National Association of Reversionary Property Owners (NARPO)

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Ms. Allison Davis, Acting Director, Office of Proceedings
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RE: EP 749-0 and EP749-1 and EP 753-0

Below is NARPO's reply to EP 749-0, EP 749-1, and EP 753-0. In June 2018 NARPO asked the STB to institute a rulemaking limiting the number of extension of NITU's and CITU's to three years. The STB replied by instituting EP 749-1. After the comment period closed another entity requested the STB to start another rulemaking on NITU extensions which the STB responded by instituting EP-753-0. The STB combined EP-749-1 and EP 753-0 together for an extended comment period. That comment period ended July 8, 2019. The STB has allowed replies/rebuttals until July 26, 2019.

Background

When NARPO asked the STB originally for a maximum of six 180 day extensions of NITUs and CITUs; the STB's general rule used previously was to give 180 day extensions. EP-753 requested the 180 day be extended to 365 days or one year for a maximum of three years of extensions. NARPO believes the one year extension versus the 180 day extension is efficient and fair as long as the total extension time is limited to three years.

The other part of the requests in EP-753-0 NARPO cannot agree to. EP-753-0 requests the STB to institute a rule where NITU and CITU extensions can go beyond the three year maximum if a reason showing **good cause** is put forth by the NITU or CITU trail proponent. Previous to this time, the STB used the **extraordinary circumstance** reason to extend a NITU or CITU and additional extensions were not favored by the STB. While NARPO does not believe there is even an extraordinary circumstance that could be brought forth by a trail proponent that would warrant extending the NITU beyond a maximum of three years, NARPO could accept a STB rule allowing extension beyond the three year maximum for an **extraordinary circumstance.**

Over the thirty-four years NARPO has been engaged with Interim Trail Use, 16 U.S.C. 1247(d), and the NITU and CITU process, we have seen lots of excuses put forth by the trail entities to justify a NITU extension. Some of those NITU extensions stretched out over 20 years. So far NARPO has not seen an excuse that would qualify even as an **extraordinary circumstance.**

Specific Cases of Railroads and Trails Groups Gaming the STB Rules and Using Good Cause as an Excuse to Get NITU Extensions

1* In AB 33-316X which is a 0.56 mile proposed trail, the trail entity's excuse for a NITU extension was they needed to do an appraisal of the property. The NITU had been issued over five years previous, but they had not even done an appraisal, and the line was only ½ mile long. Anyone, even a government entity, should be smart enough to get an appraisal before you even start negotiating with someone to buy something. So far NARPO has not seen the perennial excuse "the dog ate the trail use agreement and we need an extension to write another agreement", but if the STB allows NITU extensions for good cause, I suspect eventually we will see the dog ate the agreement excuse.

2*** Besides the good cause excuse for an extension, there are many other games the railroads and trails proponents are playing with the NITU and CITU extensions and STB rules. Let's look and AB 1032-2X where the railroad has sold its right of way to an individual who is selling off the right of way piecemeal to the abutting property owners even though the property owners already own the right of way through reversionary rights. The railroad is playing the extortion game with the abutting property owners saying if the property owners pay the $10,000 per lot, the railroad will not agree to trails use. The railroads know these trails are a very real detriment to abutting property owners so they are using that fear leverage to exact millions of dollars from the abutting property owners.

3*** Then we have AB 1107-0X doing the same extortion thing to the property owners near Paw Paw, Michigan. In this instance the railroad said the property owners were the ones doing the extorting. How can the property owner do the extorting when the railroad holds all the cards in the NITU scheme of things. So far the STB has not bought into this excuse by the railroad.

4*** Also look at AB 6-465X where King County, Washington cut a four entity deal with BNSF Railroad on a 20 mile abandoned right of way. Supposedly King County is now

the railroad, but they are not a carrier. Then King County builds an overhead for two and four lane light rail through the whole right of way where no trail ever could be built as the bridge abutment take up the complete 100 feet of the right of way. Also another railroad could never be built on the right of way due to the stanchions and bridge abutments, but supposedly if you are granted a NITU you agree to be able to reinstitute rail service if requested. This is just another game the railroads and trails groups are playing with STB rules.

5*** In Ft. Collins, Colorado we have AB 6-306X where the City of Ft. Collins cut a trails use agreement with BNSF and then promptly built a utility service building right in the middle of the right of way that was supposed to be a trail according to the NITU. But there is no trail there as the city has fenced off the whole 8 acres that is their utility service storage area. More games by the railroads and trail proponents by gaming the STB rules.

6*** Again in Ft. Collins we have AB 6-494X where BNSF applied years ago for an abandonment and were subject to a Section 106 historic preservation requirement by the STB. According to the Section 106 requirement imposed by the STB, nothing was to be disturbed by the railroad until the Section 106 requirement was satisfied. To date BNSF has not satisfied the 106 requirement, but they have removed crossings and other things and have sold off part of the right of way and now there is a 12 unit apartment covering ¾ of the right of way for 250 feet. But the STB accepted BNSF's excuse. Just more game playing by the railroads with STB rules.

7*** In AB 290-117 and FD 36137 three cities got a NITU for trail use from the STB and then promptly started discouraging any thought of continued rail service or rail service in the future. Interim Trail Use requires the trail entity to allow continued or future rail use if requested by a bona fide rail provider which in this case US Rail appears to be a bona fide rail service provider. The three cities are in a unique position in that they have been designated the rail carrier and they are also the NITU trail entity. But even with being on both sides of the equation, they have not been able to sign a trail use agreement in the years since the NITU was issued by the STB. This should be the poster child for the STB to view the games the railroads and trail proponents are playing loosely with the STB rules.

8*** FD 35982 in Jackson County, Missouri is another example of the railroads and trail proponents gaming the STB rules for huge amounts of money for the railroad and fraud on the local taxpayers and abutting property owners. In FD 35982 the railroad sold its right of way which has some reversionary land for $50 million to Jackson County as an operating railroad and with the STB permission. Jackson County immediately went about removing the rails and ties to build a trail even though they were supposed to

have an operating railroad, and Jackson County did not even have a NITU as one was never applied for. Here Union Pacific Railroad avoided the $14,000 filing fee for an exempt abandonment or more if it would have been a non-exemption abandonment besides collecting $50 million and indebting Jackson County taxpayers for up to $80 million when the bond sale costs are added in. If this isn't an excellent example of game playing by the railroads and trail proponents, I don't know what would qualify as an example for good cause or extraordinary circumstances to extend a NITU or CITU.

9*** FD 33389—The Land Conservancy of Seattle and King County (TLC) 1998--this is one of the early examples of game playing with the STB rules on NITU and rail trails that NARPO is aware of. In this example, the STB saw through the TLC and BNSF ruse of designating TLC as a rail carrier when all TLC was doing was setting up a trail and allowing BNSF to escape fees and troubles.

10*** AB 1065X in Indiana is another NITU dragged out over 8 years with no cause for NITU extension being given. There has been no NITU extension since May 2013. And there has been no extension of the consummation notice of the railroad, but the property owner farmers still have to drag their farm equipment over the broken rail tracks and rotten ties. This is another example of the railroads and trails groups using the lax STB rules to delay returning the land to the rightful owners. There are over 300 acres of good farmland that is covered with the right of way that could be used for agriculture production that is lying fallow because of no action by the railroad or the STB.

11*** AB 857-1X in Colorado is another trails use case that has gone nowhere, but it shows another way the railroads are using the STB rules and processes to stymie the return of reversionary land to the property owners. This is an abandonment since 2008. The NITU was issued in July 2009, but no trail use negotiations came about and no NITU extension was asked for. The railroad asked for consummation extensions until April 2014, and there has been no further word from the railroad. Meanwhile 70 acres of excellent farmland is not being used, and the farmers are still having a hard time getting their equipment from one side of the right of way to the other due to the poor condition of the rails and ties. In this abandonment all the provisions that the railroad had to accomplish had been done and the STB Office of Proceedings gave the green light to consummate in 2009. One would think the STB would be more proactive in managing the results of their decisions.

12*** In FD 34943 The STB allowed a South Carolina State agency to abandon a rail line and then apply for a NITU which the STB granted over the objections on numerous reversionary property owners. The property owners documented the State's real reason for the NITU which was to build a hotel on part of the right of way and undermine the

right of way with tunnels and utilities to access the hotel. In the past 10 years the hotel has been partially built and the tunnels are undermining the right of way, and of course there is no trail on this part of the NITU. Besides that, the State has never provided the STB with a trail use agreement as they are required to under STB regulations since 2008 or sooner. This is another case where the STB is lax on requiring compliance with their rules. And this case is another example of the railroads and trails groups playing loosely with STB rules to the detriment of abutting property owners. Two railroad bridges over large inlets were immediately removed so railroad use could never be reinstated as the state wanted the right of way for other uses, and the state used the Trails Act to thwart the reversionary property owners from using their land without the easement.

NARPO has many more cases in its files of the same sort of game playing by the railroads and trails groups in these NITU and CITU abandonments, but the above mentioned 12 should suffice to get the point across that all is not well and good for the property owners side of the rails to trails scheme.

Final Argument

One of the pro trail proponents commented "* * * that additional extensions even where no prejudice would result to any party." Obviously this commenter and the pro trail crowd don't consider the thousands of abutting property owners to these rights of way as a party to this NITU issue. The railroads and the trail proponents are a party and they have nothing to lose as they have no skin in the game, but the property owners who the trail crowd relegate to a non-party have everything to lose as they have skin in the game. For the past 100 years or so, the federal courts have defined property rights as a "bundle of sticks". See Richard A. Epstein, **Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property**, 8(3) ECON. J. WATCH 223, 225 (2011), and **Penn Central Trans. Co. v New York City** 438 US 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 - Supreme Court, 1978. That bundle of sticks includes the right to exclude others, privacy, property values and peace of mind; all of which are disrupted and violated by the rails to trails scheme enacted by Congress and promulgated by the ICC and now the STB. So yes the property owners are a party and prejudiced by the rails to trails scheme, and they should have a very big say in what happens to their property.

Also see the June 21, 2019 U.S. Supreme Court decision in ***Knick v. Township of Scott, Pennsylvania***, No. 17-647, which overruled **Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City**, 473 U.S. 172 (1985), and holding that a government violates the Takings Clause the moment it takes property without compensation, and a property owner may assert a Fifth Amendment claim under 42 U.S.C. § 1983 at that time, without pursuing a state-law remedy first.

In the U.S. Supreme Court case of **Planned Parenthood v. Casey**, 505 U.S. 833, 1992, the Court decided that a law that placed an "undue burden" on a person was unconstitutional. While the **Casey** Court considered a non-economic issue, the same principle applies to the undue burden that the abutting property owners have to endure with a rails to trails project through their property. The U.S. Supreme Court has already decided the rails to trails scheme, 16 USC 1247(d), is constitutional in **Preseault v United States**, 494 **U.S.** 1 (1990), nevertheless, the same principle in **Casey** applies to the undue burden borne by the property owners of the NITU through their property. The STB should do its part to keep the burden of the abutting reversionary property owners to a minimum with the rails to trails scheme by requiring no extensions to NITUs or CITUs.

It is hard to imagine the framers of the original rails to trails law in 1983, 16 U.S.C. 1247(d), envisioned the games the railroad and trail proponents have been playing with the law and the rules the ICC promulgated 33 years ago. NARPO and the tens of thousands of property owners and taxpayers hope that the STB sees what these trail entities and railroad are really doing with the STB rules. The STB should allow a maximum of three years on a NITU with extensions not favored except for a very **extraordinary circumstance** as a reason for an extension by the trail proponent. Allowing **good cause** excuses for a NITU extension is only opening the door for more of what NARPO has exposed in the above examples.

And the STB should be taking a hard look at their regulations, 49 CFR 1152(e)(2), concerning railroad consummations of approved abandonments. The railroads don't even project an excuse for consummation extension even though the regulations clearly spells out what the railroad's responsibility is.

Richard Welsh, executive director--NARPO