'Railbanking' Flopping in the Courtroom

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Last week, Senior Judge **Loren A. Smith** of the Court of Federal Claims issued his opinion [1] in the Trails Act taking case, Buford v. United States. Judge Smith's decision was the 16th decision from this Court in the past year finding the government liable for taking citizens' land underlying an abandoned railroad easement that the government authorized for conversion to trail use and possible future railroad use (i.e. "railbanking"). The Buford case involved land along a nearly 5-mile long corridor in Warren County, Mississippi.

As both **Gideon Kanner** [2], Professor of Law Emeritus at the Loyola Law School in Los Angeles, and prominent property rights attorney, **Michael Berger** [3], noted recently at the ALI-ABA Eminent Domain and Land Valuation Litigation course [4], the Justice Department has persisted with an irrational strategy of repeatedly making the same losing argument in its effort to frustrate landowners' right to be paid for that property which the federal government has taken under the National Trails System Act.

Judge Smith's latest decision rejecting the Justice Department's argument is just the most recent rejection of the government's argument. This is yet another case in the Justice Department's unbroken string of losses in these Trails Act cases. In all of these cases the government argued that, essentially, "a public recreational trail is the same thing as a railroad and, therefore, converting an abandoned railroad easement into an easement for public recreation and so-called 'railbanking' is not a taking." Or, in a variation of this argument, the Justice Department contends the value of the property taken must be determined by using a "before and after" appraisal in which the property is assumed to be perpetually encumbered by an active railroad right-of-way in the "before" condition. In all of these cases, the government has lost this argument.

It is not at all surprising that since Preseault I, 494 U.S. 1 (1990), and Preseault II, 100 F.3d 1525 (Fed. Cir. 1996) (en banc), no court has accepted this argument. The only remarkable point is that the Justice Department persists in making this argument. It is a truly bizarre litigation strategy. Again, as several speakers recently noted during the ALI-ABA conference last month, the government must not only pay the owners for the property it has taken, it must also pay interest on this amount and reimburse the owners for their litigation expenses. The Trails Act — and especially the Justice Department's litigation strategy responding to these landowners' claims — is extravagantly expensive to taxpayers.

Below is a list and brief description of all these Trails Act cases which the Justice Department has lost this past year:

- Jenkins v. United States, 2011 WL 6393515, Fed. Cl., Dec. 20, 2011 (No. 09-241L) (Firestone, J.) (Iowa)

(holding the government liable pursuant to the Trails Act for taking the Iowa landowners' right to regain unencumbered fee title to their land).

- Ybanez v. United States, — Fed. Cl. —-, 2011 WL 6016979, Fed. Cl., Dec. 05, 2011 (No. 09-172L) (Hodges, J.) (Texas) (holding the "The measure of just compensation is the difference between the value of plaintiffs' land unencumbered by a railroad easement, and the value of plaintiffs' land encumbered by a perpetual easement for recreational trail use.").
- Rogers v. United States, — Fed. Cl. —-, 2011 WL 5154550, Fed. Cl., Oct. 31, 2011 (No. 07-273L, 10-187L, 07-426L, 10-200L, 08-198L) (Williams, J.) (Florida) (holding the proper measure of compensation is the difference between the land unencumbered by a railroad easement and the land encumbered by an easement for recreational trail use and railbanking).
- Raulerson v. United States, 99 Fed. Cl. 9 (2011) (Margolis, J.) (South Carolina) (holding the proper measure of compensation is the difference between the land unencumbered by a railroad easement and the land encumbered by an easement for recreational trail use and railbanking).
- Geneva Rock Products, Inc. v. United States, 2011 WL 4099150, Fed. Cl., Sept. 15, 2011 (No. 08-920L) (Lettow, J.) (Utah) (granting Utah landowners' motion for class certification on Trails Act takings case).
- Toscano v. United States, 98 Fed. Cl. 152 (2011) (Bruggink, J.) (Utah) (granting Utah landowners' motion for class certification on Trails Act takings case).
- Farmers Co-op. Co. v. United States, 98 Fed. Cl. 797 (2011) (Damich, J.) (Kansas) (finding "a right-of-way for railway purposes and that such purposes are distinct from, and inconsistent with, use of the right-of-way as a recreational trail.").
- Ellamae Phillips Co. v. United States, — Fed. Cl. —, 2011 WL 2466201 *7 (Jun. 21, 2011)., (Baskir, J.) (Colorado) ("There is clear consensus that recreational trail use is fundamentally different in nature than railroad use.").
- Biery v. United States, 99 Fed. Cl. 565 (2011), (Firestone, J.) (Kansas) ("Indeed, a recreational trail is only viable where the operation of trains has ceased. As such, recreational trail use is outside the scope of a railroad purpose easement.").
- Ybanez v. United States, 98 Fed. Cl. 659 (2011) (Hodges, J.) (Texas) ("The original parties to railroad conveyances between 1887 and 1891 would not likely have contemplated use of the right-of-way as a recreational trail. Such a use would be 'clearly different' from railway operations.").
- Capreal, Inc. v. United States, 99 Fed. Cl. 133 (2011) (Wheeler, J.) (Massachusetts) ("A railroad…has the primary purpose of transporting goods and people. The purpose of a recreational trail is fundamentally different. A bicycle trail does not exist to transport people but rather to allow the public to engage in recreation and enjoy the outdoors. The two uses are distinct and an easement for a recreational trail is not like in kind to an easement for railroads.").
- Anna F. Nordhus Trust v. United States, 98 Fed. Cl. 331 (2011), (Wheeler, J.) (Kansas) ("To state the obvious, removing tracks to establish recreational trails is not consistent with a railroad purpose, and cannot be regarded as incidental to the operation of trains.").
- Macy Elevator v. United States, 97 Fed. Cl. 708, 730 (2011), (Firestone, J.) (Indiana) ("The taking arises because recreational trail use does not fall within the scope of the original railroad easement").

- Thompson v. United States, __ Fed. Cl. ___ (Slip Op. October 13, 2011), 2011 WL 4914782 (Braden, J.) (Michigan) ("[C]onversion of the Railroad easements into a public recreational trail transforms the nature of the easement and is substantially different from the original use. … [The] Federal Circuit has squarely rejected the notion that subsequently enacted state legislation can alter the scope of an easement granted prior to the legislation in considering whether a takings claim arises [under the federal Trails Act] … [T]he court rejects the Government's argument that the possibility of reactivation at some hypothetical time in the future signifies that the Line is still being used for a railroad purpose.").
- Hodges v. United States, __ Fed. Cl. __ (Slip Op. October 25, 2011), 2011 WL 5042383 (Damich, J.) (Michigan). ("[T]he Michigan statute's declaration of trail use as a public purpose cannot properly be employed to enlarge the scope of a railroad easement granted many decades prior in derogation of the intent of the parties to the original right-of-way. [And the state policy favoring conversion of abandoned railroad easements to public trial use does not] shield the Government from the obligation of just compensation.. This court finds that the scope of easements [for] .. a right-of-way for railroad purposes [are] distinct from, and inconsistent with, use of the right-of-way as a recreational trail.").
- Buford v. United States, __ Fed. Cl. ___ (Slip Op. February 7, 2012), 2012 WL 401607 (Smith, J.) (Mississippi) ("[T]he [STB's order issued pursuant to the federal Trails Act] discontinued active rail service and created trail use and enabled casino use. Simply, these actions are not railroad purposes under Mississippi law. Here, the Railroad's use would certainly not be consistent with a trail use. In fact, it would be highly inconsistent. … The Federal Circuit rejected the [government's] argument and held that there was no support for the proposition 'that the scope of an easement limited to railroad purposes should be read to include public recreational hiking and biking trails.' … In addition, the Federal Circuit in Toews v. United States further recognized that recreational activities are very different from railroad purposes. 376 F.3d 1371 (Fed. Cir. 2004). … The Federal Circuit has not accepted the Government's argument that public recreational use by a non-railroad is within the scope of an easement limited to railroad purposes. Therefore, a public recreational trail is outside the scope of the easement when an original deed to the railroad grants an easement for railroad purposes.").
- Ladd v. United States, 630 F.3d 1015 (Fed.Cir. Dec 14, 2010), rehr'g and rehr'g en banc denied, 646 F.3d 910 (Fed.Cir. May 26, 2011) (Holding that the STB's issuance of a order authorizing conversion of a railroad easement to public recreational use and so-called "railbanking" is a compensable per se taking of the fee owners' right to unencumbered title and possession of the land. The Federal Circuit reversed CFC Judge Hodges' erroneous conclusion that the Trails Act was only a non-compensable regulatory taking.).

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