

**Testimony of**

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**before the**

**COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE  
SUBCOMMITTEE ON RAILROADS, PIPELINES, AND HAZARDOUS MATERIALS  
UNITED STATES HOUSE OF REPRESENTATIVES  
HON. CORRINE BROWN, CHAIR**

**Hearing on**

**HISTORIC PRESERVATION OF RAILROAD PROPERTY AND FACILITIES**

**June 5, 2008**

Thank you for the opportunity to share the views and concerns of the National Trust for Historic Preservation regarding the significance and preservation of historic railroad property and facilities. My name is Elizabeth Merritt and I am Deputy General Counsel for the National Trust, where I have served as in-house counsel for more than twenty-four years.

**Background on the National Trust**

Congress chartered the National Trust in 1949 as a private nonprofit organization to “facilitate public participation” in historic preservation, and to further the historic preservation policies of the United States. 16 U.S.C. §§ 461, 468. With the strong support of our 287,000 members around the country, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. In addition to our eight regional and field offices throughout the country, and our Washington, DC headquarters, we have 29 diverse Historic Sites open to the public around the country.

The Chairman of the National Trust has been designated by Congress as a member of the Advisory Council on Historic Preservation, the independent federal agency whose regulations govern the implementation of Section 106 of the National Historic Preservation Act (NHPA). See 16 U.S.C. §§ 470f, 470i(a)(8); 36 C.F.R. Part 800. The Advisory Council works with other federal agencies, including the Department of Transportation, to assist them in fulfilling their responsibilities under the NHPA.

The National Trust has had a long-standing interest in transportation issues, and we have been a strong defender of federal laws such as Section 4(f) of the Department of

Transportation Act, 49 U.S.C. § 303, and Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f, which protect historic resources. In fact, during the recent reauthorization of the federal surface transportation program that led to the passage of SAFETEA-LU,<sup>1</sup> the National Trust was actively involved in successfully opposing amendments to weaken Section 4(f), and in developing consensus-based proposals with state departments of transportation that provided carefully tailored modifications to the law, with safeguards and monitoring.

### **Proposed Exemption for Railroads from Historic Preservation Laws**

The Alaska Railroad and the North Carolina Railroad would like to exempt historic railroad corridors and related properties and facilities from federal historic preservation laws, relying on the recent provision in SAFETEA-LU addressing the Interstate Highway System, 23 U.S.C. § 103(c)(5). The National Trust strongly opposes such an exemption. It would be inappropriate, unnecessary, unprecedented, and would inevitably encourage additional exemption requests. Existing historic preservation law provides mechanisms that are more than adequate to address the concerns of the railroads, and we have seen no evidence that these administrative tools would not resolve the railroads' concerns. The specific examples raised by the railroads simply do not seem to warrant Congressional intervention. Congress should ensure that the available administrative mechanisms have been fully employed before even considering a proposed exemption.

### **Historic Railroad Corridors as an Iconic Part of Our Nation's Heritage**

As Congress declared in the National Historic Preservation Act of 1966, preservation is essential to the American identity—our historical and cultural foundations orient our people and reflect the spirit and direction of our nation. Few institutions have been more influential in shaping the American identity than the nation's railroads. More than mere crossroads of commerce, the corridors and associated properties of American railroads have literally and figuratively determined where we as a nation are going and how we got there.

In 1832, when Charles Carroll of Carrollton laid the first stone for the new Baltimore & Ohio Railroad (now preserved in the B&O Railroad Museum in Baltimore), the venerable patriot hailed the event as second in importance only to his signing of the Declaration of Independence—if indeed second to that. For the next century, the railroads, ever expanding in capacity, size, speed, and efficiency, came to symbolize the uniquely American combination of uncanny ingenuity, abiding optimism, hard work, and awesome achievement. Just as their presence is an integral part of our physical landscape, the railroads are psychologically intertwined with the landscape of our cultural memory.

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<sup>1</sup> The Safe, Accountable, Flexible, Efficient Transportation Equity Act – A Legacy for Users, Pub. L. No. 109-59 (Aug. 10, 2005).

Engines of manifest destiny “fired with the passion of purposeful endeavor,”<sup>2</sup> the railroads opened the American west. As our cities and towns grew along the trunks and branches of the rail lines, their location was determined by how far a locomotive could travel between servicings. Railroad lines conquered the most inhospitable territory seemingly by sheer force of will; the preserved rail line clinging to the canyon of the aptly-named River of the Lost Souls<sup>3</sup> in Colorado, for example, is a testament to the great sacrifice of life and limb of thousands of immigrant workers drawn to America by the promise of building the railroad.

A now-lonely sign in the Utah desert proclaims the unthinkable feat “Ten Miles of Track Laid in One Day.” This achievement, like countless other triumphs of engineering common to American rail corridors, was the fruit of back-breaking labor. The miserable conditions under which the rail lines were built epitomized work on the early railroads generally and stood in stark contrast to the lives of the railroad barons—America’s first class of the super wealthy. The rail lines themselves became symbols of a growing disparity of wealth and power—the disenfranchised were said to live “on the other side of the tracks.” This disparity, along with an outcry over working conditions and the exploits of the railroad companies generally, gave rise to modern labor organizations and much of our modern system of federal regulation. The rail corridors we seek to protect provided the battleground for the infamous and bloody strikes that defined the early labor movement.

The muscle provided by the nation’s vast natural resources and manpower relied upon the circulatory system of America’s rail lines. Without the vital connection of the rail lines, people could not get to work and resources could not be extracted, processed, and put to use. Consequently, rail lines were prize targets during the Civil War and both World Wars. Recognizing the pivotal function served by rail corridors, the federal government assumed responsibility for railroad operation at several times in American history, long before the creation of Amtrak and Conrail. The Nazis also recognized the importance of American rail lines to the war effort, sending a group of saboteurs to the United States in 1942 to destroy selected rail corridor targets.

It is appropriate that the preservation of railroad resources has always been a priority in federal law and policy, as exemplified by our nation’s railbanking laws, 16 U.S.C. § 1247(d). In addition, many historic rail lines have been preserved for heritage tourism. The Alaska Railroad, for instance, relies heavily on tourists attracted by the historic and scenic beauty of its line. The highly successful White Pass and Yukon (also in Alaska) and the Great Smokey Mountains Railway (North Carolina) serve as additional examples of historic rail lines as tourism destinations that in turn function as regional economic generators.

Historic railroad properties have also played an iconic role in the development of our

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<sup>2</sup> State *ex rel.* Smith v. Kemp, 261 P. 556, 558-59 (Kan. 1927) (used by the court in context of upholding the preservation of lands associated with the Santa Fe and Oregon Trails via an eminent domain action).

<sup>3</sup> Río de las Animas Perdidas, traversed today by the Durango and Silverton Narrow Gauge Railway.

historic preservation laws and the preservation movement itself. It was against the backdrop of the destruction of New York’s Pennsylvania Station that Congress passed the NHPA, which forms the foundation of our current federal preservation policy. And the threat to another railroad property—Grand Central Station—led to the Supreme Court decision that undergirds historic preservation regulation as a legitimate governmental objective at all levels: *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

In the years since the destruction of Pennsylvania Station, some 2,486 rail-related properties have been added to the National Register of Historic Places, representing about three percent of all current National Register listings. Actual National Register listings represent just a fraction of the properties that are eligible for the National Register, but a review of those rail-related properties provides a useful overview of the kinds of railroad resources that are significant to our heritage.

Nearly every element of railroad infrastructure, either individually or collectively, is represented on the National Register. Of those properties listed on the Register, approximately 1,500 are stations or depots built to service passengers, freight, or both, and approximately 525 properties are listed as historic districts. But there are also other structures that, while essential to the operation of the railroad and historically important, may be less visible than a centrally located station or depot that was often the cultural heart of the community. Among these supporting structures identified on the National Register are roundhouses (12), enginehouses (4), and hotels (10). Approximately 395 are engineering features of the railroad right-of-way, including bridges (295), tunnels (51), viaducts (19), trestles (12), underpasses (9), inclines (7), culverts (4), overpasses (3), and embankments (2). In addition, the National Register includes 19 rail lines that are listed as corridors or entire railways, including the right-of-way and all associated property. (See Exhibit A.) These are scenic tourist railroads or abandoned rail corridors that qualify for railbanking as trails. Given that the essence of the railroad both now and historically has been to connect one place to another, it is fitting that the corridors themselves—the connection as well as its inherent elements—are recognized as historically significant.<sup>4</sup> We are submitting for the record a printed list of well over 100 pages, which includes all historic properties in the National Register whose significance is railroad-related.

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<sup>4</sup> Railroad corridors can have a historical significance independent of the rail, ties, structures, signage, and signals that comprise it. See *Friends of the Atglen-Susquehanna Trail (FAST) v. STB*, 252 F.3d 246 (2001) (the rail corridor as a whole, beyond its individual bridges and other elements, was deemed by the Keeper of the National Register to be historically significant). The *FAST* case also showed that the piecemeal nomination of individual elements of a rail corridor is ineffective and inefficient in preserving the historic rail corridor itself.

## **Reasons Why the National Trust Opposes an Exemption for Railroad Properties**

### **1. *Congress should not create a legislative exemption for a specific type of historic resource.***

Legislation is simply too blunt an instrument to achieve the desired balance between preserving historic resources and the efficient and responsible use of those resources. Allowing a broad exemption from historic preservation laws for the American railroad industry would not only endanger countless resources core to the American identity, but it would also set a potentially dangerous precedent. There is nothing to suggest that railroads are disproportionately burdened or constrained by historic preservation review or by the National Register-eligibility of their corridors—most of which were obtained by federal government grants in the first place. Absent a clear showing of an extraordinary burden that cannot be resolved administratively, there would be little to prevent other entities from seeking similar waivers.

Because many corridors date back to the time of the industrial revolution, they are not only comprised of characteristic features of significant historic import, they themselves are historically significant as well-established pathways. A wholesale exemption would unnecessarily ignore this value, and would foreclose the possibility of protecting the corridor itself, for example, in the context of railbanking.

### **2. *Federal dollars and permits should not be used to destroy our nation's heritage without consideration of less harmful alternatives.***

The whole purpose of the National Historic Preservation Act and Section 4(f) of the Department of Transportation Act is to ensure that federal resources are not used to harm historic properties without the consideration of impacts and alternatives. Of course, National Register listing or eligibility does not prevent private property owners from harming or even destroying their own historic properties, as long as no federal funding or federal permits are involved. But where taxpayer dollars are awarded, or federal regulatory authority is invoked, those public benefits must be conditioned on compliance with our federal laws that require historic preservation and other policies to be included in the process of planning specific projects.

### **3. *The proposed exemption is overly broad.***

The sweeping breadth of the proposed exemption could potentially encompass the entire national network of railroads, including urban mass transit systems, not to mention historic depots and historic bridges, many of which have a high level of significance in their own right. The proposed exemption would potentially exclude from consideration virtually all conceivable property relating to the railroad—not merely the trackbed, the rails, ties, etc., but all “properties and facilities” of “railroad[s]”.

The statutory definition of “railroad” provided by 49 USC § 20102 does little to narrow the broad exemption from historic resource review threatened by the proposed amendment. Section 20102(A) defines “railroad” as “any form of nonhighway ground transportation that runs on rails or electromagnetic guideways,” specifically including language referring to transportation “systems,” which would include a broad array of appurtenant—and likely historic—properties.<sup>5</sup>

Indeed, the statutory provision that excludes urban mass transit systems from the definition of railroad—49 U.S.C. § 20102(B)—is specifically omitted from the proposed definition, thus apparently expanding the scope of the proposed exemption to include all urban mass transit systems, many of which are highly significant historically, such as those in Boston, New York, and Chicago. Ultimately, the broad and ambiguous scope of the term “railroad” could sweep within the proposed exemption potentially all projects funded by the Federal Railroad Administration and the Federal Transit Administration.

#### **4. Effective administrative mechanisms are available to address the railroads’ concerns.**

**National Historic Preservation Act.** The regulations issued by the Advisory Council on Historic Preservation to implement Section 106 of the National Historic Preservation Act provide several administrative mechanisms for addressing complex issues presented by categories of historic properties or federal actions that may need special treatment. Many of these administrative tools would be ideally suited for addressing the kinds of concerns raised by the railroads. For example, these mechanisms include the following:

- “Programmatic Agreements” (PAs), which streamline or eliminate review for minor actions that have little potential to affect historic resources. 36 C.F.R. § 800.14(b). For example, the North Carolina DOT has an existing PA signed in 2007, which provides a streamlined review process for “minor” transportation projects throughout the state. Why couldn’t such a PA be developed specifically for rail projects? Indeed, the Alaska

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<sup>5</sup> While the most restrictive meaning of “railroad” in Black’s Law Dictionary refers to the track itself—“the road or way on which iron or steel rails are laid for wheels to run on”—the term also commonly refers to the entire enterprise operating on those rails, *Bradley v. Degnon Contract. Co.*, 120 N.E. 89, 91 (N.Y. 1918), including all the structures necessary to its operation. See *U.S. v. Denver & Rio Grande Ry. Co.*, 150 U.S. 1, 13 (1893) (“railroad” includes all structures necessary and essential to its operation, including the necessary appurtenances of ground adjacent to the right-of-way, station buildings, depots, machine shops, side tracks, turnouts, water tanks, etc.); *Smith v. Northern Pacific Ry. Co.*, 148 P. 393, 394 (Mont. 1915) (“railroad” incorporates all necessary appurtenances, as contemplated by Federal land grants to the railroads, including all structures, equipment, and machinery necessary to their operation). See also *Omaha & Council Bluffs Street Ry. Co. v. I.C.C.*, 230 U.S. 324, 334 (1913) (construing “railroad” to include “all bridges and ferries used or operated in connection with any railroad, and all the road in use by any corporation operating a railroad . . . , switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of . . . persons or property . . . , and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property”) (quoting 24 Stat. at L. 379, ch. 104, as amended 34 Stat. at L. 584, ch. 3591).

Railroad has a PA in place that allows for the replacement of all of its historic timber bridges—further evidence that Section 106 is not an obstacle to necessary upgrades.

- “Program Comments” issued by the ACHP, which comment on an entire category of undertakings in lieu of individual reviews. 36 C.F.R. § 800.14(e). These have been used extensively by the Department of the Defense to accomplish Section 106 compliance for enormous numbers of historic properties. For example, in 2006 the ACHP issued program comments to address tens of thousands of historic ammunition production and storage facilities managed by the Defense Department nationwide. And in 2002 the ACHP issued program comments to address all Capehart-Wherry Era military housing nationwide.
- “Exempted Categories” issued by the ACHP, pursuant to 36 C.F.R. § 800.14(c). These carefully crafted and limited exemptions have been used recently by the Federal Highway Administration for the Interstate Highway System in 2005, and by the Federal Energy Regulatory Commission for historic natural gas pipelines in 2002. While we are not at all persuaded that an exemption is appropriate for railroad properties, at the very least it should be the ACHP and the Department of Transportation, rather than Congress, undertaking the complex task of attempting to define an exemption that would not sweep too broadly.

These administrative remedies should be given a chance to work, rather than having Congress address with a hatchet what should be addressed through a much more delicately crafted approach.

**Department of Transportation Act.** In addition to Section 106 of the National Historic Preservation Act, Section 4(f) has also been implemented through existing mechanisms for streamlining, and these have not been brought to bear in this case. For example, Section 6009 of SAFETEA-LU included a new exemption for “*de minimis*” impacts on resources protected by Section 4(f). This was a carefully crafted, consensus-based amendment, which the National Trust was actively involved in developing. We believe the “*de minimis*” exemption could be used to address many of the railroads’ concerns regarding Section 4(f). In addition, the Federal Highway Administration has adopted a number of “Programmatic Section 4(f) Evaluations,” which have been used to streamline review for Historic Bridges, Minor Actions, etc. The FHWA has also implemented detailed regulations, just recently revised at 23 C.F.R. Part 774, and a Section 4(f) “Policy Paper,” to provide guidance to applicants regarding Section 4(f). We have seen no reason why these existing mechanisms would not address the concerns of the railroads, and they should certainly be fully evaluated before a statutory exemption is considered.

The fact that many of our nation’s historic railroad corridors are actively and heavily used for freight and passenger traffic should not be a reason for exempting these resources from federal historic preservation laws. Other transportation agencies manage historic transportation corridors that are in active use, and manage them in a way that respects their

historic character by complying with Section 106 and Section 4(f). For example, the list of significant elements of the Interstate Highway System, which have been singled out by the State DOTs for their historic importance, and remain subject to historic preservation laws, includes the following historic road corridors, which are active and heavily traveled:

Pennsylvania Turnpike	(160 miles)
Columbia River Highway, OR	(60 miles)
Alligator Alley, FL	(30 miles)
Vail Pass, CO	(15 miles)
Glenwood Canyon, CO	(12 miles)

In addition to these examples from the Interstate Highway system, historic parkways such as the Baltimore-Washington Parkway (MD), George Washington Parkway (VA), Rock Creek Parkway (DC), Merritt Parkway (CT), Bronx River Parkway (NY), etc. are all actively used transportation corridors that are eligible for the National Register as entire corridors, and are managed in compliance with section 106 and Section 4(f).

In short, there are well-proven administrative mechanisms that would allow for the protection of rail corridors and associated historic properties while also allowing the full use of those resources.

### ***5. Reasons Why the Interstate Highway Model Won't Work for Historic Railroads***

The limited exemption in SAFETEA-LU for the Interstate Highway System, which is cited in the proposed amendment as a model for a railroad exemption, is a poor prototype with respect to protecting historic railroad resources.

- The national railroad network, which encompasses 270,000 miles, is vastly more extensive than the Interstate Highway network, at 47,000 miles, with an array of historic resources that is much greater in number, diversity, and significance than those covered by the Interstate Highway exemption. This proposed exemption would eliminate environmental and historic review for all rail corridors throughout the country, including thousands of historic bridges, historic rail corridors, and potentially historic depots and other facilities as well. In addition, all historic rail corridor abandonments would be exempt from historic preservation review.
- Furthermore, the process for creating a list of individual elements with special significance, which would essentially be “exempt from the exemption,” would be much more difficult for railroad corridors than for the Interstate Highway system. The national network of railroad infrastructure is largely privately owned and controlled. Because railroad historic resources are numerous and scattered, surveys would be required to identify the historic properties and features with special significance. Therefore, in contrast to the role of the State DOTs, who own and control the Interstate highway system, and had already largely inventoried their historic transportation

infrastructure prior to the Interstate exemption, the process of gathering information for the list of significant individual elements of the railroad system would be highly unreliable, time-consuming, and costly.

- In the case of the Interstate Highway exemption, the Federal Highway Administration worked closely with the Advisory Council on Historic Preservation to comply with Section 106 *before* coming to Congress to seek a Section 4(f) exemption. By contrast, the railroads and the Department of Transportation have not even initiated those discussions.

## **Conclusion**

America's railroad corridors and associated historic properties are essential to the American identity—its culture, history, and economy, past, present and future. In the absence of the protections afforded by Section 106 and Section 4(f), those corridors have no meaningful procedural guarantees for preservation consideration. No compelling showing has been made that the current preservation scheme is unduly burdensome on the railroads, or that a change in such a scheme is warranted. In particular, the Interstate Highway System is an inappropriate model for an exemption.

While legislation is too blunt an instrument to achieve the desired balance between preserving historical rail resources and the efficient and responsible use of those resources, there are well-proven administrative mechanisms either currently in place or available and not yet used, which could address the railroads' concerns. We are confident that any and all concerns the railroads may have can be appropriately addressed through a remedy arrived at through such a consensus process, and we respectfully ask Congress for the opportunity to do so. The National Trust stands ready and willing to participate in that process.