TRUE NORTH LAW
A National Authority in Complex, Constitutional and Appellate Litigation.

Mark F. (Thor) Hearne, II
Founding Partner
Thor@TrueNorthLawGroup.com
Direct: 314.296.4002
Cell: 314.229.5512

January 3, 2020

The Honorable Jeffrey Bossert Clark
U.S. Assistant Attorney General
United States Department of Justice
Environment & Natural Resources Division
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: Sarasota, Florida Legacy Rail-Trail Corridor

Dear Assistant Attorney General Clark:

The federal government cannot run with the fox and hunt with the hounds. The United States cannot have it both ways with the Surface Transporation Board arguing one thing and the Justice Department arguing a contrary position.

The Surface Transportation Board invoked section 8(d) of the National Trails System Act[1] taking more than three hundred Sarasota County landowners' private property for public recreation. The Board's order also encumbered these owners' land with a new easement for a possible future railway line.[2] Under Florida law, at the time the Board invoked section 8(d) of the federal Trails Act, these owners held the unencumbered right to use and possess their land and to exclude others from their land. The Board's invocation of section 8(d) took this from them.

---

[1] National Trails System Act Amendments of 1983, codified at 16 U.S.C. §1247(d).

[2] Section 8(d) of the Trails Act provides, "interim [public recreational trail] 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."

In reliance upon the Board's order, Sarasota County demanded more than 250 Sarasota landowners remove "encroaching" improvements from their land. The offending "encroachments" include in-ground swimming pools, patios, fences, decks, sheds, drainage fields, septic systems, and other structures and improvements that have existed for decades. I have enclosed a copy of the form letter Sarasota County sent these owners.

No one disputes the federal government's ability to take private property for public use using the power of eminent domain. But also beyond cavil is the government's obligation to justly compensate the owner when the government exercises this power of eminent domain. U.S. Const. Amend. V ("No person shall be...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."). And see *Knick v. Scott Township*, 139 S.Ct. 2162, 2170 (2019) ("because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time").[3]

---

[3] The Supreme Court ruled the invocation of section 8(d) of the Trails Act is a compensable taking for which the Fifth Amendment compels the government to pay the owner for that property the government took. See *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 8 (1990) (*Preseault I*) (section 8(d) "gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests"). In *Preseault*, the Court also explained that "'[p]roperty interests ... are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Id.* at 20 (O'Connor, J., concurring) (quoting *Ruckelshaus v. Monsanto Co.*, 467

The Board's invocation of the Trails Act encumbers these owners' land with a new and different easement for uses never granted the railroad in the original abandoned right-of-way easement.[4] The original right-of-way easement granted the Seaboard Air Line Railway in 1910 terminated when the railroad no longer used the strip of land for operation of a railway. In *Brandt Rev. Trust v. United States*, 572 U.S. 93, 105 (2014), Chief Justice Roberts explained, "if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land." See also *Monroe County Comm'n v. Nettles*, 2019 Ala. LEXIS 37, *14-15 (Ala. April 26, 2019) ("[A]n easement given for a specific purpose terminates as soon as the purpose ceases to exist, is abandoned, or is rendered impossible of accomplishment.") (internal quotation omitted).

U.S. 986, 1001 (1984), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

The Federal Circuit, sitting *en banc*, likewise held the Board's invocation of the Trails Act "destroys" and "effectively eliminates" the owner's state-law property interest. *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010) (*Ladd I*) ("It is settled law that a Fifth Amendment taking occurs in Rails-to-Trails cases when government action *destroys* state-defined property rights by converting a railway easement to a recreational trail, if trail use is outside the scope of the original railway easement.") (citing *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009)) (emphasis added). See also *Caldwell v. United States*, 391 F.3d 1226, 1228 (Fed. Cir. 2004) ("a Fifth Amendment taking occurs when, pursuant to the Trails Act, state law reversionary interests are *effectively eliminated* in connection with a conversion of a railroad right-of-way to trail use") (citing *Preseault v. United States*, 100 F.3d 1525, 1543 (Fed. Cir. 1996) (*Preseault II*) (emphasis added).

[4] See *Preseault I*, 494 U.S. at 8; *Preseault II*, 100 F.3d at 1531; *Toews v. United States*, 376 F.3d 1371, 1381 (Fed. Cir. 2004); *Trevarton v. South Dakota*, 817 F.3d 1081, 1087 (8th Cir. 2016).

The text of the easement the original landowner, Adrian Honore, granted the Seaboard Air Line Railroad in 1910 specifically provided that the conveyance to the railroad was "made on the express condition" that "if at any time [following the construction of the railroad] the said [railroad] shall abandon said land for railroad purposes[,] then the above described pieces and parcels of land shall *ipso facto* revert to and again become the property of the undersigned, his heirs, administrators and assigns."[5]

Simply put, the federal government took these Florida landowners' private property when the Board invoked section 8(d) of the Trails Act to extend the Legacy Trail across these owners' land. This is established beyond cavil. See *Caldwell*, 391 F.3d at 1228; *Barclay v. United States*, 443 F.3d 1368, 1373 (Fed. Cir. 2006); *Illig v. United States*, 274 Fed. Appx. 883 (Fed. Cir. 2008), *cert. denied*, 557 U.S. 935 (2009); *Ladd I*, 630 F.3d at 1019; *Ladd v. United States*, 713 F.3d 648 (Fed. Cir. 2013) (*Ladd II*); *Navajo Nation v. United States*, 631 F.3d 1268, 1274-75 (Fed. Cir. 2010). See also then-Solicitor (now Associate Justice) General Elena Kagan's brief for the United States opposing the landowners' petition for certiorari in *Illig*, 2009 WL 1526939, *12-13 ("When the NITU is issued, all the events have occurred that entitle the claimant to institute an action based on federal-law interference with reversionary interests, and any takings claim premised on such interference therefore accrues on that date.").

So, here is the issue. To what extent does the Board's issuance of an order invoking section 8(d) of the Trails Act preempt these Florida

[5] See Honore deed, copy enclosed.

landowners' right to use and possess land they had the right to possess under Florida law and the terms of the original 1910 right-of-way easements?

The Board maintains that, when the Board invokes section 8(d) of the Trails Act and "railbanks" the corridor, the Board's "exclusive and plenary" jurisdiction over the corridor continues even though it would have otherwise terminated. The Board contends its jurisdiction over an owner's land preempts *any* right the owner of the fee estate may have to use or possess their property under state law. For example, see *Jie Ao and Zin Zhou – Petition for Declaratory Order*, 2012 WL 2047726 (STB June 6, 2012) ("The agency's broad and exclusive jurisdiction over railroad operations and activities prevents application of state laws that would otherwise be available, including condemnation to take rail property for another use that would conflict with the rail use."). The Supreme Court's opinion in *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 320 (1981) (holding the Transportation Act of 1920, 49 U.S.C. §10903(a), grants the Board (then called the Interstate Commerce Commission) absolute dominion over the land subject to a railroad right-of-way easement and completely preempts state law related to railroad rights-of-way), seems to support this position. See also *Grantwood Village v. Mo. Pac. R.R. Co.*, 95 F.3d 654, 658 (8th Cir. 1996) ("the ICC's determination of abandonment is plenary, pervasive, and exclusive of state law. Therefore, federal law preempts state law on the question of abandonment while the ICC retains jurisdiction over the right-of-way.") (citations omitted).

But, in recent federal Trails Act litigation, the Justice Department has sought to escape the federal government's obligation to

compensate landowners by arguing the Board's invocation of section 8(d) does not deny an owner's state law property rights and claiming the owner retains his state-law right to pursue quiet title and other remedies, including the ability of a state court to issue a decree allowing the owner to build a road or utilities across the federal rail-trail corridor. See, for example, the Justice Department's briefs in *Balagna v. United States*, No. 14-21, ECF No. 90, pp. 18-22, ECF No. 122, pp. 9-12, and *Albright v. United States*, No. 16-1565.

The extent to which the Board's invocation of the Trails Act "destroys" and "effectually eliminates" a landowners' state law property rights is a matter of great consequence for landowners, trailusers, railroads, and taxpayers. The Alabama Supreme Court recently confronted this issue in *Monroe County Comm'n v. Nettles*, 2019 Ala. LEXIS 37 (April 26, 2019) (petition for certiorari pending).

As noted, the federal government can't have it both ways. Either the federal government took all (or essentially all) of the landowners' state-law property rights to use and possess their land and to exclude others from the owners' land when the Board invoked the Trails Act, or the Board took only a limited interest in the owners' land when it created a new federal rail-trail corridor easement across the owners' land.

In either event, the *federal* government must pay the landowner for that property the *federal* government took. The legitimacy of the government's exercise of eminent domain depends upon the government paying the owner fair and just compensation for that property the

government took.[6] To the extent a trailuser (such as Sarasota County) claims a greater interest in the owner's property than the federal government took, the trailuser must then pay the owner.[7]

This issue (the extent of these owners' private property the Board took when the Board invoked section 8(d) of the Trails Act took versus the extent of the interest Sarasota County now claims it has acquired in these owners' land) comes to a head in the Sarasota Legacy Trail litigation. I recently wrote the Sarasota County Commissioners explaining the background of this case and asking them to clarify Sarasota County's position. I've enclosed a copy of this letter.

Given the Surface Transportation Board's position that the Board retains exclusive and plenary jurisdiction over these owners' land, it is possible that Sarasota County may claim authority to demand these owners remove their existing improvements from their land by reason of the Board's ukase invoking the Trails Act. If so, the liability for the

---

[6] See *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893) ("no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner"); *United States v. Miller*, 317 U.S. 369, 373 (1943) ("Such [just] compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."). In *Preseault II*, 100 F.3d at 1531, the Federal Circuit held, "we conclude that the taking that resulted from the establishment of the recreational trail is properly laid at the doorstep of the Federal Government."

[7] That is assuming the trailuser has the power of eminent domain and the taking was within the trailuser's eminent domain authority under state law. If the trailuser does not possess the power of eminent domain under state law or if the trailuser did not comply with the state-law requirements to exercise that eminent domain authority, the trailuser has acquired nothing and is a trespasser.

federal government, including the cost of removing the "encroaching" structures and compensation for the diminution in the value of their remaining property, is an obligation of the federal government. This will be a great expense for the federal government. See the prior Legacy Trail litigation, *McCann Holdings, Ltd. v. United States*, 111 Fed. Cl. 608 (2013); *Childers v. United States*, 116 Fed. Cl. 486 (2014); *Rogers v. United States*, 90 Fed. Cl. 418 (2009). See also the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §4654(c).

Sarasota County is demanding these owners remove all existing improvements from the land subject to the Board's order. This includes swimming pools, fences, sheds, drainage fields, septic systems, radio and cellphone towers, and other structures and improvements. The removal of these improvements will be extremely costly and will, in some cases, render the remaining property valueless or essentially valueless. Collectively, for the more-than ten-mile-long corridor across which Sarasota County is extending the Legacy Trail, this cost will easily exceed $50 million.

Alternatively, the Board can clarify the property interest the Board took from these owners. The Board could grant (to be recorded in the chain of title) a license recognizing these owners' legally-enforceable right to maintain the existing improvements and uses of the land now subject to the Board's order invoking the Trails Act. This would be a written license executed by the Board that these owners and their successors-in-interest could enforce in state or federal court. The Board's license would recognize that these owners retain their state-law remedies to define and enforce these rights (*i.e.*, a state court quiet title

action, prescriptive easement, or easement by necessity). If the Board will grant such a license to each of these landowners, the compensation the federal government must pay these landowners will be determined in light of the license the Board grants these owners allowing them to continue using their land for these existing purposes. This will be far less expensive to the federal government.

The weight of current authority provides that, when the Board invokes section 8(d) of the Trails Act, the federal government has preempted all rights the owner of the fee estate holds under state law, leaving the owner with only bare title to the fee estate encumbered by easements that deny the owner any use or enjoyment of the land. In past Trails Act cases, the Justice Department, the courts, and the owners have agreed this taking is so extensive that it amounts to taking ninety-nine percent of the owners' value in the land. It is the Pottary Barn Rule, "you break it, you buy it." If the federal government takes ninety-nine percent of an owner's interest in land, the federal government must pay the owner for that interest the government has taken.

Over the course of thirty years representing thousands of landowners in Trails Act litigation, it has been my experience that, without exception, landowners prefer to have their land more than receive compensation. Unfortunately, this is not an option the Board affords owners when the Board issues an order invoking the Trails Act.[8]

---

[8] See Mark F. (Thor) Hearne, II, *The Trails Act: Railroading Property Owners and Taxpayers for More Than a Quarter Century*, 45 REAL PROPERTY, TRUST & ESTATE L.J. 115, 175-76 (Spring 2010).

But there is an opportunity to resolve this and other Trails Act takings in a more fair, just, and efficient manner than has been the case in the past. Previously, the Justice Department's Natural Resources Division and the Surface Transportation Board have refused to grant (or even consider granting) owners a license to use land subject to the Board's order invoking the Trails Act. But this doesn't need to be so. The Board can grant the owner a license allowing the owner to retain a legally-enforceable right to use the owner's land now subject to the new rail-trail corridor easement. This license would allow the owner to continue using the land for the existing improvements, and the Board could still accomplish the public recreation and railbanking objectives for which Congress adopted the 1983 amendments to the Trails Act. This approach would also substantially reduce the cost to United States taxpayers.

But, to achieve this outcome, the Surface Transportation Board and the Justice Department must cooperate by agreeing to grant licenses allowing landowners to continue using property that is now subject to the federal government's new rail-trail corridor easement. The owners I represent are ready and eager to work with the Justice Department, the Board, and Sarasota County to negotiate such a license and achieve a fair, just, and cost-efficient resolution of this matter.

I recently wrote you about the *James v. United States* Trails Act litigation involving property the federal government took from landowners in South Carolina. See enclosed copy of my letter of December 5, 2019. In *James*, I proposed a settlement that would honor the federal government's obligation to compensate the landowners and reduce the cost to taxpayers. I made a similar settlement proposal in

Benzin v. United States and *D'Ostroph v. United States*, involving New York landowners. See enclosed copy of my letter of December 17, 2019.

These cases (*James*, *Benzin*, and *D'Ostroph*), like this case, provide an opportunity for landowners and the Justice Department to work together to resolve landowners' constitutional right to be justly compensated and save taxpayers tens of millions of dollars while still preserving the objective Congress sought to achieve when it passed the 1983 amendments to the Trails Act.

Decades of costly litigation is absolutely the worst way to resolve the federal government's obligation to compensate landowners when the federal government takes their private property. And, as noted in my letter concerning the *James* litigation, the judges on the Court of Federal Claims and Federal Circuit are increasingly frustrated by the Justice Department's intransigent opposition to landowners in Trails Act litigation.[9]

Judge Horn said, "senior management" in the Justice Department needs to become more involved and address the "department wide" problem of how the Natural Resources Section is

---

[9] Judge Horn noted in *James*, "It's more a question of trying to understand what is going on with the [Justice] Department in terms of settlements, because we've got another category of cases here at the Court in which the cooperative spirit between the Justice Department and the Plaintiffs and the Court, for that matter, have broken apart." *James*, No. 14-6, ECF No. 111, p. 9. Judge Horn asked Deputy Assistant Attorney General Jean Williams "whether anything has changed [at the Justice Department] ... because there is a somewhat frightening pattern, frankly, in ... rails-to-trails cases ... if, in fact, we can't accomplish settlements in a certain percentage of the appropriate cases." *Id.* at 10.

managing Trails Act litigation. *James*, No. 14-6, ECF No. 111, p. 7. Judge Horn continued, "I wanted a more senior person to come to this hearing" because "[t]here's certainly something going on in the rails-to-trails cases ... on just compensation and with respect to the [Justice Department] taking positions that have been lost in the [Federal] Circuit." *Id.* at 9-10, 11-12.

This litigation concerning the compensation due landowners for the northern extension of the Sarasota Legacy Trail provides an opportunity for the government and landowners to work together to achieve a prompt, fair, just, and cost-efficient resolution of the government's constitutional obligation to justly compensate these landowners and to also provide a clear determination of that interest Sarasota County obtained when the Board invoked the federal Trails Act.

I welcome an opportunity to discuss this with you in person. My personal cell phone number is 314-229-5512. You may call me anytime, and I am glad to meet at your office at your convenience.

Sincerely,

Mark F. (Thor) Hearne, II

Enclosures

cc: Deputy Assistant Attorney General Jean E. Williams
Trial Attorney Brent Allen
United States Department of Justice

Ann D. Begeman, Chair
Patrick J. Fuchs, Vice Chair
Martin J. Oberman, Member
Craig Keats, Director, Office of the General Counsel
Surface Transportation Board
395 E Street, SW
Washington, DC 20423