

Committee on Resources

Testimony

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SUBCOMMITTEE ON NATIONAL PARKS AND PUBLIC LANDS

INTRODUCTION

I am Evelyn Kitay, Senior Trial Attorney in the Office of the General Counsel at the Surface Transportation Board (Board). ⁽¹⁾ I have been involved in a number of judicial proceedings relating to the implementation of the National Trails System Act (Trails Act), as amended in 1983, by the Board and its predecessor agency, the ICC. Accordingly, in accordance with the request of the Subcommittee, I am here to testify regarding the role of the Board in implementing the Trails Act and to present views on H.R. 2438, "Railway Abandonment Clarification Act."

OVERVIEW OF THE TRAILS ACT

The Trails Act gives interested parties the opportunity to negotiate voluntary agreements to use, for recreational trails, railroad rights-of-way that otherwise would be abandoned. The Act is intended to preserve railroad rights-of-way for future use, which is called "rail banking." Many railroads do not own the land on which their track lies. Rather, they have easements over the land of adjoining property owners. Unless those easements are rail-banked by converting them to a trail, they are extinguished, and the land reverts to the adjoining property owners, when the Board authorizes the abandonment of the line and the abandonment authority is exercised. Some rights-of-way which were made into trails have been reactivated as rail lines. ⁽²⁾

THE BOARD'S SPECIFIC PROCEDURES

To begin the trail use process, a trail proponent must file a formal request in an actual abandonment docket. That is, the process cannot begin until a railroad has filed an abandonment request with the Board. A trail use request has no effect on the Board's decision as to whether to give a railroad permission to abandon the line. It is considered only after the Board has decided to permit the abandonment.

The formal trail use request must include a statement of willingness to assume financial responsibility for the property if an agreement is reached with the railroad for trail use. The trail use proponent must explicitly agree to assume responsibility for paying taxes on the right-of-way and for any liability in connection with the trail use.

When the Board has decided that an abandonment will be permitted on a particular line and a trail use request has been received regarding that line, the railroad must notify the Board whether it is willing to negotiate a trail use agreement. If the railroad declines to negotiate, the abandonment will proceed as if no trail use request was ever filed. On the other hand, if the railroad agrees to negotiate, and no offer of financial assistance to continue rail service on the line is received, the Board will impose a trail condition, which gives the trail use proponent 180 days to negotiate a trail use agreement with the railroad. The Board will often grant an extension of that period at the request of both the railroad and the trail use proponent.

The Board has no involvement in the negotiations between the railroad and the trail use proponent. It does not analyze, approve, or set the terms of trail use agreements. If a trail use agreement is reached, the parties may implement it without further Board action. If no trail use agreement is reached, the trail condition expires and the line may be fully abandoned.

The Board is not authorized to regulate activities over the actual trail. For example, the Board does not set rules for the trail; safety and use of the trail are governed by the local law. The Trails Act preempts only State or local laws regarding reversionary property interests in the right-of-way by explicitly providing that there "shall" be no abandonment, and hence no reversion, during the period of interim trail use.

Finally, the Board has no authority to deny the trail use request if the statute has been properly invoked, the two statutory requirements regarding management and rail banking have been met, and the railroad has consented to negotiate with the trail proponent. In short, the Board's jurisdiction is ministerial, i.e., the Board cannot decide on whether or not rail banking or trail use is desirable. EFFECT OF H.R. 2438

H.R. 2428, if enacted, would dramatically alter the Board's ministerial role under the Trails Act. As my testimony has indicated, under the current statute the Board must impose a trail condition permitting interim trail use on a rail line approved for abandonment whenever the statutory criteria are met. The Board has no discretionary decision-making authority in this area and no substantive authority other than to carry out the essentially automatic provisions of the Trails Act. Furthermore, the Board is not authorized to regulate a trail and its use.

Under H.R. 2438, however, the Board's ability to impose a trail condition would become discretionary. That is, the Board would be required to seek to determine if trail use is appropriate in a particular case. Requiring the Board to approve and oversee particular trails in this manner would be beyond the Board's primary mission, which is to oversee the economic regulation of railroads, motor carriers, pipelines and non-contiguous domestic water trade. The Board has no particular expertise or knowledge concerning recreational trails. Congress only gave the agency a part to play in the formation of trails because of the "rail-banking" element of the Trails Act. Furthermore, the Board has limited resources following the termination of its predecessor agency, the ICC: it currently has roughly 130 employees to handle approximately 500 pending cases. The Board lacks the staff that would be required to approve and oversee individual trail use requests. In short, involving the Board in trail use approvals would be neither consistent with its mandate nor feasible given its existing resources and expertise.

With respect to the specific provisions of H.R. 2438, the bill raises the following additional concerns:

1. The bill could result in a delay in the exercise of a railroad's right to abandon lines that are no longer needed for current rail service until the Trails Act process under the legislation -- that is, the process for determining whether to provide for a trail or not -- is completed. This result would be counter to the mandate of the law that the Board now implements, which is to facilitate and expedite the abandonment of rail lines which the Board has found to be a burden on interstate commerce.
2. The bill provides no legal standards by which the Board is to exercise the discretion the Board would be given with respect to the granting of trail authority. This lack of legal guidance could create inconsistency in the granting of trail use and vulnerability with respect to likely judicial appeals of many trail use conditions.
3. The bill raises the possibility of having to do an environmental review under the National Environmental Policy Act in every case in which a trail proposal is made, because the exercise of discretion regarding trail authority would likely be considered a major Federal action requiring such review. Such a requirement would impose additional burdens on the already strained resources of the Board.
4. The bill creates confusion within the provision eliminating federal preemption, specifically by appearing to give the vesting of any reversionary property interests pursuant to State law priority over the creation of any trail and rail banking. This provision seems to render the entire exercise of the Board's discretion with regard to trails use a nullity.

CLOSING

In summary, the role that the Board plays under the Trails Act is not intended to promote a position on the issue of the conflict between reversionary property rights and trails. The Board's existing responsibilities with respect to trails are ministerial and do not, and are not intended to, resolve this conflict from a policy perspective. However, the proposed bill appears to impose a burdensome regulatory responsibility on the Board to determine whether a trail should be

created that could be rendered a nullity in many cases by the operation of State law giving effect to reversionary property rights. This exercise, which is not consistent the Board's primary mission, would be time consuming, and a strain on its already limited resources, and could ultimately be a fruitless effort by the Board.

I appreciate the opportunity to present these views, and I would be happy to answer any questions that you might have.

1. As the Subcommittee may recall, the ICC Termination Act of 1995 (ICCTA) abolished the Interstate Commerce Commission (ICC), established the Board as the smaller successor to the ICC, and transferred certain functions to the Board. The rail abandonment and Trails Act functions at issue here, which were formerly performed by the ICC, are vested in the Board by virtue of 49 U.S.C. 10903 and 10502, as reenacted by the ICCTA, and 16 U.S.C. 1247(d). See ICCTA, sections 204(e), 205.

2. The Board is aware of two cases in which rail service has been restored to lines previously converted to trail. The first involved a small part of a former Iowa Southern right-of-way (350 feet in Council Bluffs, IA) converted to trail use in Iowa Power, Inc. - Construction Exemption - Council Bluffs, IA, 8 I.C.C.2d 858 (1990). The second involved a 9.1- mile former Norfolk and Western right-of-way in Auglaize County, OH. See Norfolk and Western Ry. Co. - Abandonment Between St. Marys and Minister in Auglaize Co., OH, 9 I.C.C.2d 1015 (1993).

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