Testimony of

MARIANNE WESLEY FOWLER,
SENIOR VICE PRESIDENT
of Federal Relations

RAILS-TO-TRAILS CONSERVANCY

on H.R. 4581

presented to the Subcommittee on National Parks
of the Committee on Resources of the
U.S. House of Representatives

July 13, 2006

Introduction and Summary

Thank you for inviting Rails-to-Trails Conservancy ("RTC") to testify before this Subcommittee on H.R. 4581, the Easement Owners Fair Compensation Claims Act of 2006. Rails-to-Trails Conservancy is a national nonprofit conservation organization founded in 1985, with more than 100,000 members nationwide, and offices in Washington, D. C., California, Florida, Massachusetts, Ohio, and Pennsylvania. The mission of RTC is to create a nationwide network of trails from former rail lines and connecting corridors to build healthier places for healthier people. Specifically, RTC identifies rail corridors that are not currently needed for rail transportation and facilitates their preservation and continued public use through conversion to public trails, non-motorized transportation corridors, and other public uses.

In achieving this objective, RTC relies on Section 8(d) of the National Trails Systems Act, 16 U.S.C. § 1247(d) (hereinafter referred to as the "Federal Railbanking Law"). Passed in 1983, the Railbanking Law is our most effective tool for preserving of America's rapidly disappearing railroad infrastructure for continued public use as transportation corridors. It is of overriding to RTC's organizational mission that this important law remain in place and intact.

The impetus for H.R. 4581 is the Federal Circuit decision in Caldwell v. United States, 391 F.3d 1226 (Fed. Cir. 2004), cert. denied, 126 S.Ct. 366 (2005). In Caldwell, the Federal Circuit held that the "takings" claim arising from the federal Railbanking Law "accrued" for purposes of the six-year statute of limitations when the Surface Transportation Board ("STB") issues a Notice or Certificate of Interim Trail Use ("railbanking order") establishing the initial 180-day period for the railroad and a potential trail manager to negotiate a railbanking/trail use agreement. This ruling rejected the reasoning of the lower court that the statute of limitations began to run when the interim trail use/railbanking agreement is executed. Caldwell v. United, 57 Fed. Cl. 193 (2003).

As a result of the Caldwell decision, three additional pending cases were dismissed: Illig v. United States, 67 Fed. Cl. 47 (2005), appeal pending, 05-5156 (Fed. Cir., filed Aug. 8, 2005) (dismissing a class action "takings" case involving Grant's Trail in Missouri); Barclay v. United States, 351 F. Supp.2d 1151 (D. Kan 2006 ) (takings claims relating to three Kansas trails: the Meadowlark Trail, Sunflower Trail, and the Flint Hills Nature Trail), and Renewal Body Works v. United States, 64 Fed. Cl. 609 (2005) (takings claim involving from the Old Town-Clovis Trail in Fresno, California). The Barclay and Renewal Body Works cases were consolidated for purposes of appeal and the Federal Circuit affirmed the dismissal of these cases. Barclay v. United States, 443 F.3d 1368 (Fed. Cir. April 11, 2006).

H.R. 4581 would provide that "takings" claim arising from the application of the Federal Railbanking Law "shall not be deemed to first accrue," for purposes of the applicable six year statute of limitations, until the interim trail manager has, by written agreement, assumed full responsibility for the corridor and the railroad has, by written instrument, transferred control over the corridor to the trail manager. The proposed amendment would require the courts to apply this new accrual date to any lawsuit pending on or commenced after the date of enactment. Further, the bill would allow any person whose claim was dismissed based on an inconsistent accrual period to bring an action requesting that the order of dismissal be vacated within one year, and directing the Court of Federal Claims to review these claims under the new law, without regard to principles of res judicata or collateral estoppel (which normally bar re-litigation of fully adjudicated lawsuits).

According to the statement by the sponsor, Representative Akin (R- MO), H.R. 4581 is intended to further two objectives. First, the bill seeks to assure "compensation to those property owners whose property the Government already acknowledged taking," and therefore "remedy the injustice worked by the Federal Circuit Decision in Caldwell v. United States . . . in the limited number of cases affected by this Caldwell decision." Second, the bill is purportedly intended to "preserve and steward the taxpayers' resources by not paying for claims where no recreational trail for public use is

ever created."

H.R. 4581 is not the right means to accomplish either of these objectives. There is no evidence that the Caldwell decision will unfairly deprive property owners of their rights to file "takings' claims arising from the Railbanking Law. The only case in which a determination of liability had already been made prior to its dismissal is the Illig case. Any perceived inequities resulting from the retroactive application of the Caldwell decision to the Illig case are best addressed through the established procedure for congressional reference under 28 U.S.C. § 2509, under which either house of Congress has the power to direct the courts to consider any unique equitable factors that may warrant reviving this case. Indeed, H.R. 4581 may do more harm to the interests of potentially aggrieved property owners by legislatively freezing the accrual date for such takings claims, and thereby eliminating the flexibility of the courts to address any special circumstances that might warrant the application of a more lenient accrual date than the one mandated by the bill.

The concern that the six-year statute of limitation could expire before the rail corridor is ever transferred to a trail manager is a purely hypothetical concern that has never arisen in any takings case, and that has no experiential basis. RTC's database of finalized rails-to-trails conversions – "Railbanked Corridors and Associated Negotiation Periods" – based on Surface Transportation Board records, shows that no railbanking negotiation has taken more than six years to complete. Indeed, the average period of negotiation is only one year and three months Further, any congressional attempt to legislative address whether a "taking" results in this context would be an unwarranted intrusion on the function of the judicial branch, which has yet to address or resolve this legal issue, and may well run afoul of constitutional separation of powers principles.

If passed, H.R. 4581 would be an unprecedented legislative attempt to carve out a special rule from the general statute of limitations applicable to all claims seeking damages from the United States solely for one subset of "takings" cases – those involving the federal Railbanking Program. As such, H.R. 4581 goes beyond the three cases involving claimants who were caught between conflicting federal court interpretations, and potentially exposes the federal government to the costs and burdens of additional litigation brought by large numbers of claimants who failed to assert their claims in a timely fashion, while preventing the courts from responding to the equities of a given situation on a case-by-case basis.

H.R. 4581 Is an Unwarranted and Unnecessary Intrusion on The Authority Vested In the Federal Judiciary to Decide "Takings" Cases

In 1990, the U.S. Supreme Court unanimously upheld the constitutionality of the Federal Railbanking Law, and also held (without deciding the issue) that the legal remedy available to property owners who believe that the conversion of the railroad corridor to a trail "takes" their property is to file a compensation claim against the United States under the Tucker Act, 28 U.S.C.§§ 1491(a)(1); 1346(a)(2). See Preseault v. ICC, 494 U.S. 1, 11-12 (1989). In 1996, the Federal Circuit issued a plurality decision holding that the conversion of a railroad corridor to a trail pursuant to the federal Railbanking Law constitutes a physical taking of the claimants' property. Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996). This decision is in conflict with the analysis of the U.S. Court of Appeals for the Second Circuit (see Preseault v. ICC, 853 F.2d 145, 152 (2d Cir. 1988)), a conflict that the U.S. Supreme Court has yet to resolve. Because the lower courts are required to apply the Federal Circuit's ruling in Preseault, a number of courts have found the United States to be liable for compensation in "takings" cases involving the federal Railbanking Law.

All "takings" claims under the Tucker Act must be filed "within six years after such claim first accrues." 28 U.S.C. § 2501. Because the Tucker Act is a statute of limitations that applies generally to all claims within the jurisdiction of the U.S. Court of Federal Claims, the statute does not define when a claim "accrues" for purposes of starting the Tucker Act's limitations period running. Instead, the question of when a claim accrues has historically been addressed by the federal judiciary on a case-by-case basis, based upon the specific nature of action causing the damage, when the damages resulting from that action became fixed, and when the claimant knew or should have known about the damage.

Rails-to-Trails Conservancy agrees with the sponsor's statement that the federal government should not be liable for a "taking" "where no recreational trail is created." However, this is a purely hypothetical concern. To date, no "takings" claim has ever been filed that challenges only the issuance of a railbanking order that expired without a transfer of control over the corridor for trail use.

Moreover, the courts have yet to address this legal issue, expressly left unresolved by the Federal Circuit, of "[w]hether, at the time a railroad applies to abandon its use of an easement limited to railroad purposes, a taking occurs under an ICC order to 'railbank' the easement for possible future railroad use." Preseault v. ICC., 100 F.3d at 1553. While RTC would forcefully contend, when and if this issue is presented to the courts, that no "taking," even a temporary one, results where no trail was created, it is doubtful that Congress possesses the authority to address this unresolved legal question as a legislative matter, and to attempt to do so may run afoul of constitutional separation of powers principles.

The Caldwell Rule Will Not Be Unfair to Claimants

The application of the Federal Circuit's interpretation of the Tucker Act in Caldwell does not unfairly cut off the rights of any existing claimants to file takings cases. Rather, each of the cases that were dismissed as a result of the Caldwell decision could have been brought within five or even six years after control of the corridor had been transferred to the trail manager, and these cases do not justify the unprecedented step of legislating a special "accrual" rule applicable solely to a single class of "takings" claims brought under the Tucker Act.

● In Barclay v. United States, no judgment of liability had been entered against the United States prior to the dismissal of the case on statute of limitations grounds. Moreover, the "takings" case was filed more than six years after control of each of the three corridors had been transferred to the trail managers, and therefore, the case would have been dismissed even under the accrual rule proposed in H.R. 4581.

● In Renewal Body Works v. United States, again the "takings" claim was dismissed prior to the entry of any judgment of liability against the United States. Moreover, the Plaintiff in Renewal Body Works waited nearly six years after the corridor was transferred to the trail manager before filing their case, and indeed, apparently waited until another set of claimants secured a judgment on the merits of their timely filed claims concerning the same trail (Toews v. United States,53 Fed. Cl. 58 (2002), aff'd,, 376 F.3d 1371 (Fed. Cir. 2004)). Thus, the Plaintiff in Renewal Body Works had ample notice of the rails-to-trails conversion, and simply unduly delayed in filing a claim.

● Even in Illig v. United States, the claimants waited nearly six years after the corridor was transferred to the trail manager before filing their takings claim.

In only one dismissed case – Illig v. United States – can the dismissal based on the Caldwell decision arguably be said to have upset legitimate expectations of compensation by "property owners whose property the Government already acknowledged taking." In that case, the Illig claimants had been on the verge of receiving court approval of a settlement of their fully litigated compensation claim when Caldwell was decided and the lower court then dismissed the case. However, it is important to note that the Illig case is still on appeal in the Federal Circuit. It is still possible that the Federal Circuit may determine that principles of fairness unique to the facts of the Illig case do not warrant dismissal of the case. As a result, congressional intervention is premature since the Illig's compensation claim may be revived as a result of this pending appellate review

Even if Congress believes that principles of fairness do not warrant the retroactive application of the Caldwell case to pending claims, there is no need to take the unprecedented step of altering the statute of limitations for all takings claims involving the railbanking program simply to address one or even a few unique situations. Rather, in these few special cases, the appropriate remedy is a congressional reference under 28 U.S.C. § 2509. Using the congressional reference mechanism, either house of Congress may send a bill to the chief judge of the U.S. Court of Federal Claims, which is empowered to make a determination of whether there is either a legal or an equitable basis for making a payment to the claimant, "including facts related to delay or laches, facts bearing upon the question whether the bar of any statute of limitation should be removed, or facts claimed to excuse the claimant for not having resorted to any established legal remedy." Id. § 2509(c).

In sum, the "injustice" that H.R. 4581 purports to remedy is purely hypothetical, since there are no actual or potential situations in which the six-year statute of limitations had expired prior to the transfer of the corridor to the trail managers. Indeed, this rigid legislative rule will interfere with the ability of the courts to flexibly respond to unique circumstances that might warrant a more lenient accrual date than that mandated by H.R. 4581. Any perceived inequity in retroactively applying Caldwell to pending cases is best handled through the established mechanism of a congressional reference. By legislatively imposing an accrual date, the proposed bill will represent an unnecessary as well as an unprecedented incursion on the authority of the judiciary to address questions of when a case of action "accrues" for purposes of the applicable statute of limitations. It is also likely to expose the federal government to belated damage claims by potential claimants who simply sat on their rights, and failed to institute an action within a reasonable time after clear notice of the transfer of the corridor for trail use pursuant to the federal Railbanking Law. Accordingly, RTC opposes H.R. 4581.