Not so Fast: Rail-To-Trail Conversions Could be More Costly Than They Appear

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In a recent article in this journal, Charles Montange wrote about the Preseault case and painted a glowing picture of the virtues of the federal "rails-to-trails" scheme (which is embodied in section 8[d] of the National Trails System Act[1] and authorizes the conversion of abandoned railroad rights-of-way to recreational trails) and urged its vigorous employment by the readers of this journal.[2] Recognizing that Mr. Montange sits on the board of directors of the National Rails to Trails Conservancy, an organization whose purpose is to facilitate the greatest possible number of such conversions, his conclusions are not surprising.

In the spirit of robust debate of public issues, this article presents another view. Before any state and local transportation officials leap to accumulate recreational trails by obtaining the rights to abandoned rights-of-way from the railroads, they might consider this additional information.

The State Law Background of the "Rails-to-Trails" Scheme

The Rails-to-Trails scheme adopted by Congress, in effect, pre-empts and nullifies generations of state property law. Because many (if not most) railroad rights-of-way are on easements, rather than land owned by the railroads in fee, settled state law provides that, on abandonment of the use for which the easement was acquired, full and unfettered use of, and title to, the property reverts to the underlying fee owner.[3] Indeed, when trail proponents attempted to convert abandoned railroad rights-of-way to trail use, state courts prohibited it.[4] In striking down a state rails-to-trails conversion statute as unconstitutionally interfering with the rights of the underlying property owners, the Washington Supreme Court commented on the interest acquired by a government agency which obtained a quitclaim deed from a railroad:

"We note that, insofar as the present record reveals, the County has only acquired, through a quitclaim deed, whatever interest Burlington Northern held. There is a strong argument to be made that Burlington Northern had no interest to convey to the County: upon abandonment of the right of way the land automatically reverted to the reversionary interest holders."[5]

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Section 8(d) of the Trails Act

Congress redefined "abandonment" so that, if a railroad voluntarily transferred its interest to a state or local government agency or a recognized trail group for recreational use with the understanding that the right of way could later be reconverted to railroad use, then cessation of railroad use (including removal of the tracks and ties, and making the roadbed suitable for hiking and biking) would not be abandonment of railroad usage.[6]

The clear purpose of this Congressional action was to facilitate the conversion of abandoned rights-of-way to recreational use by eliminating the impediment of contrary state law. The Interstate Commerce Commission (ICC) has candidly acknowledged this, concluding that "...the main purpose of the amendment is to remove reversion as an obstacle that hinders or prevents the successful conversion of entire linear rights-of-way to recreation use when the rights-of-way have been operated under easements for railroad purposes."[7]

Validity of the Rails-to-Trails Scheme

In *Preseault*,[8] the U.S. Supreme Court concluded that section 8(d) satisfied the test for validity as a regulation of commerce.[9]

Mr. Montange seems to believe that this general holding of validity can somehow immunize actions under the statute from the compensatory requirements of the Fifth Amendment's just compensation clause because the statute is merely a regulation and not all regulations are takings.[10]

A rail-to-trail conversion is not–as to the underlying property owners–a regulatory action. It is a physical invasion.[11] Physical invasions are subject to different analysis than regulatory restrictions.[12] Absent the attempted pre-emptive effect of section 8(d), the underlying property owners have a present right to possess the easement area when it ceases to be used for railroad right-of-way purposes. However, because of section 8(d), property owners face the prospect of unknown numbers of the general public trespassing on their property.

The U.S. Supreme Court has repeatedly held that such physical

invasions cannot be constitutionally countenanced without compliance with the Fifth Amendment's just compensation guarantee. The factual contexts in which this rule has been applied are as varied as public access to a private marina,[13] public access to a private beach,[14] and cable television access to a private building.[15]

The Supreme Court has described the Fifth Amendment's Taking Clause as providing protection to property owners against "...an interloper with a government license."[16] In similar fashion, Professor Tribe has described these Supreme Court decisions as intended to protect private property owners from "...government-invited gatecrashers..."[17]

Those descriptions fit rails-to-trails conversions like the proverbial glove. Although the underlying property owners are entitled to exclusive use and possession of the property under state law once railroad use terminates, the government, through section 8(d), has invited and purported to license the public to use the property as though it were public. The government cannot do that without compliance with the compensation requirement of the Fifth Amendment. That the *Preseault* opinion upholds the general validity of the statute as an exercise of Congressional power under the commerce clause gives no clue as to the statute's compliance with the just compensation clause. As the Supreme Court has repeatedly held, the two are entirely separate questions:

"In light of its expansive authority under the commerce clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a 'taking,' however, is an entirely separate question."[18] To view the federal statute as being merely regulatory, rather than authorizing a continual flow of physical invasions, is to ignore reality and distort the nature of the litigation that will follow *Preseault*.

owners as selfish individuals who simply oppose his recreational visions and who are plotting to use the U.S. Claims Court to "run up damage awards" to make the program expensive.[22]

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The Compensation Remedy

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The Supreme Court established this as the rule for regulatory takings in 1987[19] and confirmed the rule in *Preseault*, with all nine justices agreeing that the Just Compensation Clause requires compensation for all takings, regardless of their nature. The issue loomed large in *Preseault*, because Congress had expressed itself as intending to restrict the money to be spent on the trails program, demanding that no money be spent unless appropriated in advance.[20] The Supreme Court avoided the obvious problem that no money had been appropriated for any rails-to-trails conversions by noting that Congress has a standing appropriation to pay judgments against the United States in the U.S. Claims Court, and that appropriation is sufficient.[21]

As a generality, there is no disagreement with Mr. Montange as to *Preseault's* analysis of the compensation issue. However, his views on the application of the just compensation clause are of dubious validity.

First, Mr. Montange unfairly denigrates the motives of those who disagree with him. He apparently views the underlying property

There is another way of looking at things. What Mr. Montange's view disregards is that these people actually have legal and protected interests in the property. That they or their predecessors may have been willing to have a railroad operating on a right of way through their land does not mean that they are willing to have any use take the place of that railroad use. The deeds by which the easements were acquired gave these people the expectation that, upon cessation of railroad use, they would regain full use of the easement area for whatever use the owners desired. That may be selfish in the most literal sense of the word, but it is not pejoratively so. It is no more selfish than any other owner of any real or personal property insisting that he have control over his property. As the Supreme Court has routinely held, the right to exclude others from one's property is a cherished and important component of property.[23]

The people along the rights-of-way are not ogres. They are ordinary people, who want to make use of what is theirs. Mr. and Mrs. Preseault, for example, own a small plot of land adjacent to the abandoned right of way along a lakefront in Vermont. They would like to develop the property, but need some of the land within the abandoned right of way to do so. They have offered to let the city operate a bike

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path along the route, but feel there is no need for the city to claim or occupy the entire 150-foot width of the former easement for bicycles. The city wants it all. Similarly, most of the people along the 200-mile long Katy Trail in central Missouri are farmers. For many of them, removing the right of way will enable them to manage their farms more efficiently, for the first time in a century. They want to operate their farms in peace–as they are entitled to do.

And if Mr. Montange is correct that the organizers of the Katy Trail in Missouri paid $250,000 for the trail and are planning to lease rights in the easement area to fiber optic cable companies that will pay $1 million per year ($5,000 per month for each of the 200 miles),[24] why should it come as a shock that the owners through whose land those cables run believe they are entitled to that money rather than the trail operators? Put another way, what gives the trail operators the idea that they have the right to sell cable easements to others? The statutory scheme grants them only the right to operate a recreational trail. All other rights belong to the underlying fee owners who, under the general law of easements, may make any use of the underlying fee (including the grant of additional easements) which does not interfere with the use being made by the easement holder.[25]

Second, Mr. Montange says that it will be difficult for the property owners to demonstrate that a taking has occurred.[26]

In most cases, the recorded deeds to the railroads will show the property interest. That is why state courts before the adoption of the rails-to-trails scheme refused to permit conversion. And that is why Congress believed it had to act to override that body of law if there were to be any conversions. If it were difficult to prove the underlying interests and interference with them by trail use, there would have been no federal legislation. That a potentially infinite delay in re-acquiring use and control over the easement area is a substantial interference with the rights of the underlying fee owner has been repeatedly noted.[27]

Third, Mr. Montange urges that it will be difficult for the property owners to prove the value of their interests and the value should be negligible.[28]

His valuation analysis indicates that, although Mr. Montange may have significant experience in regulatory agency practice, he has limited familiarity with eminent domain valuation.

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The first mistake is in treating the valuation issue as though it were only a severance damage issue, i.e., damage to the remainder caused by use of the part taken. Mr. Montange holds that recreational trails enhance the value of property through which they run, and therefore any damage claims should be minimal.[29]

However, this is not merely a severance damage issue. Although there is severance damage, there is also the question of the value of the easement itself which is being taken from the underlying owners. In valuing the easement, the owners will be entitled to the highest price the easement area would bring on the open market for its highest and best use. That use may or may not be the same as the adjoining uses. It may or may not be the same as the railroad or recreational trail use.

Moreover, Mr. Montange makes the assumption that each individual owner would be entitled only to the value of his piece of the right of way (valued, as he puts it "by across-the-fence appraisals").[30] On the contrary, it is a standard rule of eminent domain valuation that, if adjoining property owners can show a reasonable probability that their parcels would be joined together, then they are entitled to an augmentation in the value of their land because the market would take that reasonable probability of joinder into account and value the property more highly.[31]

Mr. Montange's reliance on the valuation method used when the ICC has ordered a railroad to transfer a line to another railroad operator rather than to abandon it is misplaced.[32] Railroads are regulated utilities. Although entitled to constitutional protection, their rights are more restricted than those of non-regulated entities.

It is not the intent of this commentary to present a dissertation on public utility law. However, the following basic precepts of that law show the inappropriateness of relying on forced sales of regulated property as a measure of fair market value for non-regulated individuals.

1. Public utilities can be compelled to temporarily operate at a loss.[33]
2. A public utility may be required to operate part of its business at a loss if its overall operations achieve a fair return.[34]
3. Public utility rates may be set for an entire class without concern for the individual financial condition of each class member.[35]
4. Public utility rates may take into consideration the companies' past earnings, thus justifying a lower rate of return in the future.[36]

The law applied to valuing public utilities is one thing; that applied to ordinary property owners in condemnation cases (either direct or inverse) is something quite different. The constitutional demand of fairness to

property owners in the just compensation clause is different from the analysis applied to those who voluntarily submit themselves to operating in a regulated industry of monopolistic or oligopolistic quality.

Who Ultimately Pays?

Although *Preseault* holds that it is the U.S. government that must compensate underlying property owners through claims court judgments for any interests taken by the statutory rails-to-trails scheme, the reality will undoubtedly be quite different.

Congress has made it plain that it adopted the rails-to-trails scheme on the assumption that it would cost the U.S. government little, if anything, and that all expenditures would be subject to strict Congressional oversight.[37] *Preseault's* rule does away with that. In an era of budgetary constraint, it is unlikely that Congress would stand idly by while the U.S. Court of Claims overrides the federal budget in order to subsidize the acquisition of recreational trails. Indeed, it is foreseeable that Congress could take direct action to place the cost of this program on those state and local agencies and private trail operators who will benefit from the trails. Even in the absence of legislation to that effect, it would not be surprising to see the U.S. government seeking reimbursement from those entities for the cost of acquiring trails that were not sought by, and are neither operated nor controlled by the U.S. government.

Moreover, to the extent that state and local agencies and private trail groups participate with the U.S. government in the effectuation of the rails-to-trails scheme, they could find themselves subject to suit for violation of the property owners' rights notwithstanding the availability of a suit in the U.S. Court of Claims against the United States.[38]

To those inclined to heed the siren song of free (or, at least, relatively cheap) recreational acquisitions through conversion deals with railroads, a word of caution seems in order. It's an old saw, but nonetheless true: there's no such thing as a free lunch. (IRWA)

References

1 16 U.S.C. 1247(d).

2 Montange, *The Supreme Court Affirms The Federal Trail Use and Railbanking Statute*, 37 Right of Way, no. 3 at 12 (1990).

3 See, e.g., Comment, *The Use of Discontinued Railroad Rights-of-Way as Recreational Hiking and Biking Trails: Does the National Trails System Act Sanction Takings?* 33 St. Louis U.L.J. 205 (1988); *City of Columbia v. Baurichter*, 729 S.W. 2d 475, 481 (Mo. App. 1987); *Kansas City Area Transp. Auth. v. 4550 Main Assoc.*, 742 S.W. 2d 182,191 (Mo. App. 1986); *Hill v. Western Vt. R. Co.*, 32 Vt. 68, 77-78 [1859]; *Rutland Railroad Co. v. Chafee*, 71 Vt. 84, 85 (1899); *Dessureau v. Maurice Memorials, Inc.*, 132 Vt. 350, 351 (1974).

4 *Pollnow v. State Dept. of Natural Resources*, 276 N.W. 2d 738 (Wis. 1979); *Schnabel v. County of DuPage*, 428 N.E. 2d 671 (Ill. App. 1981); *McKinley v. Waterloo R. Co.*, 368 N.W. 2d 131 (Iowa 1985); *Lawson v. State*, 730 P.2d 1308 (Wash. 1986). Compare *State by Washington Wildlife Preservation, Inc. v. State*, 329 N.W. 2d 543 (Minn. 1983) (conversion permitted because deed did not restrict use to railroad right of way). For discussion, see *National Wildlife Federation v. I.C.C.*, 850 F.2d 694, 706 (D.C. Cir. 1988).

5 *Lawson*, 730 P.2d at 1315.

6 See House Report 98-28 at 8-9; *Rail Abandonments–Use of Rights-of-Way as Trails* (1986) 2 I.C.C. 2d 591, 597 *(Trails Rules)*.

7 *Trails Rules*, 2 I.C.C. 2d at 597; emphasis added.

8 *Preseault v. I.C.C.*, 494 U.S. ,108 L.Ed.2d 1 (1990).

9 I.e., the Court was able to conclude that it could conjure some rational basis for the statute. (108 L.Ed.2d at 17)

10 Montange at 13.

11 The statute is regulatory *only* as to the railroad. But it is not the railroad's rights which have caused the disputes and which will be the subject of future litigation. The focus must be on the underlying fee property owners' rights and the scheme's interference with them.

12 See, e.g., *Hall v. City of Santa Barbara*, 813 F.2d 198 (9th Cir. 1986) (rent control ordinance held to be a physical taking of property because it required landlord to yield control of occupancy to tenants).

13 *Kaiser Aetna v. U.S.*, 444 U.S. 164 (1979).

14 *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987).

15 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

16 *F.P.C. v. Florida Power Corp.*, 480 U.S. 245, 253 (1987).

17 *Tribe, American Constitutional Law*, 9-5 at 602 (2d ed. 1988).

18 *Kaiser Aetna*, 444 U.S. at 174. See also *Loretto*, 458 U.S. at 425; *Nollan*, 483 U.S. at 841-842.

19 *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

20 Pub. L. 98-11, 101.

21 108 L.Ed.2d at 15.

22 Montange at 14.

23 *Kaiser Aetna*, 411 US at 176; *Loretto*, 458 US at 435.

24 See Montange at 14.

25 E.g., *Restatement, Property* 482, 486.

26 Montange at 14.

27 E.g., *Preseault*, 108 L.Ed.2d at 21 (O'Connor, J., concurring); *National Wildlife*, 850 F.2d at 704-705; *Lawson*, 730 P.2d at 1313.

28 Montange at 14-15.

29 Montange at 14.

30 Montange at 33.

31 E.g., *McCandless v. U.S.*, 298 U.S. 342, 345 (1936).

32 Montange at 33.

33 *New Haven Inclusion Cases*, 399 U.S. 392, 493-494 (1970); *Gibbons v. U.S.*, 660 F.2d 1227,1236-1239 [7th Cir. (1981); *Lehigh New England Ry. Co. v. I.C.C.*, 540 F.2d 71, 83 (3d Cir. 1976).

34 *Baltimore Ohio R.R. v. U.S.*, 345 US 146,148 (1953).

35 *Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968).

36 *F.P.C. v. Hope Nat. Gas Co.*, 320 U.S. 591, 603-604 (1944).

37 See *Preseault*, 108 L.Ed.2d at 14,15-16.

38 E.g., *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312,1318 (9th Cir. 1989).