

# Rails-to-Trails Property Rights

## So whose right of way is it, anyway?



BY KURT C. KIELISCH, ASA, IFAS, SR/WA, R/W-AC

One crisp day last fall, my wife and I decided to take in the season's colors while biking down the Wiouwash recreational trail in Winnebago County, Wisconsin. We were not alone – dozens of bikers, dog walkers, couples walking hand-in-hand and small family groups had the same idea. The air was fresh, the colors were popping and the ride was invigorating. What a great idea, this rails-to-trails program. However, as right of way professional, I had another thought. I wondered what rights were utilized to create this trail. As it turns out, this is the very question many courts are wrestling with today.

### Abandonment Issues

The National Trails System Act was enacted in 1968, opening the door to federal involvement in trails of all types, from city centers to remote backcountry. In 1983,

Congress passed the Rails-to-Trails Act Amendment, which was designed to preserve unused railroad rights of way by converting them into recreational trails. Since then, thousands of miles of unused right of way corridors have been converted into multiuse trails, thus providing recreational opportunities for walkers, bikers, snowmobilers and equestrians.

The trails are perceived as beneficial to the community because they turn corridors that had once been laid to waste into more practical uses. However, these conversions have caused an underlying Fifth Amendment issue to surface. When a railroad no longer has need for its rail right of way, it typically abandons the easement. When an easement is abandoned, it can revert back to the underlying fee holder of the estate, such as the neighboring property owner. Recent legal victories among property owners in

Kansas, Michigan and other states have opened the door for just compensation relief due to takings of the property owners' reversionary rights after abandonment of a railroad easement for recreational trail purposes.

In the halls of the United States Congress, there was great concern that such wholesale abandonment of rail corridors could be a disservice to the interests of the country should there be a need for the rail system to return. As a result, Congress sought to protect these corridors by use of a "railbanking" provision in the Trails Act. The basic concept behind railbanking is that a right of way can be banked until such a time the railroad service is restored. This provision attempts to hold intact the rail line corridors that once linked the country together in the event a need for them arises in the future.

## Declaration of Intent

In most cases, the path from rails to trails follows a two-step approach. The first step is for the railroad to declare its intent to abandon the rail line right of way. The railroad informs the Surface Transportation Board (STB) of its intent, which sets in motion the process for any interested parties (state, municipality or private group) to pursue the conversion of the rail right of way into a trail. Then, if the railroad and proposed trail operator show a willingness to negotiate a trail use agreement, the STB "stays" the abandonment process until such an agreement is finalized. Of course, this is a simplistic version, which may be misleading because multiple timelines must be adhered to, bureaucratic red tape must be dealt with, and legal interests must be conveyed before a trail can be built.

Yet it is through this process that a trail will be granted to the operators with the railbanking caveat. In legalese, the trail is an "interim use" with the provision of re-establishing rail use in the future. This change of use from a rail to a trail will typically involve ownership rights issues. In instances where the right of way being transferred has been under easement ownership, several abutting property owners have sued that this is a taking, seeking just compensation as defined in the takings clause of the Fifth Amendment of the U.S. Constitution. These challenges are being heard in the U.S. Court of Federal Claims due to the associated government's authorization of railbanking and trail use under the Trails Act.

If the original right of way is considered an easement, then the courts need to decide whether a taking has occurred. Therefore, these kinds of cases may rely on the scope of the railroad easement. If the court determines

that the scope of the easement does not provide for a recreational trail use and the property owner was prevented from their reversionary rights, then the court may determine that a taking has occurred and a valuation of the taking will follow. So, what is required to appraise a rails-to-trails easement?

## Before and After

To proceed with an appraisal, understanding what has legally taken place is important. The recommended appraisal methodology in these situations is the before and after approach, where the property is valued in the before condition by ignoring any future easement, and then in the after condition with full consideration given to the impact of the easement on the whole property. The difference between the two values is the loss and damage due to the taking.

In the before taking condition, the appraiser needs to view the transaction as follows: the railroad right of way was abandoned and the reversionary rights of the property owner were exercised, leaving the property under full fee ownership with no easement in place. In the after taking condition, the appraiser will value the property with the new easement in place, which includes the public's use of the recreational trail and railbanking rights. For additional consideration, these easements typically do not allow for the abutting property owner to access this trail from their land or use it as a means to link their property if divided.



Built on a former rail corridor, the Wiouwash State Trail in northeastern Wisconsin is maintained and operated by the counties of Winnebago, Outagamie, Waupaca and Shawano.



Since the Rails to Trails Act is a federal program, the Uniform Standards of Professional Appraisal Practice (USPAP) applies, as well as adherence to the Uniform Appraisal Standards for Federal Land Acquisitions, commonly referred to as the Yellow Book. The Yellow Book specifies that federally-owned property is to be valued at its highest and best use, regardless of its current use. For instance, you may have a property that is currently being farmed, but market analysis shows that it is better suited to be a development parcel. The point is, just because the property is currently being farmed does not mean that farming is its highest and best use.

One of the trickier elements of such a valuation involves what to do with the old rail bed in the before condition. Oftentimes, this rail bed is elevated or bisects the property, a problem that can be cured by the property owner, if they are in fact, the owners of the rail easement. The cost-to-cure could be provided by the mineral extraction of the old bed, which typically has an abundance of crushed stone that can be utilized elsewhere. In those cases where the beds are not elevated, with a little effort, they can be incorporated back into the property.

The key point to remember is that the old bed is part of the whole property now and can be traversed and utilized as the owner sees fit.



Missouri's Ruby Jack Trail, located in the southwestern part of the state, runs 16 miles from the town of Carthage, Missouri to the Kansas state line.

## Finding Comps

While various appraisal methodologies can be used, one of the best ways to value real estate is with comparable sales, and this is especially true with land valuation. Finding comparable sales in the before condition is rarely a problem; it's the after condition that poses the biggest challenges.

The ideal comparable sale in this situation is one that was sold previously without an easement, and then resold in a reasonable period of time encumbered with a rails-to-trails easement. However, the likelihood of finding such a sale is slim, so the next step involves looking for sales of comparable properties that are already encumbered with a rails-to-trails easement. In this scenario, use caution to make certain the easement is comparable, especially in comparing the railbanking option. Additionally, you'll need to do some sleuthing to find out if the railbanking option was fully disclosed to the buyer, which can make all the difference. Unfortunately, the chances of finding such a sale is slim usually because the very neighborhood where you're searching for comparable sales has only one rail line going through it – the one you are working on.

The next question is what to do if you come up empty-handed and there are no rails-to-trails comparable sales.

In that case, you would pursue a comparable after use. This would be a property that currently has one of the following: a recreational trail only with no railbanking option, a property with an inactive rail line but not abandoned, or one that has an active rail line. If you find a property sale with a recreational trail easement without the railbanking option, it would be useful to analyze whether the perception of trail use is positive, negative or neutral to property value. Remember, that is only part of the equation because your subject property has an additional element to consider – railbanking.

The inactive rail line property would be useful for measuring the market's response to a railroad right of way encumbering the property which currently has no train traffic, but may in the future. Again, that is only one element of your easement, for such a property does not measure the impact of public trail use. The last option involves the use of an active rail right of way which measures the impact, such a line has when active, which of course is the ultimate potential of the easement with the

railbanking provision. However, recognize that such a sale does not measure the impact of the interim recreational trail use.

## When Studies Can Support Impact

If you are unable to find any sales that are not encumbered with a railroad or recreational trail easement, then your next source for determining how such trails impact property value is literature published on the subject. This could begin with a broad sweep of everything published on the topic of recreational trails and property value, as this gives you a measure of whether the public perceives such trails as contributors or detractors to property value. The internet provides an accessible and inexpensive way to gather this information.

Following this collection process, it becomes easier to narrow the field by focusing on studies or opinion surveys completed. A word of caution here, you need to know who sponsored these studies, as well as their structure and intent. For instance, say the Foundation of Recreational Trail Advancement funded a study that concluded all trails increase property value. But, further digging reveals that this study was an opinion survey taken by its members who interviewed recreational trail users with the intent to bolster their funding request. Or perhaps the study gave a biased conclusion, but you wouldn't know this because they didn't publish the actual data collected.

To make sure the published data is useful and applicable, it's critical to look for the specific details. Does it report on properties with the same highest and best use? Does it report on rail-banked properties with the same likelihood of return to rail use and within the same time frame? Does the market that it studied have similar value dynamics as the subject market? Be thorough and sure that all of their data is available to review, not just the aspects that support the author's goal.

## The Bottom Line

If a railroad right of way is transferred to a recreational trail operator in lieu of abandonment, and the courts rule that such an action has interfered with the underlying property owner's right to reversion, then a taking has occurred and falls under the takings clause of the Fifth Amendment.



A popular rails-to-trails project is Missouri's Katy Trail, a 237-mile bike path stretching across river bluffs, through farmland and small communities.

The valuation of a rails-to-trails easement requires a before and after valuation format. In the before condition, the property is valued as having exercised its reversionary rights of the old railroad right of way and has no such easement burdening the property. In the after condition, the property is valued as being encumbered by the rails-to-trails easement on the property with full consideration given to the railbanking provision of the easement. All this information is crucial for the courts when concluding just compensation for these multi-purpose properties.

## References

- Barclay v. United States, 443 F. 3d 1368, 1371 (Fed. Cir. 2006).
- Dorothy L. Biery, et al. and Jerramy and Erin Pankratz, et al. v. The United States, No. 07-693L & No. 07-675L (United States Court of Federal Claims June 9, 2011).
- The Dana R. Hoges Trust, et al v. The United States, No. 09-289 L (United States Court of Federal Claims October 25, 2011).
- National Trails System Act Amendments of 1983, 16 U.S.C. ss 1247(d).

### **Kurt C. Kielisch, ASA, IFAS, SR/WA, R/W-AC**

*Kurt is the President and Senior Appraiser of the Forensic Appraisal Group, Ltd, located in Oshkosh, Wisconsin. His company focuses on forensic appraisal services which include eminent domain, stigmatized properties, utility easements, impact studies, litigation consultation and expert witness. He can be reached at [reprof@forensic-appraisal.com](mailto:reprof@forensic-appraisal.com).*

