Is King County Liable for the taking of a trail easement?

Thoughts and Ideas

John Rasmussen April 8, 2001

Since the Hilchkanum deed to SLS&E granted only an easement limited to railroad purposes, and my deed is burdened by that same easement, the establishment of a trail across my property raises the question of what right exists for that trail to be built. The creation of a trail on the right of way *establishes a new and different easement for a new purpose that is separate from a railroad easement.* In *Lawson v. State*[1], the Washington State Supreme court found that a railroad easement couldn't be shifted in use to a trail using the doctrine of shifting public use. Since I own the underlying property and the railroad easement is limited to railroad use, a taking has occurred if King County is establishing a trail on my property. My wife and I did not grant a trail easement.

Who is responsible for the taking that allows establishment of the trail? I need only to look out my window to discover who is establishing the trail. I see only King County employees involved with this project. King County is establishing the trail. The county has voluntarily decided to establish a trail that it claims it has planned since 1971. There is no federal requirement for King County to establish the trail. Further, the county is completely in charge of every aspect of establishing the trail. The county is responsible for obtaining the funds for the project. The trail is located totally within King County, Washington, and is being built for the benefit of King County residents. Further, King County, agreed to "…assume full *responsibility* for management of such rights-of-way and for any *legal liability* arising out of

[1] Lawson v. State, 107 Wn.2d 444, 730 P.2d 1308 (1986).

such transfer or use…"[2] The county committed to this legal liability when it sought the permission of the federal government to establish a trail that would not interfere with the STB control of railroads. The taking of an easement for a trail would be a *legal liability* for which the county must take *responsibility*. While King County controls the establishment of the trail, it claims that it has no requirement to take responsibility for the harm it has done by the taking of an easement for that trail.

If I properly understand the county's position, King County claims the federal government has established this trail easement through the Rails to Trails Act, and therefore, the county claims the federal government is responsible for the taking. Further, the county states that I must take any

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[2] 16 U.S.C. §1247 (d) Interim use of railroad rights-of-way

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 801 et seq.), shall **encourage** State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to **assume full responsibility for management of such rights-of-way and for any *legal liability* arising out of such transfer or use**, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

claim associated with this taking to the United States Court of Federal Claims. If the county is correct with its assumption that the federal government is liable, then the county should be able to identify some source of *authority that grants the STB the right to establish a trail easement.* I cannot find that authority. The STB's authority to railbank rights of way is described in 16 USC §1247(d). That Act authorizes the STB to withhold abandonment and retain its authority over railroad rights of way that are railbanked under that Act. The Act authorizes the STB only to "…*encourage* State and local agencies and private interests to establish appropriate trails…" Congress did not *direct* the STB to establish trail easements with those words, rather it only *encouraged* the establishment of trail easements. If Congress only "encourages" an event, that would not make the event mandatory. If Congress wanted to make the establishment of a trail easement mandatory with railbanking, Congress needs to state that in the law. It is not within the power of the STB nor the courts to change the effect of the Rails to Trails Act by redefining the meaning of the word "*encourage*" to mean "*require*". The intent of Congress in the Rails to Trails Act is clearly shown by the language of the Act. Congress authorized railbanking if "…a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use…" By withholding abandonment, Congress makes the federal government liable for a portion of the damage to the rights of the reversionary owners, but since the Act only *encourages* establishment of trails, the Act holds the municipality liable for the taking of the trail easement. It is well established by the *Preseault* decisions[3] that the harm for

[3] Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) and

the *taking involved in withholding of abandonment* is compensated in the United States Court of Federal Claims. Considering these facts, it can be seen that there are *two separate takings* with railbanking when the easement is restricted to railroad use. This would include one taking for the withholding of abandonment, and one taking for the establishment of the trail easement. If the easement granted to the railroad were broad enough to allow both railroad and trail use, this would not be the case because a separate trail easement would not be *required*.

This is easier to understand if one tries to identify when the trail easement is established. If one contends the federal government establishes the trail easement, what federal event causes that taking? Was it when the Congress passed the act? Was it when the railroad filed for railbanking? Was it when the STB authorized railbanking? Was it when the railroad passed its interests to the trail manager? None of these events seem to fit. On the other hand if one just looks at the sequence of events, one can see that *the trail easement is taken when the property is entered for trail purposes.* King County has done that by entering my property to plan and prepare for the trail. The county does this voluntarily, and is in completely in control of the process. King County is responsible for the taking of a trail easement.

Since there are two different takings involved with railbanking on my property, there are two different possibilities for compensation. The taking for the *withholding of abandonment* is available to me under the Tucker Act. But, because the Rails to Trails Act only *encourages* trail establishment, I would have no claim under the Tucker Act for the damages due for the

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PRESEAULT v. ICC, 494 U.S. 1 (1990).

separate *taking of a trail easement.* Yet King County claims the Tucker Act is the *only* avenue for *all* compensation arising from railbanking. This makes no sense to me. The Tucker Act gives the United States Court of Federal Claims jurisdiction over claims based of five different possibilities[4] Since the Rails to Trails Act does not *direct* the establishment of trails, and only "encourages" their establishment, Tucker Act compensation is not available for the taking of the trail easement because the *United States Court of Federal Claims lacks jurisdiction* under the five possibilities listed.

The Rails to Trails Act covers several different possibilities with respect to reversionary ownership. With my deed, the right of way was granted for railroad uses only. This is the most restrictive grant of a railroad right of way. The STB controls railroad use of that right of way (if this isn't a spur line), including abandonment, but is limited by the terms of the easement expressed in the deed, and Acts of Congress. In my case, where the easement is limited to rail use, the STB would have no authority to allow such alternate uses as the building of a hospital, sewer plant, prison, or other use beneficial to the public. Nor would the STB have authority to allow trail

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[4] 28 U.S.C.1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)

(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

use because the deed is restricted to railroad use only, and the Rails to Trails Act only *encourages* a trail, and does not *order, mandate, or direct* that a trail be built. The STB would only have the authority to grant uses that are within the authorized use of the right of way as granted in the easement, or authorized by Congress. Since neither Congress nor I have authorized the establishment of a trail easement, the STB has no authority to grant a trail easement. What the STB has a right to grant is an "easement to the easement", one might say. The STB is simply granting that a trail, which co-exists with the railbanked right of way, does not interfere with the STB's authority to use the right of way for rail purposes. The STB grants only what it has the right to grant: that a trail will not interfere with suspended railroad use. It cannot grant powers in excess of its own.

With respect to my property, since there is no jurisdiction in the United States Court of Federal Claims to compensate me for the taking of a trail easement under the Tucker Act, and King County is the entity that is taking the trail easement, King County is liable for the taking of that easement. The Washington State Constitution and RCW 64.04.180 & 190 define this requirement.

King County has taken an easement for a trail on my property.