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**PETITION FOR RULEMAKING BY THE NATIONAL ASSOCIATION OF REVERSIONARY
PROPERTY OWNERS (NARPO)**

Richard Welsh, Executive Director
1100 Bellevue Way NE Ste.8A PMB 719
Bellevue, WA 98004
760-238-8420
dick156@earthlink.net

BEFORE THE SURFACE TRANSPORTATION BOARD

NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS

PETITION FOR RULEMAKING

EXPARTE NO. 778

PETITION FOR RULEMAKING

Pursuant to 49 C.F.R. § 1110.2(b), NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS (NARPO) hereby respectfully petitions the Surface Transportation Board to open a proceeding to issue rules identified below.

IDENTITY AND INTEREST OF NARPO

NARPO is an IRS approved 501(c)(3) non-profit foundation dedicated to the preservation of private property rights with members in 50 states and parts of Canada. NARPO is well known to the Board by virtue of having participated in a number of prior proceedings and rulemakings in which private property rights would be affected. NARPO has a legitimate interest when railbanking and interim recreational trail use would unduly infringe upon private property rights of NARPO members and the public.

RULE SOUGHT TO BE ISSUED

The proposed rule sought would be an amendment to 49 CFR 1152.29, Prospective Use Of Rights-Of-Way For Interim Trail Use And Railbanking. When the Board issues a Notice or Certificate of Interim Trail Use or Abandonment (CITU or NITU), the proposed new rule would require the rail carrier or trail use proponent who are parties to the NITU/CITU to promptly send notice of issuance of the CITU/NITU to each landowner who owns land adjacent to the rail line right-of-way covered by the CITU/NITU and explain the proposed trail and right-of-way use. The specific proposed rules are in the Appendix.

ARGUMENTS IN SUPPORT OF THE PROPOSED RULE

Effective notice of a CITU/NITU is essential for property owners to adequately protect their property rights and interests. Since the ICC and now STB issued the rules for Interim Trail Use under 16 USC 1247(d) and 49 CFR 1152.29 back in 1986, much has occurred in the legal arena concerning property owner rights and the pertinent statute of limitations to file suit for a “takings.”

For property owners abutting railroad rights-of-way that will possibly have an Interim Trail on their property, these property owners have only six years from the date the STB issues a CITU/NITU to file a takings lawsuit in the U.S. Court of Federal Claims. *See Caldwell v United States* 57 Fed.Cl. 193, (2003) and affirmed with modifications in 391 F. 3rd 1226 (Fed, Cir. 2004). In Caldwell, the court specifically ruled that the start of the six-year statute of limitations for these Interim Trail “takings” started the day the CITU/NITU was issued by the STB. Prior to this decision, the courts had ruled that the six-year statute of limitations started when a “trail use agreement” was signed by the abandoning railroad and the trail entity.

Even if a trail use agreement is signed and reported to the STB, in many cases the trail construction is not even begun for years afterward since the STB essentially washes its hands of the CITU/NITU and doesn’t keep track of whether or not the trail is actually built. Consequently, the property owners who have reversionary right to the railroad right-of-way may not know that their rights have been trampled on by government, railroad, and trail entity action, so the six-year statute of limitations can easily expire much like it did for the Caldwells.

5th AMENDMENT DUE PROCESS

When the ICC issued the original rules for 16 USC 1247(d) and 49 CFR 1152.29 in 1986, *see* 2 ICC 591, 600 (1986), the ICC declared that it was unduly burdensome for the railroad and/or proposed trail entity to notify the property owner who owned property along the soon-to-be-abandoned railroad line. Even though NARPO and other commenters brought the reversionary property owners issue to the forefront in the 1986 rulemaking, the ICC still went ahead and took the railroad’s “too burdensome” response as the basis not to notify the abutting property owners of their Fifth Amendment due process rights.

In 1986, the ICC wrote the rules for Interim Trail Use, **4 I.C.C.2d 152 (1987)**. On March 29, 1994, NARPO petitioned the ICC to change the procedures to convert a railroad line to a trail. NARPO asked the ICC to modify its procedural rules to require either the railroad or the trail operator to "provide actual notice to the owners of reversionary interests in rights-of-way before [the ICC] approves conversion of those rights-of-way to trail use." (Petition for Rulemaking

Concerning the Rails-to Trails Program, March 25, 1994.) The ICC denied the petition on July 27, 1994. Rail Abandonments--Use of Rights-of-Way as Trails--Supplemental Trails Act Procedures, Ex Parte No. 274 (Sub-No. 13). NARPO sought judicial review in the DC Circuit. See: **NARPO v. ICC, 70 F.3d 638 (D.C. Cir. 1995)**. The DC Circuit in its decision said, "We accord extraordinary deference to an ICC decision declining to initiate rulemaking. NARPO has not overcome this deference. Accordingly, NARPO's petition is denied." That was 1995.

It is now 2025, with a court ruling on deference issued in 2024 by the U.S. Supreme Court. The U.S. Supreme Court discarded the Chevron deference doctrine when it ruled in **Loper-Bright v. Raimondo**, 603 US 369 (2024). This "deference doctrine" was relied upon by the D.C. Circuit decision against NARPO's challenge in 1995. With "deference" now out of the way, the STB can institute a rulemaking as NARPO has proposed here in order to satisfy the Fifth Amendment requirements on due process to abutting property owners.

It is no longer unduly burdensome for trail use proponents or rail carriers who are parties to an CITU/NITU to send notice to all adjoining landowners, See, Schroeder, [371 U.S. 208 \(1962\)](#) , and *Benchmark Resources Corp.v. United States*, 64 Fed Cl. 526 (2005). Practically every county in the United States now has its property records on local county computers. A trail use proponent can now easily search the county records, or have a title company do so, to obtain the names and addresses of all adjoining landowners to a proposed abandonment. That being the case, Federal Register or local newspaper notice of an CITU/NITU is no longer sufficient; see: Schroeder, [371 U.S. 208 \(1962\)](#) *Benchmark Resources Corp.v. United States*, 64 Fed Cl. 526 (2005).

The needs of property owners for adequate notice is illustrated in CSX Transportation, Inc. --Abandonment -- between Delphi and Frankfort, IN, 2012 WL 4354809 (STB Docket No. AB-55 [Sub-No. 401], decision served September 24, 2012). In that case, the Board's predecessor, the ICC, approved abandonment of the involved rail line in 1991. *Id.*, 1991 WL 278351, decided December 31, 1991. More than 20 years later, the involved rail carrier agreed to convey a segment of the rail line and a bridge to a qualified trails group. *Id.* 2012 WL 4354809 at* 1. The property owners adjacent to that rail line segment did not receive notice of

that action even though it adversely affected their property rights and had been lying dormant for more than 20+ years.

See: United States v. 125.2 Acres of Land, [732 F.2d 239](#) (1st Cir. 1984)."

Holding that publishing and posting was inadequate where the government possessed knowledge of the claimant's name and town, the community was small, and the telephone book provided his street address.

Also see: Schroeder, [371 U.S. 208 \(1962\)](#) (quoting Mullane v. Cent. Hanover Tr. Co., [339 U.S. 306, 314](#) (1950))."

In that instance the City attempted to give notice by statutorily required publication in the City Record and local newspapers, along with postings on trees and poles within a stretch of the plaintiff's property, even though plaintiff's name and address were available in deed and tax records." The Court held that this notice was insufficient because "notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." Id. at 212-13.

The Supreme Court reiterated the general rule that an "elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" Schroeder, 371 U.S. at 211-12, 83 S.Ct. 279

Also see: *Benchmark Resources Corp.v. United States*, 64 Fed Cl. 526 (2005)

The Ladd cases

In Ladd I v. U.S., 630 F.3rd 1015, (2010) and Ladd II 12-5086 , Ladd II v. U.S. 713 F.3rd --- (2013), both the U.S. Court of Federal Claims (Ladd I) and the U. S. Federal Circuit Court of Appeals (Ladd II) agreed that the STB and railroad's notice of the NITU was deficient and was subject to the "claims accrual suspension rule". Thus the landowners were entitled to a new starting date to start the six-year statute of limitations on their takings cases before the Court of Federal Claims. See below the quote from the Ladd II decision; "There is also no reason that the landowners should have known about the 1998 NITU. The government admits that there is no evidence that the 1998 NITU was published in the Federal Register or in a newspaper. Nor is there any evidence that the railroad company that initiated the STB proceedings published newspaper notice of the NITU."

16 U.S.C. 1247(d)

With a thorough reading of 16 U.S.C. 1247(d), it appears the ICC and STB did not follow the direct mandates of the Congressional law. Directly below is the codified version of 16 USC 1247(d).

16 USC 1247(d) Interim use of railroad rights-of-way

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 ([45 U.S.C. 801 et seq.](#)) and chapter 224 of Title 49, shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, **as an abandonment** of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, **then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter**, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use. [Emphasis has been added.]

The following are excerpts of Chapter 1240, of which 16 U.S.C.1247(d) is a part. Notice above in which 1247(d) says, “the Board [previously ICC] shall impose terms and conditions consistent with this Chapter.” Nowhere in Chapter 1240 is condemnation authorized. Throughout Chapter 1240, Congress put in stipulations that the agencies notify and work with property owners abutting the proposed trails. *[Emphasis added in below sections]*

16 U.S. Code Chapter 27 – Section 1240 NATIONAL TRAILS SYSTEM Sections 1241 thru 1251 16 usc 1242 (a)(3)

. The appropriate Secretary may certify other lands as protected segments of an historic trail upon application from [State](#) or local governmental agencies or private interests involved if such segments meet the national historic trail criteria established in this chapter and such criteria supplementary thereto as the appropriate Secretary may prescribe, and are administered by such agencies or interests **without expense to the United States.**

Definitions for Chapter 1240 et. Seq. [16 USC § 1251\(4\)](#) without expense to the United States

(4) The term “without expense to the United States” **means that no funds may be expended by Federal agencies for the development of trail-related facilities or for the acquisition of lands or interests in lands outside the exterior boundaries of Federal areas.** For the purposes of the preceding sentence, amounts made available to any state or political subdivision under chapter 2003 of title 54 or any other provision of law shall not be treated as an expense to the United States.

16 USC 1243 (b)(iii)

Trails on privately owned lands may be designated “National Recreation Trails” by the appropriate Secretary **with the written consent of the owner of the property involved.**

16 USC 1244(6) National Historic Trails

The Lewis and Clark National Historic Trail, a trail of approximately 4,900 miles, extending from the Ohio River in Pittsburgh, Pennsylvania, to the mouth of the Columbia River in Oregon, following the outbound and inbound [routes](#) of the Lewis and Clark Expedition depicted on the map entitled “Lewis and Clark National Historic Trail Authorized Trail Including Proposed Eastern Legacy Extension, dated April 2018, and numbered 648/143721. The map shall be on file and available for public inspection in the office of the Director, National Park Service, Washington, D.C. The trail shall be administered by the Secretary of the Interior. **No land or interest in land outside the exterior boundaries of any federally administered area may be acquired by the Federal Government for the trail except with the consent of the owner of the land or interest in land.** The authority of the Federal Government to acquire fee title under this paragraph shall be limited to an average of not more than ¼ mile on either side of the trail.

16 USC 1245 Side Trails and Trail Markings

Connecting or side trails within park, forest, and other recreation areas administered by the Secretary of the Interior or Secretary of Agriculture may be established, designated, and marked by the appropriate Secretary as components of a national recreation, national scenic or national historic trail. When no Federal land acquisition is involved, connecting or side trails may be located across lands

administered by interstate, [State](#), or local governmental agencies with their consent, or, where the appropriate Secretary deems necessary or desirable, **on privately owned lands with the consent of the landowner.** Applications for approval and designation of connecting and side trails on non-Federal lands shall be submitted to the appropriate Secretary.

16 USC 1246(a)(2) Administration and development of national trails system

Pursuant to [section 1244\(a\) of this title](#), the appropriate Secretary shall select the rights-of-way for national scenic and national historic trails and shall publish notice of the availability of appropriate maps or descriptions in the Federal Register: Provided, that in selecting the rights-of-way full consideration shall be given to minimizing the adverse effects upon the adjacent landowner or user and his operation. . . . **In selecting rights-of-way for trail purposes, the Secretary shall obtain the advice and assistance of the States, local governments, private organizations, and landowners and land users concerned.**

16 U.S.C. 1248 notes

[Pub. L. 100-470, §5, Oct. 4, 1988, 102 Stat. 2283](#), provided that:

"(a) Nothing in this Act [amending this section and [section 1244 of this title](#) and enacting provisions set out as notes under this section and [section 1241 of this title](#)] **shall be construed as authorizing the Secretary of the Interior to use condemnation proceedings** to retain or acquire all or any portion of a right-of-way described in this Act.

"(b) Nothing in this Act shall be construed to expand or diminish existing condemnation authorities contained in the National Trails System Act, as amended [16 U.S.C. 1241 et seq.]."

16 U.S. Code § 1249 - Authorization of appropriations

(b) LAND DEEMED TO QUALIFY FOR FUNDING

For the purposes of [Public Law 95-42 \(91 Stat. 211\)](#), the lands and interests therein acquired pursuant to this section shall be deemed to qualify for funding under the provisions of section 1, clause 2, of said Act.

No money was appropriated for eminent domain or condemnation in any part of Chapter 1240

After reading through all the sections of Chapter 1240, it appears that the STB has enough reasons to initiate a rulemaking as NARPO has requested for proper due process Fifth Amendment notification to abutting property owners.

EP-690

Twenty-Five Years of Railbanking

In addition, the STB initiated EP-690 in 2009 to seek input on 25 years of Railbanking. . Twenty-Five Years of Railbanking, A Review and Look Ahead. NARPO gave 20 minutes of oral testimony through our attorney Ms. Kathleen Kaufman, plus a written statement. Many other property right proponents and abutting property owners made comments to EP-690. One commenter in EP-690 said “the Board must act to require notice to adjoining landowners so that the requirements of the Fifth Amendment are satisfied.” The STB did not follow up on the recommendations.

RAILROAD VALUATION MAPS

Congress passed the Interstate Commerce Commission and Land Valuation Act of 1913 (37 Stat. 701), which required the railroads to do a survey and produce maps of how all their rail lines were acquired and supply these maps to the ICC. The ICC kept all these maps until 1987 when they transferred the maps to the National Archives in College Park, Maryland. The maps are sometimes titled Right-of-Way and Tract Map or Valuation Tract map. These maps had an index that listed each parcel the right of way was on, how each parcel was acquired, and the book and page number where the acquisition instrument was recorded in local county records.

All if not most states followed up on the Congressional Act by having an agency in state government, usually in the revenue department, to keep track of these maps and update the maps when conditions changed such as abandonments or changed routes. Also most counties have all their title records on computer, and their records are easily accessed at home or in the office. Besides being easy to do title searches of county records or state agency records, there is no merit that it would be unduly burdensome for the trail entity to notify the right of way property owners about the proposed trail and thereby satisfying the trail entity’s Fifth Amendment responsibilities. Moreover, all the railroads have these Valuation and Tract maps in their offices and could supply the trail entity the book and page number of the right-of-way acquisition instruments.

Alternatively, the STB could require the abandoning railroad to notify each property owner along the right of way that the railroad is considering changing the use of the right-of-way to a public trail. After all, it is the railroads that have an interest in the right-of-way for railroad purposes. Currently, because of the federal law, 16 USC 1247(d), the railroads can consider changing the legal use of their right-of-way for railroad purposes to a trail even though the railroad's original easement was strictly for railroad purposes. The railroads have skirted this Fifth Amendment due process notice for 38 years as a result of the ICC and STB allowing the railroads not to notify the abutting property owners of the "use" change. Now is the time for the railroads and the trail sponsors to step up to their constitutional due process requirements.

Conclusion

A survey of the U.S. Court of Claims decisions of the past 34 years will show the U.S. government, via US taxpayer, has paid property owners abutting abandoned right-of-way over \$2 billion for the "takings" of reversionary rights for these Interim Trails. The U.S. Court of Claims has decided that over 80 percent of the property titles before them on the 1247(d) cases have been reversionary to the abutting property owners and are compensable for the takings of the reversionary rights.

When Congress passed what is now codified as 16 U.S.C. 1247(d) in 1983, the Congressional Record shows no indications that members of Congress had any idea that the railroads did not own their right-of-ways or that the federal treasury would have to pay out billions of dollars for Fifth Amendment takings of reversionary rights.

For the above reasons, NARPO respectfully requests the STB to institute a rulemaking to modify 49 CFR 1152.29, see Appendix, to the effect that the abandoning rail carrier and/or the trail sponsor receiving a CITU or NITU for interim trail use be responsible for notifying all the abutting property owners that there is a soon-to-be interim trail on their property.

Richard Welsh, Executive Director, NARPO

dick156@earthlink.net

760-238-8429

APPENDIX Underlines and Bolds are proposed rule changes

Specific Recommended Amendments to 49 C.F.R. § 1152.29

Prospective use of rights-of-way for interim trail use and rail banking.

49 CFR 1152.29 (c)

Abandonment application proceedings.

(1) In abandonment application proceedings, if continued rail service does not occur pursuant to [49 U.S.C. 10904](#) and [§ 1152.27](#), and a railroad agrees to negotiate an interim trail use/railbanking agreement, then the Board will issue a CITU to the railroad and to the interim trail sponsor for that portion of the right-of-way as to which both parties are willing to negotiate. [Begin proposed amendment] **The Board will require the railroad and/or the interim trail sponsor to notify by registered mail all property owners abutting the soon-to-be abandoned right-of-way and inform the abutting property owners of the possibility of an interim trail on the railroad right-of-way.** [End proposed amendment]

49 CFR 1152.29 (d)

Abandonment exemption proceedings.

(1) In abandonment exemption proceedings, if continued rail service does not occur under [49 U.S.C. 10904](#) and [§ 1152.27](#), and a railroad agrees to negotiate an interim trail use/railbanking agreement, then the Board will issue a Notice of Interim Trail Use or Abandonment (NITU) to the railroad and to the interim trail sponsor for the portion of the right-of-way as to which both parties are willing to negotiate. [Begin proposed amendment] **The Board will require the railroad and/or the interim trail sponsor to notify by registered mail all property owners abutting the soon-to-be abandoned right-of-way and inform the abutting property owners of the possibility of an interim trail on the railroad right-of-way.** [End proposed amendment]