IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEBRASKA

WILLIAM SCHNEIDER, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	8:99CV315
PAUL F. SEGER, KAREN M. SEGER, DOUGLAS W. MATSCHULLAT, and HELEN SUE MATSCHULLAT, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	4:99CV3056
LAZY HORSESHOE RANCH, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	4:99CV3153
TIMOTHY M. GRAY and MARGARET S. GRAY, Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	4:99CV3154 MEMORANDUM AND ORDER

This matter is before the Court pursuant to the parties' cross-motions for summary judgment (Filing Nos. 144 and 169 in Case No. 8:99CV315; Filing Nos. 148 and 158 in Case No. 4:99CV3056; Filing Nos. 88 and 102 in Case No. 4:99CV3153; and Filing Nos. 124 and 141 in Case No. 4:99CV3154) and plaintiffs' motion to stay all issues raised by defendant that do not address the liability issue this Court ordered should first be determined (Filing No. 200 in Case No. 8:99CV315; Filing No. 183 in Case No. 4:99CV3056; Filing No. 167 in Case No. 4:99CV3153; and Filing No. 124 in Case No. 4:99CV3154). The issue before the Court is under what circumstances, if any, the Rails-to-Trails Act can constitute a taking. The Court has reviewed the motions, briefs, evidence, and applicable law, and finds that the Rails-to-Trails Act can, in some circumstances, constitute a taking that is compensable under the Fifth Amendment.

Also before the Court are motions to strike allegations in plaintiff's declarations pursuant to Fed.R.Civ.P. 56(e) (Filing No. 172 in Case No. 8:99CV315; Filing No. 161 in Case No. 4:99CV3056; Filing No. 105 in Case No. 4:99CV3153; and Filing No. 144 in Case No. 4:99CV3154) wherein defendants seek to strike from the declaration of Schneider, Schwaninger and Spilker certain allegations which more appropriately relate to the effect of change in the use of the railroad right-of-way. These allegations were not considered relevant to the determinations

the Court makes in this memorandum but the Court will not strike them at this time. For this reason, defendants' motion will be denied.

Also pending are opposition of intervenor defendant Rails-to-Trails Conservancy to plaintiff's motion for partial summary judgment and motion to file second amended complaint (Filing No. 177 in Case No. 8:99CV315; Filing No. 164 in Case No. 4:99CV3056; Filing No. 108 in Case No. 4:99CV3153; and Filing No. 147 in Case No. 4:99CV3154). The motion for partial summary judgment will be denied as moot.

Also pending is opposition of intervenor defendant Rails-to-Trails Conservancy to plaintiff's motion to stay (Filing No. 209 in Case No. 8:99CV315; Filing No. 196 in Case No. 4:99CV3056; Filing No. 137 in Case No. 4:99CV3153; and Filing No. 180 in Case No. 4:99CV3154) and these motions will be denied as moot.

I. SUMMARY JUDGMENT STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court should grant summary judgment only when the evidence is such that a reasonable jury could not return a

verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In order for the moving party to prevail at this early stage, it must demonstrate to the Court that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is "material" only when its resolution affects the outcome of the case. *Anderson*, 477 U.S. at 248. A material issue is "genuine" if it has any real basis in the record. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

On a motion for summary judgment, the Court must view all evidence in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 250. However, the nonmoving party may not rest on the mere denials or allegations in its pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial. *Celotex*, 477 U.S. at 324.

II. BACKGROUND

The Rails-to-Trails Act was enacted on March 28, 1983 as part of the National Trails System Act ("Act") Amendments of 1983, Pub. L. No. 98-11, Title II, 97 Stat. 42, 48 (codified at 16 U.S.C. §1247(d) (1994)). The purpose of the Act is "to provide for the ever-increasing outdoor recreation needs of an expanding population and . . . to promote the preservation of, public access to, travel within, and enjoyment and appreciation

of the open-air, outdoor areas and historic resources of the nation . . . ." 16 U.S.C. § 1241 (1982). The Act authorizes the use of discontinued railroad rights-of-way as recreational trails until conditions require the reactivation of the railroad transportation over the rights-of-way. The Act provides:

> 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.

16 U.S.C. § 1247(d).

III. DISCUSSION

A. Abandonment

Plaintiffs argue that the railroads abandoned their rights-of-way when they applied to the Surface Transportation Board ("STB") for a Notice of Interim Trail Use or Abandonment ("NITU") or a Certificate of Interim Trail Use or Abandonment ("CITU") and that, under Nebraska law, the rights-of-way reverted back to them upon abandonment. Plaintiffs contend that the conversion of these rights-of-way into recreational trails, or "linear parks," constitutes a taking entitling them to reasonable compensation.

Plaintiffs argue that the railroads abandoned their rights-of-way by applying to the STB for permission to abandon those rights-of-way under the Rails-to-Trails Act. Plaintiffs contend that, "by definition of the process itself . . . [the railroad] must follow regulations that require it to state unequivocally that it intends to abandon the right-of-way for railroad purposes, whether or not it is converted to recreational trial (sic.) use." (Plaintiffs' Brief (Filing No. 145 in Case No. 8:99CV315; Filing No. 149 in Case No. 4:99CV3056; Filing No. 89 in Case No. 4:99CV3153; Filing No. 125 in Case No. 4:99CV3154) at 14 (citing 49 C.F.R. §1152.20 et seq.)). As such, the plaintiffs contend that the STB's issuance of a NITU or CITU means that the railroad has unconditionally announced its intention to abandon the line and satisfy the STB's requirement that the right-of-way is no longer economically viable for railroad purposes.

Plaintiffs rely heavily on state law as the basis for their abandonment argument. In Nebraska, "[a]bandonment is the voluntary and intentional relinquishment of a right to property. An easement may be abandoned by unequivocal acts showing a clear intention to abandon and terminate the right . . . ." *Mueller v. Bohannon*, 256 Neb. 286, 292, 589 N.W.2d 852, 857 (1999) (internal citations omitted). Pursuant to state law, the abandonment of a railroad right-of-way held by the railroad as an easement limited

to railroad purposes results in a reversion to the owner of the servient estate. *Blakely v. Chicago*, K. & N.R. Co., 46 Neb. 272, 64 N.W.2d 972 (1895); *Roberts v. Sioux City and P.R. Co.*, 73 Neb. 8, 22, 102 N.W.2d 60, 65 (1905); *Lillich v. Lowery*, 211 Neb. 757, 763, 320 N.W.2d 463, 466 (1982).

Plaintiffs also cite a recent case from the Court of Federal Claims in support of their argument. In *Toews v. United States,* 53 Fed. Cl. 58 (Ct.Fed.Cl. 2002), the plaintiff-landowners, who claimed to own fee interests in land used as a rail corridor, alleged that interim trail use of the corridor under the Rails-to-Trails Act constituted a taking. In determining whether the railroad had abandoned its easement, the Court of Federal Claims stated:

> [W]e believe it is clear that there was an abandonment here of the easement by the railroad. The documentation supporting [railroad's] petition to abandon, coupled with the granting of the permit (albeit subject to the Rails-to-Trails designation), the removal of all the track, and the creation of the trail makes it clear that the original use is at an end with no remote prospect of resuscitation. There have plainly been "unequivocal and decisive acts . . . showing an intent to abandon."

Toews, 53 Fed. Cl. at 62. Likewise, in this case, the railroads petitioned the ICC or STB for abandonment, the ICC or STB granted such request, and the tracks, ties, and ballast were removed

years ago. Absent from the record, however, are the railroads' petitions to abandon and supporting documentation and evidence of the railroads' future intentions with respect to any potential resuscitation of the original use of the rights-of-way. In other words, the evidence in this case does not support the same finding that the *Toews* court reached. There is not sufficient evidence to conclude that any of the railroads in this case abandoned their rights-of-way through the Rails-to-Trails conversion process.

The defendant argues that the concept of "railbanking" precludes a finding of abandonment, meaning that no taking occurred in these situations. In addition, defendant argues that the plaintiffs erroneously rely on state law to define abandonment when federal law actually controls the issue.

The defendant contends that the plaintiffs' argument is flawed because it erroneously relies on state law regarding abandonment. The defendant points out that the question of whether a railroad has abandoned a right-of-way "necessarily involves federal law." *Grantwood Village v. Missouri Pac. Railroad Co.*, 95 F.3d 654 (8th Cir. 1996). In *Grantwood,* the Eighth Circuit stated that it was "guided by the principle that the ICC's determination of abandonment is plenary, pervasive, and exclusive of state law." *Grantwood*, 95 F.3d at 657 (citing *Colorado v. United States,* 271 U.S. 153, 164-65 (1926); *Kalo*

Brick & Tile, 450 U.S. 311, 323 (1981)). As such, "federal law preempts state law on the question of abandonment." *Grantwood*, 95 F.3d at 658.

The relevant federal law is the Trails Act Amendments of 1983. These amendments specifically address the issue of abandonment:

> 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 [STB] 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.

16 U.S.C. § 1247(d) (emphasis added). Essentially, if a third party agrees to assume financial responsibility for the right-of-way, the rail line will not be considered abandoned, and thus it does not revert to property owners possessing reversionary interests. *Nebraska Trails Council v. Surface Transp. Bd.*, 120 F.3d 901, 904 (8th Cir. 1997) (citing *Goos v. I.C.C.*, 911 F.2d 1283, 1286 (8th Cir. 1990)). The Act requires that interim trail use be treated like a discontinuance rather than an abandonment. 16 U.S.C. § 1247(d); *see also Grantwood*, 95 F.3d at 659 (citing *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 8 (1990)). For this reason, courts have concluded that the ICC's authorization of interim trail use "precludes a finding of abandonment of the right-of-way under state law." *Grantwood,* 95 F.3d at 659 (citing *Preseault*, 853 F.2d 145, 150 (2d Cir. 1988), *aff'd* 494 U.S. 1 (1990)).

In this case, the Court agrees that the Rails-to-Trails Act, and the procedures set forth therein, preclude the finding of abandonment in circumstances where a railroad holds a right-of-way as an easement and then applies for a NITU or CITU from the STB. *See Grantwood*, 95 F.3d at 657-59 (finding that the Rails-to-Trails Act precludes a finding of abandonment of a right-of-way under state law). Federal law preempts state law on

this issue, and 16 U.S.C. § 1247(d) clearly provides that a railroad's application to the STB can not result in an abandonment, but rather should be treated as a mere discontinuance.

Even if the Court looked to state law to determine whether the railroads had abandoned their rights-of-way, the Court would still be unable to conclude that abandonment had occurred. In *Chevy Chase Land Co. v. Maryland*, 733 A.2d 1055 (Md. 1999), the Court of Appeals of Maryland addressed this issue and determined that a conclusion of abandonment was unsupported by law. Rather, the *Chevy Chase* court stated:

> [T]he decisive act required to carry the abandonment proponent's burden of proof cannot be supplied by acts entirely consistent with the federal regulatory scheme, which precludes such abandonment. Furthermore, if abandonment of the state-law property interest occurs when a trail use agreement is being pursued in compliance with federal law, that abandonment would occur without the federal regulatory approval, which . . . could result in criminal liability. *Chevy Chase*, 733 A.2d at 1088.

The *Chevy Chase* court then stated:

> If we were to accept the appellants' efforts to use the railroad's acts taken in pursuit of federal regulatory approval for "abandonment" as the decisive acts necessary to demonstrate an intent to abandon an easement under state law, it would create an

> irreconcilable dilemma for railroads wishing to pursue rails-to-trails agreements or otherwise dispose of their property interests in right-of-ways. The railroad could not pursue a rails-to-trails agreement without filing an application for regulatory abandonment at the ICC, but the actions taken to pursue such an application, and the application itself, would constitute evidence of abandonment for state law purposes, thereby causing it to risk undermining the rails-to-trails agreement. This would create a Hobson's choice for the railroad that must apply for regulatory abandonment under federal law as the necessary first step to obtaining a CITU, while that application itself would constitute evidence of an intent to abandon in terms of state law (thereby undermining the CITU effort by making it more costly). Such a holding would completely frustrate state and federal policies intended to promote the preservation of rail corridors and their conversion to trail use. We conclude therefore that the actions of the railroad taken to comply with the federal regulatory regime cannot, as a matter of state law, supply the unequivocal act or acts that evidence the intent to abandon an easement interest in land.

Id. at 1090-91.

Plaintiff's argument that the regulatory process related to the Rails-to-Trails Act results in an abandonment of the railroads' rights-of-way is not compelling. This Court agrees with the result reached by the *Chevy Chase* court and finds

that the railroads' adherence to the discontinuance procedure outlined in the Rails-to-Trails Act cannot constitute the decisive acts necessary to establish an intent to abandon an easement under state law. The Court concludes that a railroad does not abandon its right-of-way by adhering to the regulatory process related to the Rails-to-Trails Act and applying to the STB for a discontinuance. As such, the plaintiffs' motion for summary judgment on this issue of abandonment will be denied and the defendant's motion for summary judgment on the abandonment issue will be granted.

B. The Scope of the Railroads' Rights-of-Way

Plaintiff-landowners next argue that even if the railroads have not abandoned their rights-of-way, the "new use" of the rights-of-way as recreational trails constitutes new easements, entitling them to reasonable compensation. *See* Plaintiffs' Brief at 18-22.

Although the Rails-to-Trails Act (16 U.S.C. § 1247(d)) precludes a finding of abandonment, the imposition of a new easement, a "linear park," via the Rails-to-Trails Act, results in a compensable taking from class members who own land adjacent to the rights-of-way held by easement, regardless of whether the railroads abandoned those rights-of-way. *Preseault*, 100 F.3d at 1550; *Glosemeyer*, 45 Fed. Cl. at 781; *Toews*, 53 Fed. Cl. at 62; *see also* Plaintiffs' Brief at 19. When railroads' rights-of-way

are converted into recreational trails, the purpose and use of the easements are different in kind. *Toews*, 53 Fed. Cl. at 62. While the previous purpose of the rights-of-way was the movement of goods or people in commerce, the use now becomes fundamentally recreational. *Id.* Rather than being subjected to the occasional freight train, the plaintiffs' land is now available to any member of the public for any legal purpose. *Id.* "The current use, a linear park, is, in short, fundamentally different in kind than a railroad purpose." *Id.* (citing *Pollnow v. Wisconsin*, 88 Wisc.2d 350, 276 N.W.2d 738 (1979)). "An owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). As such, when a railroad right-of-way is converted into a recreational trail, a new easement has been imposed, regardless of the language in the Rails-to-Trails Act indicating that interim use "shall not be treated . . . as an abandonment." 16 U.S.C. § 1247(d) (1994). As the *Preseault* court noted, "the taking of possession of the lands owned by the [plaintiffs] 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." *Preseault*, 100 F.3d at 1550.

In addition to *Loretto, Preseault, Toews,* and *Glosemeyer*, plaintiffs also point to *Lucas v. Ashland Light, Mill & Power Co.*, 92 Neb. 550, 138 N.W. 761 (1912), as support for

their argument that the new and different use of the right-of-way imposes a new easement entitling them to compensation. In *Lucas*, the defendant was given an easement, via condemnation proceedings, to build a fifteen-feet tall dam and to flood abutting lands so that it could build a flour mill that would be "of public utility." *Id.* at 552, 138 N.W. at 762. Many years later, a higher dam was built under the easement to generate electricity for the city of Ashland. The owners of the servient estates sought injunctive relief, asking the court to have the dam removed and prohibit further unauthorized use. The Nebraska Supreme Court found that, although the new dam did not constitute an abandonment of the original easement, the owners of the property might be entitled to recover if their property was damaged by the "new use" of water power. *Id.* at 559, 138 N.W. 765. The plaintiffs contend that the *Lucas* opinion essentially requires this Court to award money damages to them in this case.

The defendant contends that the plaintiffs overstate the importance of the *Lucas* opinion, and that the *Lucas* court merely remanded the case to determine whether money damages were appropriate. Defendant points to language in the concurring and dissenting opinions in suggesting that the *Lucas* decision does not impact this case. Although it involves a set of facts quite different from the case at bar, the Court nonetheless finds the *Lucas* opinion to be instructive. In this case, there was clearly

a change from one public use to another when the railroads were essentially converted to recreational trails. Like *Lucas*, the change does not rise to the level of abandonment, but the property owners "should be allowed to recover from defendant all damages which their property has sustained by the new use . . . if any, over and above the damages caused by the [previously] authorized use." *Id*.

Defendant attempts to argue that the use of the rights-of-way as recreational trails is not a "new use" that rises to the level of a compensable taking. 158 F.3d 135. Rather, the defendant attempts to distinguish this case from those such as *Toews,* 53 Fed. Cl. at 62, and *Preseault*, 100 F.3d at 1543, which found new easements upon conversion to recreational trails. Defendant contends that the *Preseault* and *Toews* courts had more fully developed records on which to base their conclusions, whereas this Court does not have a sufficiently developed record from which to conclude, on summary judgment, that the use of the rights-of-way constitute a new easement. Defendant's Brief at 46. The defendant notes that the *Preseault* case involved only one property belonging to the Preseaults and there was evidence in the record regarding the large number of trail users, and the *Toews* case, which was not a class action, also turned on the facts before the Court. The defendant contends that it is impossible to reach a similar conclusion in this case, based on

the evidence presently before the Court, due to the fact that this is a state-wide class action involving many class members and the use of the trails vary from one trail to the next.

The defendant's argument is not persuasive. Although the Court will not make specific findings with respect to individual plaintiffs, it is possible at this time to rule on the summary judgment motion with respect to the category of plaintiffs who granted the railroads a right-of-way easement. The Court finds that summary judgment should be granted in favor of these plaintiffs on their claims that the use of the railroad rights-of-way constitutes a new easement that entitles them to reasonable compensation.

C. Fee Simple Conveyances

Defendant argues that some of the railroads received their rights-of-way as fee simple conveyances, so there is no reversionary interest for the landowners to possess. Defendant's brief applies "rules of deed construction" to the source deed of plaintiff William Schneider. The Court has not reviewed Schneider's deed because it would be premature to do so. At this time, the Court will only rule on the general circumstances under which the Rails-to-Trails Act can effectuate a taking; the claims of specific landowners will be evaluated at a later date based on these general findings.

In instances where the rights-of-way consist of fee simple interests held by a railroad, the railroad is entitled to transfer or use the rights-of-way for non-railroad purposes once the STB authorizes abandonment or discontinuance of rail service. These rights-of-way are not affected by the takings clause. *See National Wildlife Federation v. I.C.C.,* 850 F.2d 694, 703 (D.C.Cir. 1988).

Accordingly, the Court finds that the Rails-to-Trails Act does not effectuate a taking in situations where the railroad received its right-of-way in a fee simple conveyance.

D. Federal Land Grants

The defendant further argues that some railroads received their rights-of-way via federal land grants, and that such land cannot be the subject of a taking entitling the abutting landowners to reasonable compensation. Plaintiffs, on the other hand, argue that the Court should decline to address this issue at this time due to the pending appeal of *Hash v. United States,* No. CV 99-324-S-MHW (D.Idaho), in the Federal Circuit. The Court sees no benefit in delaying disposition of this issue.

The defendant cites *Mauler v. Bayfield Co.*, 309 F.3d 997 (7th Cir. 2002), as authority for its claim that land granted to railroad companies by the United States in 1856 and 1864 reverted to the United States and not to the abutting landowners

under 43 U.S.C. § 912 and 16 U.S.C. § 1248(c). In *Mauler*, the Seventh Circuit stated "[c]learly Congress assumed the United States possessed a reversionary interest in railroad rights of way, else it would make little sense for Congress to have passed laws . . . to dispose of land the federal government did not own." *Mauler*, 309 F.3d at 1002 (referring to 43 U.S.C. §§ 912 and 913 and 16 U.S.C. § 1248(c)). The *Mauler* court concluded that land granted by the United States to railroads in 1856 and 1864 reverted back to the United States under 43 U.S.C. § 912 and 16 U.S.C. § 1248(c). The Court concurs in that conclusion.

The Court will grant summary judgment for the defendant on any claims where the railroad received the land via a land grant from the United States in 1856 or 1864. Although the Court will not identify specific plaintiffs at this time who fall within this category, such evaluation will be one of the next steps in the progression of this case.

E. Statute of Limitations

The defendant also contends that the statute of limitations bars some of the class members' claims. The plaintiffs, however, contend that this issue is not properly before the Court and the Court should stay this issue until it has reached a determination on liability.

The only question currently before the Court is whether the Rails-to-Trails Act can constitute a taking under any

circumstances. The Court can answer such question without addressing any potential defenses such as the statute of limitations. Accordingly, the Court defers ruling on that issue at this time.

F. Certification of Questions to Nebraska Supreme Court

The defendant also requests that the Court certify various questions to the Nebraska Supreme Court. Plaintiffs generally oppose the idea. At this point, the Court finds it unnecessary to utilize the certification process set forth in Nebraska Revised Statute § 24-219, as there are no issues of law critical to this matter that remain unresolved.

Specifically, the defendant contends that the Court should certify questions to the Nebraska Supreme Court regarding how Neb. Rev. Stat. § 37-1010 impacts this case. The defendant argues that "the implications of the state's public policy statute, Neb. Rev. St. § 37-1010, are unclear because that statute has never been interpreted by the Nebraska Supreme Court." (Defendant's Brief at 54.) The Court has sufficient law, without certifying any questions to the Nebraska Supreme court, to answer the questions raised by the summary judgment motions in this case. Accordingly, the Court declines to certify any questions to the Nebraska Supreme Court at this time.

G. Plaintiffs' Motion to Stay Various Issues

On May 7, 2003, plaintiffs filed a "Motion to Stay All Issues Raised by Defendant That Do Not Address the Liability Issue the Court Ordered Should First Be Determined." Filing No. 200 in Case No. 8:99CV315; Filing No. 183 in Case No. 4:99CV3056; Filing No. 167 in Case No. 4:99CV3153; and Filing No. 124 in Case No. 4:99CV3154. In this opinion, the Court has addressed some of the issues plaintiffs asked the Court to stay and the Court has refrained from addressing other issues plaintiffs' motion addressed. This memorandum opinion addresses those issues which the Court finds relevant to the liability issue the parties were directed to brief. There is no purpose in ordering a stay on issues the Court has not yet reached. Accordingly, the plaintiffs' motion will be denied.

IV. CONCLUSION

The Court finds that the plaintiffs' motion for summary judgment will be granted in part and denied in part. The Court also finds that the defendant's motion for summary judgment will be granted in part and denied in part. The plaintiffs' motion to stay various issues will be denied.

The next stage of the proceedings requires the identification of specific class members who fall within the above-enumerated categories. The Court will direct the parties to propose the manner in which this process should be completed. Accordingly,

IT IS ORDERED:

1) Plaintiffs' motion for summary judgment on the issue of abandonment is denied;

2) Defendants' motion for summary judgment on the issue of abandonment is granted;

3) Plaintiffs' motion for summary judgment on the issue of the use of the railroad rights-of-way as an easement that entitles them to reasonable compensation is granted, to the extent that plaintiffs are able to prove damages;

4) Defendants' motion for summary judgment on the issue of the use of the railroad rights-of-way as an easement that entitles plaintiffs to reasonable compensation is denied;

5) Plaintiffs' motion for summary judgment with respect to railroads which received fee simple conveyances is denied;

6) Defendants' motion for summary judgment with respect to railroads which received fee simple conveyances is granted;

7) Plaintiffs' motion for summary judgment with respect to railroads which received property through federal land grants is denied;

8) Defendants' motion for summary judgment with respect to railroads which received property through federal land grants is granted;

9) The parties shall have until September 22, 2003, to propose the manner in which particular class members shall be identified who fall within the above-enumerated categories.

10) Motions to strike allegations in plaintiff's declarations pursuant to Fed.R.Civ.P. 56(e) (Filing No. 172 in Case No. 8:99CV315; Filing No. 161 in Case No. 4:99CV3056; Filing No. 105 in Case No. 4:99CV3153; and Filing No. 144 in Case No. 4:99CV3154) are denied.

11) Defendant Rails-to-Trails Conservancy's objection to plaintiff's motion for partial summary judgment and motion to file second amended complaint (Filing No. 177 in Case No. 8:99CV315; Filing No. 164 in Case No. 4:99CV3056; Filing No. 108 in Case No. 4:99CV3153; and Filing No. 147 in Case No. 4:99CV3154) is denied as moot.

12) Plaintiffs' motion to stay all issues raised by defendant that do not address the liability issue this Court ordered should first be determined (Filing No. 200 in Case No. 8:99CV315; Filing No. 183 in Case No. 4:99CV3056; Filing No. 167 in Case No. 4:99CV3153; and Filing No. 124 in Case No. 4:99CV3154) is denied as moot.

13) Intervenor defendant's opposition to plaintiff's motion to stay (Filing No. 209 in Case No. 8:99CV315; Filing No. 196 in Case No. 4:99CV3056; Filing No. 137 in Case No.

4:99CV3153; and Filing No. 180 in Case No. 4:99CV3154) is denied as moot.

DATED this 29th day of August, 2003.

BY THE COURT:

/s/ Lyle E. Strom

LYLE E. STROM, Senior Judge
United States District Court