

Federal Courts Hold the United States Responsible for Taking Private Property When Converting Railroad Rights of Way to Recreational Trail Use

Landowners should be aware that when a railroad right of way is turned into a hiking and biking trail, if the conversion is being made under the federal National Trails System Act, 16 U.S.C. § 1247(d), the United States has consistently been held liable for taking private property.

This means that if a private individual or business owns property next to or under a railroad corridor, they may be entitled to just compensation for the taking of their property for unauthorized use.

Every federal court that has addressed the question of a Fifth Amendment "taking" under these circumstances in cases brought by Ackerson Kauffman Fex, PC, has gone on to hold the United States to be liable for taking private property. Additionally, in some pending cases brought by Ackerson Kauffman Fex, the United States has admitted to liability even without a court judgment.

The legal issues involved in proving the Government's liability, however, are quite complex. Under United States Supreme Court precedent, establishing liability hinges on a multi-step analysis which includes determining whether the original railroad interest was such that the property owner can claim a property interest in the underlying land. Additionally, questions concerning the scope of the original railroad interest, other related state or federal laws, and federal takings jurisprudence also come into play. Finally, a minority of state law cases exist as precedent for the US Government to argue for a different outcome, which may set traps for the unwary litigant.

Court decisions in which federal courts have held the United States liable include *Schneider v. United States*, 2008 WL 160921 (D. Neb., January 15, 2008) (holding US liable for converting federally-created right of way to trail use); *Hash v. United States*, 403 F.3rd 1408 (Fed. Cir. 2005) (same); *Schmitt v. United States*, 2003 WL 21057368 (S.D. Ind. 2003) (holding US liable for converting state-created easements to trail use); *Schneider v. United States*, 2003 WL 25711838 (D. Neb. 2003) (same); *Swisher v. United States*, 176 F.Supp.2d 1100 (D. Kan. 2001) (same). Additionally, following victories on this issue in federal courts, the United States has stipulated to liability in two other class actions, *Bywaters v. United States*, 6:99-cv-00451 (E.D. Tex.) and *Lowers v. United States*, 1:99-cv-90039 (S.D. Iowa).

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