Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986

Senate Bill 118 (as enacted) **PUBLIC ACT 39 of 2017**
Sponsor: Senator Goeff Hansen
Senate Committee: Outdoor Recreation and Tourism
House Committee: Tourism and Outdoor Recreation

Date Completed: 7-3-18

RATIONALE

Rail-banking occurs when a railroad company and another entity (a trail sponsor) enter into an agreement to use an out-of-service railroad right-of-way for interim use as a trail until the company needs the corridor again for rail service. This approach allows individuals to use the corridor for recreational purposes, while preserving it in the event additional railroad capacity is needed. One aspect of the agreement is the allocation of liabilities arising out of the use of the corridor for recreational purposes. Federal law has generally predicated this type of use of a railroad corridor on the trail sponsor's willingness to assume full legal liability arising out of the transfer or use of the corridor. Evidently, until 2012, notice of agreements reached between railroads and trail sponsors for interim use did not need to be submitted to Surface Transportation Board, the Federal agency responsible for administering the program.

In 2012, the Board amended its rules to require the trail sponsor and railroad to notify the Board when an agreement is reached, and include a certification that the agreement requires the sponsor to fulfill the assumption of liability requirements. As a result, according to some, the Michigan Department of Natural Resources would have been constitutionally precluded from entering into such an agreement and, absent a statutory change, would have had to end its rail banking program. In addition, a 2012 Michigan Court of Appeals opinion contradicted a Federal court ruling that trail sponsors had evidently relied upon to limit their liability for injuries incurred by people using the trail for recreational purposes.

To address these issues it was suggested that amendments to the Natural Resources and Environmental Protection Act should prescribe a process for the assumption of a railroad's liability and provide for limited liability on trails.

CONTENT

The bill amended Part 721 (Michigan Trailways) and Part 733 (Liability of Landowners) of the Natural Resources and Environmental Protection Act to do the following:

- **Specify that if the Department of Natural Resources (DNR) enters into negotiations with a railroad for the Department to become a trail sponsor under Federal law, the DNR must comply with a Federal regulation requiring it to assume responsibility for any liability arising out of the transfer.**
- **Specify that a cause of action does not arise for injuries to a person against a person with whom the owner, tenant, or lessee of land contracted to construct, maintain, or operate a trail or other land improvement used by the injured party, unless the injuries were caused by the gross negligence or willful and wanton misconduct of the contractor.**
- **Specify that a cause of action does not arise for injuries to a person against a railroad that owns or owned or operated a rail line right-of-way that has been dedicated for**

interim trail use, for injuries that occur after the dedication and before reactivation for rail service.

The bill took effect on August 21, 2017.

Assumption of Liability, Pure Michigan Trailways

Part 721 allows the DNR Director to designate a trail as "Pure Michigan Trail" if it meets certain requirements. The Department also may do any of the following: a) grant easements or use permits or lease land owned by the State that is being used for a Pure Michigan Trail for a use that is compatible with the use of the Pure Michigan Trail; b) enter into contracts for concessions along a State-owned Pure Michigan Trail; or c) lease land adjacent to a State-owned Pure Michigan Trail for the operation of concessions. If the Department acquires land, the DNR Director may state that it is acquired for use as a Pure Michigan Trail. Following the acquisition, any money derived from that land, except as otherwise provided by law, must be deposited into the Pure Michigan Trails Fund.

Under the bill, if the Department enters into negotiations with a railroad for the DNR to become a trail sponsor under 16 USC 1247(d), the Department must comply with 49 CFR 1152.29(a)(2)(ii). The Department must assume full responsibility for any potential legal liability arising out of the transfer or use of the railroad right-of-way. In exchange for the assumption of liability, the railroad must provide the Department with the fair value of the DNR's assumption of liability. "Fair value" means the value that the Department and the railroad mutually agree accurately reflects the risk of liability assumed by the DNR.

(Section 1247(d) of Title 16 of the U.S. Code provides for the interim use of railroad rights-of-ways as trails. Under that section, if such interim use is subject to restoration or reconstruction for railroad purposes, it may not be treated as an abandonment of the use of the rights-of-way for railroad purposes. Under 49 CFR 1152.29(a)(2)(ii), if a state, political subdivision or qualified private organization is interested in acquiring or using a rail line right-of-way for interim trail use and rail banking, it must file a request to do so, and the filing must include a statement indicating the trail sponsor's willingness to assume full responsibility for any legal liability arising out of the transfer or use of the right-of-way, unless the user is immune from liability, in which case, it need only indemnify the railroad against any potential liability.)

Limited Liability, Trails

Generally, under Part 733, a cause of action does not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a consideration for the purpose of outdoor recreational use or trail use, or for the purpose of entering or exiting from or using a Michigan Trailway or other public trail, with or without permission, against the owner, tenant, or lessee of the land unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee.

The bill specifies that a cause of action also does not arise for injuries to a person, against a person, other than a for-profit legal entity, with whom the owner, tenant, or lessee of land contracts to construct, maintain, or operate a trail or other land improvement used by the injured party as described above, unless the injuries were caused by the gross negligence or willful and wanton misconduct of the person with whom the owner, tenant, or lessee contracts.

In addition, a cause of action does not arise against a railroad that owns or formerly owned or operated a right-of-way of a rail line that has been dedicated or set apart for interim trail use and rail banking under 16 USC 1647(d) for injuries to a person who is on the right-of-way that occur after the Surface Transportation Board approves the dedication of the right-of-way, or after the dedication of the right-of-way under the State Transportation Preservation Act, and before the right-of-way is reactivated for return to rail service.

MCL 324.72108 et al.

BACKGROUND

Railroad Abandonment

The process of railroad abandonment is administered by the Surface Transportation Board (STB), an independent adjudicatory and regulatory agency. An abandonment application is typically filed by the rail carrier that owns the track to be abandoned. A rail carrier may abandon a part of its railroad line or discontinue the operation of all rail transportation over any part of its line only if the STB finds that the present or future public convenience and necessity require or permit the abandonment (or discontinuance). There are some exceptions to this. For example, under an "exempt abandonment", a railroad carrier may abandon a line if it certifies that no local traffic has moved over the line for at least two years, that any overhead traffic can be rerouted over other lines, and that there are or no formal complaints alleging (or, if already decided, proving) that carrier has imposed an illegal embargo or unlawful impediment to service pending (or decided within the previous two years) before the STB or a United States District Court.

If these criteria are met, the railroad may abandon the railroad by filing a notice of exemption with STB. Otherwise, the railroad must file a notice and abandonment application with the STB and proceed with the abandonment application process promulgated in 49 CFR Part 1152. If the abandonment is consummated, the disposition of the right-of-way generally is subject to state law and may revert to adjoining land owners or be subject to other state law governing ownership of the underlying land. For example, under the Michigan State Transportation Preservation Act, the Michigan Department of Transportation is granted first right of refusal, and the Michigan Department of Natural Resources second right of refusal for portions of rail property, including rights-of-way.

Rail-Banking

In 1968, Congress enacted the National Trails System Act (the Trails Act) to establish a system of recreational and scenic trails. Originally, the Trails Act did not include provisions to address the conversion of railroad right-of-ways for use as trails. However, decades of consolidation in rail transportation resulted in the closure and abandonment of short and main line railroad corridors. In 1983, to preserve unused railroad corridors and encourage the development of nature trails, Congress amended the Trails Act to create the system of rail banking. The statute requires the STB to preserve established rights-of-way for possible reactivation by prohibiting abandonment of a right-of-way if a trail sponsor offers to assume responsibility for its use as a trail. The process of rail banking prevents the reversion of a rail corridor right-of-way according to state law and allows the right-of-way to be preserved for future use.

During any abandonment proceedings, any party that wishes to acquire or use the right-of-way for interim use as a trail must file a comment or petition to that effect, along with a Statement of Willingness. The Statement of Willingness indicates the prospective trail sponsor's willingness to assume legal liability and management responsibility for the trail. If the railroad is willing to negotiate with the prospective trail sponsor, the STB will issue a Certificate of Interim Trail Use or Notice of Interim Trail Use (depending on whether the process was through the application proceeding or the exemption proceeding), which allows the parties 180 days to negotiate an agreement. Once an agreement is reached, the trail sponsor may begin managing the right-of-way subject to the agreement and the railroad's right to reactivate the corridor for rail services.

A trail use agreement is the product of negotiations between the trail sponsor and railroad. The STB has little authority to preempt negotiations between the parties, does not have rules regarding the fitness of a party to serve as a trail sponsor, and does not require a final trail use agreement to be submitted to the Board. Until a few years ago, the Board did not require notice that an agreement had been reached. However, in 2012, the STB amended 49 CFR 1152.29 to require the trail sponsor and railroad jointly to notify the Board when an agreement is reached. This notice must include a map and description of the portion of the right-of-way governed by the agreement, and a certification that the agreement includes provisions requiring the sponsor to fulfill the management and tax responsibilities and assumption of liability required under the rule.

Liability for Injuries on Trails

Part 733 of Natural Resources and Environmental Protection Act (NREPA) provides limited liability for owners, tenants, and lessees of land used for outdoor recreational purposes for injuries occurring on the land. While Part 733's predecessor act, the Recreational Use Act, specifically limited liability for owners, tenants, and lessees of such land, it did not do so for entities with whom an owner, tenant, or lessee had contracted to maintain or operate it. In *Kruse v. Iron Range Snowmobile Club* (890 FSupp 681), a 1995 Federal district court case, the Court construed the Recreational Use Act's grant of immunity for owners, lessees, or tenants broadly. In that case, a Wisconsin resident snowmobiling at night on a State-owned snowmobile trail hit a portion of a railroad bridge, causing injury to his leg. The injured snowmobiler sued the Iron Range Snowmobile Club, which had contracted with the DNR to maintain and groom the trail. In granting the Club's motion for summary judgment, the United States District Court for the Western District of Michigan stated that was "undisputed that the Snowmobile Club was not, in the traditional sense of the terms, an 'owner, tenant, or lessee' of the subject trail"; however, given the construction of the Act by Michigan courts at the time, the court agreed with the Club's contention that it was properly classified as a "lessee" for the purposes of the Act's immunity provisions. To deny the Club immunity, the Court stated, would "undermine the Act's purpose to promote tourism by opening up vast areas of vacant land and making them available for use by the general public."

In 2013, the Michigan Court of Appeals rejected this broad construction of the immunity provisions. In *Duffy v. Irons Area Tourist Association* (300 Mich App 542), the plaintiff sued after she lost control of her all-terrain vehicle and was injured on a State trail maintained by the Irons Area Tourist Association. The trial court granted the Association's motion for summary disposition on the grounds that the Association was immune from liability under Part 733 of the NREPA. In reviewing the lower court's decision, the Court of Appeals noted, in part, that the lower court had relied on the *Kruse* court's reading of the immunity provisions. The Court stated that this reliance was improper given the Act's repeated references to "owner, tenant, or lessee". The Court opined that the references established the Legislature's intent to afford limited liability protection only to those parties. The court noted that the Tourist Association entered into a contract with the DNR (the trail's owner) to make improvements to the trail in exchange for grant disbursements but the contract did not transfer to the Association an ownership interest or a right to possess exclusive possession or control over the land for the trail. The court held that because the Tourist Association was not an owner, tenant, or lessee of the land, the trial court had erred when it extended the Act's liability protections to it for the plaintiff's injuries.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

According to the Department of Natural Resources website, Michigan has more than 12,500 miles of State-designated trails and pathways, over 200 miles of which are located on rail-banked land. These trails offer many opportunities for tourists and residents to engage in outdoor recreational activities and explore the State's abundant natural resources. Rail-banking allows the Department to open up a railway corridor for recreational uses while keeping it available if a railroad company later wishes to reopen the corridor for rail use. As of February 2017, the DNR used 13 of these corridors for natural trails; the development of two more trails was contingent on the bill's enactment.

According to the Department, before 2012, the STB required a trail sponsor to state that it was willing to assume legal liability arising out of the use of the right-of-way. As noted in **BACKGROUND**, however, the STB does not require a final trail use agreement to be submitted to the Board and, before 2012, did not require notice that an agreement had been reached. To avoid constitutional issues (see below), the DNR indicated a willingness to assume liability but negotiated

out any language in the final trail use agreement that would have required the DNR to indemnify the railroad company. In 2012, the STB amended the rules governing the rail-banking program to require notice described above, which must certify that the trail sponsor is assuming responsibility for legal liability arising out of the use of the right-of-way.

Article 9, Section 17 of the Michigan Constitution prohibits the payment of money out of the State Treasury except as made by an appropriation; Section 18 generally prohibits the lending of the State's credit except as otherwise provided by the Constitution. According to testimony before the Senate Committee on Outdoor Recreation and Tourism, without statutory changes, the DNR's participation in the rail-banking program arguably would have violated these prohibitions, and the DNR would not have been able to continue the rail banking program. The bill eliminates the need for an appropriation to continue the program by requiring the railroad to provide the DNR with the fair value of the DNR's assumption of liability in exchange for the assumption of liability. This change avoids a negative fiscal impact to the State, satisfies the amended STB rules, and preserves the rail-banking program.

Supporting Argument

The bill addresses the issue created by the Michigan Court of Appeals decision in *Duffy*, specifically, that entities that operate or maintain a trail without having an ownership interest in it can be held liable for injuries resulting from a person's use of the trail. The *Duffy* decision created an incentive for entities not to take over maintenance or operation of State-owned trails out of concern that they could be held liable for injuries incurred by individuals using the trails for recreational purposes. By limiting liability for those parties to injuries arising out of gross negligence or willful or wanton misconduct, the bill essentially codifies the Federal court's ruling in *Kruse*, and eliminates the incentive for entities not to take over management of a trail from the State.

Legislative Analyst: Jeff Mann

FISCAL IMPACT

The bill will have no fiscal impact on State or local government.

Fiscal Analyst: Josh Sefton

SAS\A1718\s118ea