses.

From the perspective of some federal policy makers, the ideal of nationwide recreational trails justifies a legal fiction that railroad easements are not really "abandoned" for railroad use when trails are built on them. State property laws are preempted and replaced with a vague and unenforceable federal concept. From the STB's perspective, the congressional trails mandate excuses the agency from review or enforcement of either trails use or the validity and operations of trail sponsors. Correspondingly, preemption of state law leads to a virtually lawless state where no one in fact regulates trail sponsors or much of the conduct on the trail lands.

For the real owners of the land, the consequences are very real. First, they lose their land. Second, their farming or business operations, or even worse their family's sense of security and safety, may be compromised by the new trail use. Where a train occasionally crossed their land on a fixed track in the middle of a right-of-way, without invasion of their privacy, the rails-to-trails measure allows the entire corridor through their land, sometimes right up to their kitchen and bedroom windows, to be used at all hours of the day and night by anyone at all, regardless of their motives.

Third, if the trail sponsor abuses the law, the real landowners are denied access to state and local government to redress grievances, including not only land use but in some instances even health and safety enforcement. Fourth, landowners have no practical access to federal law enforcement, because the STB has held that it has no discretion to

deny trail use or to police it, and has insufficient budget or staff to perform law enforcement responsibilities that would be exercised by state or local government, but for federal preemption.

If members of this Subcommittee put themselves in the positions of landowners, a different perspective will be obvious. I urge a balanced policy that respects the perspective across the corridor as well as down the corridor. I urge this Subcommittee to adopt positions of public policy that consider the real world effects of preempting state law, where federal agencies can provide no practical substitute law enforcement.

H.R. 2438 provides a way to restore balance among the various public and private interests that are affected by the Rails-to-Trails Act. Public policy should recognize and protect the legitimate interests of persons whose land is taken for a new public purpose and whose lives and the lives of their families will be changed forever as a result. Those persons who are most affected should at the very least have a role in the process, be given protection against the loss of security and privacy, and have access to traditional land law to enforce their property rights.

The conservation and recreation objectives of the Rails-to-Trails Act can be accomplished without sacrificing constitutional safeguards, without eliminating the roles of state and local government, and without violating the simple principles that we should never take what is not ours without first asking, and we should pay for what we take.

###