IN THE SUPREME COURT OF PENNSYLVANIA

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WESTERN DISTRICT

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Appellants,

v.

ALLEGHENY VALLEY LAND TRUST, ARMSTRONG COUNTY CONSERVANCY CHARITABLE TRUST, ARMSTRONG RAILS TO TRAILS ASSOCIATION, CONSOLIDATED RAIL CORPORATION, JERRY F. LONGWELL, LEE J. CALARIE, DAVID R. RUPERT, NORMAN KARP, and WILHELMINA DECOCK,

Appellees.

BRIEF OF *AMICUS CURIAE* RAILS-TO-TRAILS CONSERVANCY IN SUPPORT OF APPELLEES

Appeal From the Order and Decision of the Superior Court of Pennsylvania at No. 914 WDA 2006, entered June 25, 2007, reversing the Order of the Court of Common Pleas of Armstrong County, Pennsylvania at No. 0963-Civil Term 1995, Dated January 27, 2006, entered February 1, 2006 Certifying the Order Entered January 5, 2006 Pursuant to PA. R.A.P. 341

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STATEMENT OF INTEREST OF *AMICUS CURIAE* RAILS-TO-TRAILS CONSERVANCY

This case concerns important questions of public policy and property law relating to the treatment of inactive railroad rights-of-way. The construction and development of a nationwide system of rail lines, assembled at public expense and great governmental assistance through federal land grants and state-conferred powers of eminent domain, helped transform the United States into an economic power at the turn of the last century. In 1920, at the peak of the rail era, 272,000 miles of track crisscrossed the United States, carrying freight and passengers from one end of the country to the other.[1] But just as the miles of rail line peaked, other methods of transportation emerged and a long period of decline began. By 1990, our nation's rail system had shrunk to 141,000 miles and experts were predicting that 3,000 more miles would be abandoned every year through the end of the century.[2] Thus, our nation's rail corridor infrastructure, "painstakingly created over several generations" was at risk of becoming irreparably fragmented. *Reed v. Meserve*, 487 F.2d 646, 649-50 (1st Cir. 1973) ("To assemble a right of way in our increasingly populous nation is no longer simple.").

In order to prevent the irreplaceable loss of these valuable national assets, both Congress and the Pennsylvania Legislature passed "railbanking" legislation that allows a railroad right-of-way to be "railbanked" and maintained as an interim trail for public recreation and non-motorized transportation until such time as the right-of-way is needed for rail use. Together, federal and state "railbanking" laws have helped preserve thousands of miles of rail corridors for continued and future transportation use by converting them into interim trails that provide immediate health, recreational, environmental, and economic benefits to local communities.

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1 *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 5 (1990).

2 *Id.*

Amicus Curiae Rails-to-Trails Conservancy ("RTC") is a nonprofit corporation formed in 1985, with more than 76,718 members nationwide, including approximately 7,530 active members in the Commonwealth of Pennsylvania. The mission of RTC is to create a nationwide network of trails from former rail lines and connecting corridors to build healthier places for healthier people. Specifically, RTC identifies rail corridors that are not currently needed for rail transportation and facilitates their preservation and continued public use through conversion to interim recreational trails, non-motorized transportation corridors, and other public uses. According to records maintained by RTC, Pennsylvania presently has 134 open rail-trails totaling 1,318 miles, and efforts are presently underway to acquire and preserve 49 additional former railroad corridors as trails.[3] RTC represents the interests of state- and county-wide trail users and future users of these corridors for rail transportation, and, as a nationwide organization, RTC is uniquely situated to assist the Court in identifying and considering those interests when resolving this case.

RTC has considerable expertise in the legal issues raised in this case, particularly as they concern Section 8(d) of the National Trails System Act ("National Act"), 16 U.S.C. § 1247(d). RTC has participated in numerous "rails-to-trails" conversions under the National Act and has also taken part in numerous cases involving the implementation and interpretation of the National Act.[4] RTC also often appears as *amicus curiae* in state court suits addressing complex

[3] Statistics maintained by the Rails-to-Trails Conservancy as of June 1, 2008.

[4] *See Preseault v. U.S.*, 494 U.S. 1 (1990) (*amicus*); *Citizens Against Rails to Trails v. Surface Transp. Bd.*, 267 F.3d 1144 (D.C. Cir. 2001) (*amicus*); *Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990) (intervenor-defendant); *Birt v.Surface Transp. Bd.*, 90 F.3d 580 (D.C. Cir. 1996) (*amicus*); *Glosemeyer v. Missouri-Kansas-Texas R.R.*, 879 F.2d 316 (8th Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990) (intervenor-defendant); *Connecticut Trust for Historic Preservation v. Interstate Commerce Comm'n*, 841 F.2d 479 (2d Cir. 1988) (petitioner); *Nat'l Assoc. of Reversionary Property Owners v. Surface Transp. Bd.*, 158 F.3d 135 (D.C. Cir. 1998) (intervenor-defendant); *Nebraska Trails Council v. Surface Transp. Bd.*, 120 F.3d 901 (8th Cir. July 31, 1997) (petitioner); *Fritsch v. Interstate Commerce Comm'n*, 59 F.3d 248 (D.C. Cir. 1995), *cert. denied, sub. nom CSX Transp. v. Fritsch*, 116

questions that arise under state and federal law concerning the ownership and use of former railroad rights-of-way, and filed an *amicus* brief in the Superior Court below.[5] This extensive involvement in the federal railbanking program and in state court litigation over the ownership issues raised by rails-to-trails conversions renders RTC uniquely suited to provide its views as *amicus curiae* to this Court.

This appeal concerns a 33.4-mile section of former rail corridor (the "Rail Corridor") owned by Allegheny Valley Land Trust. Situated in Armstrong County, Pennsylvania, the Rail Corridor is part of the longer Armstrong Trail, which runs along the east bank of the Allegheny River from Schenley to Upper Hillville. The Armstrong Trail is an important element of the statewide greenway plan for the Commonwealth of Pennsylvania, which was adopted in 2001, entitled *Pennsylvania Greenways: An Action Plan for Creating Connections.* This statewide plan provides a "greenprint" for communities, state government, the private sector, and individual citizens to work as partners in developing an outstanding statewide network of greenways – a system that will be enjoyed by current and future generations of Pennsylvanians.

S.Ct. 1262 (1996) (*amicus*); *Grantwood Village v. Missouri Pacific Railroad Co.*, 95 F.3d 654 (8th Cir. 1996), *cert. denied,* 117 S. Ct. 1082 (1997) (*amicus*); *Dave v. Rails to Trails Conservancy,* 863 F. Supp. 1285 (E.D. Wash. 1994), *aff'd,* 79 F.3d 940 (9th Cir. 1996) (Defendants).

[5] *See, e.g., Moody v. Allegheny Valley Land Trust,* 930 A.2d 505 (Pa. Super. Ct. 2007); *Chevy Chase Land Co. v. United States,* 733 A.2d 1055 (Md. 1999); *State v. Hess,* 684 N.W.2d 414 (Minn. 2004); *Rowley v. Massachusetts Electric Co.,* 784 N.E.2d 1085 (Mass. 2003); *Lowers v. United States,* 663 N.W.2d 408 (2002); *Malnati v. State,* 803 A.2d 587 (N.H. 2002); *Township of Bingham v. RLTD Railroad Corporation,* 624 N.W.2d 725 (Mich. 2001); *Chatham v. Blount County,* 789 So.2d 235 (Ala. 2001); *Bayfield County v. Maulers,* Case No. 99-2678 (Wisc. App. Aug. 15, 2000), *petition for review denied,* 619 N.W. 94 (Wis. 2000); *May v. Tri-County Trails Comm'n,* No. 97-0588 (Wis. App. 1997), *petition for review denied,* 589 N.W.2d 628 (Wis. 1998); *Cary v. CSX Transportation, Inc.,* No. 95-03311-CH (Mich. Cir. Ct., Gratiot Cty. April 19, 1996), *aff'd mem.,* No. 195528 (Mich. App. July 29, 1997); *Conrail v. Llewellen,* 666 N.E.2d 958 (Ind. App. 1996), *petition for transfer granted* (Ind. June 19, 1997); *Bigelow v. Michigan Dep't of Transportation,* No. 88-3199-CH (Mich. Cir. Ct., Benzie Cty.); *Grill v. West Virginia R.R. Maintenance Authority,* 423 S.E.2d 893 (W.V. 1992); *Barney v. Burlington Northern R.R.,* 490 N.W.2d 726 (S.D. 1992), *cert. denied,* 113 S. Ct. 1263 (1993).

The Armstrong Trail, including the Rail Corridor, forms a vital segment of the Erie-Pittsburgh network, which would connect with the Great Allegheny Passage, creating a continuous route from New York to Maryland and on to Washington, D.C., with the potential to extend to Buffalo, New York and possibly farther. While the Armstrong Trail is significant in its own right, offering significant health, recreational, environmental, and economic benefits to county residents, it comprises at least a quarter of the total mileage of the Erie-Pittsburgh network and may possibly be the only viable route north from Allegheny County.

Amicus RTC believes that the Pennsylvania Superior Court below properly held that the Rail Corridor had not been "abandoned" and, consistent with both the letter and the purpose of the federal and state rails-to-trails laws, correctly applied Pennsylvania Supreme Court precedent holding that *private* railbanking – *i.e.*, without formal petition to the Interstate Commerce Commission – is permissible under the National Act. *See Buffalo Township,* 571 Pa. 637, 655, 813 A.2d 659, 670 (2002). Toward that end, *amicus* RTC respectfully asks this Court to affirm the Superior Court's Order dated June 25, 2007.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Did the Superior Court correctly rule that a rail corridor may be privately "railbanked" under the National Trails System Act where a qualified private organization makes a binding commitment that the corridor will be subject to restoration or reconstruction for railroad purposes?

2. Did the Superior Court correctly rule that a railroad company's decision to transfer its interest in a rail corridor to a qualified private organization prepared to assume full responsibility for the corridor pursuant to the National Trails System Act was the "chief" factor indicating that the railroad company did not abandon the rail corridor?

COUNTER-STATEMENT OF THE CASE

Amicus Curiae Rails-to-Trails Conservancy hereby incorporates by reference Respondents' Counterstatement of the Case, but provides the following abbreviated statement of facts for the Court's benefit:

This appeal concerns a 33.4-mile section of former rail corridor (the "Rail Corridor") owned by Allegheny Valley Land Trust ("AVLT") and maintained as an interim recreational use trail pursuant to the National Trails System Act ("National Act"). The Rail Corridor was previously owned by Consolidated Rail Corporation ("Conrail"), a common carrier operating freight rail service subject to the jurisdiction of the Interstate Commerce Commission ("ICC"). (R. 310a, 311a) On February 3, 1984, Conrail filed an application pursuant to Section 308(c) of the Regional Rail Reorganization Act of 1973 ("RRRA") requesting permission from the ICC to abandon a section of the Rail Corridor between milepost 53.8 at Templeton and milepost 63.4 at Redbank. (R. 311a) The ICC gave Conrail permission to abandon this section of the Rail Corridor on May 18, 1984, but ordered Conrail to advise the ICC in writing if Conrail decided to exercise the abandonment authority granted by the ICC. (R. 312a, 373a) Conrail never advised the ICC of any such decision. On March 7, 1989, Conrail filed an application under the same section of the RRRA seeking the ICC's permission to abandon the rest of the Rail Corridor between milepost 30 at Schenley and milepost 53.8 at Templeton. (R. 311a) The ICC gave Conrail permission to abandon this section of the Rail Corridor on June 16, 1989. (R. 312a) Conrail subsequently began marketing the Rail Corridor for sale. (R. 312a)

On July 11, 1991, Conrail entered into a Conditional Agreement of Sale (the "Agreement") to sell the Rail Corridor to the Armstrong County Conservancy (the "Conservancy") or its nominee. (R. 312a) Under the Agreement, Conrail retained the right to sell the rails, ties, plates, spikes and other track material for up to two years. (R. 313a, 382a) At

the time Conrail entered into the Agreement, it was aware that the Conservancy intended to designate the Rail Corridor for interim trail use/railbanking under the National Act, but Conrail declined to be involved in railbanking proceedings before the ICC because its counsel advised against such involvement. (R. 312a) Consistent with this advice from counsel, Conrail also sought to make it clear in the Agreement that it would not be obligated to provide rail service along the Rail Corridor. (R. 313a, 383a) Conrail did not, however, intend to preclude other parties from reinstituting rail service. *Id.* In fact, Conrail even provided for the possibility that it might someday resume rail service on the Rail Corridor if both parties agreed. *Id.*

On January 7, 1992, Conrail transferred title to the Rail Corridor to the Conservancy's nominee, AVLT, by quitclaim deed. (R. 313a, 693a) Two days later, on January 9, 1992, AVLT filed a "Declaration of Railbanking" with the Armstrong County Recorder of Deeds. (R. 417a, 695a) The Declaration stated, *inter alia*, that AVLT intended to "railbank" the Rail Corridor "for future rail service, related transportation purposes, or other uses as provided for by the National Trails System Act." (R. 417a)

At the time Conrail transferred title to AVLT, all of the rails, ties, crossings, bridges and other equipment needed to operate rail service along the Rail Corridor were in place. (R. 313a, 693a) On April 6, 1992, Conrail filed an application with the Pennsylvania Public Utility Commission ("PUC") to abolish its responsibility to maintain the road crossings and bridges along the Rail Corridor. (R. 313a) Conrail proposed removing the rails, ties and other track material from the road crossings and transferring responsibility for the bridges to AVLT, the Conservancy, and Armstrong County pursuant to an agreement reached by those three parties. (R. 430a, 696a) The PUC issued an order abolishing Conrail's responsibility for the road

crossings and assigning responsibility for the bridges to AVLT, the Conservancy, and Armstrong County on October 15, 1992. (R. 313a, 430a, 696a)

On December 28, 1992, Conrail agreed to sell the track material to Joe Kovalchick Salvage Company ("Kovalchick"). (R. 314a) Kovalchick subsequently removed most rails, ties, plates, signals and other track material along the Rail Corridor. (R. 695a)

Since acquiring title from Conrail in 1992, AVLT has taken affirmative steps to preserve the Rail Corridor for future rail service and facilitate its use as an interim trail. (R. 696a) Among other things, AVLT has cut weeds, removed fallen trees and maintained bridges and culverts along the Rail Corridor. (R. 696a) AVLT has also met and negotiated with various parties about the possibility of reinstituting rail service along portions of the Rail Corridor. (R. 561a, 697a) Notwithstanding these preservation efforts undertaken by AVLT, three of the individual plaintiffs in this action have posted, fenced and/or barricaded portions of the Rail Corridor to which they are claiming ownership. (R. 696a)

This action was brought by Plaintiffs in the Court of Common Pleas to quiet title in their favor, based on their view that Conrail had "abandoned" the Rail Corridor prior to the sale to AVLT. The Court of Common Pleas of Armstrong County held that Conrail abandoned the Rail Corridor as of June 16, 1989, the date the ICC gave Conrail *permission* to abandon rail service, because Conrail failed to agree to railbank the corridor pursuant to procedures established by the ICC. On appeal, the Pennsylvania Superior Court held that the trial court erred in ruling that Conrail had abandoned the Rail Corridor and further found, consistent with this Court's holding in *Buffalo Township*, 571 Pa. at 655, 813 A.2d at 670, that the corridor had been "privately railbanked" under the National Act. Accordingly, the Superior Court reversed the trial court's order and remanded the matter for further proceedings.

SUMMARY OF ARGUMENT

The Superior Court properly applied this Court's decision in *Buffalo Township v. Jones*, 571 Pa. 637, 813 A.2d 659 (2002), which recognized that a railroad right-of-way may be privately railbanked and converted into an interim trail under the National Trails System Act ("National Act"), 16 U.S.C. § 1247(d), by transferring the right-of-way to a third-party *without* following the Interstate Commerce Commission's ("ICC") regulatory procedures for railbanking. Despite this clear precedent, Plaintiffs refuse to recognize that a rail corridor may be railbanked outside the regulatory framework established by the ICC.

Contrary to Plaintiffs' argument, a railroad company's decision to railbank outside the ICC's regulatory framework and the concomitant decision not to expressly reserve for itself an exclusive right to reactivate rail service does not negate the possibility of railbanking under the National Act. As the Superior Court recognized below, the National Act does not require the consent of the railroad that last provided service on the line or the express reservation of reactivation rights by the railroad. These regulatory requirements, to the extent they exist at all, apply only to corridors that are railbanked through the ICC. As this Court held in *Buffalo Township*, a corridor may also be privately railbanked under the National Act so long as "such interim use is subject to restoration or reconstruction for railroad purposes." 16 U.S.C. § 1247(d). This result can be accomplished, as it was here, by the interim trail manager's binding commitment to make the corridor "subject to restoration or reconstruction for railroad purposes" by any railroad for any railroad purpose.

Nor are Plaintiffs correct that a transferring railroad's decision to railbank outside the ICC's regulatory framework without reserving the right to reactivate rail service on the line demonstrates an intent to abandon the property. Again, Plaintiffs' argument fails because they

refuse to recognize that a rail corridor may be privately railbanked outside the regulatory framework established by the ICC so long as the corridor is subject to reactivation for railroad purposes. Railbanking, whether accomplished under the ICC's procedures or privately, does not constitute abandonment of the right-of-way. As a result, a railroad's decision to privately railbank outside the regulatory framework established by the ICC without expressly reserving the right to reactivate rail service does *not* indicate an intent to abandon.

Plaintiffs also argue for the first time that private railbanking under the National Act effects a "taking" by preventing the right-of-way from being abandoned. This argument is wholly without merit. As the U.S. Supreme Court has made clear, any "takings" claim arising under the National Act must be brought against the United States under the Tucker Act. *Preseault v. I.C.C.*, 494 U.S. 1 (1990). Thus, even if Plaintiffs' "takings" argument had been properly raised before the trial court it would still not be properly before this Court.

Finally, the Superior Court's decision furthers the important public policy purposes behind the federal and state rails-to-trails laws. As this Court recognized in *Buffalo Township*, both the National Act and the Pennsylvania Rails to Trails Act "display a strong legislative policy encouraging the preservation of railroad rights-of-way by using existing rights-of-way for interim recreational use." 571 Pa. at 650, 813 A.2d at 667. The wisdom of this policy can be seen clearly today. After decades of decline, the railroad industry is once again on the rise thanks in large part to high oil prices and the need for more fuel-efficient forms of transportation. As fuel-efficient trains become a more important part of our nation's transportation mix, current efforts to preserve rail corridors will help us avoid having to reassemble a national rail system from scratch. In the meantime, interim trail use provides immediate health, recreational and economic benefits to local communities while preserving a valuable national asset for future use.

ARGUMENT

I. <u>Railbanking a Corridor May be Accomplished in Two Distinct Ways: By Utilizing the ICC Procedures or by "Private Railbanking."</u>

Plaintiffs' opening brief rests on two fundamentally incorrect propositions: (1) that the ICC[6] retains jurisdiction over all railtrails created under the National Trails System Act ("National Act") (Plaintiffs' Brief at 18), and (2) that a railroad right-of-way cannot be "privately railbanked" under the National Act where the railroad that last operated service on the line declined to railbank the corridor under the ICC's procedures or reserve its own right to re-enter the corridor for the purpose of reactivating or restoring rail service. Both propositions are fundamentally incorrect because they ignore the distinctions between public railbanking under the ICC's regulatory procedures (which is not at issue here) and private railbanking, in which a corridor that is not under the ICC's jurisdiction is railbanked directly under the National Act.

Enacted by Congress in 1983, the National Act provides as follows:

> [I]n 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."

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6 On January 1, 1996, the ICC was replaced by the Surface Transportation Board ("STB"). *See* Interstate Commerce Commission Termination Act, 49 U.S.C. §§ 701-706, 10101-11908. Because the ICC issued the certificate of abandonment cited in these proceedings, this brief refers exclusively to the ICC.

16 U.S.C. § 1247(d) (emphasis added). While this statute authorizes the establishment of ICC procedures for railbanking, the National Act also operates independently of the ICC's regulatory authority and extends broadly to prevent any conveyance for interim trail use from being abandoned for purposes of state law so long as "such interim use is subject to restoration or reconstruction for railroad purposes." *Id.; Buffalo Township*, 571 Pa. at 654, 813 A.2d at 669-70). These two, separate methods for achieving the protections of the National Act are set forth as follows:

A. Railbanking through the ICC.

Railbanking through the ICC is governed by ICC rules and regulations. *See* 49 C.F.R § 1152.29. As Plaintiffs point out, a corridor under the ICC's jurisdiction can be railbanked if the railroad consents to railbanking and a railbanking/trail use agreement is reached. Plaintiffs' Brief at 21, 25. Under this procedure, a potential interim trail manager can request that the ICC issue a notice or certificate of railbanking/interim trail use after a railroad applies for permission from the ICC to discontinue or "abandon" (*i.e.*, terminate) its common carrier obligation to provide freight rail service on a line.[7] 49 U.S.C. § 10903; 49 C.F.R. § 1152.29. If a "state, political subdivision, or qualified private organization" is willing to assume responsibility for a rail line proposed to be abandoned for interim trail use and railbanking pursuant to the National Act, and the railroad consents to such use, the ICC will issue a trail use condition, allowing the parties 180 days in which to negotiate an interim trail use/railbanking agreement. *Id.; 49 C.F.R.* § 1152.50(d)(1).

[7] A railroad can request authorization simply to discontinue rail service or to fully abandon its railroad line and dispose of any property interest it has in the railroad corridor. 49 U.S.C. § 10903. Since this case involves a railroad's application for abandonment authorization, the text focuses on that issue. Obtaining ICC "abandonment" authorization is distinct from the railroad's abandonment of its property interest in a right-of-way. *See* note 11, *infra.*

If an agreement is reached within this period, the corridor is "railbanked" and remains under the ICC's jurisdiction for so long as interim trail use continues. The ICC has determined that "railbanking" with the ICC continues the ICC's authority over the railroad, and that the railroad retains a residual common carrier obligation with respect to the line. *Norfolk & Western Railway Co.--Abandonment Between St. Marys and Minister in Auglaize County, OH*, 9 I.C.C.2d 1015 (1993); *Iowa Power, Inc.--Construction Exemption--Council Bluffs, IA*, 8 I.C.C.2d 858 (1990). This residual common carrier obligation potentially subjects railroad companies to petitions from shippers asking the ICC to compel the railroad to provide service on the line.

Railbanking through the ICC gives the abandoning railroad an automatic license to operate interstate rail service; "[n]o authority under 49 U.S.C. 10901 is required to reactivate rail service where . . . the carrier who would have been the abandoning railroad had there not been rail banking and interim trail use, or its successor, is the one who decides to restore active rail service." *Georgia Great Southern Division, South Carolina Central Railroad Co. Inc. -- Abandonment and Discontinuance Exemption -- Between Albany and Dawson, in Terrell, Lee and Dougherty Counties*, GA, Dkt. No. AB-389 (Sub-No. 1X), 2003 WL 21132515, at *3 (May 9, 2003). Thus, "reactivation" rights under the ICC's regulations accrue only to the abandoning railroad or to its successors in interest. Other carriers have no automatic regulatory right to resume service on the line, but must instead obtain new construction approval from the ICC. *See* 49 U.S.C. § 10901.

The ICC has clarified that its role with respect to the reactivation of corridors that are railbanked through the ICC's regulatory procedures is limited to vacating the trail use condition and reinstating the corridor as an active rail line. The ICC has no authority to compel the trail manager to transfer the property to the railroad seeking to reactivate rail service on the line. *Id.*

Thus, contrary to Plaintiffs' suggestion (Plaintiffs' Brief at 32), a reactivating railroad may still need to go to state court to establish the terms of the railroad's reactivation rights even if the right-of-way is railbanked in accordance with ICC procedures.

B. Private Railbanking.

Alternatively, a corridor can be privately railbanked directly under the National Act. After considering the broad purposes and statutory language of both the National Act and the Pennsylvania Rails to Trails Act ("State Act"), this Court concluded in *Buffalo Township* that "there is nothing in the language of the statute requiring a trail owner . . . to comply with the ICC regulations. . . . We refrain from reading such a requirement into the statute where the language of the statue itself does not make such a requirement mandatory for trail conversion." *Buffalo Township,* 571 Pa. at 651-52, 813 A.2d at 668. Further support for this ruling came from the ICC itself, which "indicated that the statute in and of itself supported a finding that railroad rights-of-way could be preserved in the absence of ICC authorization." *Id.* at 652, 813 A.2d at 668 (citing *Southern Pacific Transportation Co. – Exemption – Abandonment of Service in San Mateo County, CA*, Dkt. No. AB-12 (Sub-No. 118X), 1991 WL 108272, at *4 (February 20, 1991) ("[T]he underlying right-of-way can be preserved under 16 U.S.C. § 1247(d) without ICC authorization.").

Thus, it is now well-established that even if ICC procedures are not followed, "a railroad right-of-way can be converted to a recreational trail . . . so long as the proposed trail user complies with the requirements of section 1247(d)." *Buffalo Township*, 571 Pa. at 654, 813 A.2d 670. This "private railbanking" mechanism tolls any reversion of the rail corridor to the adjacent landowners, and preserves the corridor for future railway use in a manner consistent with the National Act. *Id.* at 650, 813 A.2d at 667 ("upon the conversion of a railroad line to a

recreational trail, the railroad's right-of-way does not terminate but is held in abeyance, and thus, the land does not revert to the property owner.").

Private railbanking can be used for corridors that cannot be railbanked under the ICC's rules because they were never under the ICC's jurisdiction to begin with (*i.e.*, corridors used for passenger rail service, spur lines, or purely for intra-state rail lines). Private railbanking can also be used when the ICC has already lost jurisdiction over the corridor, *i.e.,* if abandonment was "consummated" for purposes of ICC rules, but not abandoned under state law. Thus, Plaintiffs' assertion that "[t]he ICC/STB retains jurisdiction over all [National Act] railtrails" (Plaintiffs' Brief at 18) is wrong, since the ICC does not have jurisdiction over privately railbanked corridors. Nonetheless, according to this Court in *Buffalo Township,* private railbanking is a viable alternative to railbanking through the ICC. 571 Pa. at 654, 813 A.2d at 670.

Reactivation of a privately railbanked corridor occurs outside of the ICC's regulatory process. Unlike corridors railbanked with the ICC, which can only be reactivated for freight rail service, private railbanking allows for a much broader possibility of reactivation of rail service. The Allegheny Valley Land Trust's ("AVLT") actions in privately railbanking the Rail Corridor, for example, permit the possibility that the corridor might be reactivated for passenger rail service, or other uses over which the ICC does not have jurisdiction. It might also be reactivated by railroads other than the Consolidated Rail Corporation ("Conrail"). Therefore, there is a higher likelihood that a privately railbanked corridor will one day be used for rail service than there is for a corridor railbanked with the ICC, since reactivation in the private railbanking context contemplates more railroads and more railroad uses.

II. AVLT's Actions Were Sufficient to Constitute Private Railbanking

AVLT privately railbanked the Rail Corridor at issue in a manner entirely consistent with the broad purpose of the National and State Acts, as well as this Court's holdings in *Buffalo Township*. As articulated by this Court, "under section 1247(d), the right-of-way can be preserved so long as the interim use is subject to restoration or reconstruction by the railroad company and the trail user is willing to assume full managerial, financial, and legal responsibility for the management of such rights-of-way and for any liability arising out of such transfer or use." *Buffalo Township*, 571 Pa. at 654, 813 A.2d at 669-70.

In this case, AVLT met the requirements of section 1247(d) of the National Act, both through the filing of the Declaration of Railbanking and through AVLT's actual assumption of full managerial, financial, and legal responsibility for the right-of-way as an interim recreational trail until the right-of-way is again needed for railroad purposes. In the Declaration of Railbanking, ALVT plainly states that the Rail Corridor was being "preserved [pursuant to the National Act] as an interim recreational use trail and [is] railbanked for future rail service, related transportation purposes, or other uses as provided for by the National Trails Systems Act." (R. 417a) Thus, AVLT has effectively preserved the right-of-way under the National Act, and Plaintiffs' arguments that the Rail Corridor cannot be privately railbanked where the railroad that last provided service on the line has declined to pursue railbanking under the ICC's procedures or to secure an exclusive contractual right to reactivate service on the line are without merit.

A. Private Railbanking, Unlike Railbanking Through the ICC's Procedures, Does Not Require the Consent of the Transferring Railroad.

Plaintiffs insist that the Rail Corridor cannot be "railbanked" under the National Act because Conrail did not expressly consent to railbanking or execute a "railbanking" agreement with AVLT as required by ICC regulations. Plaintiffs' Brief at 21-27. Contrary to Plaintiffs'

argument, however, Conrail's decision not to avail itself of the ICC's procedures to negotiate a railbanking agreement is consistent with private railbanking under the National Act. Indeed, in this regard, this case is identical to *Buffalo Township*, in which the railroad likewise did not railbank under the ICC's procedures. There is nothing in the National Act itself to support Plaintiffs' claims that the railroad must expressly agree that the corridor is "railbanked" under the National Act. Rather, this requirement applies solely to corridors that are railbanked under the ICC's procedures, and which remain under the ICC's jurisdiction. 49 C.F.R. § 1152.29 (conditioning issuance of a Certificate of Interim Trail Use or Notice of Interim Trail Use on transferring railroad's willingness to negotiate an interim trail use/rail banking agreement).

Furthermore, as the Superior Court correctly noted, none of the cases relied upon by Plaintiffs stands for the proposition that there must be an express "railbanking" agreement between the railroad company and the rail-to-trails organization. *Moody v. Allegheny Valley Land Trust ("Moody III")*, 930 A.2d 505, 521 (Pa. Super. Ct. 2007). Rather, as the Superior Court properly points out, these cases indicate only that the ICC will not *compel* a railroad to sell or transfer the right-of-way for the purpose of creating an interim trail. *Id.* (citing for example to *Goos v. Interstate Commerce Comm'n*, 911 F.2d 1283 (8th Cir. 1990) and *National Wildlife Federation v. Interstate Commerce Comm'n*, 850 F.2d 694 (D.C. Cir. 1988)). There is simply no support for Plaintiffs' apparent view that the statute must necessarily require the railroad to affirmatively agree to railbanking simply because the ICC will not compel an "involuntary" sale for interim trail use. Additionally, Plaintiffs' representations that *Buffalo Township* imposes such a requirement where the statute is silent are simply false, and Plaintiffs cite to no passage from that decision in support of this statement. Plaintiffs' Brief at 15.

In any event, it is undeniable that Conrail entered into a *voluntary* agreement to transfer the Rail Corridor to the Armstrong County Conservancy ("Conservancy") or its nominee, that Conrail was aware that the Conservancy intended to designate the Rail Corridor for interim trail use, and that AVLT later made an express commitment to "railbank" the Rail Corridor until such time as railroad services were needed. (R. 312a, 378a, 417a) The mere fact that Conrail chose not to avail itself of the ICC's regulatory railbanking mechanism does not signify that railbanking was "refused" by Conrail as Plaintiffs insist. To the contrary, Conrail's reluctance to railbank through the ICC is evidence only that Conrail preferred to avoid any "residual common carrier obligation" that Conrail would otherwise have if the ICC retained jurisdiction over the Rail Corridor. *See Norfolk and Western Railway Co. Abandonment Between St. Mary's and Minster in Auglaize County, OH*, 9 I.C.C.2d 1015, 1018 (1993) (holding that the abandoning railroad retains a residual common carrier interest in the railbanked line).[8] Thus, Conrail's disclaimer in the quitclaim deed of its intent to operate rail service on the line signifies only that, notwithstanding AVLT's intent to preserve the corridor for future rail service, Conrail did not wish to be *obligated* to reactivate rail service without its express consent. (R. 313a) ("Conrail did not preclude, restrict or limit the right of AVLT or any third party to reinstitute rail service on the Rail Corridor at any time in the future. Conrail only sought to make clear that it would not be *obligated* to provide rail service along the Rail Corridor.") (emphasis added).

Additional evidence of Conrail's voluntary consent to railbank the right-of-way can be found in the Addendum to Conditional Agreement of Sale, in which Conrail specified that it

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[8] While the ICC cannot compel railbanking and interim trail use, the ICC does have the authority to compel a carrier to provide rail service on a line over which it has jurisdiction. *See* 49 U.S.C. § 10904; 49 C.F.R. § 1152.27 (authorizing ICC to establish the terms and conditions of the subsidy or purchase of the rail line to provide continued rail service). Thus, a railroad such as Conrail that wishes to make its corridor available for future rail service but does not want to be compelled to do so might opt to privately railbank the line and eliminate any potential ICC jurisdiction for a forced subsidy.

could resume rail service in the future. (R. 383a). By allowing the corridor to be privately railbanked, Conrail ensured that the corridor remained available for future rail service restoration by Conrail or any other carrier, while avoiding the possibility that it might be *required* at some point to reinstate or subsidize rail service on the line.

B. The Railbanking Laws Do Not Require A Railroad Company to Reserve Its Own Right of Re-entry.

Contrary to Plaintiffs' argument, the fact that Conrail did not explicitly reserve the right to reactivate rail service on the Rail Corridor does not mean that the corridor has not been privately railbanked. There is no requirement under either the National or State Act that the transferring railroad company must explicitly retain its own right of re-entry. Again, Plaintiffs cite to no such statutory language. Nor can they: the "railbanking" language of the National Act does not require that a railroad explicitly reserve reactivation rights to itself, but instead simply requires that the corridor be "subject to restoration or reconstruction for railroad purposes." 16 U.S.C. § 1247(d). In other words, the statutory focus is not on the reactivation rights held by a particular railroad company but on the availability of the corridor itself for future rail service. Indeed, Plaintiffs concede that a "different railroad may reactivate service" on a railbanked corridor.[9] Plaintiffs' Brief at 35.

The reason for this is manifest under the National Act, which is premised on the recognition that the fortunes of any given railroad may rise or fall with market conditions, but the importance of preserving the railroad rights-of-way for future use by any railroad company is paramount. Thus, the *resumption* of rail service by the same carrier is not the primary goal of

[9] A different railroad, however, could only reactivate service on a "privately" railbanked corridor, since, as noted above, ICC railbanking gives automatic reactivation rights only to the abandoning railroad or its successor-in-interest.

either the National or State Act. Rather, the primary goal of these laws is the *preservation* of railroad rights-of-way for potential future reactivation even if the timeframe for and manner of reactivation are indeterminate. *See Preseault v. Interstate Commerce Comm'n.*, 494 U.S. 1, 19 (1990). As the U.S. Supreme Court explained, "Congress did not distinguish between short-term and long-term rail banking, nor did it require that the [ICC] develop a specific contingency plan for reactivation of a line before permitting conversion. To the contrary, Congress apparently believed that every line is a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable." *Id.*

Similarly, the State Act, "following the federal lead," sought to "prevent[] the further loss of railroad track." *Buffalo Township*, 571 Pa. at 650, 813 A.2d at 667. Like the National Act, the State Act does not place any time limit on reactivation of rail use, instead simply stating that an interim trail may be held for "future transportation use." 32 Pa. Stat. § 5619(d). In light of the plain language and general purpose of these statutes, the Superior Court correctly found that requiring the transferring railroad company to reserve its own right of re-entry at some future time would make little sense (Indeed, reading such a requirement into the statute would dramatically narrow its scope and effect) and properly found that the Rail Corridor had been railbanked by AVLT pursuant to the National Act. *Moody III*, 930 A.2d at 523.

Here, as noted above, AVLT entered into a binding commitment that the corridor is "railbanked for future rail service, related transportation purposes, or other uses as provided for by the National Trails Systems Act." (R. 417a) This Declaration of Railbanking, a duly recorded instrument, ensures that the corridor is available for future rail service, as evidenced, for example, by the fact that Kiski Junction Railroad may seek to provide service on the line.[10]

[10] Contrary to Plaintiffs' argument, the fact that the Kiski Junction Railroad might need to go to state court to

Thus, AVLT's Declaration of Railbanking satisfies the requirements of the National Act and effectively "railbanks" the corridor for future rail service.

A ruling that the railroad company last providing service on the line must explicitly reserve its own right to resume rail service is contrary to the plain language and broad policies embodied in both National and State Acts. Private railbanking assures that, if and when rail use is needed along a preserved right-of-way, the corridor will remain intact and subject to future rail service if any railroad operator – whether the former operator of the line, a successor in interest, another railroad company, or a governmental entity – determines that rail service is viable on the line. When such a need arises in the future, AVLT is bound by its Declaration of Railbanking to step aside and facilitate the reactivation of the line.

III. The Superior Court Correctly Held That the Railway Corridor at Issue Had Not Been Abandoned When It Was Transferred to AVLT for the Purpose of Conversion to an Interim Recreational Trail.

The Superior Court held that the trial court erred when it ruled that Conrail had abandoned its right-of-way on June 16, 1989, the date when the railroad company received unconditional authorization from the ICC to abandon its remaining portion of the Rail Corridor. *Moody III*, 930 A.2d at 520.[11] Following this Court's guidance in *Buffalo Township*, the

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effectuate reactivation of rail service by initiating condemnation proceedings does not negate the existence of reactivation rights. Plaintiffs' Brief at 32-33. Rather, as the ICC has made clear, even where a corridor is railbanked with the ICC, the ICC has no authority to compel the trail manager to transfer the property to the railroad seeking to re-activate rail service on the line. *Georgia Great Southern Division, South Carolina Central Railroad Co. Inc. -- Abandonment and Discontinuance Exemption -- Between Albany and Dawson, in Terrell, Lee and Dougherty Counties*, GA, Dkt. No. AB-389 (Sub-No. 1X), served May 16, 2003. Therefore, a railroad reactivating service under the ICC's procedures will still likely need to go to state court to establish the specific terms of the return of the corridor to the railroad. Indeed, after thirteen years of litigation from Plaintiffs in this case, plus certain Plaintiffs' physical obstruction of the trail, Kiski Junction Railroad would understandably wish its rights to the corridor to be confirmed by a judicial decree.

[11] When holding that the Rail Corridor was "abandoned" under state law on June 16, 1989, when the ICC granted unconditional authority to abandon rail service on the line, the trial court judge confused the term "abandonment" in the context of federal railroad regulations with the very different meaning of "abandonment" under state property law. For purposes of federal regulation, "abandonment" refers to the discontinuance of rail

Superior Court found ICC abandonment authorization to be insufficient indicia of intent to abandon to support the trial court's conclusion. *Id.* at 517, 520.

Nonetheless, Plaintiffs contend that the trial court's reliance on ICC abandonment authorization as evidence that the railroad intended to abandon the line was merely "harmless error," arguing that Conrail's decision to railbank outside the ICC's regulatory framework without reserving an express right to re-enter and its alleged consummation of abandonment under the regulations were "dispositive" of the question of Conrail's intent to abandon its property interest in the right-of-way. Plaintiffs' Brief at 42. At best, however, Conrail's refusal to railbank the corridor with the ICC or reserve reactivation rights in the deed of sale merely demonstrates that Conrail sought to end the ICC's regulatory jurisdiction over the line, not that Conrail intended to abandon the right-of-way under state law. Indeed, the record contains much stronger evidence that Conrail did not intend to abandon the line, including Conrail's voluntary decision to transfer the line to AVLT for interim trail use and railbanking.

A. Conrail's Decision to Railbank the Rail Corridor Outside the ICC's Regulatory Framework Without Reserving the Right to Reactivate Rail Service Does Not Indicate an Intent to Abandon the Right-of-Way.

Contrary to Plaintiffs' argument, this Court's decision in *Buffalo Township* makes clear that a railroad's decision not to railbank under the ICC's rules does *not* indicate an intent to

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service on a particular line, as approved by the ICC, while common-law "abandonment" typically refers to the relinquishment or termination of the property rights held under an easement. *See, e.g., Chevy Chase Land Co v. United States*, 355 Md. 110, 168-69, 733 A.2d 1055, 1086 (1999) ("[T]he acts alleged to support a finding of abandonment of the state law property interest relate primarily to the railroad's plans to undertake an abandonment proceeding before the ICC. . . . We believe that appellants unnecessarily confuse the state law question by relying on actions taken by the railroads to comply with regulatory 'abandonment' under federal law"). The case law in this and other jurisdictions is crystal clear that "ICC approval of abandonment . . . is only a determination that . . . cessation of service would not hinder ICC's purposes. *It is not a determination that the railroad has abandoned its lines.*" *Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1330, 1339 (9th Cir. 1990), *cert. denied*, 498 U.S. 967 (1990) (emphasis added); *Buffalo Township*, 571 Pa. at 647, 813 A.2d at 665 (ICC's issuance of unconditional certificate of abandonment is not conclusive evidence of an intent to abandon).

abandon under state property law, "so long as the property user complies with the requirements of § 1247(d) [of the National Act]." 571 Pa. at 654, 813 A.2d at 670. As this Court noted in *Buffalo Township*, to show abandonment, there must be "some affirmative act" on the part of the easement holder "which renders use of the easement impossible, or of some physical obstruction of it by him in a manner that is inconsistent with its further enjoyment." *Id.* at 646, 813 A.2d at 665 (emphasis added) (citing *Thompson v. R.R. Preservation Society*, 417 Pa. Super. 216, 222, 612 A.2d 450, 453) (Pa. Super. Ct. 1992). Nothing in Conrail's decision not to railbank under the ICC's procedures creates any obstacle to reactivation of rail service by a third-party carrier – or even by Conrail, should it choose to do so in the future. As noted above, Conrail's decision not to avail itself of the ICC's procedures for placing the corridor in the ICC's "railbank" simply signifies that Conrail did not wish to continue to be subject to the ICC's regulatory authority and reflects Conrail's desire to avoid retaining any residual common carrier obligation that might be the basis for a subsequent order from the ICC compelling Conrail to re-start rail service on the line.

Nor is Conrail's failure to reserve to itself a specific future right to re-start service on the line evidence of an intent to abandon the right-of-way. Expressly reserving a right to reactivate service on the line by the abandoning railroad is not required by the plain language of the National Act in order to privately railbank the line. While in *Buffalo Township* the railroad's reservation of a right to re-enter the land for future railroad use was a factor in that case militating against abandonment, the Court's decision made clear that "no single factor alone is sufficient to establish intent to abandon." *Id.* at 647, 813 A.2d at 665. As the Superior Court found, *Buffalo Township* "establishes that a railroad's transfer of a railroad right-of-way to a qualified entity dedicated to preserving the right-of-way under the National Act prohibits a

reversion of the property to the servient land owners, " and that was the "chief" factor in adducing whether the railroad intended to abandon the corridor. *Moody III*, 930 A.2d at 513, 517.

Indeed, the intent of the railroad last operating service on a particular line to permanently discontinue rail service is weak evidence of an intent to abandon where the same railroad has nonetheless transferred the corridor intact to an entity that has committed to preserving the corridor for future rail use and for an interim use as a trail that is fully compatible with future rail service. As the Superior Court correctly observed, *Buffalo Township* makes clear that the focus of any inquiry into whether a corridor has been "abandoned" is on whether the corridor itself can no longer be use for rail service rather than on whether the railroad most recently operating service on the line wants to discontinue its use of the corridor for railroad purposes. In other words, the most salient factor in ascertaining a railroad's intent to abandon is the fact that the railroad negotiated and transferred the corridor to an entity that has committed to preserving the corridor for future rail service contemporaneously with its own cessation of service. *Moody III*, 930 A.2d at 517.

Again, Plaintiffs' assumption that Conrail's alleged disinterest in securing for itself a future right to re-start rail service signifies an intent to abandon the property is without support in the record. Instead, as the Superior Court found, "the question is whether there can be a distinction between selling the corridor to a railroad company or to a rails-to-trails organization for purposes of Pennsylvania law of abandonment and reversion." *Moody III*, 930 A.2d at 513.

In fact, no distinction is supportable under Pennsylvania Law. Rather, a railroad can fully divest itself of any present or future interest in operating service on a line – as it typically does when transferring the corridor to another railroad company – without causing line to

become abandoned and revert to the servient owners. As the Superior Court pointed out – and Plaintiffs do not challenge this assertion – "[h]ad Conrail transferred the Rail Corridor to another railroad company, presumably there would have been, absent unusual circumstances, no contention that the right-of-way had been abandoned." *Id.* The railroad's intention to discontinue service on a line in the context of a transfer for trail use is no different from a railroad's decision to transfer its right-of-way to another railroad company; in both contexts, the failure of the transferor to reserve a future interest in operating rail service does not constitute evidence that the railroad intends to abandon the property.

As the Superior Court correctly found, "the evidence shows that Conrail never intended that the Rail Corridor would forever be abandoned for rail service. Rather, Conrail merely showed an intent that ***it*** would no longer use the Rail Corridor." *Id.* at 519 (emphasis added). Indeed, Conrail specifically stated that it did *not* abandon the right-of-way at any time. (R.679a) Moreover, the record also shows that, while Conrail declined to expressly reserve reactivation rights in the deed, Conrail did not permanently disavow any future intention to restart rail service on the line. Rather, Conrail specifically provided in the Addendum to the Conditional Agreement of Sale that it *could* resume service in the future by mutual agreement of the parties. (R. 383a) As noted above, these actions are fully in accord with a consistent and logical position on the part of Conrail: that while Conrail supported the "railbanking" of the line for future rail service by any railroad (including itself), it sought to avoid any language that might conceivably operate to compel it to provide rail service in the future.

Furthermore, the record indisputably shows that "Conrail never intended to 'preclude, restrict or limit the right of AVLT or any third party to reinstate rail service on the Rail Corridor at any time in the future.'" *Moody III*, 930 A.2d at 518. In fact, Conrail specifically denied that

"in filing an Application for Abandonment, [the railroad] desired that the Railroad Corridor not be retained and/or preserved for potential future railroad service." (R. 33a, 37a) Accordingly, the record here demonstrates no intention on the part of Conrail to "render[] use of the easement impossible" or otherwise take action "that is inconsistent with its further enjoyment." *Buffalo Township*, 571 Pa. at 646, 813 A.2d at 665. Therefore, the Superior Court properly found that Conrail's decision not to reserve to itself any future right to re-start rail service on the line does not constitute conclusive or persuasive evidence that Conrail intended to abandon the property.

B. Conrail's Conduct in Negotiating and Conveying the Corridor for Trail Use Outweighs Each of the Remaining Factors on Which Plaintiffs Rely to Demonstrate that Conrail Intended to Abandon the Line.

As noted above, Conrail's failure to utilize the ICC's "railbanking" procedures or reserve to itself reactivation rights cannot counter the powerful evidence that Conrail, in contemporaneously negotiating to transfer the corridor to AVLT, did not intend to abandon the right-of-way. Nor do any of the other factors that Plaintiffs rely upon demonstrate, on balance, that the railroad intended to abandon the corridor. Rather, as the Superior Court found below, while certain acts of Conrail's might be interpreted as indicia of intent to abandon, the "chief" factor countering any other such factors was "Conrail's contemporaneous negotiation of the sale and transfer of the Rail Corridor to another entity," and "the undisputed fact that Conrail's activities in shutting down its rail service along the Rail Corridor coincided with and were part and parcel of its negotiations with and sale of the corridor to the Conservancy and the subsequent delivery of a deed to AVLT." *Moody III*, 930 A.2d at 517. On balance, as the Superior Court held, this factor strongly contradicted any intent to abandon the right-of-way.

The Superior Court's finding here was a straightforward application of this Court's holding in *Buffalo Township* that a railroad's conveyance of its interest in a corridor for interim

trail use by a user who has committed to retain the corridor intact and make it available for future rail service manifestly does not render use of the easement impossible or subject to an inconsistent physical obstruction. *See Buffalo Township*, 571 Pa. at 647-48, 813 A.2d at 665-66. As set forth in the Superior Court's opinion below, this finding is fully in accord with the law in the Commonwealth of Pennsylvania and elsewhere. *See Burnier v. Dep't of Envtl. Res.*, 148 Pa. Commw. 530, 534, 611 A.2d 1366, 1368 n.6 (Pa. Commw. Ct. 1992) (conveyance to a non-railroad third party for a rail to trail conversion does not trigger reversionary interests); *Quarry Office Park Assoc. v. Philadelphia Elec. Co.*, 394 Pa. Super. 426, 576 A.2d 358 (Pa. Super. Ct. 1990) (conveyance of railroad company's property interests to a "non-railroad" does not constitute abandonment). *See also Birt v. Surface Transp. Bd.*, 90 F.3d 580, 588 (D.C. Cir. 1996) (finding that the "contemporaneous and continued trail negotiations over a period of . . . months . . . suggested that the railroad did not intend to abandon.").

Far from rendering use of the easement impossible or subject to an inconsistent physical obstruction, the conveyance of the corridor to the Conservancy and ultimately to AVLT accomplishes exactly the opposite – it fundamentally protects and *preserves* opportunities for future rail service by Conrail or any other railroad company should the need arise. Indeed, as noted above, the possibility of reactivation is much greater as a result of AVLT's "Declaration of Railbanking" than it would be if the corridor were railbanked under the ICC's procedures, since the corridor will now be available for a wider range of railroad purposes, such as passenger rail service or rail serving intra-state commerce, and to any person seeking to institute such service, rather than simply to the abandoning carrier or its successor-in-interest.

Nor did Conrail's agreement to sell the tracks, ties, and other railroad material conclusively establish an intent to abandon the right-of-way, as these actions are equally

consistent with an intent to railbank the corridor.[12] Likewise, a Public Utility Commission ("PUC") certification abolishing the crossings is not dispositive of whether a right-of-way has actually been abandoned. *See Thompson*, 417 Pa. Super. at 227, 612 A.2d at 455.[13] Thus, none of these factors conclusively establishes abandonment under state property law, particularly since none of these events had even occurred in this case until after the transfer agreement was negotiated between the railroad company and a railbanking entity.

Specifically, in this case, Conrail agreed to sell the railroad materials only after it agreed to sell the right-of-way to the Conservancy and transferred title to AVLT for the purpose of converting the Rail Corridor for interim trail use. (R. 312a-314a) In addition, Conrail filed its application with the Pennsylvania Public Utility Commission to abolish its responsibility to maintain the road crossings and bridges along the Rail Corridor after it agreed to sell the right-of-way to the Conservancy and transferred title to AVLT. (R. 313a) Thus, the agreement to transfer the Rail Corridor to the Conservancy was reached *before* Conrail agreed to sell the railroad material from the line, *before* Conrail turned over responsibility for maintaining the crossings and bridges, and *before* any of the other pre-sale facts had occurred that this Court considered in *Buffalo Township*. This contrasts with the facts in *Buffalo Township*, where this Court upheld a finding that the right-of-way had not been abandoned where Conrail not only

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[12] *See Buffalo Township*, 571 Pa. at 647, 813 A.2d at 665; *Thompson*, 417 Pa. Super. at 223, 612 A.2d at 453; *see also Union Pacific Railroad Company – Exemption – Abandonment of Service in McPhearson County, KS*, 7 I.C.C. 2d 1035 (I.C.C. 1997) ("[D]iscontinuance and removal of the line's track and ties cannot be construed as the consummation of an abandonment."); *Union Pacific Railroad Company –Exemption – Abandonment of Service in Morgan County, CO (Julesburg Subdivision)*, 1997 WL 33786 (I.C.C. 1997) ("While discontinuance of rail service, salvage of track, and tariff cancellation are actions often taken in connection with abandonment, they are also fully consistent with a lesser action of temporary cessation of rail operations ***or trail use***. Thus, they are entitled to little weight where, as here, [the railroad's] actions demonstrate an intent not to abandon by its continued willingness to negotiate.") (emphasis added).

[13] Moreover, in the present case, the PUC expressly assigned responsibility for above-grade crossings along the Rail Corridor to AVLT, the Conservancy, and Armstrong County, clearly indicating that the state agency does not consider the Rail Corridor to be abandoned. (R. 313a, 438a-439a)

received abandonment authority from the ICC, but also removed its railroad materials along the corridor *before* transferring the right-of-way to the railbanking entity. 571 Pa. at 647, 813 A.2d at 665. While these factors weighed against Conrail in *Buffalo Township*, this Court nevertheless found that Conrail's negotiations regarding the sale of the right-of-way to a railbanking entity for conversion to an interim recreational trail indicated that Conrail "did not abandon its interest in the property *prior to the transfer of the property*." *Id.* at 648, 813 A.2d at 666 (emphasis added). It would be incongruous to find in this case that Conrail intended to abandon the right-of-way where it merely discontinued service and then immediately sought to transfer the right-of-way to a railbanking entity, as this Court has already decided otherwise on those same facts in *Buffalo Township*.

Finally, Plaintiffs' suggestion that Conrail admitted to consummating the abandonment (Plaintiffs' Brief at 48) is misleading in the extreme. Rather, as the record makes clear, Conrail specifically objected to the term "abandonment" as being "ambiguous" and undefined in responding to Plaintiffs' Requests for Admission. (R. 678a) Moreover, Conrail specifically stated in response to another request for admission that it did ***not*** abandon the right-of-way at any time. (R.679a) Furthermore, despite the ICC's order that it be "advised ... in writing immediately after abandonment of the line of railroad of the date on which abandonment actually took place,"[14] Conrail never filed any "notice" to the ICC that it had consummated abandonment authorization.

In any event, even if Conrail had, in fact, notified the ICC that it had "consummated" abandonment authorization under the ICC's regulatory regime, that would not have constituted

[14] ICC Certificate And Decision, Dkt. No. AB-167, May 14, 1984 (R. 373a), granting permission to discontinue rail service along the Rail Corridor between Milepost 53.8 and Milepost 63.4.

evidence that the right-of-way had been abandoned under state law. Rather, a railroad's "consummation" of regulatory abandonment authorization is, like Conrail's decision not to avail itself of the ICC's railbanking procedures, merely further evidence that Conrail sought to terminate the ICC's regulatory jurisdiction over the corridor and divest itself of its common carrier obligations to provide rail service on the corridor rather than evidence of any intent to abandon the railroad right-of-way.[15]

Considering all of these factors together, under the test articulated in *Buffalo Township*, the Superior Court correctly found that the railroad did not intend to abandon the corridor under Pennsylvania state property law.

IV. Railbanking and Interim Trail Use Are Valid Railroad Purposes

The Superior Court made its ruling in the context of the strong federal and state policy of preserving railroad rights-of-way for interim recreational use. It is important to emphasize that AVLT's trail use under the National Act is *interim* in nature. That is, AVLT's written Declaration that the Rail Corridor is subject to future restoration and reactivation of the right-of-way for rail services represents a binding commitment that it will step aside if and when a railroad company wishes to restore rail service on all or part of the line. Thus, railbanking here represents a seamless continuation of the easement interest and trail conversion is a valid railroad purpose.

[15] The purely regulatory significance of notifying the ICC that abandonment has been "consummated" is made clear in the current STB regulations, pursuant to which STB abandonment authorization is only "consummated" when the railroad notifies the STB that it has consummated the abandonment authority. 49 C.F.R. § 1152.29(e)(2). If the railroad fails to consummate abandonment authorization within one year, the abandonment authorization lapses. *Id.* The corridor would then remain under the STB's jurisdiction, and the railroad would retain its common carrier obligation to provide service on the line, and could be compelled by a shipper to provide service on the line. 49 U.S.C. § 10904; 49 C.F.R. § 1152.27.

This conclusion is consistent with findings in other courts. For example, in a case involving a railbanked corridor in Montgomery County, Maryland, the Maryland Court of Appeals (Maryland's highest court) held that neither the original grantor of a right-of-way nor the adjacent landowner had a right under state law to possess a railbanked corridor because the scope of the right-of-way was sufficiently broad to include interim trail and future railroad uses. *Chevy Chase Land Co. v. United States*, 733 A.2d 1055 (Md. 1999). After reviewing the facts of the case and considering Maryland authority concerning the interpretation of right-of-way transportation easements, the Maryland Court of Appeals found that:

> It is self-evident that the use of the right-of-way as a transportation corridor for walking, biking, and other transportation purposes, including its possible use in the future for light rail, imposes no new burdens on the servient tenements and does not result in the 'substitution of a different servitude from that which previously existed.'

Id. at 1077-78 (*quoting Reid v. Washington Gas Lt. Co.,* 194 A.2d 636, 638 (Md. 1963)). The Court not only found "the conversion of a railway used for freight to a footpath [to be] consistent and compatible with the prior railway use" but also found interim trail use to be "less burdensome than freight railroad use." *Id.* at 1080, 1094.[16] Once the Court found that recreational trail use was a permissible railroad use and that the railroad had performed no acts abandoning that use, the servient estate holder could not show a property interest that had been impermissibly taken. *Chevy Chase Land Co. v. United States*, 230 F.3d 1375 (Fed. Cir. 1999). [17]

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[16] The court specifically rejected the original grantor's argument that the conveyance of a right of way to a railroad automatically indicates that the right of way is narrowly restricted to railroad purposes only. *Id.* at 1074.

[17] Plaintiffs' reliance on state court decisions from Washington, Wisconsin, and Illinois is misplaced as the corridors involved in these cases were *not* railbanked for interim trail use and future rail service. Plaintiffs' Brief at 53-54. In any case, numerous other state courts have found that trail use *is* consistent with a railroad easement. For example, the Supreme Court of Minnesota has ruled that use of a railroad easement for biking, hiking, and jogging is within the scope of the easement. *State by Wash. Wildlife Pres., Inc. v. State*, 329 N.W.2d 543, 547 (Minn. 1983) (holding that "[r]ecreational trail use of the land is compatible and consistent with its prior use as a rail line and imposes no greater burden on the servient estates."); *Hatch v. Cincinnati & Indiana R.R. Co.*, 18 Ohio St. 92 (Ohio

As the Superior Court correctly acknowledged below, there is no practical, legal, or logical difference between the previous transfers of the Rail Corridor for ongoing use as a railroad and the present transfer to a third-party with a declared interest in railbanking. *Moody III*, 930 A.2d at 513, 520. In other words, just as no abandonment occurred when Penn Central Transportation Company transferred its interests in the right-of-way to Conrail in 1976 (R. 311a-311a), likewise no abandonment occurred when Conrail transferred the right-of-way to AVLT, a railbanking entity with a binding commitment to preserve the corridor until such time as it is needed for future rail service. Railbanking results in no actual change in status or termination of the general railroad interest in the right-of-way that was contemplated in the original conveyances and is so important to the national and state interests. Thus, railbanking and interim trail use amount to a *bona fide* railroad purpose, well within the scope of the railroad right-of-way, and trigger no lapse or reversion of rights because interim trail use *is* essentially a continuing railroad purpose.

V. Constitutional "Takings" Issues Are Not Properly Before this Court.

Plaintiffs argue that the application of private railbanking in accordance with the National Act has "taken" their property and that they are entitled to just compensation. Plaintiffs' Brief at 57. As an initial matter, Plaintiffs failed to properly preserve this issue for appeal, raising it for the first time on June 30, 2008 in their Brief to this Court. *Id.* These claims should not be considered by his Court now. Pa. R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on Appeal.").

1868) (converting a canal into a railroad does not extinguish the original easement). *See also Preseault*, 494 U.S. at 16 n.9 (citing cases).

More importantly, however, Plaintiffs' argument is misplaced and without merit. As the Supreme Court held in *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990), if plaintiffs feel that federal law displaced a state law property interest such that a "taking" occurred, then the proper approach is for plaintiffs to file a "takings" claim against the United States under the Tucker Act. *See also Louisiana-Pacific Corp v. Texas Dept. Of Transp.*, 43 F. Supp. 2d 708, 710 (E.D. Tex. 1999) (holding that plaintiffs' state law "takings" claim is "fundamentally a federal law claim," and that "[t]he appropriate venue for such an action, provided that it exceeds $10,000 is the United States Court of Claims"); *Good v. Skagit County*, 104 Wash. App. 670, 17 P.3d 1216 (Wash. App. 2001) (holding that "we do not have jurisdiction over the takings issue," and that "allegations of a taking resulting from a transfer of property under the Trails Act must be brought in the United Sates Court of Claims."). Thus, even if Plaintiffs' "takings" argument had been timely raised, it would still not be properly before this Court.

VI. The Superior Court's Decision Furthers the Important Public Policy Purposes Behind the National Trails System Act and the Pennsylvania Rails to Trails Act.

A. The Superior Court's Decision Furthers the Important Public Policy of Preserving Our Nation's Rail Corridors for Future Use

As the U.S. Supreme Court observed in *Preseault v. Interstate Commerce Commission*, the National Act was the "culmination of congressional efforts to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails." 494 U.S. at 4. In passing this legislation, Congress recognized that the nation's extensive system of rail lines was at risk of becoming irreparably destroyed. By creating a process through which rail lines could be preserved for future rail use, Congress expressed its belief that "every line is a potentially valuable national asset that merits preservation ***even if no future rail use for it is currently foreseeable.***" *Preseault*, 494 U.S. at 19 (emphasis added).

Pennsylvania expressed its support for rails-to-trails conversions a few years later when the Legislature passed the Pennsylvania Rails to Trails Act ("State Act"). As this Court recognized in *Buffalo Township*, both the National Act and the State Act "display a strong legislative policy encouraging the preservation of railroad rights-of-way by using existing rights-of-way for interim recreational trail use." 571 Pa. at 650, 813 A.2d at 667.

The wisdom of this policy can be seen clearly today. After decades of decline, the railroad industry is once again on the rise and enjoying its biggest building boom in more than a century.[18] This growth is due in large part to high oil prices and the need for more fuel-efficient forms of transportation.[19] According to the Association of American Railroads, a diesel locomotive can move a ton of freight 436 miles on a single gallon of fuel, making a full train about ten times more fuel efficient than the new Toyota Prius.[20] As a result, freight rail tonnage is expected to increase by ninety percent over the next twenty-five years.[21]

The high price of oil has also made passenger rail travel more appealing. Mass transit systems across the country have seen dramatic increases in ridership over the past year and Amtrak recently set records both for the number of passengers it carried and for ticket revenues.[22] As the First Circuit observed during an earlier period of high oil prices, "[a] scarcity

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[18] Frank Ahrens, *A Switch on the Tracks: Railroads Roar Ahead—Global Trade, Fuel Costs Add Up to Expansion for Once-Dying Industry,* Washington Post (April 20, 2008), *available at* www.washingtonpost.com/wp-dyn/content/article/2008/04/20/AR2008042002407.html; Ann Belser, *Strong Market Lifts Local Railroad Companies to Record Profits*, Pittsburgh Post-Gazette, June 15, 2008; Daniel Machalaba, *New Era Dawns for Rail Building*, Wall Street Journal, February 13, 2008.

[19] Ahrens, *supra* note 16; Belser, *supra* note 16; Machalaba, *supra* note 16.

[20] Association of American Railroads, Railroad Fuel Efficiency Sets New Record (May 21, 2008), http://www.aar.org/Pressroom/PressReleases/2008/05/RailroadFuelRecord.aspx.; Toyota Web Site, http://www.toyota.com/prius-hybrid/specs.html.

[21] Ahrens, *supra* note 16.

[22] Matthew L. Wald, *Travelers Shift to Rail as Cost of Fuel Rises*, N.Y. Times, June 21, 2008; Clifford

of fuel and the adverse consequences of too many motor vehicles suggest that society may someday have need either for railroads or for the rights of way over which they have been built." *Reed*, 487 F.2d at 649-50. With gas prices currently approaching $4 per gallon, "someday" may come sooner than we think and current efforts to preserve our nation's rail corridors will help us avoid having to reassemble a national rail system from scratch.

Notwithstanding disputes such as this one, where adjacent landowners illegally barricade portions of the rail corridor, federal and state railbanking laws have been effective in preserving our nation's rail corridors. According to records maintained by the Rails-to-Trails Conservancy, there are currently 1,534 open rail-trails in the United States (15,346 miles) and 717 additional rail-trail projects underway. Pennsylvania has the second-highest number of rail-trails in the country with 134 open rail-trails (1,318 miles) and 49 additional rail-trail projects underway. Already, a number of railbanked corridors have been reactivated throughout the United States for railroad use.[23] Without the possibility of a rails-to-trails conversion, in all likelihood, it would have been impossible to re-assemble and return these corridors to rail service.

B. The Superior Court's Decision Furthers the Important Public Policy of Encouraging the Development of Trails

In addition to preserving our nation's rail corridors for future use, Congress also "intended to encourage the development of additional trails and to assist recreational users by

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Krauss, *Gas Prices Send Surge of Riders to Mass Transit*, N.Y. Times, May 10, 2008.

[23] *See Owensville Terminal Co., Inc.--Abandonment Exemption--In Edwards and White Counties, IL and Gibson and Posey Counties, IN*, No. AB-477 (Sub-No. 3X), 2005 WL 2292012 (S.T.B Sept. 20, 2005); *BG & CM Railroad, Inc.--Exemption From 49 U.S.C. Subtitle IV*, No. 34399, 2003 WL 22379168 (S.T.B. Oct. 17, 2003); *Georgia Great Southern Division, South Carolina Central Railroad Co., Inc.--Abandonment and Discontinuance Exemption--Between Albany and Dawson, In Terrell, Lee and Dougherty Counties, GA*, No. AB-389 (Sub-No. 1X), 2003 WL 21132515 (S.T.B. May 9, 2003); *Norfolk & Western Railway Co.--Abandonment Between St. Marys and Minister in Auglaize County*, OH, 9 I.C.C.2d 1015 (1993); *Iowa Power, Inc.--Construction Exemption--Council Bluffs, IA*, 8 I.C.C.2d 858 (1990).

providing opportunities for trail use on an interim basis." *Preseault*, 494 U.S. at 17-18. The coupling of railroad corridor preservation with interim trail use is a natural pairing from a transportation policy perspective because it allows these corridors to be productively used while they are being preserved for future rail use. Rail-trails provide safe, traffic-free paths for walkers, joggers, cyclists and others to exercise and enjoy the outdoors. In addition to the health and recreational benefits these trails provide for local residents, rail-trails also attract visitors to the community. Cafes, inns, hotels and bike shops have cropped up along trails to serve both locals and tourists. As a result, rail-trails boost local economies and often create new business opportunities in communities where other industries are waning.[24]

The rail corridor at issue here is a perfect example of the benefits of interim trail use. Situated in beautiful Armstrong County, the corridor is part of the longer Armstrong Trail, which runs along the east bank of the Allegheny River from Schenley to Upper Hillville.[25] The Armstrong Trail forms a vital segment of the Erie-Pittsburgh network, which would connect with the Great Allegheny Passage, creating a continuous route from New York to Maryland and on to Washington, D.C., with the potential to extend to Buffalo, New York and possibly farther. Indeed, the Armstrong Trail comprises at least a quarter of the total mileage the Erie-Pittsburgh network and may possibly be the only viable route north from Allegheny County. Local residents use the trail for walking, jogging, horseback riding, cycling and cross-country skiing, local community organizations, like the YMCA, use the trail for charitable events and volunteers

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[24] Mary Kate Malone, *Rite of Passage*, Pittsburgh Post-Gazette, July 27, 2008, B1 (discussing growth of small businesses along the Great Allegheny Passage trail).

[25] Armstrong Trail Website, http://www.armstrongtrail.org/.

help keep the trail in good condition.[26] Like other rail-trails across the country, the Armstrong Trail provides tremendous health, recreational and economic benefits to the local community while preserving a valuable national asset for future use.

In deciding *Buffalo Township*, this Court recognized that private railbanking furthers the federal and state goal of preserving railroad rights-of-way as interim recreational trails. 571 Pa. at 655, 813 A.2d at 670 ("Our decision today furthers the legislative purpose to promote interim trail use in order to preserve the railroad company's interest in the property . . . ."). The Superior Court's decision in this case likewise furthers the broad statutory goal of preserving railroad rights-of-way by permitting them to be converted to interim recreational trails. A reversal of this decision will undermine the "strong legislative policy" embodied in both the federal and state legislation. *Id.* at 650, 813 A.2d at 667.

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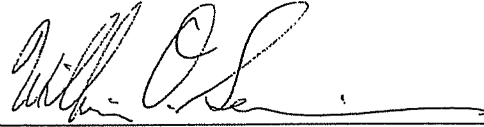
26 *Id.*

CONCLUSION

For the foregoing reasons, *Amicus* Rails-To-Trails Conservancy requests that this Court affirm the Superior Court's Order dated June 25, 2007.

Respectfully submitted,



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Dated: August 7, 2008

CERTIFICATE OF SERVICE

I, hereby certify that, pursuant to Pa.R.A.P. 121, two copies of the foregoing Brief of *Amicus Curiae* Rails To Trails Conservancy were served upon all counsel of record by first class mail, on August 7, 2008 including:

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