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Railroad Abandonments, Trail Planning, and Easements

Between 1840 and 1920, the United States built railroads at a frenetic pace. Before the widespread adoption of the automobile, having a railroad was make or break for cities, towns, and villages. Portland lost its status as the preeminent metropolis of the Pacific Northwest at least in part because Seattle had direct access to three transcontinental lines while Portland had just two, and Prineville built it's own municipal railroad after the Oregon Trunk bypassed their town in favor of Redmond and Bend. The hurried pace, pressure from financial institutions, and a myriad of other factors meant that efficiently connecting places with other places didn't always play a forward role in the development of a railway.

Thus, as shipping via truck became more efficient from the 1950s onwards, railroads were met with a crisis. Their historical lines were often built in illogical, nonsensical, or duplicitous ways, and faced with competition from a heavily subsidized trucking industry (by way of the Interstate Highway System), many lines became deeply unprofitable. Federal regulations prevented abandonment of lines (as well a lengthy process to cease unprofitable passenger service), coming to a head in a series of bankruptcies – of which Penn Central (the largest bankruptcy until Enron[1]) and the Milwaukee Road (leading to the only transcontinental line abandonment[2]) were most notable.

[1] Yahoo! Finance, "This Day In Market History: Penn Central Bankruptcy."
[2] Forgotten Lands, Places and Transit, "Milwaukee Road's Pacific Extension: America's Longest Abandoned Railroad."

In response to this, in the 1980s the federal regulations on railroad abandonments (and mergers) were relaxed, allowing for massive consolidation of formerly duplicate routes alongside the closure of countless branch lines. Planners, policy makers, and activists saw these abandonments as a massive opportunity. Railroad right of ways are relatively flat, typically separated from roadway traffic, and post-abandonment were just sitting there – perfect opportunities for trails (as well as new mass transit lines – like the MAX Blue Line in both Washington & Multnomah Counties which runs in former main line railway rights of way). The result: in 1983, an amendment to the National Trails System Act was passed, allowing the government to "railbank" an abandoned right of way – allowing interim trail use while preserving the right of way for potential future railway use[3].

All levels of government, rail companies, and the general public have all profited from this arrangement. Government entities have been able to build widely-used trails for the public without having to resort to eminent domain and expensive property owner litigation, and railroads have been able to retain interests in lightly used lines which may be needed in the future without being forced to maintain them indefinitely. Locally, consulting future trail plans is often an exercise in identifying lightly used branch lines which may be abandoned in the future[4]. This is especially relevant for non-Class I operators, who have fewer financial resources and are often purpose-built from former Class I operator branch lines which the larger railroad had little interest in continuing service on (despite being clearly profitable, as evidenced by the existing operations still present).

[3] Rails to Trails Conservancy, "History of RTC and the Trails Movement."
[4] Metro Parks and Nature, "2023 Regional Trails System Plan."

In Oregon, where railroad building activity was generally lower than in the Midwest or Northeast, fewer duplicate routes were built. Thus, there are far fewer existing rail trails than in states like Wisconsin, where intense competition between three major railroads for passengers between Chicago and the Twin Cities led to numerous duplicate routes, easy targets for abandonment in the mergers and acquisitions era of the 1980s. The longest rail trails in Oregon consist of two former logging-exclusive railroads (which had much lower traffic in the years following the Timber Wars and Northwest Forest Plan) and the Springwater Corridor – an old interurban line between Portland and Estacada (the trail ends at Boring, owing to a trestle fire on the line between Boring and Estacada). However, the massive success, relatively low cost, and history of promoting active transportation in Oregon has meant that trail planning has been of great public importance since the 1983 act.

However successful the 1983 act was in creating value for the public, government entities, and railroads, it has never been popular among private landowners. Locally, the proposed trail on the former Southern Pacific westside main line in Yamhill County was met with lawsuits (including an appeal to LUBA in favor of the farmers against the county[5]), agrarian outrage, and was scuttled in 2020[6]. The refrain from adjacent property owners is usually along the lines of damages that trail users will inflict on their land, and that the repurposing of the right of way from railroad to trail constitutes a taking.

To know if it truly does constitute a taking, the specific historical context of the railroad right of way matters. In the western US, this mostly means determining if it is a pre-1875 or

[5] Oregon Land Use Board of Appeals, "Schrepel v. Yamhill County."
[6] Hannah Ray Lambert, "'Cut Our Losses': Yamhill County Withdraws Multi-Use Trail Plans."

post-1875 railroad. Before 1875, railroads were generally built through direct land grant schemes – a railroad would receive a generous grant of land from the federal government within so many miles of it's line for each segment of track built, with the government retaining interest in every other tract to prevent a monopoly control of one company (leading to the "checkerboard" pattern)[7]. By 1875, the general public was not as keen as it had been 15 years prior on granting huge swaths of land to railroad companies – no doubt influenced by the massive fraud of the Crédit Mobilier scheme uncovered in 1872. Thus, the 1875 act gave companies one year to complete any land grant railroad plans and five years to finish construction, but did (seemingly) little to change the underlying property relationship. This relationship – limited fee – gave the government an interest in the line if the company ceased to use the land for the purposes which it was granted[8].

Seemingly is the key word above. In the years between 1875 and 1941, the courts asserted that this limited fee view of railroad property rights was the intention of the 1875 act. In *Great Northern Railroad Co. v. United States* (1942), the government asserted that a railroad retained no subsurface rights to oil and gas. The Supreme Court agreed, but also decided that the 1875 act granted easements, rather than limited fee ownership, a clear reversal of previous interpretations of the 1875 act[9].

This interpretation was solidified in *Brandt Revocable Trust v. United States* (2014), where a group of landowners sued when the government attempted to railbank an abandoned

[7] Kayla L. Thayer, "The 1875 General Railway Right of Way Act and Marvin M. Brandt Revocable Trust v. United States: Is This the End of the Line?"
[8] Kayla L. Thayer.
[9] Kayla L. Thayer.

line in Wyoming[10]. Heavily leaning on the precedent set in *Great Northern*, the court asserted that since the railroad companies just have easements, when an abandonment occurs on an 1875 act line, the property reverts to the adjacent property owner, rather than the government. Thus, if the government wishes to retain a non-railroad public use on the land, they must pay just compensation for it, as required by the Fifth Amendment. Evidently, what is meant by "railroad use" is likely the factor by which any rail trail will now live or die on. If railbanking is considered to be a legitimate railroad use, then retaining an easement is more straightforward. But if it's not, then the government is potentially liable for a takings claim for every foot of trail built on an abandoned right of way since 1983. This potential liability issue is mentioned by the lone *Brandt* dissenter, Sotomayor, whose dissent hinged at least in part of the fact that this ruling opens up the government to a massive potential liability[11].

For planners, understanding the full ramifications of this case is not straightforward. In Oregon, the primary benefactor of pre-1875 land grants was the Oregon & California (O&C)[12], acquired by Southern Pacific in the 1880s, and now part of Union Pacific. Other lines were primarily built in the post-1875 landscape (excepting the Union Pacific line to Boise), though specific documentation is not readily available (it is accessible via the National Archives, but this is old-school archives in a box in Washington, DC[13]). And it is likely too simple to say that all former O&C rights of way are limited fee while those built by other railroads are easements. The O&C had branch lines that were built after 1875 – including the line from Hillsboro to

[10] Brian Hodges, "U.S. Supreme Court Upholds Property Rights in Rails-to-Trails Case."
[11] Kayla L. Thayer, "The 1875 General Railway Right of Way Act and Marvin M. Brandt Revocable Trust v. United States: Is This the End of the Line?"
[12] Cain Allen, "Oregon and California Railroad."
[13] Southern Pacific Railroad Company, "Railroad Maps Related to the 1875 Act Granting to Railroads the Right-of-Way Through the Public Lands of the United States."

McMinnville which was part of the proposed trail in Yamhill County – but O&C vs. not O&C is still a useful starting point, pending further research.

Thus, rail lines such as the former Oregon Electric (established in 1906) line from Beaverton to Forest Grove (now the MAX from Beaverton to Hillsboro) were certainly built in the post-1875 era. Fortunately for TriMet, a light rail line is unambiguously a railroad use, so there is no specific risk of litigation on this front. However, the remnant line between Forest Grove and downtown Hillsboro was in active use until recently (being formally abandoned in 2023), and is the planned location of the Council Creek Regional Trail – a funded project to build a rail trail between Forest Grover and Hillsboro[14]. Despite the Oregon Department of Transportation (ODOT) owning the right of way, the precedent set by *Brandt* means that property owners along the right of way potentially have reversionary rights if the easement is converted from rail use to trail use[15]. The additional costs of litigation for trail use of the right of way are likely enough to sink this project, and they are certainly enough to sink other planned trails in Washington County seeking to leverage the other lightly-used ex-Oregon Electric lines in the area.

However, the Rails to Trails Conservancy (and common sense) tell us that at least the trail planned between Hillsboro and Forest Grove is likely safe from any *Brandt* related litigation[16], since ODOT owns the underlying land[17]. However, other segments of the Council Creek Regional Trail run over different parts of the Portland & Western network on alignments

[14] Washington County, "Council Creek Regional Trail."
[15] Jonathan Maus, "Big Steps Forward for Carfree Path — and Future MAX Line? — Between Forest Grove and Hillsboro."
[16] Rails to Trails Conservancy, "What the Marvin M. Brandt Case Means for America's Rail-Trails."
[17] Surface Transportation Board, "Portland & Western Railroad, Inc.-Abandonment Exemption-in Washington County, Or."

where ODOT does not own the underlying land. In particular, the segment from Hillsboro to Banks was certainly built after 1875, and is not owned by ODOT. While the Rails to Trails Conservancy asserts that railbanking is enough to prevent takings-based claims on rail trails[18], it seems that is not a unanimous legal opinion[19]. Interestingly, the 2015 trail master plan avoids this corridor[20] – but in the years since it has been added to the Metro Regional Trail Plan[21]. Some of this could relate to changing rail traffic patterns, but an overview of the topology of Portland & Western network (the current rail operator) shows that this specific corridor is a key connection between two otherwise disconnected parts of their network near Banks[22]. As a planner, it's easy to identify a lightly used rail corridor as a location for a future trail, but neither the 2015 Master Plan nor the Metro Regional Trail Plan give any oxygen to the post-*Brandt* legal environment which adds significant complications to trail planning – especially in the Western US where post-1875 rail corridors are the norm. This is a worrying trend. If plans do not engage with the potential that re-using an abandoned rail right of way will require just compensation to property owners adjacent to the right of way, they overstate the benefits and understate the drawbacks (at least from a financial view point).

Given that *Brandt* was an 8-1 decision, any revisions to the easement interpretation of the 1875 act seem unlikely[23]. As mentioned earlier, future trail use of abandoned rights of way thus hinges on if a railbanked trail is indeed a "railroad use". Further questions arise when one

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[18] Rails to Trails Conservancy, "What the Marvin M. Brandt Case Means for America's Rail-Trails."
[19] Kayla L. Thayer, "The 1875 General Railway Right of Way Act and Marvin M. Brandt Revocable Trust v. United States: Is This the End of the Line?"
[20] City of Hillsboro, "Council Creek Regional Trail Master Plan."
[21] Metro Parks and Nature, "2023 Regional Trails System Plan."
[22] Portland & Western, "Portland & Western Network Map."
[23] Kayla L. Thayer, "The 1875 General Railway Right of Way Act and Marvin M. Brandt Revocable Trust v. United States: Is This the End of the Line?"

considers situations like the Springwater on Willamette, a “rails with trails” where a trail is built within the railroad right of way, but adjacent tracks are retained. Expanding the doctrine of what we collectively understand to be a “railroad use” to include utilities and temporary trails means that the *Great Northern* interpretation of 1875 era railroads as easements need not conflict with rail trails as a concept[24], and can prevent inevitable takings-based litigation as railroad abandonments turned trails continue in the coming decades.

Rail trails are popular with the general public, even if recent concerns of camping in the right of way have dominated the zeitgeist around them in recent years. And preserving railroad rights of way for future use has immense economic value – especially if the US is to ever reckon with climate change. However, given that the current court has undeniably ruled that post 1875 act railroad rights of way are indeed easements, and that adjacent property owners have reversionary rights rather than the government, it is now of great public interest on how the courts will interpret “railroad use”. A narrow approach will mean prohibitive costs for governments as they navigate takings-based litigation over the creation of interim non-railroad uses – scuttling promising trails which would greatly benefit the public writ large. A broad approach has more benefits, but absent clearer evidence from the courts, it seems that risk-adverse governments may end up abandoning promising rail trail projects rather than risk future litigation. In either case, planners must consider what this means in practice. Toeing the most risk adverse line is likely to alienate the public – conditioned for decades to associate railroad abandonments with trail projects – but ignoring the legal context that a future trail may operate in is not a road towards practical solutions.

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[24] Kayla L. Thayer.

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