

RAILBANKED RECREATIONAL TRAILS THE RIGHTS AND DUTIES OF LANDOWNERS AND TRAIL MANAGERS

CONGRESSIONAL INTENT

The purpose of rails-to-trails is to *preserve America's future* by conserving rail corridors for future transportation needs and, in the interim, utilize the railbanked right of way easements as recreational trails. The railbanking of the rail corridors under the National Trails System Act railbanking amendment [16 USC 1247(d) as implemented by 49 CFR 1152.29] preserves existing Railroad Right of Way easements for future use. The railroad technically retains the right to regain ownership of a railbanked right of way. Until that happens, and in the interim, a third party (owner/manager/responsible party) is authorized to use the railbanked right of way for recreational purposes. The United States Surface Transportation Board (STB) retains jurisdiction over the railbanked trail.

In 1990, the Supreme Court unanimously ruled, in the case of *Preseault v. United States* [Preseault v ICC, 110 S.Ct. 914 (1990)], that preserving a corridor for future rail use through railbanking is a legitimate exercise of governmental power under the Commerce Clause of the U.S. Constitution. This decision protects both a railroad's legal right to transfer all forms of its ownership, including easements, to a trail organization and to reactivate a railbanked line for railroad use in the future. To date more than 20 railbanked rail lines in the United States have been reactivated for railroad use.

Railbanked Right of Way Easement

In Kansas, all railroad corridors are considered to be an exclusive Right of Way Easement for railroad transportation purposes, regardless of how that Right of Way Easement was obtained. When that Right of Way Easement is determined to be "abandoned" by the Surface Transportation Board, the Right of Way Easement is extinguished. Then the use of the surface of the land formerly "burdened" by the Right of Way Easement, "reverts" to the landowner. When railbanking occurs, the Federal Government prevents any "abandonment," and continues the *existing* transportation Right of Way Easement. This is the act of "taking" the use of the surface of the land from the landowner for an indeterminate period of time.

Just compensation for "taking" private property for public use

In Kansas, in the US District Court (Wichita) at least one landowner in McPherson County (Galen and Cheryl Swisher) was awarded \$10,000 "just compensation" for the "taking" of the 66 foot Railbanked Right of Way for one quarter of a mile, or roughly two acres (Swisher vs. United States, No 98-1352 (D. Kan.)). However, their lawyers were awarded more than \$360,000 for representing the landowner. The US Treasury paid these awards. Several other landowners in

central Kansas were denied “just compensation” by the US District Court (Wichita) because they filed their petition for “just compensation” more than 6 years after the “taking” had occurred. Obviously, the landowner must file a timely claim with the US Court of Federal Claims for “just compensation” from the US Treasury [Barclay vs. United States, 351 F. Supp. 1169 (D. Kan. 2004)].

Taxation of Real Estate burdened by a Right of Way Easement

Under Article II of the Kansas Constitution, Real Estate is subject to taxation. A Right of Way Easement has been determined not subject to taxation as real estate; but, the real estate below the Right of Way Easement is subject to real estate taxes. However, the value of the Real Estate burdened by a Railbanked Right of Way Easement may, or may not, be determined by the County Appraiser less for determining its value for tax purposes.

OCCUPANCY RIGHTS

1. **Railbanked Right of Way:** The owner/manager/responsible party has the right to exclusive possession of the Railbanked Right of Way Easement under Kansas law.
2. **Adjacent Landowners:** The landowners “burdened” with the Railbanked Right of Way Easement have the right of exclusive possession of their real estate subject to the exclusive use of the Railbanked Right of Way.
3. **Crossing privileges:** The adjoining landowner can move agricultural equipment across the trail to property also owned by the adjacent owner if an existing license or easement is in place. The owner/manager/responsible party of a Railbanked Right of Way Easement has a duty under K.S.A. 58-3212 (9) to grant crossing easements to adjacent landowners “consistent with the use of the adjacent property” in the same procedure as for operating railroads specified in K.S.A. 66-301 through 66-303.

VIOLATIONS OF EXCLUSIVE POSSESSION

Trespass: One who enters upon another’s possession of land without permission commits trespass, which is a violation of Kansas law. Depending upon the facts and circumstances, a person who enters another’s possession of land may be subject either to criminal trespass (a violation of K.S.A. 21-5808 through 21-5810), or to a civil trespass action for damages, injunction, or other relief; or both.

RIGHTS AND DUTIES

Rights: We all have the right of free speech and to express our opinions – and to speak untruths if it does not cause injury to another. Virtually all citizens have the right to vote.

Duties: We all have the duty to follow the law, even laws with which we do not like. For example, the owners/managers/responsible parties of Railbanked Right of Way Easements have a duty to follow the duties imposed by the Kansas Recreational Trails Act even though they find that law onerous. By the same token, landowners deprived of their “reversionary rights” to possession of the Railbanked Right of Way Easement have a duty to follow the law even though they may find that law onerous.

GOOD NEIGHBOR POLICY – HOW WE DO BUSINESS

The owner/manager/responsible party of the Railbanked Right of Way Easement desires to be a good neighbor and build mutual respect with those who adjoin the trails. The goal of the Good Neighbor Policy is to minimize negative impacts on neighboring lands and to promote a positive experience for recreational trail users. A neighboring landowner who has a concern should communicate it to the owner/manager/responsible party and that concern will be addressed in a good-faith manner.

Years of experience have shown that Railbanked Recreational Trails make just as good neighbors as any other recreational trail and fully developed rail-trails create fewer problems than highways or active rail lines. Generally, neighboring landowners experience few problems out of the ordinary. With regular active use, recreational trails, railbanked or otherwise, become self-policing as the presence of trail users discourages potential misconduct.

In conclusion, good neighbors respect the rights of others and are willing to communicate with each other in a good-faith manner.

Duly adopted by the Board of Directors of Sunflower Rail-Trails Conservancy, Inc. on March 28, 2015.