

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

CAPTION: J. PAUL PRESEULT, ET UX., Petitioners V.
INTERSTATE COMMERCE COMMISSION, ET AL.

CASE NO: 88-1076

PLACE: WASHINGTON, D.C.

DATE: November 1, 1989

PAGES: 1 - 51

ALDERSON REPORTING COMPANY
1111 14TH STREET, N.W.
WASHINGTON, D.C. 20005-5650
202 289-2260

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x

3 J. PAUL PRESEULT, ET UX., :

4 Petitioners, :

5 v. : No. 88-1076

6 INTERSTATE COMMERCE :

7 COMMISSION, ET AL., :

8 Respondents. :

9 -----x

10 Washington, D.C.

11 Wednesday, November 1, 1989

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 10:51 a.m.

15 APPEARANCES:

16 MICHAEL M. BERGER, ESQ., Los Angeles, California; on
17 behalf of the Petitioners.

18 BRIAN J. MARTIN, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.;
20 on behalf of the federal Respondent.

21 JOHN K. DUNLEAVY, ESQ., Assistant Attorney General of
22 Vermont, Montpelier, Vermont; on behalf of the state
23 Respondent.

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
MICHAEL M. BERGER, ESQ.	
On behalf of the Petitioners	3
BRIAN J. MARTIN, ESQ.	
On behalf of the federal Respondent	22
JOHN K. DUNLEAVY, ESQ.	
On behalf of the state Respondent	36
<u>REBUTTAL ARGUMENT OF</u>	
MICHAEL M. BERGER, ESQ.	
On behalf of the Petitioners	48

1 light of the fact that the Interstate Commerce Commission
2 cannot approve the conversion of an abandoned railroad
3 right of way to a recreational hiking or biking trail
4 until after it first determines that there is no future
5 railroad need for the particular right of way in question.

6 I would like to turn first, then, to the Fifth
7 Amendment problems in this case.

8 First, what the statute does is clearly to
9 override and change settled state law. The reason, in
10 fact, why this statute was enacted in 1983 as an amendment
11 to the National Trails Act was that trail groups had tried
12 to transform abandoned railroad rights of way into
13 recreational trails before that and found themselves
14 confronted by state courts which would not permit it.

15 The reason that the state courts would not
16 permit it is that what the railroads acquired, usually in
17 the 1800s, was an easement for railroad right of way
18 purposes. And under settled state law in virtually every
19 state in this nation, once the railroad stopped using the
20 right of way for railroad purposes, for running trains,
21 the easement would vanish and the underlying fee title
22 owner would be entitled to full use, enjoyment, and
23 possession of the property.

24 So that state courts were not, based on that
25 body of law, permitting the transformation of abandoned

1 rights of way into some other use because the railroad in
2 a very classic sense owned nothing and therefore could
3 transfer nothing.

4 QUESTION: Mr. Nance -- excuse me -- Mr. Berger,
5 is it possible that the state law that applies to define
6 the property interest of your clients would take into
7 account the federal determinations of public purpose or
8 railway use?

9 MR. BERGER: The major --

10 QUESTION: Is it possible that the state law
11 determination would look back at the federal position?

12 MR. BERGER: I believe it does work into the
13 calculus, Justice O'Connor. The way that it works in is
14 that it's been consistently held both by this Court and by
15 the Vermont Supreme Court that until the Interstate
16 Commerce Commission declares an abandonment of a railroad
17 right of way there is no room for the state law to come
18 into effect. State law, until that point, is preempted by
19 the supremacy clause.

20 And my clients have no quarrel with that state
21 of affairs where the Interstate Commerce Commission,
22 exercising its expertise on the need for rail
23 transportation and the need for particular rights of way,
24 determines whether the abandonment of a right of way is
25 appropriate in a particular case.

1 Once there is an abandonment, however, this
2 Court's opinions are likewise clear that state law then
3 takes over and controls and the ICC and the federal
4 determinations are out of the picture and --

5 QUESTION: Well, here, of course, they may take
6 the position that there still has been no abandonment
7 because of the ultimate reserved potential use.

8 MR. BERGER: The way that that works, Justice
9 O'Connor, is that before the ICC considers whether to
10 approve the negotiations between a railroad and either a
11 state and local agency or a recognized trail organization
12 to transform this right of way into a recreational right
13 of way from a full-blown transportation right of way, the
14 ICC first has to determine that it is appropriate for the
15 railroad to abandon railroad usage of this right of way
16 and that there is neither present nor future public
17 railroad need for the right of way. That's in Section
18 10903, 49 USC, and the statute is very clear.

19 The ICC is also very clear on that. They said
20 earlier this year that in every trails case before they
21 reach the trail question they will already have decided
22 that the public use does not require continued railroad
23 usage and permits the railroad to fully abandon the
24 railroad usage.

25 QUESTION: Even if you are correct so far, I

1 suppose it's arguable that you still have a Tucker Act
2 remedy for your clients to get compensation.

3 MR. BERGER: That is certainly the other
4 question in this case, and I'd be happy to address that
5 since Your Honor is interested in it.

6 The Tucker Act, of course -- and I must confess
7 I find it strange standing here arguing that there is no
8 right on behalf of my clients to recover compensation and
9 find the Solicitor General arguing, oh, yes, they should
10 be getting money for this.

11 The -- analyzing the Tucker Act question gets us
12 into the issue of action Congress authorized the federal
13 government to take. And it may get a little bit
14 technical, but this Court in *Ruckelshaus v. Monsanto*, in
15 the Regional Rail Reorganization Act cases most recently,
16 concluded that the Tucker Act and a suit for compensation
17 in the claims court is available for authorized
18 governmental activity and only for authorized governmental
19 activity.

20 If it's not authorized, then this Court and the
21 claims court treat it as a tort and that's not available
22 for recompense under the Tucker Act.

23 So, we have to examine the statute in this case
24 to determine what is it that Congress authorized anybody
25 to do under this statute. And what we find is that

1 Congress authorized the conversion of abandoned railroad
2 rights of way into recreational hiking and biking trails
3 if that could be done without the expenditure of federal
4 money unless Congress had specifically appropriated money
5 for this program in advance of the acquisition. That's in
6 Section 101 of this statute, and it is as clear an
7 expression of congressional attempt to control expense as
8 I've ever seen.

9 QUESTION: Where will we find Section 101 of the
10 statute? Do you -- do you have handy a ready citation to
11 the appendix or somewhere?

12 MR. BERGER: It --

13 QUESTION: If you don't --

14 MR. BERGER: It's on page 18 of the Solicitor
15 General's brief, Your Honor.

16 QUESTION: Thank you.

17 MR. BERGER: What the statute says, and I'll be
18 happy to read it for the record and for the Court, is
19 "Notwithstanding any other provision of this act,
20 authority to enter into contracts and to make payments
21 under this act shall be effective only to such extent or
22 in such amounts as are provided in advance in
23 appropriations acts."

24 What the intent of Congress was in doing this
25 was to create essentially a voluntary program that would

1 result in no liability to the federal government if
2 voluntary agreements could be worked out among the parties
3 that they thought were involved in these proceedings.

4 The problem is that the way that the statute is
5 set up, the way that the ICC administers it, the people
6 who own the underlying fee interest in these rights of way
7 are not even consulted, let alone brought into the
8 picture.

9 QUESTION: Well, the Solicitor General in his
10 brief right after having set forth that section says that
11 this is not sufficient to withdraw the Tucker Act remedy.
12 The language now is saying that any other provision of
13 this act is a common provision in appropriation bills and
14 is not the clear withdrawal of the Tucker Act remedy that
15 we've required.

16 MR. BERGER: Your Honor, I recognize the
17 Solicitor General has argued that position. It seems to
18 me that what we need to do is to look at what this Court
19 has done with similar provisions in the past and with
20 congressional restrictions on expenditures.

21 The classic case is the case which is cited in
22 the briefs, called Hooe v. United States, a case this
23 Court decided sometime in the '20s, I believe, but was
24 relied on this by Court in the Regional Rail
25 Reorganization Act cases a decade ago to describe and

1 illustrate what this Court meant by authorized
2 congressional action.

3 What happened in Hooe was that the Congress had
4 created the Civil Service Commission, authorized it to
5 both exist and rent quarters. And then it appropriated a
6 sum of money for it to rent those quarters.

7 The Commission went out and rented quarters but
8 instead of renting \$4,000 worth of space like Congress had
9 told it to do, the Commission had a \$6,000 appetite. When
10 the landlord accepted the rent from the Commission, didn't
11 complain about it, never sued over the next couple of
12 years to throw the Commission out of the space that wasn't
13 being paid for, the landlord sued in the claims court and
14 thought that he had either an implied contract from the
15 government to pay for this extra space which was being
16 occupied or he had a constitutional claim for a taking of
17 his property without payment of compensation.

18 What this Court said was, analyzing it under the
19 Tucker Act, when Congress said you could have \$4,000 to
20 rent space, that's what Congress meant. And Congress did
21 not authorize the occupancy of any space beyond what
22 \$4,000 would buy. Therefore, the occupation of additional
23 space by an agency of the federal government was
24 unauthorized governmental activity and at best was a tort
25 that was not compensate -- compensable in the claims court

1 either as an implied contract or as a constitutional
2 remedy for a taking of property by the government. This
3 was not authorized governmental conduct.

4 And, as I said, when this Court decided the
5 Regional Rail Reorganization Act cases a decade or so ago
6 and examined some of the early precursors to this
7 reorganization of the transportation statutes, it quoted
8 from the Hooe case with approval on just what is
9 authorized governmental action and what is not.

10 QUESTION: Well, then, if I own some land with a
11 stream flowing through it and the Corps of Engineers goes
12 on that land and builds a dam and diverts the water, I
13 don't have a Tucker -- an inverse condemnation action if
14 it turns out that action of the Corps of Engineers was not
15 authorized by Congress?

16 MR. BERGER: Your Honor, that's what this Court
17 has said. Candidly, I'm not all comfortable with some of
18 those opinions but I think that they are there. And as I
19 say, as recently as the Regional Rail cases this Court
20 quotes that line of authority -- with approval -- saying
21 that in effect has carved out a branch of actions which
22 the Court says are not actions of the government but are
23 actions by government officials unauthorized by Congress,
24 and the remedy for those actions is not in the claims
25 court.

1 QUESTION: Well, in this case the prohibition of
2 against expenditures of the money may have referred to
3 expenditures other than expenditures for takings, i.e.,
4 staff to negotiate these easements and so forth. I don't
5 think you necessarily can construe this statute as
6 applying only to payments for takings.

7 MR. BERGER: Justice Kennedy, I don't construe
8 it only as applying to that. I construe it as applying
9 across the board to takings as well as to all of the other
10 --

11 QUESTION: But my point is --

12 MR. BERGER: -- and other needs by --

13 QUESTION: -- the language, it seems to me, can
14 be given some effect and still allow a Tucker Act claim.

15 MR. BERGER: Certainly it could be given some
16 effect. I can't quarrel with that. But it seems to me
17 that the statute, as written, doesn't lend itself to that
18 sort of an interpretation. It's a broadly written statute
19 which, it seems to me, is a clear indication of what the
20 slim legislative history in this case reflects. And that
21 is that what Congress wanted to do was to create these
22 trails if it could do so without spending money. If it
23 had to spend money, I don't think Congress was interested
24 in this --

25 QUESTION: Well, what if we agree with the

1 Solicitor General and think you do have a Tucker Act
2 remedy? What do we do in this case? Affirm the judgment
3 on a different ground?

4 MR. BERGER: Well, Justice O'Connor, I certainly
5 think it would have to be with a very different approach
6 than the one that the Second Circuit took because what the
7 Second Circuit said was that under no circumstances do we
8 have a taking here which anybody could remedy.

9 So that if the Court were to agree that there is
10 a Tucker Act remedy available here, there would certainly
11 have to be some dealing with that issue and a clear
12 expression from the Court that that in fact is what the
13 underlying fee property owners in these trail conversions
14 are supposed to be doing and --

15 QUESTION: Well, we also don't know what the
16 Vermont law is as yet, do we?

17 MR. BERGER: Well, it's been cited to the Court
18 but there certainly has been no determination --

19 QUESTION: Right.

20 MR. BERGER: -- in this case. Both the ICC and
21 the Second Circuit simply assumed that Mr. and Mrs.
22 Preseault had the interest that they claimed, that there
23 would be an interference with it, but that it did not
24 present a Fifth Amendment problem.

25 QUESTION: Suppose -- suppose there is a

1 property with a railroad easement on it and a reversion,
2 the reversion to take effect when the easement is no
3 longer used for railroad purposes, and the ICC says, we're
4 pretty sure that this route will be used in 25 years and
5 therefore we do not allow an abandonment. Is that a
6 taking of the property?

7 MR. BERGER: No, Your Honor. That's an entirely
8 different situation. What we would have there, Justice
9 Kennedy, is an application of the existing regulatory
10 scheme as it is intended to operate and as the fee owners
11 underlying these rail easements understand it to operate.
12 And that is that the ICC determines whether in a
13 particular case abandonment of the right of way is
14 appropriate.

15 Please recall that what we have in this case,
16 however, is something which is wholly different. If the
17 ICC decided there would be no abandonment, then the
18 tracks, the ties, the bridges, the trestles, they all
19 remain in place, and the railroad is responsible for
20 maintaining them if it wants to hold on to that
21 possibility of reactivating the rail line in 25 years.

22 What we have in a Trails Act conversion is that
23 the abandonment is in fact approved. What the ICC says is
24 we don't need this property for railroad use anymore, you
25 may go forth, tear up the tracks --

1 QUESTION: Including future railroad use, based
2 on what you've told us earlier that the statute requires?

3 MR. BERGER: The statute is very clear that the
4 ICC in authorizing abandonment must consider whether there
5 is any future railroad need for this property, and if it
6 finds that there is, it must deny the abandonment.

7 In this case, of course --

8 QUESTION: Do railroads ever remove tracks and
9 trestles and ties but keep the right of way because of the
10 possibility of future use, i.e., that they'd then lay down
11 new, more modern tracks and so forth?

12 MR. BERGER: I suppose they could do that, Your
13 Honor, and I'm sure in some cases that in fact happens.
14 Whether it happens in cases where they owned only a right
15 of way for railroad purposes, I sincerely doubt.

16 I think where you have that situation you would
17 find it where the railroad had bought fee title to the
18 right of way area and wanted to clear its tracks off.

19 When the ICC authorizes abandonment, it
20 authorizes full abandonment. When it authorizes a
21 discontinuance in service, the tracks, ties, trestles,
22 bridges all remain in place for reactivation.

23 What we have here in this situation is somewhat
24 of a -- a different angle because the railroad in question
25 never asked anybody for permission to stop running along

1 this route. They simply stopped 14 years ago, tore up the
2 ties and tracks and put them to other use, and when Mr.
3 and Mrs. Preseault decided that they had had enough and
4 they wanted to clear their title to the land and they went
5 to the ICC to ask the ICC to declare a de facto
6 abandonment here, the railroad stepped in and said, oh,
7 yes, by the way, why don't you approve what we did ten
8 years ago.

9 The situation is a little off the norm
10 factually, but all of those facts are really sort of only
11 in broad brush in the record here because no court has
12 ever examined what the facts are in this case.

13 QUESTION: Mr. Berger, do you have any idea how
14 -- how expensive a pig in the poke this statute would have
15 been if -- if indeed it's to be interpreted the way the
16 government says as simply authorizing the taking of land
17 and we'll pay the bill later when it's presented? Do you
18 have any idea how much --

19 MR. BERGER: Justice Scalia --

20 QUESTION: -- how much money you're talking
21 about for all these rights of ways that --

22 MR. BERGER: I honestly don't, Justice Scalia.
23 All I can tell you is that the -- what the record does
24 reflect is that approximately 3,000 miles of right of way
25 are being abandoned every year and that that was one of

1 the reasons why the trail organizations wanted to get
2 Congress involved in this and why there was such a
3 nationwide interest, because this is happening in many
4 states around the country.

5 But at 3,000 miles a year, some of this land is
6 quite valuable. The case that's before the Court today
7 involves a right of way that runs essentially along the
8 lakefront in Burlington, Vermont. It is quite expensive
9 land. The --

10 QUESTION: Do you know what percentage of those
11 -- well, I'm sure you don't -- what percentage contain a
12 reversionary interest? Is that more common or more
13 unusual?

14 MR. BERGER: It is the more common, as I
15 understand what has happened in these cases, Your Honor.
16 The railroads in many cases -- in many states, rather,
17 including Vermont, were essentially forbidden either by
18 statute or by case law from acquiring anything other than
19 an easement for right of way purposes.

20 And even where they weren't, they elected to
21 acquire the lesser estate in the land or the property
22 owners at the time elected to retain some interest in case
23 railroad usage should cease at some future point. That
24 way they would be able to reclaim and reuse what was left.

25 But it is a substantial problem, if in fact

1 there has to be payment, which gets us back into the
2 skimpy legislative history of this program where the
3 Congressional Budget Office examined the rails-to-trails
4 program and the other amendments to the Trails Act in 1983
5 and concluded, with the concurrence of the House committee
6 that examined it, that the funding required for all of
7 these amendments would be, in their words, insignificant.

8 And I would suggest to you that almost any value
9 you placed upon 3,000 miles of right of way every year is
10 going to be something more than insignificant even in the
11 context of determining the federal budget.

12 What we've got here is a program that could in
13 fact result in substantial judgments. We have a statute
14 whereby Congress said it didn't want to spend money unless
15 it approved the expenditure of that money in advance in
16 order to keep some control over what those potential
17 federal expenditures might be.

18 QUESTION: I take it the act would have
19 substantial effect if it were confined to the cases in
20 which the railroad does own the fee.

21 MR. BERGER: The act, in fact, would have no
22 application at all if it were confined to cases in which
23 the railroad owns the fee, Justice Kennedy. It was
24 designed to operate and needed to operate only in those
25 situations where the railroad owned an easement, subject

1 to reversion.

2 The point being, and the ICC's reports bear this
3 out, that where the railroad owns fee title, the railroad
4 has always been free to transfer its interest to a state
5 or local government or a trail organization for any use
6 that it wanted to.

7 QUESTION: Well, but doesn't this statute set
8 forth a policy to encourage the ICC to work with the
9 railroads to do that?

10 MR. BERGER: The statute says it encourages the
11 ICC to do that. In practice what happens is that the ICC
12 simply holds its abandonment hearings. If during the
13 proceedings up -- leading up to abandonment some state or
14 local government agency or a recognized trail group files
15 papers with the ICC indicating an interest in acquiring
16 the property to operate a trail on, then the ICC grants
17 the railroad and that organization 180 days after the
18 determination that an abandonment is appropriate in order
19 to see whether they can negotiate voluntarily any transfer
20 of use to a recreational trail.

21 The ICC has clearly said that its function in
22 this process is purely ministerial, to provide this brief
23 time period for negotiations. And if either of those
24 parties to the negotiation, either the railroad or the
25 trail proponents on the other hand, do not voluntarily

1 wish for whatever reason to consummate an agreement, the
2 ICC has no authority to compel an agreement or even if you
3 listen to their words, to lean very hard on people to
4 convince them that that's what they ought to be doing.

5 It's a purely ministerial ICC action to
6 facilitate voluntary agreement between the railroads --

7 QUESTION: Whereas for this type of land what?
8 What does the ICC do?

9 MR. BERGER: That is the ICC's only role here,
10 Your Honor.

11 QUESTION: No. In a reversionary situation.

12 MR. BERGER: Yes.

13 QUESTION: What does the ICC --

14 MR. BERGER: In a reversionary situation,
15 Justice Scalia, what the ICC does is to first rule that
16 the railroad may abandon the right of way --

17 QUESTION: Right.

18 MR. BERGER: -- and then if some agency has
19 indicated interest in transforming the right of way into a
20 recreational trail, the ICC issues one of two documents.
21 Either what it calls a Certificate of Interim Trail Use or
22 Abandonment, or a Notice of Interim Trail Use or
23 Abandonment. It grants the parties 180 days to negotiate.

24 And if they reach agreement, then they reach
25 agreement, and it's transformed into a recreational trail.

1 If they don't reach agreement, then that certificate
2 automatically, without further ICC action, transforms into
3 a complete Certificate of Abandonment and the railroad
4 goes on its way.

5 QUESTION: In the fee situation as opposed to
6 the reversionary situation, does the Commission show any
7 interest in the consideration that the railroad might
8 receive in connection with the transaction? I assume
9 these must be fairly profitable for the railroads in the
10 fee situation.

11 MR. BERGER: Justice Stevens, the railroads I'm
12 sure have thought this was a wonderful idea. They are in
13 the non-fee situation in the easement situation, selling
14 something that they were willing to simply walk away from.

15 QUESTION: In the non-fee reversionary situation
16 is consideration paid to the railroad by the trail people
17 or the transferees?

18 MR. BERGER: In some cases it is, Your Honor.
19 In this case, since what we have is two government
20 agencies, I'm not sure whether there was consideration
21 paid. In the more standard situation where you have a
22 private railroad negotiating, the records are clear that
23 the railroads are in fact being paid for the transfer of
24 this interest, whereas the underlying fee owners are
25 receiving nothing.

1 QUESTION: Thank you.

2 MR. BERGER: If the Court has further inquiry,
3 I'd be happy to respond. Otherwise, Mr. Chief Justice,
4 I'd like to reserve my time.

5 QUESTION: Thank you, Mr. Berger.
6 Mr. Martin, we'll hear now from you.

7 ORAL ARGUMENT OF BRIAN J. MARTIN
8 ON BEHALF OF THE FEDERAL RESPONDENT

9 MR. MARTIN: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 First, I would like to respond to Justice
12 Kennedy's last question. The statute does apply and has
13 meaning in the fee simple situation and the railroad's
14 incentive in that type of case would be to not abandon the
15 railroad right of way because once it is abandoned, the
16 ICC grants a Certificate of Abandonment. If 20 years
17 later the railroad wants to resume service, they would
18 have to go through the initial application under 10903 of
19 the Interstate Commerce Act for constructing a railroad
20 and getting permission to run a railroad, which involves a
21 more lengthy process.

22 Under this scheme, if they resume service in the
23 future, even in the fee simple situation, all they would
24 have to do is notify the Commission.

25 So, the statute applies to all railroad rights

1 of way. It has incentives to apply in every type of
2 situation.

3 The Court could affirm the decision of the ICC,
4 and this is an action for judicial review, on any of three
5 grounds. We urge the Court to affirm on the Tucker Act
6 ground, that even if there is a taking, there is an
7 available remedy for compensation, which is all the
8 Constitution requires, and that remedy is the Tucker Act.

9 The two other possible grounds would be under
10 Vermont law or, as the Second Circuit held, the statute
11 may never result in a taking in either -- in any case, in
12 any conceivable case.

13 We think it would be inappropriate to resolve
14 the case under Vermont law for essentially three reasons.
15 In the first place, the Commission did not look to Vermont
16 law, did not resolve this case on the basis of Vermont
17 law, and this is --

18 QUESTION: But the court of appeals looked to
19 Vermont law.

20 MR. MARTIN: No, it didn't. It held that the
21 statute may never result in the taking in any case.

22 QUESTION: Well, it said until the ICC issues a
23 Certificate of Abandonment, the railway property remains
24 subject to the ICC's jurisdiction, and state law may not
25 cause a reverter of the property. And it said the Vermont

1 Supreme Court recognized this.

2 MR. MARTIN: Right. The Vermont Supreme Court
3 would not issue an opinion on the title as long as the ICC
4 retained jurisdiction over the right of way if it had not
5 issued --

6 QUESTION: Well, there is no reverter until
7 there is an abandonment. That's what it seems to me the
8 court of appeals said.

9 MR. MARTIN: Well, if it held -- if it gave its
10 views of Vermont law, if -- if that's an interpretation of
11 Vermont law, so be it. But the ICC did not rest its
12 decision on Vermont law.

13 QUESTION: Well, I know, but we're reviewing the
14 court of appeals.

15 MR. MARTIN: You're also reviewing a decision of
16 an agency. This is an action for judicial review. And
17 under SEC against Chenery, the court generally confines
18 its review to the explanation given by the agency for its
19 decision. And the agency does not want to get into the
20 business of deciding title questions under state law. The
21 agency believes that the Tucker Act is available if there
22 is a plausible or compensable --

23 QUESTION: Well, that may be so, but doesn't the
24 -- doesn't the court of appeals have power to review
25 whether or not the ICC has the authority to refuse to

1 issue a Certificate of Abandonment?

2 MR. MARTIN: Certainly.

3 QUESTION: And -- so how do you go about that?
4 Why did it have the authority to refuse to --

5 MR. MARTIN: Well, --

6 QUESTION: -- issue the Certificate of
7 Abandonment?

8 MR. MARTIN: I don't think there's any dispute
9 in this case that the ICC acted in accordance with its
10 authority under Section 8(d) of the Trails Act. Under
11 that statute, the ICC --

12 QUESTION: But it refused to consider the
13 constitutionality of it, I suppose?

14 MR. MARTIN: It did -- the ICC has expressed its
15 opinion that it's constitutional because there is an
16 available remedy, the Tucker Act, for compensation. It
17 did not express an opinion on whether or not there is a
18 taking in this particular case, a taking of property.

19 Whether or not there is, it's still
20 constitutional because the government of the United States
21 will pay if you file and prove your case under the Tucker
22 Act.

23 QUESTION: Under the Tucker Act, Mr. Martin, and
24 whether it's available, how do you deal with the Hooe case
25 that is relied on by Mr. Berger?

1 MR. MARTIN: The Hooe stands for the proposition
2 that the government's action must be authorized. Well,
3 the ICC's decision is authorized. It's explicitly
4 authorized by Section 8(d) of the Trails Act.

5 Therefore, the -- question comes down to is the
6 Tucker Act available? If it is, then the United States
7 will pay for the ICC's action. So it's another way to
8 rephrase the central question, is the Tucker Act
9 available.

10 QUESTION: Well, but the argument they make is
11 that the amendments to the appropriations act withdraw
12 that authority --

13 MR. MARTIN: Exactly.

14 QUESTION: -- when there are no funds. How do
15 you deal with that?

16 MR. MARTIN: Well, that's clearly -- their main
17 argument is that Section 101 of the 1983 amendments is an
18 unambiguous withdrawal of the Tucker Act remedy. And
19 that's the test, the test under the regional rail cases in
20 Monsanto is that it must be an unambiguous withdrawal of
21 the Tucker Act remedy.

22 QUESTION: Excuse me. You say the 1983
23 amendments?

24 MR. MARTIN: Yes.

25 QUESTION: Amendments to the Trails Act?

1 MR. MARTIN: To the Trails Act. The Trails Act
2 was passed in 1968. In 1983 they amended it with trails
3 purposes and railroad purposes. So we're talking about
4 Section 8(d) of the Trails Act which was added by the 1983
5 amendments.

6 QUESTION: Yeah, but the whole program we're
7 talking about here is a 1983 program. Isn't that right?

8 MR. MARTIN: The rails-to-trails program is a
9 1983 program.

10 QUESTION: So effectively this provision is
11 contained in the act that we have before us. It's not --

12 MR. MARTIN: That's right.

13 QUESTION: This provision is just not an
14 amendment to that Act that was adopted later. It's --

15 MR. MARTIN: No. It's --

16 QUESTION: -- part and parcel of the whole
17 package.

18 MR. MARTIN: It's an uncodified provision of the
19 1983 amendments, and the 1983 amendments is the rails-to-
20 trails scheme.

21 QUESTION: Okay.

22 MR. MARTIN: It is not an unambiguous switch to
23 the Tucker Act remedy, however, for two reasons. The
24 provision says that any payment under the 1983 amendments
25 must be made in accordance with an appropriations law.

1 We think, in the first place, that a payment
2 under the Fifth Amendment for a takings claim could not be
3 a payment under the 1983 amendments. The 1983 amendments
4 have --

5 QUESTION: Well, but it says authority to enter
6 contracts shall be effective only to the extent or in such
7 amounts as are provided in advance by appropriation.

8 MR. MARTIN: The ICC has entered into no
9 contract in this case. So the -- provision they're
10 relying on is the authority to make payment. They're
11 saying that the government has no authority to make a
12 payment under the Tucker Act.

13 We think that 101 has nothing to do with the
14 Tucker Act. It has to do with payments made under the
15 1983 amendments. And those amendments did a lot of
16 things. They designated new scenic trails, authorized
17 expenditures for markers for trails and acquisition of
18 other lands. That's what 101 deals with.

19 Also, 101 restates the constitutional command
20 found in Article I, Section 9. No payments may be made
21 without an appropriation of Congress.

22 QUESTION: Suppose that we were to find that
23 this act does effect a taking, if there is a reversionary
24 interest --

25 MR. MARTIN: Uh-huh.

1 QUESTION: -- and suppose that taking of
2 reversionary interests amount to \$20 million a year.

3 MR. MARTIN: Uh-huh.

4 QUESTION: Is it consistent with the
5 congressional intent and with the purpose of this act for
6 the government of the United States to argue that the
7 claims court should dole out \$20 million a year when the
8 Congress thought it wouldn't cost a dime?

9 MR. MARTIN: I think it is consistent, certainly
10 under the principles for reconciling the Tucker Act and
11 other statutes, as this Court's announced in Monsanto.

12 It's consistent for the following reasons. When
13 we first -- finish answering Justice O'Connor's question
14 which also applies to your question -- Congress has
15 appropriated money for takings. There is a permanent
16 standing appropriation, 31 USC 1304, to pay inverse
17 condemnation claims, to pay Tucker Act claims.

18 We're informed maybe the United States pays
19 perhaps \$25 million a year for inverse condemnation claims
20 under statutes such as the National Wild and Scenic Rivers
21 Act and mining statutes, various statutes. Water project
22 acts, agricultural statutes. In all those cases, Congress
23 legislated against the background of the Tucker Act with
24 the knowledge that takings claims would be resolved by the
25 claims court.

1 I think in 1983 Congress did not focus on
2 whether or not there would be a takings. That's why
3 there's nothing in the legislative history. That's the
4 same thing --

5 QUESTION: Well, Congress also said in this act
6 in Section 1247(d) that interim use -- the rail-for-trail
7 interim use -- shall not be treated for any rule of law as
8 an abandonment of the use of such right of way for
9 railroad purposes.

10 MR. MARTIN: Uh-huh.

11 QUESTION: Now, is that an attempt to foreclose
12 any claim, even a Tucker Act claim?

13 MR. MARTIN: No. That is an attempt to override
14 state law, which gives rise to plausible takings claims.

15 Without that provision, once the railroad ceased
16 operating an active railroad and turned it into a bike
17 path, under state law there might be --

18 QUESTION: But it seems like a direct attempt to
19 avoid exactly this situation of a potential Tucker Act
20 claim for a taking.

21 MR. MARTIN: It was a direct attempt to make
22 sure that there would be available bike paths. It's not
23 in reference to the Tucker Act or available compensation.
24 I don't think Congress thought about a taking, and I don't
25 know how many takings there will. The statute has been in

1 effect for six years; there's not been one claim filed
2 under the Tucker Act in the claims court. If there are --
3 I mean, many of these railroad rights of way are held in
4 fee; others are held by easements broad enough to cover
5 another use.

6 And to answer your question of earlier on, many
7 state laws have developed to the point to encourage this
8 type of conversion themselves. So there may be a state
9 law taking. I don't know. But there would not be a
10 federal law taking.

11 That's why we don't know how much the government
12 would be liable in a claims court, but that's what the
13 claims court is for and that's what the judgment to fund a
14 permanent appropriation is for.

15 QUESTION: Mr. Martin, would you tell me what
16 you think this provision does mean if it doesn't cover the
17 situation of action taken under the act which -- which
18 must be compensated for? What does the provision cover
19 when it says, "Notwithstanding any other provision
20 authority to make payments under this act shall be
21 effective only to the extent and in such amounts as are
22 provided in advance in appropriations act"?

23 You mean to make payments that the act names in
24 dollar amounts? Are there payments that are named in the
25 act?

1 MR. MARTIN: Yes. There are a number -- the
2 1983 amendments covered a number of areas that designated
3 new scenic trails, designated markers. It authorized
4 expenditures. It gave money figures. It authorized
5 amounts but it was not an appropriations law.

6 QUESTION: It gave money figures for other
7 purposes?

8 MR. MARTIN: For other purposes --

9 QUESTION: But not for this.

10 MR. MARTIN: -- it gave money figures. For
11 acquiring certain trails as part of the national trails
12 system.

13 QUESTION: So you read under this act to mean to
14 make payments in amounts specifically specified under this
15 act, not to make payments required under this act?

16 I mean, you'll agree that if there is a taking,
17 the payment is required by reason of this act, not by
18 reason of the Tucker Act?

19 MR. MARTIN: By reason of this act and by reason
20 of the Fifth Amendment.

21 QUESTION: Right. Right.

22 MR. MARTIN: I mean, it's probably more natural
23 to say it's required by the Fifth Amendment than by this
24 act. That's the way the courts describe takings claims,
25 as founded upon the Constitution.

1 But even if this 101 would apply to a takings
2 claim, the requirement is an appropriations law.

3 Now, in many cases, many expenditures under the
4 act, I don't know if the funds were appropriated to
5 acquire all this land or to buy the scenic markers and the
6 like. That would -- that requires a separate bill, of
7 course. But there is an appropriation to pay for takings
8 claims.

9 So, the two statutes can be read consistently.
10 And the Court need not struggle too much. And, of course,
11 the test is is there an unambiguous withdrawal.

12 QUESTION: That may be the general test. But,
13 you know, the thing that puzzles me about this case is
14 you'd have to wonder if Congress would have enacted this
15 particular statute if they would have thought they were
16 incurring a very --

17 MR. MARTIN: Exactly.

18 QUESTION: -- substantial liability.

19 MR. MARTIN: We wondered about that too. And
20 Congress has a history of paying for this type of thing.
21 The --

22 QUESTION: The statute seems to be structured in
23 a way with this concept of railroad banking which is
24 somewhat artificial --

25 MR. MARTIN: Uh-huh.

1 QUESTION: -- I would think because I guess most
2 of these right of ways are not going to be used for future
3 railroad -- it looks like it was a devise to avoid
4 financial responsibility.

5 MR. MARTIN: And it may work if state --
6 (Laughter.)

7 QUESTION: But I would think it would be --

8 MR. MARTIN: -- if state law -- state law may
9 have developed to the point where they defer to the ICC's
10 abandonment authority, whatever that is.

11 QUESTION: Yeah. They might buy the Second
12 Circuit's rationale.

13 MR. MARTIN: Right. Right.

14 QUESTION: But it would seem to me that it would
15 be the United States' interest to know as promptly as
16 possible whether this would be considered a taking. And I
17 understand that the interest --

18 MR. MARTIN: This particular case would be
19 considered --

20 QUESTION: Pardon me? Well, assuming there is a
21 reversionary interest -- and we don't really know that yet
22 --

23 MR. MARTIN: Right.

24 QUESTION: -- because I understood the Second
25 Circuit to say we don't reach that question. But -- but

1 if there were one -- and this is kind of a test case for a
2 whole lot of other cases -- I -- I understand your arguing
3 the law, but I would think that the United States would
4 have a great in knowing as soon as possible whether they
5 have this financial obligation or not.

6 MR. MARTIN: Well, there are so many different
7 hypothetical cases that -- that resolving one particular
8 case under Vermont law and under a particular right of way
9 would not help the United States that much.

10 A holding under the Tucker Act would. That
11 would mean the ICC will continue its business and we would
12 litigate takings claims in the claims court where we
13 always do. There we would examine the interests, we'd
14 examine state law, we would examine the federal overlay
15 and the like. So that's the interests of the United
16 States. I wish we could know -- resolve them all in one
17 case but we don't think that we can.

18 The Commerce Clause argument I think is just a
19 variation of the Fifth Amendment.

20 QUESTION: Well, you do agree that state law
21 ultimately will determine the extent and nature of the
22 Petitioners' interest?

23 MR. MARTIN: I think in this case that's true.
24 There are some rights of ways which are granted under
25 federal statutes, so federal law would have something to

1 say with it. And there is also possible argument that any
2 interests acquired since 1983 would have been taken
3 subject to the federal statute we're talking about today.

4 QUESTION: But in this case you would --

5 MR. MARTIN: I think that's right.

6 QUESTION: -- say Vermont law should determine?

7 MR. MARTIN: That's right. Thank you.

8 QUESTION: Thank you, Mr. Martin.

9 Mr. Dunleavy, we'll hear now from you.

10 ORAL ARGUMENT OF JOHN K. DUNLEAVY

11 ON BEHALF OF THE STATE PETITIONER

12 MR. DUNLEAVY: Mr. Chief Justice, and may it
13 please the Court, on behalf of my client, the State of
14 Vermont, and its fellows respondents, the City of
15 Burlington and Vermont Railway, I urge this Court in the
16 event it finds petitioner's taking claim right for review
17 to hold that the Petitioners are not deprived of any
18 property interest by Section 1247(d).

19 In essence, we submit to the Court that Section
20 1247(d) takes nothing and changes nothing.

21 QUESTION: So you agree with the court of
22 appeals?

23 MR. DUNLEAVY: We do, Your Honor. It leaves the
24 Petitioners just where they would be if the ICC had
25 ordered the railroad to keep running.

1 QUESTION: Well, but that's like saying if my
2 aunt were a man, she'd be my uncle.

3 (Laughter.)

4 QUESTION: The ICC didn't order the railroad to
5 keep running.

6 QUESTION: Saying the railroad could have
7 continued using it for rail purposes so you really haven't
8 lost anything. In fact, they didn't, but they might
9 have. Even though you have a deed that says if we stop
10 using it for rail purposes it's yours, you say, well, you
11 haven't lost anything because, yeah, they have stopped
12 using it for rail purposes. But they might not have.

13 MR. DUNLEAVY: Well, we think that --

14 QUESTION: Now, that's not very appealing to me.

15 MR. DUNLEAVY: We think, Your Honor, that the
16 rail banking is itself a legitimate railroad regulatory
17 function. I think one of the basic differences between
18 our view and that taken by the Petitioners in this case,
19 they characterize the transactions by which these rights
20 of ways were assembled as just a series of private
21 transactions.

22 That is really at odds with the history of how
23 the railroads were built. They were built and operated in
24 an atmosphere -- atmosphere of pervasive government
25 regulation. The rights of way were assembled by public

1 service corporations that had the power of eminent domain,
2 certainly one of the most far-reaching powers that the
3 government can delegate to a private corporation.

4 The railroads, from the very beginning, it was
5 understood that they would be regulated by governmental
6 authority, either the states or, as has indeed in more
7 recent years become predominant, the federal government.

8 QUESTION: We're talking as much about the
9 relationship between the railroad and the people from whom
10 they bought the rights of way, as we are between the
11 railroads and the government, aren't we? The railroads
12 did have to go out and condemn this property. And I guess
13 some of them got fee interest and I guess some of them got
14 only easement.

15 MR. DUNLEAVY: Well, Your Honor, I think this
16 goes to the point that, as was held by the Vermont Supreme
17 Court in the Fitzgerald case in 1980 and by this Court in
18 Louisville and Nashville v. Mottley in 1911, that when
19 parties enter into transactions with a railroad
20 corporation which is subject to regulation by Congress
21 under the Commerce Clause those parties are chargeable
22 with knowledge that that regulation can have an effect on
23 the behavior of the railroad in the future.

24 QUESTION: Well, that might be the law of the
25 State of Vermont, in which case I suppose there would be

1 no taking here. But certainly we can't speak for the law
2 of 50 states on this subject.

3 MR. DUNLEAVY: Well, we would submit, Your
4 Honor, that the Commerce Clause has always been there.
5 Congress may not -- it didn't establish the Interstate
6 Commerce Commission until 1888. It didn't start to
7 regulate abandonments until 1920. But when it did start
8 to regulate abandonments in 1920, there were no
9 grandfather clauses for railroads that were constructed
10 prior to that time.

11 QUESTION: Yeah, but suppose that under a given
12 state law -- forget Vermont for a minute -- under a given
13 state law the state would recognize a reversionary
14 interest despite the fact that the ICC had said we're
15 going to put this under rails for trails.

16 MR. DUNLEAVY: Then I think, Your Honor, that
17 that particular --

18 QUESTION: Why isn't that a taking then?

19 MR. DUNLEAVY: I think that particular state's
20 policy would have to yield to the supremacy clause.

21 QUESTION: But the Commerce --

22 QUESTION: Well, I mean, why doesn't the policy
23 have to yield to the Fifth Amendment takings clause? I
24 just don't understand.

25 MR. DUNLEAVY: The --

1 QUESTION: If under state law a reversionary
2 interest would be recognized and the federal government
3 has somehow legislated and acted so as to take that
4 reversionary interest, why isn't compensation required?

5 MR. DUNLEAVY: The action of the federal
6 government, although it could not obviously have been
7 specifically predicted, is occurring in an atmosphere
8 where the possibility of government regulation under the
9 Commerce Clause has always existed.

10 QUESTION: Do you take the position that by
11 acting under the Commerce Clause the federal government
12 can avoid always having any takings problem?

13 MR. DUNLEAVY: Not always, Your Honor.

14 QUESTION: It can put somebody in physical
15 possession of the reversionary interest --

16 QUESTION: Not always.

17 QUESTION: -- and there's no taking because it's
18 under the Commerce Clause.

19 MR. DUNLEAVY: Not always, Your Honor. However,
20 in a situation where we are talking about a railroad that
21 was of indisputably interstate character from its very
22 inception --

23 QUESTION: It can do it for railroads?

24 MR. DUNLEAVY: I think clearly they can.

25 QUESTION: That's an amazing argument.

1 QUESTION: What's your closest authority for
2 this amazing argument in this Court?

3 MR. DUNLEAVY: I think, Your Honor, probably the
4 whole series of cases. First, Colorado v. United States
5 in 1926, which recognized -- its a seminal case on the
6 ICC's abandonment authority. More recently Chicago and
7 Northwestern v. Kalo in 1981. The fact that ICC --

8 QUESTION: Well, but those didn't really deal
9 with the takings problem, did they? Those dealt with the
10 authority of Congress to regulate the railroads, were they
11 not?

12 MR. DUNLEAVY: They go to the issue of --
13 congressional authority under the Commerce Clause. I
14 think some of the -- Colorado v. U.S. I think was
15 addressed to --

16 QUESTION: How about some of the navigational
17 servitude cases?

18 MR. DUNLEAVY: Well, we would suggest to the
19 Court that that situation is strongly analogous.

20 QUESTION: There -- in there they do deal with
21 the question of taking. They say that under some
22 circumstances what you had was not something that was
23 really a property right so there was no taking.

24 MR. DUNLEAVY: Yes, Your Honor. And I think the
25 rationale used there is that although the state of title

1 or the condition of title may vary from state to state,
2 and in fact may be unknown, what is clear is that the
3 property interest of reparation owners were subject to a
4 dominant public servitude from the beginning. And as long
5 as the action of Congress takes place pursuant to that
6 servitude, it does not result in a taking.

7 And I might -- this is not a rare situation.
8 It's something that we encounter in a daily basis on
9 Vermont -- in Vermont. One of our principal state
10 highways is U.S. Route 7 which was -- sections of it were
11 laid out in the 1790s, early 1800s. Obviously, the
12 property owners involved in a condemnation in 1795 did not
13 anticipate the presence of 80,000 pound motor trucks,
14 power lines, fiber optic lines, sewers, guard rails, but
15 they did understand that their land was being appropriated
16 to a dominant public servitude and that the exact use of
17 that would vary depending with changing public needs and
18 also with actions of future governmental authority in
19 regulating the use of that --

20 QUESTION: So even though you say for railroad
21 purposes, it doesn't mean for -- it means for any
22 purposes. That's equivalent to giving a highway easement?
23 Do you think your state could -- could use those highway
24 easements for amusement parks in the future?

25 MR. DUNLEAVY: Well, this --

1 QUESTION: I mean, I don't care whether it's --
2 you know, it's a cart or a truck, it's still a highway.
3 But how is that comparable to saying that when a property
4 owner gives a -- gives an easement saying so long as it is
5 used for railroad purposes. What -- what does it mean if
6 it doesn't mean so long as it's used for railroad purposes
7 --

8 MR. DUNLEAVY: Well, --

9 QUESTION: -- and not for a bike trail or a
10 hiking path?

11 MR. DUNLEAVY: -- Justice Scalia --

12 QUESTION: Or an amusement park?

13 MR. DUNLEAVY: -- I think there are two
14 different issues there. One is, of course, the issue or
15 Vermont law which was not reached by the Second Circuit.
16 It is, incidentally, our position that Vermont law in
17 effect equates highways with railroads and permits a
18 variety of public uses.

19 But I think the point that is immediately
20 presented in this case is the Commerce Clause regulation
21 of railroads. And I don't think one needs to --

22 QUESTION: Well, I don't doubt that when the
23 person gives an easement he knows that the federal
24 government is going to determine the nature of that
25 railroad, whether it can run, whether it can't run,

1 whether the easement has to be abandoned. And I'll even
2 be willing to concede, if you like, that he knows that the
3 federal government might pass an act like this that says
4 in the future that is going to be used for a bike path.

5 But he doesn't know that in the future the ICC
6 is going to be able to override the Fifth Amendment by
7 saying in the future that's going to be used for a bike
8 path even though we have no right to do it and we're not
9 going to pay you.

10 The issue here, it seems to me, is not whether
11 the ICC has authority. Does anybody contest that the ICC
12 has authority to do this if it wants to with payment? The
13 only issue is whether it overrides the Fifth Amendment.
14 And what case do you have that shows that the ICC can
15 displace the Fifth Amendment?

16 MR. DUNLEAVY: Well, I think the -- we don't
17 argue that the Commerce Clause displaces the Fifth
18 Amendment. I think the Court's decisions on that are
19 clear.

20 However, as in the navigational servitude cases,
21 if the governmental action that is being reviewed is
22 occurring pursuant to a servitude to which the property
23 has always been subject, there is no additional taking
24 even though the exact use of it may not have been
25 specifically foreseen.

1 QUESTION: Well, I thought this property -- the
2 easement was acquired many years ago for the purpose of
3 putting on the railroad, that it required acquisition of
4 the easement. Is that right?

5 MR. DUNLEAVY: The property was acquired in 1899
6 under condemnation powers of --

7 QUESTION: Right.

8 MR. DUNLEAVY: -- the Vermont legislature
9 delegated to the railroad.

10 QUESTION: Exactly.

11 MR. DUNLEAVY: But, Justice O'Connor, the record
12 in this case is illustrative. The statute provided that
13 it was for a public use. The legislature reserved the
14 right to pass amendatory legislation and the general
15 statutes in effect at that time even provided that the
16 state could acquire the right of way for public ownership.
17 So the idea of the rigid static approach just --

18 QUESTION: Could acquire it for free?

19 MR. DUNLEAVY: Excuse me?

20 QUESTION: Could acquire it for free?

21 MR. DUNLEAVY: Acquire it from the railroad.

22 QUESTION: Without paying the railroad the value
23 of what was taken?

24 MR. DUNLEAVY: No, they would have to pay the
25 railroad, but they --

1 QUESTION: The takings clause would require
2 that?

3 MR. DUNLEAVY: Yes, it would require that.

4 QUESTION: Yes.

5 MR. DUNLEAVY: I think in conclusion I would
6 urge the Court to hold that any ICC action under Section
7 1247(b) is not materially different from other types of
8 ICC action affecting railroad abandonments.

9 The only thing that is different here is that
10 the Section 1247(d) shifts the burden of rail corridor
11 preservation from the carriers to the trail sponsor.
12 Congress could have taken the heavy-handed approach that
13 said simply, we're going to preserve all rail corridors
14 and we're going to make the rail carriers bear the expense
15 of that.

16 But obviously they made this decision and this
17 is, of course, quite consistent with the general tenor of
18 deregulation over the past few years that they would not
19 do that and that in effect this is a subsidy that
20 transfers the expense to the trail sponsors.

21 It is, nonetheless, a railroad purpose. And the
22 fact that the burden --

23 QUESTION: Are there any regulations or rules
24 that tell the trail sponsor what kind of steps he must
25 take to preserve it for rail purposes? Supposing they

1 start building walls up and down and change it totally?
2 There is nothing to prevent the rail sponsor from doing
3 anything that would make it effective in the --

4 MR. DUNLEAVY: The statute requires them to
5 maintain the right of way and to acknowledge that it's
6 subject to resumption of railroad purposes. I don't think
7 there is anything -- any specific regulation. In this
8 particular instance, the lease requires them to maintain
9 it and the ICC acknowledged that fact in its decision.

10 QUESTION: I see.

11 MR. DUNLEAVY: We submit that the rule urged by
12 Petitioners is not only impractical but analytically
13 unsound in that it ignores the role of federal regulation
14 under the commerce clause as an integral part of the
15 burden of railroading for which the Petitioners'
16 predecessors in interest were fully compensated in 1899.

17 Thank you.

18 QUESTION: It's a curious evolution of
19 federalism that a state would be before us arguing that
20 under the Commerce Clause the federal government can take
21 property rights that a state could not itself take.

22 MR. DUNLEAVY: Well, contrary, Your Honor, to
23 the Petitioners' suggestion, I think the record is clear
24 that they had heard of the Commerce Clause in Vermont in
25 the 19th century.

1 Thank you.

2 QUESTION: Thank you, Mr. Dunleavy.

3 Mr. Berger, do you have rebuttal? You have
4 three minutes remaining.

5 REBUTTAL ARGUMENT OF MICHAEL M. BERGER

6 ON BEHALF OF THE PETITIONERS

7 MR. BERGER: Thank you, Your Honor.

8 I would like to touch briefly on the question
9 raised by the Solicitor General --

10 QUESTION: What remedy is it you are seeking?

11 MR. BERGER: We are seeking invalidation of the
12 statute, Justice White. That is our belief -- that the
13 statute, as written, cannot constitutionally stand.

14 QUESTION: And therefore there is a -- therefore
15 the ICC's decision has to be turned aside?

16 MR. BERGER: Both the Second Circuit and the ICC
17 need to be reversed because they were operating under the
18 assumption that this was a valid statute which authorized
19 this sort of a transmogrification of private property into
20 public property without even consulting the property
21 owners.

22 QUESTION: But at some point you can't win
23 unless and until you show that some property has been --
24 that your client has a property interest.

25 MR. BERGER: One that's done, Your Honor, that's

1 correct. We're going to have to go back to court. My
2 clients began this litigation, as the record shows, as a
3 quiet title litigation in the Vermont state courts. They
4 were unable to reach the merits of that action because the
5 Vermont Supreme Court said you first have to get the ICC
6 to sign off on its jurisdiction.

7 So we came to the ICC to try to get the ICC to
8 sign off and what they did was to convert the property
9 into a bike trail for the City of Burlington.

10 If we can get the appropriate ruling from this
11 Court which will free us of those constraints placed by
12 both the Second Circuit and the ICC, then we'll be able to
13 find out under Vermont law --

14 QUESTION: Of course, if the --

15 MR. BERGER: -- what we have.

16 QUESTION: -- we wouldn't be facing any -- much
17 of a problem here if it had been decided in Vermont that
18 your client didn't have a property.

19 MR. BERGER: If they had reached that issue and
20 made that decision, the case wouldn't be here. I'd have
21 been sort of startled had they done that, given what I
22 know of Vermont law.

23 QUESTION: So we don't have to -- really have to
24 decide whether your client has a property interest or not?

25 MR. BERGER: I think, Your Honor, that's

1 correct.

2 QUESTION: And so we don't really have to decide
3 Vermont law at all. We can just --

4 MR. BERGER: I don't believe that's here. What
5 both the --

6 QUESTION: For purposes of this case we assume
7 that he has a property interest.

8 MR. BERGER: That is my understanding, Justice
9 Scalia, of the posture of this case. That both the ICC
10 and the Second Circuit mad that assumption and based their
11 rulings on the assumption.

12 QUESTION: Of course, we might want to avoid
13 dealing with some of these issues by certifying the
14 question to the Vermont Supreme Court.

15 MR. BERGER: If the Court wished to take that
16 action, of course, that --

17 QUESTION: We could avoid all sorts of
18 constitutional arguments.

19 (Laughter.)

20 MR. BERGER: Perhaps they would be delayed, Your
21 Honor, rather than avoided, if that were done. And the --

22 QUESTION: Well, no. Not if the Vermont court
23 said there is no property interest here, the reversion
24 doesn't ripen until there is an abandonment.

25 MR. BERGER: Well, that's where we were before

1 and that's why we need the ICC's --

2 QUESTION: I know. I know.

3 MR. BERGER: -- ruling on whether there is an
4 abandonment or not.

5 QUESTION: I know. But we still -- if the
6 Vermont Supreme Court said that no reversionary interest
7 arises until there is -- until the ICC has issued a
8 Certificate of Abandonment --

9 MR. BERGER: The ICC has effectively done that,
10 Your Honor, subject only to this Trails Act conversion
11 which takes place after they decide that abandonment is
12 appropriate. As they say, in every Trails Act case they
13 first decide that they don't need this property for
14 railroad use. Then they reach that issue.

15 So, the ICC has reached that question --

16 QUESTION: Thank you, Mr. Berger.

17 MR. BERGER: Thank you.

18 CHIEF JUSTICE REHNQUIST: The case is submitted.

19 (Whereupon, at 11:50 a.m., the case in the
20 above-entitled matter was submitted.)

21

22

23

24

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 88-1076 - J. PAUL PRESEULT, ET UX., Petitioners V. INTERSTATE COMMERCE COMMISSION,
ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Alan Friedman

(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHALS OFFICE

'89 NOV -9 P12:02