

UNITED STATES OF AMERICA

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SURFACE TRANSPORTATION BOARD

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PUBLIC HEARING

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TWENTY-FIVE YEARS OF RAIL : Ex Parte
 BANKING: A REVIEW AND LOOK : No. 690
 AHEAD :

1st Floor Hearing Room
 395 E Street, S.W.
 Washington, D.C.

Wednesday,
 July 8, 2009

The above-entitled matter came on
 for hearing, pursuant to notice, at 9:00 a.m.

BEFORE:

FRANCIS P. MULVEY, Acting Chairman
 CHARLES D. "CHIP" NOTTINGHAM, Vice
 Chairman

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ALSO PRESENT:

PANEL I:

MARIANNE FOWLER, Rails-to-Trails
Conservancy

CHARLES H. MONTANGE, Madison County
Transit

PANEL II:

EDWARD R. HAMBERGER, Association of
American Railroads

PETER J. SHUDTZ, CSX Transportation,
Inc.

ERIC S. STROHMEYER, CNJ Rail
Corporation

PANEL III:

KATHLEEN KAUFFMAN, National
Association of Reversionary Property
Owners

DANAYA C. WRIGHT, University of
Florida, College of Law

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C O N T E N T S

	<u>PAGE</u>
Opening Remarks:	
Chairman Francis P. Mulvey	4
Vice Chairman Charles D. Nottingham	10
Panel I: Trail Users Interests	
Marianne Fowler, Rails-to-Trails	
Conservancy	13
Charles H. Montange, Madison County	
Transit	30
Panel II: Railroad Interests	
Edward R. Hamberger, Association of	
American Railroads	112
Peter J. Shudtz, CSX Transportation,	
Inc.	118
Eric S. Strohmeier, CNJ Rail	
Corporation	124
Panel III: Other Interested Parties	
Kathleen Kauffman, National	
Association of Reversionary	
Property Owners	151
Danaya C. Wright, University of	
Florida, Levin College of Law	169

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P R O C E E D I N G S

(9:02 a.m.)

CHAIRMAN MULVEY: Good morning and welcome to the Board's hearing entitled "Twenty-five Years of Rail Banking: a Review and a Look Ahead."

We are holding this hearing to provide an opportunity to consider past experience and think about the future of "rail banking" implementation. Specifically we have gathered today to examine the impact, effectiveness, and future of rail banking under Section 8(d) of the National Trail System Act.

To set the stage, I would like to spend a few moments on the origin of Section 8(d). The time was 1983, and the freight railroad industry had struggled through years of financial hardship. Although the railroads had abandoned many thousands of miles of track, the process of rationalizing the railroad was slow and the carriers were still

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1 burdened with substantial excess capacity.

2 With the passage of the Staggers
3 Rail Act in 1980, freight railroads were able
4 to abandon unprofitable Rail lines with
5 greater ease and to rationalize their systems
6 in other ways as well. The rail abandonments
7 that followed passage of Staggers helped ease
8 the financial hardships faced by the freight
9 rail industry.

10 But the numbers of miles of rail
11 line being abandoned caused concerns of
12 another sort. Congress saw that valuable
13 corridors that might one day be restored to
14 rail service under changed circumstances were
15 being permanently removed from the nation's
16 rail network.

17 Once removed from the rail
18 network, buildings and other structures
19 erected on former railroad rights-of-way could
20 preclude the return of rail service.

21 So in 1983, Congress acted passing
22 the Section 8(d) of the National Trail System

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1 Act to create a program to allow the
2 preservation of railroad corridors for future
3 railroad use. Congress called the program
4 "rail banking" and allowed rail corridors that
5 would otherwise be abandoned to be used in the
6 interim as recreational trails.

7 Over the past quarter century, the
8 Board has worked hard to satisfy the mandate
9 that Congress charged us with in Section 8(d),
10 preserving rail corridors for future Rail use.
11 Through the Trails Act and the Board's
12 implementing regulations, interested parties
13 have the opportunity to negotiate a voluntary
14 agreement to use railroad rights-of-way that
15 would otherwise be abandoned as recreational
16 trails.

17 The trail sponsor must agree to
18 assume responsibility for managing the trail,
19 for paying the property taxes for the right-
20 of-way, and for any liability in connection
21 with trail use.

22 In turn, the rail carrier may

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1 salvage its track and discontinue service on
2 the line. If the parties are able to reach a
3 Trails Act agreement, the right of way can be
4 used as a trail until, and if ever, a rail
5 carrier decides to restore rail service on the
6 line or the trail user terminates trail use
7 under the Board's regulations.

8 The Agency has issued a large
9 number of decisions authorizing trail use
10 negotiation periods, and many of these
11 negotiations have resulted in trail use
12 agreements between railroads and interim trail
13 sponsors. To date, nine cases have emerged in
14 which the railroad has reactivated rail
15 service on a rail-banked line.

16 As I explain this, it seems quite
17 straightforward, but like many things in life,
18 complexities have a way of arising. In the
19 notice announcing this hearing, Vice Chairman
20 Nottingham and I discussed some of the
21 thornier issues confronting us in the area of
22 rail banking and have posed a number of

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1 questions on which we are eager to hear your
2 views.

3 We are fortunate today to have
4 present stakeholders who represent a wide
5 range of viewpoints, including railroads,
6 trail sponsors, and landowners.

7 I will close this with a
8 clarification of our purpose in calling this
9 meeting. Some have expressed concern that the
10 Board is considering ending the rail banking
11 program. We are not, and indeed, we can not.
12 Rail banking was established by statute and
13 will remain available to willing and eligible
14 parties.

15 What we seek to understand today
16 is how rail banking affects various interest
17 groups and whether the Board's implementation
18 of the Trails Act has been effective. Before
19 I turn to Vice Chairman Nottingham for his
20 opening remarks, I want to mention a few
21 procedural notes.

22 We will keep this docket open for

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1 30 days to allow those who wish to to submit
2 follow up materials or information. Regarding
3 the testimony itself, as usual we will hear
4 from all the speakers on the panel prior to
5 questions from the Board Members.

6 Speakers, please note that the
7 timing lights are in front of me, and when you
8 see a yellow light, that means you have one
9 minute remaining, and the red light means your
10 time has expired. Please do your best to keep
11 within the time you have been allotted.

12 I assure you that we have read all
13 of your statements and comments, and there is
14 no reason to read those verbatim here.

15 After hearing from the entire
16 panel, we will rotate with questions from the
17 Vice Chairman and myself until we have
18 exhausted all of our questions.

19 Additionally, just a reminder to
20 everyone to please turn off your cell phones.

21 And I now would like to turn it
22 over to Vice Chairman Nottingham for his

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1 opening remarks.

2 VICE CHAIRMAN NOTTINGHAM: Thank
3 you, Acting Chairman Mulvey.

4 I would also like to welcome
5 everyone to the hearing this morning. We're
6 here today to take a look back at our
7 experience since Congress amended the National
8 Trail System Act in 1983 to permit the
9 preservation of rail corridors through interim
10 trail use, or "rail banking," and to look
11 ahead at issues surrounding the future of rail
12 banking.

13 Rail banking has been an important
14 part of the regulatory landscape for rail line
15 abandonment since 1983. Since the Board was
16 created in 1996 to succeed the Interstate
17 Commerce Commission, the agency has granted on
18 average about 30 notices or certificates of
19 interim trail use per year, permitting a
20 railroad to negotiate with potential trail
21 sponsors for interim trail use of a line
22 targeted for abandonment.

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1 In cases where an interim trail
2 use agreement is reached, rail banking serves
3 the dual purposes of permitting a public use
4 of the right-of-way as a trail, while at the
5 same time preserving for possible future rail
6 service a rail corridor that, once abandoned,
7 could be difficult or impossible to
8 reassemble.

9 In our hearing notice, we identify
10 a number of questions to guide us as we look
11 ahead to the future of rail banking, and I
12 appreciate the efforts of the witnesses today,
13 as well as those who submitted written
14 comments, to address those issues, such as:
15 whether the Board should consider establishing
16 some sort of notice provision when interim
17 trail use agreements are reached or require
18 submission of the agreements themselves;

19 Who should bear the cost of
20 replacing bridges and otherwise restoring a
21 rail corridor when rail service is restored;

22 And what effect has rail banking

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1 had on trail users, on reversionary property
2 owners, and on the ability to restore rail
3 service on the railbanked line?

4 I am pleased that we have
5 appearing before us today witnesses from the
6 major stakeholder group with an interest in
7 rail banking: railroads, trail sponsors, and
8 adjacent property owners, who can help us
9 address these questions and more.

10 I have reviewed the written
11 testimony submitted by today's speakers, as
12 well as the written submissions from parties
13 who are not speaking today, and I look forward
14 to a lively discussion this morning.

15 Thank you.

16 CHAIRMAN MULVEY: Thank you, Vice
17 Chairman Nottingham.

18 With that I'll call up our first
19 panel. Panel I, trail user interests, and
20 that will be Marianne Fowler of the Rails-to
21 Trails Conservancy, and representing Madison
22 County Transit, Charles H. Montange.

1 MS. FOWLER: Do we just start?

2 VICE CHAIRMAN NOTTINGHAM: Ms.

3 Fowler, do you want to begin?

4 MS. FOWLER: Okay. Thank you,
5 sir.

6 I'm Marianne Fowler, Senior Vice
7 President, Federal Relations for Rails-to-
8 Trails Conservancy.

9 And Rails-to-Trails is pleased to
10 offer this testimony on the occasion of the
11 25th anniversary of Section 8(d), Rail Banking
12 and the National Trail System Act, and I want
13 to thank the Board for having us here today.
14 We are honored to be participants in this
15 diverse array of stakeholders, people with
16 interest in the rail banking statute.

17 Before I begin though, I would
18 like to draw the Board's attention to the
19 monitors, which if that button works right --
20 yes, there we go -- what you will see, as you
21 may have guessed, are pictures of rail trails
22 that are rail banked under Section 8(d). We

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1 thought it important to bring the trails to
2 the hearing, and so they are their own witness
3 this morning.

4 Rails-to-Trails Conservancy is a
5 national, nonprofit conservation organization
6 founded in 1985. We are headquartered in
7 Washington, D.C., with field offices in
8 California, Florida, Pennsylvania, and Ohio.
9 Our mission is to create a nationwide network
10 of trails from former rail line connecting
11 corridors, to build healthier places for
12 healthier people.

13 RTC has over 100,000 members and
14 supporters nationwide. Over the last 25
15 years, we have taken a leading role of the
16 defender, user, and advocate of the Trails
17 Act. And over as many years, RTC has
18 developed and managed a comprehensive database
19 of information.

20 Part of that information is
21 available to the public through
22 www.trailinc.com, a free access Website with

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1 detailed maps, with trail overlays designed to
2 help trail users find rail trails based upon
3 locale, allowed uses, surface type, historic
4 features, nearby amenities, et cetera.

5 The database also includes more
6 esoteric information, such as the numbers of
7 rail banking orders that have been issued by
8 this Board and subsequent actions taken as a
9 result of these orders. The database houses
10 thousands of records relating to rail
11 quarters, open trails, and trails in
12 development. It is kept up to date on a
13 weekly basis, and it is probably, to the best
14 of our knowledge, it's the most comprehensive
15 and perhaps the only national database of
16 information about rail trails in existence.

17 We provide this background by way
18 of establishing RTC's credibility to speak
19 knowledgeably and authoritatively to the
20 questions that you have posed in the call.

21 So under those questions, the
22 success of the Trails Act corridor conversion

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1 rates. The numbers in RTC's database tell the
2 story of success and unrealized potential. On
3 the success side, since the program's
4 inception, you have issued 698 rail banking
5 orders. Of these corridors subject to rail
6 banking requests, only 301 have been
7 successfully rail banked, representing just
8 over 5,000 miles. Ninety-two are currently in
9 negotiation. One hundred and fifty-nine were
10 abandoned when rail banking negotiations
11 failed.

12 Of the rail banked corridors, 120,
13 representing about 2,700 miles, are presently
14 open to the public for use as trails, and 72
15 corridors, representing just over another
16 1,000 miles are currently under development.

17 As a result of rail banking, the
18 corridors preserved for future use also
19 provide multiple benefits to the communities
20 in which they are located. The Pine Creek
21 Rail Trail in Pennsylvania entertained 138,000
22 users in 2006, generating \$5 million in

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1 expenditures in the community from those using
2 the trail.

3 Boston's Minute Man Trail, for
4 example, serves a more urban area, has over a
5 million users each year, many of whom have
6 incorporated the trail into their daily
7 commute.

8 The statute has given us treasures
9 that range from the Cowboy Trail in Nebraska,
10 which at 320 miles is the nation's longest
11 rail trail, to the High Line, an elevated
12 industrial corridor in midtown Manhattan,
13 which opened just a few weeks ago.

14 Everyone's trail is special.
15 Everyone's trail is the best.

16 The 159 corridors as rail banking
17 negotiations fell short were subsequently
18 abandoned, totaling 2,974 miles. To put these
19 numbers in a larger perspective, our figures
20 show that over 832 corridors have been
21 approved for abandonment in the past 25 years,
22 representing 9,105 miles, and your figures may

1 actually be better on that than ours. These
2 miles, of course, have been lost from the rail
3 system that's regulated by the federal
4 government and is probably not subject to
5 conversion, although some of them, 163 of
6 those corridors have been saved as rail
7 trails. They're just non-rail banked rail
8 trails.

9 So 5,000 miles save, 9,000 lost.
10 If we were playing baseball, .358 average
11 would be exceptional, but we're playing with
12 our nation's future and the loss of two-thirds
13 of what could have been saved does not really
14 constitute success.

15 Eight (d) has performed
16 wonderfully as a trail building tool. Its
17 effectiveness as an instrument of corridor
18 preservation demands improvement.

19 So what should the Board do to
20 facilitate rail banking? Well, part of the
21 answer to that question goes back to the
22 original decision in 1986 when the ICC chose

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1 to adopt the interpretation that rail banking
2 was a discretionary activity, and that that
3 tact left the preservation of the nation's
4 built system solely to the discretion of prior
5 railroads. This hands off approach -- oops,
6 my name tag fell over. We would not want to
7 lose track of who I am. I wouldn't want to
8 lose track of who I am.

9 CHAIRMAN MULVEY: We know who you
10 are.

11 (Laughter.)

12 MS. FOWLER: Anyway, the way we
13 deal with rail banking stands in stark -- or
14 you all deal with rail banking stands in stark
15 contrast to the Office of Financial
16 Assistance, the longstanding provision on
17 which the ICC transfers rail corridors from
18 railroads to railroads, and that's a mandatory
19 process.

20 In the absence of any regulatory
21 mandate to participate in rail banking, many
22 railroads decline to rail bank corridors based

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1 on misplaced concerns about potential residual
2 liability, the lure of windfall profits
3 through private sales, an unwillingness to
4 leave a corridor intact that might someday be
5 reactivated by a competitor, or for no
6 apparent reason at all.

7 So bold railroads even use the
8 threat of rail banking to make piecemeal
9 corridor sales to adjacent landowners, even in
10 cases where the adjacent landowner already
11 owned the underlying fee.

12 Now, these reasons, we didn't make
13 these up. These are reasons that railroads
14 have told us over the years that's why they
15 have not rail banked.

16 The methodology for evaluating the
17 cost of the rail corridor for our trail
18 manager is also different in the rail banking
19 process from the OFA process, leading to some
20 very high prices which are just something not
21 reachable by public or private organizations
22 that would want to preserve a corridor.

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1 So we think there's some modest
2 steps that the Board could take that could
3 encourage or facilitate rail banking. First,
4 the time period between notice of abandonment
5 and effective date of abandonment is
6 frequently too short for public agencies to
7 respond. Since exempt abandonment procedures
8 apply to lines that have already been out of
9 service for two years, there is no need for
10 such an expedited time frame, particularly
11 since this rush may well preclude rail banking
12 and interim trail use. These time frames
13 should, therefore, be lengthened.

14 Second, the STB should reexamine
15 the required language for filing statements of
16 willingness in the breadth of interim trail
17 managers' required assumption of liability.
18 This language, for example, has prevented the
19 State of Florida from participating in rail
20 banking due to state statutory limitations of
21 the state's ability to assume liability. So
22 there's got to be a disconnect between the

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1 federal and the state law there.

2 Third, it's our experience that
3 180 days is almost never a sufficient amount
4 of time to negotiate a rail banking agreement.
5 Sometimes you can't even get anybody on the
6 phone in 180 days. It requires multiple
7 extensions as a hardship on potential trail
8 managers, particularly for private
9 organizations who have to pay that \$350 fee
10 every time an extension is made.

11 So instead a one-year time frame
12 might be more appropriate for trail use
13 negotiations.

14 Fourth and perhaps not so modest a
15 proposal, to best protect our rail corridor
16 infrastructure from future deterioration, the
17 Board should make 16 USC 1247(d) mandatory
18 rather than discretionary.

19 Next question: should a notice or
20 a copy of the Trails Act be submitted to the
21 Board?

22 Scrutiny of the rail banking

1 statistics that are provided by RTC reveal
2 that status of 109 corridors is unknown, and
3 these are rail banked corridors. And so a
4 requirement that a Trails Act agreement be
5 filed would help in keeping track of those and
6 help us to have better, more complete
7 information and, therefore, evaluate the
8 program more effectively, and a document of
9 record might also be helpful in addressing the
10 issues that arise by the time of reactivation.

11 Who should bear the cost to
12 restore a rail corridor for rail service,
13 including replacing any bridges that might
14 have been removed during interim trail use?

15 The railroad, of course. Since
16 the witness who succeeds me will address this
17 question in detail, I'll just make two quick
18 points. One is that many corridors proposed
19 by the railroads for abandonment subsequently
20 rail banked as trails are the very ones that
21 are most vulnerable to such natural forces as
22 flooding and erosion. Cost of constant repair

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1 led to loss of economic viability and to the
2 railroad's decision to cut its losses and seek
3 abandonment.

4 Once converted to trail use, those
5 elements continue to undermine the corridor
6 and its construction. Restoration toward a
7 standard necessary to accommodate trail use is
8 one thing; to a level to sustain the tonnage
9 of a train quite another. To require a trail
10 manager upon reactivation to bear the cost
11 that the railroad itself was unwilling to
12 shoulder is just too unfair.

13 Secondly, the rail banking
14 provisions of the Trails Act were adopted by
15 Congress as a long-term strategy for corridor
16 preservation. Structures deteriorate,
17 technologies and design change. Pursuit of a
18 policy holding trail managers responsible for
19 maintaining railroad features to a standard
20 necessary to accommodate rail use at a future
21 time leads to absurdity.

22 Imagine 50 years hence when a

1 train second deck magnetically levitates above
2 a rail based carriage. This wondrous train is
3 way too high to fit through the somewhat
4 dilapidated, perhaps more than somewhat
5 dilapidated 19th Century tunnel. Would anyone
6 seriously suggest that it is the trail
7 manager's responsibility to anticipate and pay
8 for future railroad facilities?

9 How have some reversionary
10 property owners been affected by rail banking?
11 There's been much sound and fury over the
12 purported impact of rail bank orders on the
13 putative property rights of adjacent
14 landowners or the so-called reversionary
15 property owners. These adjacent landowners
16 point to a questionable and most importantly
17 non-precedential decision, the Preseault case,
18 which found that in some cases interim trail
19 use imposes an additional easement on the rail
20 corridor for which the underlying law owner is
21 entitled to compensation.

22 However, it is important to note

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1 that the courts have never found that the use
2 of these corridors for rail banking in any way
3 imposes these so-called reversionary
4 interests.

5 In other words, the state or
6 political subdivision acquired a quarter and
7 simply banked it unused and undeveloped for
8 the foreseeable future while in the meantime
9 wholly excluded adjacent property owners from
10 the land. These property owners would have no
11 cause to complain about a taking of their
12 property since rail banking is unquestionably
13 a permissible use of railroad easement.

14 The court's interpretation of the
15 law has provided an economic windfall to
16 adjacent property owners and an even greater
17 one to the class action legal counsel who
18 represents them who richly profited from the
19 compensation litigation.

20 As a result of interim trail use,
21 underlying property owners receive a payment
22 from the United States government to

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1 compensate for the additional use trail
2 easement in the corridor while at the same
3 time they now have access to the corridor from
4 which they would otherwise have been excluded,
5 and they retain the underlying fee interest in
6 the corridor and the right to repossess the
7 property if interim trail use ceases without
8 any reactivation of service.

9 The benefits to adjacent
10 landowners does not end here. Study after
11 study has demonstrated that trails increase
12 the value of adjacent property, more than
13 similar property not adjacent to a trail, and
14 protect the homes from flood damage by
15 absorbing excess water.

16 Adjacent property owners,
17 including some of the most vocal opponents of
18 the trail are the most avid users, with the
19 attendant-- oops, that's that yellow light.

20 So they have many benefits. In
21 conclusion, we have an extraordinary
22 investment out there in our built rail system.

1 Congress gave us the National Trail System
2 Act, and the Trails Act is the tool to
3 accomplish the goal with which to protect it.

4 The Surface Transportation Board
5 and RTC have been partners in this endeavor,
6 and the statute has become a forging policy
7 which has not only given us the 2,700 miles of
8 rail bank trails, but has also created an
9 atmosphere in which we've had many other rail
10 trail conversions so that we now have 15,347
11 miles of open public rail trail nestled in
12 former rail corridors and more to come.

13 Between us we've done well, but on
14 balance not well enough. We look forward to
15 a stronger partnership and stressing as we
16 tackle the old problems that we have
17 identified here today -- does that mean you
18 turn off the microphone?

19 CHAIRMAN MULVEY: No, no.
20 Continue.

21 MS. FOWLER: Okay. The new ones
22 that will arise as we urban relocations and

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1 rail trails opportunities, and as now we've
2 got the reactivation and the even newer ones
3 that we haven't thought of yet, but we will
4 because we must become better stewards of our
5 trail state.

6 Thank you.

7 CHAIRMAN MULVEY: Thank you very
8 much, Ms. Fowler.

9 Mr. Montange.

10 MR. MONTANGE: Mr. Chairman, good
11 morning. My name is Charles Montange, and Mr.
12 Vice Chair. I have the honor today to testify
13 on behalf of Madison County Transit, which
14 runs the public bus system for Madison County,
15 one of the Illinois suburbs of St. Louis.

16 Mr. Cain, the Executive Director
17 with whom I worked on rail banking and rail
18 trails and preservation of right-of-way for
19 mass transit for the past 20 years, asked me
20 to specifically note to the Board that Madison
21 County Transit is also responsible for urban
22 mobility in the St. Louis area generally as it

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1 runs the van and carpooling system, organized
2 van and carpooling system for the whole metro
3 area and is, in general, very committed to
4 what he calls green transportation and,
5 accordingly, used the subject of this hearing
6 as extremely important not only to his agency,
7 but to the St. Louis metro area generally.

8 MCT has extensive experience in
9 proceedings before this agency involving rail
10 abandonments and rail trails. I have even
11 more extensive experience, as some on the
12 Board know, especially at least one of those
13 ladies behind you. I've been at this since
14 practically the inception of the statute.

15 I'm here today, however,
16 specifically on behalf of Madison County
17 Transit, which has a considerable interest in
18 rail banking as it has participated in six
19 different proceedings that we could count over
20 the past week, five of which were successful
21 in acquiring trails and acquiring trails' rail
22 bank corridors, and all five of which actually

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1 have trail development on them at this time.

2 I want to thank the Board for
3 having this hearing. This is the first
4 hearing, actual oral hearing, I have been to
5 on the rail banking statute or in a rail
6 banking proceeding since, I think, 1988 when
7 the CSX or the Chessie system was abandoning
8 the Georgetown Branch here in town. And at
9 that time there was an oral hearing on the EIS
10 that then the ICC required for the system, for
11 the Georgetown Branch, and I think this is the
12 first time since then that there's ever been
13 a hearing on rail banking and the trail
14 statute. So I think this is a welcome action.

15 I'm not sure what happened to my
16 chair, but I'm going to substitute.

17 CHAIRMAN MULVEY: A little lever,
18 you pull up on that and then you pull it back
19 up again.

20 MR. MONTANGE: Maybe I kicked it
21 with my foot.

22 CHAIRMAN MULVEY: You have to be

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1 careful with your leg or you'll sink down.

2 MR. MONTANGE: Oh, well. If it
3 will happen, it'll happen to me.

4 This is the first comprehensive
5 review also, I believe, that the federal
6 regulatory agencies have undertaken of the
7 statute since roughly 1990 when the ICC issued
8 a policy statement in ex parte 274. The
9 policy statement at that time was directed at
10 the initial implementation of rail banking,
11 that is, how the agency construed the rail
12 banking statute at the time of abandonment.
13 That's primarily oriented toward the
14 acquisition of the about to be abandoned
15 corridor for continued public use of some sort
16 that's preservation.

17 Not much has changed since that
18 policy statement. I see no real reason to ask
19 for a diversion from that policy statement or
20 the policies that the old ICC was
21 implementing, with one possible exception to
22 which Marianne, my old colleague from RTC days

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1 --

2 MS. FOWLER: Old?

3 MR. MONTANGE: -- alluded to. I'm
4 older, and that is that if the Board is
5 genuinely interested in exploring ways to
6 enhance use of rail banking at the time of
7 abandonment and you lose the opportunity after
8 abandonment has occurred, about the only
9 thing, the only adjustment I can reasonably
10 think of to go in the direction of enhancing
11 its use would be to look at some kind of
12 mandatory application of it.

13 That would be difficult given the
14 position of other interest groups, but at
15 least in some circumstances, such as in cases
16 where a rail bank trail exists, you have a
17 segment that is currently in rail use
18 connecting to the rest of the built rail
19 system, and that segment that's in use then
20 comes up for abandonment for whatever reason
21 the railroad refuses to negotiate trails
22 agreement that can result in a severance of

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1 your rail bank section from the rest of the
2 main line, and it seems to me to be incredibly
3 unfair if that were to disqualify the severed
4 section from continued rail banking
5 preservation.

6 And in circumstances like this,
7 the Board needs to develop some kind of policy
8 so that it doesn't put those rail bank
9 segments that exist or rail bank in good faith
10 by the railroad at the time put those at risk
11 because opponents of rail banking will
12 frequently argue that a severed section is no
13 longer eligible for rail banking on grounds
14 that it can't be reactivated because of the
15 severance.

16 So at least in those circumstances
17 you might like to at least give some thought
18 there.

19 The bulk of the thrust of the
20 Board's other specific questions relating to
21 the Trails Act seem to me to relate to
22 reactivation issues. If you are going to

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1 reactivate rail service on a rail bank
2 corridor, how should you go about it? What
3 should happen?

4 I'm going to speak from the point
5 of view of a transit agency, which is Madison
6 County transit. We acquire these things for
7 two basic purposes in mind. One of the
8 principal purposes is there's a light rail
9 system in St. Louis, and Madison County
10 Transit being interested in green
11 transportation wants to preserve corridors for
12 an extension of that service into Madison
13 County.

14 If you look at the maps that I
15 furnished as exhibits, you'll see that many of
16 our rail trails look like they're a fan or set
17 of fingers spread out from the St. Louis metro
18 area. We expect that many of these would be
19 ideal rail trail -- what would be ideal light
20 rail corridors.

21 In addition to that, because the
22 Madison County Transit is a green

1 transportation agency, they're extremely
2 interested in trails. Why? Because they have
3 a bus-bike system. They want to encourage
4 people to get to their bus stops.

5 Most people don't want to walk
6 more than three or four blocks to get to a bus
7 stop. So if they're trying to get folks to
8 your bus system, you either have to put a
9 parking lot in and have people drive to it or
10 else get them to walk or bike. Many folk, if
11 they're going to get on a bike, would prefer
12 to have a dedicated bikeway because they feel
13 safer. It's very simple.

14 And if you think I will walk 15
15 minutes to a bus stop, in 15 minutes you can
16 go, oh, six blocks maybe. That would be
17 maxing you out, especially in an urban area.
18 On a bike you can go a mile or two. Even
19 someone who's not very used to biking can get
20 a mile or two on that. So it spreads out the
21 number of folk that would use their bus
22 system.

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1 And in addition to all of that, it
2 provides open space, recreation, and all the
3 other benefits that are typically associated
4 with preserving an old rail bank or old
5 corridor.

6 Many of our corridors are, as I've
7 indicated, rail bank, but many aren't, and
8 indeed, many of the Madison County Transit
9 trails are not even on an old railroad right-
10 of-way. They operate stuff on a university
11 campus, and they also have an extensive system
12 over on the Mississippi River levy.

13 Anyway, it's a matter of great
14 concern to Madison County Transit how rail
15 reactivation is handled, and let me put it
16 this way. When we buy one of these corridors
17 from either Norfolk Southern or Union Pacific,
18 we pay consideration for them. After we pay
19 consideration, Madison County Transit invests
20 its own funds or gets grants from public
21 agencies, including the federal government, to
22 put in a trail, transit nodes, parking lots,

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1 bus stops on these things, and in addition, if
2 we ultimately get to the stage of light rail,
3 we'll spend a fortune putting in a light rail
4 system.

5 If Madison County Transit loses
6 that investment upon freight rail
7 reactivation, it would be catastrophic. If
8 the law is that the owner, the rail banking
9 owner, of a railroad right-of-way has no right
10 to compensation before freight rail service is
11 reactivated, then rail banking loses its
12 luster rapidly for an entity like ours, and we
13 think for many other at least urban rail trail
14 owners. We would probably be getting out of
15 the rail banking business just as fast as we
16 possibly could.

17 Now, as I've indicated in our
18 written testimony, we're very concerned about
19 a case that came out, I believe, in 2004
20 called Georgia Great Southern. That has been
21 interpreted by some as indicating that a rail
22 bank rail corridor can be restored for service

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1 without any compensation whatsoever, without
2 any compensation whatsoever to the rail
3 banking owner.

4 That is extremely distressing to
5 an entity like us. Now, I point out that
6 especially on light rail, which is very
7 expensive, the old ICC at almost the same time
8 it came out with that policy statement came
9 out with a decision in the Georgetown Branch
10 case saying light rail is compatible with rail
11 banking. So you can put light rail on a rail
12 bank corridor.

13 Well, it's not compatible with
14 rail banking if we can lose the whole system.
15 Instead it's like a set-up. Anyone who claims
16 that they want to reactivate service could
17 divest us of our investment, and that would
18 allow kind of a shakedown situation, if you
19 will. Somebody charge a regulatory rent so we
20 could continue our use.

21 So we ask that the Board be very
22 attentive to that particular issue.

1 Now, I want to address one other
2 subject because Marianne told me she was
3 expecting me to, and that is what happens with
4 respect to bridges, other structures on the
5 right-of-way. Who is responsible for
6 restoration?

7 If I might, I'll just conclude on
8 that.

9 Abandonment authorization and a
10 rail banking authorization operate exactly the
11 same way in respect to salvage of rail
12 structure on the premises. They authorize the
13 removal of rail and bridges, for that matter.
14 It just happens that in general a trail owner
15 likes to preserve a rail bridge.

16 But many of those bridges are in
17 very deteriorated condition when they're
18 received by the -- one of the reasons the line
19 is abandoned is because bridges take a lot of
20 money to maintain and restore. So they come
21 to the -- the trails aren't frequently in bad
22 condition at all, but the key point is the

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1 abandonment authorization or rail banking and
2 abandonment, 9-2, also authorized abandonment,
3 anticipates a salvage.

4 Once that goes into place then it
5 follows that there should be no obligation on
6 the rail banker per se to restore a structure
7 for rail reactivation, and that's all the more
8 so if we're not going to be paid.

9 So you know, we're not enslaved to
10 a short line railroad or even one of the main
11 lines. Once an agreement is struck, the deed
12 is issued, the obligation of restoration
13 should be on whoever holds the current common
14 carrier obligation for the right-of-way. I
15 say that sort of categorically.

16 Now, I would like to close on a
17 couple of notes. We fully concur that
18 railroad corridor are a natural -- akin to a
19 natural and a national resource. They're very
20 hard to assembly in a populated area, very
21 hard to assemble. Once lost they can be lost
22 forever. About the only current way to

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1 preserve them or the most inexpensive current
2 way to preserve them to get you any kind of
3 current use at all is through trail use, and
4 rail banking is ideal for that purpose.

5 In terms of how to handle this in
6 the future, I'll note that the rail banking
7 statute kind of came into its own only in the
8 very late '80s or I'd argue after the Supreme
9 Court's Preseault decision in 1990. Before
10 that time, here's a book called Right-of-way,
11 a Guide to Abandoned Railroad Corridors, put
12 out by this old gentleman here who died in
13 1989, and in his retirement he got infatuated
14 with old rail corridors from an historic and
15 trail use point of view. He did a compilation
16 of some 84,000 miles of abandoned railroad
17 corridor, lost forever since the height of the
18 build rail system around the time of the 1920s
19 until roughly 1989.

20 Now, since then I think one of the
21 witnesses said there's probably been another
22 15,000 miles known to be abandoned. Of the

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1 84, 85,000 miles, he documents rail banking
2 was effectively not available and almost all
3 of this is lost, probably lost forever.

4 What we're dealing with is the
5 tail of the dog, and we're trying to close the
6 barn door after the horse is out. So the bet
7 things you could do is try to optimize now.
8 We're kind of down to the stems; the branches
9 of the tree are all trimmed. You're down to
10 the stems. We would urge the Board to do
11 everything it can to enhance use, the
12 preservational use of this statute. Look for
13 ways to encourage people to preserve these
14 rights-of-way for future use and to be mindful
15 that the future rail use should not be viewed
16 narrowly as a freight rail use, but also
17 include our light rail and passenger rail
18 options.

19 I mean, that really is becoming
20 increasingly federal policy as we become far
21 more concerned about climate change and our
22 dependence on foreign sources for oil.

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1 Thank you very much.

2 CHAIRMAN MULVEY: Thank you very
3 much, Mr. Montange.

4 I'll start with a few questions.
5 First of all, in the interest of full
6 disclosure, I myself as a trail user. I do
7 use the Capital Crescent Trail. I bike into
8 work. I haven't done so far this year, but I
9 intend to begin doing that again. So I have
10 taken advantage of the program.

11 However, I'm also mindful of the
12 purpose of the program, and the purpose of the
13 program is to preserve the rights-of-away for
14 possible reestablishment of freight railroad
15 use if, indeed, circumstances change. So
16 there's a reason why we're trying to preserve
17 these corridors, and we are making good use of
18 them while they are rail banked.

19 Ms. Fowler, you suggest that trail
20 sponsors not be compelled to pay for those
21 activities that will be required to restore
22 rail service over a rail bank line.

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1 Theoretically why should trail sponsors not be
2 required to do this?

3 And if so, should there be some
4 limit in changes that rail sponsors are
5 allowed to make during the interim trail use?

6 It seems to me that there are some
7 changes that, as you said, make sense and have
8 to be done because of the condition of the
9 bridges or what have you, which probably
10 should not be compensated for, but if there
11 are other major changes which are done simply
12 in the interest of the trail and not in the
13 interest of the restored railroad, shouldn't
14 the trail sponsor be required to undo those?

15 MS. FOWLER: It's difficult for me
16 to answer that in the hypothetical. You know,
17 in thinking of what kind of -- other than
18 major structures which are subject to the
19 deterioration for the time, the huge
20 preponderance of activity is that trail
21 managers sticks to the rail corridor. There's
22 both an effect and a practicality to doing

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1 that.

2 Sometimes you have to reroute
3 because there might be pollutants, and so
4 you'd have to seek an alternate route, you
5 know, around a polluted site, but of course,
6 that pollution was caused by the railroad, and
7 since it is quite possible that that original
8 corridor might deteriorate somewhat.

9 Sometimes also as urbanization
10 occurs and suburbanization, the pressures on
11 a trail will cause some breakdown of the
12 corridor and state DOTs will come in and
13 change crossings and what have you. So I'm
14 not sure that the right to the responsible
15 party is the trail manager, but perhaps the
16 entity that caused the incursion, and maybe
17 there should be some sort of -- to get at what
18 you're dealing with, there should be some sort
19 of -- if you're going to make a major change
20 to a rail corridor, there has to be some sort
21 of agreed upon, maybe supervised process.
22 That's the way to do it.

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1 CHAIRMAN MULVEY: Well, I said in
2 my opening statement that this seems very
3 straightforward, but then there's all of these
4 complexities that can arise. Another way of
5 saying that, the devil is always in the
6 details.

7 Is it possible that a lot of these
8 issues can be resolved between the trail
9 sponsor and the railroad in the trail use
10 agreements and there could be plausible
11 agreements that spell out clearly who is
12 responsible for what and so that we don't have
13 the disagreements over who should pay to
14 restore the bridges? So, that could all be
15 spelled out in the trail use agreements?

16 And I address that to both you and
17 Mr. Montange.

18 MS. FOWLER: I think that we can
19 go a long way in that direction, and I think
20 trail use agreements do tend to be more
21 detailed and complicated now. I know they're
22 negotiating one in Pennsylvania right now

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1 where a bridge is actually a subject of great
2 disagreements, one of the hardest things to
3 work out between the abandoning railroad and
4 the -- it's actually a land trust group.

5 So, yes, I think that agreement
6 can be used as a vehicle for that, but even
7 so, 50 years from now what made sense now does
8 not make sense then.

9 CHAIRMAN MULVEY: Mr. Montange.

10 MR. MONTANGE: I think it's a very
11 good question. I will tell you what I -- I'll
12 give you my general approach when I'm advising
13 a rail banker owner, and that is to behave as
14 if he or she or it is a railroad. I really
15 think that the best approach the Board can
16 take, in general, on this is to treat the rail
17 banker as a railroad, but without a common
18 carrier obligation, current common carrier
19 obligation.

20 So you have certain obligations
21 that flow from the fact that you're a railroad
22 or you're treated a certain way at the STB if

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1 you're a railroad, and you're also treated a
2 certain way if you have a common carrier
3 obligation, so to sort that out and kind of
4 figure out kind of where things lie.

5 So if you're the rail banker owner
6 of the railroad, you've got what amounts to a
7 line where salvage has been allowed, but you
8 still have the squarest obligation you've got
9 to keep the corridor intact.

10 So what I tell people is don't
11 sell anything. You know, you are alienating
12 stuff that at your risk could result in what's
13 called the severance, and although the Board
14 has no direct decision that I'm aware of where
15 they've ever derail banked a corridor because
16 of severance, they certainly held that out as
17 a possibility in the dicta.

18 So you don't want to do anything
19 with the corridor that would result in a
20 severance. I'd tell people don't put a new
21 county jail in the middle of the corridor
22 because that could be considered as severance.

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1 You've devoted it to something that's just not
2 a biotic or transportation use at all.

3 But what does a railroad do with
4 its corridor? Well, it will allow streets to
5 be located on it. Many of them will allow a
6 trail to be located on it. Many will put
7 parking lots on it, especially in urban areas.

8 Those kind of uses, yeah, they
9 sort of flow. They commonly are not
10 understood as a significant interference with
11 the rail use.

12 Then I advise them that if the
13 county or state highway department approach
14 you and they say, "You've got to get rid of
15 this big, old bridge because we want to widen
16 our two-lane road to be a new six or eight
17 lane interstate. You're just a bunch of trail
18 users. Let us take out this bridge. It will
19 cost us a fortune to restore it for rail use,"
20 I said, "Well, I don't know what the Board is
21 going to do there. I advise you to get the
22 state highway department to agree that if a

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1 railroad is ever restored and someone tries to
2 tag you with liability, that you require the
3 state highway department to bear that cost and
4 not assume it yourself."

5 And that is generally what Madison
6 County Transit tries to do with Illinois DOT
7 because we're hit up with this kind of stuff
8 all the time. But realize that Madison County
9 Transit can afford to hire people like me or
10 Fritz Kahn or someone else around here that
11 could say to them, "You'd better watch out."

12 A lot of folk out there, they
13 don't know what Washington, D.C. federal
14 regulatory practice is, and certainly the STB
15 has no best practices guide out right now that
16 is advising folk on what they ought to or
17 ought not to do.

18 In general then my view on stuff
19 like bridges is that because the abandonment
20 authorization allows the removal of
21 structures, and that's commonly understood to
22 include bridges, that the fact that a bridge

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1 is removed pursuant to an abandonment or rail
2 banking, the same thing, should not result in
3 liability either on the part of the railroad
4 that salvaged the bridge in the first place
5 or, if the rail banker salvaged the bridge, on
6 his liability either. The responsibility to
7 restore those kind of things should rest with
8 the person who gets the current common carrier
9 obligation or reactivates it, just as if you
10 were doing new rail construction.

11 If it's new rail construction, the
12 underlying owner of a parcel that's going to
13 have a bridge doesn't have to build the bridge
14 for the railroad. The railroad builds the
15 bridge for the railroad. So that's how I
16 would handle that.

17 But in terms of how the corridor
18 itself is used, my advice to my client -- and
19 I would think it would be consistent with the
20 Board's view -- would be don't do what a
21 railroad wouldn't do.

22 Now, having said that, some

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1 railroads will certainly sell off, and they
2 don't have to go to the Board for approval,
3 surplus edges on the corridor. They'll sell
4 off the underlying fee and preserve a railroad
5 easement. Heavens, I've been instances
6 recently where some of the railroads even
7 purport to sell the whole thing and don't
8 reserve a railroad easement without getting an
9 abandonment authority, and those are very
10 troubling.

11 Certainly, if you're going to let
12 a railroad go free, well, they'd be able to
13 sell off its underlying interest in total
14 without any kind of sanction. Then that
15 narrows the -- I mean, why should more be
16 required of the rail banker owner? In
17 general, the railroad probably should be
18 keeping at least a railroad easement and its
19 basic structures intact until it gets
20 effective abandonment authority, and
21 similarly, a rail banker should be at least
22 keeping the corridor intact sufficient to

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1 operate a trail and a railroad until it either
2 de-rail banks the thing or until there's rail
3 reactivation of some sort.

4 I don't know. That's sort of a
5 general view of how I think this thing should
6 probably shuffle out that's fail to all.

7 MS. FOWLER: It does occur to me
8 that if there were more specific details of
9 what should and must be preserved or would be
10 preserved in a railroad agreement, that would
11 actually give the trail manager some
12 protection against other powers or entities in
13 the state, like the state DOT or what have
14 you, who are pursuing their own interest of
15 wanting to take a bridge down.

16 They would have to find ways of
17 doing that, but if it were compatible with
18 protecting both the trail integrity as well as
19 future railroad integrity.

20 On the other hand, you know, we
21 had this sort of crazy mayor down in Texas who
22 put a heliport right in the middle of the rail

1 trail, and I don't know what you can do about
2 things like that. I mean, he's not in office
3 anymore, and that is a community that's not
4 particularly economically viable, and they
5 were left with a heliport in violation of the
6 law. So there you have it.

7 MR. MONTANGE: One other note. On
8 bridges, for example, you have highway
9 crossovers of rail, rail crossover of highway.
10 In general, the Board has taken a kind of
11 hands off position on crossings generally. So
12 you've got river bridges. You've got highway
13 bridges. You've got railroad bridges. All of
14 them have a kind of different sort of feel,
15 and it's hard to come up with a general rule.

16 I've negotiated many trails use
17 agreements on behalf of the rail banker owner,
18 and I don't recall of any instance where we
19 ever thought that the rail banker owner would
20 have an obligation to restore a bridge,
21 although in general it's in the interest of
22 the rail banker owner to do so wherever

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1 possible. Wherever they can get away with it,
2 we like to do it because if the bridge will
3 support an 80 ton locomotive or coal train,
4 it's going to support whatever a trail user
5 puts on it.

6 The main threat to these things
7 tends to be washout problems at rivers and
8 state highway departments. So if you were to
9 do something, maybe make the state highway
10 department or county highway department liable
11 for restoration, that would help scare them
12 off, honestly. It's kind of like that.

13 CHAIRMAN MULVEY: Would it be
14 useful or helpful for the Board to work with
15 trail owners and railroads or through the
16 rulemaking process or to develop some sort of
17 prototype or some sort of sample Trails Act
18 agreement and say these are the things that
19 need to be addressed or that should be
20 addressed or that are recommended to be
21 addressed in the Trails Act agreement so that
22 some of these issues would be resolved in the

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1 agreement and would not be so contentious or
2 do you think that it's just too complicated to
3 come up with a prototype?

4 MS. FOWLER: As long as the
5 prototype were not mandatory but were
6 suggestive, that maybe you violated the
7 prototype at your own risk, and also as long
8 as there was good public input into developing
9 the prototype so that we would have a body of
10 prospective, I think that could be very
11 helpful.

12 You know, we try to provide
13 templates and prototypes to people with rail
14 banking trails. As matter of fact, we
15 sometimes fill them out and what have you. So
16 the more consistency we can get I think the
17 better it is.

18 CHAIRMAN MULVEY: When you have
19 developed those on your own, have you worked
20 with the railroads to develop those or have
21 they been basically developed by the Rails-to-
22 Trails Conservancy for people trying to

1 develop a trail?

2 MS. FOWLER: Mostly with the
3 Rails-to-Trails Conservancy with people trying
4 to develop a trail.

5 CHAIRMAN MULVEY: I was sort of
6 thinking of one that took into account all
7 parties, both parties.

8 MS. FOWLER: Yes, I think that
9 would be very good, yes.

10 MR. MONTANGE: The issue of an
11 agreement is a tough one, I think. From my
12 point of view in dealing with railroads, I see
13 them as the people in the most powerful
14 bargaining position because it'd kind of -- if
15 you have ever read the science fiction book
16 Dune, it's how Paul Muad'Dib ultimately wins,
17 is he's able to destroy something. It's not
18 that he can beat the empire. It's that he can
19 destroy everything, and ultimately when you
20 want to apply the rail banking statute, it's
21 generally in a situation where if you -- I did
22 it again -- if you don't get the agreement,

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1 then the whole corridor is going to fall
2 apart.

3 So you're under considerable
4 pressure by the railroad to do what they say,
5 and it is difficult in that kind of situation
6 to imagine that some of the Trails Act
7 agreements -- also, you have to also
8 understand that the railroad property
9 departments generally are interested in huge
10 deals, and especially with the larger carriers
11 don't want to waste a lot of time on some four
12 miles and palavering over the details of
13 something that they don't want to really deal
14 with because they get their commissions and
15 get their salary by maximizing the amount of
16 money they get for the railroad.

17 So it's a difficult situation. I
18 think that perhaps a way to approach it,
19 certainly there are private agreements that
20 deal with many of the subjects, like rail
21 reactivation, and there are rail banking
22 agreements that do deal with that, talk about

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1 what should happen at least in bare bones
2 fashion, but maybe develop a set of
3 presumptions on what should happen that could
4 be altered by agreement so that it's on the
5 table.

6 The other issue you have is, as I
7 said, the horse is out of the barn. First,
8 the horse is out of the barn on many of these,
9 but most of these things have been lost
10 already. The amount of abandonments that
11 we're going to see in the future is going to
12 taper off even more. So most of the rail
13 banking agreements, to the extent they have
14 now been reached are in place and they won't
15 have the benefit of a set of best practices or
16 guidance from the Board.

17 In retrospect, it would be nice if
18 rail banking had been available in 1928 and
19 ICC had worked out all this stuff for us so
20 we'd have it in place by now, but one wants to
21 be careful of retroactive application, too.

22 CHAIRMAN MULVEY: Thank you.

1 Vice Chairman Nottingham, any
2 questions?

3 VICE CHAIRMAN NOTTINGHAM: Thanks,
4 Chairman Mulvey.

5 I had just a couple questions.
6 Ms. Fowler, thank you for being here and thank
7 you for all your good works.

8 MS. FOWLER: You're welcome.

9 VICE CHAIRMAN NOTTINGHAM: I want
10 to make sure I understand your testimony. You
11 made the point, I believe, that on the
12 discretionary versus the mandatory aspect of
13 rail banking.

14 MS. FOWLER: Yes.

15 VICE CHAIRMAN NOTTINGHAM: The
16 idea whether, if I understand it correctly,
17 your point is that railroads when they seek to
18 abandon rail property should be required to
19 enter into a trails agreement, whether or not
20 they think it's a good idea or in their best
21 interest or not. Is that a fair --

22 MS. FOWLER: Yes, because that's

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1 the mechanism that Congress has established
2 for preserving the corridor. I think that
3 that's the primary value here.

4 One way of preserving the corridor
5 is for a short line to take over operation.
6 That preserves the corridor. So as we go down
7 that chain, then the next option is rail
8 banking. That preserves the corridor.

9 So it's not so much that they're
10 being forced to make a trail. It's that that
11 is the means for preserving the corridor that
12 Congress has identified.

13 VICE CHAIRMAN NOTTINGHAM: Did
14 Congress mandate that railroads enter into
15 trail agreements? If so, our current policy
16 is against the law. I need to know that.

17 MS. FOWLER: Well, as I understand
18 it, this is before, not being as old as Mr.
19 Montange seems to think I am; this was before
20 I joined the Rails-to-Trails Conservancy, and
21 so Chuck can maybe shed more light on this.

22 But my understanding is that

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1 initially the ICC was inclined to think that,
2 yes, Congress had meant the rail banking to be
3 a mandatory, you know, following that line.
4 If the major carrier wanted to abandon, if no
5 other rail line wanted to carry on the
6 railroading function or use of the corridor,
7 then if there was a willing trail manager,
8 that that would occur.

9 There was huge, you know, sort of
10 backlash, if you will, from the railroad
11 industry for that interpretation of Congress'
12 law, and that's when the ICC came out with
13 that interpretation. It was challenged in
14 court, and eventually the courts ruled that
15 the SEC's interpretation was a reasonable one,
16 not the only possible one under the
17 construction of the law, but was a reasonable
18 interpretation.

19 So where does that leave you in
20 terms of congressional intent? Certainly
21 every time we looked at the possibility of
22 going back to Congress to strengthen the law,

1 it seemed not to be at the top of Congress'
2 list of priorities and not to have much chance
3 of passing. I mean, members of Congress were
4 interested, but you never want to particularly
5 introduce something that you don't think can
6 make its way through.

7 So that's where it has been left.

8 VICE CHAIRMAN NOTTINGHAM: I would
9 just say as one Commissioner that my read of
10 the statute is Congress did not mandate that
11 railroads enter into trail agreements, and
12 they did that very purposefully in a
13 consistent manner with most of the other major
14 what I'll call natural resource preservation
15 statutes that exist, whether it be historic
16 preservation, which certainly has some
17 mandatory components to it, but open space and
18 scenic easements, all very important social
19 goods that we try to and Congress has tried to
20 promote, but typically not so much in a
21 mandatory, but I'll give you an example.

22 One of the thresholds for

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1 qualifying for protection as an historic
2 property, as I'm sure you know, is that the
3 property be 50 years of age or older. If
4 property owners out there felt that the law
5 was going to be changed to mandate that every
6 piece of property that turned 50 was going to
7 be encumbered with historic preservation
8 restrictions on reconstruction or
9 redevelopment, that would be a huge seachange.
10 It would also trigger, I'm guessing, some
11 private behavior about what people do when
12 their property gets 48, 49 years, and it could
13 be historically significant at that point,
14 destined for great things, but the owner wants
15 to take advantage of his or her property
16 rights and decides to take down the property
17 or something.

18 So I just would say I think the
19 law is pretty clear that railroads are not by
20 statute required to enter into it, and that
21 that's consistent with many, if not most, of
22 the historic preservation open space, scenic.

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1 I'd say this as somebody who as
2 head of the Virginia Department of
3 Transportation dramatically increased
4 investments primarily out of the enhancement
5 grant program in trails, in Civil War
6 battlefield scenic easements, and we were
7 pioneers. We were one of the first states to
8 ever put major money through the enhancement
9 program into Civil War battlefield
10 preservation. People before that thought that
11 might not be legal or doable, and we did it,
12 and we weren't challenged.

13 So I say this as an advocate. I
14 think you get better results when a social
15 good is voluntarily pursued as opposed to
16 mandated. Our challenge is to juggle multiple
17 social goods here at the Board, the social
18 good of mobility and freight and passenger
19 rail corridors, which have done a lot of good
20 things for our country historically and will
21 in the future, whether you look at trying to
22 reduce our carbon footprints and get people

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1 less dependent on oil and gas, and the social
2 good, of course, of trails.

3 And I'm a trail user myself and
4 used a trail to get to work just last week.
5 So I say this as a supporter of trails, but
6 any feedback on this? Mr. Montange, any?

7 MR. MONTANGE: Well, the argument
8 that the Commission would at least have the
9 power under the statute for mandatory use is
10 because the statute and I think its final
11 sentence says "shall order rail banking," not
12 "may" but "shall," in the event that someone
13 is willing to assume the various liabilities
14 the statute provides.

15 However, three courts of appeals
16 have upheld the old ICC interpretation, and I
17 think you could ask your Office of General
18 Counsel what the legal position of the Surface
19 Transportation Board would be under those
20 circumstances in the event of a change of the
21 law.

22 However, I think what Marianne and

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1 to some degree Madison County Transit were
2 saying is if you're looking for ways to
3 enhance the preservation of corridor under the
4 rail banking statute, about the only thing at
5 the initial inception of the rail banking
6 statute that its application that we can think
7 of, I can think of and she can think of is
8 probably in the area of looking at more
9 mandatory application or broadening the
10 ability of the trail, the rail banker to do
11 something against what the threat of trail
12 destruction is.

13 As I said, there's a bit of an
14 uneven, from my point of view, bargaining
15 position since the railroad can just say we're
16 going to walk. You know, unless you meet our
17 compensation demands, goodbye, because we're
18 interested in getting as much out of you as we
19 can.

20 And that's a threat to a national
21 resources, but having said that --

22 VICE CHAIRMAN NOTTINGHAM: Can I

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1 just jump in on that thought --

2 MR. MONTANGE: Sure, yeah.

3 VICE CHAIRMAN NOTTINGHAM: --
4 before you move on?

5 Isn't that the case though any
6 time there's negotiation between a property
7 owner and somebody who would like to become a
8 property owner or property user. In other
9 words, the property owner in our country has
10 the option typically to say, "Well, never
11 mind. I need to think about this a little
12 longer."

13 MR. MONTANGE: Yes, yeah. You
14 could argue that, Mr. Vice Chairman. I would
15 counter with one notion, and that is that a
16 railroad is a regulated entity and has been by
17 this Board and its predecessors. I mean, the
18 ICC was the original federal regulatory agency
19 and has had abandonment jurisdiction since
20 what, 1920? And they got that because it was
21 so hard for the railroads to get abandonment
22 as I understand it from the state. They're

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1 usually under some state charters that
2 virtually precluded them shy of bankruptcy of
3 getting rid of lines.

4 And so, you know, it isn't the
5 same as if, say, I had an Iowa farm and I
6 wanted to have a conservation easement on it,
7 but I wanted to be compensated and I want to
8 negotiate that compensation or I had a
9 historic building in Virginia horse country
10 and someone wanted that to be preserved and
11 you'd want to negotiate compensation. That's
12 a private land, a completely private
13 landowner. It's not railroad property.

14 VICE CHAIRMAN NOTTINGHAM: Can I
15 explore that a little bit with you?

16 MR. MONTANGE: Sure.

17 VICE CHAIRMAN NOTTINGHAM: Because
18 we do hear this from time to time. If I hear
19 you correctly, you're saying in different
20 words than I'll put it that property owned by
21 private railroads in the United States,
22 they're private property, but they're a lesser

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1 type of private property than private property
2 that would be generally otherwise recognized.
3 It's some kind of a hybrid or a quasi private
4 property that maybe the Fifth Amendment
5 takings clause or other laws relating to the
6 property don't fully cover. Is that --

7 MR. MONTANGE: No, I would say
8 that it's not that. I would say that it is
9 property that has traditionally been regulated
10 to reach public ends. That's not to say that
11 the public wouldn't have to compensate in
12 order to reach those ends.

13 VICE CHAIRMAN NOTTINGHAM: Kind of
14 like my front yard. If I didn't mow it for
15 three months and the neighbors called the
16 local authorities, I mean, in other words is
17 there much property in our country that's
18 complete not regulated?

19 MR. MONTANGE: Well, I think that
20 we're dealing with a different cast of
21 characters on that. Interesting for rail
22 corridor, if you don't want to mow your rail

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1 corridor, there's frequently not much the
2 local public authorities can do about it
3 because of preemption under either FRA regs or
4 your regs.

5 VICE CHAIRMAN NOTTINGHAM: In some
6 cases it's actually less regulated.

7 MR. MONTANGE: Yes, it certainly
8 is. That's one of the benefits that flow from
9 STB regulation on stuff like that. So, you
10 know, it cuts both ways.

11 But what the Board is about is
12 insuring that transportation -- you're
13 responsible for our transportation system.
14 Let's face it. To some degree your
15 jurisdiction is narrow, but there's no reason
16 not to take into account within that
17 narrowness other public benefits that flow
18 from rail corridor preservation, and in the
19 case of 16 USC 1247(d), that's not a statute
20 that's part of the Termination Act or was part
21 of the old revised Commerce Act. I don't
22 think you're constrained under the Trails Act

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1 to just the rail policy declared in the
2 Termination Act.

3 You can look at other things and
4 think about other things there in addition to
5 the fact that it would be a hard argument for
6 me to make that regulated rail property,
7 subject to common carry obligations is the
8 same as some guy living in St. Louis who
9 doesn't mow his lawn.

10 VICE CHAIRMAN NOTTINGHAM: Do you
11 agree that if we were to construe the act or
12 if Congress were to change the statute to make
13 trail use agreements mandatory in abandonment
14 scenarios that there would be some cases where
15 a railroad who otherwise would abandon and
16 otherwise might be open to negotiating a
17 trail, might look at the situation and just
18 say, "No, we're going to hold onto that land.
19 It's too much. There are too many risks, too
20 many variables, and so you actually might deny
21 trail users that ultimate benefit.

22 MR. MONTANGE: I think that there

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1 would be too many variables for me to project
2 that kind of -- to really answer.

3 VICE CHAIRMAN NOTTINGHAM: It's
4 possible though, right? You've got to admit
5 it's possible.

6 MR. MONTANGE: Well, whenever one
7 is faced with a system in human beings, just
8 about anything is possible. Let's face it.
9 It's kind of quantum mechanical.

10 VICE CHAIRMAN NOTTINGHAM: Right.
11 People will act in their self-interest where
12 they can, and --

13 MR. MONTANGE: Yeah. I think it's
14 in the self-interest of railroads to try to --
15 they view their self-interest right now, and
16 many of them have worked very hard on these
17 things, and I'm not denying at all that some
18 of these guys are genuinely interested in
19 preserving the corridor frequently because
20 their local staff use the thing for trails,
21 too, or their kids use it to get to school.
22 So they're very happy as staff people to

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1 participate in these kinds of transactions,
2 but let's face it. They're interested in
3 maximizing the amount of money and minimizing
4 the amount of liability on the part of the
5 railroad.

6 So they're looking at an equation
7 where they have to say to themselves how do I
8 carry out my obligation to our shareholders
9 either by reducing our taxes, by reducing our
10 liability for tort, because they typically
11 salvage a bridge because you don't want some
12 kind jumping off it, right, or falling off of
13 it. It's an attractive nuisance in some
14 states after abandonment.

15 And how do we get the most out of
16 the corridor? Can we sell it to the local
17 highway department for a new highway? Can we
18 sell it to a town for a trail? Can we sell it
19 to adjoining landowners?

20 So their equation is how can we
21 best do that, and sometimes, as I've alluded
22 to, my experience is that the transaction is

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1 so small it's just hard to get base time. You
2 know, they'll contract it out to a disposal
3 firm which makes money by breaking it up, and
4 those guys you can hardly talk to them about
5 a deal that we're offering.

6 So you have all kinds of
7 situations out there in the world.

8 VICE CHAIRMAN NOTTINGHAM: Like
9 you say, under my hypothetical where if we did
10 interpret the law to be mandatory, I do
11 believe personally that there would be
12 situations where railroads who otherwise would
13 abandon and otherwise would be open to at
14 least considering a trail scenario would
15 decline to go down that path, no pun intended.

16 In that scenario then the next, I
17 guess, way to achieve the social good of more
18 rail trail conversion would be to somehow
19 bypass the abandonment process and require
20 railroads to fork over the land.

21 Do you support that? Would you
22 support that?

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1 MR. MONTANGE: Let me approach it
2 in a way that you'll maybe think completely
3 differently. In some ways I think the issue
4 now of mandatoriness is almost moot. I go
5 back to my point that the horse is out of the
6 barn. It's a little late to close the door.
7 Honestly, my concern right now is more to
8 preserve quarters that are already being
9 preserved, as much so as trying to create
10 conditions under which we can get a higher
11 batting average, in Marianne's terms.

12 I think that if reactivation type
13 issues are not handled properly, there will be
14 a tremendous incentive on the part of the
15 entity I'm representing here today and many
16 other agencies that are acquiring these with
17 an eye toward using them for light rail or
18 putting an expensive trail investment in not
19 to do that. Why would they invest if they're
20 going to lose all of their money?

21 In fact, it may be contrary to
22 local law for them to put an investment in

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1 property that they can be divested of for
2 free. So the fear I have and where I think if
3 I were to make a recommendation to you which
4 I would prioritize in thinking about how to
5 maximize use of the statute right now is to
6 look at reactivation and think in terms of
7 what the interest holders on the rail banker
8 side of the fence are looking at as opposed to
9 future rail abandonments.

10 In the case of mandatory
11 application, I'll be very realistic and
12 suggest that it's not just a case of
13 either/or, either discretionary or mandatory.
14 There are certain circumstances, I believe,
15 where you have a possible severance situation
16 where the Board maybe should think about doing
17 something so that the rail banker has a means
18 to protect itself against severance of its
19 facility from the built rail system and the
20 loss of the whole rail bank corridor as a
21 result because it's not their fault if someone
22 else in the middle decides they're just going

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1 to abandon and for whatever reason deed it to
2 the local city councilman's brother-in-law for
3 his parking lot for his Honda dealership or
4 something.

5 You know, you want to think about
6 what you do in situations where you've got
7 people in a pickle that's consistent with the
8 basic purpose of the statute to preserve these
9 rights-of-way for alternative public uses and
10 for possible future rail reactivation.

11 MS. FOWLER: I didn't understand
12 the answer, Mr. Vice Chairman, the scenario.
13 First of all, let me say I think if rail
14 banking were mandatory rather than
15 discretionary, you might find that railroads
16 were more inclined to rail bank because so
17 often railroads tell us that the reason they
18 don't is because it's often the case when
19 abandonment first comes up, part of the shock
20 of a community of having its rail service
21 jerked away from it is that they had
22 instinctive negative reaction toward any other

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1 use of that corridor, and they think that it's
2 because some of the people who want to trail
3 are responsible for the abandonment. So
4 there's, you know, antagonism toward the
5 trail.

6 So railroads often tell us that,
7 you know, the public relations issues are just
8 too dicey. They don't want to take the grief
9 from the community, that they're the ones who
10 make the decision to rail bank, but if it were
11 a required procedure, they would have that
12 cover, which is they could say, "Call your
13 Congressman. Don't get angry at us. This is
14 something that we have to do," or, "Call Mr.
15 Vice Chairman and tell him how aggravated you
16 are."

17 But the second scenario after that
18 that you postulate, I didn't quite understand
19 what that was.

20 VICE CHAIRMAN NOTTINGHAM: Well,
21 you raise a couple of good points, and I'll
22 answer questions. One is that a major

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1 obstacle to trails, and we've seen this as we
2 monitor these projects, is very often local
3 government or local community resistance to
4 trails. Often it does not get appreciated.
5 People often assume the reason there are on
6 trails is because some obscure agency in
7 Washington must have exported it or something.

8 Very often when I read the local
9 papers and the clips which the Internet is so
10 helpful to us in monitoring these days, it's
11 local communities and towns who can't agree
12 amongst themselves, which is I realize a tough
13 challenge on its own.

14 To answer your question, I agree
15 with you that if trail use agreements were
16 mandatory, once a railroad actually decided to
17 abandon, they would be more likely to enter
18 into negotiations because it would be the law.
19 They'd have to, and you're right. They'd also
20 be able to tell local governments who might be
21 in opposition, "Look. We must."

22 But my point was that you may see

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1 some railroads do otherwise, would abandon
2 opting not to abandon, not to expose
3 themselves to the process, which would be a
4 shame for trail users, I think, long term, but
5 that's just my own personal view. I can't
6 cite any -- it's hard to prove a negative.
7 It's a hypothetical, but I appreciate the
8 panel's time.

9 I've been taking up a lot myself.
10 So I'm going to yield back to the Chairman.

11 CHAIRMAN MULVEY: Well, thank you.

12 Just a couple of other questions.
13 Ms. Fowler, you requested more time between
14 the notice of abandonment and the effective
15 date of the abandonment authority. Others
16 have argued that this would add uncertainty to
17 the process rather than help it in creating a
18 trail. Are there any other ways where
19 potential trail sponsors could prepare
20 themselves for potential rail banking
21 opportunities rather than expending the time
22 beyond what it's allowed now?

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1 MS. FOWLER: Actually, in the new
2 proposed -- Chairman Oberstar's proposed
3 reauthorization bill, which would sub-allocate
4 the transportation enhancements and what that
5 means is that local communities would have a
6 guaranteed stream of money, knowing that it
7 was available to them.

8 The reason that it takes so much
9 time is that coming up with the resources from
10 the time you first hear about an amendment to
11 when you come up with the resources that you
12 feel confident that you could move forward
13 with a real commitment to preserve a corridor
14 and enter into a rail making agreement, that
15 just takes time, and one of the reasons it
16 takes time is because you don't know if you've
17 got any money.

18 So the sub-allocation of one of
19 the main sources of the money for rail banking
20 could make a difference. We have tried with
21 our early warning system to let communities
22 know in advance as soon as possible, you know,

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1 by monitoring the registrar and all of this
2 kind of stuff.

3 At one point we used to do an
4 analysis of system diagram maps to see which
5 lines were going to up for abandonment, but
6 then it turned out that railroads didn't
7 really use those, and so that didn't make much
8 difference.

9 Perhaps something that is just how
10 much time do you have from the -- you know,
11 it's all about time and putting together
12 resources. Some of these abandonments, you
13 know, particularly the ones that are abandoned
14 through the exemption process which occurs
15 more and more often, you know, it can be just,
16 you know, 30 days or 59 days or what have you.
17 They vary depending on the circumstances.

18 I think it's something that should
19 be addressed, and we have people on our staff
20 that deal with this on a day-to-day basis, and
21 you know, if you decide to go in that
22 direction, we have people who would like to

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1 work with you.

2 CHAIRMAN MULVEY: One final
3 question for the group from me, and that is we
4 talk about the public use of the trails and
5 the purpose of the trails program to begin
6 with was to preserve the system of rails, the
7 railway network, for reestablishing rail
8 freight service. But today, a public use is
9 also anything that would help get people off
10 the highways and reduce congestion, et cetera.

11 So instituting passenger rail,
12 light rail or for that matter commuter rail,
13 which would be heavy rail, but light rail,
14 should that be a purpose that is different
15 from becoming a trail? Should passenger rail
16 use be treated differently from a banked rail
17 that went to just a biking and hiking trail,
18 and that once it was made into a light rail
19 use with all of the investment in it, et
20 cetera, should there be some procedure for
21 taking them out of the rail bank program, that
22 once it's made into a light rail corridor,

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1 then it's a light rail corridor and cannot be
2 returned to freight rail use?

3 Freight rail and light rail are
4 really incompatible because of the size, the
5 weight of the equipment, et cetera, on these
6 things for the most part.

7 MR. MONTANGE: The old ICC
8 addressed this. I believe there's only one or
9 two instances in which the Surface
10 Transportation Board and the ICC have
11 addressed that. The first instance was with
12 respect to the Georgetown Branch, now the
13 Capital Crescent Trail and which the local
14 community interest opposed, argued that there
15 should not be any kind of light rail on the
16 corridor because it would be incompatible not
17 only with the trail, they argued. The local
18 adjacent neighborhood was arguing. It's not
19 the trail community.

20 They argued it was incompatible
21 with the trail, but they also argued it was
22 incompatible with the restoration of freight

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1 service. The ICC responded to the restoration
2 point by saying that it's not incompatible
3 because light rail operates on the same gauge
4 in the United States as freight rail, and I
5 think in theory, I've looked at quite a few of
6 these systems for clients because I represent
7 a number in addition to Madison County
8 Transit, a number of other urban rail banking
9 parties, and when they review this stuff they
10 say the idea when talking to rail engineers is
11 you can have timed separation of the two uses.

12 So you can have freight at night
13 when you're not operating. There are times
14 you are not operating your light rail, and
15 then light rail during the day. So you get
16 the time separation and you can use the same
17 gauge.

18 Now, in terms of weighted
19 equipment, that's always a concern, and you
20 may have limitations. There are limitations
21 on the existing freight rail system to some
22 degree. You have speed limitations. In some

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1 places they're just not able to operate a
2 huge, whole train that goes down through an
3 area. So there might be incompatibility.

4 But the key issue for us is this.
5 A light rail system or a commuter rail, any
6 kind of commuter rail system is an expensive
7 proposition to put in, and our key issue on
8 reactivation is we don't want to be divested
9 of that interest. The pedal should be to the
10 metal if someone wants to operate freight
11 there to get a deal with the entity that owns
12 the right-of-way so that both of the systems
13 can be operated compatibly. It makes no sense
14 to say take from -- if the light rail ever
15 went in on the Capital Crescent Corridor
16 between Bethesda and Silver spring, and by the
17 way, the Bethesda Metro stop has a knock-out
18 panel designed to accommodate that and always
19 has. So that's been in the cards forever, if
20 Maryland DOT will ever come up with the money
21 so they can do it.

22 But it makes no sense to say to

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1 Montgomery County if it ever got a light rail
2 system in there for \$100 million to tear all
3 of that out or remove it or get out of Dodge
4 because someone wants to ship ten carloads of
5 furniture or ten carloads of cars to the Honda
6 dealership down the pike.

7 So you know, you need to take that
8 kind of stuff into account, but the rail
9 property interest held by the rail banking
10 owner should be taken into account and the
11 public interest should be taken into account.
12 Even though this agency has a limited purview
13 in that it focuses on freight use, once should
14 always remember that 16 USC 1247(d) is not
15 part of the Termination Act, and the purview
16 of the agency should take into account the
17 interest that that statute represents.

18 So something needs to be worked
19 out that protects the light rail. For that
20 matter, if all we did with the thing was a
21 trail, we would still want to have protection
22 of that interest. It's just that the thing

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1 gets up an order of magnitude in cost or two
2 orders of magnitude when you go to a light
3 rail system.

4 And Madison County Transit is very
5 serious about this, although there's not a
6 current plan because we're in a recession and
7 they've having trouble funding the St. Louis
8 light rail system as it is. That's not going
9 to -- hopefully that's not going to be the
10 condition in the next decade.

11 So, you know, that's the reason I
12 say I think the focus of the Board if it wants
13 to encourage rail banking should be on
14 handling those kinds of issues on reactivation
15 and honestly at Madison Country Transport we'd
16 love to see rail go in. We'd love to see
17 light rail because that means the economy is
18 expanding. Our population is expanding, and
19 we're getting people into green
20 transportation. All of those things are
21 wonderful. We'd just prefer that some more
22 minor use not get in the way of that then.

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1 And in the interim, we would
2 prefer that the trail uses be protected so
3 that the corridor remains available for that
4 light rail use. That's one of the reasons we
5 acquired it.

6 CHAIRMAN MULVEY: Thank you.

7 I have no other questions.

8 VICE CHAIRMAN NOTTINGHAM: A
9 couple of quick ones, Mr. Acting Chairman.
10 Thank you for your patience.

11 Just to follow up on that, Mr.
12 Montange, I agree with you that under the
13 light rail scenario it would be kind of
14 practically difficult and somewhat infeasible,
15 not technically or scientifically infeasible,
16 but practically speaking to put a local
17 government in or a light rail operator in a
18 position of investing the kind of money you
19 need to invest to build out that system and
20 then say, "And by the way, any time the owner
21 of the underlying rail transportation
22 interest, the freight railroad, wants to take

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1 this back, we're out of luck. We're just
2 taking this risk. I mean, to me wouldn't that
3 be handled though maybe outside of the Trails
4 Act at some point where you realize this land
5 is no longer talking about rail banking and
6 we're talking about conversion? We're talking
7 about putting it into a different type of very
8 long-term use, and that would presumably just
9 require some compensation to the railroad.
10 You know, it's important to have a light rail.
11 We're going to buy you out of your interest,
12 or the railroad just donating it or, you know,
13 giving it up.

14 But to say, wink, wink, nod, nod,
15 this is rail banked, but if anyone ever dares
16 exercise their rights under rail banking of
17 reclaiming it, you know, there will be huge
18 problems.

19 MR. MONTANGE: I would say this
20 again. I think the rail banker owners should
21 be treated the same way as the railroad that
22 owned it, and that the Board in no instance

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1 that I'm aware of -- you guys allow transfer
2 of rail property in two circumstances. One is
3 voluntary acquisitions. You have all kinds of
4 provisions for that, and in a voluntary
5 acquisition, somebody gets a notice of
6 exemption to acquire. Short Line buys a
7 segment from, say, CSX or BN. They'll file a
8 notice of exemption for acquisition. The
9 Board doesn't get involved in figuring out
10 compensation because it's a voluntary; it's a
11 ticket to the dance. You don't have to dance.

12 So the BN or NS or CSX, whoever is
13 selling the property is satisfied with
14 whatever compensation arrangement they work
15 out with the short line, which may be almost
16 a donation to the short line, but then they
17 get money from the tariffs that the short line
18 will be generating for them.

19 You know, whatever it works out it
20 works out. In those instances where you
21 require a mandatory transfer of property and
22 those with the offers of financial assistance

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1 or feeder line applications or mandatory use
2 of property is under your alternative service
3 regulations for emergency service or for
4 temporary alternative service when it's rarely
5 used, but in those instances where it is used,
6 either the parties have to work out voluntary
7 compensation for the railroad property owner
8 or else this Board will set compensation. I
9 know that because I've had to go through that
10 in the last couple of years.

11 The only instance that I'm aware
12 of where there's been this issue of whether
13 rail property can be transferred for free is
14 on rail reactivation, and to the extent that
15 that's what the Georgia Great Southern's case
16 holds, that's the unusual situation.

17 So it's not a question of the rail
18 banking owner obstructing rail service. The
19 rail banking owner should be treated like a
20 railroad property owner, and you guys don't
21 take railroad property and give it to another
22 without compensation. That's just not what

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1 the STB has ever done before.

2 Now, having said that, sure, there
3 are going to be instances when adjoining
4 property owners will oppose the trail going
5 in, and they may well oppose a light rail
6 system going in, and they may well oppose a
7 freight rail system going in. That's the
8 Georgetown Branch here in town, but that's a
9 different issue.

10 Sure, people are going to use any
11 kind of thing their lawyers or they can dream
12 up to oppose whatever they are opposed to, but
13 the key for purposes here for a regulatory
14 agency like this is what do you do. It's not
15 so much balancing the issue, interest, but
16 carrying out the intent of Congress to try to
17 preserve these corridors and to maximize the
18 benefits from that or obtain the goals that
19 Congress set out for you.

20 And I think that to do that, to
21 maximize use of the corridor, the best
22 approach is to treat the rail banker owner as

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1 if it's like a railroad, and, yes, you can
2 order transfer of that property, but you
3 should do so compensating the owner for its
4 investment in that property and then work out
5 some mechanism for that so that if they don't
6 reach a voluntary reactivation agreement, you
7 may have to intervene and say, well, it must
8 be done. You either work out this or we're
9 going to have you arbitrate the compensation
10 issues or we'll apply our equivalent of the
11 base statute to it, but you have to come up
12 with something that actually protects those
13 interests in order to actually foster this
14 statute in its continued use.

15 VICE CHAIRMAN NOTTINGHAM: Thank
16 you.

17 Respectfully I'll say I don't
18 think I agree with your concept of sort of
19 dual ownership or I'm having this vision of
20 you go down to the county courthouse and you
21 look up who the owner of the rail line or
22 former rail line is and it says, you know, XYZ

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1 Railroad and it says also ABC trail. I mean
2 to me, I'd have to really understand how that
3 comports with sort of our notions of property
4 ownership and rights.

5 MR. MONTANGE: yes, I think that
6 Georgia Great Southern is the real problem
7 there. If you go down to the county
8 courthouse, there will be a deed. In 99.-
9 something percent of rail banking cases the
10 railroad transfers the property by deed, quit
11 claim deed. All of our interests are
12 transferred. So you go to the county
13 courthouse. The owner is Madison County
14 Transit of Madison County Transit's quarters.
15 It's not Norfolk Southern or N&W or IT or
16 Illinois Central or Union Pacific or any of
17 the predecessor entities. It is Madison
18 County Transit.

19 This right of rail reactivation is
20 a regulatory disposition of the common carrier
21 obligation, which is a different matter and
22 that is handled by the Board. But you have

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1 raised a broader issue, Mr. Vice Chairman, and
2 that is that it is difficult many times to
3 work out to the satisfaction particularly of
4 state courts what the actual role of the STB
5 is and how that federal interaction relates to
6 state property law.

7 That is something that we struggle
8 with repeatedly.

9 VICE CHAIRMAN NOTTINGHAM: Right.

10 MR. MONTANGE: But that's a
11 broader subject.

12 VICE CHAIRMAN NOTTINGHAM: I think
13 we're all mindful of kind of the progression
14 or the relationship between railroad right-of-
15 way, trail under the Trails Act. We have a
16 lot of precedent and success stories there.

17 Then you take it to light rail,
18 and then you get towards -- you're closer to
19 your ultimate analogy of, you know, the county
20 jail or let's say it's the new parking lot for
21 the light rail. Light rail is actually
22 somewhere over there, but they need some extra

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1 land. They need to intrude on the trail. So
2 it's not really light rail, but it's property
3 to help light rail or then it's property to
4 help some other public good.

5 So where that line draws and where
6 we sort of say, you know, what, we're no
7 longer really under the Trails Act here.
8 We're under another scenario, I mean, where
9 public goods can be achieved and we can work
10 this out, but let's not kid ourselves and say
11 it's under the Trails Act.

12 MR. MONTANGE: Well, basically the
13 Trails Act treats continued trail use as if it
14 were continued freight rail use, and for
15 purposes of state and local law. I mean,
16 let's forget about the Trails Act for a moment
17 and just take a regulated freight rail
18 corridor. L.A., the L.A. bought a lot of that
19 from Atchison and from Southern a decade or 15
20 years ago for light rail and commuter rail
21 development and left the common carrier
22 obligation for freight with the freight

1 railroad, but gradually those things have been
2 abandoned, and they're being converted in many
3 instances into a passenger light rail system
4 within California.

5 And you could also operate freight
6 rail and light rail, passenger rail in the
7 same corridor. That's done. Heavy commuter
8 rail on freight corridor in the Northeast.

9 The only reason I think people are
10 looking for exclusive passenger corridors is
11 sometimes to move these things out so you can
12 get faster rail service. But there's on
13 reason that you can't in the abstract operate.

14 The European do it all the time.
15 They'll have freight and light rail on, going
16 big Swiss Railroads, little Swiss Railroads.
17 They'll all have freight rail cars traveling
18 over those things or parked alongside it.
19 They'll put them out when the tourists and the
20 local residents aren't using the rail to get
21 up to those chalets.

22 VICE CHAIRMAN NOTTINGHAM: Thank

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1 you.

2 CHAIRMAN MULVEY: There is a
3 considerable difference, however, in the
4 weight of those trains, the impact of crashes
5 and the like, and the amount of freight
6 traffic on those lines compared to the United
7 States.

8 MR. MONTANGE: There is, indeed,
9 and I don't want to belittle the safety
10 concerns at all.

11 VICE CHAIRMAN NOTTINGHAM: I did
12 have one last comment and question for Ms.
13 Fowler.

14 MS. FOWLER: Yes.

15 VICE CHAIRMAN NOTTINGHAM: you
16 mentioned something of great interest to me,
17 sub-allocation, which to many people might
18 sound like a hyper technical jargon, but for
19 those of us who have worked on the federal aid
20 highway program and the enhancement program
21 and all the different programs under the
22 federal aid highway program, whether it be the

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1 congestion mitigation, air quality allocation
2 or the enhancement grant.

3 I just will say I understand the
4 local government's especially historic support
5 for sub-allocation of pretty much everything
6 and anything possible that flows out of
7 Washington. I will just say my experience
8 running a state DOT, the third largest state
9 DOT in the country at the time, we spent a lot
10 of time trying to modernize our accounting and
11 bookkeeping, and I learned that we had a large
12 amount of money, millions of dollars sitting
13 from past years' enhancement grant allocations
14 out to --

15 MS. FOWLER: Yes, you did.

16 VICE CHAIRMAN NOTTINGHAM: --
17 local governments, and we did something while
18 I was there that had never been done before.
19 We sent a very nice, courteous letter to all
20 of the holders of those grants saying, you
21 know, we notice the grants haven't been used
22 in over three years or I forget the exact

1 time, but it was a significant period of time.
2 Please let us know if you intend to use the
3 grants that you applied for and received. If
4 so, just give us some indicia of your
5 progress; show us that you have a plan.

6 And I was amazed. Dozens and
7 dozens and dozens of localities wrote back
8 quite promptly and said, "Thank you. It's
9 good to hear from you. Take the money back.
10 This project has gotten bogged down. We've
11 run into regulatory problems. We've run into
12 environmental problems. We've run into local
13 controversy. We thought the streetscape was
14 a no-brainer, but when all the shops on Main
15 Street heard that they were going to be put
16 out of business for six months while we tore
17 up the sidewalk we realized that maybe we
18 shouldn't have applied for that grant."

19 Long story short, we recouped
20 millions of dollars and put it out to local
21 governments and trail operators and
22 battlefield preservation groups that had real

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1 and actionable plans to advance the public
2 interest, and so I just would say beware of
3 sub-allocation. Make sure there are some
4 safeguards because we can sub-allocate a lot
5 of money and never see the benefit.

6 MS. FOWLER: Well, two things.
7 Number one, this is accompanied by efforts to
8 streamline the ability to implement small
9 scale, low impact projects. Part of the
10 problem with the enhancements program, as you
11 know, is that spending the money was often
12 held to exactly the same standards. To put in
13 a bike rack, you had to go through the same
14 procedure as if you were building an
15 interstate clover leaf. It was just quite,
16 quite absurd.

17 So that's one thing. This sub-
18 allocation is accompanied by expedited
19 implementation plans. But you raise a very
20 good point. I might want to speak to Chairman
21 Overstar about what does a state do if it
22 finds that there is a huge backlog of money

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1 not being spent, that there might be some way
2 for the state to pull that money back and
3 reallocate it. So that's a very good
4 suggestion.

5 Could I just make one point in the
6 discussion about the rail trail passenger
7 rail-freight rail?

8 VICE CHAIRMAN NOTTINGHAM: Yes.

9 MS. FOWLER: Currently we have
10 examples where the rail banking statute says
11 you have to have a trail there. It does not
12 speak to passenger or light rail, but if the
13 locality wants to put in light rail and keep
14 the rail banking statute intact, as long as
15 they keep the trail intact in tandem with the
16 light rail, in other words, the rails with
17 trails, they've not violated the provisions of
18 the rail banking statute and can proceed.

19 And we are actually looking to
20 that as the need for light rail grows in this
21 country and our corridors that currently have
22 trails in them become increasingly in demand

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1 that this combination of rails with trails
2 will be a way to accommodate both needs, but
3 also will create, as Mr. Montange described,
4 very efficient systems because trails parallel
5 to rails increase the catch basin for the
6 system itself, and so we have the two modes
7 working in tandem, and that left some fields
8 really good.

9 VICE CHAIRMAN NOTTINGHAM: I have
10 no further questions for this panel, Mr.
11 Chairman.

12 CHAIRMAN MULVEY: Well, thank you
13 very much. We appreciate your testimony. It
14 was very helpful, very informative and very
15 useful. Thank you very much, Ms. Fowler.
16 Thank you very much, Mr. Montange. A safe
17 trip back.

18 Our next panel are railroad
19 interests representing the Association of
20 American Railroads, Edward Hamberger; the CSX
21 Transportation, Peter Shudtz; and CNJ Rail
22 Corporation, Eric Strohmeier.

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1 So, gentlemen, please be seated,
2 and we will begin with Mr. Hamberger.

3 Again, please be mindful of the
4 times. And you over on the far right, no not
5 --

6 MR. HAMBERGER: This is actually
7 the left from where I'm sitting.

8 CHAIRMAN MULVEY: Okay. I wasn't
9 suggesting you were at the far right. Will
10 the gentleman proceed, Mr. Hamberger?

11 MR. HAMBERGER: Mr. Chairman, Mr.
12 Vice Chairman, thank you for the opportunity
13 to present the views of the Association of
14 American Railroads pertaining to the rail
15 banking program administered by the Board
16 under Section 8(d) of the Trails Act.

17 The AAR believes, in short, that
18 the voluntary rail banking program under the
19 Trails Act as administered by the Board over
20 the past 25 years has been a success for both
21 carriers and trail users and effectively
22 implements Congress' farsighted objectives.

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1 The rail banking program allows
2 the carrier through voluntary agreement with
3 a trail sponsor who assumes financial and
4 managerial responsibility to agree to the
5 conversion of a rail corridor to interim
6 recreational trail use. During this interim
7 period and until the line is actually
8 abandoned, any reversionary property rights
9 that would otherwise arise are preempted.

10 The program is often attractive to
11 carriers because it provides them with a
12 potentially useful long-term option to
13 abandonment of the currently unused line for
14 which no foreseeable rail use sits. The
15 program provides a means for preserving the
16 corridor intact for potential future
17 reactivation of rail service while providing
18 incentives to establish an interim
19 recreational trail use that's actually a very
20 balanced approach.

21 And Mr. Montange mentioned the
22 Dune trilogy, and of course, he is, therefore,

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1 very much aware that the Bene Gesserit
2 Sisterhood recognized the existence and worked
3 hard to maintain a balance in the universe,
4 and I would submit to you today that rather
5 than the destructive force that he referenced,
6 that this balance of maintaining the use or
7 potential use of the rail line with incentives
8 to provide trail use is a balance that the
9 Bene Gesserit themselves would applaud.

10 The success of the rail banking
11 program in preserving rail lines that would
12 otherwise be abandoned and converting them to
13 interim trail use is confirmed by its
14 widespread use. Ms. Fowler talked eloquently
15 about this subject in the previous panel, and
16 I will not repeat her comments, but I will
17 associate myself with them.

18 The AAR believes that the success
19 of the rail banking program is due in large
20 measure to its effective administration by the
21 Board. The Board's regulations are
22 straightforward, do not impose undue

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1 procedural burdens, and appropriately reflect
2 the ministerial nature of the Board's role
3 under the Trails Act, that of facilitating the
4 negotiation of voluntary interim trail
5 agreements.

6 The Board's regulations
7 effectively implement the program that
8 Congress intended and should be kept in place.

9 In response to your specific
10 questions, the AAR would not object to a Board
11 requirement that the parties provide the Board
12 with a notice when a Trails Act agreement has
13 been successfully negotiated. Such notice
14 could certainly be deemed useful by the Board
15 in monitoring the program.

16 The AAR believes, however, that
17 there should not be any Board requirement that
18 a copy of the interim trails agreement be
19 submitted to it. As the Board recognizes,
20 such agreements are private agreements that
21 fall outside of your regulatory jurisdiction
22 and could contain concessions by the parties

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1 on either side that would not otherwise be
2 offered in other interim trail negotiations.
3 Collection and potentially public
4 dissemination of the agreements could add
5 unnecessary complications in the negotiation
6 process.

7 Our one suggestion for improvement
8 to the rail banking program is that the board
9 informally encourage, but not require parties
10 to anticipate in their agreements potential
11 issues that may arise, and, Mr. Chairman, as
12 usual, you've identified one way to address
13 the issue of reinstating rail use, and that
14 should be an issue of whether and what amount
15 of compensations, if any, is due to either
16 party should the carrier exercise its right to
17 restore rail service at any time. This would
18 avoid potential problems at the outset.

19 In the absence of specific terms
20 in the agreement, the AAR would consider that
21 the party proposing to reactivate rail service
22 should bear the cost to restore the corridor

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1 for rail service use.

2 The Board also solicited comment
3 on the future of rail banking in an era of
4 constrained infrastructure. We submit that so
5 long as the future holds economic
6 uncertainties for any particular industry or
7 enterprise, the rail banking program will
8 continue to serve a useful purpose. The
9 changes in shipping patterns and demand for
10 various products change, and therefore the
11 potential for the need for rail banking
12 opportunities is there, and we believe that
13 the public interest is well served by
14 providing the opportunity for the economic and
15 environment benefits of rail transportation to
16 be provided for a time when it might be needed
17 in the future.

18 CHAIRMAN MULVEY: You're getting
19 very experienced with this, Mr. Hamberger.

20 Mr. Shudtz.

21 MR. SHUDTZ: Yes. Good morning
22 and thank you for this opportunity to be heard

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1 by CSX.

2 We're here to help celebrate the
3 25 years of trails use, and many of us in this
4 room actually enjoy the Georgetown Branch,
5 which I was happy to have worked upon with the
6 many others in this room. The Capital
7 Crescent Trails are another piece of trail
8 success.

9 CSXT, of course, supports the
10 comments of AAR and all of the good purposes
11 that the Trails Act supports, and today we'd
12 like to address the most recent trail success,
13 the High Line in New York City, which is a
14 trail that has just been developed and was
15 just opened on June the 9th of this year, and
16 we're going to talk about the High Line
17 through using the Conservancy Friends of the
18 High Line slides that we asked them to prepare
19 for us.

20 And as you can see, the High Line
21 is a city park of the City of New York. This
22 is an aerial description of the location of

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1 the High Line. It's the west side of the
2 Borough of Manhattan, extending from the meat
3 packing district to the Javits Center.

4 Now, everything has a history.
5 This slide depicts what railroading and horse
6 drawn carriages were like on Tenth Avenue in
7 the 1920s, and you can see the railroad is
8 quite there. It's called Death Avenue because
9 of all of the complexity of operation.

10 As you can see here we had various
11 state laws requiring us to have horses in
12 front of the New York Central locomotives as
13 they went down the street.

14 Public processes took us to
15 building a very nice elevated structure as
16 you'll see here, and this is the High Line
17 when New York City had a great deal of
18 industrial activity going on on the west side
19 of Manhattan.

20 I know both Chairman Mulvey and
21 myself are native New Yorkers and don't quite
22 remember back this far, but over time, the

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1 heavy industry of the west side of Manhattan
2 declined, and the High Line became a little
3 seedy, so to speak, and went through an
4 abandonment process, and as part of this
5 process, some friends of the High Line were
6 formed, and they started dealing with the
7 various public and elected officials, and this
8 is a quick time line of the High Line itself.

9 And most importantly for this
10 proceeding, the CITU process got underway in
11 2002, and the Board issued its CITU, which
12 enabled this park to be formed. Of course, it
13 would not be a park without a ground breaking.
14 There are many popular figures that attended
15 this as elected officials, and the
16 construction started, and you can see
17 essentially they took it all the way back down
18 to the bed and rebuilt up some pictures of
19 some of the construction work going on.

20 The bridge, all of the paint was
21 removed and was repainted, the viaduct that's
22 a mile and a half long, and there are some

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1 more pictures. If anyone is familiar with the
2 City of New York and the public park system,
3 that's the official color of the city parks.

4 This is a demonstration of the
5 care that went into installing new beds here
6 for the trail, and these are some of the
7 plants you'll see later. Various plantings
8 going on, and the friends of the High Line
9 were very concerned to insure that the rail
10 history of this park and trail was recognized.
11 So all through the beds and trails they
12 actually re-employed old rail from the High
13 Line. Another example is some of the quality
14 construction. This shows that there are
15 various accesses along the High Line,
16 obviously stairwells and elevators.

17 And it wouldn't be a ground
18 breaking without many elected officials.
19 You'll recognize quite a few of these folks in
20 the picture, Councilman Nadler, Mayor
21 Bloomberg. That's Diane von Furstenberg
22 there, one of the great donors of the

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1 reconstruction, and here's a picture of the
2 final product.

3 I am also going to mention in a
4 moment about kind of creative additional
5 usages, that this is a hotel that's been built
6 over the High Line, everything to clearances
7 to insure reactivation, and pictures of public
8 usages here.

9 You recall the Death Avenue
10 beginning slide with the fellow on the horse?
11 Well, they actually built this kind of
12 amphitheater there and enjoyed it.

13 Just a few more pictures very
14 quickly. Some of the development going on in
15 the Whitney Museum, residential development
16 and my final slide here is just to show you
17 the amount of activity on the High Line. This
18 is in the first ten days, and over the holiday
19 weekend, my friends tell us that they had over
20 45,000 people on the High Line using the
21 trail.

22 And the High Line's Website is

1 identified here and the Friends of the High
2 Line have asked me to make it available so
3 that anyone who likes maps of the High Line,
4 as well as membership applications --

5 (Laughter.)

6 MR. SHUDTZ: -- I have them here.

7 Thank you very much. I'm sorry to
8 have run over.

9 CHAIRMAN MULVEY: That's fine, Mr.
10 Shudtz.

11 As a native New Yorker or former
12 native New Yorker, I think New York City very
13 much appreciates the investment in the High
14 Line and what a beautiful addition it is to
15 the New York City park system.

16 Mr. Strohmeier.

17 MR. STROHMEYER: Good morning, Mr.
18 Chairman and Mr. Vice Chairman. On behalf of
19 SNJ Rail Corporation, the Board has heard me
20 testify on numerous occasions about loss of
21 the system around the fringe, and of course,
22 rail banking is a mechanism for preserving

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1 portions of the system, and so we felt the
2 need and desire to come down here and testify
3 today.

4 In addition, we've worked on
5 numerous projects, numerous abandonment
6 proceedings. You've heard my testify
7 previously, and so we'd like to talk a little
8 bit about the rail banking provisions and sort
9 of focus with a little bit of a bent on
10 reactivation.

11 We've heard about preserving them,
12 but we haven't heard the process of putting
13 them back into the national rail system. In
14 fact, the Board hasn't given an extensive
15 amount of thought up until now on how do we go
16 about doing that.

17 And one of the things that we
18 wanted to address previously is in the nine
19 previous cases, a critical element that we
20 want the Board to focus on is that you have
21 yet to declare a line being reconverted from
22 a rail bank corridor back into a rail corridor

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1 new construction, and we hope that the Board
2 in any decision that you do with regard to
3 this proceeding holds those precedents as
4 well.

5 The potential implication of
6 having to go through a full blown 10.901
7 construction application where you're
8 intending on using the previously rail bank
9 corridor, we think we can not only defeat the
10 purpose of what the statute was intended to do
11 was to preserve that, but it would also just
12 add tremendously on the amount of cost
13 associated. In the recent Elgin Juliet and
14 Eastern case, which went through a full blown
15 environmental review process, I think I heard
16 the figure somewhere of 21 or \$22 million has
17 been spent on just that portion alone.

18 If you were to impose new
19 construction provisions on previously rail
20 banked corridors, it would send the cost
21 through the ceiling, and so we ask that the
22 Board be mindful of that as you contemplate,

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1 you know, these potential future
2 considerations.

3 The second question is there's
4 been significant discussion about whether or
5 not the trails agreement should be previously
6 submitted to the Board. I actually have a
7 concern only in so much as I think the trail
8 agreements should be submitted to the Board
9 for a determination.

10 As we have heard and as the Board
11 is aware in the case that I was recently
12 involved in in AD-193.21(x), which was the
13 case in Vicksburg, Mississippi, the trail user
14 in that case was the City of Vicksburg that
15 ultimately acquired the line through the
16 trails agreement, but as the Board is aware,
17 the right-of-way was conveyed in its entirety
18 to the city.

19 What isn't quite clear in that
20 particular case is how do you activate rail
21 service. As you know, there was not one but
22 two potential shippers down along that line.

1 The existing shipper was able to relocate his
2 facility to a trans-load facility up from his
3 facility at less cost than acquiring the line,
4 but the question had always come up how do I
5 get the service back if I want the service
6 back, and therein, you know, we did a little
7 bit of brainstorming before we made the
8 decision in that case to withdraw the OFA.

9 And the question had come up what
10 kind of agreement does KCS have in place to
11 allow for the reactivation of the line, and as
12 the Board is aware, when rail property is
13 conveyed, certain rail assets are conveyed,
14 the Board usually does a determination in
15 advance of that consistent with your State of
16 Maine cases and Wisconsin DOT to make sure
17 that the carrier who acquired the line didn't
18 acquire too much control.

19 And we like the Board to at least
20 consider that in the possibility of moving
21 forward that you may want to look at those
22 issue to see whether or not the railroads are,

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1 in essence, conveying too much that prohibit
2 the restoration of the rail line. If you
3 don't look at the agreement, you don't know,
4 and so that was one of the issues that we
5 wanted the Board to also look at.

6 And the third and final issue, and
7 given the time I'll hopefully try to wrap this
8 up here quickly, was the possibility of if you
9 cannot reach a voluntary agreement with the
10 underlying residual commentary or owner using
11 the AB-103.21(x) case scenario provisions that
12 we like to discussion about possibly utilizing
13 the provisions of 49 USC 10907 to compel the
14 sale of those residual rights.

15 And I'm available for any
16 questions.

17 CHAIRMAN MULVEY: Thank you.

18 I remind the panelists that we
19 have a 10901 case before us right now where we
20 are going to try and resolve the issues as to
21 what are the responsibilities under rail
22 banking versus new construction. That's the

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1 so-called R.J. Coleman case that is before us
2 right now. So we really can't discuss it in
3 any kind of detail, but some of those issues
4 which you raise will be resolved when we
5 finally issue our results in the R.J. Coleman
6 case.

7 So let me start out with a couple
8 of questions. Mr. Shudtz, I understand that
9 CSX, unlike the other railroads, has a
10 subsidiary which operates trails. Is that
11 called the Georgetown and High Line Railway
12 Company? It's a separate --

13 MR. SHUDTZ: Yes.

14 CHAIRMAN MULVEY: -- subsidiary of
15 CSX?

16 MR. SHUDTZ: Yes.

17 JUDGE MASON: And, Mr. Hamberger
18 as well, does any other railroad have this
19 besides CSX?

20 MR. HAMBERGER: I'm not familiar.

21 CHAIRMAN MULVEY: I didn't think
22 so. I believe you're the only one that does

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1 that.

2 Yes, sir, Mr. Montange.

3 MR. MONTANGE: (Speaking from an
4 unmiked location.)

5 CHAIRMAN MULVEY: Okay. So
6 there's a short line that does, but you're the
7 only Class 1 that has the subsidiary here.

8 MR. MONTANGE: Right.

9 VICE CHAIRMAN NOTTINGHAM: Mr.
10 Chairman, if you could, the stenographer kind
11 of signaled to me that he had difficulty
12 picking up testimony that might have been
13 volunteered from the audience. I don't know
14 if you just want to clarify that for the
15 record.

16 Thank you.

17 CHAIRMAN MULVEY: Right. He
18 mentioned that there was a short line
19 railroad, the AK Railroad, that also has a
20 short line railroad but also has a subsidiary
21 property, and AK operates a trail as part of
22 it. It's a for profit company, and so it has

1 both a railroad operation as well as a
2 subsidiary that runs a trail. But the point
3 was that only the CSX of the Class 1 railroads
4 has a trail operating subsidiary.

5 VICE CHAIRMAN NOTTINGHAM: And
6 that was Mr. Montange.

7 CHAIRMAN MULVEY: Mr. Montange who
8 testified earlier, yes.

9 Mr. Shudtz.

10 MR. SHUDTZ: Yes. We performed
11 that as an aid to, you know preserving cargos
12 for trails use, recognizing that sometimes it
13 takes a considerable period of time to work
14 out arrangements and for people to get the
15 funding necessarily to support trails. We
16 have been, I think, very cooperative in trails
17 use over the years, and I think you mentioned
18 earlier about the time it take, and we
19 appreciate the Board's extension of the time
20 that it customarily gives the parties to
21 include their voluntary agreements.

22 You know, we look forward to those

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1 extensions so that people can secure their
2 funding and move forward. The subsidiary was
3 designed as an aid to protect the right-of-way
4 in times when it takes a long time to work out
5 agreements.

6 CHAIRMAN MULVEY: As a matter of
7 fact, whenever two parties are in negotiations
8 and both parties come before us asking for
9 extension, we generally accommodate those
10 requests because both parties are indicating
11 that they are moving towards reaching an
12 accord, moving towards resolving their
13 differences, and we want to be accommodating,
14 and we want to help to bring about a mutually
15 beneficial resolution.

16 There's a number of times though,
17 and it has been alleged by the Rails-to-Trails
18 Conservancy and others that the railroads
19 refuse to participate in a negotiation, it's
20 a voluntary program, and railroads don't want
21 to participate in the creation of a trail.

22 Could you, Mr. Hamberger or Mr.

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1 Shudtz or Mr. Strohmeier, spell out some of
2 the circumstances under which a railroad would
3 say, "Well, a trail might be a nice public
4 benefit, but we don't want to be involved in
5 that"?

6 MR. HAMBERGER: Well, I think the
7 previous panel beat this around a little bit,
8 and that is what is the ownership right of a
9 private sector railroad for a private piece of
10 land on which it is operating and is its right
11 to come into this Board, ask for an
12 abandonment. If there is an OFA, then another
13 carrier can come in and maintain the rail use,
14 which is a very high priority.

15 If not, then of course, if there
16 is a great local demand for trails use, then
17 the city or the county can exercise its right
18 of eminent domain to establish such a trail,
19 and finally, if none of that occurs, the
20 railroad is free to then negotiate the sale of
21 its property.

22 So you know, one has to take a

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1 look at all of the options on the table, and
2 Ms. Fowler slipped in the word "windfall
3 profits." I don't consider it a windfall
4 profit when one sells a piece of property for
5 more than one paid for it.

6 So, you know, it is a series of
7 considerations, and maintaining the right-of-
8 way for future use is one of those, but
9 certainly there are times when you can foresee
10 that that may not be the case, and it is your
11 fiduciary obligation to your shareholders to
12 maximize what you can for that private piece
13 of property.

14 CHAIRMAN MULVEY: Mr. Shudtz, do
15 you have anything to add?

16 MR. SHUDTZ: Just some practical
17 considerations. You know, as long as we owned
18 the property, we were, of course, responsible
19 to the public communities for its upkeep and,
20 of course, there's always liability concerns
21 with bridges and things of that nature. So
22 in some instances if we don't see a likelihood

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1 of successfully concluding a trail, we may not
2 wish to enter into a long period of
3 negotiation.

4 But, again, we're very desirous of
5 looking for ward to our properties being
6 reused for other purposes, private and public,
7 and as Mr. Hamberger just said, you know,
8 trail use is a public use, but there are other
9 public uses of the properties.

10 For example, in New York State we
11 are required after we conclude the abandonment
12 process to make our properties available to
13 the state and local subdivisions, and they
14 have a right of purchase. This is common also
15 in Massachusetts and other places.

16 So the governmental authorities
17 like to have the opportunity to reuse the
18 properties for maybe roadways or parks or
19 other public purposes. So the whole event of
20 process is a piece of this puzzle of kind of
21 reuse of the property.

22 MR. STROHMEYER: The only thing

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1 that I would add on that is if I was sitting
2 in the position of an abandoning carrier I
3 would be seeking to maximize whatever return
4 that I could get.

5 In the KCS case that I cited
6 earlier, it was quite obvious to Kansas City
7 Southern that they were seeking the, you know,
8 maximum price that they could get for their
9 real estate, and I certainly wouldn't be
10 advocating the position that would begrudge
11 them, you know, their fair consideration.

12 I happen to also work, speaking of
13 the High Line, if the Board may recall, there
14 was a feeder line application by the 40-plus
15 Organization in that proceeding back in 2001-
16 2002. I had been asked to actually conduct a
17 study. The group advocating the feeder line
18 didn't like the conclusions that I reached
19 because gentrification was occurring at such
20 a rapid pace in the Cheslea section of
21 Manhattan. I thought it was kind of a silly
22 waste of time, energy, and money when the loss

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1 that these industrial buildings were being
2 converted into were going for sky high real
3 estate values. It was like you're not going
4 to put a warehouse in that portion of
5 Manhattan. It's just the nature of the beast.

6 And I'm very grateful that CSX
7 actually chose to go the way that they did and
8 preserve the corridor for some future use
9 because I think they probably would have made
10 more money had they not gone that way just by
11 the nature of the beast. They would have had
12 some demolition costs, but with the way new
13 York City real estate exploded shortly
14 thereafter, their decision to do what they did
15 was actually quite noble.

16 CHAIRMAN MULVEY: What came up
17 earlier was this issue of a contract, a
18 prototype contract, and Mr. Hamberger, would
19 the AAR be interested in working with a group
20 at the RTC to develop some sort of boiler
21 plate Trails Act agreement that would clarify
22 who's responsible for bearing the cost of

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1 replacing bridges and making other necessary
2 repairs on rail services that are going to be
3 restored over a rail bank line?

4 MR. HAMBERGER: We have not
5 specifically discussed that in preparation for
6 this hearing, but I would certainly recommend
7 to our members that they would participate in
8 such an activity.

9 CHAIRMAN MULVEY: Mr. Shudtz,
10 would that be something that the CSX would be
11 interested in working with these trail groups
12 to come up with some sort of boilerplate
13 language that would try to address all of
14 these issues that seem to come up as to who
15 bears the responsibility and liability, et
16 cetera?

17 MR. SHUDTZ: Yes, we're always
18 willing to work with folks. We've had
19 conversations, of course, over the years with
20 the Rail-to-Trails Conservancy. My point of
21 emphasis here is the voluntary nature of the
22 transactions and the need to insure that the

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1 railroads are not encumbered with the property
2 over long periods of time, and that we're not
3 preventing other public and private uses of
4 the property through a mandatory rail banking
5 and extended periods.

6 CHAIRMAN MULVEY: I raise this
7 question of the public character of rail
8 corridors. They are private property, but as
9 Mr. Montange pointed out before, they are
10 private property charged with a public use and
11 public regulation and the like.

12 I'm not a lawyer, but I do go back
13 and remember the cases like Nebbia v. New York
14 and some of the other ones, I think, that
15 dealt with this issue of private companies
16 charged with a public interest.

17 And trails operations certainly
18 represents a public good. Is there something
19 to be said to that, that the railroad rights-
20 of-way are, in fact, a public good that need
21 to be preserved above and beyond restoration
22 of rail service, but can be converted into

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1 other things like trails for public use and
2 that's a good use and a fair use of that
3 property, but with just compensation?

4 MR. HAMBERGER: Well, I think you
5 have to go through the abandonment process to
6 get to the final end of that, as Mr. Montange
7 did accurately portray, it is a regulated
8 piece of property, and that's why we have to
9 come here to get free of the common carrier
10 obligation, but then once that occurs if there
11 is plenty of time in that process for others
12 to come in and with OFA and, you know,
13 preserve it or transform it into other public
14 uses with appropriate financial assistance.

15 But if you get through to the
16 abandonment, then it should be free and clear,
17 it seems to me.

18 CHAIRMAN MULVEY: Thank you.

19 Vice Chairman Nottingham.

20 VICE CHAIRMAN NOTTINGHAM: Thank
21 you, Chairman Mulvey.

22 I did want to comment Mr.

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1 Hamberger for not only completing his
2 testimony right on time today, but delivering
3 a book review and report in addition as a
4 bonus.

5 I have to confess though I --

6 MR. HAMBERGER: It's a great
7 trilogy.

8 VICE CHAIRMAN NOTTINGHAM: -- have
9 a third grader at home. I'm helping him with
10 his summer reading. If you're trying to
11 connect with this Commissioner, I recommend
12 you try to allude to books like James and the
13 Giant Peach or The Big, Friendly Giant.
14 That's just a free tip for all of you
15 practitioners out there.

16 And one reason we have -- probably
17 not the only reason, Mr. Chairman -- that we
18 have 30 days to supplement the record, if
19 anybody else wants to contribute to Mr.
20 Hamberger and Mr. Montange's dueling book
21 reviews, I think it's now wide open. So we
22 look forward --

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1 MR. HAMBERGER: Revenge of the
2 Giant Peach is where he said -- no, that's the
3 Friendly Giant where he says, "Am I right or
4 am I left?"

5 VICE CHAIRMAN NOTTINGHAM: I think
6 you're right. We'll have to have another
7 hearing for that.

8 I did want to commend the CSX and
9 all the folks in New York City and Friends of
10 the High Line for completing and opening what
11 truly is an amazing contribution to New York
12 City and to the trail network and the whole
13 concept of recreation and converting rail
14 right-of-way to new and greatly appreciated
15 public use. I think it's just outstanding.

16 I do want to say there were some
17 STB and ICC staff -- and I'll probably be
18 omitting some -- but there are some that we
19 know of who are still with us who worked quite
20 hard to make that day possible --

21 MR. HAMBERGER: Yes, indeed.

22 VICE CHAIRMAN NOTTINGHAM: -- and

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1 some of the nitty-gritty legal stuff that
2 turns up that needed to.

3 I wanted to recognize Evelyn
4 Kitay, Vicki Rutson and Alan Weinstein, in
5 particular. And we followed the press. I
6 will say it wasn't any personal pride because
7 all of the hard work happened before I came to
8 the Board, but I asked around and nobody at
9 the Board actually knew that the opening was
10 happening until he read about it. We have
11 some people who probably would have on their
12 own time loved to have gone up there and been
13 part of the celebration.

14 But I say that just for the trail
15 advocates. If you do think that the Board was
16 actually helpful -- and please know we do try
17 to monitor these things and we do enjoy the
18 opportunity to celebrate successes as well.
19 We missed that one, but I can't wait until the
20 next time I'm in Manhattan, which I think will
21 be in August on my own nickel to go up there
22 and navigate the crowd.

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1 Hopefully they don't have the
2 17,500 people there when I'm there, but if so,
3 that's all the more successful. But
4 congratulations on that.

5 The issue of removal of rail
6 bridges in the context of a trail operation,
7 in the context of having a trail in operation,
8 we have seen and we continue to see a whole
9 range of fact scenarios from bridges being
10 deemed by some public entity like the state
11 DOT to be so old and so decrepit that there's
12 a public safety risk and it certainly would be
13 unfair to charge, I think, to charge the trail
14 operator in that kind of scenario with the
15 cost of dismantling the bridge.

16 I could say it might be equally
17 unfair post abandonment to charge the railroad
18 with the cost of dismantling the bridge, but
19 certainly I think some clarity could be in
20 order there. I guess as one Commissioner I
21 would just be looking for sort of some kind of
22 public -- some documentation of a real public

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1 need to dismantle. I don't think we've had
2 many cases like this, but I always worry about
3 over zealous dismantling of bridges.

4 If a trail group determined it was
5 in their interest to fend off the resumption
6 of rail service, would they be tempted to
7 arbitrarily remove bridges just to make it
8 really expensive to resume rail service? I'm
9 concerned about that scenario and others. But
10 I would be open to suggestions.

11 I'm also very interested in trying
12 to, I guess, improve the Board's -- I
13 understand it takes time to execute these
14 agreements, and I don't want to have any
15 arbitrary deadline, but I will say when I see
16 when the third, fourth, fifth, sixth seventh
17 extension crosses my desk, the longer I'm at
18 the Board I just kind of wonder what's going
19 on here.

20 We never really get to see because
21 I don't think we ask of it; we never really
22 see much in the way of -- they all look the

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1 same. They all say, "We're still working on
2 it. We'll get back to you. We need 180 more
3 days."

4 I never really know if somebody
5 really is working on it. I mean is there some
6 -- and so I'd be interested in just a little
7 more gentle pressure or let the Board help.
8 You know, hey, folks, can we help move this
9 along? We know it's voluntary, but how long
10 is -- you know, this is hanging out there.

11 And with that some notice, too, I
12 think, of when agreements are consummated. It
13 would be just, I think, orderly and in the
14 spirit of kind of good oversight if we just as
15 an agency just knew that there was an
16 agreement consummated. I don't think we need
17 the terms or the confidential agreement or
18 anything but just the fact knowing which ones
19 are still out there unresolved and which ones
20 are actually consummated would be of interest
21 to me.

22 But I throw that out to any of the

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1 witnesses. Mr. Hamberger, do you want to go
2 first and then Mr. Shudtz?

3 MR. HAMBERGER: I'm going to defer
4 to counsel from CSX.

5 MR. SHUDTZ: Yes, I think the good
6 news, the multiple extensions, is that people
7 are still talking in a voluntary context and
8 are hopeful of reaching conclusion. I know
9 our experience has been that many times it's
10 the securing of the funding necessary to
11 create the park and all the public interests
12 that have to be addressed.

13 So the Board's tolerance of the
14 extensions were involuntarily sought by both
15 parties is an aid to including a trail.

16 As far as advising of a
17 consummation of the agreement, I think that's
18 a helpful item for the Board's record keeping
19 and for the parties to know, other parties in
20 the proceeding to know that an agreement has
21 been struck.

22 I know we often do that ourselves

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1 just voluntarily just so the record is clear.

2 VICE CHAIRMAN NOTTINGHAM: Mr.
3 Shudtz, could that be done in your view just
4 by some regulatory action by the Board to
5 start requiring a notice of consummation?

6 MR. SHUDTZ: I would think in the
7 CITU certificates themselves, you just specify
8 that upon the completion of the agreement the
9 parties shall notify the Board.

10 VICE CHAIRMAN NOTTINGHAM: That's
11 all I have for this panel.

12 Mr. Strohmeier, anything you
13 wanted to contribute on any of those points?

14 MR. STROHMEYER: Nothing at this
15 time.

16 VICE CHAIRMAN NOTTINGHAM: Thank
17 you.

18 CHAIRMAN MULVEY: Well, thank you
19 very much. Once again, very, very useful,
20 very, very helpful, and thank you for coming
21 today.

22 VICE CHAIRMAN NOTTINGHAM: Thank

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1 you.

2 CHAIRMAN MULVEY: We'd like now to
3 have our final panel come up today. This is
4 the panel representing reversionary property
5 interests. Well, it's listed as other
6 interested parties.

7 We have the National Association
8 of Reversionary Property Owners. Speaking for
9 them is Kathleen Kauffman, and Danaya C.
10 Wright from the University of Florida's Levin
11 School of Law.

12 Thank you both for coming today,
13 and we'll begin with you, Ms. Kauffman.

14 MS. KAUFFMAN: Thank you, Mr.
15 Chairman.

16 Good morning. My name is Kathleen
17 Kauffman. I'm a partner with the firm of
18 Ackerson, Kauffman, Fex here in the District
19 of Columbia.

20 CHAIRMAN MULVEY: Do you want to
21 speak directly into the mic a little bit
22 because it's hard to hear sometimes?

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1 Thank you.

2 MS. KAUFFMAN: Does that work? Is
3 that good?

4 CHAIRMAN MULVEY: Yes.

5 MS. KAUFFMAN: Okay. My firm
6 represents landowners in disputes over
7 ownership of railroad rights-of-way. Their
8 practice includes several class actions and
9 individual suits where we represent landowners
10 in Tucker Act suits against the United States
11 to recover compensation when a trail results
12 in the taking of property.

13 It is gratifying, as listening to
14 the Board's comments and to the prior
15 panelists, including the railroads, to
16 recognize the importance of property rights
17 and the importance of our system of law that
18 protects those property rights, whether they
19 be the property rights of the railroad or the
20 property rights of the reversionary interests
21 of the adjoining landowners.

22 One of my firm's most noteworthy

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1 cases, my firm represented Paul Preseault in
2 the damages action that followed the Supreme
3 Court's and the federal circuit court's
4 decision that the trail created through his
5 property constituted a governmental taking
6 that must be compensated under the U.S.
7 Constitution.

8 In other actions we represent
9 landowners in suits against telecommunications
10 companies, use active railroad rights-of-way
11 without permission from adjoining landowners
12 who retain the rights to the fee.

13 Finally, we are also retained in
14 eminent domain proceedings, another way of
15 creating public uses such as parks and trails
16 where, for instance, a governmental agency
17 seeks to condemn property for a park or a
18 stadium.

19 Today I'm here representing the
20 National Association of Reversionary Property
21 Owners whose written testimony has been
22 submitted by its Executive Director, Richard

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1 Welsh.

2 NARPO's written testimony details
3 for the Board the winners and the losers under
4 the Trails Act. The biggest winners are the
5 railroads, and I don't think that's a
6 difficult proposition at the end of the day
7 today in listening to the testimony that has
8 come before. They have the discretion and the
9 option to either take the deal or walk away
10 from the table. They are there with their
11 property rights demanding full economic value
12 for those property rights or they will pass on
13 the deal.

14 At the same time, they often take
15 large, charitable tax deductions for their
16 trouble in that instance.

17 The trail proponents are also
18 obviously winners. They want a trail, and as
19 a result of the legislation they can get a
20 trail in a very streamlined process.

21 My organization or the
22 organization I represent is not here -- as the

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1 Chairman indicated at the beginning, this
2 hearing is not about whether there should be
3 a Trail Act or there should not be a Trail
4 Act. That's not the purpose of the
5 recommendations NARPO gave to the Board.

6 The purpose is to say how the
7 Trail Act can be more fairly administered so
8 that the interests of all of the parties, the
9 trail, the railroads with property interest,
10 and the reversionary owners who also have
11 property interests can be fairly and
12 adequately accommodated in that process.

13 It is important to look at your
14 regulatory ability in this area because the
15 major losers in this process are the property
16 owners who adjoin the land. That is the
17 reason trails are welcome only when they are
18 in someone else's property. The trails drive
19 down property values for adjoining owners and
20 increase crimes against their property and
21 their person. The trails are sometimes
22 beautifully managed. They are sometimes

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1 poorly managed, and the trails group sometimes
2 become defunct.

3 Although many adjoining
4 landowners, most, in fact, in our experience,
5 are entitled to compensation because the trail
6 is a taking of their property rights, the
7 system is stacked against them. Statutes of
8 limitations may run even before they know a
9 trail will be put in place. That is the down
10 side of the unlimited extensions after a
11 notice of interim trail use goes in.

12 It is one thing to be put on
13 notice when the plows come through and the
14 blacktop is put down that some trail is being
15 put down next to your property. It is another
16 thing to know that it is the filing of that
17 notice of interim trail use that begins the
18 ticking clock on statute of limitations for
19 the only remedy these adjoining landowners
20 have, which is a suit under the Tucker Act.

21 Even if the landowners become
22 aware of their rights before the statute of

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1 limitations runs and brings suit under the
2 Tucker Act, as has been specifically
3 recognized to be their right by the Supreme
4 Court and they have successfully done in many
5 instances, these suits are very expensive to
6 litigate. Attorney's fees and expenses can be
7 recovered at the end, but the suits can take
8 a decade or more, and property owners may have
9 to pay millions in fees and expenses before
10 the case is done.

11 Another loser is the taxpayer
12 because if the adjoining landowners do bring
13 suit under the Tucker Act, then taxpayers must
14 pay for compensation and attorney's fees even
15 though no legislative body decided that the
16 cost for that particular trail at that
17 particular time was affordable or worth the
18 cost.

19 The federal government under the
20 Tucker Act pays the adjoining landowners. The
21 parties at the table negotiating the trail use
22 agreement are the railroad who is there to get

1 money for its maybe 50 percent rights on that
2 rail. The trail group is looking to raise
3 money to make it as nice as they can, but the
4 economic costs of compensating the adjoining
5 landowners is not in that room and is not on
6 the shoulder of either of the parties who are
7 negotiating that trail agreement.

8 It is a lovely thing to have a
9 lovely trail. For the community as a whole,
10 our National Association of Reversionary
11 Property Owners does not say that it's not a
12 public use, that is, a proper means for which
13 property can be taken. But the way this
14 system works dislocated the decision making
15 process and the economic process because the
16 adjoining landowner's recourse is against the
17 federal government, and under the Tucker Act,
18 whereas the people making the decision to
19 enter into that trail agreement or not, for
20 them the cost of compensating the adjoining
21 landowners is a totally free good.

22 And as a result, it is not the

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1 sort of decision making that we traditionally
2 do in the system before property is taken for
3 a public use.

4 In addition, of course, the
5 federal taxpayers not only compensate in
6 Tucker Act suits, but they also allocate
7 approximately a billion dollars out of the
8 federal gas tax for bike trails.

9 It is helpful to contrast what we
10 do to create a park and what we do to create
11 a trail. If a city or state wants a new park,
12 they go through a well established
13 condemnation process to get the necessary
14 rights. Before establishing the park, they
15 determine whether money exists to acquire
16 rights and to operate the park.

17 After the park is established,
18 it's managed and policed by local governmental
19 entities. Adjoining landowners can petition
20 local authorities over poor maintenance or
21 security issues. None of these safeguards are
22 in place for trails.

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1 It could be if the trail group is
2 a unit of New York City, then the only
3 distinction between the creation of that park
4 and the creation of some other park in New
5 York is the fact that the adjoining landowner
6 compensation, the actual owners of the
7 underlying fee, that is put to the side and is
8 kept out of the process.

9 But in other cases there are more
10 distinctions because the trail group is not
11 necessarily New York City. The trail group
12 may be a group who spent years putting
13 together a minimum amount of money and a lot
14 of hope and wish and prayer that it was all
15 going to come together, and then goes defunct
16 or does not have the money necessary to
17 maintain it and keep it secure and well
18 policed.

19 NARPO's written testimony proposes
20 five concrete steps the STB can take today to
21 make the Trails Act fair and just for adjacent
22 property owners and taxpayers.

1 Number one, adjoining landowners
2 must be notified of the abandonment and the
3 potential for the notice of interim trail use.
4 Under a 2004 federal circuit decision, the
5 statute of limitations begins to run when the
6 notice of interim trail use is issued. The
7 STB must establish a rule that eliminates the
8 Tucker Act Catch-22 so actions are not barred
9 by the statute of limitations before adjoining
10 landowners even know a trail is going in.

11 In its 1990 decision in Preseault
12 v. ICC, the Supreme Court recognized that many
13 railroads do not own their rights-of-way
14 outright but rather hold them under easement
15 or similar property interest. It avoided the
16 question of whether the Trails Act violated
17 the Fifth Amendment takings clause because it
18 found that the Tucker Act provided an adequate
19 process for obtaining compensation.

20 Obviously, the Tucker Act is not
21 an adequate process if a claimant's rights are
22 foreclosed before he or she has reasonable

1 notice of the potential cause of action. In
2 other contexts where the Supreme Court has
3 considered what process is due a citizen
4 before he or she is deprived of property
5 rights, the Court has held that reasonable
6 notice is required.

7 In the case of property, notice by
8 direct mail to those whose names are available
9 in the public record is required.

10 Second, railroads should be
11 required to file evaluation maps and land
12 schedules when the notice of interim trail use
13 is issued. These schedules will provide
14 landowners with guidance on title. As the
15 Supreme Court noted in Preseault, many
16 railroads do not own the right-of-way
17 outright. In my firm's Tucker Act class
18 actions, with one exception, the adjoining
19 landowners are found to have title superior to
20 the railroad and, therefore compensable
21 interest if the trail goes through between 50
22 and 80 percent of the time.

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1 The railroads have, as the panel
2 knows, valuation maps. Those valuation maps
3 contain land schedules. They are easily
4 available to the railroad. They are less
5 easily available out in College Park to
6 somebody adept at the archives system, but
7 they are not available to citizens in Nebraska
8 or Ohio or Arizona who know that there has
9 been a railroad next to their property for 100
10 years and have a very difficult time knowing
11 whether they are on a portion of the railroad
12 where, in fact, their property has the
13 reversionary interest or on a portion where
14 the railroad has free title.

15 This Board in the past or the ICC
16 in the past has required that the railroads
17 catalogue their interest, required that that
18 be made available to the Board so that the
19 Board knows what the mix of private and
20 railroad interest is, and part of the process
21 of making the Trail Act fair to adjoining
22 landowners whose sole ability to get

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1 compensation for their private property is
2 through a Tucker Act action. Part of the
3 process of making this act more fair for all
4 of the interested parties at the table is
5 requiring that those valuation maps and those
6 land schedules be filed within the STB docket
7 when the NIT is issued.

8 Three, the STB should issue a
9 maximum of four 180-day extensions so the
10 parties have no more than two years to
11 consummate a trail use agreement. One of the
12 items of agreement among all of the panelists
13 from all of the various interests has been
14 that the STB needs to have a public
15 notification that the process actually came to
16 an end and that there was a trail use
17 agreement consummated.

18 Think of what is fair to the
19 landowner with reversionary interests in
20 Nebraska or in Minnesota or in North Dakota.
21 In Washington, D.C. a notice of interim trail
22 use is filed. If the Board adopts what we

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1 think is a crucial recommendation and notice
2 goes out, they will know that there's an STB
3 docket. They will know that that STB docket
4 may have an impact on their personal property
5 rights.

6 If they hire a lawyer, they will
7 find out they don't get to be at that table
8 where the railroad tries to get maximum
9 compensation for their property rights.

10 But to know whether or not this
11 trail is going to go through, they need to
12 know whether or not the trail agreement has
13 been consummated, and that seems to be not
14 disputed by anybody.

15 But then the question also must be
16 how long do you need to sit in that farmhouse
17 in North Dakota to try and wonder whether your
18 farm is going to be bisected not by a railroad
19 with a freight train that comes by once a day
20 where you've got a crossing agreement, but
21 instead by an entirely different public use.
22 It's a public use, but it's an entirely

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1 different public use.

2 And the National Association of
3 Reversionary Property Owners submits that two
4 years is enough time to find out whether your
5 railroad tracks going through your property
6 are going to stay or they're going to go and
7 whether they are going to be replaced with an
8 entirely different public use.

9 Fourth, the STB should be notified
10 of the contact information for the trail
11 manager on the consummation of the trail use
12 agreement. The consummation of the trail use
13 agreement may be the end of the story for the
14 STB. It may be the end of the story for the
15 railroad, but it is the beginning of the story
16 for those adjoining landowners who now need to
17 deal not only with beautiful, beautiful parks
18 which made their cameo here today, but with a
19 lot of not so beautiful parks, with trails
20 that the funding was too shoestring on, where
21 the maintenance is not what it should be,
22 where the security is not what it should be,

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1 and with some of these groups, particularly
2 when they go defunct, the landowner is stuck
3 looking for who do they contact. So is the
4 trail manager?

5 And the Board needs to require
6 that when there is a consummation of a trail
7 use agreement there is a public notice filed
8 in the STB, that notice include the name of
9 the trail manager, and if that trail manager
10 changes, that that also be a subject of public
11 notice.

12 Fifth, the STB should provide a
13 simple process to seek relief from derelict
14 trail managers, and if that simple process
15 does not result in a resolution of the issue,
16 it should issue a statement of non-
17 jurisdiction if the issues cannot be resolved
18 at the STB level so landowners can pursue the
19 issues in their local courts.

20 I wanted to make a comment -- and
21 those are the recommendations in the written
22 testimony that was submitted. I wanted to

1 make one further comment on the question of
2 whether or not the conversion of trail use
3 should be mandatory. I would submit that if
4 you look at the economic consequences of
5 mandatory conversion to trail use, the
6 American Association of Railroads was not
7 interested in that because they have private
8 property. They own it.

9 If they don't like the agreement
10 they get from the trail group, they want to be
11 able to go and sell their property however it
12 is they want to be able to sell their
13 property.

14 Well, the members of the National
15 Association of Reversionary Property Owners
16 have those same interests, and if there is
17 mandatory rail banking, mandatory trails, then
18 what you will do is create a huge unfunded
19 liability for the federal government because
20 each and every one of those adjoining
21 landowners would then have a right under the
22 decisions of the federal circuit and the

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1 Supreme Court to go in for compensation.

2 So we would urge that it not be
3 mandatory going into the future.

4 Thank you.

5 CHAIRMAN MULVEY: Thank you very
6 much, Ms. Kauffman.

7 Ms. Wright.

8 MS. WRIGHT: Yes, thank you.

9 I am an outsider here. I don't
10 represent anyone. I'm a professor of law who
11 has spent the last 15 years studying in this
12 area. In particular, I focus on legal rights
13 of railroads to their property in their rail
14 corridors. I studied the federally granted
15 rights-of-way, and I've obviously spent some
16 time studying the rail banking statute itself.

17 If I represent anyone, it's the
18 sort of unnamed, unidentified public who
19 value, I think, or should value probably more
20 than they think they value coherent, rational,
21 and equitable laws. That's what law
22 professors do. We spend a lot of time

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1 thinking about what's the right law here.

2 And I realize that the Surface
3 Transportation Board's jurisdiction over the
4 common carrier obligations and liabilities are
5 different than the state law property rights
6 that my colleague here has been speaking
7 about, and my goal here is to correct the
8 number of statements that were made in the
9 testimony of NARPO and also to put the legal
10 challenges to rail banking and railroad
11 property into an historical perspective.

12 As you know, in the 19th Century
13 from the 1840s to around the turn of the
14 century a railroad could mean the difference
15 between economic viability and economic
16 stagnation for a community. For that reason
17 nearly everyone wanted railroads in their
18 communities, and they sought to woo them with
19 countless incentives.

20 More importantly, courts and
21 lawmakers strongly supported the rights of
22 railroads particularly in their property

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1 rights to land in their corridors. State
2 after state gave railroads eminent domain
3 powers, and state courts protected the
4 property rights of these railroads against
5 adverse possessors or adjacent landowners who
6 tried to limit the uses the railroads could
7 make of the land that had been conveyed to
8 them.

9 But the honeymoon soon ended. By
10 the turn of the 20th century, railroad abuses
11 of all sorts had led numerous states to limit
12 the property rights railroads could acquire by
13 eminent domain and many courts began a
14 concerted effort to limit the railroad's
15 property rights, to punish them for setting
16 discriminatory freight rates, entering pooling
17 agreements, manipulating stock prices, those
18 sorts of things.

19 Many railroads faced tremendous
20 pressures to consolidate and shed unproductive
21 lines in the 1890s and again in the 1930s.
22 Many railroads were not built. These

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1 political and economic realities led the
2 regulatory reform movement against the
3 railroads, which of course resulted in the
4 creation of the Interstate Commerce Commission
5 in 1887 and the nationalization of the
6 railroads during World War I.

7 The legal effects of this period
8 was the development of a body of case law and
9 common law rules that narrowly limited the
10 property rights of railroads, reversing the
11 19th Century presumptions in favor of railroad
12 property rights and giving adjacent landowners
13 property rights in abutting corridors that
14 were nowhere described in their own deeds.

15 In modern terms, these cases,
16 these 20th Century cases, resulted in what we
17 would deem to be unconstitutional shifts of
18 property rights from railroads and the public
19 to private landowners. And I want to
20 emphasize the public. I strongly support the
21 idea that the railroads and the landowners are
22 not the only parties at the table and should

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1 not be the only parties at the table.

2 This conflict between the 19th
3 Century pro railroad cases, as I call it just
4 for shorthand, in the early 20th Century,
5 anti-railroad cases has provided the legal
6 framework for most of these rail banking and
7 rail property disputes, but as a property
8 professor, I am deeply troubled by the anti-
9 railroad cases from the 20th Century and the
10 exceptions they have created to standard, well
11 reasoned property doctrines.

12 For instance, it's a standard rule
13 that one cannot claim property rights by
14 challenging the weakness of one's neighbor's
15 title, but only on the strength of one's own.
16 This principal is jettisoned in these railroad
17 cases, and I should say has been exploited by
18 the adjacent landowners in many of these
19 lawsuits.

20 A second is that the law construes
21 ambiguities against the grantor of property.
22 This rule, too, is ignored by many courts in

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1 the railroad context only.

2 A third is that the law abhors
3 forfeiture and will not interpret ambiguous
4 language to create reversionary rights unless
5 the language is explicit. This, too is a rule
6 that applies everywhere except in the railroad
7 property context.

8 A fourth is that rail property is
9 unique in class action suits or inappropriate
10 mechanisms for trying title to property.
11 Another long time rule is ignored.

12 I mention these examples, and I
13 can give more, to explain why I think these
14 anti-railroad cases of the 20th Century are,
15 quite frankly, wrong. For over 900 years, the
16 common law rules of property have evolved
17 slowly and carefully -- and I have to say I
18 rather enjoy the 16th century. It was a very
19 nice century -- to protect the interests of
20 those in possession and those with the best
21 and most equitable claims.

22 Yet over a very short period these

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1 rules were cast aside to provide results
2 oriented decisions to punish railroads for
3 their widespread abuses in other areas.

4 The problem with this shortsighted
5 rulemaking by countless state courts is that
6 these rules quickly get expanded to undermine
7 the property rights of all.

8 Another problem is that that they
9 are expensive and time consuming to correct,
10 yet they are being corrected. The litigation
11 over the past 25 years has resulted in
12 numerous state courts analyzing their history
13 of deconstruction rule interpretation and
14 reversing many of these anti-railroad rules.
15 Minnesota is a perfect case. Iowa is another
16 case; Maryland.

17 When they have placed their
18 precedents into historical context, they have
19 seen that the better rules are ones that do
20 not create exceptions for railroad deeds that
21 are not based on punishing the railroads for
22 this behavior and that harmonize property

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1 rules across a broad spectrum of landowners.
2 They also acknowledge public rights in
3 railroad corridors.

4 Some states have not made that
5 shift and merely mimic the anti-railroad rules
6 from the recent past, but those states are
7 discovering that the exceptions that are being
8 perpetuated are leading to quite serious
9 unintended consequences, conflicts among
10 property rules, tension and land uses and a
11 general weakening of property rights
12 protections for all.

13 The spate of recent railroad
14 property cases is actually resolving many of
15 these conflicts and forcing states to come to
16 grips with the quite exceptional rules they
17 adopted in the early 20th Century.

18 Moreover, there are relatively few
19 cases in the grand scheme of things if you
20 think about it. In the first 25 years of
21 railroad construction, there were far more
22 cases than we have today disputing railroad

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1 property rights, and while the cases today may
2 seem expensive and bitter, I believe we're
3 making progress.

4 So I want to assure the Board that
5 the legal challenges are not unusual. They
6 are progressing toward more stable and
7 coherent rules that will protect the property
8 rights of everyone.

9 I would like to take a quick
10 moment to address a number of erroneous points
11 made by NARPO. First, the claim is that
12 railroads acquired most of their property
13 rights as easements is simply untrue. I have
14 examined over probably 3,000 and my students
15 and I have examined over 7,000 railroad deeds
16 from the 19th Century, and I can attest that
17 over 80 percent of those from States like
18 Pennsylvania, New York, Ohio, Indiana, Kansas,
19 Missouri, Iowa, Idaho and Washington are
20 clear, unambiguous fee simple absolute deeds
21 in the railroads. Most of the remaining 20
22 percent were intended to be fee simple deeds,

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1 but contain what would later become in this
2 later period of case law ambiguous elements,
3 like use of the term "right-of-way."

4 In the 19th Century, when these
5 deeds were granted, the parties understood
6 that fee interests were being conveyed and the
7 courts for the most part supported that. And
8 the courts applied basic common law property
9 rules of construction to protect the title of
10 the railroads, which were the parties in
11 possession who had paid valuable consideration
12 for that land.

13 And I have to say I am not paid by
14 the railroad. This is my belief that this is
15 an area of law where courts really need to do
16 some serious thinking.

17 Second, the vast majority -- and I
18 don't have specific data on this, but from
19 what I have looked on a somewhat anecdotal
20 basis -- well over 90 percent of adjacent
21 landowners do not acquire any rights to
22 abutting railroad corridor lands when they

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1 acquire their property. Most of their deeds
2 exclude the railroad corridor land from land
3 being conveyed to them, and they should not be
4 able to claim property rights simply because
5 they adjoin land that may have a clouded
6 title, especially when that land is infused
7 with the public interest.

8 They do not pay to purchase the
9 land underlying the railroad corridor, and
10 they have not paid taxes on that land.

11 Moreover, where railroads have
12 taken a tax deduction for donating corridor
13 land, those deductions have not gone
14 unchecked. The Internal Revenue Service has
15 challenged many of the claims and ultimately
16 settled the appropriate tax disputes by
17 examining the railroad's title to the lands
18 being donated, and I can say that because I
19 have been part of that.

20 The Department of Justice is not
21 protracting litigation. They're defending the
22 public Treasury against claimants who hear the

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1 clink of a cash register when they see a
2 public trail being built. As you know, the
3 Supreme Court in Preseault did not hold that
4 all rail banking and interim trail use would
5 be compensable. Quite the contrary, the
6 federal courts determined that whether
7 compensation due is on a case-by-case matter
8 based on intricacies of different state law.

9 So arguing the legal issues are
10 complex and are slowly being resolved is one
11 of my goals, but my second is to assure you
12 that rail banking is a success, that the
13 difficulties of reactivation can be resolved
14 relatively easily. I support the suggestion
15 made by Richard Timmons of the American Short
16 Line Railroad Association of creating a
17 committee to study possible future regulation,
18 changes to facilitate the primary goal of rail
19 banking which is corridor -- I have one more.
20 Thank you.

21 But we must not forget that as
22 land becomes more scarce and resources more

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1 limited, we should put land to its highest and
2 best use whenever possible. It may be that
3 recreational trails are higher and better uses
4 in some instances, and this goes back to Mr.
5 Montange's point earlier: would we destroy a
6 popular trail like the Capital Crescent Trail,
7 especially that had light rail on it, to
8 reestablish freight service for one shipper?

9 This Board can offer significant
10 leadership on how we can develop rules to
11 balance the competing interests and protect
12 the public's rights in these national assets.

13 And I look forward to the Board's
14 guidance in establishing regulations to help
15 balance these interests so I can move on to
16 something else, my scholarship.

17 Thank you.

18 CHAIRMAN MULVEY: Thank you very
19 much.

20 Just a couple of questions. Ms.
21 Kauffman, how do you reconcile your claim that
22 the existence of a trail reduces the property

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1 values for adjacent property owners with the
2 Conservancy's point that, in fact, property
3 values next to trails actually are higher?

4 Do you have -- and I guess the
5 question is also going to be addressed to Ms.
6 Fowler too -- are there any studies that have
7 been done that prove one way or the other what
8 the impact on property values from the
9 presence of a trail is?

10 MS. KAUFFMAN: Yes, Your Honor.
11 Yes, Mr. Chairman. In the written testimony
12 of the National Association of Reversionary
13 Property Owners, you were referred to one
14 study which I believe is available on a public
15 Website, and I believe was done in the State
16 of Washington. It's on page 3 of the written
17 testimony. The results of the study, the
18 effect of environmental zoning and amenities
19 on property values in Portland, Oregon --

20 CHAIRMAN MULVEY: Land Economics,
21 is that the one?

22 MS. KAUFFMAN: Yes.

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1 CHAIRMAN MULVEY: The 2004?

2 MS. KAUFFMAN: The property values
3 next to trails and cemeteries indicated a 5.4
4 percent yearly decrease in property values.

5 Now, that's different than being
6 in the vicinity of a trail. I think the
7 difference might be analogous to it's great to
8 live in a neighborhood with good schools, but
9 not necessarily great to own the house next to
10 the playground, and I think you need to be
11 careful when you're looking at property value
12 research to look at research focused on
13 exactly adjacent landowners versus the effect
14 on the neighborhood in general.

15 In addition, there is a study in
16 Minnesota which I think is more useful if I
17 submit a short written follow-up to the
18 Chairman. It's available online. It's named
19 "Effect of Off-street Bike trails on home
20 values in Hennepin County, Minnesota," and it
21 again showed a decrease in values for the
22 particular adjacent landowners.

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1 CHAIRMAN MULVEY: In many cases
2 the landowners were not the owners of the land
3 at the time the railroad was built, and that
4 the land has passed into many, many hands
5 several times.

6 How do you distinguish between
7 people who have bought the lands and, one
8 would assume paid a discounted amount for the
9 land because it was on an abandoned right-of-
10 way which could be converted to a trail,
11 versus somebody who had the land in the family
12 for all the time since the railroad was built
13 back in the 19th Century? Should we make a
14 distinction between people who bought the land
15 afterwards from people whose family had the
16 land at the time the railroad was built?

17 MS. KAUFFMAN: Well, Mr. Chairman,
18 I would say with respect, and possibly from
19 where you sit happily, that is an issue under
20 the Tucker Act for landowners to prove up with
21 they prove the amount of value they lost when
22 the trail went through.

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1 I think Professor Wright is too
2 modest when she describes herself as strictly
3 an academic. In fact, we often appear on
4 opposite sides of cases with Professor Wright.
5 You know, she was paid to examine all of those
6 deeds in Ohio, and actually that's a current
7 case right now coming out of the Penn Central
8 bankruptcy that we on opposite sides of.

9 Within the Tucker Act cases, what
10 happens is there is a class action brought of
11 all the adjoining landowners. In most of the
12 states there's a center line presumption that
13 says regardless of what your deed says, you
14 own to the center line, and that is in part
15 because the law doesn't want little strips and
16 pieces of property going around without anyone
17 who owns it.

18 So all of the class members then
19 come in, and they have the opportunity through
20 the process to either have it shown that their
21 title, the current title they own through
22 their chain of title gives them compensable

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1 rights underlying the right-of-way or doesn't.
2 Some of them win, some of them lose in that
3 process.

4 My firm has experience in actually
5 working the Tucker Act class actions through
6 to the end when all of the winners and losers
7 have been called, and in Iowa, because of the
8 state court decision -- and the state law on
9 deed interpretation has a major impact here --
10 in Iowa a lot of people lost because of state
11 law, and that's what the law says, and there
12 was due process, and that's how we go forward.

13 In other states, including Indiana
14 where the law is very favorable to landowners,
15 and Ms. Wright was involved in the litigation
16 we did in Indiana as well; in other states, 50
17 to 80 percent of the time the adjoining
18 landowners doing a simple state law based deed
19 analysis are found to have had compensable
20 reversionary interest.

21 And then the question is: what's
22 the value? And at that point appraisers come

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1 in and say this was the value before the
2 trail; this was the value after. It's a
3 pretty simple standard analysis that you would
4 go through any time a governmental entity
5 takes a piece of property and then is faced
6 with compensating the landowners under the
7 Fifth Amendment.

8 So the Board is not going to have
9 to decide how to value those interests. The
10 mechanism for getting value for those
11 interests is the Tucker Act mechanism, and
12 there is a process that is followed in those
13 cases to make those decisions.

14 I think the important issue for
15 the Board is to make sure that the Board's
16 piece of the process is fairly administered so
17 that those landowners have the ability to get
18 into federal court and find out whether their
19 deed is one of the deeds where Danaya Wright's
20 view of deed construction is going to hold
21 sway or whether it is going to be one where
22 they are found to have a reversionary

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1 interest.

2 It will vary from property to
3 property. It's going to vary from state to
4 state.

5 CHAIRMAN MULVEY: The interest of
6 NARPO though is for the property owners to be
7 fairly compensated; is that true, rather than
8 preclude the development of a trail?

9 MS. KAUFFMAN: Well, the testimony
10 of NARPO that they have submitted in response
11 to your request for this hearing is all
12 focused on making the process more fair for
13 adjoining landowners, and that is the
14 testimony that they've asked me to come here
15 and present to you today.

16 I'm not in a position to tell the
17 Chairman what NARPO might -- you know, whether
18 they would be against the Trail Act or for the
19 Trail Act. That is, as the Chairman pointed
20 out, not the focus of this hearing and,
21 therefore, not the focus of the testimony I'm
22 here to present.

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1 CHAIRMAN MULVEY: Well, I did
2 notice in the testimony that there was
3 reference to crimes that are committed on
4 trails; that when you put a trail through
5 somebody's property, of course, you make that
6 accessible to the public at large, and not
7 everyone in the public at large is equally a
8 good citizen and that there are crimes
9 committed on these trails.

10 MS. KAUFFMAN: And it's
11 particularly a problem in these long, linear
12 parks, you know. On the High Line Trail for
13 a mile and a half through Manhattan, very
14 dense population, lots of eyes on the
15 property; that's going to be one thing. You
16 have 350 miles of trail through Nebraska going
17 by farmhouses, going by homes, going by
18 businesses. It is just a natural fact of our
19 society that security issues will arise there,
20 and it's going to be an issue for adjoining
21 landowners.

22 CHAIRMAN MULVEY: Wouldn't they

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1 also arise on farm-to-market roads which also
2 go through rural areas and through farmland,
3 et cetera? I mean, they are also places where
4 these kinds of things could happen beyond just
5 a trail.

6 MS. KAUFFMAN: It is absolutely
7 the case, and I don't think the National
8 Association of Reversionary Property Owners
9 means to imply that the only place crime
10 happens is on a trail.

11 I think, however, that there are
12 unique factors of trails that you are not
13 going to have. When you have a street, you
14 have other cars on the street. You have other
15 houses looking on the street. Depending upon
16 the area, you might have street lights; you
17 might have sidewalks; you might have lots of
18 the community action that is going to serve to
19 keep crime down.

20 If you have 350 miles going
21 through rural area without any of those even
22 normal rural area road factors -- and I have

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1 a farm in Minnesota, and you know every car on
2 that road, and you wave to every car on that
3 road, and you know, when that must be a rental
4 car because you haven't seen that car before.

5 You're just not going to get that
6 on a long, long linear trail, and it's going
7 to have a factor that has an impact on crime.

8 CHAIRMAN MULVEY: Ms. Wright, you
9 note that the level of implementation of the
10 Trails Acts and rail banking varies widely by
11 state. What distinguishes a state that
12 actively facilitates rail banking from those
13 that do not in terms of policy, funding, et
14 cetera? Is there any kind of pattern?

15 MS. WRIGHT: There's quite a
16 number of differences. Some states will
17 actively acquire the corridors. Well, first
18 they'll monitor abandonments. They might have
19 them on their master plans or trail rec parks'
20 master plans. They'll monitor them. They
21 will actually acquire, negotiate with the
22 railroads and acquire this land, and then they

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1 will be active in obtaining grants to help
2 develop the land, to develop the trail.

3 Other states take this not only a
4 hands off approach. If a private entity wants
5 to go out and negotiate a Trails Act
6 agreement, fine, but don't come to the Parks
7 Department or the DOT for assistance.

8 Some states it's very common that
9 a lot of state Parks Departments don't have
10 eminent domain powers, but the DOTs do, and so
11 if you're in a state where trail acquisition
12 is primarily funneled to your Parks
13 Department, you severely hamstring the ability
14 of the Parks Department by not giving eminent
15 domain power to possibly, you know, fix any
16 gaps in a corridor.

17 State of Indiana I remember had a
18 rule that said that you had to develop the
19 trail to the same specifications as you would
20 a highway. So it's fine to have a trails and
21 greenways office that you might even be
22 encouraging acquisition of trails, but then to

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1 turn around and require that it meet those
2 requirements.

3 So there's a whole handful of
4 differences. Other states simply promote --
5 I mean, there's also a number of ways in which
6 states that have interpreted their property
7 laws in a way that is more supportive of the
8 integrity of the corridor and the possibility
9 of shifting that use from a railroad to
10 another public use; you recognize these as
11 public highways, multi-use corridors, and that
12 trail use is not an additional burden, for
13 instance.

14 In those states, the state law,
15 the state courts and the state common law have
16 evolved rules that will facilitate; at least
17 I should say reduce hopefully the litigation
18 which then frees up more money to build the
19 trail.

20 So I mean, there's a whole host of
21 ways in which state laws differ.

22 CHAIRMAN MULVEY: Vice Chairman

1 Nottingham.

2 VICE CHAIRMAN NOTTINGHAM: Thank
3 you, Acting Chairman Mulvey.

4 Ms. Kauffman, I think you present
5 a very real legal conundrum that personally I
6 think deserves some STB attention. The fact
7 that we very well not only could have but have
8 had proposed or potential trail agreements in
9 play but not consummated for more than six
10 years, yet the federal court of claims is
11 increasingly apparently looking at six years
12 from the date of our publishing of the notice
13 of interim trail use --

14 MS. KAUFFMAN: Exactly. It's a
15 real Catch-22.

16 VICE CHAIRMAN NOTTINGHAM: -- as
17 the operative date for whether or not someone
18 can even bring a Tucker Act claim to redeem or
19 receive the benefit of one of our core civil
20 rights in the Bill of Rights, the Fifth
21 Amendment takings clause is a pretty serious
22 conundrum that we're in.

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1 You know, I guarantee you if those
2 damages to the successful Tucker Act
3 plaintiffs came out of the STB budget, we'd be
4 all over coming up with a solution to that
5 situation. The fact that it's out of nobody's
6 budget, it's an annoyance to the Justice
7 Department. It doesn't really come out of
8 Justice's budget, it's my understanding. So
9 it's just out there.

10 If we required, because we've had
11 testimony already that we could require
12 through some fairly simple rulemaking
13 activity, and I think we could, notice of
14 consummation of a trail agreement to be filed
15 with the Board, that we in turn could
16 acknowledge receipt of that through some kind
17 of notice; that could be potentially the
18 operative start time for the six-year Tucker
19 Act statute of limitations, could it not?

20 MS. KAUFFMAN: It could. It quite
21 possibly should, but that's not what the
22 federal circuit determined, and you know, I

1 think --

2 VICE CHAIRMAN NOTTINGHAM: Well,
3 in fairness, because there is no such notice.

4 MS. KAUFFMAN: right.

5 VICE CHAIRMAN NOTTINGHAM: They
6 picked the only notice they could find is my
7 understanding.

8 MS. KAUFFMAN: And part of the
9 dislocation you've indicated, you know, the
10 federal government who is going to pay the
11 Tucker Act doesn't sit down year to year and
12 say, "Yes, it's worth the public money to have
13 this bike trail going through."

14 The compensations going on in the
15 Tucker Act, you're doing what is within your
16 purview to regulate. If it is within your
17 purview to control the start of the statute of
18 limitations and have that start be the
19 consummation of the trail agreement, that
20 would help and if there was notice to the land
21 owners, that would help us out of the Catch-
22 22.

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1 What I am not sure about is
2 whether this -- and perhaps it's something we
3 need to look into and provide supplemental
4 filing on it -- of whether this board can be
5 the authority to define when that statute of
6 limitations starts running or whether that is
7 still something the federal circuit is going
8 to decide. Sometimes those jurisdictional
9 issues take five, six, seven years to
10 determine.

11 You know, I just took Amtrak up to
12 New York for the Fourth of July, and every
13 time you get on the train and off they say,
14 "Mind the gap," and one of the things I was
15 thinking about for these property owners
16 coming in is my word to this Board is, "Mind
17 the gap," because this is not the usual
18 rational way in which we go about public use
19 in compensating citizens in this country.

20 So if there is the authority for
21 you to define when that statute of limitations
22 starts and if it is the consummation of the

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1 trail agreement and if the adjoining
2 landowners who I think under due process
3 rights have a right to actual direct notice of
4 that; if we can bundle that all together, that
5 would be excellent.

6 If we can't do that, then we need
7 to move the notice process back and still be
8 mindful of unlimited extensions on the notice
9 of interim trail use because that just leaves
10 all those property rights in limbo.

11 VICE CHAIRMAN NOTTINGHAM: I would
12 suggest just as one Commissioner, not on
13 behalf of the entire Board by any means, but
14 that this Board would never be the guardian
15 of the Tucker Act and the agency or entity
16 that sets statute of limitations policy under
17 the Tucker Act, but we are the guardian or
18 custodian of some very important components of
19 the Trails Act, and the whole process of going
20 through the notice of the beginning of trail
21 negotiations very easily could become the
22 publisher of a notice documenting the

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1 completion.

2 So imagine if every town or county
3 or local government who announced a public
4 hearing to think about and ponder building a
5 park or a jail or school had that beginning of
6 that thought process count as the taking
7 event. And then how do you value?

8 In other words, your clients, what
9 they have to do now, I assume, is in advance
10 of the consummation of the trail agreement
11 potentially file a lawsuit and then be open to
12 the claim, well, who's taking your property.
13 There's no trail.

14 MS. KAUFFMAN: Exactly.

15 VICE CHAIRMAN NOTTINGHAM: That's
16 a tough case to win, right? And you lose the
17 case and hear later that the trail is
18 consummated, and then you're told that you're
19 shut out of court because six years went past
20 from the time of the first notice.

21 MS. KAUFFMAN: Mr. Vice Chairman,
22 I welcome your solution to it.

1 VICE CHAIRMAN NOTTINGHAM: The
2 claims court could. It would be within their
3 purview, I would suggest, if we were to take
4 such an action to take notice of that and say,
5 "Wow, there is now a more operative, a more
6 valid trigger to the statute."

7 MS. KAUFFMAN: And under --

8 VICE CHAIRMAN NOTTINGHAM: There
9 may not have been before, but there is now.

10 MS. KAUFFMAN: And under Chevron,
11 deference is due to your interpretation of the
12 statute, which you are responsible for
13 regulating.

14 VICE CHAIRMAN NOTTINGHAM: Well, I
15 know that from our distant vantage point
16 sitting here in Washington, D.C., these six
17 and eight and 12 and 15 foot strips that run
18 across our country may not be the most
19 valuable Tucker Act awards out there, but to
20 me it's a matter of principle that people,
21 whether it's an inch or six inches or six
22 miles of land, that there be a fair process

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1 for someone to bring a claim.

2 And if they've got a claim, great.
3 If they don't, they should lose. That's what
4 our system is about.

5 I do have a question for Ms.
6 Wright, Professor Wright. Thank you for being
7 here, as well.

8 I appreciated your tour through
9 the history books a little bit, and it
10 occurred to me, it reminded me a little bit of
11 Justice Scalia's concurring opinion in the
12 Preseault Supreme Court decision out of the
13 Vermont case in the Second Circuit, where he
14 emphasized, and I think the Court generally,
15 even though it was a concurring opinion,
16 emphasized that property rights are really
17 creatures that are born out of state law, and
18 they can vary from state to state, and there's
19 no real system of federally conferred property
20 rights in our tradition.

21 And that can evolve, as you
22 pointed out. There could be periods of time

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1 where state action and state policy can
2 enhance certain types of property rights and
3 also do the opposite of enhancing, can dilute
4 or devalue certain property rights.

5 Do you have anything to say about
6 this ongoing commentary we have here at the
7 Board, and sometimes we hear it in the halls
8 of Congress and elsewhere that railroad
9 property rights are de facto because it's
10 railroad, that if the railroad is involved
11 that there's somehow just de facto a lesser
12 form of property rights, or would you suggest
13 it's more important to look at each deed and
14 do the research because in some cases it can
15 be the most protected type of private property
16 rights deserving the fullest protections or
17 something less than that, depending on what's
18 in the record?

19 MS. WRIGHT: I think we need to
20 think of it in two different contexts. When
21 we're talking about an adjacent landowner and
22 the railroad, two ostensibly private entities

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1 doing basic deed interpretation the way any
2 two neighbors would be doing deed
3 interpretation, the rules should be the same;
4 the rules of deed interpretation should be the
5 same. The problem is they're not.

6 And part of the reason they're not
7 has to do with a very complicated history.
8 But another reason that states have seen it to
9 be permissible to create different rules is
10 because the railroads are these quasi-public
11 entities that have eminent domain powers.
12 They've been given tax deductions. States
13 invested heavily in stocks to build these
14 railroads when they originally came through,
15 and so when we're talking about a deed
16 interpretation rule, I think the rule should
17 be the same.

18 But when we're talking about other
19 potential stakeholders in an intact corridor
20 that was constructed with significant amounts
21 of public welfare, that the public's rights to
22 reuse these corridors for utility purposes,

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1 for light rail, for trails, for other public
2 transportation purposes to me seem just
3 absolutely without question a factor that
4 should be taken into account.

5 And the problem is adjacent
6 landowners and railroads, neither one, have a
7 real incentive to bring the public right to
8 the table. They're not going to bring someone
9 in representing the general public into
10 litigation, and so that's really why I'm here,
11 is to try to speak for the general public and
12 to recognize that as a result of extensive
13 long-term regulation of the railroads this
14 property is property infused with a public
15 trust.

16 And we recognize this with public
17 trust lands. We don't allow wetlands. We
18 don't allow, you know, land right adjacent to
19 waterways, in waterways that are trust lands
20 to be privatized.

21 So I think that when we're talking
22 about eminent domain power, tax deductions

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1 given to railroads that then purchase
2 property, that this property is infused with
3 the public interest, and many states are
4 moving along in that line and recognizing
5 that.

6 VICE CHAIRMAN NOTTINGHAM: In your
7 research, are there federal courts of appeals
8 or U.S. Supreme Court decisions that actually
9 arrive at the conclusion that because
10 something is owned by a railroad that that's
11 sort of the end of the inquiry; that it's
12 therefore the property is entitled to a less
13 degree of private property rights?

14 MS. WRIGHT: Absolutely,
15 absolutely. I mean, all you can think of --
16 I mean, you're a lawyer. You know, the
17 infamous Lochner era and the notorious history
18 of Lochner era cases, and yet the vast
19 majority of cases during the progressive era
20 where the courts were not supposedly
21 protecting these very robust property rights
22 were railroad cases where they held, you know,

1 of course you can regulate railroad rates. Of
2 course you can tell railroads that they can't
3 privatize this land or they can't restrict
4 elevators, you know, shippers who want to put
5 elevators over rail lines to access waterways
6 and things like that.

7 So actually there's a tremendous
8 amount of case law from that period that
9 recognizes that railroads are in a different
10 situation because of this common carrier
11 public, quasi-public character.

12 We wouldn't be asking these
13 questions if we were talking about a
14 Department of Transportation because a DOT,
15 the state purchases the roadways. They use
16 eminent domain. They use the public money to
17 purchase it, and that land is now public land.
18 It's publicly owned. It's held in the public
19 trust.

20 These quasi-railroad lands are, i
21 think, closer to those highway lands than to
22 just the farm out in Minnesota.

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1 VICE CHAIRMAN NOTTINGHAM: Thank
2 you.

3 Ms. Kauffman, you had a comment on
4 that line?

5 MS. KAUFFMAN: I did. I spend
6 most of my time litigating these issues
7 against telecommunications companies who have
8 paid money to the railroads and not to the
9 underlying fee owners, suing railroads who
10 have tried to sell back to adjoining
11 landowners the land they already own.

12 In another litigation where
13 Professor Wright and I are often on opposite
14 sides, this is, I have to say, the first time
15 that I have heard railroads' rights being
16 described as lesser than the rights of other
17 people. What I usually hear coming from the
18 other side is, sure, we only have an easement,
19 but an easement in the hands of a railroad is
20 tantamount to a fee.

21 So we're going to act as if our
22 easement is just a fee. It is comforting for

1 me to hear that the railroad doesn't get
2 enhanced rights. When they have an easement
3 deed, they've got an easement deed, and they
4 don't get to go around saying it's tantamount
5 to a fee.

6 The other comment I wanted to make
7 was that going back to our Constitution and
8 also touching on the fact that our property
9 law coming over from England was really some
10 of the first law that got developed. Much of
11 the law that followed came after we developed
12 property law because it was so important to
13 us, is that there are many reasons why a
14 government might decide that there is a public
15 need and there's a public use for a piece of
16 property.

17 Nothing in the Fifth Amendment to
18 the Constitution keeps the government from
19 saying there is a greater need; there is a
20 higher need; there is a public need. So even
21 though you, Mr. and Mrs. Landowner, don't
22 really want to give up your property, we're

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1 taking it.

2 That is permitted by our
3 Constitution. We get as a government to act
4 in the public interest.

5 What we don't get to do is say
6 there is a greater public need. So we're
7 taking your property and we're not
8 compensating you for it. That's what we don't
9 get to do.

10 VICE CHAIRMAN NOTTINGHAM: I
11 understand. I'll wrap up momentarily, Mr.
12 Chairman, if it's okay.

13 I did want to just clarify.
14 Professor Wright, you did mention, point out
15 that in your study most of the property
16 accumulated over the decades and centuries by
17 railroads was actually purchased in fee
18 simple, complete full ownership, no
19 reversionary.

20 But would you at least agree that
21 a significant number of parcels out there were
22 purchased under terms of something less than

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1 fee, for example, reversionary?

2 MS. WRIGHT: Absolutely, yes.

3 VICE CHAIRMAN NOTTINGHAM: And
4 would you agree that that was probably not an
5 accident? In other words, the railroad
6 lawyers didn't just mess up and sign the wrong
7 form. There was at least one party, the
8 railroads, certainly had smart lawyers like
9 Abraham Lincoln and others working for them in
10 the past, but they probably did that for a
11 reason, that they wanted to pay more for the
12 property or pay less for the property than fee
13 simple would be.

14 MS. WRIGHT: I don't think they
15 paid more or less for the property.

16 VICE CHAIRMAN NOTTINGHAM: You
17 don't think they paid less for the property
18 because they got a reversionary clause?

19 MS. WRIGHT: No, I really don't.

20 VICE CHAIRMAN NOTTINGHAM: Why
21 would they give up the reversionary clause?
22 I'm just curious. Why wouldn't they just grab

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1 --

2 MS. WRIGHT: No one ever thought
3 the railroads would go away. They didn't
4 think it mattered. They really didn't think
5 it mattered.

6 VICE CHAIRMAN NOTTINGHAM: Just
7 had to make the landowner feel a little
8 better?

9 MS. WRIGHT: That's right. That's
10 right. They were far more concerned with the
11 railroad not being built, and so there were a
12 lot of clauses that if they weren't built
13 within a certain period of time they land
14 would be forfeited and come back, but no one
15 ever thought the railroads would leave. These
16 were --

17 VICE CHAIRMAN NOTTINGHAM: I mean,
18 look at our history. Look at canals. I mean,
19 George Washington was convinced that canals
20 would be the greatest, longest, biggest impact
21 transportation development ever. I mean even
22 in the 1800s people had already an

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1 understanding that today's great new mode
2 might not be tomorrow's. I don't think
3 railroad lawyers have ever been accused of
4 being overly naive even by their biggest
5 critics.

6 (Laughter.)

7 MS. WRIGHT: Well, there are a few
8 in the room. So I'm certainly not going to --

9 VICE CHAIRMAN NOTTINGHAM: That
10 they just developed reversionary purchase
11 agreements because they would make the
12 property owners feel better. That's the first
13 I've heard that. I think they did it --
14 that's fair to assume they did it to save some
15 money because they can get that for a little
16 less, and maybe they did it in a tricky way.
17 they might have winked and said, "Oh, but
18 don't worry. We're going to -- it's less than
19 you'd like for your property, but don't worry.
20 You could get it back."

21 In other words, so they paid
22 something less than you'd like for your

1 property, but don't worry. You could get it
2 back.

3 In other words, so they paid
4 something less, and to me that has some legal
5 meaning, and it means that the reversionary
6 owner actually retained something.

7 MS. WRIGHT: I have no doubt there
8 are certainly deeds in which the word
9 "easement" is used. I have not seen a
10 railroad deed from the 19th Century that used
11 the word "easement." They use the word, you
12 know, "give, grant, bargain, sell and convey,"
13 or "grant, bargain, convey and release the
14 land," a strip of land.

15 VICE CHAIRMAN NOTTINGHAM: "For so
16 long as."

17 MS. WRIGHT: "For so long" or
18 "over, through and across my land." It's not
19 described very well. There's all sorts of
20 ambiguities in these deeds.

21 But if we realize that in the
22 1840s and 1850s when the first sort of spate

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1 of construction was happening, there wasn't
2 even a concept of a railroad easement. The
3 idea that one would purchase only a surface
4 right or use right was pretty unknown.
5 Because the railroads had to have exclusive
6 access to this corridor. They had to be able
7 to exclude the landowners, and so everybody
8 understood that what was generally being
9 acquired was the land. You know, they had to
10 be able to fence it and control access to it.

11 Later, especially when we get into
12 about the 1880s when we have 70,000 miles of
13 new track laid in that decade, you begin to
14 see a real shift, and by this time railroads
15 have sort of figured out what they're doing.
16 They've had 30 years to do it. Their deeds
17 are a little bit better in the sense that they
18 often tried to get releases or contracts, and
19 then they would come back and execute a deed
20 that would have more explicit descriptions.

21 They often used the term "right-
22 of-way." "We're acquiring right-of-way."

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1 VICE CHAIRMAN NOTTINGHAM: If I
2 could jump in, thank you for yours. I would
3 suggest that the whole reason we came up with
4 -- and I say "we" -- the whole reason some
5 smart folks in England and Scotland and
6 Ireland developed something that became known
7 as railroads was coal mining, and coal mining
8 was where we really started to expand the
9 understanding of surface rights, mineral
10 rights.

11 So the law of property had
12 actually gotten pretty sophisticated on things
13 like surface rights, rights that are less than
14 100 percent of fee simple, and the whole
15 reason we had railroads was that it was a much
16 easier way to get coal out of the ground, and
17 then that developed from there.

18 But, Ms. Kauffman, do you have
19 anything to contribute to this?

20 MS. KAUFFMAN: No, I was just
21 thinking of fee simple as the bundle of
22 rights. I mean, to say it's a bundle of

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1 rights says that they are separate, separable
2 in time or in space.

3 I've seen a lot of railroad deeds
4 that say "easement." So but, again, going
5 back to the fact that thankfully for this
6 Board you're not going to have to plow through
7 those easements. That's the federal circuit
8 that has to plow through the easements, but it
9 is important to recognize that that process
10 needs its due time, and the playing field
11 which is set primarily by this Board needs to
12 be one that permits that process to go
13 forward.

14 VICE CHAIRMAN NOTTINGHAM: Thank
15 you.

16 I have no further questions, Mr.
17 Acting Chairman.

18 CHAIRMAN MULVEY: Well, thank you.

19 I would just add a couple of small
20 points here. Remember when this country was
21 founded originally, it was life, liberty and
22 pursuit of property. Well, no, but then

1 people thought better of that and ultimately
2 at that time also relatively few people were
3 property endowed, and we have progressed since
4 that. So it's pursuit of happiness.

5 And there's also, I think, a
6 broader understanding of the public good and
7 public property as well. So in terms of the
8 analogy to the canals, which the Vice Chairman
9 made, I would remind him that Mr. Washington
10 was dead 20 years before the Erie Canal was
11 finished. I agree with your interpretation of
12 history, Ms. Wright; that I don't think
13 anybody at the time with 270,000 miles of
14 railroads in the 1880s thought the railroads
15 would ever go away. I don't think it was
16 sloppy work on the part of the railroad
17 lawyers who the Vice Chairman correctly says
18 are probably the brightest lawyers of the
19 time.

20 But nonetheless, the expectation
21 was this was not going to be a problem. So I
22 think you've got a good reading of history.

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1 VICE CHAIRMAN NOTTINGHAM: Mr.
2 Acting Chairman, could I just respond?

3 CHAIRMAN MULVEY: Yes, okay.

4 VICE CHAIRMAN NOTTINGHAM: I do
5 agree that my passing knowledge of General
6 Washington and President Washington is you're
7 correct. He never got to enjoy a canal, but
8 his family would tell you and his ancestors
9 they sure wished they had all the money he
10 laid out to help buy some of the land and
11 investment in the land companies in
12 preparation of the canal system coming. He
13 was I call him our first transportation
14 leader. He was a surveyor, a path finder.
15 That's what he loved to do, and he stumbled
16 from that into the military and into
17 government. But we need to always claim him
18 as a transportation person because we don't
19 have enough great leaders in history, but --

20 CHAIRMAN MULVEY: And as a great
21 Virginian.

22 VICE CHAIRMAN NOTTINGHAM: We can

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1 have a whole other hearing on that perhaps,
2 but that's all I have.

3 CHAIRMAN MULVEY: Well, and as a
4 great Virginian as well, and let me thank all
5 of the panelists today for their coming and
6 testifying. It has been very, very helpful
7 and very, very useful.

8 I also want to thank the Board
9 staff for the hard work they put in in putting
10 together this hearing.

11 And thank you all and have a safe
12 trip home. Thank you.

13 (Whereupon, 12:20 p.m., the
14 hearing in the above-entitled matter was
15 concluded.)

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22

A				
AAR 107:17	111:19 absolute 170:20	164:12 171:21	193:4 195:1 actionable 104:1	176:13,22 195:21
109:18 110:10,16	absolutely 183:6	172:1 184:17,21	actions 15:8 145:8	197:5,18
111:20 113:10	197:3 198:14,15	184:22	146:8 154:8	adjoin 148:16
132:19	203:2	acquired 26:6 91:5	155:18 179:5	172:5
abandon 5:4 61:18	absorbing 27:15	121:15 122:17	activate 121:20	adjoining 75:19
63:4 73:15 76:13	abstract 100:13	170:12 207:9	active 146:10 185:1	95:3 145:21
79:1 81:17 82:1,2	absurd 104:16	acquiring 30:21,21	actively 184:12,17	146:11 148:19
abandoned 4:20	absurdity 24:21	77:16 122:3	activities 44:21	149:3,19 150:12
5:11 6:5,15 11:6	abuses 164:10	207:22	activity 19:2 45:20	150:20 151:4,16
16:10 17:18 32:14	168:3	acquisition 32:14	114:18 117:17	151:20 152:19
40:19 42:11,16,22	abutting 165:13	93:5,8 185:11,22	133:8 188:13	153:5 154:1,9
84:13 100:2 108:8	171:22	acquisitions 93:3	Acts 184:10	155:18 156:21
109:12 177:9	AB-103.21(x)	act 4:14 5:3 6:1,11	actual 31:4 98:4	159:16 161:20
abandoning 31:7	123:11	7:3 8:18 10:8	153:6 191:3	178:11 179:17
48:3 131:2	academic 178:3	13:12 14:17 15:22	add 82:16 111:4	181:13 182:20
abandonment	access 14:22 27:3	22:20 23:4 24:14	120:12 129:15	191:1 200:10
10:15,22 17:21	199:5 207:6,10	28:2,2 34:21	131:1 209:19	adjustment 33:9
21:4,5,7 23:19	accesses 116:15	56:17,21 59:6	addition 35:21 37:1	administered
24:3 32:12 33:7,8	accessible 182:6	72:20,21,22 73:2	38:1 73:4 87:7	107:15,19 148:7
33:20 40:9 41:1,2	accident 203:5	73:11 74:11 89:15	118:14 119:4	180:16
41:2 51:19 52:1	accommodate 24:7	92:4 98:15 99:7	136:3 152:4	administration
53:9,20 69:19,21	24:20 88:18 106:2	99:11,13,16	176:15	109:20
73:13 75:14 76:19	127:9	107:16,19 110:3	additional 25:19	admit 74:4
79:19 80:3 82:14	accommodated	110:12 113:11	27:1 117:4 186:12	adopt 19:1
82:15 84:5 108:13	148:12	132:21 145:10	Additionally 9:19	adopted 24:14
115:4 119:5	accommodating	147:4 148:3,4,7	address 11:14 12:9	169:17
128:12 130:11	127:13	149:20 150:2,13	23:16 40:1 47:16	adopts 157:22
135:5,16 139:17	accompanied 104:7	150:20 151:17	111:12 113:12	advance 83:22
154:2	104:18	152:6 153:21	119:18 133:13	104:1 122:15
abandonments 5:6	accomplish 28:3	154:8,16,18,20	170:10	192:9
30:10 60:10 78:9	accord 127:12	155:17 156:21	addressed 56:19,20	advantage 44:10
84:12 184:18	account 58:6 72:16	157:2,3 177:20	56:21 84:19 86:8	65:15
ABC 97:1	89:8,10,11,16	178:9 179:5	86:11 142:12	adverse 164:5
abhors 167:2	197:4	180:11 181:18,19	175:5	advice 52:18
ability 12:2 21:21	accounting 102:10	185:5 187:18	addressing 23:9	advise 50:12,21
68:10 104:8	accumulated	188:2,19 189:11	adept 156:6	advising 48:12
148:14 156:22	202:16	189:15 191:15,17	adequate 154:18	51:16 142:16
180:17 185:13	accurately 135:7	191:19 193:19	154:21	advocate 14:16
able 5:3 7:2 53:12	accused 205:3	200:21 202:3	adequately 148:12	66:13
58:17 81:20 88:1	achieve 76:17	acted 5:21	adjacent 12:8 20:9	advocates 138:15
122:1 161:11,12	achieved 99:9	Acting 1:19 10:3	20:10 25:13,15	advocating 131:10
172:4 207:6,10	Ackerson 144:18	211:2	26:9,16 27:9,12	131:17
above-entitled 1:17	acknowledge 169:2	action 26:17 31:14	27:13,16 86:18	AD-193.21(x)
212:14	188:16	143:4 146:2 155:1	153:21 164:5	121:12
Abraham 203:9	acquire 35:6 93:6	157:2 167:9	165:12 166:18	aerial 113:22
absence 19:20	122:18 152:15	178:10 183:18	171:20 175:1	afford 51:9
				affordable 150:17

age 65:3	ahead 1:10 4:6 10:11 11:11	60:10 75:3,4 101:5 102:12 111:14 117:17 119:15 120:12 153:13 177:8,21 199:8	appearing 12:5	86:17,20,21
agencies 21:6 32:6 37:21 77:16	aid 101:19,22 126:11 127:3 142:15	amounts 49:6 196:20	applaud 109:9	arguing 86:18 173:9
agency 7:8 10:17 30:6,9 32:11 35:5 36:1 69:18 81:6 89:12,16 95:14 141:15 146:16 191:15	air 102:1	amphitheater 117:12	application 33:12 60:21 68:6,9 78:11 120:7 131:14	argument 67:7 73:5
aggravated 80:15	AK 125:19,21	Amtrak 190:11	applications 94:1 118:4	arising 7:18
ago 17:13 99:20	akin 41:18	analogous 176:7	applied 103:3,18 171:8	Arizona 156:8
agree 6:17 50:22 73:11 81:11,14 91:12 96:18 108:4 202:20 203:4 210:11 211:5	alienating 49:11	analogy 98:19 210:8	applies 167:6	arrangement 93:14
agreed 46:21	alleged 127:17	analysis 84:4 179:19 180:3	apply 21:8 58:20 96:10	arrangements 126:14
agreement 6:14 7:3 11:2 22:4 23:4 33:22 41:11 48:5 54:10 56:18,21 57:1 58:11,22 60:4 61:19 83:14 96:6 108:2 110:12 110:18 111:20 121:5,16 122:10 123:3,9 132:21 141:16,17 142:17 142:20 143:8 150:22 151:7,19 157:11,12,17 158:12,20 159:12 159:13 160:7 161:9 185:6 188:14 189:19 191:1 192:10	allocation 102:1 104:18	anniversary 13:11	appraisers 179:22	asked 29:19 113:18 118:2 131:16 138:8 181:14
agreements 7:12 11:17,18 47:10,11 47:15,20 55:17 59:7,19,22 60:13 62:15 64:11 73:13 81:15 110:5,20,20 111:4,10 121:8 126:21 127:5 140:14 141:12 164:17 187:8 205:11	allocations 102:13	announced 192:3	appreciate 11:12 82:7 106:13 126:19	asking 127:8 199:12
	allotted 9:11	announcing 7:19	appreciated 81:4 137:14 194:8	aspect 61:12
	allow 6:1 9:1 39:18 50:4,5 93:1 122:11 197:17,18	annoyance 188:6	appreciates 118:13	assemble 41:21
	allowed 6:4 15:3 45:5 49:7 82:22	answer 18:21 45:16 74:2 79:12 80:22 81:14	approach 19:5 48:12,15 50:13 59:18 77:1 95:22 108:20 185:4	assembly 41:20
	allows 51:20 108:1	antagonism 80:4	appropriate 22:12 135:14 172:16	assets 122:13 174:12
	allude 136:12	anti 166:8	appropriately 110:1	assistance 19:16 93:22 135:14 185:7
	alluded 33:3 75:21	anticipate 25:7 111:10	approval 53:2	associate 109:17
	alongside 100:18	anticipates 41:3	approved 17:21	associated 37:3 120:13
	altered 60:4	anti-railroad 166:5 167:14 168:14 169:5	approximately 152:7	Association 2:8,17 3:10,19 106:19 107:13 144:7 146:20 151:10 159:2 161:6,15 173:16 175:12 183:8
	alternate 46:4	anybody 22:5 136:19 158:14 210:13	arbitrarily 140:7	assume 6:18 21:21 51:4 67:13 81:5 177:8 192:9 205:14
	alternative 79:9 94:2,4	Anyway 19:12 37:13	arbitrary 140:15	assumes 108:3
	amazed 103:6	apart 59:2	arbitrate 96:9	assumption 21:17
	amazing 137:11	apparent 20:6	archives 156:6	assure 9:12 170:4 173:11
	ambiguities 166:21 206:20	appeals 67:15 198:7	area 7:21 17:4 29:22 30:3,7 35:18 36:17 41:20 68:8 88:3 148:14 162:12 171:15 183:16,21,22	Atchison 99:19
	ambiguous 167:3 171:2	appear 178:3	areas 50:7 168:3 183:2	atmosphere 28:9
	amended 10:7		argue 34:12 42:8 69:14	attendant 27:19
	amendment 71:4 83:10 154:17 180:7 187:21 201:17		argued 82:16 86:14	
	amenities 15:4 175:18			
	AMERICA 1:1			
	American 2:8 3:11 106:20 107:14 161:6 173:15			
	amount 22:3 59:15			

attended 115:14	103:9 105:2	22:22 24:13 25:10	battlefield 66:6,9	bent 119:9
attention 13:18	106:17 114:22	26:2,12 29:17	103:22	best 9:10 15:13
187:6	115:17 119:13,22	30:18 31:5,6,13	bear 11:19 23:11	17:15 22:15 48:15
attentive 39:22	122:5,6 131:15	32:10,12 33:6	24:10 51:3 111:22	51:15 60:15 61:20
attest 170:16	134:12 141:2	34:4,11,13 38:8	bearing 132:22	75:21 95:21
attorney's 150:6,14	174:4 177:13	38:11,15 39:3,11	bears 133:15	167:20 174:2
attractive 75:13	191:7 200:10	39:14 40:10 41:1	beast 132:5,11	bet 43:6
108:10	201:7 204:14	42:4,6 43:1 52:2	beat 58:18 128:7	Bethesda 88:16,17
audience 125:13	205:20 206:2	57:14 58:20 59:21	beautiful 118:14	better 18:1 23:6
August 138:21	207:19 209:5	60:13,18 61:13	159:17,17,19	29:4 51:11 57:17
authoritatively	background 15:17	62:8 63:2 67:11	beautifully 148:22	66:14 168:19
15:19	backlash 63:10	68:4,5 79:14	becoming 43:19	174:3 204:8
authorities 71:16	backlog 104:22	82:20 83:19 87:8	85:15	205:12 207:17
72:2 130:16	bad 40:21	89:9 90:13 92:5	bed 115:18	210:1
152:20	balance 28:14	92:16 94:18,19	beds 116:5,11	beware 104:2
authority 53:9,20	109:3,6,8 174:11	97:9 105:10,14,18	began 164:13	beyond 82:22
82:15 190:5,20	174:15	107:15,18 108:1	beginning 117:10	134:21 183:4
authorization 40:9	balanced 108:20	109:10,19 111:8	148:1 159:15	big 50:15 100:16
40:10 41:1 51:20	balancing 95:15	112:3,7,11 118:22	191:20 192:5	136:13
authorize 40:12	bank 19:22 25:12	119:8 123:22	begins 149:17	biggest 147:4
authorized 41:2	28:8 30:22 33:16	134:4 161:17	154:5	204:20 205:4
authorizing 7:9	34:1,8,9 35:1 37:4	162:16 163:10	begrudge 131:10	bike 36:10,11,18
available 8:13	37:7 38:22 39:12	166:6 173:4,12,19	behalf 29:13 30:16	44:7 104:13 152:8
14:21 43:2 60:18	44:22 78:20 79:16	184:10,12	55:17 118:18	176:19 189:13
83:7 91:3 118:2	80:10 85:21	bankruptcy 70:2	191:13	bikeway 36:12
123:15 130:12	119:22 120:8	178:8	behave 48:13	biking 36:19 85:17
155:8 156:4,5,7	133:3	banks 54:2	behavior 65:11	bill 83:3 187:20
156:18 175:14	banked 13:22 16:7	bare 60:1	168:22	billion 152:7
176:18	16:12 18:7 20:15	bargain 206:12,13	beings 74:7	biotic 50:2
Avenue 114:6,8	23:3,20 26:7	bargaining 58:14	belief 171:14	bisected 158:18
117:9	44:18 49:15 85:16	68:14	believe 32:5 38:19	bit 68:13 70:15
average 10:18	92:15 120:20	barn 43:6 60:7,8	61:11 76:11 78:14	119:8,9 122:7
18:10 77:11	banker 41:6 48:13	77:6	86:8 112:12	128:7 144:21
avid 27:18	48:17 49:5 52:5	barred 154:8	124:22 170:2	194:9,10 207:17
avoid 111:18	53:16,21 55:17,19	base 76:1 96:11	175:14,15	bitter 170:2
avoided 154:15	55:22 68:10 78:7	baseball 18:10	believes 107:17	blacktop 149:14
awards 193:19	78:17 92:20 95:22	based 15:2 19:22	109:18 110:16	blocks 36:6,16
aware 49:14 93:1	banking 1:10 4:5	25:2 168:21 173:8	belittle 101:9	Bloomberg 116:21
94:11 109:1	4:10,12 6:4 7:22	179:18	Bene 109:1,9	blown 120:6,14
121:11,16 122:12	8:10,12,16 10:10	basic 35:7 53:19	beneficial 127:15	BN 93:7,12
149:22	10:12,13 11:2,11	79:8 171:8 196:1	benefit 60:15 73:21	board 1:3 6:8 8:10
a.m. 1:18 4:2	11:22 12:7 13:11	basically 57:21	104:5 128:4	9:5 10:15 11:15
	13:16 15:7 16:4,6	99:12	187:19	13:13 15:8 18:19
B	16:10,17 17:16	basin 106:5	benefits 16:19 27:9	21:2 22:17,21
back 10:6 18:21	18:20 19:1,13,14	basis 15:13 84:20	27:20 37:3 72:8	28:4 29:20 30:12
31:18 63:22 77:5	19:21 20:8,18	171:20	72:17 95:18	31:2 33:4 34:7
82:10 92:1 103:7	21:3,11,20 22:4	batting 77:11	112:15	39:21 43:10 48:15

49:13 50:20 53:2 55:10 56:14 60:16 66:17 67:19 69:17 72:11 78:16 86:10 90:12 92:22 93:9 94:8 97:22 107:15 107:19 109:21 110:10,11,14,17 110:19 111:8 112:2 115:11 118:19 119:14,20 120:1,22 121:6,8 121:10,16 122:12 122:14,19 123:5 128:11 131:13 138:8,9,15 140:18 141:7 143:4,9 147:3 148:5 156:15,18,19 157:22 160:5 170:4 174:9 180:8 180:15 188:15 190:4,16 191:13 191:14 195:7 209:6,11 212:8 Board's 4:4 6:11 7:7 8:17 13:18 34:20 52:20 109:21 110:2,6 126:19 140:12 142:13,18 145:14 163:3 174:13 180:15 body 57:9 150:15 165:8 bogged 103:10 boiler 132:20 boilerplate 133:12 bold 20:7 bones 60:1 bonus 136:4 book 42:10 58:15 136:3,20 bookkeeping 102:11 books 136:12 194:9 born 194:17	Borough 114:2 Boston's 17:3 bought 99:18 177:7 177:14 brainstorming 122:7 Branch 31:8,11 39:9 86:12 95:8 113:4 branches 43:8 breadth 21:16 breakdown 46:11 breaking 76:3 115:13 116:18 bridge 40:15 48:1 50:15,18 51:22 52:4,5,13,13,15 54:15 55:20 56:2 75:11 115:20 139:15,18 bridges 11:20 23:13 40:4,13,16 40:19 45:9 47:14 51:19,22 55:8,12 55:13,13 129:21 133:1 139:6,9 140:3,7 brightest 210:18 bring 14:1 127:14 150:12 187:18 194:1 197:7,8 brings 150:1 broad 169:1 broadening 68:9 broader 98:1,11 210:6 brother-in-law 79:2 brought 178:10 budget 188:3,6,8 build 14:11 42:18 52:13 91:19 186:18 196:13 building 18:16 70:9 104:14 114:15 192:4 buildings 5:18	132:1 builds 52:14 built 19:4 27:22 33:18 78:19 117:5 117:11 164:22 173:2 177:3,12,16 204:11,12 bulk 34:19 bunch 50:17 bundle 191:4 208:21,22 burden 186:12 burdened 5:1 burdens 110:1 bus 29:14 36:4,6,8 36:15,21 38:1 business 38:15 103:16 businesses 182:18 bus-bike 36:3 button 13:19 buy 37:16 92:11 211:10 buys 93:6 bypass 76:19	capacity 5:1 Capital 44:7 86:13 88:15 113:6 174:6 car 184:1,2,4,4 carbon 66:22 cards 88:19 care 116:5 careful 32:1 60:21 176:11 carefully 167:17 cargos 126:11 carloads 89:4,5 carpooling 30:1,2 carriage 25:2 carriages 114:6 carrier 6:22 7:5 41:14 48:18,18 49:2 52:8 63:4 97:20 99:21 108:2 111:16 122:17 128:13 131:2 135:9 163:4 199:10 carriers 4:22 59:10 107:21 108:11 carry 63:5 73:7 75:8 carrying 95:16 cars 89:5 100:17 183:14 case 25:17 38:19 39:10 69:5 72:19 78:10,12 79:18 94:15 120:14 121:11,13,14,20 122:8 123:11,19 124:1,6 129:10 131:5 150:10 155:7 165:8 168:15,16 171:2 178:7 183:7 192:16,17 194:13 199:8 cases 7:13 11:1 20:10 25:18 33:15 72:6 73:14 97:9 119:19 122:16	134:13 140:2 146:1 153:9 165:15,16 166:3,5 166:9,17 167:14 169:14,19,22 170:1 177:1 178:4 178:9 180:13 195:14 198:18,19 198:22 case-by-case 173:7 cash 173:1 cast 71:20 168:1 catalogue 156:17 catastrophic 38:7 catch 106:5 189:21 Catch-22 154:8 187:15 categorically 41:15 cause 26:11 46:11 155:1 caused 5:11 46:6 46:16 ceases 27:7 ceiling 120:21 celebrate 113:2 138:18 celebration 138:13 cell 9:20 cemeteries 176:3 center 114:3 178:12,14 Central 97:16 114:12 178:7 centuries 202:16 century 6:7 25:5 163:12,14 164:10 165:11,16 166:3,4 166:9 167:14,18 167:19 169:17 170:16 171:4 177:13 206:10 certain 48:20,22 49:2 78:14 122:13 195:2,4 204:13 certainly 49:16 51:14 53:1,11 59:19 63:20 64:16
---	--	--	--	--

72:7 110:14 129:9 131:9 133:6 134:17 139:12,19 203:8 205:8 206:8 certificates 10:18 143:7 cetera 15:4 85:10 85:20 86:5 133:16 183:3 184:14 chain 62:7 178:22 chair 29:12 31:16 Chairman 1:19,22 3:4,4 4:3 7:19 8:19 9:17,22 10:2 10:3 12:16,17 13:2 19:9 28:19 29:7,10 31:17,22 44:2 47:1 48:9 56:13 57:18 58:5 60:22 61:1,3,4,9 61:15 62:13 64:8 68:22 69:3,14 70:14,17 71:13 72:5 73:10 74:3 74:10 76:8 79:12 80:15,20 82:10,11 83:2 85:2 91:6,8,9 96:15 98:1,9,12 100:22 101:2,11 101:15 102:16 104:20 105:8 106:9,11,12 107:8 107:11,12 111:11 112:18 114:20 118:9,18,18 123:17 124:14,21 125:5,9,10,17 126:5,7 127:6 129:14 132:16 133:9 134:6 135:18,19,20,21 136:8,17 137:5,22 143:2,10,16,18,22 144:2,15,20 145:4 148:1 162:5 174:18 175:11,20 176:1,18 177:1,17	181:5,17,19 182:1 182:22 184:8 186:22,22 187:2,3 187:16 189:2,5 191:11 192:15,21 193:1,8,14 198:6 200:1 202:10,12 203:3,16,20 204:6 204:17 205:9 206:15 208:1 209:14,17,18 210:8,17 211:1,2 211:3,4,20,22 212:3 chalets 100:21 challenge 66:16 81:13 challenged 63:13 66:12 172:15 challenges 163:10 170:5 challenging 166:14 chance 64:2 change 24:17 43:21 44:15 46:13,19 67:20 73:12 112:10 changed 5:14 32:17 65:5 changes 45:4,7,11 112:9 160:10 173:18 character 134:7 199:11 characters 71:21 charge 39:19 139:13,13,17 charged 6:9 134:10 134:16 charitable 147:15 Charles 1:21 2:5 3:4,8 12:22 29:11 charters 70:1 Cheslea 131:20 Chessie 31:7 Chevron 193:10 CHIP 1:21	chose 18:22 132:7 Chuck 62:21 circuit 146:3 154:4 161:22 188:22 190:7 194:13 209:7 circumstances 5:14 33:15 34:6,16 44:15 67:20 78:14 84:17 93:2 128:2 cite 82:6 cited 131:5 citizen 155:3 182:8 citizens 156:7 190:19 CITU 115:10,11 143:7 city 79:2 113:13,21 113:21 114:17 116:2,3 118:12,15 121:14,18 128:17 131:6 132:13 137:9,12 152:11 153:2,11 civil 66:5,9 187:19 claim 97:11 166:13 170:11 172:4 174:21 187:18 192:12 194:1,2 211:17 claimants 172:22 claimant's 154:21 claims 39:15 167:21 172:15 187:10 193:2 clarification 8:8 clarify 125:14 132:21 202:13 clarity 139:19 class 26:17 125:7 126:3 145:8 155:17 167:9 178:10,18 179:5 clause 71:5 154:17 187:21 203:18,21 clauses 204:12 clear 65:19 121:19	135:16 143:1 170:20 clearances 117:6 clearly 47:11 client 52:18 clients 87:6 192:8 climate 43:21 clink 173:1 clips 81:9 clock 149:18 close 8:7 41:16 43:5 77:6 closer 98:18 199:21 clouded 172:5 clover 104:15 CNJ 2:11 3:13 106:21 coal 56:3 208:7,7 208:16 coherent 162:20 170:7 Coleman 124:1,5 colleague 32:22 163:6 Collection 111:3 College 2:22 3:22 156:5 color 116:3 Columbia 144:19 combination 106:1 come 28:12 40:20 46:12 55:15 57:3 83:11 88:20 96:11 119:2 122:4,9 127:8 128:11,13 133:12,14 135:9 135:12 144:3 147:8 149:13 153:15 169:15 178:19 179:22 181:14 185:6 188:7 204:14 207:19 comes 33:20 79:19 158:19 comforting 200:22 coming 83:9	143:20 144:12 178:7 188:4 190:16 200:17 201:9 211:12 212:5 commend 137:8 comment 101:12 112:2 135:22 160:20 161:1 200:3 201:6 commentary 123:10 195:6 comments 9:13 11:14 109:16 113:10 145:14 Commerce 10:17 72:21 165:4 Commission 10:17 67:8 165:4 Commissioner 64:9 136:11 139:20 191:12 commissions 59:14 commitment 83:13 committed 30:3 182:3,9 committee 173:17 common 41:13 48:17,18 49:2 52:8 73:7 97:20 99:21 130:14 135:9 163:4 165:9 167:16 171:8 185:8 186:15 199:10 commonly 50:9 51:21 communities 16:19 81:11 83:5,21 129:19 163:18 community 17:1 55:3 79:20 80:9 81:3 86:14,19 151:9 163:16 183:18 commute 17:7 commuter 85:12
---	--	--	---	--

88:5,6 99:20 100:7 companies 134:15 146:10 200:7 211:11 company 124:12 125:22 compared 101:6 compatible 39:10 39:13 54:17 compatibly 88:13 compel 123:13 compelled 44:20 compensable 155:20 173:5 178:22 179:19 compensate 27:1 71:11 152:5 compensated 45:10 70:7 146:6 181:7 compensating 96:3 151:4,20 180:6 190:19 202:8 compensation 25:21 26:19 38:10 39:1,2 68:17 70:8 70:11 92:9 93:10 93:14 94:7,8,22 96:9 135:3 145:11 149:5 150:14 153:6 154:19 157:1 158:9 162:1 173:7 compensations 111:15 189:14 competing 174:11 competitor 20:5 compilation 42:15 complain 26:11 complete 23:6 71:18 202:18 completely 70:12 77:2 completing 136:1 137:10 completion 143:8 192:1	complex 173:10 complexities 7:18 47:4 complexity 114:9 complicated 47:21 57:2 196:7 complications 111:5 components 64:17 191:18 comports 97:3 comprehensive 14:18 15:14 32:4 concept 96:18 137:13 207:2 concern 8:9 37:14 77:7 87:19 121:7 concerned 38:18 43:21 116:9 140:9 204:10 concerns 5:11 20:1 101:10 129:20 concerted 164:14 concessions 110:22 conclude 40:7 130:11 concluded 212:15 concluding 130:1 conclusion 27:21 142:8 198:9 conclusions 131:18 concrete 153:20 concur 41:17 concurring 194:11 194:15 condemn 146:17 condemnation 152:13 condition 40:17,22 45:8 90:10 conditions 77:10 conduct 131:16 conferred 194:19 confess 136:5 confident 83:12 confidential 141:17 confirmed 109:13	conflict 166:2 conflicts 169:9,15 confronting 7:21 congestion 85:10 102:1 congratulations 139:4 Congress 5:12,21 6:3,9 10:7 24:15 28:1 62:1,12,14 63:2,11,22 64:1,3 64:10,19 73:12 95:16,19 107:22 110:8 195:8 congressional 63:20 Congressman 80:13 connect 136:11 connecting 14:10 33:18 connection 6:20 consequences 161:4 169:9 Conservancy 2:4 3:7 12:21 13:8 14:4 57:22 58:3 62:20 113:17 127:18 133:20 Conservancy's 175:2 conservation 14:5 70:6 consider 4:8 11:15 111:20 122:20 129:3 considerable 30:17 59:3 101:3 126:13 consideration 37:18,19 131:11 171:11 considerations 121:2 129:7,17 considered 49:22 155:3 considering 8:10 76:14	consistency 57:16 consistent 52:19 64:13 65:21 79:7 122:15 consolidate 164:20 constant 23:22 constitute 18:14 constituted 146:5 Constitution 146:7 201:7,18 202:3 constrained 72:22 112:4 constructed 196:20 construction 24:6 52:10,11 63:17 115:16,19 116:14 120:1,7,19 123:22 169:21 171:9 180:20 207:1 construe 73:11 construed 32:11 construes 166:20 consuming 168:9 consummate 157:11 consummated 141:12,16,20 157:17 158:13 187:9 192:18 consummation 142:17 143:5 159:11,12 160:6 188:14 189:19 190:22 192:10 contact 159:10 160:3 contain 110:22 156:3 171:1 contemplate 120:22 contentious 57:1 context 139:6,7 142:7 167:1,7 168:18 contexts 155:2 195:20 continue 24:5	28:20 39:20 112:8 139:8 continued 32:15 34:4 96:14 99:13 99:14 contract 76:2 132:17,18 contracts 207:18 contrary 77:21 173:5 contrast 19:15 152:9 contribute 136:19 143:13 208:19 contribution 137:11 control 122:18 189:17 207:10 controversy 103:13 conundrum 187:5 187:22 conversations 133:19 conversion 15:22 18:5 76:18 92:6 108:5 161:2,5 conversions 28:10 converted 24:4 100:2 132:2 134:22 177:10 converting 109:12 137:13 convey 206:12,13 conveyed 121:17 122:13,13 164:7 171:6 172:3 conveying 123:1 convinced 204:19 cooperative 126:16 copy 22:20 110:18 core 187:19 Corporation 2:12 3:13 106:22 118:19 correct 163:7 168:9 211:7 corrected 168:10
---	--	--	---	---

<p>correctly 61:16 70:19 210:17 corridor 11:6,21 15:22 17:12 18:17 20:4,9,17,22 22:15 23:12 24:5 24:15 25:20 27:2 27:3,6 32:15 35:2 37:5 38:22 39:12 41:18 42:17 45:21 46:8,12,20 49:9 49:15,19,21 50:4 52:17 53:3,22 59:1 62:2,4,6,8,11 63:6 68:3 71:22 72:1,18 74:19 75:16 78:20 80:1 83:13 85:22 86:1 86:16 88:15 91:3 95:21 99:18 100:7 100:8 108:5,16 111:22 119:22,22 120:9 132:8 171:22 172:2,9,12 173:19 185:16 186:8 196:19 207:6 corridors 5:13 6:2 6:4,10 10:9 14:11 16:5,12,15,18 17:16,20 18:6 19:17,22 23:2,3 23:18 26:2 28:12 30:22 35:11,20 37:6,16 42:11,14 44:17 66:19 95:17 100:10 105:21 120:20 134:8 162:14 164:1 165:13 169:3 184:17 186:11 196:22 cost 11:19 20:17 23:11,22 24:10 50:19 51:3 90:1 111:22 120:12,20 122:3 132:22</p>	<p>139:15,18 150:16 150:18 151:20 costs 132:12 151:4 Councilman 116:20 councilman's 79:2 counsel 26:17 67:18 142:4 count 30:19 192:6 counter 69:15 countless 163:19 168:5 country 66:20 69:9 70:9 71:17 90:15 102:9 105:21 190:19 193:18 209:20 county 2:5 3:8 12:22 29:13,14,21 30:16 35:6,9,13 35:22 37:8,14,19 38:5 49:21 50:13 51:6,8 56:10 68:1 87:7 89:1 90:4 96:20 97:7,12,13 97:14,18 98:19 128:17 176:20 192:2 couple 41:17 61:5 80:21 82:12 91:9 94:10 124:7 174:20 209:19 course 18:2 23:15 46:5 67:2 108:22 113:9 115:12 118:21 128:15 129:18,20 133:19 152:4 165:3 182:5 199:1,2 court 63:14 150:4 154:12 155:2,5,15 162:1 173:3 179:8 180:18 187:10 192:19 193:2 194:12,14 198:8 courteous 102:19 courthouse 96:20</p>	<p>97:8,13 courts 26:1 63:14 67:15 98:4 160:19 163:20 164:3,13 166:22 168:5,12 171:7,8,15 173:6 186:15 198:7,20 court's 26:14 42:9 146:3,3 cover 71:6 80:12 Cowboy 17:9 crashes 101:4 crazy 54:21 create 6:1 14:9 77:9 106:3 142:11 152:10,10 161:18 167:4 168:20 196:9 created 10:16 28:8 146:4 166:10 creating 82:17 146:15 173:16 creation 127:21 153:3,4 165:4 creative 117:4 creatures 194:17 credibility 15:18 Creek 16:20 Crescent 44:7 86:13 88:15 113:7 174:6 crime 183:9,19 184:7 crimes 148:20 182:3,8 critical 119:19 critics 205:5 crosses 140:17 crossing 158:20 crossings 46:13 55:11 crossover 55:9 crossovers 55:9 crowd 138:22 crucial 158:1 CSX 2:9 3:12 31:7 93:7,12 106:20</p>	<p>113:1 124:9,15,19 126:3 132:6 133:10 137:8 142:4 CSXT 113:9 curious 203:22 current 41:13,22 42:1,3 48:18 52:8 62:15 90:6 178:6 178:21 currently 16:8,16 33:17 105:9,21 108:13 custodian 191:18 customarily 126:20 cut 24:2 cuts 72:10</p> <hr/> <p>D</p> <p>d 1:21 3:4 4:1 18:15 daily 17:6 Dakota 157:20 158:17 damage 27:14 damages 146:2 188:2 Danaya 2:21 3:21 144:9 180:19 dance 93:11,11 dares 92:15 data 171:18 database 14:18 15:5,9,15 16:1 date 7:13 15:12 21:5 82:15 187:12 187:17 day 5:13 87:15 137:20 147:6 158:19 days 9:1 22:3,6 32:22 81:10 84:16 84:16 117:18 136:18 141:3 day-to-day 84:20 de 195:9,11 dead 210:10</p>	<p>deadline 140:15 deal 19:13,14 59:13 59:20,22 76:5 84:20 88:11 114:17 147:9,13 159:17 dealership 79:3 89:6 dealing 43:4 46:18 58:12 71:20 115:6 deals 59:10 dealt 134:15 Death 114:8 117:9 decade 90:10 99:19 150:8 207:13 decades 202:16 decide 84:21 180:9 190:8 201:14 decided 81:16 150:15 decides 7:5 65:16 78:22 decision 18:22 24:2 25:17 39:9 42:9 49:14 80:10 120:2 122:8 132:14 146:4 151:14,18 152:1 154:4,11 179:8 194:12 decisions 7:9 161:22 168:2 180:13 198:8 deck 25:1 declare 119:21 declared 73:1 decline 19:22 76:15 declined 115:2 deconstruction 168:13 decrease 176:4,21 decrepit 139:11 dedicated 36:12 deduction 172:12 deductions 147:15 172:13 196:12 197:22 deed 41:11 79:1</p>
--	--	--	---	---

97:8,10,11 178:13 179:9,18 180:19 180:20 195:13 196:1,2,4,15 201:3,3 206:10 207:19 deeds 165:14 168:20 170:15,20 170:22 171:5 172:1 178:6 180:19 206:8,20 207:16 209:3 deem 165:17 deemed 110:14 139:10 deeply 166:8 defeat 120:9 defender 14:16 defending 172:21 defer 142:3 deference 193:11 define 190:5,21 defunct 149:2 153:15 160:2 degree 68:1 72:14 87:22 198:13 delivering 136:2 demand 105:22 112:9 128:16 demanding 147:11 demands 18:18 68:17 demolition 132:12 demonstrated 27:11 demonstration 116:4 dense 182:14 deny 73:20 denying 74:17 department 50:13 50:22 51:3 56:10 56:10 66:2 75:17 172:20 185:7,13 185:14 188:7 199:14 departments 56:8	59:9 185:9 dependence 43:22 dependent 67:1 depending 84:17 183:15 195:17 depicts 114:5 deprived 155:4 derail 49:15 derelict 160:13 described 106:3 165:14 200:16 206:19 describes 178:2 description 113:22 descriptions 207:20 deserves 187:6 deserving 195:16 design 24:17 designed 15:1 88:18 127:3 desire 119:2 desirous 130:4 desk 140:17 destined 65:14 destroy 58:17,19 174:5 destruction 68:12 destructive 109:5 detail 23:17 124:3 detailed 15:1 47:21 details 47:6 54:8 59:12 147:2 deteriorate 24:16 46:8 deteriorated 40:17 deterioration 22:16 45:19 determination 121:9 122:14 determine 152:15 190:10 determined 140:4 173:6 188:22 devalue 195:4 develop 34:7 56:16 57:20 58:1,4 60:2	132:20 174:10 185:2,2,18 developed 14:18 57:19,21 113:14 201:10,11 205:10 208:6,17 developing 57:8 development 15:12 16:16 31:1 99:21 117:14,15 165:8 181:8 204:21 devil 47:5 devoted 50:1 de-rail 54:2 diagram 84:4 Diane 116:21 dicey 80:8 dicta 49:17 died 42:12 differ 186:21 difference 83:20 84:8 101:3 163:14 176:7 differences 127:13 184:16 186:4 different 20:18 30:19 55:14 70:19 71:20 85:14 92:7 95:9 97:21 101:21 158:21 159:1,8 163:5 173:8 176:5 195:20 196:9 199:9 differently 77:3 85:16 difficult 11:7 33:13 45:15 59:5,17 91:14 98:2 147:6 156:10 difficulties 173:13 difficulty 125:11 dilapidated 25:4,5 dilute 195:3 direct 49:14 155:8 191:3 directed 32:9 direction 33:10	47:19 84:22 directly 144:21 Director 29:16 146:22 disagreements 47:13 48:2 disclosure 44:6 disconnect 21:22 discontinue 7:1 discounted 177:8 discovering 169:7 discretion 19:4 147:8 discretionary 19:2 22:18 61:12 78:13 79:15 discriminatory 164:16 discuss 124:2 discussed 7:20 133:5 discussion 12:14 105:6 121:4 123:12 dislocated 151:14 dislocation 189:9 dismantle 140:1 dismantling 139:15 139:18 140:3 disposal 76:2 disposition 97:20 disputed 158:14 disputes 145:6 166:7 172:16 disputing 169:22 disqualify 34:3 dissemination 111:4 distant 193:15 distinction 153:3 177:14 distinctions 153:10 distinguish 177:6 distinguishes 184:11 distressing 39:4 district 114:3	144:18 diverse 13:15 diversion 32:19 divest 39:17 divested 78:1 88:8 doable 66:11 docket 8:22 157:6 158:3,3 doctrines 166:11 document 23:8 documentation 139:22 documenting 191:22 documents 43:1 Dodge 89:3 dog 43:5 doing 44:9 45:22 52:10 54:17 78:16 119:16 179:18 189:15 196:1,2 207:15 dollars 102:12 103:20 152:7 domain 128:18 146:14 164:2,13 185:10,15 196:11 197:22 199:16 donated 172:18 donating 92:12 172:12 donation 93:16 donors 116:22 door 43:6 77:6 DOT 51:6 54:13 88:20 102:8,9 122:16 139:11 185:7 199:14 DOTs 46:12 185:10 doubt 206:7 dozens 103:6,7,7 dramatically 66:3 draw 13:18 drawn 114:6 draws 99:5 dream 95:11 drive 36:9 148:18
--	---	--	--	--

dual 11:3 96:19 due 21:20 109:19 111:15 155:3 173:7 179:12 191:2 193:11 209:10 dueling 136:20 Dune 58:16 108:22 D.C 1:14 14:7 51:13 157:21 193:16 <hr/> E E 1:13 3:1 4:1,1 eager 8:1 earlier 126:8,18 131:6 132:17 174:5 early 83:21 166:4 169:17 ease 5:5,7 easement 25:19 26:13 27:2 53:5,8 53:18 70:6 154:14 200:18,19,22 201:2,3 206:9,11 207:2 209:4 easements 64:18 66:6 170:13 209:7 209:8 easier 208:16 easily 156:3,5 173:14 191:21 Eastern 120:14 economic 24:1 26:15 112:5,14 147:11 151:4,15 161:4 163:15,15 165:1 economically 55:4 Economics 175:20 economy 90:17 edges 53:3 Edward 2:8 3:10 106:20 effect 11:22 45:22 175:18 176:13,19	effective 8:18 21:5 53:20 82:14 109:20 effectively 23:8 43:2 107:21 110:7 effectiveness 4:12 18:17 effects 165:7 efficient 106:4 effort 164:14 efforts 11:12 104:7 eight 18:15 50:16 193:17 EIS 31:9 either 36:8 37:17 52:3,6 54:1 72:3 75:9 78:13 94:6 96:8 111:1,15 147:9 151:6 178:20 either/or 78:13 elected 115:7,15 116:18 element 119:19 elements 24:5 171:2 elevated 17:11 114:15 elevators 116:16 199:4,5 Elgin 120:13 eligible 8:13 34:13 eliminates 154:7 eloquently 109:14 else's 148:18 emerged 7:13 emergency 94:3 eminent 128:18 146:14 164:2,13 185:10,14 196:11 197:22 199:16 emphasis 133:21 emphasize 165:20 emphasized 194:14 194:16 empire 58:18 enabled 115:12	encourage 21:3 36:3 43:13 90:13 111:9 encouraging 185:22 encumbered 65:7 134:1 endeavor 28:5 ended 164:9 endowed 210:3 ends 71:10,12 energy 131:22 engineers 87:10 England 201:9 208:5 enhance 33:6 43:11 68:3 195:2 enhanced 201:2 enhancement 66:4 66:8 101:20 102:2 102:13 enhancements 83:4 104:10 enhancing 33:10 195:3 enjoy 113:4 138:17 167:18 211:7 enjoyed 117:12 enslaved 41:9 enter 61:19 62:14 64:11 65:20 81:17 83:14 130:2 151:19 entering 164:16 enterprise 112:7 entertained 16:21 entire 9:15 191:13 entirely 158:21,22 159:8 entirety 121:17 entities 54:12 97:17 152:19 195:22 196:11 entitled 4:4 25:21 149:5 198:12 entity 38:12 39:5 46:16 69:16 77:15	88:11 139:10 180:4 185:4 191:15 environment 112:15 environmental 103:12 120:15 175:18 equally 139:16 182:7 equation 75:6,20 equipment 86:5 87:19 equitable 162:21 167:21 equivalent 96:10 era 112:3 198:17 198:18,19 erected 5:19 Eric 2:11 3:13 106:22 Erie 210:10 erosion 23:22 erroneous 170:10 esoteric 15:6 especially 30:12 36:17 39:6 50:7 59:10 102:4 172:6 174:7 207:11 essence 123:1 essentially 115:17 establish 108:18 128:18 154:7 established 8:12 62:1 152:12,17 establishing 11:15 15:18 152:14 174:14 estate 131:9 132:3 132:13 et 15:4 85:10,19 86:5 133:15 183:3 184:13 European 100:14 evaluate 23:7 evaluating 20:16 evaluation 155:11	Evelyn 138:3 event 67:12,20 130:19 192:7 eventually 63:14 everybody 207:7 Everyone's 17:14 17:15 evolve 194:21 evolved 167:16 186:16 ex 1:9 32:8 exact 102:22 exactly 40:10 104:12 176:13 187:14 192:14 examine 4:11 178:5 examined 170:14 170:15 examining 172:17 example 17:4 21:18 55:8 64:21 116:13 130:10 203:1 examples 105:10 167:12 excellent 191:5 exception 32:21 155:18 exceptional 18:11 169:16 exceptions 166:10 168:20 169:7 excess 5:1 27:15 exclude 172:2 207:7 excluded 26:9 27:4 exclusive 100:10 207:5 execute 140:13 207:19 Executive 29:16 146:22 exempt 21:7 exemption 84:14 93:6,8 exercise 92:16 111:16 128:17 exhausted 9:18
---	---	---	---	--

exhibits 35:15 exist 34:9 64:15 existence 15:16 109:2 174:22 existing 87:21 122:1 exists 33:16 152:15 expand 208:8 expanded 168:6 expanding 90:18 90:18 expect 35:18 expectation 210:20 expecting 40:3 expedited 21:10 104:18 expending 82:21 expenditures 17:1 expenses 150:6,9 expensive 39:7 77:18 88:6 140:8 150:5 168:9 170:2 experience 4:9 10:7 22:2 30:8,11 75:22 102:7 142:9 149:4 179:4 experienced 112:19 expired 9:10 explain 7:16 167:13 explicit 167:5 207:20 exploded 132:13 exploited 166:17 explore 70:15 exploring 33:5 exported 81:7 expose 82:2 expressed 8:9 extended 134:5 extending 114:2 extension 22:10 35:12 126:19 127:9 140:17 extensions 22:7 127:1 142:6,14 149:10 157:9	191:8 extensive 30:8,11 37:11 119:14 197:12 extent 60:13 94:14 extra 98:22 extraordinary 27:21 extremely 30:6 36:1 39:4 eye 77:17 eyes 182:14 <hr/> F <hr/> face 72:14 74:8 75:2 faced 5:8 74:7 164:19 180:5 facilitate 18:20 21:3 173:18 186:16 facilitates 184:12 facilitating 110:3 facilities 25:8 facility 78:19 122:2 122:2,3 fact 48:21 51:22 57:14 73:5 77:21 119:14 127:7 134:20 139:9 141:18 149:4 153:5 156:12 175:2 178:3 182:18 187:6 188:5 201:8 209:5 facto 195:9,11 factor 184:7 197:3 factors 183:12,22 fail 54:6 failed 16:11 fair 61:21 131:11 135:2 153:21 156:21 157:3,18 181:12 193:22 205:14 fairly 148:7,11 180:16 181:7	188:12 fairness 189:3 faith 34:9 fall 59:1 110:21 falling 75:12 familiar 116:1 124:20 family 177:11,15 211:8 fan 35:16 far 43:20 44:8 107:4,9 114:22 142:16 169:21 204:10 farm 70:5 158:18 184:1 199:22 farmhouse 158:16 farmhouses 182:17 farmland 183:2 farm-to-market 183:1 farsighted 107:22 fashion 60:2 fast 38:15 faster 100:12 fault 78:21 favor 165:11 favorable 179:14 fear 78:2 features 15:4 24:19 federal 13:7 18:3 22:1 32:5 37:21 43:20 51:13 69:18 98:5 101:19,22 146:3 150:19 151:17 152:5,8 154:4 161:19,22 173:6 180:18 187:10 188:22 189:10 190:7 198:7 209:7 federally 162:14 194:19 fee 20:11 22:9 27:5 53:4 146:12 153:7 170:20,22 171:6 200:9,20,22 201:5	202:17 203:1,12 208:14,21 feedback 67:6 feeder 94:1 131:14 131:17 feel 36:12 55:14 83:12 204:7 205:12 fees 150:6,9,14 fell 17:17 19:6 fellow 117:10 felt 65:4 119:1 fence 78:8 207:10 fend 140:5 Fex 144:18 fiction 58:15 fiduciary 129:11 field 14:7 209:10 fields 106:7 fifth 71:4 140:16 154:17 160:12 180:7 187:20 201:17 fifty-nine 16:9 figure 49:4 120:16 figured 207:15 figures 17:19,22 115:14 figuring 93:9 file 93:7 155:11 192:11 filed 23:5 157:6,22 160:7 188:14 filing 21:15 149:16 190:4 fill 57:15 final 67:10 85:2 117:2,16 123:6 135:6 144:3 finally 124:5 128:19 146:13 financial 4:19 5:8 19:15 93:22 108:3 135:14 find 15:2 54:16 79:15 158:7 159:4 180:18 189:6	finder 211:14 finds 104:22 fine 118:9 185:6,20 fingers 35:17 finished 210:11 firm 76:3 144:17 145:5 146:1 179:4 firm's 145:22 155:17 first 12:18 21:3 31:3,12 32:4 44:5 52:4 60:7 66:7 79:13,19 83:10 86:11 117:18 142:2 169:20 170:11 184:17 192:20 200:14 201:10 205:12 206:22 211:13 fit 25:3 five 30:20,22 153:20 190:9 fix 185:15 flood 27:14 flooding 23:22 Floor 1:13 Florida 2:22 3:22 14:8 21:19 Florida's 144:10 flow 48:21 50:9 72:8,17 flows 102:6 focus 90:12 119:9 119:20 162:12 181:20,21 focused 176:12 181:12 focuses 89:13 folk 36:10,21 51:12 51:16 folks 36:7 116:19 133:18 137:9 141:8 208:5 follow 9:2 91:11 followed 5:7 138:5 146:2 180:12 201:11
--	--	--	--	--

following 63:3	12:20 13:1,3,4,6	fullest 195:16	gentle 141:7	183:2 185:5
follows 41:5	19:12 28:21 29:8	fully 41:17 71:6	gentleman 42:12	190:18 201:4
follow-up 176:17	33:2 44:19 45:15	function 63:6	107:10	204:3 209:12
foot 31:21 193:17	47:18 54:7 57:4	funding 90:7	gentlemen 107:1	210:15
footprints 66:22	58:2,8 61:6,8,14	126:15 127:2	gentrification	goal 28:3 163:7
force 109:5	61:22 62:17 79:11	142:10 159:20	131:19	173:18
forced 62:10	82:13 83:1 101:13	184:13	genuinely 33:5	goals 95:18 173:11
forces 23:21	101:14 102:15	funds 37:20	74:18	goes 18:21 41:4
forcing 169:15	104:6 105:9	funneled 185:12	George 204:19	88:2 149:11
foreclosed 154:22	106:15 109:14	furnished 35:15	Georgetown 31:8	153:15 155:21
foreign 43:22	129:2 175:6	furniture 89:5	31:11 39:9 86:12	158:2 174:4
foresee 129:9	FRA 72:3	Furstenberg	95:8 113:4 124:11	going 31:16 34:22
foreseeable 26:8	frame 21:10 22:11	116:21	Georgia 38:20	35:4 36:11 41:8
108:14	frames 21:12	further 106:10	94:15 97:6	46:19 50:21 52:12
forever 41:22	framework 166:6	161:1 209:16	Gesserit 109:1,9	53:11 56:4 59:1
42:17 43:3 88:19	Francis 1:19 3:4	fury 25:11	getting 38:14 53:8	60:11,11 63:22
forfeited 204:14	frankly 167:15	future 4:9,12 6:2	68:18 70:3 90:19	65:5,6 68:16
forfeiture 167:3	free 14:22 53:12	6:10 10:11 11:5	112:18 180:10	73:18 77:20 78:22
forget 99:16 102:22	78:2 94:13 128:20	11:11 16:18 18:12	Giant 136:13,13	82:10 84:5 90:8,9
173:21	135:9,16 136:14	22:16 24:20 25:8	137:2,3	92:11 95:3,4,6,7
forging 28:6	151:21 156:14	26:8 42:6 43:14	give 34:17 48:12	95:10 96:9 100:15
fork 76:20	frees 186:18	43:15 54:19 60:11	54:11 64:21 94:21	103:15 113:16
form 195:12 203:7	freight 4:17 5:3,8	66:21 78:9 79:10	103:4 167:13	114:18 115:19
formed 115:6,12	38:6,10 43:16	108:16 112:3,5,17	201:22 203:21	116:8 117:3,14
former 5:19 14:10	44:14 66:18 85:8	121:1 129:8 132:8	206:12	123:20 132:2,3
28:12 96:22	86:2,3,22 87:4,12	162:3 173:17	given 17:8 28:7	133:2 140:18
118:11	87:21 88:10 89:13		33:13 119:14	142:3 153:15
fortunate 8:3	91:22 95:7 99:14		123:7 196:12	154:10 158:11,18
fortune 38:3 50:19	99:17,22,22 100:5		198:1	159:5,6,6,7 162:3
forward 12:13	100:8,15,17 101:5	G 4:1	gives 126:20	175:5 178:16
28:14 83:12	158:19 164:16	gap 190:14,17	178:22	180:8,20,21 181:3
122:21 126:22	174:8	gaps 185:16	giving 92:13	182:15,16,17,17
127:2 136:22	frequently 21:6	gas 67:1 152:8	165:12 185:14	182:20 183:13,18
174:13 179:12	34:12 40:21 72:1	gathered 4:11	go 13:20 33:10 35:2	183:20 184:5,6
209:13	74:19	gauge 87:3,17	36:16,18 47:19	189:10,13,14
foster 96:13	Friendly 136:13	general 30:3 40:14	53:2,12 62:6	190:7 191:19
found 25:18 26:1	137:3	48:12,16 51:18	76:15 77:4 84:21	197:8 200:21
154:18 155:19	friends 113:17	53:17 54:5 55:10	90:2,16 94:9	201:7 205:8,18
179:19 180:22	115:5 116:8	55:15,21 67:17	96:20 97:7,12	209:4,6 210:21
founded 14:6	117:19 118:1	169:11 176:14	104:13 119:15	good 4:3 29:10 34:9
209:21	137:9	197:9,11 211:5	120:6 132:7	44:17 48:11 57:8
four 36:6 59:11	fringe 118:21	generally 29:22	134:12 135:5	58:9 61:7,20
157:9	Fritz 51:10	30:7 51:5 55:11	138:21 142:1	66:15,18,19 67:2
fourth 22:14	front 9:7 71:14	58:21 59:9 71:2	152:12 158:11	76:17 80:21 99:4
140:16 159:9	114:12	127:9 194:14	159:6 160:2	103:9 104:20
167:8 190:12	full 44:5 120:6,14	207:8	161:11 162:1	105:3 106:8
Fowler 2:3 3:6	147:11 202:18	generating 16:22	179:12 180:4	112:21 113:10
		93:18		

118:17 134:18,20 135:2 141:14 142:5 144:16 145:3 151:21 176:8 182:8 210:6 210:22 goodbye 68:17 goods 64:19 66:17 99:9 gotten 103:10 208:12 government 18:4 26:22 37:21 81:3 91:17 150:19 151:17 161:19 189:10 192:3 201:14,18 202:3 211:17 governmental 130:16 146:5,16 152:18 180:4 governments 81:20 102:17 103:21 government's 102:4 grab 203:22 grader 136:9 gradually 100:1 grand 169:19 grant 66:5 102:2,13 103:18 206:12,13 granted 10:17 162:14 171:5 grantor 166:21 grants 37:20 102:20,21 103:3 185:1 grateful 132:6 gratifying 145:13 great 37:13 38:20 48:1 65:14 94:15 97:6 101:16 114:17 116:22 128:16 136:6 176:7,9 194:2 205:1 211:19,20 212:4	greater 5:5 26:16 201:19 202:6 greatest 204:20 greatly 137:14 green 30:4 35:10 35:22 90:19 greenways 185:21 grief 80:8 grips 169:16 ground 115:13 116:17 208:16 grounds 34:13 group 12:6 48:4 85:3 131:17 132:19 140:4 149:1 151:2 153:1 153:10,11,12 161:10 groups 8:17 33:14 103:22 133:11 160:1 grows 105:20 guarantee 188:1 guaranteed 83:6 guardian 191:14 191:17 guess 76:17 139:20 140:12 175:4 guessed 13:21 guessing 65:10 guidance 60:16 155:14 174:14 guide 11:10 42:11 51:15 guy 73:8 guys 74:18 76:4 93:1 94:20	130:7 132:18 133:4 135:4 136:1 136:6,20 137:1,21 142:1,3 hamstring 185:13 hand 54:20 handful 186:3 handle 42:5 52:16 handled 37:15 77:13 92:3 97:22 handling 90:14 hands 19:5 55:11 177:4 185:4 200:19 hanging 141:10 happen 32:3,3 35:3 60:1,3 131:12 183:4 happened 31:15 138:7 happening 138:10 207:1 happens 40:3,14 178:10 183:10 happily 177:19 happiness 210:4 happy 74:22 113:5 hard 6:8 41:20,21 55:15 69:21 73:5 74:16 76:1 82:6 109:3 137:20 138:7 144:22 212:9 hardest 48:2 hardship 4:19 22:7 hardships 5:8 harmonize 168:22 head 66:2 headquartered 14:6 healthier 14:11,12 hear 8:1 9:3 70:18 70:18 83:10 103:9 144:22 172:22 192:17 195:7 200:17 201:1 heard 103:15	112:22 118:19 119:6,11,12 120:15 121:10 200:15 205:13 hearing 1:5,13,18 4:4,7 7:19 9:15 10:5 11:9 14:2 30:5 31:3,4,9,13 133:6 137:7 148:2 181:11,20 192:4 212:1,10,14 Heavens 53:5 heavily 196:13 heavy 85:13 100:7 115:1 height 42:17 held 49:16 89:9 104:12 155:5 198:22 199:18 heliport 54:22 55:5 help 12:8 15:2 23:5 23:6 56:11 82:17 85:9 99:3,4 113:2 127:14 141:7,8 174:14 185:1 189:20,21 211:10 helped 5:7 helpful 23:9 56:14 57:11 81:10 106:14 138:16 142:18 143:20 152:9 212:6 helping 136:9 Hennepin 176:20 hey 141:8 high 17:11 20:20 25:3 113:13,16,18 113:20 114:1,16 115:2,5,8 116:8 116:12,15 117:6 117:17,20,22 118:1,3,13 124:11 128:14 131:13 132:2 137:10 182:12 higher 77:10 174:3 175:3 201:20	highest 174:1 highway 50:13,22 51:3 55:8,9,12 56:8,9,10 75:17 75:17 101:20,22 185:20 199:21 highways 85:10 186:11 hiking 85:17 hire 51:9 158:6 historic 15:3 42:14 64:15 65:1,7,22 70:9 102:4 historical 163:11 168:18 historically 65:13 66:20 history 114:4 116:10 168:12 194:9 196:7 198:17 204:18 210:12,22 211:19 hit 51:7 hold 73:18 154:14 173:3 180:20 holders 78:7 102:20 holding 4:7 24:18 holds 41:13 94:16 112:5 120:3 holiday 117:18 home 136:9 176:19 212:12 homes 27:14 182:17 Honda 79:3 89:5 honestly 56:12 77:7 90:15 honeymoon 164:9 honor 29:12 175:10 honored 13:14 hope 120:1 153:14 hopeful 142:8 hopefully 90:9 123:7 139:1 186:17 horse 43:6 60:7,8
--	--	---	---	--

70:9 77:5 114:5 117:10 horses 114:11 host 186:20 hotel 117:5 house 176:9 houses 15:9 183:15 huge 45:19 59:9 63:9 65:9 88:2 92:17 104:22 161:18 human 74:7 hundred 16:9 hybrid 71:3 hyper 101:18 hypothetical 45:16 76:9 82:7	110:7 implementation 4:10 8:17 32:10 104:19 184:9 implementing 6:12 32:21 implements 107:22 implication 120:5 imply 183:9 importance 145:16 145:17 important 10:13 14:1 25:22 30:6 64:18 92:10 148:13 180:14 191:18 195:13 201:12 209:9 importantly 25:16 115:9 163:20 impose 109:22 120:18 imposes 25:19 26:3 impossible 11:7 improve 140:12 improvement 18:18 111:7 inappropriate 167:9 incentive 77:14 197:7 incentives 108:18 109:7 163:19 inception 16:4 30:14 68:5 inch 193:21 inches 193:21 inclined 63:1 79:16 include 43:17 51:22 126:21 160:8 includes 15:5 145:8 including 8:5 23:13 27:17 37:21 142:15 145:15 179:13 incompatibility 88:3	incompatible 86:4 86:16,20,22 87:2 incorporated 17:6 increase 27:11 106:5 148:20 increased 66:3 increasingly 43:20 105:22 187:11 incredibly 34:2 incursion 46:16 Indiana 170:18 179:13,16 185:17 indicated 37:7 38:17 148:1 176:3 189:9 indicating 38:21 127:10 indicia 103:4 individual 145:9 industrial 17:12 114:18 132:1 industry 4:18 5:9 63:11 112:6 115:1 inexpensive 42:1 infamous 198:17 infatuated 42:13 infeasible 91:14,15 informally 111:9 information 9:2 14:19,20 15:6,16 23:7 159:10 informative 106:14 infrastructure 22:16 112:4 infused 172:6 197:14 198:2 initial 32:10 68:5 initially 63:1 input 57:8 inquiry 198:11 installing 116:5 instance 55:18 86:11 92:22 94:11 146:16 147:16 166:12 186:13 instances 53:5 86:9 93:20 94:5 95:3	100:3 129:22 150:5 174:4 instinctive 79:22 instituting 85:11 instrument 18:17 insure 116:9 117:7 133:22 insuring 72:12 intact 20:4 49:9 53:19,22 105:14 105:15 108:16 196:19 integrity 54:18,19 186:8 intend 44:9 103:2 intended 76:15 110:8 120:10 170:22 intending 120:8 intent 63:20 95:16 interaction 98:5 interest 8:16 12:6 13:16 27:5 30:17 33:14 44:5 45:12 45:13 53:13 54:14 55:21 61:21 78:7 86:14 88:9 89:9 89:11,17,22 91:22 92:11 95:15 101:16 104:2 112:13 134:16 140:5 141:20 148:9 154:15 155:21 156:13,17 156:20 172:7 179:20 181:1,5 198:3 202:4 interested 3:15 6:12 33:5 35:10 36:2 59:9 64:4 68:18 74:18 75:2 132:19 133:11 140:11 141:6 144:6 157:4 161:7 Interesting 71:21 interests 3:5,9 12:19 26:4 96:13	97:11 106:19 142:11 144:5 145:20 148:8,11 157:13,19 161:16 167:19 171:6 174:11,15 180:9 180:11 interference 50:10 interim 6:6 7:12 10:9,19,21 11:1 11:16 21:12,16 23:14 25:18 26:20 27:7 45:5 91:1 108:5,6,18 109:13 110:4,18 111:2 149:11,17 154:3,6 155:12 157:21 173:4 187:13 191:9 Internal 172:14 Internet 81:9 interpret 76:10 167:3 interpretation 19:1 26:14 63:11,13,15 63:18 67:16 168:13 179:9 193:11 196:1,3,4 196:16 210:11 interpreted 38:21 186:6 interstate 10:16 50:17 104:15 165:4 intervene 96:7 intricacies 173:8 introduce 64:5 intrude 99:1 invest 77:19 91:19 invested 196:13 investing 91:18 investment 27:22 38:6 39:17 77:18 77:22 85:19 96:4 118:13 211:11 investments 66:4 invests 37:19
--	---	---	--	--

involuntarily 142:14 involved 93:9 121:12 128:4 179:15 195:10 involving 30:9 Iowa 70:5 168:15 170:19 179:7,10 Ireland 208:6 issue 39:22 58:10 60:6 77:3 88:4,7 94:12 95:9,15 98:1 111:13,14 122:22 123:6 124:5 132:17 134:15 139:5 157:8 160:15,16 177:19 180:14 182:20 issued 7:8 15:7 16:4 32:7 41:12 115:11 154:6 155:13 157:7 issues 7:21 10:11 11:14 23:10 34:22 47:8 56:22 77:13 80:7 90:14 96:10 111:11 123:4,20 124:3 133:14 152:21 160:17,19 173:9 182:19 190:9 200:6 item 142:18 items 157:12 it'd 58:14 it'll 32:3 J J 2:9 3:12 jail 49:21 98:20 192:5 James 136:12 jargon 101:18 Javits 114:3 jerked 79:21 jettisoned 166:16 joined 62:20	JUDGE 124:17 juggle 66:16 Juliet 120:13 July 1:15 190:12 jump 69:1 208:2 jumping 75:12 June 113:15 jurisdiction 69:19 72:15 110:21 160:17 163:3 jurisdictional 190:8 Justice 172:20 188:6 194:11 Justice's 188:8 K Kahn 51:10 Kansas 131:6 170:18 Kathleen 2:16 3:17 144:9,16 Kauffman 2:16 3:17 144:9,13,14 144:17,18 145:2,5 162:6 174:21 175:10,22 176:2 177:17 181:9 182:10 183:6 187:4,14 188:20 189:4,8 192:14,21 193:7,10 200:3,5 208:18,20 KCS 122:10 131:5 keep 8:22 9:10 49:9 105:13,15 153:17 183:19 keeping 23:5 53:18 53:22 142:18 keeps 201:18 kept 15:12 110:8 153:8 key 40:22 88:4,7 95:13 kicked 31:20 kid 99:10 kids 74:21	kind 33:11 34:7 39:18 42:2,7 43:8 45:17 49:3,4 50:8 51:7 52:7 53:14 55:10,14 56:12 58:14 59:5 71:3 71:13 74:2,9 75:12 84:2 86:15 88:6 89:8 91:13 91:18 95:11 98:13 117:4,11 122:10 124:3 125:10 130:20 131:21 139:14,21 140:18 141:14 184:14 188:16 kinds 75:1 76:6 90:14 93:3 183:4 Kitay 138:4 knew 138:9 141:15 knock-out 88:17 know 19:9 30:12 41:9 45:16 46:5 47:21 49:11 50:20 51:13 54:4,20 55:1 57:12 62:16 63:3,9 65:2 68:16 70:4 72:10 76:2 79:5 80:4,7 83:16 83:22,22 84:10,13 84:15,16,21 89:7 90:11 92:10,12,17 93:19 94:9 96:22 98:19 99:6 102:21 103:2 104:11 114:20 121:1,21 122:6 123:3 125:13 126:11,22 128:22 129:6,17 130:7 131:7,11 135:12 137:19 138:16 141:4,8,9 141:10 142:8,19 142:20,22 149:8 149:16 154:10 156:8 158:2,3,10 158:12 163:12	173:2 178:5 181:17 182:12 184:1,3 185:15 188:1,22 189:9 190:11 193:15 197:18 198:16,22 199:4 206:12 207:9 knowing 83:6 141:18 156:10 knowledge 15:14 211:5 knowledgeably 15:19 known 42:22 208:6 knows 156:2,19 L ladies 30:13 laid 207:13 211:10 land 26:10 48:4 70:12 73:18 76:20 92:4 99:1 128:10 148:16 155:11 156:3 157:6 164:1 164:7 169:10 171:12 172:2,2,5 172:6,9,10,13 173:22 174:1 175:20 177:2,4,9 177:11,14,16 184:22 185:2 189:20 193:22 197:18 199:3,17 199:17 200:11 204:13 206:14,14 206:18 207:9 211:10,11 landowner 20:10 70:13 153:5 157:19 160:2 195:21 201:21 204:7 landowners 8:6 20:9 25:14,15 27:10 75:19 145:6 145:9,21 146:9,11	149:4,19,21 150:12,20 151:5 151:21 152:19 154:1,10 155:14 155:19 156:22 159:16 160:18 161:21 164:5 165:12,19,21 166:18 169:1 171:21 176:13,22 177:2,20 178:11 179:14,18 180:6 180:17 181:13 182:21 191:2 197:6 200:11 207:7 landowner's 151:16 lands 171:22 172:17 177:7 197:17,19 199:20 199:21 landscape 10:14 lane 50:17 language 21:15,18 133:13 167:4,5 large 7:8 102:11 109:19 147:15 182:6,7 larger 17:19 59:10 largest 102:8 late 42:8 77:6 Laughter 19:11 118:5 205:6 law 2:22 3:22 22:1 25:20 26:15 38:8 55:6 62:16 63:12 63:17,22 65:4,19 67:21 76:10 77:22 81:18 98:6 99:15 144:11 145:17 162:10,21 163:1,5 165:8,9 166:20 167:2,16 171:2,8 171:15 173:8 178:15 179:8,11 179:11,14,18
---	--	--	--	--

186:14,15 194:17 199:8 201:9,10,11 201:12 208:11 lawmakers 163:21 lawn 73:9 laws 71:5 114:11 162:21 186:7,21 lawsuit 192:11 lawsuits 166:19 lawyer 134:12 158:6 198:16 lawyers 95:11 203:6,8 205:3 210:17,18 leader 211:14 leaders 211:19 leadership 174:10 leading 14:15 20:19 169:8 leads 24:21 leaf 104:15 learned 102:11 leave 20:4 63:19 204:15 leaves 191:9 led 24:1 164:11 165:1 left 19:3 55:5 64:7 99:21 106:7 107:7 137:4 leg 32:1 legal 26:17 66:11 67:18 138:1 162:12 163:9 165:7 166:5 170:5 173:9 187:5 206:4 legislation 147:19 legislative 150:15 lengthened 21:13 lesser 70:22 195:11 200:16 letter 102:19 let's 72:14 74:8 75:2 98:20 99:10 99:16 level 24:8 160:18 184:9	lever 31:17 Levin 3:22 144:10 levitates 25:1 levy 37:12 liabilities 67:13 163:4 liability 6:20 20:2 21:17,21 51:2 52:3,6 75:4,10 129:20 133:15 161:19 liable 56:10 liberty 209:21 lie 49:4 life 7:17 209:21 light 9:8,9 27:19 35:8,19 38:2,3 39:6,10,11 43:17 62:21 77:17 85:12 85:13,18,22 86:1 86:3,15 87:3,14 87:15 88:5,14 89:1,19 90:2,8,17 91:4,13,17 92:10 95:5 98:17,21,21 99:2,3,20 100:3,6 100:15 105:12,13 105:16,20 174:7 197:1 lights 9:7 183:16 likelihood 129:22 likes 40:15 118:3 limbo 191:10 limit 45:4 164:6,11 164:14 limitations 21:20 87:20,20,22 149:8 149:18 150:1 154:5,9 188:19 189:18 190:6,21 191:16 limited 89:12 165:9 174:1 Lincoln 203:9 line 5:11 7:2,6,15 10:14,21 12:3 14:10 17:11 34:2	40:18 41:10 44:22 49:7 62:5 63:3,5 93:6,15,16,17 94:1 96:21,22 99:5 108:7,13 109:7 113:13,16 113:18,20 114:1 114:16 115:2,5,8 115:8 116:8,13,15 117:6,17,20 118:2 118:3,14 119:21 121:15,22 122:3 122:11,17 123:2 124:11 125:6,18 125:20 131:13,14 131:17 133:3 137:10 173:16 178:12,14 182:12 198:4 200:4 linear 182:11 184:6 lines 5:4 21:8 41:11 70:3 84:5 101:6 109:11 164:21 199:5 Line's 117:22 list 64:2 listed 144:5 listening 145:13 147:7 litigate 150:6 litigating 200:6 litigation 26:19 168:10 172:21 179:15 186:17 197:10 200:12 little 31:17 69:11 70:15 77:6 100:16 115:2 119:7,9 122:6 128:7 141:6 144:21 178:15 194:9,10 204:7 205:15 207:17 live 176:8 lively 12:14 living 73:8 local 71:16 72:2 74:20 75:16 77:22	79:2 81:2,3,8,11 81:20 83:5 86:13 86:17 91:16 99:15 100:20 102:4,17 103:12,20 128:16 130:13 152:18,20 160:19 192:3 locale 15:3 localities 103:7 locality 105:13 located 16:20 50:5 50:6 location 113:22 125:4 Lochner 198:17,18 locomotive 56:3 locomotives 114:12 long 47:19 57:4,7 82:4 103:19 105:14 112:5 115:22 127:4 129:17 130:2 134:2 141:9 158:16 167:11 182:11 184:6,6 206:16,17 longer 34:13 69:12 92:5 99:7 140:17 longest 17:10 204:20 longstanding 19:16 long-term 24:15 92:8 108:12 197:13 look 1:10 4:6 10:6 10:10 11:10 12:13 28:14 33:11 35:14 35:16 43:12 66:21 73:3,17 78:6 81:21 96:21 122:21 123:3,5 126:22 129:1 136:22 140:22 148:13 161:4 174:13 176:12 190:3 195:13 204:18,18	looked 63:21 87:5 171:19 looking 68:2,8 75:6 78:8 100:10 105:19 130:5 139:21 151:2 160:3 176:11 183:15 187:11 lose 19:7,8 33:7 39:14 77:20 179:2 192:16 194:3 loser 150:11 losers 147:3 148:15 179:6 loses 38:5,11 loss 18:12 24:1 78:20 118:20 131:22 losses 24:2 lost 18:2,9 41:21,21 42:17 43:3,3 60:9 177:21 179:10 lot 36:9 40:19 47:7 51:12 59:11 66:19 79:3 82:9 98:16 98:20 99:18 102:9 104:4 153:13 159:19 162:22 179:10 185:9 204:12 209:3 lots 37:22 50:7 182:14 183:17 Louis 29:15,22 30:7 35:9,17 73:8 90:7 love 90:16,16 loved 138:12 211:15 lovely 151:8,9 low 104:9 luck 92:1 lure 20:2 luster 38:12 L.A 99:18,18 M Madison 2:5 3:8
--	--	---	---	--

12:21 29:13,14,20 30:16 35:5,9,12 35:22 37:8,14,19 38:5 51:5,8 68:1 87:7 90:4,15 97:13,14,17 magnetically 25:1 magnitude 90:1,2 mail 155:8 main 34:2 41:10 56:6 83:19 103:14 Maine 122:16 maintain 40:20 109:3 128:13 153:17 maintaining 24:19 109:6 129:7 maintenance 152:20 159:21 major 12:6 45:11 45:18 46:19 63:4 64:13 66:8 80:22 148:15 179:9 majority 171:17 198:19 making 44:17 83:14 133:1 151:14,18 152:1 156:21 157:3 170:3 181:12 Man 17:3 managed 14:18 148:22 149:1 152:18 manager 20:18 24:10 46:15 54:11 63:7 159:11 160:4 160:9,9 managerial 108:4 managers 21:17 22:8 24:18 45:21 160:14 manager's 25:7 managing 6:18 mandate 6:8 19:21 62:14 64:10 65:5 mandated 66:16	mandatoriness 77:4 mandatory 19:18 22:17 33:12 57:5 61:12 63:3 64:17 64:21 67:9 68:9 73:13 76:10 78:10 78:13 79:14 81:16 93:21 94:1 134:4 161:3,5,17,17 162:3 Manhattan 17:12 114:2,19 115:1 131:21 132:5 138:20 182:13 manipulating 164:17 manner 64:13 maps 15:1 35:14 84:4 118:3 155:11 156:2,2 157:5 Marianne 2:3 3:6 12:20 13:6 32:22 40:2 67:22 Marianne's 77:11 Maryland 88:20 168:16 MASON 124:17 mass 29:19 Massachusetts 130:15 master 184:19,20 materials 9:2 matter 1:17 37:13 40:13 57:14 85:12 89:20 97:21 127:6 173:7 193:20 212:14 mattered 204:4,5 maximize 78:5 95:17,21 129:12 131:3 maximizing 59:15 75:3 maximum 131:8 157:9 158:8 maxing 36:17	mayor 54:21 116:20 MCT 30:8 mean 28:17 43:19 53:15 55:2 64:3 69:17 71:16 92:2 97:1 99:8,15 141:5 163:14 183:3 186:5,20 198:15,16 204:17 204:18,21 208:22 meaning 206:5 means 9:8,9 62:11 78:17 83:5 90:17 108:15 151:12 183:9 191:13 206:5 meant 63:2 measure 109:20 meat 114:2 mechanical 74:9 mechanism 62:1 96:5 118:22 180:10,11 mechanisms 167:10 meet 68:16 186:1 meeting 8:9 members 9:5 14:13 64:3 133:7 161:14 178:18 membership 118:4 mention 8:20 117:3 167:12 202:14 mentioned 101:16 108:21 125:18 126:17 merely 169:5 mess 203:6 metal 88:10 methodology 20:16 metro 30:2,7 35:17 88:17 mic 144:21 microphone 28:18 middle 49:21 54:22 78:22	midtown 17:12 mile 36:18,20 115:22 182:13 miles 4:20 5:10 16:8,13,16 17:10 17:18,22 18:2,9 28:7,11 42:16,22 43:1 59:12 182:16 183:20 193:22 207:12 210:13 military 211:16 million 16:22 17:5 89:2 120:16 millions 102:12 103:20 150:9 mimic 169:5 mind 35:7 69:11 190:14,16 mindful 43:14 44:11 98:13 107:3 120:22 191:8 mineral 208:9 minimizing 75:3 minimum 153:13 mining 208:7,7 ministerial 110:2 Minnesota 157:20 168:15 176:16,20 184:1 199:22 minor 90:22 minute 9:9 17:3 minutes 36:15,15 misplaced 20:1 missed 138:19 mission 14:9 Mississippi 37:12 121:13 Missouri 170:19 mitigation 102:1 mix 156:19 mobility 29:22 66:18 mode 205:1 modern 165:15 modernize 102:10 modes 106:6 modest 21:1 22:14	178:2 moment 99:16 117:4 170:10 momentarily 202:11 moments 4:16 money 40:20 59:16 66:8 75:3 76:3 77:20 83:6,17,19 88:20 91:18 93:17 102:12 103:9 104:5,11,22 105:2 131:22 132:10 151:1,3 152:15 153:13,16 186:18 189:12 199:16 200:8 205:15 211:9 monitor 81:2 138:17 184:18,20 monitoring 81:10 84:1 110:15 monitors 13:19 Montage 2:5 3:8 12:22 29:9,10,11 31:20 32:2 33:3 44:3 47:17 48:9 48:10 55:7 58:10 62:19 67:6,7 69:2 69:13 70:16 71:7 71:19 72:7 73:22 74:6,13 77:1 86:7 91:12 92:19 97:5 98:10 99:12 101:8 106:3,16 108:21 125:2,3,8 126:6,7 134:9 135:6 Montage's 136:20 174:5 Montgomery 89:1 months 71:15 103:16 moot 77:4 morning 4:3 10:5 12:14 14:3 29:11 112:21 118:17 144:16
--	--	---	---	---

move 69:4 83:12 100:11 127:2 141:8 174:15 191:7 movement 165:2 moving 122:20 127:11,12 198:4 mow 71:14,22 73:9 Muad'Dib 58:16 multiple 16:19 22:6 66:16 142:6 multi-use 186:11 Mulvey 1:19 3:4 4:3 10:3 12:16 19:9 28:19 29:7 31:17,22 44:2 47:1 48:9 56:13 57:18 58:5 60:22 61:4 82:11 85:2 91:6 101:2 106:12 107:8 112:18 114:20 118:9 123:17 124:14,21 125:5,17 126:7 127:6 129:14 132:16 133:9 134:6 135:18,21 143:18 144:2,20 145:4 162:5 174:18 175:20 176:1 177:1 181:5 182:1,22 184:8 186:22 187:3 209:18 211:3,20 212:3 Museum 117:15 mutually 127:14	163:9 170:11 181:6,10,17 NARPO's 147:2 153:19 narrow 72:15 narrowly 43:16 165:9 narrowness 72:17 narrows 53:15 national 2:16 3:17 4:13 5:22 10:7 13:12 14:5 15:15 28:1 41:19 68:20 119:13 144:7 146:20 151:10 159:2 161:14 174:12 175:12 183:7 nationalization 165:5 nationwide 14:9,14 nation's 5:15 17:10 18:12 19:3 native 114:21 118:11,12 natural 23:21 41:18,19 64:14 182:18 nature 110:2 129:21 132:5,11 133:21 navigate 138:22 nearby 15:4 nearly 163:17 Nebbia 134:13 Nebraska 17:9 156:7 157:20 182:16 necessarily 126:15 153:11 176:9 necessary 24:7,20 133:1 142:10 152:13 153:16 need 21:9 56:19 62:16 69:11 89:7 91:19 98:22 99:1 105:20 112:11	119:2 133:22 134:20 140:1 141:2,16 158:11 158:16 159:16 171:15 176:10 190:3 191:6 195:19 201:15,19 201:20,20 202:6 211:17 needed 112:16 138:2 needs 34:7 89:18 106:2 157:14 160:5 209:10,11 negative 79:22 82:6 negotiate 6:13 10:20 22:4 33:21 70:8,11 128:20 184:21 185:5 negotiated 55:16 110:13 negotiating 47:22 73:16 150:21 151:7 negotiation 7:10 16:9 69:6 110:4 111:5 127:19 130:3 negotiations 7:11 16:10 17:17 22:13 81:18 111:2 127:7 191:21 neighborhood 86:18 176:8,14 neighbors 71:15 196:2 neighbor's 166:14 neither 197:6 nestled 28:11 network 5:16,18 14:9 85:7 137:12 never 22:3 26:1 64:4 69:10 102:18 104:5 140:20,21 141:4 191:14 211:7 new 28:21 49:20	50:16 52:10,11 75:17 83:1 98:20 113:13,21 114:12 114:17,21 116:2,5 118:11,12,12,15 120:1,18 123:22 130:10 132:12 134:13 137:9,11 137:14 152:11 153:2,4,11 170:18 190:12 205:1 207:13 newer 29:2 news 142:6 nice 60:17 102:19 114:15 128:3 151:3 167:19 nickel 138:21 night 87:12 nine 7:13 119:18 Ninety-two 16:8 NIT 157:7 nitty-gritty 138:1 noble 132:15 nobody's 188:5 nod 92:14,14 nodes 37:22 non 160:16 nonprofit 14:5 non-precedential 25:17 non-rail 18:7 Norfolk 37:17 97:15 normal 183:22 North 157:20 158:17 Northeast 100:8 note 9:6 25:22 29:20 42:6 55:7 184:9 noted 155:15 notes 8:21 41:17 noteworthy 145:22 notice 1:18 7:19 11:9,16 21:4 22:19 82:14 93:5	93:8 102:21 110:12,13 141:11 143:5 149:11,13 149:17 154:3,6 155:1,6,7,12 157:21 158:1 160:7,8,11 182:2 187:12 188:13,17 189:3,6,20 191:3 191:7,8,20,22 192:20 193:4 notices 10:18 notification 157:15 notified 154:2 159:9 notify 143:9 notion 69:15 notions 97:3 notorious 198:17 Nottingham 1:21 3:4 7:20 8:19 9:22 10:2 12:17 13:2 61:1,3,9,15 62:13 64:8 68:22 69:3 70:14,17 71:13 72:5 73:10 74:3,10 76:8 80:20 91:8 96:15 98:9,12 100:22 101:11,15 102:16 105:8 106:9 125:9 126:5 135:19,20 136:8 137:5,22 143:2,10,16,22 187:1,2,16 189:2 189:5 191:11 192:15 193:1,8,14 198:6 200:1 202:10 203:3,16 203:20 204:6,17 205:9 206:15 208:1 209:14 211:1,4,22 no-brainer 103:14 NS 93:12 nuisance 75:13 number 7:9,22
--	---	---	--	--

11:10 36:21 87:7 87:8 104:7 127:16 154:1 163:8 170:10 184:16 186:5 202:21 numbers 5:10 15:6 16:1 17:19 numerous 118:20 119:5,5 164:11 168:12 N&W 97:15	offers 93:22 office 19:15 55:2 67:17 185:21 offices 14:7 official 116:3 officials 115:7,15 116:18 Off-street 176:19 of-way 6:20 37:10 134:20 207:22 oh 32:2 36:16 205:17 Ohio 14:8 156:8 170:18 178:6 oil 43:22 67:1 okay 13:4 28:21 107:8 125:5 145:5 202:12 211:3 old 28:16 32:20,22 33:2 37:4,4,9 39:7 42:12,14 50:15 62:18 67:16 72:21 86:7 116:12 139:11 older 33:4 65:3 omitting 137:18 once 5:17 11:6 24:4 41:4,11,21 81:16 85:18,22 89:13 135:10 143:19 158:19 ones 23:20 28:21 29:2 80:9 84:13 91:9 134:14 141:18,19 168:19 one's 166:14,15 one-year 22:11 ongoing 195:6 online 176:18 oops 19:5 27:19 open 8:22 15:11 16:14 28:11 37:2 64:17 65:22 73:16 76:13 136:21 140:10 192:11 opened 17:13 113:15	opening 3:3 8:20 10:1 47:2 137:10 138:9 operate 37:10 40:10 54:1 88:1 88:10 100:5,13 152:16 operated 88:13 operates 87:3 124:10 125:21 operating 87:13,14 126:4 128:10 operation 62:5 114:9 126:1 139:6 139:7 operations 134:17 operative 187:17 188:18 193:5 operator 91:17 139:14 operators 103:21 opinion 194:11,15 opponents 27:17 34:11 opportunities 29:1 82:21 112:12 opportunity 4:8 6:13 33:7 107:12 112:14,22 130:17 138:18 178:19 oppose 95:4,5,6,12 opposed 66:15 78:8 86:14 95:12 opposite 178:4,8 195:3 200:13 opposition 81:21 optimize 43:7 opting 82:2 option 62:7 69:10 108:12 147:9 options 43:18 129:1 oral 31:4,9 order 67:11 71:12 90:1 96:2,13 139:20 orderly 141:13	orders 15:7,9 16:5 25:12 90:2 Oregon 175:19 organization 14:5 131:15 147:21,22 organizations 20:21 22:9 organized 30:1 oriented 32:13 168:2 origin 4:16 original 18:22 46:7 69:18 originally 196:14 209:21 ostensibly 195:22 ought 51:16,17 outright 154:14 155:17 outset 111:18 outside 92:3 110:21 outsider 162:9 outstanding 137:15 overlays 15:1 overly 205:4 oversight 141:14 Overstar 104:21 owned 20:11 70:20 92:22 129:17 198:10 199:18 owner 25:20 38:8,9 39:3 40:14 48:13 49:5 52:12 53:16 55:17,19,22 65:14 69:7,8,9 89:10 91:20 94:7,18,19 94:20 95:22 96:3 96:21 97:13 123:10 206:6 owners 2:18 3:20 12:2,8 25:10,15 26:9,10,16,21 27:16 38:14 56:15 65:4 92:20 95:4 144:8 146:21 148:10,16,19 150:8 151:11	153:6,22 159:3 161:15 175:1,13 177:2 181:6 183:8 189:21 190:15 200:9 205:12 ownership 96:19 97:4 128:8 145:7 202:18 owns 88:11 178:17
O O 3:1 4:1 Oberstar's 83:2 object 110:10 objectives 107:22 obligation 41:5,12 41:14 48:18,19 49:3,8 52:9 55:20 75:8 97:21 99:22 129:11 135:10 obligations 48:20 73:7 163:4 obscure 81:6 obstacle 81:1 obstructing 94:18 obtain 95:18 obtaining 154:19 185:1 obvious 131:6 obviously 116:16 147:18 154:20 162:15 occasion 13:10 occasions 118:20 occur 54:7 63:8 occurred 33:8 194:10 occurring 131:19 occurs 46:10 84:14 128:19 135:10 OFA 20:19 122:8 128:12 135:12 offer 13:10 174:9 offered 111:2 offering 76:5	P P 1:19 3:4 4:1 pace 131:20 Pacific 37:17 97:16 packing 114:3 page 3:2 175:16 paid 41:8 129:5 171:11,13 172:10 177:8 178:5 200:8 203:15,17 205:21 206:3 paint 115:20 palavering 59:12 panel 2:2,6,14 3:5,9 3:15 9:4,16 12:19 12:19 88:18 106:10,18 109:15 128:7 143:11 144:3,4 156:1 panelists 123:18 145:15 157:12 212:5 panel's 82:8 papers 81:9 parallel 106:4 parcel 52:12 parcels 202:21 park 113:21 115:12 115:13 116:2,10 118:15 142:11 146:17 152:10,11 152:14,16,17 153:3,4 156:5 192:5 parked 100:18 parking 36:9 37:22 50:7 79:3 98:20			

parks 116:3 130:18 146:15 159:17,19 182:12 184:19 185:6,9,12,14	passenger 43:17 66:18 85:11,15 100:3,6,10 105:6 105:12	126:10	Pine 16:20	32:8,9,18,19 34:7 39:8 43:20 62:15 73:1 184:13 191:16 195:1
part 10:14 14:20 18:20 52:3 72:20 72:20 75:4 77:14 79:19 86:6 89:15 104:9 115:4 125:21 138:13 156:20 157:2 171:7 172:19 178:14 189:8 196:6 210:16	passing 5:21 64:3 211:5	period 21:4 103:1 108:7 126:13 130:2 165:7 167:22 171:2 199:8 204:13	pioneers 66:7 place 41:4 52:4 60:14,20 110:8 122:10 149:9 152:22 183:9	political 26:6 165:1
parte 1:9 32:8	path 76:15 211:14	periods 7:10 134:2 134:5 194:22	placed 168:17	pollutants 46:3
participants 13:14	patience 91:10	permanently 5:15	places 14:11 88:1 130:15 183:3	polluted 46:5
participate 19:21 75:1 127:19,21 133:7	pattern 184:14	permissible 26:13 196:9	plaintiffs 188:3	pollution 46:6
participated 30:18	patterns 112:9	permission 146:11	plan 90:6 103:5	ponder 192:4
participating 21:19	Paul 58:16 146:1	permit 10:8	plans 104:1,19 184:19,20	pooling 164:16
particular 39:22 112:6 121:20 138:5 150:16,17 162:12 176:22	pay 22:9 25:7 37:18 37:18 44:20 47:13 150:9,14 172:8 189:10 203:11,12	permits 209:12	plantings 116:7	poor 152:20
particularly 21:10 22:8 55:4 64:4 84:13 98:3 160:1 163:22 182:11	paying 6:19	permitted 202:2	plants 116:7	poorly 149:1
parties 3:15 6:12 7:2 8:14 12:12 58:7,7 87:9 94:6 110:11,22 111:9 126:20 127:7,8,10 142:15,19,19 143:9 144:6 148:8 150:21 151:6 157:4,10 165:22 166:1 171:5,10	payment 26:21	permitting 10:19 11:3	plate 132:21	popular 115:14 174:6
partner 144:17	pays 150:20	perpetuated 169:8	plausible 47:10	populated 41:20
partners 28:5	Peach 136:13 137:2	person 52:8 148:21 211:18	play 187:9	population 90:18 182:14
partnership 28:15	pedal 88:9	personal 82:5 138:6 158:4	playground 176:10	portion 120:17 132:4 156:11,13
party 46:15 111:16 111:21 203:7	Penn 178:7	personally 76:11 187:5	playing 18:10,11 209:10	portions 119:1
pass 147:12	Pennsylvania 14:8 16:21 47:22 170:18	perspective 17:19 163:11	please 9:6,10,20 103:2 107:1,3 138:16	Portland 175:19
passage 5:2,7	people 13:15 14:12 36:4,5,9 43:13 49:10,20 51:9 57:13,22 58:3,13 65:11 66:10,22 74:11,22 79:7 80:2 81:5 84:19 84:22 85:9 90:19 95:10 100:9 101:17 117:20 126:14 127:1 138:11 139:2 142:6 151:18 177:7,14,15 179:10 193:20 200:17 204:22 210:1,2	Peter 2:9 3:12 106:21	pleased 12:4 13:9	portray 135:7
passed 177:4	percent 97:9 151:1 155:22 170:17,22 171:20 176:4 179:17 208:14	petition 152:19	plenty 135:11	posed 7:22 15:20
		phone 22:6	plow 209:6,8	position 33:14 55:11 58:14 67:18 68:15 91:18 131:2 131:10 181:16
		phones 9:20	plows 149:13	possession 167:20 171:11
		picked 189:6	point 25:16 35:4 39:5 40:22 42:15 58:12 61:11,17 65:13 68:14 77:5 81:22 84:3 87:2 92:4 104:20 105:5 126:2 133:20 174:5 175:2 179:22 193:15 202:14	possessors 164:5
		picking 125:12	pointed 134:9 181:19 194:22	possibility 49:17 63:21 122:20 123:8 186:8
		pickle 79:7	points 23:18 80:21 143:13 170:10 209:20	possible 11:5 32:21 44:14 46:7 47:7 56:1 63:16 74:4,5 74:8 78:15 79:10 83:22 102:6 137:20 173:17 174:2
		picture 116:20 117:1	policed 152:18 153:18	possibly 38:16 123:12 177:18 185:15 188:21
		pictures 13:21 115:18 116:1 117:7,13	policies 32:20	post 139:17
		piece 65:6 113:7 128:9 129:4,12 130:20 135:8 180:5,16 201:15	policy 24:18 28:6	postulate 80:18
		piecemeal 20:8		potential 10:20 16:2 20:1 22:7
		pieces 178:16		
		pike 89:6		
	perfect 168:15			
	performed 18:15			

82:19,20 108:16 109:7 111:10,18 112:11 120:5 121:1,22 154:3 155:1 187:8 196:19 potentially 108:12 111:3 188:17 192:11 power 67:9 185:15 197:22 powerful 58:13 powers 54:12 164:3 185:10 196:11 practical 129:16 practicality 45:22 practically 30:14 91:14,16 practice 51:14 145:8 practices 51:15 60:15 practitioners 136:15 prayer 153:14 precedent 98:16 precedents 120:3 168:18 preclude 5:20 21:11 181:8 precluded 70:2 predecessor 97:17 predecessors 69:17 preempted 108:9 preemption 72:3 prefer 36:11 90:21 91:2 premises 40:12 preparation 133:5 211:12 prepare 82:19 113:18 preponderance 45:20 Preseault 25:17 42:9 146:1 154:11 155:15 173:3	194:12 presence 175:9 present 2:1 8:4 107:13 181:15,22 187:4 presently 16:13 preservation 6:2 10:9 18:18 19:3 24:16 29:18 32:16 34:5 64:14,16 65:7,22 66:10 68:3 72:18 103:22 preservational 43:12 preserve 20:22 35:11 40:15 42:1 42:2 43:13 44:13 44:16 53:4 77:8 79:8 83:13 85:6 95:17 120:11 132:8 135:13 preserved 16:18 54:9,10 70:10 77:9 134:21 preserves 62:6,8 preserving 6:10 11:5 37:4 62:2,4 62:11 74:19 108:15 109:11 118:22 119:11 126:11 President 13:7 211:6 press 138:5 pressure 59:4 141:7 pressures 46:10 164:20 presumably 92:8 presumption 178:12 presumptions 60:3 165:11 pretty 65:19 102:5 180:3 187:21 207:4 208:12 prevented 21:18	preventing 134:3 previous 109:15 119:19 128:7 previously 119:7 119:18 120:8,19 121:5 price 131:8 prices 20:20 164:17 pride 138:6 primarily 32:13 66:4 185:12 209:11 primary 62:3 173:18 principal 35:8 166:16 principle 193:20 prior 9:4 19:4 145:14 priorities 64:2 prioritize 78:4 priority 128:14 private 20:3,21 22:8 59:19 65:11 70:12,12,21,22 71:1,1,3 110:20 128:9,9 129:12 130:6 134:3,8,10 134:15 156:19 157:1 161:7 165:19 185:4 195:15,22 198:13 privatize 199:3 privatized 197:20 pro 166:3 probably 15:13 18:4 38:14 42:21 43:3 45:9 53:17 54:6 68:8 132:9 136:16 137:17 138:11 162:19 170:14 203:4,10 210:18 problem 97:6 104:10 168:4,8 182:11 196:5 197:5 210:21	problems 28:16 56:7 92:18 103:11 103:12 111:18 procedural 8:21 110:1 procedure 80:11 85:20 104:14 procedures 21:7 proceed 105:18 107:10 proceeding 31:6 115:10 120:3 131:15 142:20 proceedings 30:9 30:19 119:6 146:14 process 4:21 19:19 20:19,19 46:21 56:16 76:19 82:3 82:17 84:14 111:6 115:4,5,10 119:12 120:15 130:12,20 135:5,11 147:20 148:12,15 151:15 151:15 152:13 153:8 154:19,21 155:3 156:20 157:3,15 160:13 160:14 178:20 179:3,12 180:12 180:16 181:12 191:2,7,19 192:6 193:22 209:9,12 processes 114:14 product 117:2 products 112:10 professor 162:10 166:8 178:1,4 194:6 200:13 202:14 professors 162:22 profit 125:22 129:4 profited 26:18 profits 20:2 129:3 program 6:1,3 8:11 23:8 44:10,12,13 66:5,9 85:5,21	101:20,20,22 104:10 107:15,18 108:1,10,15 109:11,19 110:7 110:15 111:8 112:7 127:20 programs 101:21 program's 16:3 progress 103:5 170:3 progressed 210:3 progressing 170:6 progression 98:13 progressive 198:19 prohibit 123:1 project 74:1 103:10 projects 81:2 104:9 119:5 promote 64:20 186:4 promptly 103:8 proper 151:12 properly 77:13 properties 130:5,9 130:12,18 property 2:17 3:20 6:19 12:1,8 25:10 25:13,15 26:9,10 26:12,16,21 27:7 27:12,13,16 59:8 61:18 65:2,3,4,6 65:12,15,16 69:6 69:8,8,9 70:13,20 70:22 71:1,1,4,6,9 71:17 73:6 78:1 89:9 93:2,13,21 94:2,7,13,20,21 95:4 96:2,4 97:3 97:10 98:6 99:2,3 108:8 122:12 125:21 128:21 129:4,13,18 130:21 134:1,4,8 134:10 135:3,8 144:4,8 145:12,16 145:18,19,20 146:5,17,20
--	---	---	---	---

147:11,12 148:9 148:11,15,18,19 148:20 149:6,15 150:8 151:11,13 152:2 153:22 154:15 155:4,7 156:9,12 157:1 158:4,9 159:3,5 161:8,11,13,15 162:13 163:5,11 163:22 164:4,12 164:15 165:10,12 165:13,18 166:7,7 166:11,13,21 167:7,8,10,16 168:7,22 169:10 169:11,14 170:1,7 170:12 171:8 172:1,4 174:22 175:1,2,8,13,19 176:2,4,11 178:16 180:5 181:2,3,6 182:5,15 183:8 186:6 190:15 191:10 192:12 194:16,19 195:2,4 195:9,12,15 197:14,14 198:2,2 198:12,13,21 201:8,12,16,22 202:7,15 203:12 203:12,15,17 205:12,19 206:1 208:11 209:22 210:3,7 proponents 147:17 proposal 22:15 proposed 23:18 83:2,2 187:8 proposes 153:19 proposing 111:21 proposition 88:7 147:6 prospective 57:10 protect 22:15 27:14 28:3 78:18 127:3 167:19 170:7	171:9 174:11 protected 91:2 164:3 195:15 protecting 54:18 198:21 protection 54:12 65:1 89:21 protections 169:12 195:16 protects 89:19 96:12 145:18 prototype 56:17 57:3,5,7,9 132:18 prototypes 57:13 protracting 172:21 prove 82:6 175:7 177:20,21 provide 4:8 15:17 16:19 57:12 109:8 110:11 155:13 160:12 168:1 190:3 provided 23:1 26:15 112:16 154:18 166:5 provides 37:2 67:14 108:11,15 providing 108:17 112:14 provision 11:16 19:16 provisions 24:14 93:4 105:17 119:8 120:19 123:11,13 public 1:5 11:3 14:21 16:14 20:21 21:6 28:11 29:14 32:15 37:20 57:8 71:10,11 72:2,17 79:9 80:7 85:4,8 89:11 99:4,9 104:1 111:3 112:13 114:14 115:7 116:2 117:7 128:3 129:19 130:6,8,9,19 134:3,7,10,11,16	134:18,20 135:1 135:13 137:15 139:10,12,22,22 142:11 146:15 151:12 152:3 155:9 157:14 158:21,22 159:1,8 160:7,10 162:18 165:18,20 169:2 172:7,22 173:2 175:14 182:6,7 186:10,11 189:12 190:18 192:3 196:21 197:1,7,9 197:11,14,16 198:3 199:11,16 199:17,18 201:14 201:15,20 202:4,6 210:6,7 publicly 199:18 public's 174:12 196:21 publisher 191:22 publishing 187:12 pull 31:18,18 105:2 pun 76:15 punish 164:15 168:2 punishing 168:21 purchase 130:14 172:8 198:1 199:17 205:10 207:3 purchased 202:17 202:22 purchases 199:15 purport 53:7 purported 25:12 purpose 8:8 42:4 44:12,12 79:8 85:5,14 112:8 120:10 148:4,6 purposefully 64:12 purposes 11:3 35:7 35:8 95:13 99:15 113:10 130:6,19 196:22 197:2	pursuant 1:18 52:1 pursue 160:18 pursued 66:15 pursuing 54:14 pursuit 24:17 209:22 210:4 purview 89:12,15 189:16,17 193:3 put 17:18 34:8,10 36:8 37:15,22 39:11 42:11 49:20 50:6 54:22 66:8 70:20 77:22 88:7 91:16 100:19 103:15,20 104:12 105:13 132:4 149:9,12,14,15 153:7 163:9 174:1 182:4 199:4 212:9 putative 25:13 puts 56:5 putting 38:3 77:18 84:11 92:7 119:12 153:12 212:9 puzzle 130:20 p.m 212:13	179:21 194:5 197:3 questionable 25:16 questions 8:1 9:5 9:16,18 11:10 12:9 15:20,21 34:20 44:4 61:2,5 80:22 82:12 91:7 106:10 110:10 123:16 124:8 174:20 199:13 209:16 quick 23:17 91:9 115:8 170:9 quickly 117:14 123:8 168:6 quit 97:10 quite 7:16 24:9 46:7 80:18 87:5 103:8 104:15,16 114:8,21 116:19 121:19 131:6 132:15 137:19 167:15 169:8,16 173:5 184:15 188:20
			Q	R
			qualifying 65:1 quality 102:1 116:13 quantum 74:9 quarter 6:7 26:6 quarters 15:11 77:8 97:14 quasi 71:3 quasi-public 196:10 199:11 quasi-railroad 199:20 question 18:21 22:19 23:17 48:11 81:14 85:3 94:17 101:12 121:3 122:4,9 134:7 154:16 158:15 161:1 175:5	R 2:8 3:10 4:1 rack 104:13 rail 1:9 2:11 3:13 4:5,9,12 5:3,4,6,9 5:10,14,16,17,20 6:4,4,10,10,22 7:4 7:5,14,22 8:10,12 8:16 10:9,10,11 10:13,14 11:2,5,6 11:11,21,21,22 12:2,7 13:11,16 13:21,22 14:10 15:2,7,10,16 16:4 16:5,7,10,12,17 16:21 17:11,16 18:2,6,7,20 19:1 19:13,14,17,21,22 20:8,15,17,18 21:3,11,19 22:4

22:15,22 23:3,12	95:5,7,22 96:21	94:7,20,21 96:1	164:2,4,6,12,19	142:8
23:12,20 24:13,20	96:22 97:9,19	97:1,10 98:14	164:22 165:3,6,10	reaction 79:22
25:2,10,12,19	98:17,21,21 99:2	100:1 106:18	165:18,21 168:2	reactivate 35:1
26:2,12 27:22	99:3,14,17,20,20	114:7 124:18	168:21 170:12,21	39:16 111:21
28:8,9,11,12 29:1	100:3,6,6,6,8,12	125:19,19,20	171:10 172:11	reactivated 7:14
29:17,17 30:9,10	100:15,17,20	126:1 128:2,9,20	184:22 196:10,14	20:5 34:14 38:11
30:18,21 31:5,5	105:6,7,10,12,13	134:19 139:17	197:6,13 198:1	reactivates 52:9
31:13 32:10,11	105:14,16,18,20	145:7,19 146:10	199:2,9 200:8,9	reactivation 23:10
33:6,16,17,18	106:21 107:14,18	150:22 155:20	200:15 202:17	24:10 27:8 29:2
34:1,4,8,9,11,13	108:1,5,14,17	156:4,9,11,14,20	203:8 204:3,15	34:22 37:15 38:7
35:1,1,8,16,19,20	109:7,10,11,19	158:8,18 159:5,15	207:5,14 208:7,15	41:7 54:3 59:21
37:4,7,14 38:2,3,6	111:8,13,17,21	163:10,14 164:10	210:14,14	77:12 78:6 79:10
38:8,10,11,13,15	112:1,3,7,11,15	165:11 166:3,9,16	railroad's 24:2	88:8 90:14 94:14
38:21,22 39:2,6	116:9,12 118:19	167:1,6 168:20	164:14 172:17	96:6 97:19 108:17
39:10,10,11,11,14	118:22 119:8,13	169:3,13,21,22	rails 85:6 105:16	117:7 119:10
40:10,11,13,15	119:22,22 120:8	170:15 171:14,22	106:1,5	122:11 173:13
41:1,6,7 42:4,6,14	120:19 121:20	172:2,9 173:16	Rails-to 12:20 13:7	read 9:12,14 58:15
42:18 43:1,15,16	122:12,13 123:2	177:3,12,16 186:9	57:21	64:9 81:8 138:10
43:17,17 44:18,22	123:21 128:13	195:8,10,10,22	Rails-to-Trails 2:3	reading 136:10
44:22 45:4,21	133:2,3 134:4,7	198:10,22 199:1	3:6 13:9 14:4	210:22
46:20 48:13,16	134:22 137:13	200:19 201:1	58:3 62:20 127:17	real 32:18 83:13
49:5 50:11,19	139:5 140:6,8	203:5 204:11	railway 85:7	97:6 103:22 131:9
52:1,5,10,11	151:2 161:17	205:3 206:10	124:11	132:2,13 139:22
53:16,21 54:2,22	162:13,16 163:10	207:2 209:3	rail-banked 7:15	187:5,15 194:19
55:9,9,17,19,22	166:6,7 167:8	210:16	rail-freight 105:7	197:7 207:14
57:13 58:20 59:20	173:4,12,18 174:7	railroading 63:6	Rail-to-Trails	realistic 78:11
59:21 60:12,18	184:10,12 197:1	114:5	133:20	realities 165:1
61:13,18 62:7	199:5	railroads 2:8 3:11	raise 80:21 104:19	realize 51:8 81:12
63:2,5 66:19	railbanked 12:3	4:19 5:3 7:12 8:5	124:4 134:6 151:2	92:4 163:2 206:21
67:11 68:4,5,10	railroad 3:9 4:18	12:7 19:5,18,18	raised 98:1	realized 103:17
71:21,22 72:18	4:22 5:19 6:2,3,14	19:22 20:7,13	range 8:5 17:9	reallocate 105:3
73:1,6 76:18	7:14 10:20 23:15	23:19 53:1,6	139:9	really 18:13 43:19
77:17 78:7,9,17	24:11,19 25:8	56:15 57:20 58:12	rapid 131:20	48:14 59:13 74:2
78:19,20 79:10,13	26:13 33:21 34:10	61:17 62:14 64:11	rapidly 38:12	84:7 86:4 97:2
79:16,20 80:10	37:9 38:9 41:10	65:19 69:21 70:21	rarely 94:4	99:2,7 106:8
82:20 83:14,19	41:18 42:11,16	74:14 76:12,20	rates 16:1 164:16	124:2 140:8,20,21
85:7,11,12,12,13	44:14 45:13 46:6	79:15,17 80:6	199:1	141:4,5 171:15
85:13,15,16,18,21	47:9 48:3,14,17	82:1 84:6 100:16	rational 162:20	188:7 194:16
85:22 86:1,2,3,3	48:21 49:1,6 50:3	100:16 106:20	190:18	197:10 201:9,22
86:15 87:3,4,8,10	51:1 52:3,14,14	107:14 122:22	rationalize 5:5	203:19 204:4
87:14,15,21 88:5	52:15,21 53:4,8	124:9 126:3	rationalizing 4:21	208:8
88:5,6,14 89:1,8,9	53:12,17,18 54:1	127:18,20 134:1	reach 7:2 71:10,12	reason 9:14 20:6
89:19 90:3,8,13	54:10,19 55:13	145:15 147:5	96:6 123:9	32:18 33:20 44:16
90:16,17 91:4,13	59:4,8,16 63:10	148:9 154:13	reachable 20:21	72:15 79:1,17
91:17,21 92:5,10	68:15 69:16 70:13	155:10,16 156:1	reached 11:2,17	81:5 83:8 90:11
92:15,16,20 93:2	73:15 75:5 81:16	156:16 161:6	60:14 131:18	100:9,13 136:16
94:13,14,17,18,19	91:22 92:9,12,21	162:13 163:17,22	reaching 127:11	136:17 148:17

163:16 196:6,8 203:11 208:3,4,15 reasonable 63:15 63:17 154:22 155:5 reasonably 33:9 reasoned 166:11 reasons 20:12,13 40:18 83:15 91:4 201:13 reassemble 11:8 reauthorization 83:3 rebuilt 115:18 rec 184:19 recall 55:18 117:9 131:13 receipt 188:16 receive 26:21 187:19 received 40:18 103:3 recession 90:6 reclaiming 92:17 recognize 116:19 138:3 145:16 186:10 197:12,16 209:9 recognized 71:2 109:2 116:10 150:3 154:12 recognizes 110:19 199:9 recognizing 126:12 198:4 recommend 133:6 136:11 recommendation 78:3 158:1 recommendations 148:5 160:21 recommended 56:20 reconcile 174:21 reconstruction 65:8 117:1 reconverted 119:21	record 23:9 125:15 136:18 142:18 143:1 155:9 195:18 records 15:10 recouped 103:19 recourse 151:16 recover 145:11 recovered 150:7 recreation 37:2 137:13 recreational 6:6,15 108:6,19 174:3 red 9:9 redeem 187:18 redevelopment 65:9 reduce 66:22 85:10 186:17 reduces 174:22 reducing 75:9,9 reestablish 174:8 reestablishing 85:7 reestablishment 44:14 reexamine 21:14 reference 182:3 referenced 109:5 referred 175:13 reflect 110:1 reform 165:2 refuse 127:19 refuses 33:21 regard 120:2 Regarding 9:2 regardless 178:13 register 173:1 registrar 84:1 regs 72:3,4 regulate 189:16 199:1 regulated 18:3 69:16 71:9,18 72:6 73:6 99:17 135:7 regulating 193:13 regulation 72:9	134:11 173:17 197:13 regulations 6:12 7:7 94:3 109:21 110:6 174:14 regulatory 10:14 19:20 32:6 39:19 51:14 69:18 95:13 97:20 103:11 110:21 143:4 148:14 165:2 reinstating 111:13 relate 34:21 relates 98:5 relating 15:10 34:20 71:5 relations 13:7 80:7 relationship 98:14 relatively 169:18 173:14 210:2 release 206:13 releases 207:18 relief 160:13 relocate 122:1 relocations 28:22 remain 8:13 remaining 9:9 170:21 remains 91:3 remarks 3:3 8:20 10:1 remedy 149:19 remember 89:14 114:22 134:13 185:17 209:20 remind 123:18 210:9 reminded 194:10 reminder 9:19 removal 40:13 51:20 139:5 remove 89:3 140:7 removed 5:15,17 23:14 52:1 115:21 rent 39:19 rental 184:3 repainted 115:21	repair 23:22 repairs 133:2 repeat 109:16 repeatedly 98:8 replaced 159:7 replacing 11:20 23:13 133:1 report 136:3 repossess 27:6 represent 8:4 87:6 145:9 146:8 147:22 162:10,17 represented 146:1 representing 12:21 16:7,13,15 17:22 77:15 106:19 144:4 146:19 197:9 represents 26:18 89:17 134:18 145:6 request 181:11 requested 82:13 requests 16:6 127:10 require 11:17 24:9 51:2 76:19 92:9 93:21 111:9 160:5 186:1 188:11 required 21:15,17 31:10 44:21 45:2 45:14 53:16 61:18 65:20 80:11 130:11 155:6,9,11 156:16,17 188:10 requirement 23:4 110:11,17 requirements 186:2 requires 22:6 requiring 114:11 143:5 157:5 reroute 46:2 research 176:12,12 195:14 198:7 reserve 53:8 residential 117:15	residents 100:20 residual 20:1 123:10,14 resistance 81:3 resolution 127:15 160:15 resolve 123:20 resolved 47:8 56:22 124:4 160:17 173:10,13 resolving 127:12 169:14 resource 41:19 64:14 resources 68:21 83:9,11 84:12 173:22 respect 40:4,11 86:12 177:18 Respectfully 96:17 respond 21:7 211:2 responded 87:1 response 110:9 181:10 responsibilities 123:21 responsibility 6:18 25:7 52:6 108:4 133:15 responsible 24:18 29:21 40:5 46:14 47:12 72:13 80:3 129:18 132:22 193:12 rest 33:18 34:1 52:7 restoration 24:6 40:6 41:12 56:11 86:22 87:1 123:2 134:21 restore 7:5 12:2 23:12 40:20 41:6 44:21 47:14 50:19 52:7 55:20 111:17 111:22 restored 5:13 11:21 38:22 45:13 51:1
--	---	---	--	---

133:3 restoring 11:20 restrict 199:3 restrictions 65:8 result 15:9 16:17 26:20 33:22 49:12 49:19 52:2 78:21 147:19 151:22 160:15 197:12 resulted 7:11 165:3 165:16 168:11 results 66:14 124:5 145:11 168:1 175:17 resume 140:8 resumption 140:5 retain 27:5 146:12 retained 146:13 206:6 retirement 42:13 retroactive 60:21 retrospect 60:17 return 5:20 131:3 returned 86:2 reuse 130:17,21 196:22 reused 130:6 reveal 23:1 Revenge 137:1 Revenue 172:14 reversing 165:10 168:14 reversionary 2:17 3:19 12:1 25:9,14 26:3 108:8 144:4 144:8 145:20 146:20 148:10 151:10 156:13 157:19 159:3 161:15 167:4 175:12 179:20 180:22 183:8 202:19 203:1,18 203:21 205:10 206:5 review 1:10 4:5 32:5 87:9 120:15	136:3 reviewed 12:10 reviews 136:21 revised 72:21 re-employed 116:12 Richard 146:22 173:15 richly 26:18 rid 50:14 70:3 right 6:19 7:3 13:19 27:6 37:9 38:9 46:14 47:22 51:15 54:22 74:4 74:10,15 75:12 77:7 78:5 81:19 97:19 98:9 107:4 107:9 111:16 123:19 124:2 125:8,17 128:8,10 128:17 130:14 136:2 137:3,6 150:3 161:21 163:1 178:7 189:4 191:3 192:16 197:7,18 204:9,10 207:4,4,21 rights 25:13 65:16 92:16 97:4 108:8 123:14 134:19 145:16,18,19,20 146:12 147:11,12 149:6,22 151:1 152:14,16 154:21 155:5 158:5,9 162:12 163:5,21 164:1,4,12,15 165:10,12,13,18 166:13 167:4 168:7 169:2,11 170:1,8,13 171:21 172:4 174:12 179:1 187:20,20 191:3,10 194:16 194:20 195:2,4,9 195:12,16 196:21 198:13,21 200:15	200:16 201:2 208:9,10,13,13,22 209:1 rights-of-away 44:13 rights-of-way 5:19 6:14 43:14 79:9 145:7 146:10 154:13 162:15 right-of 98:14 129:7 177:9 right-of-way 11:4 29:18 38:9 40:5 41:14 42:10 88:12 121:17 127:3 137:14 155:16 171:3 179:1 207:22 risk 34:10 49:12 57:7 92:2 139:12 risks 73:19 river 37:12 55:12 rivers 56:7 road 50:16 183:22 184:2,3 roads 183:1 roadways 130:18 199:15 robust 198:21 role 14:15 98:4 110:2 room 1:13 113:4,6 151:5 205:8 rotate 9:16 roughly 32:7 42:19 route 46:4 RTC 14:13,17 23:1 28:5 32:22 132:20 RTC's 15:18 16:1 rule 55:15 154:7 166:12,22 167:5 167:11 168:13 185:18 196:16,16 ruled 63:14 rulemaking 56:16 168:5 188:12 rules 165:9 167:16	168:1,6,14,19 169:1,5,10,16 170:7 171:9 174:10 186:16 196:3,4,9 run 103:11,11,12 118:8 149:8 154:5 193:17 running 102:8 190:6 runs 29:14 30:1 126:2 150:1 rural 183:2,21,22 rush 21:11 Rutson 138:4 R.J 124:1,5 <hr/> S <hr/> S 2:11 3:1,13 4:1 safe 106:16 212:11 safeguards 104:4 152:21 safer 36:13 safety 101:9 139:12 salary 59:15 sale 123:14 128:20 sales 20:3,9 salvage 7:1 40:11 41:3 49:7 75:11 salvaged 52:4,5 sample 56:17 sanction 53:14 satisfaction 98:3 satisfied 93:13 satisfy 6:8 save 18:9 205:14 saved 18:6,13 saw 5:12 saying 39:10 47:5 68:2 70:19 87:2 102:20 201:4,19 says 67:11 96:22 97:1 105:10 137:3 178:13,13 179:11 209:1 210:17 scale 104:9 Scalia's 194:11	scarce 173:22 scare 56:11 scenario 76:14,16 79:12 80:17 91:13 99:8 123:11 139:14 140:9 scenarios 73:14 139:9 scenic 64:18 65:22 66:6 schedules 155:12 155:13 156:3 157:6 scheme 169:19 scholarship 174:16 school 74:21 144:11 192:5 schools 176:8 science 58:15 scientifically 91:15 Scotland 208:5 Scrutiny 22:22 se 41:6 seachange 65:9 seated 107:1 second 21:14 25:1 80:17 121:3 155:10 166:20 171:17 173:11 194:13 Secondly 24:13 section 4:13,16 5:22 6:9 13:11,22 34:1,4,12 107:16 131:20 sector 128:9 secure 127:1 153:17 securing 142:10 security 152:21 159:22 182:19 SEC's 63:15 see 9:8 13:20 32:18 35:15 58:12 60:11 81:22 84:4 90:16 90:16 104:5 113:20 114:7,10
--	--	--	---	--

114:16 115:16 116:7 122:22 129:22 139:8 140:15,20,22 173:1 207:14 seedy 115:3 seek 8:15 24:2 46:4 61:17 160:13 seeking 131:3,7 seeks 146:17 seen 81:1 139:8 168:19 184:4 196:8 206:9 209:3 segment 33:17,19 93:7 segments 34:9 self-interest 74:11 74:14,15 sell 49:11 53:1,3,7 53:13 75:16,18,18 161:11,12 200:10 206:12 selling 93:13 sells 129:4 send 120:20 Senior 13:6 sense 45:7 48:7,8 88:13,22 207:17 sent 102:19 sentence 67:11 separable 209:1 separate 124:12 209:1 separation 87:11 87:16 series 129:6 serious 90:5 169:8 171:16 187:21 seriously 25:6 serve 112:8 183:18 served 112:13 serves 11:2 17:4 service 5:14,20 7:1 7:5,15 11:6,21 12:3 21:9 23:12 27:8 35:1,12 38:10,22 39:16	44:22 79:20 85:8 87:1 94:2,3,4,18 100:12 108:17 111:17,21 112:1 121:21 122:5,5 134:22 140:6,8 172:14 174:8 services 133:2 set 4:15 35:16 60:2 60:15 94:8 95:19 209:11 sets 191:16 setting 164:15 settled 172:16 set-up 39:15 seven 190:9 seventh 140:16 severance 33:22 34:15 49:13,16,20 49:22 78:15,18 severed 34:3,12 severely 185:13 shakedown 39:18 shame 82:4 shareholders 75:8 129:11 shed 62:21 164:20 shift 169:5 207:14 shifting 186:9 shifts 165:17 ship 89:4 shipper 122:1 174:8 shippers 121:22 199:4 shipping 112:9 shock 79:19 shoestring 159:20 shops 103:14 short 17:17 21:6 41:10 62:5 93:6 93:15,16,17 103:19 107:17 125:6,18,20 167:22 173:15 176:17 shorthand 166:4	shortly 132:13 shortsighted 168:4 shoulder 24:12 151:6 show 17:20 103:5 117:16 showed 176:21 shown 178:20 shows 116:14 Shudtz 2:9 3:12 106:21 112:20,21 118:6,10 124:8,13 124:16 126:9,10 128:1 129:14,16 133:9,17 142:2,5 143:3,6 shuffle 54:6 shut 192:19 shy 70:2 side 16:3 78:8 111:1 114:1,18 115:1 149:10 153:7 200:18 sides 178:4,8 200:14 sidewalk 103:17 sidewalks 183:17 sign 203:6 signaled 125:11 significant 50:10 65:13 103:1 121:4 174:9 196:20 202:21 silly 131:21 Silver 88:16 similar 27:13 154:15 similarly 53:21 simple 36:13 160:13,14 170:20 170:22 179:18 180:3 188:12 202:18 203:13 208:14,21 simply 26:7 45:11 170:13 172:4 186:4	sink 32:1 sir 13:5 125:2 Sisterhood 109:2 sit 158:16 177:19 189:11 site 46:5 sits 108:14 sitting 102:12 107:7 131:1 193:16 situation 39:18 58:21 59:5,17 73:17 78:15 94:16 188:5 199:10 situations 76:7,12 79:6 six 30:18 36:16 50:16 103:16 187:9,11 190:9 192:19 193:16,21 193:21 sixth 140:16 six-year 188:18 size 86:4 sky 132:2 slide 114:5 117:10 117:16 slides 113:18 slipped 129:2 sloppy 210:16 slow 4:22 slowly 167:17 173:10 small 76:1 104:8 209:19 smart 203:8 208:5 SNJ 118:19 social 64:18 66:14 66:17,17 67:1 76:17 society 182:19 sole 156:22 solely 19:4 solicited 112:2 solution 188:4 192:22 somebody 39:19	66:1 69:7 93:5 141:4 156:6 177:11 somebody's 182:5 someday 20:4 somewhat 25:3,4 46:8 91:14 171:19 soon 83:22 164:9 sophisticated 208:12 sorry 118:7 sort 5:12 11:16 32:15 41:15 46:17 46:18,20 49:3 50:9 54:3,4,21 55:14 56:16,17 58:5 63:9 96:18 97:3 99:6 119:8 132:20 133:12 139:21 152:1 162:18 198:11 206:22 207:15 sorts 164:11,18 206:19 sought 142:14 163:18 sound 25:11 101:18 sources 43:22 83:19 Southern 37:17 38:20 97:6,15 99:19 131:7 Southern's 94:15 so-called 25:14 26:3 124:1 space 37:2 64:17 65:22 209:2 spate 169:13 206:22 speak 15:18 35:4 104:20 105:12 115:3 144:21 197:11 speakers 9:4,6 12:11 speaking 12:13 91:16 125:3
---	---	--	---	---

131:12 144:8 163:6 special 17:14 specific 34:20 54:8 110:9 111:19 171:18 specifically 4:10 29:20 30:16 133:5 150:2 specifications 185:19 specify 143:7 spectrum 169:1 speed 87:22 spell 47:11 128:1 spelled 47:15 spend 4:16 38:3 162:22 200:5 spending 104:11 spent 102:9 105:1 120:17 153:12 162:11,15 spirit 141:14 sponsor 6:17 45:14 47:9 108:3 sponsors 7:13 8:6 10:21 12:7 44:20 45:1,4 82:19 spread 35:17 spreads 36:20 spring 88:16 squarest 49:8 St 29:15,22 30:7 35:9,17 73:8 90:7 stable 170:6 stacked 149:7 stadium 146:18 staff 74:20,22 84:19 137:17 212:9 stage 4:15 38:2 Staggers 5:2,7 stagnation 163:16 stairwells 116:16 stakeholder 12:6 stakeholders 8:4 13:15 196:19	standard 24:7,19 166:10,12 180:3 standards 104:12 stands 19:13,14 stark 19:13,14 start 13:1 44:4 124:7 143:5 188:18 189:17,18 started 115:6,16 208:8 starts 190:6,22 state 21:19,20 22:1 26:5 29:5 46:12 50:13,22 51:3 54:13,13 56:8,9 69:22 70:1 98:4,6 99:15 102:8,8 104:21 105:2 114:11 122:15 130:10,13 139:10 152:11 163:5 164:1,2,3 168:5 168:12 173:8 175:15 179:8,8,10 179:18 181:3,4 184:11,11 185:9 185:11,17 186:14 186:15,15,21 194:17,18,18 195:1,1 199:15 statement 32:8,9 32:18,19 39:8 47:2 160:16 statements 9:13 21:15 163:8 states 1:1 26:22 66:7 70:21 75:14 87:4 101:7 145:10 164:11 169:4,6,15 170:17 178:12 179:13,16 184:16 185:3,8 186:4,6 186:14 196:8,12 198:3 state's 21:21 statistics 23:1 status 23:2	statute 8:12 13:16 17:8 28:6 30:14 31:5,14 32:7,12 42:7 43:12 58:20 64:10 65:20 67:9 67:10,14 68:4,6 72:19 73:12 78:5 79:8 89:17 96:11 96:14 105:10,14 105:18 120:10 149:18,22 154:5,9 162:16 188:19 189:17 190:5,21 191:16 193:6,12 statutes 64:15 149:7 statutory 21:20 stay 159:6 STB 21:14 48:22 51:14 72:9 95:1 98:4 137:17 153:20 154:7 157:6,8,14 158:2 158:3 159:9,14 160:8,12,18 187:6 188:3 stems 43:8,10 stenographer 125:10 steps 21:2 153:20 stewards 29:4 sticks 45:21 stock 164:17 stocks 196:13 stop 36:7,15 88:17 stops 36:4 38:1 stories 98:16 story 16:2 103:19 159:13,14,15 straightforward 7:17 47:3 109:22 strategy 24:15 stream 83:6 streamline 104:8 streamlined 147:20 street 1:13 103:15 114:13 183:13,14	183:15,16 streets 50:4 streetscape 103:13 strength 166:15 strengthen 63:22 stressing 28:15 strictly 178:2 strip 206:14 strips 178:15 193:17 Strohmeyer 2:11 3:13 106:22 118:16,17 128:1 130:22 143:12,14 stronger 28:15 strongly 163:21 165:20 struck 41:11 142:21 structure 40:12 41:6 114:15 structures 5:18 24:16 40:4 45:18 51:21 53:19 struggle 98:7 struggled 4:18 stuck 160:2 students 170:14 studied 162:14 studies 175:6 study 27:10,11 131:17 173:17 175:14,17 176:15 202:15 studying 162:11,16 stuff 37:10 49:12 51:7,18 60:19 72:9 84:2 87:9 89:8 138:1 stumbled 211:15 sub 104:17 subdivision 26:6 subdivisions 130:13 subject 16:5 18:4 30:5 40:2 45:18 48:1 73:7 98:11	109:15 160:10 subjects 59:20 submission 11:18 submissions 12:12 submit 9:1 109:4 112:4 161:3 176:17 submits 159:3 submitted 11:13 12:11 22:20 110:19 121:6,8 146:22 160:22 181:10 subsequent 15:8 subsequently 17:17 23:19 subsidiary 124:10 124:14 125:7,20 126:2,4 127:2 substantial 5:1 substitute 31:16 suburbanization 46:10 suburbs 29:15 sub-allocate 83:3 104:4 sub-allocation 83:18 101:17 102:5 104:3 succeed 10:16 succeeds 23:16 success 15:22 16:2 16:3 18:14 98:16 107:20 109:10,18 113:8,12 173:12 successes 138:18 successful 30:20 139:3 188:2 successfully 16:7 110:13 130:1 150:4 sufficient 22:3 53:22 suggest 25:6 44:19 78:12 191:12 193:3 195:12 208:3
---	---	---	---	--

<p> suggesting 107:9 suggestion 105:4 111:7 173:14 suggestions 140:10 suggestive 57:6 suing 200:9 suit 149:20 150:1 150:13 suits 145:9,10 146:9 150:5,7 152:6 167:9 summer 136:10 superior 155:19 supervised 46:21 supplement 136:18 supplemental 190:3 support 56:3,4 76:21,22 102:4 126:15 165:20 173:14 supported 163:21 171:7 supporter 67:5 supporters 14:14 supportive 186:7 supports 113:9,11 supposedly 198:20 Supreme 42:8 146:2 150:3 154:12 155:2,15 162:1 173:3 194:12 198:8 sure 31:15 46:14 61:10 65:2 69:2 70:16 95:2,10 104:3 122:16 180:15 190:1 200:18 211:9 surface 1:3 15:3 28:4 67:18 86:9 163:2 207:3 208:9 208:13 surplus 53:3 surrounding 10:11 surveyor 211:14 sustain 24:8 </p>	<p> sway 180:21 Swiss 100:16,16 system 4:14 5:22 10:8 13:12 18:3 19:4 27:22 28:1 29:14 30:1,2 31:7 31:10 33:19 35:9 36:3,8,22 37:11 38:4 39:14 42:18 72:13 74:7 78:19 83:21 84:4 85:6 87:21 88:5,6 89:2 90:3,8 91:19 95:6 95:7 100:3 106:6 116:2 118:15,21 119:1,13 145:17 149:7 151:14 152:2 156:6 194:4 194:19 211:12 systems 5:5 87:6 88:12 106:4 S.W 1:13 </p> <hr/> <p style="text-align: center;">T</p> <p> T 3:1,1 table 60:5 129:1 147:10 150:21 157:4 158:7 165:22 166:1 197:8 tackle 28:16 tact 19:3 tag 19:6 51:2 tail 43:5 take 10:6 21:2 40:19 48:16 50:18 54:15 62:5 65:15 65:16 72:16 80:8 88:14 89:7,16 91:22 94:21 98:17 99:17 103:9 126:18 128:22 147:9,14 150:7 153:20 170:9 185:3 190:9 193:3 193:4 taken 14:15 15:8 </p>	<p> 44:10 55:10 89:10 89:11 151:13 152:2 172:12 197:4 takes 83:8,15,16 126:13 127:4 140:13 180:5 takings 71:5 154:17 187:21 talk 59:22 76:4 85:4 113:16 119:7 talked 109:14 talking 87:10 92:5 92:6,6 142:7 195:21 196:15,18 197:21 199:13 tandem 105:15 106:7 tantamount 200:20 201:4 taper 60:12 targeted 10:22 tariffs 93:17 tax 147:15 152:8 172:12,16 196:12 197:22 taxes 6:19 75:9 172:10 taxpayer 150:11 taxpayers 150:13 152:5 153:22 tear 89:2 technical 101:18 technically 91:15 technologies 24:17 telecommunicati... 146:9 200:7 tell 16:1 48:11 49:10,20 79:17 80:6,15 81:20 117:19 181:16 199:2 211:8 templates 57:13 temporary 94:4 tempted 140:6 ten 89:4,5 117:18 tend 47:20 </p>	<p> tends 56:7 tension 169:10 Tenth 114:6 term 82:4 171:3 207:21 terminates 7:6 Termination 72:20 73:2 89:15 terms 42:5 52:17 63:20 77:11 78:6 87:18 111:19 141:17 165:15 184:13 202:22 210:7 testified 126:8 testify 29:12 118:20 119:2,6 testifying 212:6 testimony 9:3 12:11 13:10 38:18 61:10 106:13 125:12 136:2 146:21 147:2,7 153:19 160:22 163:9 175:11,17 181:9,14,21 182:2 188:11 Texas 54:21 thank 10:2 12:15 12:16 13:4,13 29:6,7 31:2 44:1,2 60:22 61:6,6 82:11 91:6,10 96:15 100:22 103:8 106:12,15 106:16 107:12 112:22 118:7 123:17 125:16 135:18,20 143:16 143:18,20,22 144:12,14 145:1 162:4,5,8 173:20 174:17,18 187:2 194:6 200:1 208:2 209:14,18 212:4,8 212:11,12 thankfully 209:5 </p>	<p> Thanks 61:3 Theoretically 45:1 theory 87:5 they'd 53:12 81:19 81:19 thing 24:8 33:9 52:2 53:7 54:2,5 68:4 74:20 89:20 89:22 95:11 104:17 130:22 149:12,16 151:8 182:15 things 7:17 35:6 38:1 43:7 48:2 49:4 52:7 55:2 56:6,18 60:9 65:14 66:20 73:3 73:4 74:17 86:6 90:20 100:1,11,18 104:6 119:17 129:21 135:1 138:17 164:18 169:19 183:4 190:14 199:6 208:12 think 4:9 21:1 31:6 31:11,14 33:10 36:14 38:13 42:20 47:18,19 48:5,10 48:15 52:19 54:5 57:2,10,16 58:8 58:11 59:18 61:20 62:2,19 63:1 64:5 65:18 66:14 67:10 67:17,22 68:6,7,7 69:11 71:19 72:22 73:4,22 74:13 77:2,3,12 78:2,6 78:16 79:5,13 80:1 82:4 84:18 87:5 90:12 92:20 95:20 96:18 97:5 98:12 100:9 118:12 120:9,15 121:7 124:21 126:16,17 128:6 132:9 134:14 </p>
---	--	---	---	--

135:4 136:21	22:4,10,11 23:10	119:3 136:2	27:1,7,13,18 28:1	174:6,6,22 175:9
137:5,15 138:15	24:21 27:3 31:1,9	143:21 144:3,12	28:10,11 29:5	176:6 177:10,22
138:20 139:13,19	31:12 32:9,12	146:19 147:7	31:1,13 33:16	180:2 181:8,18,19
140:1,21 141:12	33:6 34:10 39:7	153:20 159:18	35:19 37:22 38:13	182:4,12,16 183:5
141:13,16 142:5	42:10,18 45:19	169:22 170:1	40:14 42:3,15	183:10 184:6,19
142:17 143:6	51:8 59:11 63:21	181:15 212:5	44:6,7,19 45:1,5	185:2,11,19
147:5 157:18	69:6 70:18,18	today's 12:11 205:1	45:12,14,20 46:11	186:12,19 187:8
158:1 162:19,20	76:1 82:8,13,21	told 20:14 40:2	46:15 47:8,9,15	187:13 188:14
167:13 169:20	83:9,10,15,16	192:18	47:20 50:6,17	189:13,19 191:1,9
176:6,10,16 178:1	84:10,11 87:16	tolerance 142:13	54:1,11,18 55:1	191:20 192:10,13
180:14 183:7,11	91:20 100:14	tomorrow's 205:2	56:4,15 58:1,4	192:17
187:4,6 188:13	102:9,10 103:1,1	ton 56:3	62:10,15 63:7	trails 6:6,11,16 7:3
189:1 191:2 192:4	111:17 112:16	tonnage 24:8	64:11 67:3,4	8:18 12:21 13:8
194:14 195:19,20	114:22 115:8	tool 18:16 28:2	68:10,11 73:13,17	13:21 14:1,10,16
196:16 197:21	123:7 126:13,18	top 64:1	73:21 75:18 76:14	15:2,11,11,16,22
198:15 199:21	126:19 127:4	tore 103:16	76:18 77:18 80:2	16:14 18:7,8
203:14,17 204:4,4	131:22 134:2	tort 75:10	80:5 81:15 82:4	22:20 23:4,20
205:2,13 210:5,12	135:11 136:2	total 53:13	82:18,19 85:15,17	24:14 27:11 28:2
210:15,22	138:12,20 140:13	totaling 17:18	86:13,17,19,21	28:8 29:1,18
thinking 45:17	143:15 147:14	totally 151:21	89:21 91:2 95:4	30:10,21,21 33:21
58:6 78:4 163:1	150:17 155:22	touching 201:8	97:1 98:15 99:1	34:21 35:16 36:2
171:16 190:15	156:10 159:4	tough 58:11 81:12	99:13 103:21	37:9 40:21 55:16
208:21	162:16,22 167:11	192:16	105:6,11,15	56:17,21 57:14,22
third 22:2 102:8	168:9 177:3,12,16	tour 194:8	107:21 108:3,6,19	59:6 61:19 66:5
123:6 136:9	179:17 180:4	tourists 100:19	109:8,13 110:4	67:2,5 72:22
140:16 167:2	188:18 190:13	town 31:8 75:18	111:2 113:7,12,14	74:20 81:1,4,6
thornier 7:21	192:20 194:22	95:8 192:2	116:6,10 117:21	85:4,5 92:3 98:15
thought 14:1 29:3	200:6,14 204:13	towns 81:11	121:7,13 125:21	99:7,11,13,16
34:17 55:19 66:10	207:14 209:2,10	track 4:21 7:1 19:7	126:2,4 127:21	105:17,22 106:1,4
69:1 103:13	210:2,13,19	19:8 23:5 207:13	128:3,18 130:1,8	107:16,19 110:3
119:15 131:21	timed 87:11	tracks 159:5	133:11 137:12	110:12,18 113:3,7
192:6 204:2,15	times 87:13 98:2	tradition 194:20	138:14 139:6,7,13	113:11 116:11
210:1,14	107:4 127:4,16	traditionally 71:9	140:4 142:15	121:5,16 124:10
thousands 4:20	129:9 142:9 177:5	152:1	145:11 146:4	126:12,15,16
15:10	timing 9:7	traffic 101:6	147:17,18,20	128:16 132:21
threat 20:8 56:6	Timmons 173:15	trail 3:5 4:13 5:22	148:3,3,7,9 149:5	134:17 135:1
68:11,20	tip 136:14	6:17,18,21 7:4,6,6	149:9,11,14,17	146:15 147:4
three 36:6 67:15	title 155:14,19	7:9,11,12 8:6 10:8	150:16,21 151:2,7	148:17,18,21
71:15 102:22	156:14 166:15	10:10,19,20,21	151:9,19 152:11	149:1 152:8,22
157:8	167:10 171:9	11:1,4,17 12:1,7	153:1,10,11 154:3	153:21 154:16
thresholds 64:22	172:6,17 178:21	12:19 13:12 15:1	154:6,10 155:12	159:19 161:17
throw 141:22	178:21,22	15:2 16:21 17:2,3	155:21 156:21	174:3 175:3 176:3
thrust 34:19	today 4:11 8:3,15	17:6,9,11,14,15	157:11,16,21	176:19 182:4,9
ticket 93:11	10:6 11:12 12:5	18:16 20:17 21:12	158:11,12 159:10	183:12 184:10
ticking 149:18	12:13 13:13 28:17	21:16 22:7,12	159:11,12 160:4,6	185:5,20,22
time 4:17 9:10,11	29:12 30:15 77:15	23:14 24:4,7,9,18	160:9,9,14 161:2	191:19 197:1
11:5 21:4,10,12	85:8 109:4 113:11	25:6,18 26:20	161:5,10 173:2,4	train 24:9 25:1,2

56:3 88:2 158:19 190:13 trains 101:4 transaction 75:22 transactions 75:1 133:22 transfer 93:1,21 96:2 transferred 94:13 97:12 transfers 19:17 97:10 transform 135:13 transit 2:5 3:8 12:22 29:13,19,21 30:17 35:5,6,10 35:22 37:8,14,19 37:22 38:5 51:6,9 68:1 87:8 90:4 97:14,18 Transit's 97:14 Transport 90:15 transportation 1:3 2:9 3:12 28:4 30:4 35:11 36:1 50:2 66:3 67:19 72:12,13 83:4 86:10 90:20 91:21 106:21 112:15 163:3 197:2 199:14 204:21 211:13,18 trans-load 122:2 traveling 100:17 treasures 17:8 Treasury 172:22 treat 48:16 95:22 treated 48:22 49:1 85:16 92:21 94:19 treats 99:13 tree 43:9 tremendous 77:14 164:19 199:7 tremendously 120:12 tricky 205:16 tried 64:19 83:20	164:6 200:10 207:18 tries 51:1,6 158:8 trigger 65:10 193:6 trilogy 108:22 136:7 trimmed 43:9 trip 106:17 212:12 trouble 90:7 147:16 troubled 166:8 troubling 53:10 true 181:7 truly 137:11 trust 48:4 197:15 197:17,19 199:19 try 43:7 57:12 64:19 74:14 95:16 123:7,20 133:13 136:12 138:16 158:17 197:11 trying 36:7 43:5 44:16 57:22 58:3 66:21 77:9 102:10 136:10 140:11 167:10 Tucker 145:10 149:20 150:2,13 150:20 151:17 152:6 154:8,18,20 155:17 157:2 177:20 178:9 179:5 180:11 187:18 188:2,18 189:11,15 191:15 191:17 193:19 tunnel 25:5 turn 6:22 8:19 9:20 9:21 28:18 163:13 164:10 186:1 188:15 turned 65:6 84:6 turns 138:2 Twenty-five 1:9 4:5 two 21:9 23:17 35:7 36:18,20 86:9	87:11 90:1 93:2 104:6 106:6 121:22 127:7 157:10 159:3 195:20,22 196:2 two-lane 50:16 two-thirds 18:12 type 15:3 71:1 77:12 92:7 195:15 types 195:2 typically 37:3 64:20 69:10 75:10 <hr/> U <hr/> ultimate 73:21 98:19 ultimately 38:2 58:16,19 121:15 172:15 210:1 unambiguous 170:20 uncertainties 112:6 uncertainty 82:16 unchecked 172:14 unconstitutional 165:17 underlying 20:11 25:20 26:21 27:5 52:12 53:4,13 91:21 123:10 153:7 172:9 179:1 200:9 undermine 24:5 168:6 understand 8:15 59:8 61:10,16 62:17 69:22 79:11 80:18 97:2 102:3 124:8 140:13 202:11 understanding 62:22 188:8 189:7 205:1 208:9 210:6 understood 50:10 51:21 171:5 207:8 undertaken 32:6 underway 115:10	undeveloped 26:7 undo 45:14 undue 109:22 uneven 68:14 unfair 24:12 34:3 139:13,17 unfunded 161:18 unidentified 162:18 unintended 169:9 Union 37:17 97:16 unique 167:9 183:12 unit 153:2 United 1:1 26:22 70:21 87:4 101:6 145:10 universe 109:3 university 2:21 3:21 37:10 144:10 unknown 23:2 207:4 unlimited 149:10 191:8 unmiked 125:4 unnamed 162:18 unnecessary 111:5 unproductive 164:20 unprofitable 5:4 unquestionably 26:12 unrealized 16:2 unresolved 141:19 untrue 170:13 unused 26:7 108:13 unusual 94:16 170:5 unwilling 24:11 unwillingness 20:3 upheld 67:16 upkeep 129:19 urban 17:4 28:22 29:21 36:17 38:13 50:7 87:8 urbanization 46:9 urge 43:10 162:2	usages 117:5,8 USC 22:17 72:19 89:14 123:13 use 6:3,10,14,21 7:6,9,11 10:10,19 10:21 11:2,3,17 16:14,18 20:7 21:12 22:12 23:14 24:4,7,20 25:19 26:1,13,20 27:1,7 32:15 33:6,11,17 33:19 36:21 39:20 42:3,3,15 43:11 43:12,14,15,16 44:7,15,17 45:5 47:9,15,20 50:2 50:11,19 55:16 63:6 67:9 73:13 74:20,21 78:5 80:1 81:15 84:7 85:4,8,16,19 86:2 87:16 89:13 90:22 91:4 92:8 94:1 95:10,21 96:14 99:13,14 103:2 108:6,14,19 109:6 109:7,8,13,14 111:13 112:1 113:3 126:12,17 128:13,16 129:8 130:8,8 132:8 134:10 135:1,2,2 137:15 146:10 149:11,17 150:21 151:12 152:3 154:3,6 155:12 157:11,16,22 158:21,22 159:1,8 159:11,12 160:7 161:2,5 171:3 173:4 174:2 186:9 186:10,12 187:13 190:18 191:9 199:15,16 201:15 206:11 207:4 useful 56:14 106:15 108:12 110:14
--	--	---	---	--

112:8 143:19 176:16 212:7 user 7:6 12:19 14:16 44:6 56:4 67:3 69:8 121:13 users 3:5 12:1 15:2 16:22 17:5 27:18 50:18 73:21 82:4 107:21 uses 15:3 50:8 79:9 87:11 91:2 130:9 134:3 135:14 146:15 164:6 169:10 174:3 usual 9:3 111:12 190:17 usually 70:1 122:14 200:17 utility 196:22 utilizing 123:12 U.S 146:6 198:8	157:13 vary 84:17 181:2,3 194:18 vast 171:17 198:18 vehicle 48:6 verbatim 9:14 Vermont 194:13 versus 61:12 123:22 176:13 177:11 viability 24:1 163:15 viable 55:4 viaduct 115:21 Vice 1:21 3:4 7:19 8:19 9:17,22 10:2 12:16 13:2,6 29:12 61:1,3,9,15 62:13 64:8 68:22 69:3,14 70:14,17 71:13 72:5 73:10 74:3,10 76:8 79:12 80:15,20 91:8 96:15 98:1,9 98:12 100:22 101:11,15 102:16 105:8 106:9 107:12 118:18 125:9 126:5 135:19,20 136:8 137:5,22 143:2,10 143:16,22 186:22 187:2,16 189:2,5 191:11 192:15,21 193:1,8,14 198:6 200:1 202:10 203:3,16,20 204:6 204:17 205:9 206:15 208:1 209:14 210:8,17 211:1,4,22 vicinity 176:6 Vicki 138:4 Vicksburg 121:13 121:14 view 35:5 42:15 51:18 52:20 54:5	58:12 68:14 74:15 82:5 143:3 180:20 viewed 43:15 viewpoints 8:5 views 8:2 107:13 violated 57:6 105:17 154:16 violation 55:5 Virginia 66:2 70:9 Virginian 211:21 212:4 virtually 70:2 vision 96:19 vocal 27:17 voluntarily 66:15 143:1 voluntary 6:13 93:3,4,10 94:6 96:6 107:18 108:2 110:4 123:9 126:21 127:20 133:21 141:9 142:7 volunteered 125:13 von 116:21 vulnerable 23:21	170:4 178:15 199:4 201:22 202:13 212:8 wanted 63:4,5 70:6 70:7,10 119:18 123:5 138:3 143:13 160:20,22 163:17 201:6 203:11 wanting 54:15 wants 35:11 60:20 65:14 88:10 89:4 90:12 91:22 105:13 136:19 152:11 185:4 War 66:5,9 165:6 ward 130:5 warehouse 132:4 warning 83:21 Washington 1:14 14:7 51:13 81:7 102:7 157:21 170:19 175:16 193:16 204:19 210:9 211:6,6 washout 56:7 wasn't 107:8 138:6 207:1 waste 59:11 131:22 watch 51:11 water 27:15 waterways 197:19 197:19 199:5 wave 184:2 way 7:3,18 15:17 19:12 25:3 26:2 37:16 40:11 41:22 42:2 46:22 47:4 47:19 48:22 49:2 59:18 62:4 64:6 76:17 77:2 88:17 90:22 91:20 92:21 98:15 105:1 106:2 111:12 115:17 129:8 132:7,10,12 140:22 146:14 151:13 175:7	177:10 186:7 190:18 196:1 205:16 208:16 ways 5:6 33:5 43:13 54:16 68:2 72:10 77:3 82:18 186:5,21 weakening 169:11 weakness 166:14 Website 14:22 117:22 175:15 Wednesday 1:15 week 30:20 67:4 weekend 117:19 weekly 15:13 weeks 17:13 weight 86:5 101:4 weighted 87:18 Weinstein 138:4 welcome 4:4 10:4 31:14 61:8 148:17 192:22 welfare 196:21 Welsh 147:1 went 85:17 88:15 114:13 115:3 116:5 120:14 177:22 192:19 weren't 66:12 204:12 west 114:1,18 115:1 wetlands 197:17 we'll 38:3 96:10 137:6 141:2 144:13 we're 10:5 18:11 38:18 41:8,9 43:4 43:5,8 44:16 51:7 60:11 68:15,17 71:20 73:18 76:5 90:6,19 92:1,1,6,6 92:11 96:8 98:13 99:6,8 113:2,16 130:4 133:17 134:2 141:1 170:2 187:22 195:21
---	---	---	--	---

196:15,18 197:21 200:21 201:22 202:6,7 205:18 207:22 we've 28:9,13 29:1 81:1 103:10,11,12 119:4,11 133:18 140:1 188:10 whatsoever 39:1,2 Whitney 117:15 wholly 26:9 wide 8:4 136:21 widely 184:10 widen 50:15 widespread 109:14 168:3 willing 8:13 63:7 67:13 133:18 willingness 21:16 win 179:2 192:16 windfall 20:2 26:15 129:2,3 wink 92:14,14 winked 205:17 winners 147:3,4,18 179:6 wins 58:16 Wisconsin 122:16 wish 9:1 130:2 153:14 wished 211:9 withdraw 122:8 witness 14:2 23:16 witnesses 11:12 12:5 42:21 142:1 wonder 140:18 158:17 wonderful 90:21 wonderfully 18:16 wondrous 25:2 woo 163:18 word 129:2 190:16 206:8,11,11 words 26:5 69:9 70:20 71:16 105:16 192:8 203:5 205:21	206:3 work 44:8 48:3 56:14 67:4 85:1 93:14 94:6 96:4,8 98:3 99:9 115:19 126:13 127:4 131:12 133:18 138:7 145:2 210:16 212:9 worked 6:8 29:17 57:19 60:19 74:16 89:18 101:19 109:2 113:5 119:4 137:19 working 106:7 132:19 133:11 141:1,5 179:5 203:9 works 13:19 61:7 93:19,20 151:14 world 76:7 165:6 worry 140:2 205:18 205:19 206:1 worth 150:17 189:12 wouldn't 19:7 52:21 71:11 92:2 116:17 131:9 182:22 199:12 203:22 Wow 193:5 wrap 123:7 202:11 Wright 2:21 3:21 144:10 162:7,8 178:1,4 179:15 184:8,15 194:6,6 195:19 198:14 200:13 202:14 203:2,14,19 204:2 204:9 205:7 206:7 206:17 210:12 Wright's 180:19 written 11:13 12:10,12 38:18 146:21 147:2 153:19 160:21 175:11,16 176:17	wrong 167:15 203:6 wrote 103:7 www.trailinc.com 14:22 X XYZ 96:22 Y yard 71:14 yeah 50:8 69:2,13 74:13 year 10:19 17:5 44:8 113:15 189:11,11 yearly 176:4 years 1:9 4:5,18 14:15,17 17:21 20:14 21:9 24:22 29:19 48:7 65:3 65:12 94:10 99:20 102:13,22 107:20 113:3 126:17 133:19 153:12 156:10 157:10 159:4 162:11 167:15 168:11 169:20 187:10,11 190:9 192:19 207:16 210:10 yellow 9:8 27:19 yield 82:10 York 113:13,21 114:12,17 116:2 118:12,15 130:10 132:13 134:13 137:9,11 153:2,5 153:11 170:18 190:12 Yorker 118:11,12 Yorkers 114:21 Z zealous 140:3 zoning 175:18 \$	\$100 89:2 \$22 120:16 \$350 22:9 \$5 16:22 1 1 125:7 126:3 1st 1:13 1,000 16:16 10 3:4 10.901 120:6 100 156:9 208:14 100,000 14:13 109 23:2 10901 123:19 10907 123:13 112 3:11 118 3:12 12 193:17 12:20 212:13 120 16:12 124 3:13 1247(d) 22:17 72:19 89:14 13 3:7 138,000 16:21 15 36:14,15 99:19 162:11 193:17 15,000 42:22 15,347 28:10 151 3:20 159 17:16 16 22:17 72:19 89:14 16th 167:18 163 18:5 169 3:22 17,500 139:2 180 22:3,6 141:2 180-day 157:9 1800s 204:22 1840s 163:13 206:22 1850s 206:22 1880s 207:12 210:14 1887 165:5	1890s 164:21 19th 25:5 163:12 165:11 166:2 170:16 171:4 177:13 206:10 1920 69:20 1920s 42:18 114:7 1928 60:18 1930s 164:21 1980 5:3 1983 4:17 5:21 10:8 10:15 1985 14:6 1986 18:22 1988 31:6 1989 42:13,19 1990 32:7 42:9 154:11 1996 10:16 2 2,700 16:13 28:7 2,974 17:18 20 29:19 170:21 210:10 20th 164:10 165:16 166:4,9 167:14 169:17 2001 131:15 2002 115:11 131:16 2004 38:19 154:4 176:1 2006 16:22 2009 1:15 21 120:16 22 189:22 25 14:14 17:21 107:20 113:3 168:11 169:20 25th 13:11 270,000 210:13 274 32:8 3 3 175:16 3,000 170:14 30 3:8 9:1 10:18 84:16 136:18
--	--	--	---	---

207:16	9-2 41:2			
301 16:6	9:00 1:18			
320 17:10	9:02 4:2			
350 182:16 183:20	90 171:20			
358 18:10	900 167:15			
395 1:13	99 97:8			
<hr/> 4				
4 3:4				
40-plus 131:14				
45,000 117:20				
48 65:12				
49 65:12 123:13				
<hr/> 5				
5,000 16:8 18:9				
5.4 176:3				
50 24:22 48:7 65:3				
65:6 151:1 155:21				
179:16				
59 84:16				
<hr/> 6				
690 1:10				
698 16:4				
<hr/> 7				
7,000 170:15				
70,000 207:12				
72 16:14				
<hr/> 8				
8 1:15				
8(d) 4:13,17 5:22				
6:9 13:11,22				
107:16				
80 56:3 155:22				
170:17 179:17				
80s 42:8				
832 17:20				
84 43:1				
84,000 42:16				
85,000 43:1				
<hr/> 9				
9th 113:15				
9,000 18:9				
9,105 17:22				

CERTIFICATE

This is to certify that the foregoing transcript
in the matter of: Public Hearing

Before: Francis Mulvey

Date: July 8, 2009

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.


Eric Hendrixson

