Rasmussen-Goldman Letters

The following is a compilation of email letters between John Rasmussen and Peter Goldman in 1999. The letters discuss the validity of the information in a fact sheet about the East Lake Sammamish Trail. Goldman had published the fact sheet on the internet, and was one of its authors

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Subject: Trail
Date: Thu, 13 May 1999 22:04:15 -0700
From: Rasmussen <issyras@ibm.net>
To: "Goldman, Peter" <pgoldman@wflc.org>

Hi Peter,

I've just read your posting on the "ELST 2 Cents Page". Just wondering if you are really aquatinted with the facts of what you posted, or you copied the info from some other page, like the Bike Alliance?

I don't know if you feel you have a responsibility to be honest or informed when you post like that, but if you do, I'd like to challenge a couple of things you wrote. On the chance you have an open mind, send me a note, and I'll give you a couple of things to think about.

If you don't care about anything but getting a bike trail for yourself...don't bother to write.

Regards,

John Rasmussen

Subject: RE: Trail
Date: Sat, 15 May 1999 07:43:05 -0700
From: Peter Goldman <pgoldman@wflc.org>
To: "'issyras@ibm.net'" <issyras@ibm.net>

Hello Mr. Rasmussen:

Thanks for the note. Sure, I'd be happy to communicate with you about the ELS trail. The piece you read was developed by the Trails committee of the bike alliance; it is on their web site as well. I was one of the 5 writers who put it together. I was also the one who forwarded it to the Two Cents page.

I have been involved with promoting the ELS trail now for 3 years. I helped the Land Conservancy acquire the right of way from BN and worked to make it a win-win for all involved. I have attended every single public meeting, am a lawyer who is very familiar with environmental law and rail banking law, and have spent hours listening patiently and carefully the arguments of the adjacent property owners. I understand the concerns of the property owner and have always done my best to pressure the county into listening carefully to the concerns about specific properties and work to amelioate those concerns in the interim planning process.

Please let me know the points you disagree with the Bike Alliance piece on and I will do my best to respond.

Peter Goldman

Subject: Re: Trail
Date: Sat, 15 May 1999 09:57:48 -0700
From: Rasmussen <issyras@ibm.net>
To: Peter Goldman <pgoldman@wflc.org>
References: 1

Mr. Goldman,

Thanks for the reply.

I'm about to leave town for ten days and will have some time while on the road to respond. I'll load up my laptop with a bunch of reference material, and give you my side of this issue.

It will be a few days until I get back to you.

Regards, John

Subject: ELST
Date: Fri, 21 May 1999 12:37:54 -0700
From: John Rasmussen <johnras@ibm.net>
To: Peter Goldman <pgoldman@wflc.org>

Hi Peter,

You wrote, "Please let me know the points you disagree with the Bike Alliance piece on and I will do my best to respond." Reading the Bike Alliance "fact" sheet, I see many half-truths and outright lies mixed in with facts. I'm so offended by the document; I hardly know where to begin. Believing you are sincere with your offer to respond, I'll invest the effort in this letter.

Let me give you some background. I'm a homeowner along Lake Sammamish with the right-of-way bisecting my lot between the house and the beach. My wife and I are members of RIRPA. I'm not strongly opposed to a trail because I'm an avid bicyclist and have been biking for exercise on the plateau for the last twenty years. What I oppose is the outrageous and illegal theft of my property to establish the trail. Further, I am sickened by the way those of us most impacted by this taking have been shutout of the process by the STB, TLC and King County.

I'll start with your section, "3. RAILBANKING IS NOT A "TAKING" OF PRIVATE PROPERTY." Your "fact" sheet states: "Trail opponents assert that railbanking is a "taking" of private property. Having lost this argument in the U.S. Supreme Court, they now float it as a reason for King County not to develop the trail." I assume you are referring to the Supreme Court Preseault decision. If you imply that the U.S. Supreme Court decided that a taking did not occur with Preseault, you are simply wrong.

Here are three quotes from PRESEAULT v. ICC, 494 U.S. 1 (1990).

"We find it unnecessary to evaluate the merits of the takings claim because we hold that even if the rails-to-trails statute gives rise to a taking, compensation is available to petitioners under the Tucker Act, 28 U.S.C. 1491 [494 U.S. 1, 5] (a)(1) (1982 ed.), and the requirements of the Fifth Amendment are satisfied."

"We need not decide what types of official authorization, if any, are necessary to create federal liability under the Fifth Amendment, because we find that rail-to-trail conversions giving rise to just compensation

claims are clearly authorized by 8(d)." 8(d) refers to the Rails-to-Trails statute.

"In sum, petitioners' failure to make use of the available Tucker Act remedy renders their takings challenge to the ICC's order premature. We need not decide whether a taking occurred in this case."

Peter, your Bicycle Alliance statement, "Having lost this argument in the U.S. Supreme Court..." is a total misrepresentation of the facts. >From the quotes above, we can see that the Preseaults did not lose a taking claim in the U.S. Supreme Court, they were sent to another court with that claim. The Preseaults are "winning" their case. In 1986 the United States Court of Appeals for the Federal Circuit found a taking had indeed occurred (Preseault v. United States, 100 F.3d 1525, Fed. Cir. 1996), and it is presently in the U.S. Court of Claims for settlement. I say "winning" because after 15 years and over a million in legal expenses, it is hard to call the Preseaults "winners" even though they will finally receive compensation.

Further on in your "fact" sheet you state, "The Supreme Court ruled that an adjacent property owner who believes that railbanking has "taken" his or her property may seek compensation from the United States by filing a claim in the U.S. Court of Claims." That statement is a half-truth. It implies that the U.S. Court of Claims is the only avenue for compensation. It conveniently omits the fact that it has also been found legal to sue in State court.

Here in the State of Washington, we have a State law supporting railbanking, but at the same time supporting property rights. With your background, you should be very familiar with it. It requires payment to the reversionary property owners. This is that law.

"RCW 64.04.180 Railroad properties as public utility and transportation corridors--Declaration of availability for public use--Acquisition of reversionary interest. Railroad properties, including but not limited to rights-of-way, land held in fee and used for railroad operations, bridges, tunnels, and other facilities, are declared to be suitable for public use upon cessation of railroad operations on the properties. It is in the public interest of the state of Washington that such properties retain their character as public utility and transportationcorridors, and that they may be made available for public uses including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. Nothing in this section or in RCW 64.04.190 authorizes a public agency or utility to acquire reversionary interests in public utility and transportation corridors without payment of just compensation. [1988 c 16 § 1; 1984 c 143 § 22.]"

Of course, you must also be aware of the Lawson case...

"King County cannot acquire the [ ] right of way from Burlington Northern without payment of just compensation to the reversionary interest holders. If the County takes this right of way and commences to build a recreation trail, it does so in violation of the constitution." Lawson v. State. (Washington State Supreme Court 1986)

You state, "...the U.S. Supreme Court has held that the Court of Claims (not the King County Council) is the forum to decide whether anyone is entitled to compensation as a result of the railbanking program." After reading the above RCW and quote, it seems that your statement would be difficult to support.

Further, you must be aware of the railbanking case in process in Skagit County. Skagit County tried to duck responsibility for the rails-to-trails taking by claiming the case belonged in Federal Court. The Federal Judge, however, sent the case back to be tried under State law. If you claim the proper forum to decide railbanking takings claims is the U.S. Court of Claims, then why did the Federal Judge send that case back to State court? Your "fact" sheet statement is not supported by the facts.

The laws of the State of Washington clearly state King County is responsible to pay for the taking of reversionary railbanked property along Lake Sammamish. It is outrageous for Locke, Sims and Council to simply ignore the laws of the State, but they do. Contrary to your statement, this very definitely belongs in the King County Council. One of the biggest problems in our legal system is the lack of the offending party being held responsible for his actions. It is dishonest, in principle, to make the U.S. taxpayer liable for the King County takings along Lake Sammamish. The County took this reversionary property voluntarily; is benefiting from the taking; and is, therefore, responsible to pay.

On the other hand, it's very important to the Bicycle Alliance and the Rails-to-Trails Conservancy that the claims are settled in Federal Court where the U.S. taxpayer will pay instead of the local community. Local politicians and bureaucrats will be much less willing to take people's property for a trail if they actually have to pay for what they take.

Next you state, "Land that that the railroad acquired through easements would, in the event of abandonment, revert to the successors of the individuals who sold the property to the railroad in 1887 -- not the adjacent property owner." I have to challenge that statement. If an individual granted the easement, a reversionary interest was created. An examination of each change of title down to the present owners determines if the reversionary rights are held by the present adjacent owner, or one of the previous owners going back to and including the original conveyor of the easement. Your idea that reversionary rights automatically stay with the original grantor is unsupported in law, to my knowledge. Perhaps you could site a few Washington State railbanking reversionary decisions that support your assertion.

Next, "Most adjacent property owners do not seek compensation, however, because most do not qualify for it." I'll have to challenge that one too. Many adjacent property owners do not seek compensation because they get bad advice, like that in your Bicycle Alliance document. Many cannot find a competent lawyer who understands reversionary property law. But the biggest reason, I believe, is that they cannot afford the emotional and financial cost of this fight for their rights. Preseault has taken fifteen years and over a million dollars in legal fees. Many people in Lawson and the Skagit case became discouraged and gave up. Lawson was a great victory for property rights in this State and the Nation, but not for many of the individuals actually involved. Sadly, this makes it that much tougher for those of us along Lake Sammamish. It is cheaper for King County to delay and outlast people in court than to obey the law and pay for the takings. I'm certain this is the tactic King County is employing. That's dishonest government. This is one of the many situations where the courts are not used to resolve legal issues, but rather to control and wear-down the opponent. It is a gross abuse of our legal system, and an unfortunate reality.

To summarize, you state or imply that the U.S. Supreme Court has ruled that a taking does not occur in railbanking; that the Federal Government is the only forum for claims; that reversionary rights remain only with the original grantor; that most adjacent property owners along Lake Sammamish don't qualify for compensation; and that King County has no responsibility for the takings. I disagree with each one of these statements for the reasons I have stated above. Kindly justify or further explain your position in each case.

Even the title of your section "RAILBANKING IS NOT A "TAKING" OF PRIVATE PROPERTY" is, itself, a lie. Here would be a more honest statement of the rails-to-trails taking situation along East Lake Sammamish.

RAILBANKING IS OFTEN A "TAKING" OF REVERSIONARY PRIVATE PROPERTY. BNSF appraised the value of the land under the right-of-way along East Lake Sammamish at over $40 million. Only about 2% of that value was land owned fee simple by BNSF, and was sold to TLC as part of the $1.5 million railbanking transaction. It's likely most of the ELST right-of-way was originally attained by easements in 1887, creating reversionary interests. This would indicate that King County might be liable for around $40 million in taking claims along the ELST right-of-way. King County is intentionally refusing to obey the Washington State law requiring payment to the reversionary owners. Sadly, these owners will need to fight an expensive and emotionally exhausting legal battle to hold King County responsible for it's actions. Most do not have the resources to fight this battle. The reversionary owner may or may not be the present abutting property owner, but often is.

Your "fact" sheet states seven "facts" about ELST. This letter disputes just one of those seven "facts". I have strong disagreements with the other six "facts" too.

Peter, I hope you will answer. I'm interested in your views.

Regards, John

John Rasmussen

Subject: RE: ELST
Date: Fri, 21 May 1999 16:43:34 -0700
From: Peter Goldman <pgoldman@wflc.org>
To: "'John Rasmussen'" <johnras@ibm.net>

John:

My response to you is attached in the enclosed document. I look forward to continuing our dialogue.

Peter Goldman

Attachment:

Dear John:

Thanks for taking the time to respond. I dropped what I was supposed to work on this afternoon to respond to you right away (the internet does, indeed, affect work-place productivity!!)

I restate your points and my responses are printed in blue. I don't have the time to respond to all of your points but I tried to hit the main ones.

Hi Peter,

You wrote, "Please let me know the points you disagree with the Bike Alliance piece on and I will do my best to respond." Reading the Bike Alliance "fact" sheet, I see many half-truths and outright lies mixed in with facts. I'm so offended by the document; I hardly know where to begin. Believing you are sincere with your offer to respond, I'll invest the effort in this letter.

Let me give you some background. I'm a homeowner along Lake Sammamish with the right-of-way bisecting my lot between the house and the beach. My wife and I are members of RIRPA. I'm not strongly opposed to a trail because I'm an avid bicyclist and have been biking for exercise on the plateau for the last twenty years. What I oppose is the outrageous and illegal theft of my property to establish the trail. Further, I am sickened by the way those of us most impacted by this taking have been shutout of the process by the STB, TLC and King County.

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Here are three quotes from PRESEAULT v. ICC, 494 U.S. 1 (1990).

"We find it unnecessary to evaluate the merits of the takings claim because we hold that even if the rails-to-trails statute gives rise to a

taking, compensation is available to petitioners under the Tucker Act, 28 U.S.C. 1491 [494 U.S. 1, 5] (a)(1) (1982 ed.), and the requirements of the Fifth Amendment are satisfied."

"We need not decide what types of official authorization, if any, are necessary to create federal liability under the Fifth Amendment, because we find that rail-to-trail conversions giving rise to just compensation claims are clearly authorized by 8(d)." 8(d) refers to the Rails-to-Trails statute.

"In sum, petitioners' failure to make use of the available Tucker Act remedy renders their takings challenge to the ICC's order premature. We need not decide whether a taking occurred in this case."

Peter, your Bicycle Alliance statement, "Having lost this argument in the U.S. Supreme Court..." is a total misrepresentation of the facts. >From the quotes above, we can see that the Preseaults did not lose a taking claim in the U.S. Supreme Court, they were sent to another court with that claim. The Preseaults are "winning" their case. In 1986 the United States Court of Appeals for the Federal Circuit found a taking had indeed occurred (Preseault v. United States, 100 F.3d 1525, Fed. Cir. 1996), and it is presently in the U.S. Court of Claims for settlement. I say "winning" because after 15 years and over a million in legal expenses, it is hard to call the Preseaults "winners" even though they will finally receive compensation.

John, compensation for property allegedly taken is, by definition, a technical legal matter. So, please understand that my response must be legal. (I will note a few non-legal points at the end).

The US Supreme Court did decide numerous things in Presault: they upheld the Congressional rationale of preserving, via railbanking, of corridors and they held that folks can seek compensation if they feel they are entitled to it. I'm sorry if the forum is inconvenient and the expenses of litigation are high but, hey, I am a public interest environmental law litigator and the expenses of litigation, etc. are realities that everyone in our legal system face.

It might sound technical to you, but the fact is that the Preseault case is completely different from the ELS case. In that case, the railroad line was abandoned under Vermont law before it was railbanked. In the case of the ELST, the railbanking came before the right of way was "abandoned" under Washington law. In fact, that is the purpose of federal railbanking law: to permit an interim preservation-trail status prior to there being an abandonment under State law. The fact that railbanking came before state abandonment is a MAJOR legal difference because the US govt. does not "take" property that never vested in the first place.

Second, even assuming that the railroads origninally acquired only easements limited to railroad purposes, railbanking and interim trail use pursuant to Section 8 (d) of the Trails act do not terminate such easements under Wash. law. Railbanking and interim trail use constitutes a legitimate railroad purpose within the scope of the easements because it actively preserves the corridors for future railroad use. Many, many courts have held that easements for railroad purposes are construed broadly to effectuate any railroad purposes. Missouri K-T Railway v. Freer, 321 SW 2d 731 (Missouri, 1958). This includes all uses and future preservation of uses. Like it or not, federal law recognizes the importance of keeping the railroad corridor in your backyard available as an in-tact right of way. Can you begin to imagine how expensive it would be for the government to remove your home from the abandoned rail road right of way at some point in the future had the rail line been abandoned?

Third, it is RTC's position—one that I fully agree with—that railroad corridors were and are intended to be transportation corridors: trail use represents an energy-efficient transportation corridor which is consistent with the common law principle that railroad land is "devoted to public use." As a

result, a number of courts have held that trail use is within the scope of a railroad easement because both use are a type of transportation or public highway purpose and use of the easement for trail purposes. See Barney v. BN, 490 NW 2d 726 (S. Dakota, 1992); Wash Wildlife Preserv v. State, 329 NW 2d 543 (Minn. 1983).

Lastly, even if one assumed that interim trail use exceeds the scope of the railroad's easement and, thus, constitutes a taking, folks would only be entitled to compensation for the diminution in value of their land or increased burden on their land created by the trail use, as opposed to the railroad use. Good luck trying to convince a jury that your property is worth less with a trail than with a busy railroad. ELS homeowners bought their property knowing full well it was encumbered by a train track, one that admittedly has been sleepy but could have been developed into a busy, high speed train line one day. Given the number of people who would like to live near bike trails and the effective ways that engineering and landscaping can mitigate the impacts of a trail, can you really say that construction of a trail diminishes the value of your property? Do you really believe that the impact of such a trail is greater than the impact of a busier train line? I lived over a train yard in Boston when I was a college student and I spend alot of time near the Port of Seattle; train yards and lines are the busiest, most noisest places in the world. When's the last time you went to some of the neighborhoods in Ballard where the BN main line is located? Believe me, you are lucky to get a trail and surrounding open space and not a high speed RTA line with fences, signals, danger, noise, vibration, exhaust, etc.

Isn't really what happened here that most folks purchased their properties and built their homes on the gamble that the train line would go away? Is it fair for these same folks now to say that a change in use from an active rail line to a preserved rail corridor with interim trail use is a taking of their property?

Further on in your "fact" sheet you state, "The Supreme Court ruled that an adjacent property owner who believes that railbanking has "taken" his or her property may seek compensation from the United States by filing a claim in the U.S. Court of Claims." That statement is a half-truth. It implies that the U.S. Court of Claims is the only avenue for compensation. It conveniently omits the fact that it has also been found legal to sue in State court.

Here in the State of Washington, we have a State law supporting railbanking, but at the same time supporting property rights. With your background, you should be very familiar with it. It requires payment to the reversionary property owners. This is that law.

"RCW 64.04.180 Railroad properties as public utility and transportation corridors--Declaration of availability for public use--Acquisition of reversionary interest. Railroad properties, including but not limited to rights-of-way, land held in fee and used for railroad operations, bridges, tunnels, and other facilities, are declared to be suitable for public use upon cessation of railroad operations on the properties. It is in the public interest of the state of Washington that such properties retain their character as public utility and transportation corridors, and that they may be made available for public uses including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. Nothing in this section or in RCW 64.04.190 authorizes a public agency or utility to acquire reversionary interests in public utility and transportation corridors without payment of just compensation. [1988 c 16 § 1; 1984 c 143 § 22.]"

Of course, you must also be aware of the Lawson case...

"King County cannot acquire the [ ] right of way from Burlington Northern without payment of just compensation to the reversionary

interest holders. If the County takes this right of way and commences to build a recreation trail, it does so in violation of the constitution." Lawson v. State. (Washington State Supreme Court 1986)

This case does not apply because the land at issue was not railbanked under the federal law.

You state, "...the U.S. Supreme Court has held that the Court of Claims (not the King County Council) is the forum to decide whether anyone is entitled to compensation as a result of the railbanking program." After reading the above RCW and quote, it seems that your statement would be difficult to support.

Further, you must be aware of the railbanking case in process in Skagit County. Skagit County tried to duck responsibility for the rails-to-trails taking by claiming the case belonged in Federal Court. The Federal Judge, however, sent the case back to be tried under State law. If you claim the proper forum to decide railbanking takings claims is the U.S. Court of Claims, then why did the Federal Judge send that case back to State court? Your "fact" sheet statement is not supported by the facts.

The laws of the State of Washington clearly state King County is responsible to pay for the taking of reversionary railbanked property along Lake Sammamish. It is outrageous for Locke, Sims and Council to simply ignore the laws of the State, but they do. Contrary to your statement, this very definitely belongs in the King County Council. One of the biggest problems in our legal system is the lack of the offending party being held responsible for his actions. It is dishonest, in principle, to make the U.S. taxpayer liable for the King County takings along Lake Sammamish. The County took this reversionary property voluntarily; is benefiting from the taking; and is, therefore, responsible to pay.

On the other hand, it's very important to the Bicycle Alliance and the Rails-to-Trails Conservancy that the claims are settled in Federal Court where the U.S. taxpayer will pay instead of the local community. Local politicians and bureaucrats will be much less willing to take people's property for a trail if they actually have to pay for what they take.

I have heard about the Skagit county case but I do not know the specifics so I cannot comment. At any rate, pre-trial decisions are not final decisions and are, accordingly, not very useful legal precedent.

The RCW you cited is nothing more than a statement that railbanking is an extremely sensible idea and, at any event, the compensation language in that law would now apply to the ELST because it is pre-empted by the federal railbanking law. If you don't like the federal law (which was unanimously passed by Congress), it's your right to try to change it.

All of your arguments that you deserve compensation assume someone has taken your property. As I discussed above in the section about railbanking, while you might prefer a railroad to a trail, that is NOT the case. Your property is encumbered by a transportation corridor. The Federal railbanking law pre-empts any state law that would other wise deem the railroad purpose to be abandoned and reverted to you. Your compensation arguments must be directed at the federal courts, not the entity (King County) which holds the railbanked corridor. That is why we said your technical legal arguments don't belong before the KC Council.

Next you state, "Land that that the railroad acquired through easements would, in the event of abandonment, revert to the successors of the

individuals who sold the property to the railroad in 1887 -- not the adjacent property owner."

I have to challenge that statement. If an individual granted the easement, a reversionary interest was created. An examination of each change of title down to the present owners determines if the reversionary rights are held by the present adjacent owner, or one of the previous owners going back to and including the original conveyor of the easement. Your idea that reversionary rights automatically stay with the original grantor is unsupported in law, to my knowledge. Perhaps you could site a few Washington State railbanking reversionary decisions that support your assertion.

Your legal analysis fails to distinguish between government land grant parcels and other types of parcels. Many of the property owners own land that came from government land grants. Those parcels would not revert to the existing land owners but goes to the sovereign. I am not an expert on this area of law but the person who drafted that particular section IS and is a partner in a major law firm.

Next, "Most adjacent property owners do not seek compensation, however, because most do not qualify for it." I'll have to challenge that one too. Many adjacent property owners do not seek compensation because they get bad advice, like that in your Bicycle Alliance document. Many cannot find a competent lawyer who understands reversionary property law. But the biggest reason, I believe, is that they cannot afford the emotional and financial cost of this fight for their rights. Preseault has taken fifteen years and over a million dollars in legal fees. Many people in Lawson and the Skagit case became discouraged and gave up. Lawson was a great victory for property rights in this State and the Nation, but not for many of the individuals actually involved. Sadly, this makes it that much tougher for those of us along Lake Sammamish. It is cheaper for King County to delay and outlast people in court than to obey the law and pay for the takings. I'm certain this is the tactic King County is employing. That's dishonest government. This is one of the many situations where the courts are not used to resolve legal issues, but rather to control and wear-down the opponent. It is a gross abuse of our legal system, and an unfortunate reality.

John, I honestly don't feel we will ever agree on these points and I am not going to try to change your mind. You view the construction of a trail from an existing valid railroad easement to be a taking of your property. I view the conversion to the trail as a federally authorized preservation of an existing railroad right of way and I also view it as a situation where you are frustrated that that abandonment (which many of you were hopeful for) did not happen. If you want to view government as a conspiracy to take away your property, that's certainly your right. I am not an apologist for government; in fact, as an environmental lawyer, I spend almost all of my time challenging governmental decisions (in the issuance of permits, mostly). I guess you and I have a different view of things: I believe we are a complex society that imposes a substantial toll on our Earth. To protect ourselves and our children's future, we must all make sacrifices of our "property rights" to further the public good (preservation of species, clean air and water, liveable communities, etc). That includes enforcement of tough environmental laws and, yes, it also includes recognizing that the value of some of our individual property might be diminished (except for direct confiscation) to advance a public purpose, such as construction of a road, a train line, or a trail.

To summarize, you state or imply that the U.S. Supreme Court has ruled that a taking does not occur in railbanking; that the Federal Government is the only forum for claims; that reversionary rights remain only with the original grantor; that most adjacent property owners along Lake Sammamish don't qualify for compensation; and that King County has no responsibility for the takings. I disagree with each one of these statements for the reasons I have stated above. Kindly justify or

further explain your position in each case.

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Your "fact" sheet states seven "facts" about ELST. This letter disputes just one of those seven "facts". I have strong disagreements with the other six "facts" too.

Peter, I hope you will answer. I'm interested in your views.

Regards, John

John Rasmussen

Subject: ELST
Date: Fri, 28 May 1999 16:23:54 -0700
From: Rasmussen <issyras@ibm.net>
To: "Goldman, Peter" <pgoldman@wflc.org>

Hi Peter,

Here is my answer to your last.

Regards, John

Attachment:

Friday, May 28, 1999
From: John Rasmussen
To: Peter Goldman
Subj: ELST

Hi Peter,

I appreciate your response to my letter. I'm not sure if you want to continue this discussion, but your answer brings up more questions, and the need to refine some points.

I'll reply to your last statement, first.

I guess you and I have a different view of things: I believe we are a complex society that imposes a substantial toll on our Earth. To protect ourselves and our children's future, we must all make sacrifices of our "property rights" to further the public good (preservation of species, clean air and water, liveable communities, etc). That includes enforcement of tough environmental laws and, yes, it also includes recognizing that the value of some of our individual property might be diminished (except for direct confiscation) to advance a public purpose, such as construction of a road, a train line, or a trail.

Peter, I hate to be the one to tell you this, but that statement could actually qualify you as a "Greenie". Seriously, we do have a substantial difference in views, but perhaps not in the way you believe. I too believe *we are a complex society that imposes a substantial toll on our Earth. To protect ourselves and our children's future, we must all make sacrifices*. But you take an additional step that I despise. You would sacrifice my individual rights and property for the common good…a socialistic approach. I believe that, when a individual is harmed for the common good, the cost must be bore by the whole society. This would require compensation for the takings along Lake Sammamish, and also compensation in the area of regulatory takings…where you work. Regardless of the problems of finding the money to fund these takings, I would require compensation for the designation of wetlands, historical preservation, endangered species, some changes in zoning, etc. This won't be happening anytime soon in the area of regulatory takings, but it is the established law with railbanking. This is because railbanking falls into the area of physical takings, which are judged by different standards than regulatory takings, as you well know. BNSF appraised the value of the land under the right-of-way along ELST at $40 million. I can argue that this means that those of us that live along ELS will "contribute" $40,000,000 to establish the trail, while the other individuals in the County will contribute about $1 each. That's unfair. I don't feel that the government is out to get me, as you suggest. The problem is that all of these sacrifices, that the society must make for its future, cost money. Politicians can't keep their jobs if they are always raising taxes, so they are usually willing to keep the costs down by any method possible. Federal and Washington State law requires that I should be paid for the taking of my reversionary property along ELS, but Ron Sims and the Council can save money and buy more votes by ignoring that law. That's dishonest government, and that's what is happening.

I'll use the same type of convention that you did, and go through your comments, point by point. I'll copy your comments in green…I simply couldn't resist the temptation. I'll put my words in blue. There are lots of quotes here because I'm certainly no expert, and I'll try to let the experts "talk" for me through those quotes. The quotes will be black, indented, and preceded by the source. I'll **bold** the section in the quote that makes my point.

John, compensation for property allegedly taken is, by definition, a technical legal matter. So, please understand that my response must be legal. (I will note a few non-legal points at the end).

How is it that I grant an easement over my land for railroad use and, when that railroad goes away, the county grabs it and turns the land into a county park…against my wishes and without compensation? You point out that you must get legally technical to answer my letter. That is very true. The taking of my land is completely based on legal technicalities. Were it not for legal technicalities, the easement would have terminated and the land would be mine again. That's what the law dictated when the easement was granted. Instead, my land is becoming a park-trail. I agree that we need to look at legal technicalities because that is how King County takes my land and claims it owes me nothing. ELST is a real political finesse job on my life savings and privacy based on legal technicalities

The US Supreme Court did decide numerous things in Presault: they upheld the Congressional rationale of preserving, via railbanking, of corridors and they held that folks can seek compensation if they feel they are entitled to it.

Agreed.

I'm sorry if the forum is inconvenient and the expenses of litigation are high but, hey, I am a public interest environmental law litigator and the expenses of litigation, etc. are realities that everyone in our legal system face.

I wrote about my frustrations with court system last time and will just add this. This fight for my property rights is not an even fight. If I go to court over this, I'll be the only party in the courtroom that isn't on the payroll. In fact, I'll be paying the wages of everyone there. My lawyer, directly; the judge and staff, through my taxes; and the opponents from the County, through my taxes too. Everyone there will be on salary, except me. If I win, I'll still have lost a great amount of time that I can never get back. If I lose; in addition to my time, I lose a great amount of my savings, and the emotional investment, too. On the other hand, win of lose, my opponents from King County get paid…it's a job. The longer they drag it out, the more they get paid, and the more it costs me. They have nothing to lose personally on the scale that I do…only a small bruise to their professional egos. You write as if the realities of the legal system are an equal burden to both parties. They're not in this case. When the County decided to take my land for a park and not compensate me as required by law, I became a loser; whether I go to court or not, whether I win in court or not.

It might sound technical to you, but the fact is that the Preseault case is completely different from the ELS case. In that case, the railroad line was abandoned under Vermont law before it was railbanked. In the case of the ELST, the railbanking came before the right of way was "abandoned" under Washington law. In fact, that is the purpose of federal railbanking law: to permit an interim preservation-trail status prior to there being an abandonment under State law.

Peter, I've reread Preseault III (Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996)) and Preseault II (PRESEAULT v. ICC, 494 U.S. 1 (1990)). The distinction you make here between whether railbanking came before or after is almost completely ignored in those decisions. In fact, when the court looked at the taking issue in Preseault III, it considered both possibilities. It found a taking in both instances. Here is the section that supports that point:

> Preseault III
>
> Thus, if the Preseaults have interests under state property law that have traditionally been recognized and protected from governmental expropriation, and if, over their objection, the Government chooses to occupy or otherwise acquire those interests, the Fifth Amendment compels compensation. **The record establishes two bases on which the Preseaults are entitled to recover. One, if the easements were in existence in 1986 when, pursuant to ICC Order, the City of Burlington established the public recreational trail, its establishment could not be justified under the terms and within the scope of the existing easements for railroad purposes.** The taking of possession of the lands owned by the Preseaults for use as a public trail was in effect a taking of a new easement for that new use, for which the landowners are entitled to compensation. As discussed previously, some courts consider that the establishment of a use outside the scope of an existing easement has the effect of causing an abandonment, and thus termination, of the existing easement. See, e.g., Lawson v. State, 730 P.2d 1308 (Wash. 1986). Either way, the result is the same — a new easement for the new use, constituting a physical taking of the right of exclusive possession that belonged to the Preseaults.
>
> **Two, as an alternative basis, in 1986 when the ICC issued its Order authorizing the City to establish a public recreational biking and pedestrian trail on Parcels A, B, and C, there was as a matter of state law no railroad easement in existence on those parcels, nor had there been for more than ten years.** The easement had been abandoned in 1975, and the properties were held by the Preseaults in fee simple, unencumbered by any former property rights of the Railroad. When the City, pursuant to federal authorization, took possession of Parcels A, B, and C and opened them to public use, that was a physical taking of the right of exclusive possession that belonged to the Preseaults as an incident of their ownership of the land.

The federal judges had a perfect opportunity to support your assertion that "birth order" is a major factor here, but they didn't. From reading the above decision, I question the importance you attribute to the order in which the events happened. If I have split up the point you are trying to make, your answer is just below.

The fact that railbanking came before state abandonment is a MAJOR legal difference because the US govt. does not “take” property that never vested in the first place.

Peter, it appears that was the decision in Preseault I. (Preseault v. I.C.C., 853 F.2d 145 (2d Cir. 1988)) That argument was rejected in Preseault II. You probably know that there are five federal decisions in Preseault. Here is a quote from Justice O’Connor that disagrees with what you write. Her point is that delaying the vesting, defeats the reversionary rights of those granting the easement, and causes a taking…as I understand it.

Preseault II

> **The Commission's actions may delay property owners' enjoyment of their reversionary interests, but that delay burdens and defeats the property interest rather than suspends or defers the vesting of those property rights.** See National Wildlife Federation v. ICC, 271 U.S. App. D.C. 1, 11-12, and n. 16, 850 F.2d 694, 704-705, and n. 16 (1988). **Any other conclusion would convert the ICC's power to pre-empt conflicting state regulation of interstate commerce into the power to pre-empt the rights guaranteed by state property law, a result incompatible with the Fifth Amendment.** See Ruckelshaus [494 U.S. 1, 23] v. Monsanto Co., 467 U.S., at 1012 ("If Congress can `pre-empt' state property law in the manner advocated by EPA, then the Taking Clause has lost all vitality. [A] sovereign, `by ipse dixit, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent'"), quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S., at 164.
>
> **The Court of Appeals for the Second Circuit adopted just this unjustified interpretation of the effect of the ICC's exercise of federal power. The court concluded that even if petitioners held the reversionary interest they claim, no taking occurred because "no reversionary interest can or would vest" until the ICC determines that abandonment is appropriate.** See 853 F.2d 145, 151 (1988). **This view conflates the scope of the ICC's power with the existence of a compensable taking and threatens to read the Just Compensation Clause out of the Constitution.** The ICC may possess the power to postpone enjoyment of reversionary interests, but the Fifth Amendment and well-established doctrine indicate that in certain circumstances the Government must compensate owners of those property interests when it exercises that power. See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314-315 (1987) (The Taking Clause "does not prohibit the taking of private property, but instead places a condition on the
> exercise of that power," and the Clause "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking"). Nothing in the Court's opinion disavows these principles. The Court's conclusion that 8(d) authorizes rails-to-trails conversions that amount to takings, ante, at 13, and its conclusion that "under any view of takings law, only some rail-to-trail conversions will amount to takings," ante, at 16, are inconsistent with the Second Circuit's view. Indeed, if the Second Circuit's [494 U.S. 1, 24] approach were adopted, discussion of the availability of the Tucker Act remedy would be unnecessary. Even the federal respondents acknowledge that the existence of a taking will rest upon the nature of the state-created property interest that petitioners would have enjoyed absent the federal action and upon the extent that the federal action burdened that interest. See Brief for Federal Respondents 23-24.

Second, even assuming that the railroads orignially acquired only easements limited to railroad purposes, railbanking and interim trail use pursuant to Section 8 (d) of the Trails act do not terminate such easements under Wash. law.

An easement still is in effect after railbanking, but a taking occurs because railbanking essentially terminates the original easement and replaces it with a new one. Here is the basis of that idea.

Preseault III

Furthermore, contrary to where the dissent places its emphasis, we find the question of abandonment is not the defining issue, since **whether abandoned or not the Government's use of the property for a public trail constitutes a new, unauthorized, use.**

Preseault III

…if the easements were in existence in 1986 when, pursuant to ICC Order, the City of Burlington established the public recreational trail, its establishment could not be justified under the terms and within the scope of the existing easements for railroad purposes. **The taking of possession of the lands owned by the Preseaults for use as a public trail was in effect a taking of a new easement for that new use, for which the landowners are entitled to compensation.**

Lawson v. State. (107 WA 2d 444 (1986))

In addition to outright abandonment of a right of way, there may be a change in use of the right of way which is inconsistent with the purpose for which the right of way was granted. Where the particular use of an easement for the purpose for which it was established ceases, the land is discharged of the burden of the easement and right to possession reverts to the original land owner or to that landowner's successor in interest.

Section 8 (d) of the Trails act retains an easement on the property, but not the same easement originally agreed to by the railroad and landowner. This triggers a taking. Section 8 (d) of the Trails act does not deny the right to compensation for a taking. It cannot, or it would be unconstitutional.

. Railbanking and interim trail use constitutes a legitimate railroad purpose within the scope of the easements because it actively preserves the corridors for future railroad use. Many, many courts have held that easements for railroad purposes are construed broadly to effectuate any railroad purposes. Missouri K-T Railway v. Freer, 321 SW 2d 731 (Missouri, 1958). This includes all uses and future preservation of uses.

Peter, this is far, far from an established fact, and certainly not an established fact here in Washington State. You are referring to the "doctrine of shifting public use", a doctrine with which the federal judges have much disagreement among themselves. In Preseault III, six of the nine judges agreed with my point of view…that it is not within the scope of a railroad easement to establish a trail. Three of the judges agreed with your point of view.

Preseault III (Opinion…4 judges)

The general rule does not preclude the scope of an easement being adjusted in the face of changing times to serve the original purpose, so long as the change is consistent with the terms of the original grant:

When the easements here were granted to the Preseaults' predecessors in title at the turn of the century, specifically for transportation of goods and persons via railroad, could it be said that the parties contemplated that a century later the easements would be used for recreational hiking and biking trails, or that it was necessary to so construe them in order to give the grantee railroad that for which it bargained? We think not. **Although a public recreational trail could be described as a roadway for the transportation of persons, the nature of the usage is clearly different**. **In the one case, the grantee is a commercial enterprise using the easement in its business, the transport of goods and people for compensation. In the other, the easement belongs to the public, and is open for use for recreational purposes, which happens to involve people engaged in exercise or recreation on foot or on bicycles.** It is difficult to imagine that either party to the original transfers had anything remotely in mind that would resemble a public recreational trail. **Furthermore, there are differences in the degree and nature of the burden imposed on the servient estate. It is one thing to have occasional railroad trains crossing one's land. Noisy though they may be, they are limited in location, in number, and in**

frequency of occurrence. Particularly is this so on a relatively remote spur. When used for public recreational purposes, however, in a region that is environmentally attractive, the burden imposed by the use of the easement is at the whim of many individuals, and, as the record attests, has been impossible to contain in numbers or to keep strictly within the parameters of the easement. As the BRUCE & ELY treatise noted, "[a]n easement created to serve a particular purpose ends when the underlying purpose no longer exists," BRUCE & ELY, supra, ¶ 10.03[1], at 10-12, and **"when an easement for railway purposes is found, it is generally considered to end when it is no longer used for the stated purposes,**" id. ¶ 1.06[2][d], at 1-48. In the language of the old English courts, to allow this change would permit "a substantial variance in the mode of or extent of user or enjoyment of the easement so as to throw a greater burden on the servient tenement." Bernards v. Link, 248 P.2d at 347.

Preseault III (Concurring opinion…2 judges)

While there is some dispute over the comparative burden of scheduled rumbling freight trains versus obnoxious in-line rollerskaters, the issue can be resolved on simpler terms. **Realistically, nature trails are for recreation, not transportation. Thus, when the State sought to convert the easement into a recreational trail, it exceeded the scope of the original easement and caused a reversion.**

You say, "Many, many courts have held that easements for railroad purposes are construed broadly to effectuate any railroad purposes." That may be so, but also, many, many courts do not hold that to be true. This is an issue that sits on the fence, but tips to my side. Here in Washington, the Lawson decision sides strongly with my point of view.

Preseault III (citing and quoting Lawson)

Most state courts that have been faced with the question of whether conversion to a nature trail falls within the scope of an original railroad easement have held that it does not. Lawson v. State, 730 P.2d 1308 (Wash. 1986) (in banc), is an example of a case practically on all fours with the case before us. The Burlington Northern Railroad Company petitioned the ICC for permission to discontinue rail service over a certain right-of-way. King County requested the ICC to determine that the right-of-way was suitable as a public recreational trail, and to require that it be offered for sale for public purposes. The ICC did so under its Rails-To-Trails authority, and King County acquired the right-of-way from the Railroad.

The property owners who owned the underlying fee estates sued in Washington State court for a declaratory judgment that this was an unlawful taking without just compensation. The trial court held
for the County. The Washington Supreme Court, in banc, reversed. The Court stated the common law rule to be that when a deed conveys a right-of-way for railroad purposes only, upon abandonment by the railroad of the right-of-way the land over which the right-of-way passes "reverts" to the reversionary interest holder (the owner of the fee estate) free of the easement.

The court then stated:

In addition to outright abandonment of a right of way, there may be a change in use of the right of way which is inconsistent with the purpose for which the right of way was granted. Where the particular use of an easement for the purpose for which it was established ceases, the land is discharged of the burden of the easement and right to possession reverts to the original land owner or to that landowner's successor in interest.

Id. at 1312. **The court went on to hold that a hiking and biking trail is not encompassed within a grant of an easement for railroad purposes, citing cases from Illinois and Wisconsin, and concluded that "[a]pplying common law principles, we hold that a change in use from 'rails to trails' constitutes abandonment of an easement which was granted for railroad purposes only. At common law, therefore, the right of way would automatically revert to the reversionary interest holders."** Id. At 1313.[17] See, 3 J. SACKMAN, NICHOLS

ON EMINENT DOMAIN § 9.35, at 9-113 (3d rev. ed. 1985). The court went on to hold that a state statute which purported to prevent the ripening of the reversionary interest upon abandonment was unconstitutional as applied to the vested property rights of the plaintiffs "insofar as it purports to authorize King County to acquire without payment of just compensation existing reversionary interests which follow easements for railroad purposes only." Id. at 1316.

The Court thus concluded that "King County cannot acquire the [ ] right of way from Burlington Northern without payment of just compensation to the reversionary interest holders. If the County takes this right of way and commences to build a recreation trail, it does so in violation of the constitution." Id. Accord Schnabel v. County of DuPage, 428 N.E.2d 671 (Ill. Ct. App. 1981); Pollnow v. State Dep't of Natural Resources, 276 N.W.2d 738 (Wis. 1979); see also National Wildlife Fed'n v. ICC, 850 F.2d 694 (D.C. Cir. 1988) (rejecting ICC argument that rails-to-trails conversions will never constitute a taking, and remanding for further consideration especially regarding easements limited to railroad use and when railroad restoration "not foreseeable").

Like it or not, federal law recognizes the importance of keeping the railroad corridor in your backyard available as an in-tact right of way. Can you begin to imagine how expensive it would be for the government to remove your home from the abandoned rail road right of way at some point in the future had the rail line been abandoned?

My complaint is not with the principle or railbanking. My complaint is that politicians do not recognize that my rights are violated by the taking involved, and are unwilling accept responsibility for funding the cost of compensation.

Third, it is RTC's position—one that I fully agree with—that railroad corridors were and are intended to be transportation corridors: trail use represents an energy-efficient transportation corridor which is consistent with the common law principle that railroad land is "devoted to public use." As a result, a number of courts have held that trail use is within the scope of a railroad easement because both use are a type of transportation or public highway purpose and use of the easement for trail purposes. See Barney v. BN, 490 NW 2d 726 (S. Dakota, 1992); Wash Wildlife Preserv v. State, 329 NW 2d 543 (Minn. 1983).

I've just beaten this "shifting public use" issue almost to death, so I won't go through it all again. I'll add this. In Washington State court I'd rather cite the decision in Lawson, than cite the decision in Wash Wildlife, a case from Minnesota. Further, in the Preseault III opinion, Lawson was elevated above Wash Wildlife in importance. As I see it, this is an issue in flux, with my position holding a strong edge.

It's important for your group that the public views the trail as a transportation corridor for several reasons. It justifies your position on the "shifting public use doctrine", reducing the possibility of triggering takings that requiring compensation. Further, it gives you access to funding from ISTEA/TEA-21. I'd call it a phony transportation corridor. From a personal standpoint, the couple of times I've been on the trail at the north end of Sammamish, I had to ride so slowly, due to other users, that I would hardly consider it available for transportation. I ride, and will continue to ride, on the side of the road for exercise. When I ride for exercise, my bike speed is incompatible with the other authorized uses of the trail/park, so I must shift my bike use to a legitimate transportation corridor…the side of the public highway. I believe, most of the avid bicyclers will still be riding on the side of East Lake Sammamish Boulevard after the trail goes in, because the trail is really for recreation, not transportation. ELST will be a long, narrow park established and administered by the County Parks Department. If they are for transportation use, then why aren't the trails reserved for only that purpose during busy commuting hours of the day? They are not, because there would less public support for the projects if they were not available for public recreation use full time. I believe your group clings to the "transportation corridor" myth because it gets you funding and saves money as I described above. Under the legal technicalities standard, this concept appears to be working for you. This just is my perspective. I realize that I won't be changing your mind here.

Lastly, even if one assumed that interim trail use exceeds the scope of the railroad's easement and, thus, constitutes a taking, folks would only be entitled to compensation for the diminution in value of their land or increased burden on their land created by the trail use, as opposed to the railroad use.

I totally disagree with that statement. The quotes I list again below, would indicate to me the taking claim would be as if the railroad abandoned and land reverted to me, then a new easement were established by the County taking my land for the trail. The claim would be as if the land were condemned for public use from private property. Using BNSF's appraisal for the land, the claims against the County could reach $40 million for ELST.

> Preseault II
>
> **Even the federal respondents acknowledge that the existence of a taking will rest upon the nature of the state-created property interest that petitioners would have enjoyed absent the federal action and upon the extent that the federal action burdened that interest.**
>
> Preseault III
>
> …if the easements were in existence in 1986 when, pursuant to ICC Order, the City of Burlington established the public recreational trail, its establishment could not be justified under the terms and within the scope of the existing easements for railroad purposes. **The taking of possession of the lands owned by the Preseaults for use as a public trail was in effect a taking of a new easement for that new use, for which the landowners are entitled to compensation.**

Good luck trying to convince a jury that your property is worth less with a trail than with a busy railroad. ELS homeowners bought their property knowing full well it was encumbered by a train track, one that admittedly has been sleepy but could have been developed into a busy, high speed train line one day.

I see regulatory takings philosophy creeping in here…"investment-backed expectations". We don't do the Penn Central tests with railbanking. That idea was put forward by the three judge Preseault decision in 1995 and, later, soundly overturned in Preseault III in 1996.

Given the number of people who would like to live near bike trails and the effective ways that engineering and landscaping can mitigate the impacts of a trail, can you really say that construction of a trail diminishes the value of your property?

I've lost all faith in King County to have any consideration for my needs in the face of the additional cost it would entail. The County has shown no significant concern for those of us most affected by the trail to this point, so why would they start now? We were excluded from the CAG for a phony reason. We've been shut out of the process at every turn. The idea, that the County is now going to spend the necessary funds to mitigate the impact on us, is absurd.

Separately, the trail very definitely diminishes the value of my property. It is worth about a half a million less than it would be if it had reverted to me under the terms of my easement with the railroad.

Do you really believe that the impact of such a trail is greater than the impact of a busier train line?

Yes, I would rather take my chances with the train, than have a trail. But, of course, that doesn't really matter any more, unless RIRPA prevails in court. A trail on the present railbed destroys my privacy and threatens to destroy my ability to use the property for a home.

I lived over a train yard in Boston when I was a college student and I spend alot of time near the Port of Seattle; train yards and lines are the busiest, most noisest places in the world. When's the last time you went to some of the neighborhoods in Ballard where the BN main line is located?

The chance of having a busy train yard or main line along ELS is essentially nil.

Believe me, you are lucky to get a trail and surrounding open space and not a high speed RTA line with fences, signals, danger, noise, vibration, exhaust, etc.

Peter, have you ever thought about giving up the law, and going into used car sales?

Isn't really what happened here that most folks purchased their properties and built their homes on the gamble that the train line would go away?

Regulatory taking philosophy again. Everything we do in life is a gamble. Whenever a person buys any property, there are gambles taken. We weren't hoping for abandonment when we purchased, but rather for things to stay the way they were. We had concerns about a trail, but the Lawson victory gave us a lot of comfort…false comfort, perhaps. We did research on the original easement to the railroad, but finally realized that we couldn't get a hard answer for what would happen if the railroad left. We felt that a trail was unlikely considering the Lawson decision, the safety issues of the many crossings, and the very negative impact the trail would have on the neighborhood. Further, we believed that the principal purpose of the STB was to maintain rail service, and that we could continue to provide that service, as a community, in exchange for the keeping our privacy. In my opinion, this is why RIRPA was formed.

Is it fair for these same folks now to say that a change in use from an active rail line to a preserved rail corridor with interim trail use is a taking of their property?

Yes, that is exactly what the federal court has decided.

This next statement from you is further along in your letter and refers to Lawson v. State.

> This case does not apply because the land at issue was not railbanked under the federal law.

Judge Plager's description of Lawson, below, indicates to me that he believes the land was railbanked under federal law.

> Preseault III
>
> The Burlington Northern Railroad Company petitioned the ICC for permission to discontinue rail service over a certain right-of-way**. King County requested the ICC to determine that the right-of-way was suitable as a public recreational trail, and to require that it be offered for sale for public purposes. The ICC did so under its Rails-To-Trails authority,** and King County acquired the right-of-way from the Railroad.

I have heard about the Skagit county case but I do not know the specifics so I cannot comment. At any rate, pre-trial decisions are not final decisions and are, accordingly, not very useful legal precedent.

I haven't read much about it either. John Groen represents the property owners, and would be one of the lawyers we would consider if we file. I haven't talked to him yet.

The RCW you cited is nothing more than a statement that railbanking is an extremely sensible idea and, at any event, the compensation language in that law would [not] apply to the ELST because it is pre-empted by the federal railbanking law.

It seems to me that even though federal railbanking law pre-empts state property law, the State may write laws governing railbanking as long as they doesn't conflict with, or limit the federal statute. Preseault III allows that a taking may be triggered by the railbanking. It would follow, then, that King County could be sued for a railbanking taking under the RCW, as long as it didn't interfere with the federal railbanking law. Perhaps a decision in the Skagit case will clarify this issue. I would like to see King County pay for the taking because the County is responsible. That's how the law should work. Further, King County has treated us very poorly in their handling of the trail. I would be much more willing to file in the U.S. Court of Claims if King County were more sympathetic and helpful, instead of being so mean spirited to us. Frankly, I don't know if we can file based on the RCW, but, I'd like to.

If you don't like the federal law (which was unanimously passed by Congress), it's your right to try to change it.

I don't have a serious complaint with the idea of railbanking. I like trails. I would like to see the railbanking law modified to give more local control and responsibility. I support the Ryun bill, which is

trying to make changes. Further, for the people that have a valid taking claim, I think the process of obtaining payment should be simplified. The Preseaults have a valid claim, but still have not received compensation after fifteen years and over a million in legal expenses. That's wrong.

All of your arguments that you deserve compensation assume someone has taken your property.

Preseault III decided that a taking can occur if the conditions are met. That same logic applies to the ELST.

As I discussed above in the section about railbanking, while you might prefer a railroad to a trail, that is NOT the case. Your property is encumbered by a transportation corridor. The Federal railbanking law pre-empts any state law that would other wise deem the railroad purpose to be abandoned and reverted to you. Your compensation arguments must be directed at the federal courts, not the entity (King County) which holds the railbanked corridor. That is why we said your technical legal arguments don't belong before the KC Council.

In a section above, I've gone over why I think we might be able to file based on the RCW, and why I'd personally like to file against King County. But, payment by the U.S. Court of Claims is acceptable too, if that becomes my only option.

Your legal analysis fails to distinguish between government land grant parcels and other types of parcels. Many of the property owners own land that came from government land grants. Those parcels would not revert to the existing land owners but goes to the sovereign. I am not an expert on this area of law but the person who drafted that particular section IS and is a partner in a major law firm.

Your expert stated in your "fact" sheet, "Land that that the railroad acquired through easements would, in the event of abandonment, revert to the successors of the individuals who sold the property to the railroad in 1887 -- not the adjacent property owner." I read this to mean that the reversionary rights would remain with the original grantor and his descendents. That's how I believe an average person reading the Bicycle Alliance document would understand that sentence. If that is what your expert meant to write, I believe he is very wrong. Perhaps he meant "successors in interest" or "successors in title" instead of simply "successors". Here's a quote:

> Preseault III
>
> Under the governing law of the State, the Preseaults, successors in title to those who owned the property when the easements were created, owned the same title and interest as they, and are entitled to the same protections the law grants.

That's Vermont law, but I believe it is common law just about everywhere.

My statement was not intended to ignore reversions from government land grants, but to suggest a possible situation along ELST, and refute a statement by your expert that is wrong, vague, or misleading. You seem convinced that a lot of the properties along ELST are from federal land grants. Do you have a percentage? Do you even know of any? I know of none, but don't have much information outside my neighborhood. Your fact sheet was written to indicate that hardly anyone along ELST would have a claim. I think that is dishonest. My sense is, that a reversion to some individual is likely on many, if not most, the properties along ELS. I suspect there are very few, if any, land grant parcels. But, frankly, I don't know. Do you? If you have any statistic on the amount of land grant property along ELS, I'd be curious to know.

I believe my statement is accurate. Here it is again: "If an individual granted the easement, a reversionary interest was created. An examination of each change of title down to the present owners determines if the reversionary rights are held by the present adjacent owner, or one of the previous owners going back to and including the original conveyor of the easement." In this situation, if the title shows the land beneath the easement is included in the description of the property, the reversionary interest would be included in that title. This assumes an easement for railroad purposes.

To summarize:

Peter, there are a number of issues surrounding the establishment of ELST. I've been concentrating on the taking issue here. It's about money. Essentially, everyone around here wants trails and parks. The problem is how to pay for them and keep the costs down. It may seem that there is a perfect fit with railbank; saving abandoned rail corridors for future use, and at the same time establishing trail-parks, or commuter trails if you want. But, as is almost always the case in this world, for someone to get a good deal, someone else has to get a bad deal. In this case the bad deal goes to those of us who have legal rights to have our land returned to us when the railroad abandons. Sadly, your group and the politicians feel you must work against us attaining our rights. The reason is, that if the taxpayer is forced to pay for the taking, he will probably choose to not have rail-trails rather than to tax himself to pay the true cost. Politicians want to be there to take credit, to cut the ribbon and open the trail, but don't want to ask their constituents to pay for it. So when King County was faced with the compensation requirements of RCW 64.04.180, the politicians had two choices. They could try to comply with the meaning and spirit of that Washington State law, or they could try to find a way around it…to save the political cost of funding. They chose the latter. As you indicated at the top of your letter, this comes down to legal technicalities. Legal technicalities are being used to take my property, so, that's what we are discussing here.

You claim that, technically, a taking, requiring compensation to me, could not take place because railbanking delayed the vesting. I responded with a quote from Supreme Court Justice O'Connor, in Preseault II, indicating the delay defeats the vesting, causing a taking.

You claim, using legal technicalities, a compensatable taking could not occur because railbanking does not terminate the original railroad easement. I responded with quotes from Preseault III and Lawson v. State showing that railbanking essentially destroys the old railroad easement and creates a new easement, causing a taking.

You claim, technically, that railbanking is within the scope of the easement, so a taking cannot occur because the easement is unchanged and intact. I responded with the score and quotes from Preseault III, where six of the nine judges believe your claim is wrong. Those federal judges believe that railbanking does not fall within the scope of the railroad easement, so that a taking can occur with railbanking. Further, I quoted Lawson, a decision by our Washington State Supreme Court, which supports my view on this "doctrine of shifting public use". Lawson was elevated in importance in the Preseault III decision.

You claim if a taking were allowed, my compensation would be based on the difference between the property value with a train, and the property value with a trail. I pointed out that since the federal judges believe railbanking effectively establishes a new and different easement, that compensation would be based on the cost of converting the property from private to public through condemnation. Based on the BNSF appraisal, this would put the value of the takings along Lake Sammamish at around $40 million.

You claim that, technically, King County can ignore the Washington State law, requiring compensation for railbanking takings, because the RCW is pre-empted by the federal railbanking law. This is probably the heart of the issue in the Skagit case. I believe, since a taking is allowed in federal railbanking law, that a claim against King County based on RCW would not interfere with that federal law, and would be appropriate. Neither of us knows how that is being argued in Skagit County. In any case, we both agree I would have the right to take a railbanking taking claim to the U.S. Court of Claims.

Peter, this has become so long, I'm not sure you will ever read this far. But, even if you don't, it has been worth it for me because it has forced me to focus on the important issues, and clarify my thoughts.

Regards, John

Subject: ELST
Date: Tue, 15 Jun 1999 09:04:21 -0700
From: Rasmussen <issyras@ibm.net>
To: "Goldman, Peter" <pgoldman@wflc.org>

Hi Peter,

I sent you a letter a couple of weeks ago, and expected a reply by now. On the chance you didn't receive the letter, I'll attach it again to this note. If you did receive my letter dated 5-28-99, could you explain your reason for not replying?

Regards, John

Subject: RE: ELST
Date: Tue, 15 Jun 1999 12:36:54 -0700
From: Peter Goldman <pgoldman@wflc.org>
To: "'Rasmussen'" <issyras@ibm.net>

Dear John:

Thanks for the note. I've been very busy these days, and even more so since my 3 kids are out of school for the summer. I've enjoyed communicating with you about the technical legal issues pertaining to railbanking and, I imagine, that this process has helped flesh out the issues for both of us.

At this point, I'm going to choose not to spend any more of my time debating the legal stuff with you. It's always helpful to talk, but considering the demands on my time, I just don't feel that debating the nuances of property/railbanking law via email is going to get us anywhere. Moreover, these issues will probably be litigated with respect to the ELS trail so the arguments will face off in front of a court one day. What's the point of you and I doing all the briefing now via email??

I'll keep any eye out for you at the next public gathering and will say hello.

Peter Goldman