2016-1663

United States Court of Appeals for the Federal Circuit

NORMA E. CAQUELIN, KENNETH CAQUELIN, For Themselves and as Representatives of a Class of Similarly Situated Persons,

Plaintiffs – Appellees,

v.

UNITED STATES,

Defendant – Appellant.

On Appeal from the United States Court of Federal Claims in No. 1:14-CV-0037-CFL, Judge Charles F. Lettow

BRIEF FOR NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, AND PUBLIC LANDS COUNCIL AS *AMICI CURIAE* IN SUPPORT OF APPELLEES URGING AFFIRMANCE

Mark F. (Thor) Hearne, II
Meghan S. Largent
Lindsay S.C. Brinton
Stephen S. Davis
ARENT FOX, LLP
1717 K Street, NW
Washington, D.C. 20006
(202) 857-6000
Thor@ArentFox.com

Attorneys for Amici Curiae

COUNSEL PRESS, LLC (888) 277-3259

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Norma E. Caquelin & Kenneth Caquelin **v.** United States

Case No. 2016-1663

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ☒ (amicus) ☐ (name of party)

National Association of Reversionary Property Owners, National Cattlemen's Beef Association, and Public Lands Council

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held Companies that own 10 % or more of stock in the party
Nat'l Assoc. of Reversionary Prop. Own	Same	None
National Cattlemen's Beef Assoc.	Same	None
Public Lands Council	Same	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

n/a

December 28, 2016
Date

/s/ Mark F. (Thor) Hearne, II
Signature of counsel

Please Note: All questions must be answered

Mark F. (Thor) Hearne, II
Printed name of counsel

cc:

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules and Regulations

Other Authorities

INTRODUCTION

To avoid paying the Caquelin family $900, the government wants this Court to sit *en banc* and overturn four of its prior decisions representing the collective wisdom of more than ten members of this Court and adopt a new rule that is contrary to the Supreme Court's and this Court's Takings Clause jurisprudence. What the government asks this Court to do would throw this Court's Trails Act jurisprudence into a thicket.

This Court should deny the government's request for rehearing *en banc* and summarily affirm the Court of Federal Claims (CFC) decision that faithfully followed this Court's controlling precedent.

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Reversionary Property Owners is a non-profit foundation dedicated to defending the Fifth Amendment right to compensation when the government takes an owner's property under the federal Trails Act.[2] See, *e.g.*, *National Ass'n of Reversionary Property Owners* v. *Surface Transp. Bd.*, 158 F.3d 135 (DC Cir. 1998) (*NARPO*), and *amicus curiae* in *Preseault* v. *I.C.C.*, 494 U.S. 1 (1990) (*Preseault I*), and *Marvin M. Brandt Rev. Tr.* v. *United States*, 134 S.Ct. 1257 (2014).

The National Cattlemen's Beef Association represents the entire cattle industry. The Association represents nearly 139,000 cattle producers and forty-five affiliated state associations throughout the United States.

The Public Lands Council represents ranchers using public lands and preserving the natural resources and heritage of the American West. The Council's members are cattle, sheep, and grasslands associations throughout the western United States.

---

[1] This brief is not authored, in whole or part, by any party's counsel nor has any party or party's counsel contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

[2] The National Trails System Act of 1968, as amended in 1983, 16 U.S.C. 1241, *et seq.*

This case is important because, should this Court overturn four of this Court's prior decisions as the government asks, the certainty of title to tens of thousands of acres of land would be unsettled.

STATEMENT OF THE ISSUES

1. Should this Court sit *en banc* to overturn *Caldwell* v. *United States*, 391 F.3d 1226 (Fed. Cir. 2004), *Barclay* v. *United States*, 443 F.3d 1368 (Fed. Cir. 2006), *Illig* v. *United States*, 274 Fed. App'x 883 (Fed. Cir. 2008), and *Ladd* v. *United States*, 630 F.3d 1015 (Fed. Cir. 2010) (*Ladd I*)?

2. Assuming this Court is inclined to overturn this precedent, can this Court do so given the Supreme Court's contrary Takings Clause jurisprudence, including *Preseault I*, *Brandt*, *Arkansas Game & Fish Comm'n* v. *United States*, 133 S.Ct. 511 (2012), and *Leo Sheep Co.* v. *United States*, 440 U.S. 668 (1979), and this Court's decisions in *Preseault* v. *United States*, 100 F.3d 1525 (Fed. Cir. 1996) (*en banc*) (*Preseault II*), *Hash* v. *United States*, 403 F.3d 1308 (Fed. Cir. 2005), *Toews* v. *United States*, 376 F.3d 1371 (Fed. Cir. 2004), and *Ellamae Phillips Co.* v. *United States*, 564 F.3d 1367, 1372 (Fed. Cir. 2009)?

STATEMENT OF THE CASE

I. Congress amended the Trails Act to pre-empt owners' state-law "reversionary" rights.[3]

Railroads had more than 220,000 miles of right-of-way in 1920. *Preseault I*, 494 U.S. at 5. With the advent of the Interstate Highway System and airlines, railroads no longer needed this much right-of-way and began abandoning unused lines. *Id.* at 3. Railroad rights-of-way are common law easements granted for the limited purpose of operating a railroad across a strip of land. See *Brandt*, 134 S.Ct. at 1265.

> The essential features of easements – including, most important here, what happens when they cease to be used – are well settled as a matter of property law. *** [E]asements *** may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude." In other words, if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land.[4]

A railroad with an unneeded railway line has two options. The railroad may petition the STB to *discontinue* operations over the line. A discontinuance allows

---

[3] "Reversionary" is a shorthand term for the fee owner's interest. "Instead of calling the property owner's retained interest a fee simple burdened by the easement, this alternative labels the property owner's retained interest … a 'reversion' in fee." *Preseault II*, 100 F.3d at 1533. See also *Brandt*, 134 S.Ct. at 1266, n.4.

[4] Quoting *Restatement (Third) of Property: Servitudes* §1.2(1) (1998), comment d, §7.4, comments a and f. See also *Samuel C. Johnson 1988 Trust* v. *Bayfield County, Wis.*, 649 F.3d 799, 803 (7th Cir. 2011) ("the termination of an easement restores to the owner of the fee simple full rights over the part of his land formerly occupied by the right of way created by the easement").

the petitioning railroad to retain ownership of the right-of-way and resume railroad operations in the future. But the petitioning railroad remains subject to the STB's authority to compel that specific railroad to restore service over the line. This is a possible liability for the railroad because a shipper on the line could force the railroad to restore service when doing so is unprofitable for the railroad.

Alternatively, the railroad may petition to *abandon* the railroad line. Abandonment allows the railroad to discontinue service and salvage the track. When the STB grants a petition to abandon a railroad right-of-way, the railroad has no further obligation to preserve the right-of-way and the STB's jurisdiction terminates. For railway lines with no prospect of future use, abandonment is a much more attractive option than discontinuance.

Congress wanted to preserve otherwise abandoned railroad corridors by delaying the railroad's authority to abandon the corridor for six-months, to allow the railroad to possibly sell the right-of-way to a non-railroad for a public recreational trail. See *National Wildlife Federation* v. *I.C.C.*, 850 F.2d 694, 697 (DC Cir. 1988). But this didn't work. The Supreme Court observed, "[B]y 1983, Congress recognized that these measures [the public use provision delaying disposition for six-months] 'ha[d] not been successful in establishing a process through which railroad rights-of-way which are not immediately necessary for active service can be utilized for trail purposes.'" *Preseault I*, 494 U.S. at 6. Delaying abandonment for

six months didn't succeed because, under state law, the railroad had nothing to sell. *Nemo dat quod non habet* – one cannot convey what he does not own.

The Supreme Court explained, "many railroads do not own their rights-of-way outright but rather hold them under easements [and] … the property reverts to the abutting landowner upon abandonment of rail operations." *Preseault I*, 494 U.S. at 7. Congress adopted section 8(d)[5] to fix this problem by pre-empting state law and allowing a railroad to sell the otherwise abandoned right-of-way to a non-railroad trail-user notwithstanding the fee owner's state law reversionary interests.[6]

The Supreme Court explained section 8(d) "pre-empt[s] the operation and effect of certain state laws that 'conflict with or interfere with federal authority over the same activity.'" *Preseault I*, 494 U.S. at 21 (O'Connor, J., concurring).[7] State courts "cannot enforce or give effect to asserted reversionary interests…." *Id.* at 22.[8]

---

[5] Codified as 16 U.S.C. 1247(d).

[6] Section 8(d) states "such interim use [for public recreation or railbanking] shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes."

[7] Quoting *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 319 (1981). See also *Grantwood Village* v. *Missouri Pacific RR Co.*, 95 F.3d 654 (8th Cir. 1996).

[8] A non-railroad cannot succeed to a railroad's interest in a railroad right-of-way easement. *East Alabama Ry. Co. v. Doe*, 114 U.S. 340, 354 (1885) ("The grant to the 'assigns' of the [railroad] corporation cannot be construed as extending to any assigns except one who should be the assignee of its franchise to establish and run a railroad.").

When the STB invokes section 8(d) it denies an owner his reversionary right to possess his land and perpetually forestalls termination of the railroad easement. See *National Wildlife*, 850 F.2d at 705; *Citizens Against Rails-to-Trails* v. *Surface Trans. Bd.*, 267 F.3d 1144, 1149 (DC Cir. 2001) (*CART*); *NARPO*, 158 F.3d at 139.

Section 8(d) can only be invoked *after* a railroad first petitions the STB for authority to abandon the right-of-way and *after* the STB grants this petition. 49 U.S.C. 10903(a). The STB may only grant a railroad's petition to abandon a right-of-way if the STB first finds abandoning the railroad line is in the public interest and there is no current or future need for railroad service. 49 U.S.C. 10905; 49 C.F.R. 1152.28.

If the railroad and trail-user agree, the railroad transfers the right-of-way to the trail-user. The agreement between the railroad and trail-user is a private agreement not filed with the STB, and owners are never told of the agreement between the railroad and trail-user.[9] As a further consequence of invoking section 8(d), the STB retains jurisdiction of the corridor, perpetually pre-empting state law, and may authorize *any* railroad (not just the original railroad) to build a new railroad line across the owner's land. The STB can indefinitely extend the period for the

[9] See *Twenty-Five Years of Railbanking: A Review and Look Ahead, Hearing Before the Surface Trans. Bd.*, Ex Parte No. 690 (July 8, 2009).

railroad to reach a trail-use agreement. See *Birt* v. *Surface Trans. Bd.*, 90 F.3d 580, 589 (DC Cir. 1996); and *Rail Abandonments – Supplemental Trails Act Procedures*, 4 I.C.C.2d 152 (1987). The STB will also freely issue "replacement NITUs" substituting new and different trail-users even after the trail-use negotiating period has expired. See *Barclay*, 443 F.3d at 1376 (despite expiration of the original NITU, replacement NITU precluded consummation of abandonment and reversion of landowners' interest).

The duration between when the government originally invokes section 8(d) and when trail-use is established or negotiations with trail-users end without any agreement frequently last a decade or longer – far longer than the six-year statute of limitations. See, *e.g.*, *Wisconsin Cent. Ltd.*, No. AB-303 (Sub-No. 18X) (Surface Trans. Bd. July 28, 2009) (NITU issued March 1998 and extended until January 2010).[10] Thus, if a reversionary owner is required to wait until the outcome of the original invocation of section 8(d) is known – with either construction of a public recreational trail or the government surrendering jurisdiction of the corridor without

[10] The Rails-to-Trails Conservancy says the government invoked section 8(d) eighty-two times in the last six years. Of those eighty-two orders, trail-use agreements were reached in thirty-two cases and the remaining fifty remain in effect or expired without agreement. Amicus Brief, p. 19.

a public trail – the statute of limitations will have expired. During this time the owner's reversionary interest has been forestalled.

II. Trails Act jurisprudence.

Three themes animate past Trails Act litigation. (1) Is section 8(d) a compensable taking, and if so, is section 8(d) constitutional? (2) Did the original railroad acquire title to the fee estate or only an easement to operate a railway across the fee owner's land? And, (3) when does the reversionary owner's claim for compensation accrue?

A. The government's invocation of section 8(d) is a compensable taking.

Early Trails Act litigation challenged the constitutional legitimacy of section 8(d). See the *Preseault* series of cases culminating in *Preseault I* and *Preseault II*. See also *National Wildlife*, *CART*, *NARPO*, and *Grantwood Village* v. *Missouri Pacific RR Co.*, 95 F.3d 654 (8th Cir. 1996).

The Preseaults argued section 8(d) was unconstitutional because the Trails Act made no specific appropriation of compensation for owners. *Preseault I*, 494 U.S. at 13. The government said compensation was unnecessary because invoking section 8(d) is nothing more than an exercise of the federal government's authority to regulate railroads. The government argued that, even if the Preseaults owned "the reversionary interest they claim, no taking occurred because 'no reversionary

interest can or would vest' until the ICC determines that abandonment is appropriate." *Id.* at 23 (quoting *Preseault* v. *I.C.C.*, 853 F.2d 145, 151 (2nd Cir. 1988)).

Justice O'Connor explained the government's error:

> This view conflates the scope of the ICC's power with the existence of a compensable taking and threatens to read the Just Compensation Clause out of the Constitution. The ICC may possess the power to postpone enjoyment of reversionary interests, but the Fifth Amendment and well-established doctrine indicate that in certain circumstances the Government must compensate owners of those property interests when it exercises that power.

Preseault I, 494 U.S. at 23.

The Supreme Court held, "by deeming interim trail use to be like discontinuance rather than abandonment, Congress prevented property interests from reverting under state law." *Preseault I*, 494 U.S. at 8. The Supreme Court's analysis of section 8(d) turned upon "Congress prevent[ing] property interests from reverting under state law." *Id.* at 22. The Court found that when the government invokes section 8(d) it redefines an owner's existing state-law property interest by *ipse dixit* and is a categorical taking. *Preseault I*, 494 U.S. at 23 (quoting *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980), and *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1012 (1984)). The Supreme Court, nonetheless, found section 8(d) constitutional because an owner could obtain compensation under the Tucker Act.

In *Toews*, 376 F.3d at 1376, this Court explained, "It is elementary law that if the Government uses … an existing railroad easement for purposes and in a manner not allowed by the terms of the grant of the easement, the Government has taken the landowner's property for the new use." In *Ladd I*, this Court held that, when invoked, section 8(d) "destroys" and "effectively eliminates" the fee owner's right to their property. See *Ladd I*, 630 F.3d at 1019. This Court's holding in *Ladd I* is in accord with the DC Circuit's decision in *NARPO*, 158 F.3d at 139, holding, "When [a landowner's] easement reversion is blocked, the interim trail use has been deemed a taking … and the holder of a reversionary interest that does not vest because of a trail use may seek compensation."

B. "Railbanking" and recreation are not the same as operating a railroad.

After losing its regulatory taking theory the government adopted a new argument claiming the easements originally granted railroads in the 1880s and early 1900s gave the railroad title to the fee simple estate in the land under the railroad's right-of-way or granted an essentially unlimited "easement for anything" allowing the railroad to sell the easement to a non-railroad for uses (like public recreation) that have nothing to do with operating a railroad. The government argued so-called "railbanking" (intentionally not operating a railroad across the land) is equivalent to operating a railroad.

This Court rejected the government's argument. See *Toews*, 376 F.3d at 1376 ("it appears beyond cavil that use of these easements for a recreational trail – for walking, hiking, biking, picnicking, frisbee playing, with newly-added tarmac pavement, park benches, occasional billboards, and fences to enclose the trailway – is not the same use made by a railroad, involving tracks, depots, and the running of trains."). See also *Preseault II*, 100 F.3d at 1554 ("Realistically, nature trails are for recreation, not transportation.") (Rader, J., concurring). Judge Rader explained, "[t]he vague notion that the State may at some time in the future return the property to the use for which it was originally granted, does not override its present use of that property inconsistent with the easement. That conversion demands compensation. Moreover, the United States facilitated that conversion with its laws and regulatory approval." *Id.* at 1552.

"Railbanking" and public recreation are uses of the owner's land the railroad was not granted in the original right-of-way easement. See *Preseault II*, 100 F.3d at 1547-48, 1550 (citing *Lawson* v. *State*, 730 P.2d 1308 (Wash. 1986), and *Pollnow* v. *State Dept. of Natural Res.*, 276 N.W.2d 738 (Wis. 1979); see also *Michigan Dept. of Natural Res.* v. *Carmody-Lahti Real Estate*, 699 N.W.2d 272 (Mich. 2005).

Sitting *en banc* in *Presault II*, 100 F.3d at 1533, this Court adopted a three-part test to determine when an owner is entitled to compensation. (1) whether the

railroad acquired only an easement or obtained a fee simple estate; (2) if the railroad acquired only an easement, were the terms of the easement limited to use for railroad purposes, and; (3) even if the original railroad easement encompassed public recreation, had the original easement otherwise terminated. *Ellamae Phillips*, 564 F.3d at 1373. Judge Lettow correctly summarized this Court's holding: "in rails-to-trails cases, a taking by the government is established if the railroad acquired only an easement, the easement was limited to railroad purposes, and the scope of the [original] easement does not include recreational trail use." Opinion, p. 7.

C. An owner's claim for compensation arises when the owner first has notice of the STB's decision invoking section 8(d).

The government spawned an additional line of Trails Act litigation when it argued owners' claims were time-barred. The government said the six-year limitation period in 28 U.S.C. 2501 begins to run when the government first invokes section 8(d). See *Caldwell*, *Barclay*, and *Illig*. This Court announced a "bright-line rule" that a Trails Act taking occurs, and an owner's claim for compensation accrues, when the STB first invokes section 8(d) because that is the only *government action* that blocks an owner's state-law reversionary right from vesting. *Barclay*, 443 F.3d at 1378.

1. *Caldwell*

In July 1994 Norfolk Southern Railroad petitioned the ICC to abandon a railway line near Columbus, Georgia. *Caldwell*, 57 Fed. Cl. at 194. The ICC granted the railroad's petition but delayed abandonment for six months by imposing a public use condition under 49 C.F.R. 1152.29(d)(1). *Id.* at 195. In June 1995 a potential trail-user, the Public Trust for Land, asked the ICC to invoke section 8(d) allowing the railroad to sell the abandoned right-of-way to Public Trust. *Id.* The ICC invoked section 8(d) granting the railroad and Public Trust 180-days to negotiate the sale of the right-of-way. The railroad and Public Trust couldn't agree but asked the ICC to extend the negotiating period. *Id.* In August 1995 the railroad and Public Trust reached a tentative agreement containing numerous contingencies. The agreement was amended in July 1996 and then assigned to a new trail-user, the City of Columbus. Columbus asked the ICC to further extended the negotiating period through November 1996 to allow Columbus to consummate its purchase of the abandoned right-of-way for $1 million.

The purchase closed in early October 1996 and, shortly thereafter, the railroad quit-claimed its interest in the abandoned right-of-way to Columbus. *Id.* The owners sued for compensation in October 2002 – more than six years after the ICC first invoked section 8(d) but less than six years after the railroad conveyed the right-of-way to Columbus.

The government argued the Caldwells' right to compensation was time-barred because their claims accrued when the railroad agreed to sell the right-of-way to the trail-user. *Caldwell*, 57 Fed. Cl. at 197. The government never said exactly when it believed the Caldwells' claim accrued – when the initial trail-use-agreement was signed, when the trail-use-agreement was amended, when the contingencies were satisfied, or when the original trail-use-agreement was ultimately assigned to the subsequent trail-user. The Caldwells argued their claim couldn't accrue until the railroad actually conveyed the right-of-way to the ultimate trail-user. *Id.*

The CFC accepted the government's argument and dismissed the Caldwells' claim as time-barred. *Caldwell*, 57 Fed. Cl. at 203-04. The Caldwells appealed. Judges Dyk and Prost ruled for the government. Judge Dyk wrote the decision and Judge Newman dissented. The majority held:

> The taking, if any, when a railroad right-of-way is converted to interim trail use under the Trails Act occurs when state-law reversionary property interest that would otherwise vest in the adjacent landowners are blocked from so vesting. The question, then, is in the context of an exemption proceeding, when are state-law reversionary interests forestalled by operation of section 8(d) of the Trails Act? We conclude that this occurs when the railroad and trail operator communicate to the STB their intention to negotiate a trail use agreement and the agency issues an NITU that operates to preclude abandonment under section 8(d).

Caldwell, 391 F.3d at 1233.

This Court explained, "The issuance of the NITU is the only *government* action in the railbanking process that operates to prevent abandonment of the

corridor and to preclude the vesting of state law reversionary interests in the right-of-way." *Caldwell*, 391 F.3d at 1233-34 (emphasis in original).

The owners sought, and the government opposed, rehearing. The government argued:

> Unlike the usual physical occupation case, the landowner in a Trails Act taking case is already deprived of possession. Thus, the question is not when the owner loses the right to possess the property (since he is already not in possession), but rather when he would otherwise have recovered ownership of the easement were it not for the operation of the Trails Act. The dissent's focus on when the [trail-user] acquired the right to possess and occupy the property is misplaced in this unique context, because Caldwell was not in possession of the corridor in the first place and his alleged reversionary rights were interrupted (if at all) long before title transferred to the [trail-user].
>
> Government Opposition to Rehearing, p. 5.[11]

The government said "the argument that the NITU works a regulatory taking and that a single Government action under the Trails Act might work two separate takings is clearly incorrect." *Id.* at 7. The government explained:

> This Court has long held that a single Government action might cause a single taking, which might turn out to be temporary; if the taking later becomes permanent, it is merely the continuation of the initial taking, not a separate taking. Under the Trails Act, the STB takes only one action – it issues the NITU – that might cause one taking. The taking might turn out to be temporary if, for example, the interim trail use agreement is terminated and the rail carrier subsequently abandons the line. But the temporary taking that might be caused when the NITU and interim trail use agreement prevent reversion under state-law does

[11] 2005 WL 4146730, at *5 (Fed. Cir. No. 03-5152, filed March 10, 2005).

> not end when (or if) interim trail use ensues. Rather, that same potential taking continues and becomes permanent.

Id. at 8-9.

This Court denied rehearing. The owners petitioned for certiorari, which was denied. 547 U.S. 826 (2005).

2. *Barclay* and *Renewal Body Works*

This Court revisited this same argument a year later in *Barclay* v. *United States*, 351 F. Supp.2d 1169 (D. Kan. 2004), and *Renewal Body Works, Inc.* v. *United States*, 64 Fed. Cl. 609 (2005). The same panel from *Caldwell* heard this appeal. Judge Dyk wrote the majority decision over Judge Newman's dissent.

Renewal involved the same railroad right-of-way as *Toews*. *Barclay* involved three abandoned railroad rights-of-way in Kansas. In *Barclay* the STB issued an order invoking section 8(d) and, when the original negotiation period lapsed, the STB issued a series of new NITUs extending the negotiating period allowing the railroad to negotiate with a series of different trail-users.

The owners argued their claim didn't accrue until the railroad transferred its interest to the trail-user. The owners said *Caldwell* was wrongly-decided.[12] This Court rejected the owners' arguments and affirmed its decision in *Caldwell*:

[12] See Owners' Brief, 2005 WL 1563752.

> We explained in *Caldwell* that "[t]he taking, if any, when a railroad right-of-way is converted to interim trail use under the Trails Act occurs when state law reversionary property interests that would otherwise vest in the adjacent landowners are blocked from so vesting." Abandonment is suspended and the reversionary interest is blocked "when the railroad and trail operator communicate to the STB their intention to negotiate a trail use agreement and the agency issues an NITU that operates to preclude abandonment under section 8(d)" of the Trails Act.
>
> We concluded that "[t]he issuance of the NITU is the only *Government* action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right of way." Thus, a Trails Act taking begins and a takings claim accrues, if at all, on issuance of the NITU.
>
> We explicitly held in *Caldwell* that "[w]hile the taking may be abandoned ... by the termination of the NITU[,] the accrual date of a single taking remains fixed." The issuance of the NITU is the only event that must occur to "entitle the plaintiff to institute an action." Accrual is not delayed until a trail use agreement is executed or the trail operator takes physical possession of the right-of-way.
>
> *Barclay*, 443 F.3d at 1373.[13]

The owners sought rehearing *en banc*. The government opposed rehearing, arguing "The NITU is the only federal Government action that might allegedly constitute a taking by preventing the reversion of property rights under state law."[14] The government noted the STB's "regulations do not even require the railroad and

[13] Quoting *Caldwell*, 391 F.3d at 1233-34, and *Creppel* v. *United States*, 41 F.3d 627, 631 (Fed. Cir. 1994); citations omitted; emphasis in original; paragraph breaks added.

[14] Government's Opposition to Petition for Rehearing *en banc*, 2006 WL 2351228, at *11 (Fed. Cir. No. 05-5109, filed July 21, 2006).

the trail operator to notify the STB in the event that title is transferred." And, "preemption of the landowners' alleged reversionary rights occurred, if at all, well before title was transferred to the trail operators." *Id.* at 6. The government said, "this Court explained in *Preseault II* [that] the landowners' taking claim is not premised on the conversion of the right-of-way to a trail, but rather the Government's action which blocks the landowner's state-law reversionary interests from vesting, as they otherwise would when the right-of-way is abandoned." *Id.* at 7.

Then, quoting *Caldwell*, the government argued, "'a taking occurs when the owner is deprived of use of the property,' which in the Trails Act context occurs 'by blocking the easement reversion.'" *Id.* at 9. And, the government said, "the question is not when the owner loses the right to physically occupy the property, but rather, when the owner would otherwise have recovered full possession of the easement, were it not for operation of the Trails Act." *Id.* Finally, the government noted, "arguments about the potential for a temporary regulatory takings claim is inapposite in the context of a rails-to-trails conversion, which this Court's precedent seems to have characterized as a physical takings claim." *Id.* at 11.

This Court denied rehearing. The owners sought certiorari, which was denied. 549 U.S. 1209 (2007).

3. *Illig*

The Illigs and more than sixty of their neighbors own homes on the same abandoned railroad corridor that was the subject of *Grantwood Village* v. *MoPac*, *Grantwood Village* v. *United States*, 45 Fed. Cl. 771 (2005), and *Miller* v. *United States*, 67 Fed. Cl. 542 (1998). In *Illig* the CFC held the government owed these owners compensation as in *Grantwood Village* and *Miller*. *Illig* v. *United States*, No. 98-934L (Fed. Cl. Oct. 22, 2001). The Justice Department agreed to pay these Missouri owners a total of more than $6 million. The settlement was to be approved in December 2004. Two days before the hearing to approve settlement and enter final judgment, this Court issued its decision in *Caldwell*. On the basis of *Caldwell* the government withdrew from the settlement because, under *Caldwell*, the *Illig* owners' claims were now time-barred. The CFC followed *Caldwell* and *Barclay* and dismissed the *Illig* owners' claims. *Illig* v. *United States*, 67 Fed. Cl. 47, 56 (2005).

The owners appealed. In a unanimous decision Judges Dyk, Mayer, and Linn affirmed *Caldwell* and *Barclay* to be controlling and summarily affirmed the CFC's dismissal of the owners' claims as time-barred. *Illig* v. *United States*, 274 Fed. App'x 883, 884 (2008). Rehearing *en banc* was sought and denied without dissent. The owners petitioned the Supreme Court for a writ of certiorari. The Supreme

Court directed then-Solicitor General, now-Justice Kagan to reply. See Brief for the United States in Opposition to Petition for Writ of Certiorari, 2009 WL 1526939.

Solicitor General Kagan wrote, "[i]ssuance of the NITU thus marked the moment at which federal law (1) at least temporarily forestalled the vesting of state-law reversionary interests, and (2) authorized indefinite preclusion of such reversionary interests, contingent on the finalization of an interim trail use agreement." *Id.* at 10. Solicitor General Kagan continued, "by the time a trail use agreement is signed, federal law has already forestalled any such reversion. As the Federal Circuit has explained, a NITU stands as a 'barrier to reversion' so long as it is in effect." *Id.* at 12 (quoting *Barclay*, 443 F.3d at 1374). Solicitor General Kagan continued, "[p]etitioners contend that any taking that commences upon issuance of the NITU 'is temporary at the outset,' and that their taking claim should not accrue until the taking is 'transformed into a permanent interference.' The court of appeals has correctly rejected that contention." *Id*.

Solicitor General Kagan noted, "[t]he issuance of the NITU thus marks the 'finite start' to either temporary or permanent takings claims.' When the NITU is issued, all the events have occurred that entitle the claimant to institute an action based on federal-law interference with reversionary interests, and any takings claim premised on such interference therefore accrues on that date." 2009 WL 1526939, at *12-13 (quoting *Caldwell*, 391 F.3d at 1235). Solicitor General Kagan said this

Court's "bright-line rule [in *Caldwell* and *Barclay*] has the singular virtue of providing certainty to prospective claimants of when their claims accrue and when the limitations period expires." *Id.* at 15.

After Solicitor General Kagan filed the government's reply, the Supreme Court denied certiorari. 557 U.S. 935 (2009).

4. *Ladd*

The Ladds and their neighbors own ranches on the US-Mexican border in Arizona. The San Pedro Railroad petitioned the STB to abandon an eighty-two-mile-long railway line. In July 2006 the railroad and a potential trail-user requested the STB invoke section 8(d). *Ladd I*, 630 F.3d at 1017. The STB invoked section 8(d). After the STB issued the 2006 NITU, the railroad removed the tracks from the right-of-way. When the Ladds and their neighbors learned of the STB's order taking their reversionary right to their property, they sued for compensation.

The period for the railroad and trail-user to negotiate a trail-use agreement expired without any agreement. *Ladd I*, 630 F.3d at 1018. The STB issued new NITUs extending the negotiating period for a portion of the right-of-way and substituted different trail-users. But, alas, the railroad didn't reach any agreement with any trail-user. *Id.* For one sixteen-mile-long segment of the right-of-way the railroad consummated abandonment and the owners regained unencumbered title to their land. But, for the remaining seventy miles, the STB's jurisdiction continues

and the owners' state-law reversionary rights remain, in Solicitor General Kagan's words, "indefinitely precluded." No public trail has been built across the corridor but, because the owners cannot fence the corridor or exclude others from the land, illegal immigrants and drug smugglers now use this abandoned railroad corridor to enter the country from Mexico. *Id.* at 1018.

Under *Caldwell*, *Barclay*, and *Illig* the government's categorical obligation to compensate these Arizona ranchers arose when the STB invoked section 8(d) blocking their state-law reversionary right to possess their property. But the government argued the opposite and claimed the original order invoking section 8(d) is, at most, a temporary regulatory taking.[15] Judge Hodges bought the government's argument. *Ladd* v. *United States*, 90 Fed. Cl. 221, 227-28 (2009). The Arizona ranchers appealed and this Court reversed and unanimously affirmed *Caldwell*, *Barclay*, and *Illig*. 630 F.3d 1015 (2010).

During oral argument Judge Moore noted the government's regulatory taking argument was the same argument the government made in *Preseault I* which the Supreme Court mocked: "That's the argument you made unsuccessfully to the Supreme Court where Justice Scalia … actually made fun of you. I mean, I don't

[15] See oral argument, available at: <http://www.cafc.uscourts.gov/oral-argument-recordings?title=&field_case_number_value=2010-5010&field_date_value2%5Bvalue%5D%5Bdate%5D=> (last visited 12-26-16).

think that's going to work on us at this point. You can't say, 'Oh yeah, well they didn't lose anything because they didn't [have] anything the day before.'"[16] See Appellees' Brief, p. 2, quoting Chief Justice Rehnquist and Justice Scalia.

Judge Moore, joined by Judges Rader and Linn, unanimously rejected the government's argument. "In light of *Caldwell* and *Barclay*, we reject the Government's present suggestion that the NITU is nothing more than a temporary regulatory hold on the railroad's authority to abandon its railway." *Ladd I*, 630 F.3d at 1025.

The government sought, and this Court denied, rehearing. 646 F.3d 910 (2011). Judges Rader, Newman, Lourie, Bryson, Linn, Dyk, Prost, O'Malley, and Reyna voted to deny rehearing *en banc* and Judges Moore and Gajarsa dissented. In their dissent Judges Gajarsa and Moore noted, "[o]ur precedent, however, assumes that the issuance of an NITU is a physical taking." *Id*. The government did not seek certiorari.

After this Court remanded *Ladd* to determine compensation, the government uncovered an earlier order the ICC issued in 1998 invoking section 8(d). *Ladd II*, 713 F.3d at 651. This earlier NITU was not a public record and, despite almost a half-decade of litigation, even the government's lawyers didn't know this earlier

[16] See *Ladd I* oral argument transcript, note 15, *supra*.

NITU existed. *Id.* But the government now reverted back to its earlier position that a Trails Act taking occurs when the original order invoking section 8(d) is issued and, thus, the government argued, these owners' claims were time-barred. *Id.* at 652; *Ladd* v. *United States*, 108 Fed. Cl. 609, 612 (2012).

Judge Hodges again accepted the government's argument. 108 Fed. Cl. at 616. The owners appealed and Judges Rader, Moore, and Lourie unanimously reversed. This Court held the issuance of the earlier NITU was inherently unknowable and the claim accrual suspension rule applied. *Ladd II*, 713 F.3d at 652-53.[17] The government did not seek rehearing or certiorari.

In sum, the argument the government makes today has been considered and rejected by five panels of this Court and this Court has rejected rehearing this argument *en banc* four times. More than ten members of this Court (Judges Prost, Dyk, Rader, Linn, Lourie, Bryson, O'Malley, Reyna, Newman, and Michel) voted to reject rehearing this argument *en banc*. While Judge Newman originally dissented in *Caldwell* and *Barclay*, Judge Newman did not dissent from the denial of rehearing in *Ladd I*. And, while Judges Moore and Gajarsa voted to rehear this argument, they recognized this Court's holding in *Caldwell*, *Barclay*, and *Illig* is settled law.

[17] *Ladd II* oral argument, available at: <http://www.cafc.uscourts.gov/oral-argument-recordings?title=&field_case_number_value=2012-5086&field_date_value2%5Bvalue%5D%5Bdate%5D=> (last visited 12-26-16).

Furthermore, more than four times the Supreme Court denied certiorari and refused to hear this argument.

III. This lawsuit.

In 1866 the Eldora Railroad and Coal Company acquired an easement upon which it built a railway line to transport coal. Opinion, pp. 2-3. By 2013 Eldora Railroad's successor, North Central Railroad, no longer needed or used this railway line and petitioned the STB for authority to abandon this line. The STB granted the railroad's petition to abandon the line in July 2013.

The City of Ackley and the Iowa National Heritage Foundation asked the STB to invoke section 8(d) of the Trails Act. In July 2013 the STB granted this request, invoked section 8(d), and issued a NITU pre-empting the Caquelins' state-law reversionary right to possess their land.

The original July 2013 NITU provided a 180-day period for the railroad to negotiate with the Iowa Trails Council. Two months later, the Iowa National Heritage Foundation asked the STB to extend the negotiating period six-months so it could negotiate a trail-use agreement with the railroad. Ultimately the railroad didn't reach a trail-use agreement with either trail-group and, in April 2014, the railroad notified the STB that it consummated abandonment of the railroad line. Upon the railroad consummating abandonment, section 8(d) no longer forestalled the Caquelins' reversionary interest in their land.

The Caquelins sued for compensation, and the CFC awarded the Caquelins $900 for the nine-month taking of their property. The government "acknowledged that the easements granted the North Central Railroad were limited to railroad purposes and did not include recreational trail use." Opinion, p. 7. However, the government argued, because the Caquelins' land was not physically used for public recreation, the government didn't need to pay the Caquelins the $900 the CFC awarded. The government said the invocation of section 8(d) gave rise to, at most, a temporary regulatory taking for which the Caquelins are due nothing. The government admits the CFC rightly rejected the government's argument under this Court's controlling precedent in *Caldwell* and *Ladd I.* See Gov. Brief, pp. 1-2. But, the government says this Court "should overrule *Ladd I*'s holding that a Trails Act taking claim based on a NITU that lapses without a trail-use agreement must be treated as a physical takings claim." *Id.* at 31. And, the government says this Court "should overrule *Caldwell* and hold that a physical taking claim under the Trails Act can accrue only when an interim trail-use agreement is reached." *Id.* at 32.

ARGUMENT

Overturning this Court's "bright-line rule" in *Caldwell* (affirmed in *Barclay*, *Illig*, and *Ladd I*) would unsettle land title and throw this Court's Trails Act jurisprudence into a thicket. The government asks this Court to hold invocation of section 8(d) gives rise to multiple different takings occurring at different times. Accepting the government's argument will cast Trails Act takings adrift without any clear rule establishing when an owner's Trails Act claim accrues and when the statute of limitations begins to run. The government offers no coherent answer to either question.

Does the owner's claim for compensation arise when the railroad agrees to sell the abandoned right-of-way to a trail-user? If so, what happens if (as in *Caldwell*) the railroad and trail-user amend the agreement, make the agreement contingent upon future events, or assign the agreement to a different trail-user? Does the owner's claim accrue when the railroad conveys title to the trail-user? Or does the owner's claim accrue when the trail-user physically constructs a trail across the owner's land? And, if claim accrual is tied to the trail-use-agreement, how is the owner to know his claim accrued? A trail-use agreement is not a public record.

In *Leo Sheep*, the Supreme Court held, "this Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined

power to construct public thoroughfares without compensation." 440 U.S. at 687-88. The Court reaffirmed this principle in *Brandt*, 134 S.Ct. at 1268 ("We decline to endorse [the government's] stark change in position, especially given 'the special need for certainty and predictability where land titles are concerned.'") (quoting *Leo Sheep*, 440 U.S. at 687). The Court held, "[t]he Government loses that argument today, in large part because it won when it argued the opposite before this Court…." *Brandt*, 134 S.Ct. at 1264.[18]

So too here. In *Caldwell*, *Barclay*, and *Illig* the government argued section 8(d) gives rise to a single taking when the government first invokes this provision pre-empting an owner's state-law reversionary interest. The government won and the landowners lost. Because the statute of limitations had run the government didn't pay hundreds of owners whose property the government took in *Caldwell*, *Barclay*, and *Illig* and, by reason of this precedent, the government avoided paying thousands of other owners whose property the government took because, under this precedent, these owner's right to compensation is now time-barred.

[18] In *Great Northern Railway Co.* v. *United States*, 315 U.S. 363 (1942), the government argued rights-of-way granted railroads under the 1875 Act were only common-law easements and the railroad did not acquire title to the land and minerals under the rights-of-way. The government won. The government later decided it would benefit if the railroad acquired title to the fee estate allowing the railroad and the railroad's successor to use the land for any purpose.

Now the government wants to run with the fox and hunt with the hounds. The government wants this Court to overturn *Caldwell*, *Barclay*, *Illig*, and *Ladd* and adopt a new rule holding the opposite. But the government should be careful about what it asks for. If the new rule is that a Trails Act taking claim does not accrue until the owner learns of the trail-use agreement, there are thousands of miles of abandoned railroad rights-of-way where more than six years have passed since the STB first issued an order invoking section 8(d) but there is not yet a trail-use agreement or a public trail. Under this Court's current rule these owners' claims are time-barred, but under the government's new rule, many of these owners could now bring a claim for compensation.[19]

[19] Under the claim accrual rule and Due Process Clause the statute of limitations does not begin running "until the claimant 'knew or should have known' that the claim existed." *Ladd II*, 713 F.3d at 653.

CONCLUSION

This Court should not overturn *Caldwell*, *Barclay*, *Illig*, and *Ladd I*. These decisions are rightly-decided. But, even if one believed this Court wrongly-decided these cases, for more than a decade the government and landowners have lived under this settled jurisprudence. Overturning these decisions to announce a new and contrary rule will unsettle established land title.

In *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008), Justice Breyer said, "Justice Brandeis once observed that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.' To overturn a decision settling one such matter simply because we might believe that decision is no longer 'right' would inevitably reflect a willingness to reconsider others. And that willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability."[20]

This Court should deny the government's request that it sit *en banc* to overturn this Court's decisions in *Caldwell*, *Barclay*, *Illig*, and *Ladd I*. This Court should instead summarily affirm the CFC's decision correctly applying this Court's controlling precedent.

[20] Quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932).

Respectfully submitted,

ARENT FOX LLP

/s/ Mark F. (Thor) Hearne, II
Mark F. (Thor) Hearne, II
Meghan S. Largent
Lindsay S.C. Brinton
Stephen S. Davis
1717 K Street, NW
Washington, DC 20006
(202) 857-6000
Thor@arentfox.com

Counsel for Amici Curiae

APPENDIX

TABLE OF CONTENTS

2005 WL 1503653 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

William B. CALDWELL, III, and Ben Frank Billings, III, for Themselves
and as Representatives of a Class of Similarly Situated Persons, Petitioners,
v.
UNITED STATES OF AMERICA.

No. 04-1728.
June 21, 2005.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

Petition for Writ of Certiorari

Jeffrey O. Bramlett [*], Sarah M. Shalf, Bondurant, Mixson &, Elmore, LLP, 3900 One Atlantic Center, 1201 West Peachtree Street, NW, Atlanta, GA 30309, (404) 881-4100.

James P. Kelly, Kelly Law Firm, P.C., 200 Galleria Parkway, Suite 1510, Atlanta, GA 30339, (770) 955-2770.

* Counsel of Record

***i** QUESTIONS PRESENTED

I. Should a Trails Act taking (as discussed in this Court's *Preseault v. ICC* decision) be analyzed as a *per se* physical taking of an easement in land, or as a regulatory taking of that easement?

II. If a government agency authorizes a third party to take possession of a citizen's land upon the third party's satisfaction of certain conditions, does a taking occur (a) upon the issuance of the regulatory authorization or (b) when (and if) the third party satisfies the conditions and takes possession?

***II PARTIES TO THE PROCEEDINGS BELOW**

The caption identifies the parties to the proceedings below.

***iii** TABLE OF CONTENTS

***v** TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes, and Regulations

***vii** Other Authorities

***1** William B. Caldwell, III, and Ben Frank Billings, III, for themselves and as representatives of a class of similarly situated persons, respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The December 14, 2004 opinion of the U.S. Court of Appeals for the Federal Circuit (Pet. App. 1) is published at 391 F.3d 1226. The June 30, 2003 opinion of the U.S. Court of Federal Claims (Pet. App. 25) is published at 57 Fed. Cl. 193.

JURISDICTION

This Court has jurisdiction over the Petition for Certiorari pursuant to 28 U.S.C. § 1254(1) and Rules 13.1 and 13.3 of this Court. This is a petition for writ of certiorari to review a decision of the U.S. Court of Appeals, Federal Circuit dated December 14, 2004. On January 28, 2005, the Petitioners filed a timely petition for rehearing en banc in the Court of Appeals for the Federal Circuit, which was denied by that court on March 23, 2005.

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The relevant constitutional, statutory, and regulatory provisions are reproduced in the Appendix at 57-71.

STATEMENT OF THE CASE

Petitioners own land burdened by a Georgia railroad right-of-way. They brought suit under the Tucker Act on behalf of themselves and a putative class of nearly 400 landowners to recover compensation for the taking of private property worked by the National Trails System Act ***2** ("Trails Act") and first discussed in *Preseault v. ICC,* 494 U.S. 1 (1990). Over a vigorous and cogent dissent, the Federal Circuit deemed their claims untimely. Petitioners ask the Court to address when and how the Trails Act taking occurs - and in doing so, to correct an erroneous decision of the Federal Circuit that not only prematurely bars claims in Trails Act taking cases brought across the country, [1] but infects determinations of ripeness, standing and compensation in every such case or similar case.

1 As discussed in further detail *infra* at 18, the U.S. Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals in all federal suits founded on the Constitution, including the taking claims alleged in this case.

Ben Frank Billings, III and William Caldwell, III ("the Petitioners") are fee simple owners of land in Columbus, Georgia that was burdened by a railroad easement owned by Norfolk Southern Railroad Company ("Norfolk Southern" or "the Railroad"). On October 9, 1996, pursuant to the Trails Act, Norfolk Southern purported to convey its interest in a portion of the railroad right-of-way known as the "Warm Springs Line" by deed to the City of Columbus ("the City"), which planned to operate it as a public trail.

On October 7, 2002, Billings and Caldwell filed suit in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491 (Pet. App. 58), on behalf of themselves and a putative class of similarly situated landowners, alleging the conversion to trail use had effected a Fifth Amendment taking. However, the Court of Federal Claims dismissed the complaint on the ground that the Petitioners had not filed it within the six-year statute of limitations provided in 28 U.S.C. § 2501. The Court of Federal Claims, approaching the case as a regulatory taking, found that the Petitioners' claims accrued not when the Petitioners' reversionary [2] interests were taken through the Railroad's ***3** conveyance of its property to the City (as trail operator), but when the Railroad and the City entered into a purchase and sale agreement for the Warm Springs Line. (Pet. App. 25-50).

2 "Reversion," used strictly as a term of art, only refers to a future interest in land that remains after an estate in land (*e.g.*, a life estate) has been taken. *Black's Law Dictionary* 1345 (8th ed. 2004). However, it is used in this Petition only as shorthand for describing the result of the easement being abandoned for railroad purposes - the previously burdened land "reverts" to the full, unburdened possession of the landowner. Thus, as used here, it is a present interest in land. *See Preseault v. United States [Preseault II],* 100 F.3d 1525, 1533 (Fed. Cir. 1996) (*en banc*).

The Petitioners appealed, and the Federal Circuit affirmed, but rejected the Court of Federal Claims' analysis of the accrual date. A majority of the panel instead found that the Petitioners' claims accrued even earlier - when the Surface Transportation Board ("STB") [3] first issued a notice pursuant to the Trails Act beginning a negotiating period between the Railroad and the City - because that was the date of the last "government action" leading to trail use. (Pet. App. 1-18). Judge Newman dissented, agreeing with the Petitioners that their claims could not have accrued before the City took possession of the land for trail use. (Pet. App. 18-24). The court rejected *en banc* rehearing. (Pet. App. 54).

3 The STB (previously the Interstate Commerce Commission, or "ICC") is an executive agency with plenary authority to regulate the operation of railroads; its approval is required in order for a railroad to abandon its rail lines. *NARPO v. STB,* 158 F.3d 135, 137 (D.C. Cir. 1998). Although the proceedings in this case began before the STB succeeded the ICC, to avoid confusion, the Petition will refer only to the STB.

Petitioners ask this Court to review and correct the Federal Circuit's determination of when a Trails Act taking occurs, a determination that affects timeliness, standing and compensation in every Trails Act taking case brought against the United States. Not only is the Federal Circuit's opinion binding precedent for all Trails Act cases, it has implications for determining the timeliness of any ***4** taking claim that arises when government regulation precedes a physical taking.

A. Statutory Framework

In an effort to preserve rail corridors, Congress passed the Trails Act, 16 U.S.C. § 1241 *et seq.*, which requires that, before a railroad can consummate a government-approved abandonment of its rail line, interested and qualified agencies must have the opportunity to negotiate with the railroad to acquire possession of the rail segment and operate it as a public recreational trail, on the condition that the corridor might be returned to railroad use at some point in the future. 16 U.S.C. § 1247(d) (Pet. App. 60); *see Preseault v. ICC [Preseault I],* 494 U.S. 1, 5-6 (1990). This process is called "railbanking," because, in theory, it places the rail line in a national "rail bank" to be "withdrawn" for use when it becomes appropriate and economically feasible.

The difficulty with this approach is that, under the law of many states, when an easement granted for a limited purpose is no longer used for that purpose, the easement is deemed abandoned, *Preseault I,* 494 U.S. at 8-9, 16, and the owner of the underlying land is once again entitled to use it as he pleases - which defeats the conversion to trail use. Thus, the Trails Act provides that, in the event the rail line is converted to trail use, "such interim [trail] use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d) (Pet. App. 60). This interference with normal state property law principles, which would otherwise require the property to revert to the landowner upon the railroad's abandonment, is what gives rise to the taking alleged in this case. *Preseault I,* 494 U.S. at 8-9.

A railroad may opt to begin the STB process for abandoning a portion of its railroad line by requesting either an application for abandonment or an exemption ***5** from the abandonment proceedings,[4] either of which trigger the Trails Act procedure. A party interested in taking over as "interim trail manager" may then request that the STB issue either a Certificate of Interim Trail Use or Abandonment ("CITU") (in the case of application for abandonment) or, as is applicable here, a Notice of Interim Trail Use or Abandonment ("NITU") (in the case of a request for exemption). The prospective trail manager must certify that it is willing to assume financial, legal and management responsibility for the trail and to acknowledge that the rail easement's use as a trail is subject to "possible future reconstruction and reactivation of the right-of-way for rail service." 49 C.F.R. § 1152.29(a)(3) (Pet. App. 67). The railroad must notify the STB that it is willing to negotiate with the prospective trail manager for trail use. 49 C.F.R. § 1152.29(d) (Pet. App. 68).

4 *See* 49 U.S.C. § 10903 (Pet. App. 63) (abandonment); 49 U.S.C. § 10502 (Pet. App. 61) (exemption). The distinction between these two avenues of abandonment is not material to the issues raised here.

If these conditions are fulfilled, the STB then issues the CITU/NITU, which authorizes a 180-day period for negotiation between the railroad and the prospective trail manager, and temporarily stays the railroad's authorization to consummate abandonment of the rail line. 49 C.F.R. § 1152.29(d) (Pet. App. 68). The CITU/NITU is self-executing, in that it prospectively authorizes, but does not cause, either abandonment or trail use. Specifically, the CITU/NITU authorizes conversion to trail use if the parties' negotiations are successful and an "agreement for interim trail use/rail banking is reached" that requires "the trail user to assume for the right-of-way during the term of the agreement, full responsibility for its management, for any liability arising out of its transfer or use … and for payment of any taxes." *See, e.g.*, Pet. App. 73-74. If negotiations are unsuccessful, the CITU/NITU authorizes the railroad to proceed with consummating its abandonment. *See, e.g.*, Pet. App. 74.

***6 B. Factual Background**

1. Notice of Exemption and Initiation of Negotiations Under NITU

The Warm Springs line is a 10.6 mile right-of-way made up of two segments of a rail line owned by Norfolk Southern Railway Corporation. In May 1994, Norfolk Southern published its intent to file a notice of exemption, which requested permission from the STB to abandon a 7.4 mile segment of the line. The STB allowed the exemption, effective August 25, 1994, pending any offers for financial assistance to continue rail service or to take over the line as a trail. A389.[5]

5 References to "A ___" are to the joint appendix in the Court of Appeals.

The City was interested in obtaining the Warm Springs line to create public walkways and bikeways. A373. It had already contacted Norfolk Southern about acquiring the 7.4 mile segment, *see, e.g., id.*, noting that the city was working with Trust for Public Land ("TPL"), a nonprofit corporation that acquires land on behalf of public bodies while those parties pursue public funding for the land. *Id.*; A375, A495. Thus, Norfolk Southern notified the STB of its willingness to negotiate a trail use agreement and its consent to the issuance of an NITU, and the City notified the STB that it was

willing to assume financial and legal responsibility for the segment if the City were to take over as a trail manager, and requested that an NITU issue. A393. The STB issued the NITU on August 31, 1994, which started a 180-day negotiating period, running through February 27, 1995. (Pet. App. 72-74).

On February 23, 1995, the City and Norfolk Southern jointly requested to add another 3.2 mile segment to the 7.4 mile segment already covered by the NITU. A399; *see* Pet. App. 75-76. The STB had previously approved the line for abandonment, but Norfolk Southern had not yet removed ***7** tracks or otherwise consummated abandonment; thus, effective June 2, 1995, the STB reopened the proceedings as to the 3.2 mile segment, consolidated them with the proceedings on the 7.4 mile segment, and extended the NITU negotiating period to August 26, 1995. (Pet. App. 76-77).

2. Purchase and Sale Agreement

Norfolk Southern and TPL entered into a purchase and sale agreement ("Purchase Agreement") for the full 10.6 mile segment on August 17, 1995, with the agreed purchase price of $1 million. A407-09. TPL paid $500 in earnest money, only $100 of which would be retained by Norfolk Southern in the event TPL decided not to close. A409-10. In the event that testing revealed environmental hazards or the title examination revealed defects, and Norfolk Southern failed to remedy those defects, TPL had the option of terminating the agreement and Norfolk Southern would be obligated to refund the entire $500 in earnest money. A413-14.

Under the terms of the Purchase Agreement, Norfolk Southern agreed to transfer title within one year of the execution of the contract, and to "deliver possession of the Property" to the buyer on the closing date, along with a quitclaim deed and an assignment of leases and other agreements. A415-16. In the meantime, Norfolk Southern bore responsibility to "maintain the Property in its present condition" and to pay taxes prorated through the date of the closing. A410-11. Norfolk Southern also retained the right to receive income, rents and payments, prorated through the date of closing. A416. The Purchase Agreement granted TPL the right to enter upon the land "for the purpose of inspecting, examining, surveying, [and] making … necessary tests," but TPL agreed to indemnify and hold Norfolk Southern harmless for damages or injury incurred in connection with such testing. A412-13.

An April 18, 1996 amendment to the contract more specifically recited that the parties had entered into the agreement with the intent that "said agreement and the ***8** conveyance pursuant thereto" be governed by the Trails Act. This first amendment provided that "at closing Buyer, its successor or assignee, shall assume full responsibility for the management of the right of way, for any legal liability arising out of its transfer or use, and for any payment of taxes in accordance with the requirements of Section 8(d) [of the Trails Act]." A425.

The parties again Amended the contract on July 1, 1996, to reflect Norfolk Southern's approval of TPL's anticipated assignment of the Purchase Agreement to the City.[6] A428. In this second amendment, the parties also added an agreement to jointly move for an extension of the NITU, and to extend the closing date to the earlier of 75 days after the STB's grant of the joint motion for extension or December 20, 1996. A429. TPL assigned the Purchase Agreement to the City on July 2, 1996. A404-06.

6 At a regular meeting on October 24, 1995, Columbus City Council authorized title examination and environmental testing on the property. A431. The Council later met in an executive session on April 30, 1996, and approved proceeding with the purchase of the property. A434.

3. Completion of Negotiations and Closing

On July 5, 1996, and pursuant to the terms of the second amendment to the Purchase Agreement, the City and Norfolk Southern jointly moved the STB to "extend the time period for negotiation of a mutually acceptable interim trail use/

railbanking agreement" through November 1, 1996. A440; *see* Pet. App. 79. The motion represented that "[a] railbanking agreement has been reached by the parties" but requested an extension of the NITU "in order to ensure that the railbanking period extends through the time of the actual transfer of the corridor to the interim trail manager … and to cover any gaps that may have inadvertently occurred in the railbanking negotiating period." A440-41; *see* Pet. App. 79. In particular, the parties had never requested an extension of the NITU negotiating ***9** period past August 26, 1995. A442-43. The parties requested an extension to November 1, 1996, "the anticipated date for closing on the transaction." *Id.* In an order served August 6, 1996, the STB acknowledged that the extension was requested "to ensure that the NITU remains in effect until actual transfer of the corridor to the interim trail manager." Pet. App. 79. It found that it retained jurisdiction, and granted the extension. Pet. App. 79-80.

The parties consummated the transaction in October of 1996. On October 9, 1996, Norfolk Southern executed a quitclaim deed in favor of Columbus. A448. This deed was recorded on October 11, 1996, *id.*, and "[a]cquisition of the land and payment of related expenses was completed October 11, 1996," A434-35. On October 15, 1996, the City retroactively authorized its mayor to "execute and negotiate an agreement" with Norfolk Southern to pay the $1 million purchase price and to reimburse TPL's expenses in connection with the acquisition process. *Id.* On November 2, 1996, the City notified the STB that, as of October 13, 1996, the rail lines "have been transferred to the City of Columbus, as interim trail manager, pursuant to an interim trail use/railbanking agreement and the … NITU." A454. The STB entered the notice into the public record on November 5, 1996. *Id.* Conversion of the rail line to a trail pursuant to the Trails Act was now, finally, consummated.

4. Dismissal by the Court of Federal Claims

Because it is a claim arising under the Constitution, landowners may bring suit for just compensation for a federal taking under either the Tucker Act, 28 U.S.C. § 1491 (Pet. App. 58), or the Little Tucker Act, 28 U.S.C. § 1346 (Pet. App. 57). *See Preseault I,* 494 U.S. at 14 (payments for Trails Act takings claims arise under the Fifth Amendment, not under the Trails Act). The Tucker Act provides jurisdiction in the Court of Federal Claims for all such claims, and the Little Tucker Act provides concurrent jurisdiction in district courts for claims not exceeding $10,000. (Pet. App. 58).

***10** On October 7, 2002, less than six years after the Railroad executed the quitclaim deed, the Petitioners filed a Tucker Act suit in the Court of Federal Claims alleging that the conversion of the Warm Springs Line to trail use worked a taking of their reversion interest. The Government filed a motion to dismiss on the ground that the Petitioners had not filed within the six-year statute of limitations in 28 U.S.C. § 2501 (Pet. App. 59). Because the manner in which both courts below resolved the arguments raised demonstrates the need for this Court to decide the Questions Presented, both opinions bear describing in detail.

The Government argued in the Court of Federal Claims that the Petitioners' claims had accrued on one of two alternative dates: the dates the first NITUs for each segment issued (August 31, 1994 and June 2, 1995); or the date on which the Railroad and the City informed the STB they had "reached their interim trail use and railbanking agreement" (July 5, 1996). *Caldwell v. United States [Caldwell I],* 57 Fed. Cl. 193, 197 (2003) (Pet. App. 72-79). The Government pointed out that the Federal Circuit, in *Preseault v. United States [Preseault II],* 100 F.3d 1525 (Fed. Cir. 1996), stated that a taking claim would not be ripe "[u]ntil the [STB] makes the administrative decision to convert an unused right-of-way to a trail, rather than simply permit abandonment, and finds an appropriate public agency to operate the trail." *Id.* at 1538; *see Caldwell I,* 57 Fed. Cl. at 200 (Pet. App. 41). Thus, the Government relied most heavily on the date the NITU first issued as the date of accrual because it was the only "administrative decision" of the STB, and (because the NITU is self-executing) no further government action was required in order for the Petitioners' claims to accrue. *Id.* However, two unpublished Court of Federal Claims opinions had fixed the accrual date to be when the "railbanking/interim trail use agreement" was executed. *Id.* at 202 (Pet. App. 45-46); A327. Nevertheless, even under that view, the Petitioners' claims were not timely because the ***11** Government contended the agreement was reached no later than July 5, 1996. *Caldwell I,* 57 Fed. Cl. at 196, 197.

The Petitioners contended that the earliest date their claims could have accrued was when the Railroad executed a quitclaim deed in favor of the City. Before that time, it was not known whether the rail line would become a trail, or would instead be abandoned by the Railroad. *See id.* at 197-98 (Pet. App. 35). The NITU was a necessary but not sufficient condition for trail use, and *Preseault II* did not fully answer the question of what *was* sufficient because, in that case, the rail line had been abandoned for ten years before any regulatory action on the line. [7] Further, the Purchase Agreement did not transfer any property interest, legal responsibility, or financial responsibility, and in fact expressly conditioned the transfer on closing. *See Caldwell I,* 57 Fed. Cl. at 197-98 (Pet. App. 35). Interim trail use was not consummated until possession of the rail easement had been transferred to the City for use as a trail. *See id.* Thus, any claim for the taking Petitioners alleged could not be ripe before the transaction was closed and the deed was executed and delivered.

7 The *Preseault* litigation predated the regulations now in effect. *Preseault I,* 494 U.S. at 7 n.5. *Preseault II* is discussed in more detail *infra*, at pp. 20-21.

The Court of Federal Claims noted that "the Government's liability is set when plaintiffs' property had been definitely converted to public use and the plaintiffs were able to bring a claim under the Tucker Act." *Id.* at 197 (Pet. App. 34). But the court identified the "Trail Use Agreement" - which it defined as the "railbanking agreement" to which the parties referred in the July 5, 1996 request for extension - as the precise point of claims accrual. *Id.* at 198-99 (Pet. App. 35, 40). The court stated that the plaintiffs were wrong to focus on the inchoate nature of the Purchase Agreement rather than discussing the "Trail Use Agreement" that ended ***12** the NITU negotiating period - but the court never explained the distinction it saw between the Purchase Agreement and the "Trail Use Agreement." [8] *Id.* at 198 (Pet. App. 35).

8 Petitioners filed a motion for reconsideration asking the court to clarify the "Trail Use Agreement" to which it referred in its opinion, as well as to consider a tolling argument based on a nationwide class action of which the Petitioners learned only after the court's opinion issued. The court did not address the request for clarification, and rejected the Petitioners' tolling argument. (Pet. App. 51-53).

The Court of Federal Claims next rejected both the Petitioners' position that the conversion to trail use could not have occurred until after title passed to the City, and the Government's argument that the NITU triggered the Petitioners' claims. The Petitioners had relied on *United States v. Dow,* 357 U.S. 17 (1958), and *Kirby Forest Indus., Inc. v. United States,* 467 U.S. 1 (1984), for the proposition that, in formal condemnation cases, a taking does not occur until the earlier of when the Government takes possession of the land or legal title passes to the Government, and not when the condemnation proceeding is announced. 57 Fed. Cl. at 198 (Pet. App. 36-37). However, the court appeared to apply a regulatory taking analysis rather than a physical or *per se* taking analysis, as demonstrated by its discussion of *Dow* and *Kirby*:

> Even in the context of a condemnation proceeding, … the Supreme Court scrutinized first the ***severity of interference*** with plaintiff's property rights. Only then did the Court hold that the level of severity was met with the transfer of the deed.… The Court's holding in *Kirby* focuses … more on the ***Government's interference with plaintiff's rights***, and to that extent, the case is instructive.

Id. (emphasis added). In further support of its view that the title transfer was not the date the taking claim accrued, the court observed that interim trail use may occur by "donation, transfer, lease, sale, or otherwise," so it ***13** "would not make sense" for the claim accrual to be triggered by a deed when the Trails Act did not require a deed. *Id.* at 198-99 (Pet. App. 38).

On the other hand, the Court of Federal Claims noted, the Government's argument that the NITU was the date that Petitioners' taking claims accrued ignored a second requirement in *Preseault II*: that the STB "select an appropriate

public agency to operate the trail," a requirement that "is met only after the parties successfully negotiate a Trail Use Agreement." *Id.* at 200 (Pet. App.41). The court acknowledged the Government's contention that the NITU triggered the statute of limitations because "the NITU is effective when issued to delay the vesting of any reversionary interests," *id.* at 202 (Pet. App. 46), so although "[t]he fate of their land rights was unknown" at that point, "at least temporarily, [Petitioners'] rights were suspended," *id.* at 201 (Pet. App. 43). Again resorting to a regulatory taking analysis, however, the court rejected the Government's argument: "The Federal Circuit in *Preseault [II]* did not look at the last government action, as defendant urges, but, rather, focused on the end of the administrative process, which the Government set into action with the NITU issuance, but which concluded with the execution of the Trail Use Agreement." *Id.* at 201 (Pet. App. 43-44). In further support of its view that an NITU did not work a taking, the Court of Federal Claims relied on *Creppel v. United States,* 41 F.3d 627 (Fed. Cir. 1994), a *per se* regulatory taking case, which held that a claim for a taking of all economically viable use of property did not accrue until the EPA issued a final order blocking the project, and not when the regulatory process began. *See Caldwell I,* 57 Fed. Cl. at 203 (Pet. App. 48-49). The Court of Federal Claims thus concluded that "issuance of the NITU does not determine the results of the Government's action in the case at bar. The taking becomes fixed only after the parties reach a Trail Use Agreement. Before that date the outcome of the Government action is not certain, so the taking has not been effected." *Id.*

***14** The Petitioners timely appealed to the Federal Circuit.

5. Federal Circuit Affirmance

On appeal, the Government abandoned its argument that the NITU triggered the statute of limitations, settling instead on the date the parties had announced a "railbanking agreement has been reached." Appellee's Br. at 16-17. The Federal Circuit opinion correctly described the parties' arguments and positions on appeal. *Caldwell v. United States [Caldwell II],* 391 F.3d 1226, 1228-33 (Fed. Cir. 2004) (Pet. App. 2-12). Nevertheless, the Federal Circuit rejected both parties' arguments and selected the NITU - for which neither party argued on appeal - as the date of accrual. *Id.* at 1233 (Pet. App. 12).

As they did in the Court of Federal Claims, Petitioners contended on appeal that "a taking under the Trails Act did not occur until the railroad line right-of-way was actually converted into a trail for interim trail use." *Caldwell II,* 391 F.3 at 1233 (Pet. App. 12); Appellants' Opening Br. at 34-36. At oral argument, a member of the panel stated that the taking did not actually occur when the rail line became a trail, but (as it was described by the same panel member in the opinion) "when state law reversionary property interests that would otherwise vest in the adjacent landowners are blocked from so vesting." *Caldwell II,* 391 F.3d at 1233 (Pet. App. 12). Counsel for Petitioners agreed with the court that the taking occurred when the state-law property interests were blocked, but stated that Petitioners' position was that this only occurred when the property was converted to trail use. *Cf.* 16 U.S.C. § 1247(d) (Pet. App. 60). ("[S]uch interim [trail] use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.")

In its written opinion, a majority of the panel disagreed with Petitioners' position. Following its observation noted above, the majority added that

> ***15** the question, then, is … when are state law reversion interests forestalled by operation of section 8(d) of the Trails Act? We conclude that this occurs when the railroad and trail operator communicate to the STB their intention to negotiate a trail use agreement and the agency issues an NITU that operates to preclude abandonment under section 8(d).

391 F.3d at 1233 (Pet. App. 12).

Over the Petitioners' protestations, Appellants' Reply at 8-11, the Federal Circuit agreed with the Government's emphasis on the last "government action" as the only possible trigger. The Petitioners had contended that, in a case such as this where the federal government has authorized a third party to occupy land, it is the third party's occupation of the land, and not merely the government act authorizing it, that creates a taking. *Id.* at 9-10; *see, e.g., Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982), *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987). Without addressing this argument, the Federal Circuit stated that not only was the "issuance of the NITU … the only *government* action in the railbanking process that operates to prevent abandonment" but that "[t]he task of finalizing the trail use agreement under the Trails Act falls entirely on the railroad and trail operator." *Caldwell II,* 391 F.3d at 1233-34 (Pet. App. 13-14) (emphasis in original). Such private action, in the Federal Circuit's view, could not work a taking.

Additionally, the Federal Circuit majority rejected the Petitioners' argument that accrual could not be triggered by the NITU because an NITU could lead to either abandonment or trail use, depending on the outcome of negotiations. In fact, the court acknowledged that

> the NITU operates as a single trigger to several possible outcomes. It may, as in this case, trigger a process that results in a permanent taking in the event that a trail use agreement is reached and abandonment of the right-of-way is effectively blocked. Alternatively, negotiations may fail, and the NITU would ***16** then convert into a notice of abandonment. In these circumstances, a temporary taking may have occurred. It is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues.

Id. at 1234 (Pet. App. 14-15) (citations omitted). The Federal Circuit pointed to *United States v. Dow,* 357 U.S. 17 (1958) as support for the fact that a takings claim might first accrue - "there by physical possession, here by blocking the easement reversion" - and then be cut off, rendering it merely a temporary taking. [9] *Caldwell II,* 391 F.3d at 1235 (Pet. App. 16).

9 The Federal Circuit disclaimed any attempt to determine whether a compensable temporary taking would have occurred because this case involved a permanent taking. *Id.* at 1234 n.7 (Pet. App. 15).

Given the Court of Federal Claims' application of regulatory takings principles, the Petitioners had made a point of arguing in their appellate briefs that a Trails Act taking was a physical, *per se* taking, and that it was important, under *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002) to apply only physical taking precedents and accrual concepts to the case. Appellants' Opening Br. at 26-30; Reply at 2-5. Nowhere in the opinion did the majority state what kind of taking analysis it was applying. However, in support of its statement that it was not unusual for the temporary nature of a taking not to be apparent when it accrues, the Federal Circuit relied solely on three regulatory taking cases involving the denial of a permit. *Caldwell II,* 391 F.3d at 1234 n.8 (Pet. App. 15).

Judge Newman dissented, agreeing with the Petitioners' view of the taking as a physical taking triggered by the City's occupation and possession of the easement.

> Until the easement was transferred to the City of Columbus, Norfolk Southern Railroad not only continued as owner of the right-of-way, but retained all of ***17** the benefits and obligations of ownership.… Until the right of trail use was vested in the City the cause of action had not ripened, and the liability of the government for compensation was not fixed.

Caldwell II, 391 F.3d at 1236 (Pet. App. 20). This was so because none of the conditions for trail use (the trail operator's assumption of legal and financial responsibility for the trail) could occur until the City took possession of the trail. *Id.* The NITU represented only a "hope and a plan" that the easement would be converted to a trail, and the Purchase

Agreement made the assumption of the required responsibilities contingent on closing. *Id.* at 1237 (Pet. App. 21). Further, that agreement "documented its own negotiating status" when the provision was added July 1, 1996 providing that the parties would jointly request an extension of the negotiating period. *Id.* (Pet. App. 22). Only when, as in *Nollan*, "persons are given a permanent and continuous right to pass to and fro," had a taking claim accrued. *Id.* at 1238 (Pet. App. 22).

Judge Newman also pointed out that, far from supporting the majority's position, *Dow* supported the Petitioners. *Id.* (Pet. App. 23). *Dow* was not a statute of limitations case, but was about whether the plaintiff landowner had standing to obtain just compensation for property interests the Government acquired by eminent domain. *Id.*; *see Dow,* 357 U.S. at 23. The Government had already entered into possession, but had not yet deposited the compensation with the court, when the landowner purchased the property. *Caldwell II,* 391 F.3d at 1238 (Pet. App. 23); *Dow,* 357 U.S. at 19. The question was whether he was entitled to receive the purportedly assigned claim to compensation. *Caldwell II,* 391 F.3d at 1238 (Pet. App. 23). In fact, Judge Newman pointed out, "[t]he Court stressed that the determinative event of the taking was whether 'the Government has already entered into possession.' " *Id.* Thus, the majority's analogy to *Dow* was not apt, because in Petitioners' case, the NITU "did not change the possession and occupancy of the easement." *Id.* (Pet. ***18** App. 24). Rather, "*Dow* strongly reinforces the position that the Norfolk Southern right-of-way was not taken and compensable until there was a transfer of *possession* and occupancy, an event that did not occur until the date of Closing and the transfer of the deed." *Id.* at 1239 (Pet. App. 24).

In light of Judge Newman's dissent and the importance of this issue, the Petitioners moved for rehearing *en banc* (Pet. App. 54). The court requested a response from the Government, but ultimately denied rehearing. (Pet. App. 54).

Notably, under 28 U.S.C. § 1295(a)(2) (Pet. App. 57), the Federal Circuit has *exclusive jurisdiction* over appeals in cases arising under the Constitution and brought under either the Tucker Act or the Little Tucker Act. Further, the respective statutes of limitations (28 U.S.C. § 2501 and 28 U.S.C. § 2401) use nearly identical language. (Pet. App. 59). Thus, the issues decided by the Federal Circuit in this case are binding on every court deciding a Trails Act taking case (and, indeed, on every takings case against the United States) in the country.

REASONS FOR GRANTING THE WRIT

The Federal Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, and moreover, it has decided an important federal question in a way that conflicts with decisions of this Court.

Specifically, the Federal Circuit determined that a taking by operation of the Trails Act accrues when the STB merely issues the NITU that begins the negotiating period that ***might*** result in trail use, even though it is also possible that the negotiations will fail and the rail line will be abandoned, leaving the property interest to revert to the Petitioners. The Federal Circuit's holding applies not only to the 400 landowners in the class ***19** proposed by Petitioners, but to every Trails Act claim now pending or brought in the future, across the United States. The holding infects every aspect of the litigation of Trails Act claims, and it threatens to wreak havoc on notions of ripeness and accrual in many other areas involving state or federal regulation. The Federal Circuit came to this erroneous conclusion by ignoring several fundamental principles that have been established in this Court's takings jurisprudence, and its decision should be corrected by this Court.

I. The Federal Circuit Has Decided an Important Question of Federal Law.

The rule announced in the Federal Circuit's opinion is an important question of federal law. There is no circuit split in this case because, as noted above, the Federal Circuit's decision governs every Trails Act takings case. But, for that same reason it is important that this Court grant certiorari to correct the Federal Circuit's erroneous decision.

This Court previously addressed the potential for a taking that could be worked by the Trails Act in *Preseault I*, but declined to decide whether a taking had occurred in that case. The Court quoted the House Report for the Act, which recognized the need to state that "interim [trail] use shall not be treated … as an abandonment of the use of such rights-of-way for railroad purposes" because "there may be nothing left for trail use" after abandonment has been consummated. *Preseault I,* 494 U.S. at 8 (quoting H.R. Rep. No. 98-28, at 8-9, *reprinted in* 1983 U.S.C.C.A.N. 112, 119-20). The Court noted that "by deeming interim trail use to be like discontinuance rather than abandonment, Congress prevented property interests from reverting under state law." *Id.* Thus, the unanimous Court acknowledged that, in some cases, the Trails Act may work a taking. *Id.* at 16. However, because the Preseaults had brought a facial challenge to the Trails Act rather than bringing suit for just compensation under the ***20** Tucker Act, the Court declined to reach the question of whether a taking had occurred in that case. *Id.* at 17.

Justice O'Connor's concurring opinion (for herself and Justices Scalia and Kennedy) wrote to express the view "that state law determines what property interest petitioners possess, and that traditional takings doctrine will determine whether the Government must compensate petitioners for the burden imposed on any property interest they possess." *Id.* at 20. The Second Circuit's decision in the case had determined that no taking could occur as a matter of law because the petitioners' interests could not vest until the ICC determined abandonment was appropriate - which would never occur if the rail line were converted to a trail. *See id.* at 23. Justice O'Connor noted that the Court's opinion was "inconsistent with the Second Circuit's view," and was correct because the ICC's jurisdiction to regulate did not preempt the state property law principles with which the ICC's actions may interfere. *Id.* at 24. Rather, if ICC action interferes with state property law interests, just compensation is required. *Id.* As to the question of ***whether*** a taking had occurred, Justice O'Connor noted that "well-established principles will govern the analysis of whether the burden the ICC's actions impose upon state-defined property interests amounts to a compensable taking." *Id.* In particular, Justice O'Connor pointed to *Nollan*, where "the Government appropriated a public easement," as a likely basis for such a determination.

Following *Preseault I*, the Preseaults brought suit in the Court of Federal Claims, lost on the issue of whether there had been a taking, and appealed to the Federal Circuit. *Preseault II,* 100 F.3d at 1530. Reversing a panel decision, a majority [10] of the *en banc* Federal Circuit in ***21** *Preseault II*, guided by language in this Court's *Preseault I* opinion, including Justice O'Connor's concurrence, determined that, under Vermont law, a taking had occurred in that case. Because the railroad had, as a matter of fact, abandoned the rail line and leased it to the local government without seeking ICC approval, that case did not arise under the procedure at issue here, but rather as a result of the landowners filing a request with the ICC to certify abandonment. *Id.* at 1549. Thus, the majority found a taking occurred under either of two alternative theories: (1) if the rail easement still existed when the ICC Order issued, "[t]he taking of possession of the lands owned by the Preseaults for use as a public trail was in effect a taking of a new easement for that new use" because the change in use effected an abandonment under state law; or (2) "as an alternative basis," when the ICC issued its Order, "there was as a matter of state law no railroad easement in existence on those parcels" due to the prior abandonment, "and the properties were held by the Preseaults in fee simple" when they were taken for trail use. 100 F.3d at 1550. Either way, the majority viewed the taking as a

10 Although the Government has persisted in referring to the decision as a plurality, the Federal Circuit has held that the holding of *Preseault II* "reflects the considered view of a substantial majority of the court." *Toews v. United States,* 376 F.3d 1371, 1380 n.6 (Fed. Cir. 2004).

physical entry upon the private lands of the Preseaults, … under the Federal Government's authority pursuant to the ICC's order. That it was for a valued public use was not the issue. We have here a straightforward taking of private property for a public use for which just compensation must be paid.

Id. at 1551.

The overarching question that was not directly answered by either *Preseault I* or *Preseault II* is the one presented squarely by this case and incorrectly decided by the Federal Circuit: Where a regulatory body authorizes a physical appropriation of a public easement upon the ***22** fulfillment of certain conditions, is it a regulatory taking that accrues upon the issuance of the regulatory action, or is it the same *per se* physical taking that the Federal Circuit found in *Preseault II*, and that this Court found in *Nollan*? This question does not merely affect the determination of when these petitioners' claims accrued, but determines important questions throughout the Trails Act taking litigation, and it implicates takings under similar regulatory schemes.

Most immediately, the Federal Circuit's decision determines whether these 400 landowners, and others similarly situated, *see Barclay v. United States,* 351 F. Supp. 2d 1169 (D. Kan. 2004), will even have access to a determination of the just compensation to which they are entitled under the Constitution. As of June 15, 2005, 155 NITUs had been issued in the previous six years. Fifteen of those were issued in the previous 180 days, and an additional thirty-five were issued earlier but have been extended for additional time, for a total of fifty cases in which the trail use negotiating period is still open. Each case on the STB docket can affect hundreds of landowners who own property burdened by the rail line. Those landowners who, like the Petitioners, relied on the date the trail operator took possession as the final accrual date for their claims may now find that their claims are barred because they accrued at the much earlier (and more obscure) time - the date an NITU issued.

Even as to those landowners whose claims are not already prematurely barred under the Federal Circuit's decision, other important questions that arise in Trails Act cases are also determined by the Federal Circuit's opinion. This decision determines who has standing to assert takings claims (and in particular, the definition of classes of landowners). *Dow,* 357 U.S. 20 (noting that one may only sue for a taking if the owner at the time of the taking). It also affects the determination of the landowners' compensation. *Kirby,* 467 U.S. 10 (holding that compensation is determined as of the time of taking). If, as the ***23** Federal Circuit held, the taking occurred when the NITU issued, and not when the rail line was actually converted to trail use (which is often years later, due to extensions), classes of landowners are likely to be improperly defined, and the value of the land may have changed significantly between the date when the railroad first decided to abandon the land and when the trail operator took over possession - particularly if the public becomes aware of the change in use of the easement during that time.

The Federal Circuit's ruling that the statute of limitations accrued when the NITU issued necessarily means that Trails Act taking claims are also *ripe* as soon as the NITU issues. According to the Federal Circuit's decision, all fifty NITU negotiating periods that were still open on June 15, 2005 - *i.e.* that had not yet resulted in trail use - nonetheless presented *ripe taking claims* as of that date. This result should trouble the Government, and also presents a dilemma for the courts, who are left to deal with evaluating claims for takings when it is not yet known whether they are permanent, and whether they are compensable at all under a *Penn Central* analysis. *See Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978).

Finally, to the extent that the Federal Circuit's holding can be analogized to takings occurring as a result of other regulatory actions outside the Trails Act taking context, it threatens to wreak havoc with notions of ripeness and accrual in this broader arena.

II. The Federal Circuit Has Decided This Question in a Way That Directly Conflicts With Prior Decisions of This Court.

It is even more important for this Court to grant certiorari and decide this question of federal law because the Federal Circuit's decision conflicts with this Court's takings precedents. Specifically, it fails to recognize that the taking of an easement in land for the use of the public is a *per se*, physical taking as in *Nollan, see* 483 U.S. at 831-32, 841, regardless of whether that taking is preceded ***24** by some regulatory action. In *United States v. Clarke,* 445 U.S. 253 (1980), and *Dow v. United States,* this Court stated that a claim for compensation for a physical invasion of land accrues when the

land is actually invaded. Here, under the reasoning in *Preseault I* and the language of the Trails Act, no such invasion could have occurred until the City took possession.

Further, the Federal Circuit misinterpreted *Dow* to say that it did not make a difference whether a taking would be permanent or temporary in determining the time of accrual of a Trails Act taking. In fact, if the NITU works a temporary taking, this Court's recent *Tahoe* decision, 535 U.S. 302 (2002), requires that it be subject to a *Penn Central* ad-hoc analysis, and that is dependent, in large part, on whether the taking is permanent or temporary. Thus, based on basic and longstanding accrual principles, it cannot be the rule that a taking claim for a physical taking accrues at the time of an earlier (and conditional) regulatory authorization for that taking.

A. The Federal Circuit Erred in Failing to Analyze This Taking As a Permanent Physical Occupation.

The Federal Circuit erroneously determined that a taking claim founded upon an appropriation of an easement in land is ripe when the NITU issues because it is the last "government action" preceding the appropriation. In doing so, it improperly applied concepts and precedents relevant to regulatory takings to this *per se* physical taking of an easement in land. [11]

11 In *Lingle v. Chevron,* ___ U.S. ___, 125 S.Ct. 2074 (2005), this Court revisited the types of takings that may occur under the Constitution, presenting a more nuanced view of the distinctions between them than seen in previous cases. Rather than draw the line between "physical" or "*per se*" and "regulatory" takings, the Court distinguished between direct appropriation by the government, "regulatory action" that was tantamount to direct appropriation, and all other kinds of regulation. *Id.* at 2081. The Court identified both the *Loretto*/*Nollan* paradigm (government-authorized appropriation by a third party) and the *Lucas* paradigm (taking of all economically viable use; *see Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992)) as being in the second category of "regulatory action," while the third category of takings included those to which the *Penn Central* balancing test applied. *Id.*; *cf. Tahoe,* 535 U.S. at 323 (drawing the primary distinction between "acquisitions of property for public use," including *Loretto*, and "regulations prohibiting private uses," referring to *Lucas* as a "regulatory taking" that was an exception to the application of the *Penn Central* test). The Petitioners read *Lingle* and *Tahoe* together to describe a group of "categorical" or "*per se*" takings, which may either be a "positive taking," in the sense of a physical acquisition (or imposition of a burden) for public use, or a "negative taking" in the sense of being regulation prohibiting a private use. Thus, to be precise, this case presents a categorical, physical (or "positive") taking. This Court may find occasion to further describe these categories of takings if it grants certiorari in this case.
Regardless of the labels applied, the underlying legal principles are the same - the *Penn Central*-related questions of finality of administrative action, reasonable investment-backed expectations of the landowners, and the importance of the public benefit - are not relevant when the taking in question results in the appropriation of land for public use. *Lingle,* 125 U.S. at 2081-82. It is in this sense that Petitioners use the term "physical taking," even though the physical occupation may have come about as a result of regulatory action rather than a direct government appropriation. *See Tahoe,* 535 U.S. at 322 (referring to the *Loretto* case as a physical appropriation for a public purpose).

***25** In *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), this Court held that requiring a beachfront landowner to allow a public easement for passage to a nearby beach as a condition for obtaining a building permit, when the need for such an easement was not caused by the building, worked a compensable taking.
Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.…

26** In *Loretto*, we observed that where governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." ***We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed ….

Id. at 831-32 (emphasis added) (citations omitted).

The nature of the property interest taken in this case, and the manner in which it is taken for public use, is no different from the property interest that this Court had "no doubt" was a taking in *Nollan.* Regardless of the nature of the regulatory proceedings that bring it about, in the end, an easement in land is taken for public use when someone other than the owner of the underlying fee takes possession of or occupies it for public purposes. This is simply a physical, *per se* taking authorized by the Government, regardless of what regulatory action may have preceded it. [12]

12 Whether a taking in fact has occurred will depend on an analysis of state property law, but that analysis is only necessary to determine "the nature of the state-created property interest that petitioners would have enjoyed absent the federal action and … the extent that the federal action burdened that interest." *Preseault I*, at 24 (O'Connor, J., concurring). That is, reference to state property law is necessary to determine the nature of the property interest held by the railroad and the extent to which the shift in use from railroad to recreational trail would normally result in the easement being extinguished for misuse - questions which will be addressed in determining liability. However, because a physical taking is alleged, the point at which such a taking would occur, if at all, is no earlier than when someone other than either the railroad or the landowner was in possession. Because the Petitioners' claims would be timely if they accrued at any point after the transfer to the City, determining the precise point of accrual in this case does not require reference to state abandonment law.

***27** Liability for a physical taking accrues when physical occupation occurs. In *United States v. Clarke,* 445 U.S. 223 (1980), this Court evaluated whether Indian lands could be taken by inverse condemnation as opposed to formal condemnation proceedings. This Court quoted *Dow* on the issue of when claims accrue in cases involving physical occupation:

In a [formal] condemnation proceeding, the taking generally occurs sometime during the course of the proceeding.… When a taking occurs by physical invasion, on the other hand, the usual rule is that *the time of the invasion constitutes the act of taking*, and "[i]t is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued."

Id. at 258 (emphasis added).

Specifically in the Trails Act case, the physical occupation occurs upon conversion to trail use. The reasoning of *Preseault I* suggests that a taking, if any, accrues when the Trails Act prevents property interests from reverting under state law. *Id.* at 8-9. The statute states, "in the case of interim use of … railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, … *such interim use* shall not be treated … as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d) (Pet. App. 60). Thus, in this case, and consistent with the basic analysis of accrual of physical takings set out in *Clarke*, the taking accrued when, pursuant to a sale of the easement to the City as trail operator consistent with the Trails Act, the City took possession of the land.

Because this is a physical taking, and liability accrues when the third party occupies or enters into possession of the land, the timing of the last "government action" ***28** preceding the physical appropriation is irrelevant. In fact, in this case, the NITU did not even authorize the City (or the public) to enter the land until certain conditions regarding the City's responsibility for the easement were fulfilled. Those conditions were not fulfilled until closing, and the Federal Circuit was wrong to find otherwise.

B. The Federal Circuit Erred in Finding Petitioners' Claims Accrued as the Result of "Delay" in the Abandonment Process.

The Federal Circuit also erroneously determined that liability for a taking pursuant to the Trails Act was "fixed" when the STB imposed the NITU negotiation period prior to allowing the railroad to abandon its easement, because this mere delay in the abandonment process, the court held, "blocked" the reversion of the property interest to Petitioners.

The Federal Circuit, having decided that the NITU worked a taking, defended this position against Petitioners' (and the dissent's) argument that the NITU did not necessarily result in trail use by relying on an incorrect view of this Court's decision in *Dow*. *Caldwell II,* 391 F.3d at 1234-35 (Pet. App. 15-16). The Federal Circuit erroneously interpreted *Dow* to mean that it did not make a difference to the question of the Government's liability for a taking whether the taking was temporary or permanent - and thus it was irrelevant to the question of liability for a taking whether the conversion to trail use might be unsuccessful. *Id.*

But in *Dow*, liability for a physical taking had already been established because the Government had already entered into possession, 357 U.S. at 22; thus, as noted by Judge Newman, *Dow* was not a ripeness or accrual case. *Caldwell II,* 391 F.3d at 1238 (Pet. App. 23). The Court first reiterated the longstanding rule that "fixes the 'taking' ***at the time of the entry into physical possession.***" *Dow,* 357 U.S. at 25. Then, in defending this rule ***29** against the petitioner's claim that such a rule would prejudice the landowner in the event the Government abandoned the condemnation proceeding, the Court observed that, in that case, the physical taking would merely be a compensable temporary taking rather than a permanent one; it would not completely eliminate the landowner's ability to seek compensation. *Id.* at 26. This is a far cry from saying that a prior ***regulatory*** authorization can trigger the accrual for a subsequent ***physical*** taking.

And yet, the only plausible way in which a taking could be worked by the NITU, as the Federal Circuit erroneously concluded, is if it works a regulatory taking, by "delaying" the potential abandonment and requiring the railroad first to negotiate. *Tahoe* teaches that there is no such thing as a categorical (or *per se*) temporary regulatory taking; all temporary regulatory takings are subject to the *Penn Central* ad-hoc inquiry, as well as the finality rule for ripeness. 535 U.S. at 331, 339. "Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." *Tahoe, id.* at 332. Rather, analysis of liability for such a taking requires "a more fact-specific inquiry," including evaluation of the extent of interference with (including delay of) the landowner's investment-backed expectations, and ripeness is subject to a strict administrative finality rule. *Id.* at 332, 336, 340-41. Thus, if the NITU is the accrual trigger, liability questions are ***highly dependent*** on whether the NITU has permanent or temporary effect. Moreover, to hold that a "delay" in a regulatory process can cause a takings claim to accrue runs afoul of this Court's oft-repeated concern that "***normal delays*** in obtaining building permits, changes in zoning, variances, and the like" should not give rise to a taking. *Id.* at 335; *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 321 (1987).

Accrual (and ripeness) depend on the extent to which the elements of liability for an injury are fixed, enabling ***30** the plaintiff to file suit. *Dunlap v. United States,* 173 U.S. 65, 70 (1899). A claim cannot accrue before it has become ripe. *See id.* In *Dow*, there had already been a physical appropriation of land, so the elements of liability were fixed for the taking alleged; the question of whether the taking was temporary or permanent only implicated compensation, and not when the claim for compensation was ripe or had accrued. Here, the taking alleged is that, like in *Nollan*, upon the transfer of the deed from the railroad to the City, "individuals [were] given a permanent and continuous right to pass to and fro." *Nollan,* 483 U.S. at 832. The elements of liability for ***that*** taking were only fixed when the public had the right to invade the Petitioners' land. Whether the NITU might ***also*** work some kind of taking is questionable, but in any event is irrelevant to determining when Petitioners' claims had accrued. Even assuming the NITU works a taking, such a taking would necessarily be subject to the *Penn Central* analysis, so the fixing of the Government's liability is necessarily dependent on whether the taking will be temporary or permanent - and this can only be known when (and if) the NITU expires and the railroad abandons the rail line.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari in this case to resolve this important issue of federal law, and decide that Petitioners' taking claims are timely.

End of Document

No. 03-5152

In the United States Court of Appeals for the Federal Circuit

WILLIAM B. CALDWELL, III and BEN FRANK BILLINGS, III,
(for themselves and as representative of a class of
similarly situated persons)

Plaintiffs - Appellants,

v.

UNITED STATES,

Defendant - Appellee.

Appeal from the United States Court of Federal Claims in 02-CV-1347
Judge Christine O.C. Miller

UNITED STATES' OPPOSITION
TO PETITION FOR REHEARING EN BANC

THOMAS L. SANSONETTI
Assistant Attorney General

JOHN SMELTZER
KRISTINE TARDIFF
KATHRYN E. KOVACS
U.S. Department of Justice
Environment & Natural Resources
Division, Appellate Section
P.O. Box 23795 l'Enfant Plaza Sta.
Washington, D.C. 20026
(202) 514-4010
March 10, 2005

OF COUNSEL:

EVELYN KITAY
Surface Transportation Board
Office of the General Counsel
Washington, D.C. 20423

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, Rules and Regulations:

INTRODUCTION

This case concerns the accrual date of a claim alleging that conversion of a railroad right-of-way to interim trail use under the National Trails System Act Amendments of 1983, 16 U.S.C. § 1247(d), constitutes a taking. The majority's opinion does not conflict with any Supreme Court or circuit precedent, and this case does not present any question of exceptional importance. Thus, rehearing en banc is not warranted under Rule 35.

The Appellants, William B. Caldwell, III and Ben Frank Billings, III ("Caldwell"), alleged that they own property underlying a railroad corridor in Georgia and that the railbanking of that corridor under the Trails Act worked a taking of their property under the Fifth Amendment. On June 30, 2003, the Court of Federal Claims dismissed the complaint for lack of jurisdiction under 28 U.S.C. § 2501, holding that Caldwell did not file within the six-year statute of limitations. JA1. The United States argued that the claim accrued when the Interstate Commerce Commission ("ICC," now the "STB") issued the Notice of Interim Trail Use or Abandonment ("NITU"); in the alternative, the United States argued that the claim accrued when the railroad and the City reached a trail use agreement. Caldwell filed his complaint more than six years after both of those dates. Caldwell contended that the claim did not accrue until the railroad

delivered the deed to the City. The court held that the statute of limitations began to run on July 5, 1996, when the City notified the ICC that it had reached a trail use agreement with the railroad. JA17. The court reasoned that the NITU takes effect only if the right-of-way meets the criteria for abandonment and negotiation of trail use occurs." JA15. It is when the parties reach a trail use agreement that the "taking becomes fixed * * *. Before that date the outcome of the Government action is not certain, so the taking has not been effected." JA17.

On appeal, the United States argued that the trial court held correctly that Caldwell's claim accrued when the railroad and the City reached a trail use agreement. A divided panel of this Court affirmed the judgment, but the majority held, contrary to the government's and the trial court's position, that Caldwell's claim accrued when the ICC issued the NITU, because it was then that his alleged reversionary interest in the corridor was blocked. Slip op. at 11.[1] The majority recognized that if the NITU works a taking -- a question the Court expressly declined to answer, id. at 14 n.7 -- that taking might turn out to be temporary if trail use does not ensue and the railroad abandons the line. Id. at 14. The dissent opined that it was not until title passed to the City that Caldwell's claim accrued,

[1] The Court's slip opinion is attached to the Appellants' Petition for Rehearing En Banc and is published at Caldwell v. United States, 391 F.3d 1226 (Fed. Cir. 2004).

because it was then that the City gained the right to possess and occupy the corridor. Slip dissent at 6.

ARGUMENT

I. The majority's opinion does not conflict with Supreme Court or circuit precedent, and the question here does not otherwise warrant rehearing en banc.

Caldwell's complaint alleged that the United States took his property because converting the rail corridor to interim trail use under the Trails Act preempted his reversionary rights under state law. JA39 ¶¶18, 20. Caldwell's allegation is consistent with Preseault v. United States, where a plurality of this Court sitting en banc concluded that a taking occurs under the Trails Act "[w]hen state-defined property rights are destroyed by the Federal Government's preemptive power." 100 F.3d 1525, 1552 (Fed. Cir. 1996) (en banc); see also Preseault, 494 U.S. at 21-22 (O'Connor, J., concurring). The majority followed that precedent and answered the allegation in Caldwell's complaint when it held that "a Fifth Amendment taking occurs when, pursuant to the Trails Act, state law reversionary interests are effectively eliminated in connection with a conversion of a railroad right-of-way to trail use." Slip op. at 2, 11.

The majority also followed the statutory scheme when it recognized that "the NITU is the only government action in the railbanking process that operates

to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way." Slip op. at 13 (emphasis in original). The NITU delays the abandonment of the line for 180 days to allow the rail carrier and the trail group time to negotiate a railbanking and interim trail use agreement. 49 C.F.R. § 1152.29(d)(1). In the circumstances of this case, once the NITU issued, interim trail use was authorized without further federal action. After that point, abandonment required further STB involvement: if the railroad and the City had not reached a trail use agreement, the railroad could have abandoned by filing a notice of consummation with the STB "to signify that it has exercised the authority granted and fully abandoned the line," 49 C.F.R. §§ 1152.29(d)(1), (e)(2); National Ass'n of Reversionary Property Owners v. STB, 158 F.3d 135, 139 & n.7 (D.C. Cir. 1998); and here, where the parties reached a trail use agreement, the City could only terminate trail use and abandon the corridor by petitioning the STB to vacate the NITU, 49 C.F.R. § 1152.29(d)(2). Absent the NITU the railroad would have been able to abandon the corridor, causing title to revert to Caldwell. Thus, although the majority's conclusion differed from the reading that the United States presented in its brief on appeal, the Court's opinion reflects a permissible construction of the statutory scheme, is consistent with applicable precedent, and does not qualify for rehearing en banc under Rule 35.

Caldwell argues the dissent's position that the taking did not occur until title changed hands and the City acquired the right to possess and occupy the corridor. Slip dissent at 6. That position is inconsistent with the plurality's reasoning in Preseault, quoted above, and misunderstands a fundamental point about Trails Act takings claims. Unlike the usual physical occupation case, the landowner in a Trails Act takings case is already deprived of possession. Thus, the question is not when the owner loses the right to possess the property (since he is already not in possession), but rather when he would otherwise have recovered ownership of the easement were it not for the operation of the Trails Act. The dissent's focus on when the City acquired the right to possess and occupy the property is misplaced in this unique context, because Caldwell was not in possession of the corridor in the first place and his alleged reversionary rights were interrupted (if at all) long before title transferred to the City.[2]

Moreover, the United States has no role in a transfer of the ownership

[2] Neither the trial court nor this Court determined whether the application of the Trails Act actually preempted Caldwell's reversionary rights under state law. If this case is remanded, Caldwell will have to show that he has an interest in the corridor and that this interest would have reverted to him under state law were it not for the federal action. At that time, the parties can brief the questions raised by the amici regarding which law applies, if necessary. State law is not relevant, however, to the question currently before the Court.

interest in a rail corridor for railbanking and interim trail use.[3] "The language of the Fifth Amendment itself requires that the United States * * * commit the taking action." Alliance of Descendants of Texas Land Grants v. United States, 37 F.3d 1478, 1482 (Fed. Cir. 1994). The sale of property for Trails Act purposes does not implicate the United States, but is purely private action. Regardless of whether the title ultimately transfers or not, once the parties enter into an agreement, interim trail use is authorized. The NITU is the government action that might allegedly constitute a taking by preventing the reversion of property rights under state law. See Preseault, 100 F.3d at 1554 ("the United States facilitated that conversion with its laws and regulatory approval") (Rader, J., concurring). Compare Alliance of Descendants, 37 F.3d at 1482 (holding ratification in 1941 of treaty that extinguished legal claims was the "taking action," even though Mexico did not deny claims and leave plaintiffs without compensation until 1989). In this case, that preemption of Caldwell's alleged reversionary rights occurred, if at all, long before title passed to the City, and Caldwell did not have to wait the two years between the issuance of the NITU and the transfer of title before filing suit to

[3] As far as the Trails Act is concerned, it makes no difference whether title to the corridor transfers or not. The Trails Act specifically provides that railbanking can be accomplished through "donation, transfer, lease, sale or otherwise." 16 U.S.C. § 1247(d); see also 49 C.F.R. § 1152.29(a).

collect just compensation.

II. Caldwell's regulatory takings argument is beyond the scope of this case and is incorrect.

In his petition for rehearing en banc, Caldwell extends his argument well beyond the dissenting opinion and asserts for the first time that the issuance of the NITU constitutes a regulatory taking and transfer of title to the trail operator constitutes a separate physical taking. The Court should not address this argument, since Caldwell did not preserve it at earlier stages of the litigation. See Rumsfeld v. Freedom, NY, Inc., 346 F.3d 1359, 1361 (Fed. Cir. 2003). Moreover, although the complaint did not specify the type of taking alleged, Caldwell's brief as appellant in this Court expressly disavowed any assertion of a regulatory taking claim, Caldwell Br. at 26-27, and the Court did not address such a claim. Thus, this new regulatory takings argument is beyond the scope of this case.

In any event, the argument that the NITU works a regulatory taking and that a single government action under the Trails Act might work two separate takings is clearly incorrect. First, issuance of the NITU did not constitute a regulatory taking, because it merely delayed abandonment of the corridor, and only an extraordinary regulatory delay can constitute a taking. Wyatt v. United States, 271 F.3d 1090, 1097-1100 (Fed. Cir. 2001). Essentially, the Trails Act is analogous to

other statutes that require a permit for activities under federal jurisdiction in that it requires a railroad to obtain STB authorization to abandon a rail corridor. The NITU is an optional step in that process, triggered by a potential trail operator, which merely adds a layer of analysis and extends a process that is already required before the STB can relinquish its jurisdiction over the line. No court has held that issuance of a NITU might work a regulatory taking.[4]

Second, Caldwell provides no support for the contention that a single government action might trigger two separate takings. To the contrary, this Court has long held that a single government action might cause a single taking, which might turn out to be temporary; if the taking later becomes permanent, it is merely the continuation of the initial taking, not a separate taking. Under the Trails Act, the STB takes only one action -- it issues the NITU -- that might cause one taking. The taking might turn out to be temporary if, for example, the interim trail use agreement is terminated and the rail carrier subsequently abandons the line. But the temporary taking that might be caused when the NITU and interim trail use agreement prevent reversion under state law does not end when (or if) interim trail use later ensues. Rather, that same potential taking continues and becomes

[4] The United States reserves the right to make additional arguments in defending against a regulatory taking claim if this case is remanded and Caldwell is permitted to amend his complaint to assert such a claim.

permanent. See Cooley v. United States, 324 F.3d 1297, 1305 (Fed. Cir. 2003) (holding permit denial was final agency action that might give rise to taking claim, but remanding for determination of whether later granting of permit rendered taking temporary); Wyatt, 271 F.3d at 1097 n.6 ("A temporary taking occurs when what would otherwise be a permanent taking is temporally cut short.").

III. The majority opinion does not conflict with binding precedent.

Caldwell's contention that the majority opinion conflicts with Supreme Court and circuit precedent is incorrect, since no other court has addressed the question presented here of when a Trails Act taking claim accrues. In particular, neither Hopland Band of Pomo Indians v. United States, 855 F.2d 1573 (Fed. Cir. 1988), nor Creppel v. United States, 41 F.3d 627 (Fed. Cir. 1994), concerned the Trails Act. See Pet. at 6-7. Caldwell incorrectly relies on Hopland Band for his assertion that the NITU is "irrelevant." Id. at 7. On the contrary, the NITU is the only government action that might possibly trigger a taking. Caldwell draws from Creppel the argument that even if the NITU triggers a taking, such a claim only becomes ripe when the NITU expires. Id. However, the NITU marks the end of the regulatory process for converting a rail corridor to interim trail use; if the parties reach an agreement, the STB has no further involvement in the conversion to interim trail use.

Caldwell also takes issue with the majority's reliance on United States v. Dow, 357 U.S. 17 (1958). Pet. at 8 *ff.* While Dow is obviously distinguishable from this case, as the dissent correctly pointed out, slip dissent at 5-6, Caldwell's criticism of the majority's reliance on it reveals a misreading of the majority opinion. Caldwell reads the majority's citation of Dow as "support[ing] its conclusion that a temporary ***regulatory*** taking might occur in the situation where the NITU expires without the rail line being converted to a trail." Pet. at 9 (emphasis in original). However, the majority did not hold that issuance of the NITU triggered a regulatory taking; as noted above, Caldwell expressly disavowed any regulatory taking claim, and the Court addressed no such claim. Rather, the majority cited Dow for the unsurprising principles that a single governmental action might give rise to a single taking, not multiple takings arising at different points, slip op. at 15, and that "the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues." Id. at 14. Those holdings in Dow are consistent with recent holdings of this Court, e.g., Cooley, 324 F.3d at 1305; Wyatt, 271 F.3d at 1097 n.6, and the majority's reliance on that Supreme Court precedent certainly does not merit en banc review.

IV. Caldwell's position is not representative of landowners generally.

Although Caldwell's position benefits him in this particular case (as well as the amici in their cases), it disserves landowners generally. Waiting for trail use to actually ensue may take years or, indeed, may never occur. In this case two years elapsed between issuance of the NITU and transfer of title. During that time, the landowner cannot make use of land that would have reverted were it not for the operation of the Trails Act. The landowner need not wait for this potentially lengthy process to result in an actual transfer of title before having a ripe claim.

Caldwell's recitation of the impacts of the majority opinion, Pet. at 12, extend well beyond the narrow holding in this case. The majority held only that in the circumstances of this case, Caldwell's taking claim ripened when the ICC issued the NITU. Certainly, that holding will have implications in other Trails Act takings cases, but there is no ground for drawing grandiose conclusions outside the circumstances of the Trails Act. The majority's opinion was consistent with controlling precedent, and the issue presented in this case does not warrant en banc review under Rule 35.

CONCLUSION

For the foregoing reasons, the petition for rehearing en banc should be denied.

Respectfully submitted,

THOMAS L. SANSONETTI
Assistant Attorney General

JOHN SMELTZER
KRISTINE TARDIFF
KATHRYN E. KOVACS

U.S. Department of Justice
Environment & Natural Resources
Division, Appellate Section
P.O. Box 23795 l'Enfant Plaza Sta.
Washington, D.C. 20026
(202) 514-4010
March 10, 2005

OF COUNSEL:

EVELYN KITAY
Surface Transportation Board
Office of the General Counsel
Washington, D.C. 20423

March, 2005
90-1-23-10794

STATUTORY ADDENDUM

16 U.S.C. § 1247(d) Interim use of railroad rights-of-way

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C.A. § 801 et seq.], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

49 C.F.R. § 1152.29 Prospective use of rights-of-way for interim trail use and rail banking

(a) If any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line proposed to be abandoned for interim trail use and rail banking pursuant to 16 U.S.C. 1247(d), it must file a comment or otherwise include a request in its filing (in a regulated abandonment proceeding) or a petition (in an exemption proceeding) indicating that it would like to do so. The comment/request or petition must include:
(1) A map depicting, and an accurate description of, the right-of-way, or portion thereof (including mileposts), proposed to be acquired or used;
(2) A statement indicating the user's willingness to assume full responsibility: for

managing the right-of-way; for any legal liability arising out of the 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); and for the payment of all taxes assessed against the right-of-way; and
(3) An acknowledgment that interim trail use is subject to the user's continuing to meet its responsibilities described in paragraph (a)(2) of this section, and subject to possible future reconstruction and reactivation of the right-of-way for rail service. The statement must be in the following form

* * *

(d) Exempt abandonment proceedings.
(1) If continued rail service does not occur under 49 U.S.C. 10904 and § 1152.27 and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a Notice of Interim Trail Use or Abandonment (NITU) to the railroad and to the interim trail user for the portion of the right-of-way to be covered by the agreement. The NITU will: permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and materials, consistent with interim trail use and rail banking, as long as it is consistent with any other Board order, 30 days after the date it is issued; and permit the railroad to fully abandon the line if no agreement is reached 180 days after it is issued, subject to appropriate conditions, including labor protection and environmental matters.
(2) The NITU will indicate that interim trail use is subject to future restoration of rail service, and subject to the user continuing to meet the financial obligations for the right-of-way. The NITU will also provide that, if the user intends to terminate trail use, it must send the Board a copy of the NITU and request that it be vacated on a specific date. The Board will reopen the exemption proceeding, vacate the NITU, and issue a decision reinstating the exemption for that portion of the right-of-way. Copies of the decision will be sent to:
(i) The abandonment exemption applicant;
(ii) The owner of the right-of-way; and
(iii) The current trail user.

* * *

(e)(2) A railroad that receives authority from the Board to abandon a line (in a regulated abandonment proceeding under 49 U.S.C. 10903, or by individual or

class exemption issued under 49 U.S.C. 10502) shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line (e.g., discontinued operations, salvaged the track, canceled tariffs, and intends that the property be removed from the interstate rail network). The notice shall provide the name of the STB proceeding and its docket number, a brief description of the line, and a statement that the railroad has consummated, or fully exercised, the abandonment authority on a certain date. The notice shall be filed within 1 year of the service date of the decision permitting the abandonment (assuming that the railroad intends to consummate the abandonment). Notices will be deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation (such as outstanding conditions, including Trails Act conditions). If, after 1 year from the date of service of a decision permitting abandonment, consummation has not been effected by the railroad's filing of a notice of consummation, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. In that event, a new proceeding would have to be instituted if the railroad wants to abandon the line. Copies of the railroad's notice of consummation shall be filed with the Secretary of the Board. In addition, the notice of consummation shall be sent to the State Public Service Commission (or equivalent agency) of every state through which the line passes. If, however, any legal or regulatory barrier to consummation exists at the end of the one- year time period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier. For good cause shown, a railroad may file a request for an extension of time to file a notice so long as it does so sufficiently in advance of the expiration of the deadline for notifying the Board of consummation to allow for timely processing.

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March, 2005, two copies of the foregoing were served by first class mail upon the following:

Jeffrey O. Bramlett
Bondurant, Mixson & Elmore
3900 One Atlantic Center
1201 West Peachtree Street, NW
Atlanta, GA 30309

James P. Kelly
Kelly Law Firm
200 Galleria Parkway
Suite 1510
Atlanta, GA 30339

Kathryn E. Kovacs, Attorney

****

William B. CALDWELL, III, and Ben Frank Billings, III, (for themselves and as representative of a class of similarly situated persons),

Plaintiffs-Appellants,

V.

UNITED STATES,

Defendant-Appellee.

****

No. 03-5152

United States Court of Appeals,

Federal Circuit.

December 14, 2004

[00:01:40]

Judge Newman: Case is Number 035152, Caldwell against the United States. Mr. Bramlett, when you re ready.

Mr. Bramlett: May it please the court, the issue in the case before us is that it s a rails-to-trails taking case. The issue is when did the plaintiff s claims accrue. The Court of Federal Claims determined that they accrued in July of 1996 when the parties announced on the STB docket in the context of seeking emotion to extend the NITU for an additional period of time that they had reached a rail banking agreement. We contend that in fact the claims did not accrue until that so-called agreement that had been reached actually was consummated in October of 1996. And the acknowledgement that it had been closed was filed in the STB document in November of 1996.

Judge Dyk: The question is when the plaintiff s reversionary infrastructure [INDISCERNIBLE],?

Mr. Bramlett: We re taking, yes.

Judge Dyk: Right. And so at the filing of the agreement and the effect of cutting off their reversionary interests then that s when the plaintiff accrued, right?

Mr. Bramlett: If that were so, yes.

Judge Dyk: And so it s not a question of when the trail or trail use organization took possession of the property. It s a question of when the reversionary interests got cut off.

Mr. Bramlett: Well the--it is critical in this case to look at the agreement that the Court of Federal Claims cites as--

Judge Dyk: I know you want to go on it. Stop for a moment. So the question is whether the agreement cut off the reversionary rights. Right?

Mr. Bramlett: Well this court--I mean we frequently talked about this as a future interest and a reversion, but actually what happens is it is the burden on the fee simple of the easement, the for rail purposes. And the question is, when does the opportunity to have the property to possess the property without--

Judge Dyk: I don t see what it has to do with possession. Your clients didn t have possession of the--

Mr. Bramlett: Since the 1880s.

Judge Dyk: Right. So the question is when did their reversionary interests get cut off. I understand your argument that the filing of the agreement, at least in this case, didn t cut off the reversionary interest, but that s basically the question. It may be that in order for the reversionary interest to be cut off at their head to be a deed. I understand your argument about that. But it s not a question of when the trail organization took possession.

Mr. Bramlett: Well as long as the right of way remained in the possession of the railroad, our interest in having our fee simple unburdened by this right of way continued. It is when the railroad gave up or rather when the transfer occurred beyond an easement for rail purposes that expanded the scope of the burden on our fee simple to include rails-to-trails use of this right of way that our interest was destroyed.

[00:05:00]

Judge Dyk: Well the government claims that under the statute and the regulations when the trail use agreement is filed that s the end of it. That cuts off the reversionary interest. And you disagree with that, right?

Mr. Bramlett: We do disagree with that.

Judge Dyk: And why do you disagree with that?

Mr. Bramlett: Let me explain. First of all, this court s decision in Preseault makes it clear that what we are talking about is a physical taking, not a regulatory taking.

Judge Newman: Well just trying to focus on the question because I think it s important. Is the distinction whether there is a right of possession and occupancy at that stage as distinguished from the reversionary interest or are you saying that they re the same?

Mr. Bramlett: I m saying that when the rail easement transforms into a broader easement a larger taking, if you will, a taking for an additional purpose or additional purposes that that s when the taking occurs. When we lose--

Judge Newman: When it s irreversible? At what stage? At what stage did it become so irreversible and final? I thought your position was not until the deed was transferred.

Mr. Bramlett: That is at least the earliest. And I would actually say that the filing of the acknowledgement of it on the STB docket in November would be the actual event. But the conversion to trail use doesn t occur in this case on this document, on this record until there is in fact a transmission of title and a transmission of possession from the railroad to--

Judge Dyk: But I don t understand why conversion of trail use is the question. It seems to me the question is when is the reversionary interest cut off. You ve got a good argument about it. I mean the conversion wasn t cut off. I understand that already. I just don t understand why the transfer of possession has anything to do with the case.

Mr. Bramlett: Well these cases have come before the court in a number of different factually distinct circumstances, and I d like to focus on the facts of this case if I may just to hone the court in on why in this case it is the transfer of title and of possession to for trail use purposes that destroys our right and terminates our right. Because the point is that at the point where this easement is deposited in the government s rail bank--got to look at it like a bank deposit. The point where our property is transferred into the rail bank and perpetually available for rail use as opposed to the alternative of abandon or we might in fact get the property, that s when the taking occurs. It s when it s deposited into the rail bank. Now when does that happen? It didn t happen in July when they moved to extend the time and said we ve reached an agreement. You ve got to look at the agreement. The agreement is in the record. At the beginning of--the joint appendix of page 407.

Judge Newman: Now the government says this case could have been filed any time after July 5th. Do you disagree with that?

Mr. Bramlett: Could have been filed after July 5th? It would have been late after July 5th according to the government s position, and we do disagree with it.

Judge Newman: Any time after July 5th, 1996.

Mr. Bramlett: Yes. According--
Judge Newman: At that stage there had been--everything had been completed. There was no longer reversionary interest. It s true the title hadn t been passed. The deed hadn t been recorded. But that otherwise it was all over. And what s wrong with that?
Mr. Bramlett: And that s wrong for several reasons. First of all, what we have is a purchase and sale agreement, which gives the purchaser--it was originally the trust for public lands and then it was assigned to the City of Columbus. It gives them for one thing an option to get out of the agreement on five days notice at any time. That s Paragraph, Section 20 of the agreement. So there is that possibility. There is a provision that fields the possibility of title defects that would have to be corrected, and it gives the buyer an out there. It gives an option to get out for environmental contamination. And any of these things could have occurred.
Judge Prost: So your answer to Judge Dyk is the reversionary interest was not cut off because there were all of these conditions, it was up in the air, and it could have easily changed, and there was no commitment.
Mr. Bramlett: That s correct. And at July 5 all these outs for the buyer existed in the document that was referred to as an agreement having been reached. And so the difficulty is if we had filed the case on the 6th of July 1996 the government s position would have been as it was in Preseault. Well it would be premature. It would be unripe at that point because we don t know whether it s going to close. And think about the implications of the government s position here. If in fact the signature on a trail operator to buy a piece of property subject to certain conditions triggers the right

to compensation does it do so even when the contract never closes, when title never passes, where the purchase price, a million dollars in this case never changes hands? That can t be a correct [00:10:00] position in the law. In this particular case, under this particular case, under this particular contract, until the government s liability is fixed, that is until we know that there is this trail operator who will in fact operate this trail and the contract--I want to specifically point to the first amendment to the contract, which occurred in April of 1996. This is in the joint appendix of page 425. At this point it s still between the trust for public lands and the railroad, but in Paragraph 1 of that first amendment to the purchase agreement they say, seller and buyer acknowledge that the purchase agreement was entered into with the intention of providing this land for the rails to trails program. And then they agree in the second sentence of the paragraph. Seller and buyer agree that subsequent to the sale the property shall be used for inter-trail use under the terms of the agreement. So in July there was no opportunity to use the right of way for trail use. What they re agreeing to is that after the sale occurs the purchase price is delivered. Title passes. Then it becomes an agreement which would permit inter-trail use, and that s the point in time in which the easement is deposited in the rail bank and we lose our reversionary right.

Judge Prost: What about the government s argument that the federal--this is a taking under federal law and that the federal government s role terminated when the trail agreement was finalized in July, that that was the only role that the federal government had and was processed?

Mr. Bramlett: As this court in the Preseault decision made clear, when the government puts in effect a series of events--and of course in the Preseault case it was the State of Vermont and an easement that had been used as a trail for a number of years before the litigation came up. But as this court found then, when the--I m sorry, remind me of the point of your question.

Judge Prost: The government s argument that the federal role terminated when the trail--

Mr. Bramlett: That s what the government argued in Preseault and this court rejected that decision. Basically said, no. Once the government sets in motion this process, it s responsible for the consequence of the decision. And here we re not looking--this is not a regulatory--

Judge Dyk: You ve got a better answer than that.

Mr. Bramlett: Please share it with me.

Judge Dyk: The answer to that is that the Service Transportation Board thought it was necessary to extend the time until November 1st because of the contingent nature of this agreement. Until the deed was transferred, there wasn t going to be any compliance with the statutory scheme.

Mr. Bramlett: That is a good answer too. Unfortunately it didn t work in the Court of Federal Claims, so I m offering you that one.

Judge Newman: Is there another answer that even though whether or not the government could get out of it the municipality could have gotten out of the agreement after July 5th?

Mr. Bramlett: That s correct. It could have. And because of all the contingencies in the agreement the position that we have lost our right simply because this contingent agreement has come to fruition or rather has

been signed but has not come to fruition just can t be the law. And frankly, if you look at it the other way, it expands the government s liability in a way that doesn t make any sense. We also would suggest it is important to think about whether trail sponsors would be willing to submit to STB jurisdiction before they ve had an opportunity to do these things. Because once the agreement becomes final, if they want to abandon the use of the trail they have to go to the STB. Now, before you tested for the environmental issues, before you ve checked the title and done all those things, it seems to me unlikely--I mean it will be a restriction on the ability to recruit trail sponsors if you subject them to that regulatory authority without any reason to do so. I would like to reserve the balance of my time if that s alright.

Judge Newman: Thank you, Mr. Bramlett. Ms. Kovacs?

Ms. Kovacs: May it please the court, Katie Kovacs on behalf of the United States. A land owner need not wait for a deed to change hands before--

Judge Dyk: Well maybe that s true in some cases, but what about this case? Because here the agreement was structured so that it didn t essentially become final until the deed was transferred and the Service Transportation Board obviously viewed the structure of this thing as not being effective until the deed was transferred and granted the extension until November 1st, which you find at 446 of the record.

Ms. Kovacs: Right. Two points there. One, at the time the agreement was signed the NITU became fully and finally effective. Trail use was then authorized without further federal action. If the city at that point had decided not to follow through, not establish a trail, not consummate with the

deed it would have had to come back to the STB and ask for authorization to abandon the trail. So the agreement, even though it had an out, [00:15:00] no, the city didn t ultimately have to establish the trail. But for purposes of this statute the property--the reversion of the property right was preempted at that point and the city would have had to get permission from the STB to not go through with establishing the trail.

Judge Dyk: If that s true, why did the STB apparently view the deed as the key event and grant this extension of time until November 1st? Are you saying we should ignore that order?

Ms. Kovacs: No. I don t think we should ignore it, Your Honor. It s an oddity in the record and I don t think that it was necessary to--the parties did it, if you read their motion, they filed this motion to extend the period out of abundance of caution because it just wasn t clear what the jurisdiction was at the time. The STB came back. If you look at that order granting the motion, they make it clear that of course the STB retains jurisdiction over the corridor until the abandonment has been consummated. In essence, in granting the order the STB says, okay, we ll grant the order just to cross all the T s and dot all the I s, but it s really not necessary.

Judge Newman: But they had retained liability. They were paying the taxes. You re presenting it as if whoever owns the property is a simple technicality to be ignored, which is very strange in property law.

Ms. Kovacs: Well our reading of the statute, Your Honor, if you read the statute itself, we think that this agreement satisfied the terms of the statute and the regulations because the statute says, if a qualified

organization is prepared to assume full responsibility for the management, liability, and taxes then the STB shall not permit abandonment.

Judge Newman: So you don t think that if they had filed suit, as your brief says on July the 6th, 1996 they wouldn t have been thrown out for being premature or unripe--

Ms. Kovacs: No, Your Honor.

Judge Newman: Or subject to negation?

Ms. Kovacs: No, Your Honor. The taking at that point, if there was a taking, may have become temporary still at that point, for example, if the city had not gone through with it.

Judge Newman: But what? By one day?

Ms. Kovacs: I m sorry?

Judge Newman: Are you saying there would have been a temporary taking of one day and therefore premature?

Ms. Kovacs: No. It wouldn t have been premature. Our position is they could have filed on July the 6th. If a year later the city decided not to purchase the property, not establish a trail then there would only be a taking of say a year. Or we might be arguing that there was no permanent physical occupation. But the claim becomes ripe on the 6th.

Judge Newman: So you think that it would have been fully ripe for litigation on the merits despite all of the caveats and environmental studies and all the other things that could have defeated the entire operation?

Ms. Kovacs: Precisely, Your Honor. That s our position. And I think that it comports with--

Judge Newman: I know that s your position, but are you defending it?

Ms. Kovacs: Yes. Of course, Your Honor. And I think it comports with what the court said in Preseault, which is--I think it s worth quoting this one. Until the ICC makes the decision to convert an unused right of way to a trail rather than simply permit abandonment and finds an appropriate public agency to operate the trail, a landowner suit for taking would run a fowl of exhaustion requirements. Well the correlative of that is that when the ICC authorizes conversion to trail use and a trail operator is found and comes forward and satisfies the act, then you have a right of claim. And at the point that they reached the agreement here, that s when the property owner might otherwise have got this property back. That s when say they want to build a swimming pool in the back of their property--

Judge Newman: So where is the notice to the property owner? Where is the official act whereby the property owner says today the clock starts to run?

Ms. Kovacs: I think that the regulations--my recollection is that the regulations only require publication at the very beginning of the process of the notice of intent to abandon the line. There s no formal notice.

Judge Newman: So where is the notice for the period of limitations?

Ms. Kovacs: Right. It s possible in some cases that you may have a notice problem. And of course the statute of limitations only begins to run when the plaintiff knew or should have known of the harm. It s of course possible in some cases that the accrual period won t begin for some period after the agreement is reached because there would be no way for the property owner to know about it. Here we don t have that problem because the agreement was public. But of course in another case appointed--

Judge Newman: The July 5th agreement was published?

Ms. Kovacs: I m not sure if it was published. I believe that it was recorded.

Judge Newman: You re saying it s public. What do you mean by public?

Ms. Kovacs: It was public. It was filed in front of the ICC, so it was knowable. In another case, the plaintiff might come in and say I have no way of knowing this. I didn t find out about this until a year later, and so that s when my accrual should start or when my limitations period should accrue. And that would of course be a legitimate claim. We might contest it factually, but that s when--the accrual period in this case, they haven t made the argument that they weren t aware of the contract. They could in another case, but I agree wholeheartedly--

Judge Newman: Well there is a notice argument.

Ms. Kovacs: Of course. But there isn t a notice argument in this case. So [00:20:00] I think it s--

Judge Dyk: You mean they didn t raise it alone?

Ms. Kovacs: And they didn t raise it on appeal. They haven t said that they weren t aware of the agreement. I don t think that they did on appeal.

Judge Newman: But I don t recall any statement about public notice as to a permanent in your terms conversion either on July 5th.

Ms. Kovacs: It was--July 5th was when the agreement was sent to the ICC. Again, in this case it was public and the plaintiffs haven t--

Judge Newman: Where is that public? Under the Freedom of Information Act? What makes it public?

Ms. Kovacs: Most certainly. Yeah.

Judge Newman: So you have to know that it s there in order to file a request.

Ms. Kovacs: Of course. And of course, Your Honor--

Judge Newman: How does that make it public?

Ms. Kovacs: As I said, in another case that might have been a problem, but--

Judge Newman: No. How does that make it public? If there s an internal government document, which can be retrieved if you know it s there by filing a Freedom of Information Act request, does that make it public?

Ms. Kovacs: Absolutely.

Judge Newman: Because it s there?

Ms. Kovacs: Yes. It s absolutely a public document.

Judge Newman: Even if you don t know it s there?

Ms. Kovacs: Well the question then is whether it s knowable. And I think the test is whether it s inherently unknowable. If it s inherently unknowable--

Judge Dyk: Well the answer is that the Service Transportation Board issues an alert saying we re going to allow the conversion if somebody files something with us and somebody can go and look and see whether somebody filed something.

Ms. Kovacs: Exactly. They know that the whole process is going on. It s been published in the newspaper that the process is beginning. The regs don t require publication at every step of the process. The landowner can follow it. Again, in this case there was no problem with knowledge. In another case--and I agree wholeheartedly, these cases are very fact-specific.

Judge Newman: Is there a requirement on finality of public notice?

Ms. Kovacs: I m sorry?
Judge Newman: There s no requirement on finality on anyone s theory of finality? Let s say the transfer of the deed no one argues is finality. The question is whether it was final several months before. You re saying there s no requirement anywhere or only when the deed is transferred or only when it s advertised that now you can walk on this property or what?
Ms. Kovacs: Well the city only gained the right to walk on the property when the deed was transferred. That much is of course true. But again, the question in this case is when the reversion of the property right was preempted. And were it not for the trail use agreement, once the NITU issues it gives 180 day period for negotiation. At the end of that period, if there s no trail use agreement the railroad can come in and file a notice that they re abandoning the line. Once they ve consummated the abandonment the ICC has no more jurisdiction and at that point it can revert to the underlying property owner under state law.
Judge Prost: Let me go back to one of the earlier points and that is let s assume they had filed here on August 1st, 1996 and let s assume that the deed had never been transferred, some environmental study showed that it wasn t useful for the city, and so the deal was never effectuated. What would the government s position be as to--so there s a temporary taking as to how long that temporary taking lasted.
Ms. Kovacs: Well it would be from--if there were actually a taking we would of course say that there would be no taking, but the claim accrues.
Judge Prost: But you said you would not say the claim wasn t ripe.

Ms. Kovacs: Right. The claim would accrue when the agreement was reached. And it would end--

Judge Dyk: Reached or filed?

Ms. Kovacs: In this case it s a little confusing because it really wasn t until the agreement was amended I think that it became really abundantly clear.

Judge Dyk: No, but reached or filed?

Ms. Kovacs: Well it would be obviously when it became knowable to the plaintiffs. When the plaintiffs knew or should have known. In this case I think it s clearest to use the day it was filed with the STB. And it would be when the plaintiffs knew or should have known of the agreement to the time that trail use was abandoned. And again, once the agreement is reached the city has to come back to the STB. Even if they decide not to go through with the agreement they have to come back and say, we want to terminate trail use. This is in the regulations. And so in the normal course of things where you don t have an agreement, the railroad can come in and consummate the abandonment. If there is an agreement, then the abandonment doesn t happen. And the date that it doesn t happen is when the agreement is reached. That s why we think--the CFC here was faced with three potential dates. The date the NITU issues, the date of the agreement, and then the date of the deed. And the court chose the date in the middle. We think that that s consistent with the statutes of the regs. And we think that it was reasonable and fair. If you d choose the appellant s--

Judge Dyk: These other cases that are kind of--a lot of these cases pending, right?

Ms. Kovacs: Quite a few.
Judge Dyk: Right. Is it typical that these agreements, provided they re not fully affective until a deed is transferred or they generally provide that the agreement is final and the deed is kind of a mechanical feature of it.
Ms. Kovacs: You know, unfortunately, Your Honor, I can t answer that question. I don t know if there s anything really typical. [00:25:00] The factual scenarios really run the gamut and that s why I think it s very important to decide the case fact-specifically. I don t know if this is typical or not, unfortunately. But on the facts of this case it seems that the fairest and the date that comports best with the statute is the middle date, which is when the agreement was reached. Under their scenario, a landowner might have to wait potentially for years before having a right of claim, which seems just not fair frankly.
Judge Dyk: That s not true. That s not what they re saying. That s not what they re saying at all. They re saying the ICC or the STB extended the time to November 1st because this particular agreement was dependent upon the transfer of the deed and as soon as the deed was transferred and the STB was notified of that then the rights were cut off.
Ms. Kovacs: Well in this case it would have of course been possible for the parties to extend the closing date another year and then another year after that and another year after that.
Judge Dyk: Does that happen?
Ms. Kovacs: It could. I don t know if it does or not. Again, Your Honor, I don t handle these. I don t know if there s a typical fact scenario or not. But in this case that would have been possible. It s certainly possible that

a landowner under their reading would have to wait for a period of years to file a claim. We don t think that the statute requires that. If I might turn to the last two issues just very briefly before my time expires, they claim that their statute of limitations period was told during the pendency of another class action. They raised this for the first time in a motion for reconsideration. That decision to deny the motion for reconsideration is reviewed for use of discretion.

Judge Dyk: No, no. That s not true. That s not true. It s not reviewed for a use of discretion. The judge addressed the claim on the merits. He didn t say it was untimely.

Ms. Kovacs: But he also addressed it under the standard for ruling on Rule 59(a). And even if the court refused--

Judge Dyk: Yeah. He addressed the merits of it, so we review the merits and--

Ms. Kovacs: And even if the court ops to review the merits of course we believe that the court was right on the merits. This argument was available to the plaintiffs at the time the government filed a motion to dismiss. The denial of class certification on [INDISCERNIBLE] was published long before the limitations period ran in this case. Caldwell wasn t a member of that class because he never waived claims over $10,000. And even so the American Pipe rule doesn t hold limitations period for subsequent classes. So at best all that survives in this case are the individual claims of Caldwell on billings for less than $10,000. But again--and this isn t even touching on the question of whether tolling is available at all under Rule 2501 on positions that it s not that the court need not approach that issue in this

case. And then finally they challenge on appeal for the first time the procedure that the court used in this case. The parties did brief the question of whether 2501 goes to subject matter jurisdiction or not. That was in the context of a Rule 11 show cause order. The question is whether the court could strike the defense. They never moved to have the government s motion treated as a 12(b)(6) and they never asked for it to be converted to summary judgment. And on appeal, perhaps more importantly, they haven t shown how it would make any difference in this case. Unless the court has further questions

Judge Newman: Thank you, Ms. Kovacs. Mr. Bramlett?

Mr. Bramlett: Thank you. The notice issue, I would like for you to put yourselves in the shoes of a landowner who reads the initial NITU on the STB or then the ICC docket. Item 4, Paragraph 4 of the original NITU said if an interim trail use rail banking agreement is reached it must require the trail user to assume for the right of way during the terminal agreement, full responsibility for management, any liability rises out of operation of the trail, and payment of taxes. Assuming for a moment that the contract is an issue here, purchase and sale agreement was ever a matter of public record, and that s not clear, how would a landowner assess these requirements, statutory requirements, the regulatory requirements with this contingent contract that says the buyer has the right to get out in a five days notice for any reason whatsoever? So we think that just on the issue of notice, if you look at the NITU until this contract closes you don t know the status of your reversionary interest. You certainly don t know in July when the government says, our time for filing. Last point I wish to make is this, in

this court s decision in Preseault in the plurality opinion, the court said when the city--the City of Burlington in that case--pursuant to federal authorization took the parcels and opened them to public use that was the physical taking of the right and exclusive possession that belonged to the landowners as an incident of their ownership of the land. We subject the physical taking occurred only after this agreement closed [00:30:00] and in accordance with the terms of the agreement, trail use could begin to operate because prior to that there was no opportunity for trail use. It was still a railroad right of way. Our rights were intact. When the transaction closes, title shifts, possession shifts from the railroad to the trail operator that our rights expire. That s the trigger of the accrual of our client. Thank you very much.

Judge Newman: Thank you, Mr. Bramlett. Ms. Kovacs, case is taken under submission.

No. 05-1255

In the United States Court of Appeals for the Federal Circuit

JOHN BARCLAY, CONSTANCE BARCLAY, ROYER BARCLAY, ALTHEA BARCLAY, JOHN AMOS, MARCIA J. BACON, RONALD J. BARTEL, MELVIN BERGEN, JOHN E. BOYLE, JONATHAN EHRLICH, FLORENCE EHRLICH, DONALD GRAUMANN, RUBEN KLIEWER, ALVIN KROUPA, BARBARA KROUPA, BURDETT LEDELL, LEE DALE MILLER, VERNON MINNS, FRANK A. MITCHELL, MID KANSAS COOPERATIVE ASSOCIATION, JOHN F. OPAT, ROBERT PRESNELL, JANET REGIER, SONJA REGIER, DON REINHARDT, JANICE REINHARDT, MARY J. RODGERS, DARRELL THOMPSON, ROBERT TURNER, GENEVA TURNQUIST, DONALD TURNQUIST, CLARK E. WIEBE, and MARLENE J. WEBER,

Plaintiffs - Appellants

v.

UNITED STATES,

Defendant - Appellee

Appeal from the United States District Court for the District of Kansas
Case No. 04-1119-WEB, Senior Judge Wesley E. Brown

OPPOSITION OF FEDERAL APPELLEE TO APPELLANTS' PETITION FOR REHEARING *EN BANC*

SUE ELLEN WOOLDRIDGE
Assistant Attorney General
Environment & Natural Resources Div.

KATHRYN E. KOVACS
LANE M. MCFADDEN
U.S. Department of Justice
P.O. Box 23795, l'Enfant Plaza Station
Washington, D.C. 20026
(202) 353-9022

Table of Contents

TABLE OF AUTHORITIES

FEDERAL CASES

DOCKETED CASES

FEDERAL STATUTES AND REGULATIONS

FEDERAL RULES

INTRODUCTION

This case concerns the accrual date of a claim alleging that conversion of a railroad right-of-way to interim trail use under the National Trails System Act Amendments of 1983, 16 U.S.C. § 1247(d) (the "Trails Act"), constitutes a taking. The panel's majority opinion held that such a claim accrues on the date when the Surface Transportation Board ("STB") issues a Notice of Interim Trail Use or Abandonment ("NITU"). *Barclay v. United States*, 443 F.3d 1368, 1378 (Fed. Cir. 2006).[1] The majority opinion followed this Court's prior decision in *Caldwell v. United States*, 391 F.3d 1226, 1235 (Fed. Cir. 2004) ("[T]he appropriate triggering event for any takings claim under the Trails Act occurs when the NITU is . . . issued."). Applying *Caldwell*, the majority opinion affirmed the District of Kansas' dismissal of the complaint in this case as untimely, because it was filed well outside the six-year statute of limitations period set forth in 28 U.S.C. § 2501, as measured from the dates of the issuance of the relevant NITUs. *Id.* at 1371-72. Rehearing *en banc* is not warranted under Fed. R. App. P. 35 and Fed. Cir. R. 35 because the majority's opinion creates no conflict with Supreme Court or Federal

[1] This Court's opinion in *Barclay* also decided the claims in *Renewal Body Works, Inc. v. United States*, Fed. Cir. No. 05-5109, in a consolidated published opinion. The Appellant in *Renewal Body Works* has also filed a petition for *en banc* rehearing of this Court's opinion, which the Government has opposed in a separate opposition filed concurrently with this opposition.

Circuit precedent, and this case presents no question of exceptional importance.

BACKGROUND

Appellants in this case are 33 landowners whose properties are allegedly burdened by three former railroad rights-of-way in Kansas. These rights-of-way were transferred to trail managers for interim trail use and railbanking under the authority of the Trails Act, and the landowners alleged a Fifth Amendment taking of their reversionary property interests in the rights-of-way.

Each right-of-way at issue in this case has its own particular factual background, which is described in detail in the parties' briefing to this Court.[2] The initial NITUs were issued for each of the three trails at issue in this case on: September 28, 1995 (Meadowlark Trail), April 12, 1996 (Sunflower Trail), and March 31, 1995, and May 24, 1996 (Flint Hills Trail). *See Barclay*, 443 F.3d at 1372 n. 2. Each of these dates is more than six years prior to the landowners' filing of a complaint. 28 U.S.C. § 2501(a) (establishing a six-year statute of limitations).

The landowners filed a complaint alleging Trails Act taking claims on April

[2] On appeal, the landowners attempted to distinguish factually their claims from those at issue in *Caldwell*. Those factual issues are not raised in this petition.

7, 2004, in the United States District Court for the District of Kansas. JA35.[3] On December 30, 2004, the district court issued its judgment and opinion, applying the accrual rule announced just two weeks earlier by this Court in *Caldwell* that "it is the issuance of a NITU (Notice of Interim Trail Use or Abandonment) that gives rise to a cause of action." JA10. Applying this rule, the district court found that the landowners' claims were all barred by the statute of limitations, and granted the Government's motion to dismiss. JA19.[4] This appeal then followed and, as noted above, this Court affirmed the district court's dismissal of the complaint.

ARGUMENT

I. This Court's adherence to *Caldwell* does not conflict with Supreme Court or Federal Circuit precedent.

In *Caldwell*, this Court addressed for the first time the accrual of a takings claim "when, pursuant to the Trails Act, state law reversionary interests are

---

[3] The abbreviation "JA" refers to the Joint Appendix filed in conjunction with the landowners' opening brief on appeal to this Court.

[4] The district court agreed with the landowners that the statute of limitations was tolled while a motion to certify a potential class action (which would have included the landowners) was pending. JA15. Nevertheless, even with this additional time the district court found that the landowners' claims were untimely. This Court agreed with that latter assessment, and therefore did not rule on whether the district court was correct that the statute of limitations was tolled. *Barclay*, 443 F.3d at 1373 n. 3. The landowners do not raise this issue in their petition for rehearing *en banc*.

effectively eliminated in connection with a conversion of a railroad right-of-way to trail use." 391 F.3d at 1228 (citing *Preseault v. United States*, 100 F.3d 1525, 1543 (Fed. Cir. 1996) (*en banc*) ("*Preseault II*"). This Court held that a Trails Act taking "occurs when state law reversionary property interests that would otherwise vest in the adjacent landowners are blocked from so vesting," which happens "when the railroad and trail operator communicate to the [Surface Transportation Board] their intention to negotiate a trail use agreement and the agency issues a NITU that operates to preclude abandonment under section 8(d)." *Id.* at 1233. The landowners do not dispute that, when this rule is applied to their complaint, that complaint is untimely. Rather, the landowners argue, as they did in their briefing of this appeal, that *Caldwell* should be overturned. However, the landowners' petition does not justify rehearing this case *en banc*.

Citing a number of non-Trails Act takings cases, the landowners begin their argument with the uncontroversial proposition that "a taking accrues at the time all events have occurred to fix the government's liability." Pet. at 3 (citing *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478 (Fed. Cir. 1994)). This Court stated in *Caldwell* that, under the applicable regulatory scheme, "the NITU is the only *government* action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of

state law reversionary interests in the right-of-way." 391 F.3d at 1233-34 (emphasis in original). The NITU delays the abandonment of the line for 180 days to allow the rail carrier and the trail group time to negotiate a railbanking and interim trail use agreement. 49 C.F.R. § 1152.29(d)(1).

Although, as the landowners argue in their petition, the issuance of a NITU "puts into play a series of events," Pet. at 3 (quoting *Preseault II*, 100 F.3d at 1551), and does not finalize a trail agreement, interim trail use is authorized at that point without any further federal action being required. In contrast, abandonment would have required further federal action in the circumstances of this case, where the parties eventually reached a trail use agreement. The trail operators could terminate trail use and abandon the corridors only by petitioning the STB to vacate the applicable NITUs. 49 C.F.R. § 1152.29(d)(2). Absent the NITUs, the railroads would have been able to abandon the corridors, and title would have reverted to the landowners.

The NITU is the only federal government action that might allegedly constitute a taking by preventing the reversion of property rights under state law. *See Preseault II*, 100 F.3d at 1554 (Rader, J., concurring) (explaining that "the United States facilitated that conversion with its laws and regulatory approval"). *Cf. Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d

1478, 1482 (Fed. Cir. 1994) (holding that ratification of treaty in 1941 that extinguished legal claims was the "taking action," even though Mexico did not deny claims and leave plaintiffs without compensation until 1989).[5] The sale of property for Trails Act purposes does not implicate the United States, but rather is action between two non-federal entities (*e. g.*, a railroad company and a municipality). The regulations do not even require the railroad and the trail operator to notify the STB in the event that title is transferred. In this case, preemption of the landowners' alleged reversionary rights occurred, if at all, well before title was transferred to the trail operators.

The landowners point out in their petition that a claim against the United States cannot accrue until a plaintiff has "suffered a legally recognizable harm." Pet. at 8. The landowners argue, as they did before the panel, that because the NITU may not necessarily result in a final trail use agreement, it cannot be understood to have actually harmed them. *Id.* The majority opinion rejected this

---

[5] "The language of the Fifth Amendment itself requires that the United States * * * commit the taking action." *Alliance of Descendants*, 37 F.3d at 1482 (Fed. Cir. 1994). The United States has no role in a transfer of the ownership interest in a rail corridor for railbanking and interim trail use. Negotiations are voluntary under the Trails Act, and it does not matter how the parties to those negotiations structure their agreement so long as the trail sponsor assumes responsibility for the property and agrees that interim trail use is subject to reactivation of rail service. *See* 16 U.S.C. § 1247(d) (providing that railbanking can be accomplished through "donation, transfer, lease, sale or otherwise"); *see also* 49 C.F.R. § 1152.29(a).

argument, following *Caldwell*, because this argument misstates the harm imposed by the issuance of a NITU. The landowners protest that "without the *conversion* to trails use, landowners cannot initiate a takings claim for a rails-to-trails *conversion* under the Trails Act." Pet. at 9 (emphasis in original). However, as this Court explained in *Preseault II*, the landowners' takings claim is not premised on the conversion of the right-of-way to a trail, but rather the government's action which blocks the landowners' state law reversionary interests from vesting, as they otherwise would when the right-of-way is abandoned. 100 F.3d at 1550-52. This action, which by preventing those rights from vesting "burdens and defeats the property interest," *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 22 (1990) (O'Connor, J., concurring), is the STB's issuance of a NITU, as the panel's majority recognized. *Barclay*, 443 F.3d at 1373 ("Thus, a Trails Act taking begins and a takings claim accrues, if at all, on issuance of the NITU.").

The landowners incorrectly contend that, in adhering to *Caldwell*, the panel's majority decision here is inconsistent with *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004), and *Hash v. United States*, 403 F.3d 1308, 1318 (Fed. Cir. 2005), Pet. at 9, as well as a host of additional cases, Pet. at 1. Those cases did not address the question of when a Trails Act taking claim accrues, and neither the Supreme Court nor any other circuit court has decided the question.

This Court resolved that question in *Caldwell*, and concluded that "the NITU operates as a single trigger to several possible outcomes." 391 F.3d at 1234. In the event that a trail use agreement is reached and abandonment of the right-of-way is effectively blocked, then a permanent taking may have resulted from the NITU. *Id.* As the *Caldwell* court noted, "[i]t is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues." *Id.* (citing *Seiber v. United States*, 364 F.3d 1356, 1365 (Fed. Cir. 2004); *Cooley v. United States*, 324 F.3d 1297, 1299-1300 (Fed. Cir. 2003); and *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1347 (Fed. Cir. 2002)).

In so characterizing the effect of the NITU, *Caldwell* drew upon Supreme Court precedent in *United States v. Dow*, 357 U.S. 17 (1958), for the proposition that a single governmental action may cause either a temporary or permanent taking. *Caldwell*, 391 F.3d at 1234-35. *Dow* was a condemnation action in which the Government entered into physical possession of the land three years before it acquired title by filing a declaration of taking. *Dow*, 357 U.S. at 23. The Supreme Court held that the Government's physical possession of the land had been a taking and "rejected, as bizarre, the argument that there were two different takings of the same property, with some incidents of the taking determined as of one date and some as of the other." *Caldwell*, 391 F.3d at 1235 (quoting *Dow*, 357 U.S. at

24) (internal quotations omitted). Instead, "a taking occurs when the owner is deprived of use of the property," which in the Trails Act context occurs "by blocking the easement reversion." *Id.* Accordingly, to the extent that Supreme Court precedent sheds light on the accrual issue here, *Caldwell* is not inconsistent with that precedent.

The landowners' argument that a NITU might never result in a temporary taking, Pet. at 9-15, and therefore *Caldwell* is incorrect, relies on a characterization of the landowners' claim as something other than a claim for the government's prevention of their state law reversionary interests from vesting. In so arguing, the landowners ignore the rather peculiar circumstances of a Trails Act takings claim. Unlike the usual physical occupation case, the landowner in a Trails Act takings case has already been deprived of physical possession of the land subject to the right-of-way. Thus, the question is not when the owner loses the right to physically occupy the property, but rather, when the owner would otherwise have recovered full possession of the easement, were it not for operation of the Trails Act. The landowners' suggestion that their takings claim could not have been brought until the actual date of trail conversion, Pet. at 9, is misplaced in this unique context. The landowners were not in exclusive possession of the corridors subject to railroad rights-of-way in the first place, and their alleged

reversionary rights were interrupted (if at all) long before the completion of a trail use agreement and the transfer of title to the trail operators. This is what separates this case from physical occupation cases such as *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and explains why this panel's majority opinion does not conflict with Supreme Court or circuit precedent addressing those different circumstances.

Although the landowners object to this Court's bright-line rule, as described in *Caldwell*, and clarified by the panel's majority opinion in the present case, they provide no alternative date for accrual of their claims that would be consistent with this Court's description of the nature of their claims in cases such as *Preseault II*.[6] The conversion of a railroad right-of-way to interim trail use will

[6] Similarly, the landowners are incorrect that their claims are unripe at the point of the NITU's issuance. Pet. at 13 (citing *Stearns v. United States*, 396 F.3d 1354, 1358 (Fed. Cir. 2005), and *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985)). After issuing a NITU, the STB has "reached a final decision regarding the application of the regulations to the property at issue," *Stearns*, 396 F.3d at 1358, because none of the subsequent actions between the railroad and a potential trail operator require STB involvement. *Stearns Co.* held that the trial court erred in finding that a physical taking occurred when a federal agency determined that the plaintiff did not have "valid existing rights" to conduct mining in a national forest. The Court concluded instead that the plaintiff's claim should be treated as one for a regulatory taking, which was not ripe because the plaintiff had not sought a compatibility determination from the agency that if granted would have permitted the plaintiff to engage in mining. *See id.* In the context of a rails-to-trails conversion, the NITU is the final agency action taken in the process, unless a party

vary from case to case.

As shown above, the panel majority's adherence to *Caldwell* is consistent with applicable precedent of the Supreme Court and this Court. The landowners, however, suggest that *Caldwell* is inconsistent with this Court's decision in *Seiber*. Pet. at 12. That suggestion is incorrect. *Seiber* does not address the question of when a taking claim accrues in the context of the Trails Act, which is the issue resolved in *Caldwell*. Nor, more broadly, did it involve a physical taking as the result of federal government action, but rather a temporary regulatory takings claim. *Seiber*, 364 F.3d at 1363-64, 1366-67. The landowners' arguments about the potential for a temporary regulatory takings claim is inapposite in the context of a rails-to-trails conversion, which this Court's precedent seems to have characterized as a physical takings claim. *Preseault II*, 100 F.3d at 1540. Although *Caldwell* recognized that the issuance of a NITU may not result in a permanent taking (if the trail use agreement is not reached, for instance), this may mean that the result is a taking for a limited period of time, which the landowners' arguments do not address. *See, e.g., Dow*, 357 U.S. at 26; *Hendler v. United States*, 952 F.2d 1364, 1383 (Fed. Cir. 1991).

---

initiates a new regulatory process by, *e.g.*, petitioning the STB to vacate a previously-issued NITU.

For these reasons, *Caldwell*, which the majority opinion followed here, reflects a permissible construction of the statutory scheme, is consistent with applicable precedent, and does not qualify for rehearing *en banc* under Fed. R. App. P. 35 and Fed. Cir. R. 35.

II. This case does not raise an issue of exceptional importance.

The landowners characterize this case as presenting the question of "whether [*Caldwell*] should be overruled because it violates this Court's well-settled rule that a takings claim accrues when all events which fix the government's liability have occurred[.]" Pet. at 1. This question does not demonstrate "exceptional importance," as is required by Fed. R. App. 35 and Fed. Cir. R. 35, and merely reargues whether the majority opinion conflicts with Supreme Court or circuit precedent. As shown above, the majority opinion does not so conflict. The landowners have not demonstrated that the issues raised by this appeal are sufficiently important to merit *en banc* rehearing by this Court.[7]

Moreover, this case does not raise an issue of exceptional importance merely because, as the landowners claim in their petition, there are "at least 22 Trails Act takings cases pending" and there are several thousand miles of

[7] On March 23, 2005, this Court recently denied a petition to rehear *Caldwell* en banc, and the Supreme Court subsequently denied certiorari. *See Caldwell v. United States*, 126 S. Ct. 366 (Oct. 3, 2005).

abandoned railroad rights-of-way that are potentially subject to the Trails Act. Pet. at 15. The landowners do not suggest that the Trails Act cases currently pending raise a statute of limitations question, and undersigned counsel is aware only of three such cases other than the present case and its companion, *Renewal Body Works*. The issuance of *Caldwell* in December 2004 put all future potential plaintiffs in Trails Act cases on notice that their taking claims accrue when the STB issues the NITU, and this panel's majority opinion provides litigants with "a single bright-line rule" for determining their respective rights and obligations. 443 F.3d at 1378. The majority opinion does not purport to extend to other contexts or other types of takings cases, and is not one of exceptional importance that would merit *en banc* rehearing.

CONCLUSION

For the foregoing reasons, the petition for rehearing *en banc* should be denied.

Respectfully submitted,

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

KATHRYN E. KOVACS
LANE M. MCFADDEN
U.S. Department of Justice
Environment & Natural Resources Division

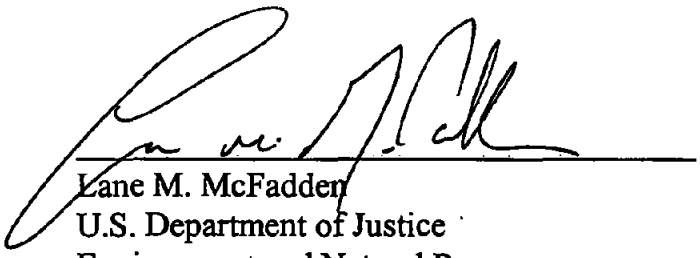
P.O. Box 23795
Washington, D.C. 20026
(202) 353-9022

July 2006
90-1-23-11259

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 2006, two copies of the foregoing Appellee's Opposition to Petition for Rehearing En Banc were served by first class U.S. mail, postage pre-paid, as follows:

Cecilia Fex
Nels Ackerson
Ackerson Kauffman Fex, PC
1250 H Street, N.W., Suite 850
Washington, DC 20005
Fax: (202) 833-8831



Lane M. McFadden
U.S. Department of Justice
Environment and Natural Resources
Division
P.O. Box 23795 (L'Enfant Plaza Station)
Washington, D.C. 20026
(202) 353-9022

****

John BARCLAY, Constance Barclay, Royer Barclay, Althea Barclay, John Amos, Marcia J. Bacon, Ronald J. Bartel, Melvin Bergen, John E. Boyle, Jonathan Ehrlich, Florence Ehrlich, Donald Graumann, Ruben Kliewer, Alvin Kroupa, Barbara Kroupa, Burdett Ledell, Lee Dale Miller, Vernon Minns, Frank A. Mitchell, Mid Kansas Cooperative Association, John F. Opat, Robert Presnell, Janet Regier, Sonja Regier, Don Reinhardt, Janice Reinhardt, Mary J. Rodgers, Darrell Thompson, Robert Turner, Geneva Turnquist, Donald Turnquist, Clark E. Wiebe, and Marlene J. Weber

Plaintiffs-Appellants,

V.

UNITED STATES,

Defendant-Appellee.

****

No. 05-1255

United States Court of Appeals,

Federal Circuit.

April 11, 2006

[00:00:45]

Judge Newman: This Case is # 0522109. Barclay against the United States. [INDISCERNIBLE] you can concentrate on [INDISCERNIBLE] specific to your client s issues.

Mr. Rosati: Thank you, Your Honor. [INDISCERNIBLE]. Basically I have three points to refer to distinguishing this [INDISCERNIBLE] and Caldwell. The first point obviously is that from the facts that we present the state law has been abandoned before the NITC official be identical fact pattern that was recognized. So this is the identical easement that was at issue to take, and the court recognized that factually that was a strong argument [INDISCERNIBLE]. We plead the identical [INDISCERNIBLE]. So in terms of distinguishing the fault withholding our position is the issues with the NITU did not bar the reputation of the easement because it had already been revoked. We already had our rights back and forth. The only time that we had it taken from us when was the rail user came in, in 1998 with possession of property after Escrow closed, which was within the statute of limitations at that point.

Judge Dyk: So in your view it s safe to say the easement reversed to the landowner even though the federal government still views the easement as being [INDISCERNIBLE] authorizing railroad operations.

Mr. Rosati: Yes and no. In other words, the question you re asking I believe is yes, but the way you phrased it I believe is no. Preseault recognizes that an easement can be abandoned before the ICC or the STB [INDISCERNIBLE]. In my mind, the STB has jurisdiction over the line. But the easement is creation to state law. If state law says this easement is

temporariness or concurrent with federal surface transportation board of regulations [INDISCERNIBLE] then the answer is only--

Judge Dyk: I m going to give you a hard time. Both state law says easement is to extinguished that unless the train runs more than once a week. And the federal government says, no, that s not abandonment. The train is still authorized to run and the easement still exists. Which law is that?

Mr. Rosati: The artificial argument, Your Honor, I know the state law says--

Judge Dyk: I understand. Hypothetical usually are, but you still have to answer them.

Mr. Rosati: Obviously in that context federal level preempts.

Judge Dyk: Now what s the difference here?

Mr. Rosati: The difference here is that federal law establishes regulations on the line. State law establishes regulations over the easement. If the easement has independent state law basis they can be terminated under state law basis. It doesn t mean [INDISCERNIBLE] over. It means that the railroad was operating basically without permission from the easement [INDISCERNIBLE]. Preseault recognized, and I didn t make this up. I m simply adopting Preseault and [INDISCERNIBLE] accomplished it. My view is that given that line of authority, at least in some jurisdiction, California being one of them, an easement can be extinguished before the Service Transportation Board terminates the line. And obviously I m basing it on Preseault and Toews [INDISCERNIBLE]. Does that answer your question?

Judge Dyk: Yes.

Mr. Rosati: But that s the one fact. We ll look at the first factual base that distinguishes my case [INDISCERNIBLE]. Second factual base is that we--

this was an exclusive easement. We had use of the property. We had physical possession of the property. We always used the property. When the railroad took up its tracks and ties in July of 1995, where were the new people on property. We re using it for commercially beneficial uses. Nobody else has access to or use of that property until the trail users to be closed. Physically [INDISCERNIBLE] property by threatening legal action, by threatening to site [INDISCERNIBLE] on her property in 1998. How could there have been a taking from us when nobody else was on the land but us? Nobody else was using the land. We had economical beneficial use. Obviously that s not the same fact as Caldwell and it probably is not a typical fact matter because from my reading of the literature most railroad easements are in fact exclusive. Probably most railroad easements to California are exclusive, but this one wasn t. The users on this line had the right to continue to use the property, [00:05:00] and these users did. They have pictures. They have testimony that we offered declaration from the general manager. So from a factual point of view I have two key areas of the facts that distinguish Caldwell. From a legal point of view my third point [INDISCERNIBLE] was Caldwell correctly decided? My view is that when the NITU issues, if it s true to the physical occupation, obviously it didn t happen in my case and didn t happen in the middle of our trail case, [INDISCERNIBLE]. But it never happened in my opinion because in my opinion the case that controlled that question [INDISCERNIBLE]. I don t see a distinction between the facts [INDISCERNIBLE] and the facts here. In [INDISCERNIBLE] to stay in place for up to 180 days, 12 months as an imposed longer-term. Not longer-term but a note of requirement before you could remove the [INDISCERNIBLE] already

there. The court said this wasn t the taking because you let them in. You voluntarily put them there. We didn t force them out of there when an NITU was issued. As a worst case scenario all that means is that the federal government allows the railroad to stay in place. But we put the railroad there, our predecessor [INDISCERNIBLE 00:06:21] that it was even granted by the property owner. We put them there. The government is not claiming [INDISCERNIBLE]. The government is simply saying we re going to regulate your relationship and maybe we re going to make you keep this property owner or this tenant in fact that the easement is on the property for another six months or another 12 months. He said that s not a taking. Now he also said that if this goes on indefinitely that might be a taking. And I obviously it s a point in the trail user physically either has [INDISCERNIBLE] escrow or physically takes possession of the property. That s a taking. Prior to that when the NITU issued, unless it s a physical invasion and under [INDISCERNIBLE] it isn t, then it has to be addressed on a regulatory [INDISCERNIBLE] state law. And every fact [INDISCERNIBLE] a little bit differently. In my view the NITU is necessary to effect a taking but not sufficient. Obviously you held over [INDISCERNIBLE] Caldwell, and that s a problem for me on that point, but I don t have to win that point to win the case, but it helped me because on Point 22 I go back to fight. 1.3 I go back and win. So obviously tactically I m a little better off at the Caldwell reversed and the court rules that taking accrues at the point of escrow because then there s not going to be a fight at the trial level [INDISCERNIBLE]. But I don t have to win that point. But I think to your purpose, you confront the issue over and over again of fact situations that

were not consistent with the Caldwell holding. How you answer two years from now when a property owner says the railroad is still running, the NITU issued four years ago. That means there was a taking. I want compensation. The government is going to come up and say, no, no, no. You granted the easement for railroad use and the railroad is still running. You re not [INDISCERNIBLE]. But under Caldwell it s already been taken, therefore the property [INDISCERNIBLE] compensation for the take. How do you answer my-- there must be other easements in the country similarly, but [INDISCERNIBLE] the property owner had the right use of the property at the same time. What was taken from that property even if the joint use, but in my fact they have no joint use. We re the only people using the property.

Judge Newman: Mr. Rosati, I agree with you, but that s not the court s law at the moment. It s not the court s law. So it would be helpful I think to all others if in fact there are arguments where either on the facts you might continue to distinguish Caldwell or distinguish it in other ways rather than suggestion that we review the basic premise.

Mr. Rosati: I think the point that I have regarding the facts are [INDISCERNIBLE].

Judge Newman: Alright. Good. Thank you, Mr. Rosati. Mr. Arbab.

Mr. Arbab: May it please the court, the basic issue in this case is whether the Court of Federal Claims correctly ruled that the taking claim was time-barred because it was filed more than six years after the Service Transportation Board issued the NITU. The answer to that question has two parts. One is statutory, one is the court s decision in Caldwell. First per the statute 28 USC section 2501 provides that every claimant with which the

court of federal claims has jurisdiction shall be brought unless the petition therein is filed within six years after such a claim first accrues. So the question is when does such a claim first accrue. [00:10:00]

In Caldwell the courts clearly held that the appropriate triggering event for any takings claim under the Trails Act occurs when the NITU was issued, so applying these principles to this case, here, the NITU issued in October of 1995 Renewal filed suit in December 2003. Therefore the suit in this case was untimely by more than two years. Now this morning, in all of its briefs, Renewal has argued for the overruling of Caldwell as one way to avoid [INDICERNIBLE]. I think as the court mentioned this morning, Caldwell findings withstand. And although Renewal has asked the court to exercise its authority under Rule [INDISCERNIBLE] to consider this case initially en banc, that step has not been taken. Moreover the court only recently in March of 2005 denied a petition for rehearing en banc in Caldwell and Renewal doesn t point to anything legal landscape that has changed since that time. There are a number of reasons for maintaining that Caldwell was correctly decided.

Judge Newman: Why don t we move on though to the second argument the appellant [INDISCERNIBLE]?

Mr. Arbab: Yes, Your Honor. Caldwell does -- [INDISCERNIBLE] Renewal doesn t attempt to distinguish this case from Caldwell. But the argument rests on the erroneous premise that the railroad easement in this case was abandoned prior to the issuance of the NITU, that is in the summer of 1995 before the issuance of the NITU on October [INDISCERNIBLE]. But the flaw in this argument is that it rests on the erroneous premise that there was a state law reverter of Renewal s interest in the property prior to the

issuance of the NITU by the Surface Transportation Board. Under federal law the easement here was not abandoned prior to the STB s issuance of the NITU. It s quite clear from the statute 49 USC 10903(a)(1) [INDISCERNIBLE] that a rail carrier providing transportation service subject to the STB s jurisdiction may not have abandon or discontiue service on any part of its railroad line without the expressed consent of the Surface Transportation Board. In fact, expressed consent was never granted here. We also know from of course the Second Circuit decision in Preseault and the DC Circuit s opinion in the National Wildlife Federation case that the, as the Second Circuit put it, until the ICC or the STB issues a certificate of abandonment the railway property remains subject to the ICC s jurisdiction and the state law may not cause a reverter of the property, whereas the DC Circuit put it in National Wildlife Federation, normally state law causes a causes a reverter of a right of way prior to the ICC approved abandonment. Or for the regulations promulgated by the STB provides--and this is the 49 CFR 1152.29(d)(1) and (2). Provided that the parties do not reach an agreement within the time allowed by the NITU, then the railroad may fully abandon the line [00:13:27] and terminate ICC jurisdiction generally by filing a notice of consummation to signify that it had exercised the authority granted to fully abandon the line. That did not happen however in this case because an interim trail use agreement was reached within the time permitted by the NITU and extended a number of times. So for the reasons that I ve outlined I believe the factual distinctions that Renewal attempted to draw between this case and Caldwell are simply unavailing.

Judge Newman: Okay. Thank you, Mr. Arbab.

Mr. Arbab: Thank you.

Judge Newman: Mr. Rosati.

Mr. Rosati: I have two final points on the issue of whether there can be state law abandonment to an easement without taking STB action. Obviously this court said there could be, so what the government is potentially arguing is approaching the rule in Preseault.

Judge Dyk: Where does Preseault say that?

Mr. Rosati: I think alternative grounds for the holding it holds that one ground would be that the state law uses abandoned in--

Judge Dyk: What pages?

Mr. Rosati: I believe it is on page 1549 and 1550 and also in the concurring opinion on page 1554.

Judge 3: Okay. So where does it say that on 1549?

Mr. Rosati: [INDISCERNIBLE]. And also was recognized in Toews at page--

Judge Dyk: [INDISCERNIBLE].

Mr. Rosati: Yes.

Judge Dyk: But you don t have a cite. You can t show me where it is.

Mr. Rosati: If it s 1549 and 1550 and the same rationale [INDISCERNIBLE] where the court says they wouldn t abandon the easement before the ICC took action. The easement was abandoned in the 1970s. State law the ICC has to take action [INDISCERNIBLE].

Judge Dyk: It d be helpful if you re going to rely on the pages.

Judge Newman: Well these cases held and considered Preseault and also this other case [INDISCERNIBLE] the effect of state law on what happens after or when the federal system decided to abandon the railroad use. Isn t that

right? They considered what happened to the easement does it revert, does it [INDISCERNIBLE]. But they didn t decide when railroad use would be terminated. That was done entirely by this act of Congress and the implementation by the Transportation Department.

Mr. Rosati: Yes. I agree with that. I mean the distinction is federal government regulates the line, but state law regulates the property line. My second point really wasn t addressed by the government is that if there was a taking, what was taken from us? Typically a taking would involve a physical intrusion or some depravation of property rights. We had all property. Nobody else did. We had all the property until at the very earliest December 22nd, 1997. The government didn t use the property. The railroad--trail user didn t use the property and the railroad didn t use the property. They were gone. We were gone. We were on it and we had physical possession and exclusive use, economic benefit. How could this property have been taken from us under those circumstances? I don t think the government addresses that question, I don t think there s an answer to that question. I think for a taking to occur there has to be a physical possession of property or regulatory imposition that deprives us of economic beneficial use. The use didn t happen. Now that [INDISCERNIBLE].

Judge Newman: Okay. Thank you, Mr. Rosati, Mr. Arbab. The case is taken under submission.

****

Jack LADD, Jobeth Ladd, John Ladd, Marie Ladd, Gail A. Lanham, James A. Lindsey, Michael A. Lindsey, William Lindsey, Charlie Miller, Pauline Miller, and Raymond Miller,

Plaintiffs-Appellants,

V.

UNITED STATES,

Defendant-Appellee.

****

No. 2010-5010

United States Court of Appeals,

Federal Circuit.

December 14, 2010

Judge Kimberly A. Moore: Would you argue that what occurred during this interim period, this nearly five-year period at this point is a temporary physical taking?

Mr. Hearne: It would be a taking of their property for the period of time they were excluded from it, yes. So, they would be

Judge Kimberly A. Moore: Not regulatory though. You think you should be analyzed under the

Mr. Hearne: Oh, absolutely not regulatory.

Judge Kimberly A. Moore: -- per se physical takings.

Mr. Hearne: Correct. They have been physically excluded from the use of their property for that time. It s no different than say [PH] Kendall Laundry, which was discussed in Supreme Court, those cases where we talk about a period of time where the owner is dispossessed of their property or property rights, certainly they re entitled to compensation for that period of time.

Judge Richard Linn: Mr. Hearne, what property right is taken by the government when the NITU is issued?

Mr. Hearne: Certainly. The property rights are -- essentially all property that the Ladd family has as the fee owners under Arizona law when the railroad stops railroad use of this easement. So, under Arizona law

Judge Linn: But the railroad technically doesn't stop railroad use?

Mr. Hearne: Oh, absolutely -

Judge Linn: When the NITU is issued, the

Mr. Hearne: Under the facts of this case, it certainly did. The railroad line washed out in 2005. The tracks and ties have been removed. No trains have--

Judge Linn: Well, that may be the case, but legally speaking, there s no abandonment until there is approval given and the abandonment is consummated, correct?

Mr. Hearne: In this case, the STB did approve the cessation and abandonment or railroad use, so [OVERLAY]

Judge Linn: That s a subsequent point. What I m trying to get at is what right at the time the NITU is issued is taken by the government.

Mr. Hearne: The right of the Ladds to get -- and their neighbors to get on their land, to grade their land, to excavate their land, to exclude others from their property, to fence their land, to incorporate this property into their ranches the same way they would have under Arizona law.

Judge Linn: But their property was subject to an easement the day before the NITU issued, and it s still subject to an easement the day after it issued, correct?

Mr. Hearne: If you extract the federal Trails Act from this equation, and [PH 00:02:11] it is decided just under Arizona law, at some point before 2006, the lands could have gone into court in Arizona, and said if the railroad tried to still exclude them and could have filed a quiet title suite, it would have won that quiet title suit.

Chief Judge Randall Rader: Yes, but the Rails to Trails Act is in place, and it talks about rail banking. We ll keep this as a trail in case we ever need

to use it as a railroad again, thus kind of linking the trail use to the railroad use. How do you deal with that?

Mr. Hearne: Well, that s a federal effort to redefine the state property rights; and as you noted in your concurrence in the Preseault case, when the federal government certainly is free to redefine property rights, but through doing so, they owe the owner compensation because they ve changed the rights that these property owners had under state law. When the STB invoked the NITU and invoked the provisions of the Trails Act, which is in 16 USC 1247(d), it speaks to land, it speaks to who owns and what the rights are in the land. It s not about regulating a railroad. So when the STB issued that, what they did is they redefined the Ladds property rights under Arizona law, deprived them of their use they can t even file a quiet title suit--and so, at this point, they have lost the use of their land for whatever period of time this continues, and at this point, it appears perpetual.

Judge Moore: Suppose tomorrow the railroad decided it was going to reinstitute service and put down tracks along those corridors. Would they be entitled to do?

Mr. Hearne: They would be entitled to do so only because of the Trails Act, not because of any provision under Arizona law. The railroad lost whatever right they had, and if we take the federal Trails Act out of it, the railroad lost whatever right it had to use this land as a matter of Arizona law when they ceased railroad use, when they removed the rails and ties, and when they had permission to abandon railroad service--

Judge Moore: So, not when they removed the rails and ties, but when the NITU issued?

Mr. Hearne: There would be a series of events that show under Arizona law that the railroad abandoned and lost any interest in right to use this property. Those would include removing the rails and ties; those would include the affirmative actions --

Judge Moore: Excuse me. But that causes me pause, because you re arguing the NITU is the trigger. But suppose at the time the NITU was issued, the railroad was still in fact operating and not abandoned yet. So then, you wouldn't have a taking as of the time of the NITU because the railroad would still have a legitimate easement until it pulled up those tracks.

Mr. Hearne: Well, this court s held that you would still have a taking even in that event, if the railroad were still using it. That s the Barclay decision--

Judge Moore: But it s not

Mr. Hearne: - where the railroad was still using it.

Judge Moore: No, I know this court held that, but you re that really isn t consistent with the logic that you re explaining to us, which is that the trigger really [00:05:00] ought to be when the railroad packs up and goes home.

Mr. Hearne: Well, what you re looking at is an interface between federal law, what the federal rule is, and what state law is under Arizona law. What are the property interests defined by Arizona law? When we look just to Arizona law, when you find when the railroad packs up and goes home, removes the tracks and ties, then the Ladds own that land free of any burden of an easement. Now federal law changes that, and that s where the NITU comes in.

Chief Judge Rader: So, the STB has to consummate the abandonment before there s an abandonment.
Mr. Hearne: The STB prevents an abandonment from occurring when they issue the NITU. They pre-empt that state law, they destroy those state rights; and then that s the takings event. Even if in some cases, like Barclay, the railroad was still using it, this court has held we don t need to resolve why, the abandonment issue to decide liability, because what happened is, what was taken wasn t just the physical possession of the land, but they took the property interest by redefining it.
Chief Judge Rader: You ve started out by telling us, Judge Hodges erred by not following the NITU rule. As soon as the NITU issued, that was the accrual date. What if the NITU doesn't actually delay the consummation of the abandonment? The NITU is issued if there is obviously going to be a delay until the Surface Transportation Board actually gets everything prepared for abandonment. What if the NITU doesn't delay that? Is there still a temporary taking?
Mr. Hearne: Well, the NITU, what that did is that gave, for whatever period of time, the railroad the railroad s actually the beneficiary. So, the railroad gains an interest to either sell or donate in the land--
Chief Judge Rader: I m asking you to reconcile the conflict in your own arguments. You either get to choose the consummation point or the NITU point. You started out with the NITU point, --
Mr. Hearne: That s correct.
Chief Judge Rader: -- and you ve kind of been switching to a different point, the point at which the railroad tore up its tracks. Which is it?

Mr. Hearne: It is definitely the NITU point. That s what the law of this court is. I was when I talk about tearing up the tracks, I was referring to the principles of state law, which are different; but the NITU prevents that state law from ever coming into play. So, that s definitely the taking occurs when the NITU is issued. And to the extent we consult state law, that is just simply showing what was taken, what the federal law pre-empted that would have been the rule under Arizona state law. And this point is one that the NITU is the taking, even when a trail is not yet physically built on a land, it s been recognized by solicitor general, now Justice Kagan, when she wrote, It s true that under Caldwell, land owners may seek compensation for the alleged taking immediately upon issuance of the NITU, even though the trail use agreement is not reached, and no taking may later be found, would only have been temporary.

Chief Judge Rader: But even without the NITU, doesn't the Surface Transportation Board control when consummation of the abandonment occurs?

Mr. Hearne: They do control the railroad s ability to cease railroad service and abandon railroad service, and in this case they granted the railroad the authority to abandon a railroad service line. That s under 49 USC 10903. So, those requirements were satisfied. The STB in fact, this was a contested abandonment proceeding. The railroad wanted to abandon--

Chief Judge Rader: But even if the railroad wants to abandon, it has to get permission from the STB, doesn't it?

Mr. Hearne: Correct, and the STB gave them permission. Not only did it give them permission, it found in their order that public use and convenience justified the cessation of this-- [OVERLAY]

Judge Moore: Is that the NITU? Is that what you re talking about, that when they granted the permission that was in the NITU?

Mr. Hearne: Both in the NITU and in prior the prior proceeding by the STB was where they granted the exempt abandonment. It was a contested abandonment, as I mentioned, where the railroad was granted the authority to remove their tracks and ties and take this corridor out of railroad service because the STB made an affirmative factual finding, We don t need this for railroad service anymore at that point. The fundamental error of Judge Hodges puts these land owners in a trick bag, and the trick bag is this: The rule is very clearly announced in Caldwell and Barclay that their statute begins to run in July of 2006. We re now four almost four going on four-and-a-half years later than that. The railroad s already been granted additional consummation time to consummate this abandonment through July of 11, and it s likely that would if they requested, it would be granted again. The STB has a policy of granting these to allow the prospect of trail use. So, in that case, we are in a situation where they don t know [00:09:58] when they can make their claim, and they have been [00:10:00] denied use of their land. [OVERLAY]

Chief Judge Rader: Do you want to save the rest to your rebuttal time, Mr.

Mr. Hearne: Thank you.

Chief Judge Rader: Mr. Skinner?

Mr. Gette: Gette, Your Honor.

Chief Judge Rader: Gette. Thank you.

Mr. Gette: May it please the court. In Tahoe Sierra, the Supreme Court said that physical appropriations are relatively rare, easily identified and

usually represent a greater affront to individual property rights. As a result, in Tahoe, the Court reiterated that there is a bright line that exists between physical takings and regulatory takings. Despite this bright line

Chief Judge Rader: Now regu can I the way I think of this, and maybe you could correct me, is a regulatory taking, well, takes some share, some part of the enjoyment of the property whereas the physical taking takes the whole thing and you have no ability to use any enjoy any share of your property rights. Isn t that what happened here?

Mr. Gette: No, and I think [OVERLAY]

Chief Judge Rader: They have no -- they can t even stop on that land without trespassing, right?

Mr. Gette: Two things first with respect to their ability to access, as we stand here today, that is not as a result of the issuance of the NITU.

Chief Judge Rader: But the point

Mr. Gette: That is [OVERLAY]

Chief Judge Rader: [OVERLAY] stick with the question, is this physical or regulatory? Regulatory will take various uses or various aspects of the enjoyment of property, whereas as the physical taking takes the whole thing. Isn t that what happened here?

Mr. Gette: No, I don t think so, because in the rep, Your Honor, we had a physical taking by the placement of a wire [OVERLAY]

Chief Judge Rader: Yeah, but they dropped something on the property and you lose that entire piece of property, wherever it was.

Mr. Gette: On no, the property itself, an apartment building, continued to be used as a rental apartment building. There was only a small physical intrusion on the property.

Chief Judge Rader: Yes, and that was a damages issue, as to how much of the whole thing was taken, and it may be little or great, but the whole thing was taken, at least as to the respect of that wire.

Mr. Gette: Well, and here, I don t think the whole thing has been taken. As I said, -

Chief Judge Rader: What can they still enjoy about their property?

Mr. Gette: They enjoy a fee interest in that property even today.

Chief Judge Rader: And so, they can go on and build a house there or they can decide to put a firing range there or something?

Mr. Gette: They enjoy a fee interest burdened only by the railroad s right to run a railroad. That was the pre-existing situation before the NITU. That s the same situation today.

Judge Moore: That s the argument you made unsuccessfully to the Supreme Court where Justice Scalia and he actually made fun of you. I mean, I don t think that s going to work on us at this point. You can t say, Oh yeah, well they didn t lose anything because they didn t anything the day before .

Mr. Gette: They did have something and they still have something today, and that is the fee interest in the property. That has not changed. Now the NITU-

Chief Judge Rader: Just no chance to enjoy that at all in any way. Why back to the Scalia argument, that was pretty well disposed of, wasn t it, in Preseault?

Mr. Gette: Well, I think in Preseault, and I think if you look at this court s ruling in Preseault, and it talks about whether the action under the 1920 Transportation Act, for example, constituted a physical taking. And this court in Preseault said, No, and a delay in the ability to abandon, as it provided--as the court was pointing out in the questioning of the appellants--is provided under the 1920 Transportation Act, and it s also provided under the Trails Act. But both of those, the delay of the right to enter the property, the delay in the use of the property has to be judged as a regulatory taking; and that was specifically spelled in Preseault. In fact, the language [OVERLAY]

Chief Judge Rader: Well, any physical invasion is a physical taking. A railroad running through your backyard is a bit of a physical invasion, isn t it?

Mr. Gette: Yes, it is.

Chief Judge Rader: And this is a physical taking, and it hasn t changed, you just told us that.

Mr. Gette: But that is -

Chief Judge Rader: They still have that right they still can invade, and so it s physical, right?

Mr. Gette: But that right is not granted by the NITU, it s granted by the railroad s acquisition of a property interest in that property 100 years ago.

Judge Linn: As I understand, you re arguing that Caldwell and Barclay only set forth a rule for accrual, not for when the taking or whether a taking occurs. Is that [00:15:00] right?

Mr. Gette: That s right.

Judge Linn: Well then you can have a circumstance where the NITU is issued and then over six years later, the abandonment occurs and the land owner s left between a rock and a hard place.

Mr. Gette: Well, I think there are a couple of --

Judge Linn: He files within the six-year statute, and a taking hasn t yet occurred. If it waits until the taking occurs, the statute of limitations has tolled. How can that be?

Mr. Gette: Well, I think there s a couple of things to say about that, Your Honor. The first is that and many of the trial courts have begun to look at this option of staying claims where a NITU has been issued but no final consummation of an agreement for trail use has been found to allow for the facts to develop to the point of determining whether or not we should evaluate these as regulatory takings.

Judge Linn: But that sort of assumes that your view of the law is correct, and then crafts some sort of a rule to react to it. But my question is whether your interpretation of the law is flawed in the first instances.

Mr. Gette: Well, I think Caldwell and Barclay tells us that there is a bright line rule as to the accrual of a claim, and it is upon the issuance of NITU.

Judge Linn: Isn t that when the taking occurs? How can you separate the two? That s really what I m getting at.

Mr. Gette: It is the point at which the taking occurs. The question is, at the moment is it regulatory or physical? And Caldwell even itself says, at the time that the NITU issues, we may not know what type of taking we--

Judge Moore: No, no it doesn't say we may not know the character of the taking. It says we may not know whether the taking is temporary or permanent.

It s quite clear about that. There s a difference between saying Caldwell raises a question of whether it s physical and regulatory. It does not. It raises the question whether it s temporary or permanent.

Mr. Gette: But there is also language in Caldwell that says the issuance and NITU begins one of what may be many outcomes, not just two whether it s temporary or whether it s permanent. I think that the Caldwell court indeed anticipated that there would be other options available in terms of whether a taking occur and how you would judge it in terms of character and duration.

Judge Linn: Well, there s nothing in Caldwell that suggests that whatever other option might be left open is considered a regulatory taking.

Mr. Gette: The Caldwell court certainly never says that a regulatory taking may be something that a future court would have to consider. It wasn t faced with that situation because it had a trail that had been established in this case.

Judge Moore: But a regulatory taking and a physical taking would be two different entirely different causes of that, correct?

Mr. Gette: They would be two different causes of action.

Judge Moore: Yes, a regulatory taking and a physical taking are two very different things, as you ve argued to us.

Mr. Gette: They are very different things.

Judge Moore: So, why would a temporary taking start the clock ticking for the statute of limitations on what ultimately is a physical taking? You re arguing the NITU begins a regulatory taking, so how could that mark the start of a statute of limitations for what ultimately becomes a physical taking when a trail is built?

Mr. Gette: I think in my mind, Your Honor, it works the same way as whether it s permanent or temporary. Whether it s permanent or temporary, it starts on the same day.

Judge Moore: Well, permanent and temporary has to do with duration of time, so of course the passive of time is relevant; but whether it s physical or regulatory are two different causes of action. It s two discreetly different causes of action to be analyzed under two entirely different bodies of law. You ve argued this to us, you can t disagree with it. So, if that s the case, then how could this regulatory taking start that statute of limitations clock? It can t. The statute of limitations doesn't begin until the cause of action arises.

Mr. Gette: Well and if the cause of action is a physical taking, and that only occurs upon entry onto the property, then you are back to the situation where Caldwell and Barclay are incorrectly decided. I don t think you have to go there. I think that you can harmonize these. I think you have a situation where in taking

Judge Moore: Is it the government position that Caldwell and Barclay are incorrectly decided. They weren t your position to begin with. I ve read every brief going back, and I m surprised Miss Kovacs didn t argue, because she was on all the briefs going back. So, you know, clearly this was not the government s choice of positions [00:20:00] from the outset. Does the government believe that it s wrong today?

Mr. Gette: I think that the government has accepted that it is the position of this court that the NITU establishes a bright line time point for the

commencement of the takings claim. We don t believe that it defined the exact nature of that takings claim.

Judge Moore: Precisely.

Chief Judge Rader: Can I ask to respond to something from Caldwell? The NITU marks the finite start to either temporary or permanent takings by halting abandonment . Just reading directly from the case. So, you halted abandonment and it started the permanent or temporary taking, right?

Mr. Gette: That s correct, it halted abandonment, and thereby placed a restriction on the Ladds potential use of this property; but it did not appropriate a new property interest to some other party. It did not appropriate a new property interest to the government. The government cannot it has no interest in this property to use it for its own benefit. There s no third party that was granted a benefit or a right to use this. There s no new easement that s been placed on this property. It is

Chief Judge Rader: The government s converted a railroad into a park, right?

Mr. Gette: Not in this case.

Chief Judge Rader: Well, what s going on then? You tell me what s going on.

Mr. Gette: What s going on is that the railroad has not yet decided whether it wants to give up the right to continue to run railroads over this line at some point. In fact, if we look at the two stretches of this railroad, we have the northern stretch and the southern stretch. The southern stretch, the railroad no longer has an interest in. It has fully abandoned its interest and to the extent that the Ladds and their other property owners have an interest in that property, all easements have now been lifted and they own that property clear. On the northern stretch, the railroad still desires at

some point in the future to potentially run trains that will connect to Mexico--

Judge Moore: That s railbanking. The potential to run trains. They re not currently running trains. The track is washed away and gone, so their easement is not preserved. The easement was for while they were operating railroads. It s not for their desire in the year 3000 to maybe put some more track down. They don t get to hold it that whole time in perpetuity.

Mr. Gette: One fundamental thing I d like to say, and I ll get then to the question is that we of course dispute that there is only an easement. We presented evidence before the trial--

Judge Moore: That s not for us. So, for purposes of this hearing, it s an easement.

Mr. Gette: So, if it s an easement, the reason that it has not lapsed and that it has not reverted back to the property owners is not because of the NITU; it s because of the 1920 Transportation Act.

Chief Judge Rader: You know, I keep waiting for you to tell me the facts as I understood them, which is the NITU failed, no trail s going to built, it won t be built, that it can t be built now. Everybody s given up on that, and so eventually this land will revert and they will own the land; and this is just a question of how much the damages are, which may be slight because you ve limited their enjoyment for a period of time. But you don t argue that. You argue that there s no taking at all. I m puzzled.

Mr. Gette: We argue that it needs to be analyzed as a regulatory taking because the limitation here there was no new appropriation of this property. The government you have to look at the nature of the government action with

respect to the property. The court has told us in Tahoe Sierra, you can t look to the impact it has on the party, you have to look at the nature of the government action. Was it the nature of the government action to appropriate an interest to itself for its own benefit? [OVERLAY]

Chief Judge Rader: Running trains through my backyard isn t taking my backyard?

Mr. Gette: Running trains on that corridor is a result of the property interest that was acquired by the railroads 100 years ago, not because of the NITU. The NITU does not instruct the railroad [OVERLAY]

Judge Moore: But they re not running trains now, they re holding the land in abeyance while they negotiate to see if they can get trail use.

Mr. Gette: No, they re no longer negotiating. The NITU has lapsed. There is no NITU on this property. It s over. The only reason they cannot go on that property today is because under the 1920 Transportation Act

Chief Judge Rader: You may want to run a railroad again, and yet you re telling me running a railroad is not a physical invasion.

Mr. Gette: It is a physical invasion by the railroad as a result of the property interest it owns as a result of the acquisition of that property interest 100 years ago; not because of the NITU. And even not because of the 1920 Transportation [00:25:00] Act.

Chief Judge Rader: Except that the NITU triggered the reversionary interest which gave them their property back.

Mr. Gette: The NITU

Chief Judge Rader: And now you re taking it a second time. You re saying, yes, you ve got your property back, but now we may want to run a railroad

again, and so that if you run a railroad again, that s a physical invasion, isn t it? Because they have their property back.

Mr. Gette: It s a physical invasion by the railroad as a result of the easement it owns, not because of the government, not because of an instruction we ve given them, and not because of a right we ve given them.

Chief Judge Rader: I just read that, remember? The NITU halts the abandonment and triggers the taking. How do you get around that?

Mr. Gette: As I think we presented, Your Honor, I think it s because there is a bright line here between a physical and a regulatory taking. The limitations on the use of the property, it did not appropriate a new interest in the property for the government. Thank you, Your Honor.

Chief Judge Rader: Thank you, Mr. Gette. Mr. Hearne, you have a little less than four minutes.

Mr. Hearne: Yes, Your Honor. Tomorrow, a new NITU could be issued and the trail could be created. The railroad can and still is -that s the reason that they have agreed to extend their time for filing a notice of consummation of abandonment, because the STB says they extend that to allow the possibility of trail use. In Barclay, the NITU by which the trail was created was the successor NITU, after the original NITU negotiating period ended. During the trial before Judge Hodges, we asked the government, Will you stipulate that no trail can ever be built on this property now that the original NITU negotiating period is over? And they couldn't and wouldn't, because 49 CFR 1152(g), the regulation STB has adopted that govern what they do, simply and clearly state even if the original NITU is over and the negotiating period expired, we will still grant a new NITU to create a new trail. So, I don t

know nor do my clients know whether there will or won t be a trail. They do know this, that they do not have access to their property, they do not have the use of their land, they do not have the ability to exclude others. This is not a regulatory taking. They ve been physically ousted from the possession of their land. The government destroyed their property interest that they enjoyed under Arizona law, and that is a taking, a per se taking the Supreme Court has so held in the Armstrong case where an order of the government destroyed lean rights. It held so in U.S. versus Security Industrial Bank where a government order that destroyed the value of private property is a per se compensable taking. That s what s gone on here. It is the only thing the railroad has to negotiate with is what they got from the STB. This railroad has nothing to negotiate or would have no interest to negotiate the sale or giving to another party under Arizona law. So, if the federal government took it from my clients and gave it to the railroad, the federal government under the Fifth Amendment must compensate them for that interest that it was taken.

Judge Linn: Was the government action here in issuing the NITU anything more than simply a mechanism that in the circumstances of this case affects a delay in when the property owners could be free of the easement that they had when they purchased the property?

Mr. Hearne: The issuance of the NITU pursuant to the Trails Act, 16 USC 1247(d), is the event, and the prior holdings of this court have so held. Is the event--

Judge Linn: But it could be it could be here that, for example, the railroad decides it s going to resume use for the is it the northern section or the southern section? I forget which one was -

Mr. Hearne: [INDISCERNIBLE]

Male Judge Linn: One where the abandonment has been consummated.

Mr. Hearne: Correct. The portion, segment east of Naco at the border of Mexico has been consummated, that small segment about

Male Judge Linn: Yup.

Mr. Hearne: - 20 miles out of [INDISCERNIBLE]

Male Judge Linn: So the other part of the track is still sort of hanging in limbo, right?

Mr. Hearne: In limbo in a federal regulatory sense, in the sense that my clients can t use their property and the railroad still has the ability to sell it to a trail group, or they could reactivate railroad service--

Judge Linn: So if they if the railroad does reactivate and resumes operation as a railroad, then that the easement that your clients had before the NITU existed would remain on the property for the balance of the time -it could be forever- that the railroad operates as a railroad, right?

Mr. Hearne: The easement would have ended under Arizona law, so--

Judge Linn: So, we re talking about a under my set of hypothetical facts, we re talking about simply a delay, that but for the [00:30:00] NITU and the Rail to Trail Act, then your clients arguably could have gotten their property back free of this easement.

Mr. Hearne: Right.

Judge Linn: But instead the easement remained on the property; but it was the same easement that was on the property before. So, it wasn t there was nothing taken from them in the sense that there s a different easement?

Mr. Hearne: I would disagree with that, Your Honor, in this way. The issuance of the NITU changed the character of the easement as well, because the easement was one for operating trains across their property. When the NITU as issued, that then gave the railroad the ability to negotiate the sale of this to a non-railroad for a non-railroad use. So--

Judge Linn: So, you re saying it s not just a delay, --

Mr. Hearne: Correct.

Judge Linn: - it s something quite different and amounts to a physical taking because it s an encumbrance upon whatever property right they had.

Mr. Hearne: Exactly, and it substantially redefines their property rights. Thank you, Your Honor.

Chief Judge Rader: Thank you, Mr. Hearne.

****

Jack LADD, Jobeth Ladd, John Ladd, Marie Ladd, Gail A. Lanham, James A. Lindsey, Michael A. Lindsey, William Lindsey, Charlie Miller, Pauline Miller, Raymond Miller, Valentin Castro, III, Deborah Ann Castro Revocable Trust, Joseph Lawrence Heinzl, Tammy Windsor-Brown,

Plaintiffs-Appellants,

V.

UNITED STATES,

Defendant-Appellee.

****

No. 2012-5086, 2012-5087

United States Court of Appeals,

Federal Circuit.

April 9, 2013

[00:00:00]
Mr. Hearne: - please the court, Your Honors. I am Thor Hearne and I represent six Arizona ranch families whose claim was dismissed by the lower court, Judge Hodges. For five of these ranchers, the primary issue is whether or not Judge Hodges was correct to dismiss their claims after remand by concluding that the limitations period under Section 2501 commences running on a newly found but older notice of interim trail use that no one knew about for 13 years almost after it was issued.
Judge Lourie: But wasn t that settled in Caldwell when the NITU issues is the key date, and this was the public record?
Mr. Hearne: Well, I would address that two points, the second point being the public record is the key point. Absolutely it settled law of the circuit that the taking in a Trails Act case accrues and the owner had the right to commence an action for compensation upon the issuance of the original NITU settled while we in no way dispute that. That s well settled now with Caldwell Barclay Illig re-hearings, and rehearing in its own - this case itself. So, that is not what we see the issue, Your Honor. Rather it is a question when the owner doesn't know of it, has no knowledge of it, and you mentioned public proceeding; and the NITU is not published in the federal register. There is no notice provided to the owner. In this case, 10 different lawyers from the Justice Department all the way through three years of discovery, including an appeal to this court, two different Assistant United States Attorney Generals, two different Surface Transportation Board General Counsel, and the Commissioner of the Service Transportation Board

Office of Proceedings all concluded that the original NITU, the first NITU, was the one in 2006. It was the subject of the litigation.

Chief Judge Rader: And now Caldwell and Barclay, they both involved NITUs that gave proper notice, right?

Mr. Hearne: They--

Chief Judge Rader: - whereas this one involved no public notice whatsoever.

Mr. Hearne: There was no public notice whatsoever of--

Judge Moore: Not even a newspaper publication, right? I understand the government alleged somewhere in its brief, Well, normally things are published . They didn t say this one was, and there was no evidence of any publication of any kind related to this NITU.

Mr. Hearne: Absolutely--

Judge Moore: - is that right?

Mr. Hearne: - correct, Your Honor, and--

Judge Moore: Then you have affidavits that say, We didn t know . It s not even just a case of, you know, constructive notice, you have actual We didn t now affidavits from all --

Mr. Hearne: Correct.

Judge Moore: - land owners.

Mr. Hearne: From every single land owner, and--

Judge Lourie: And the railroad operated until 2005, right?

Mr. Hearne: Correct. So, if an owner were to have walked out their back door, which they did, they would have had no knowledge

Judge Moore: Nothing at all, so no constructive knowledge--

Mr. Hearne: - of the physical condition--

Judge Moore: - knowledge, nothing.

Mr. Hearne: That s absolutely correct. There s no basis--the question that I would ask my clients is, what could they or should they have done to have informed themselves that they possess this claim. And the answer is there s nothing that they could have done. The only--the manner in which the NITU, the 1998 NITU, came into existence was in this private abandonment proceeding.

Chief Judge Rader: Now are you arguing that we should overturn Caldwell and Barclay and say the NITU is not the proper accrual point?

Mr. Hearne: Not--

Chief Judge Rader: What is your--what s your point [INDISCERNIBLE]

Mr. Hearne: Not at all, Your Honor. I think the court has certainly--this panel is bound, and the court en banc has spoken on this issue, the Caldwell Barclay are the--

Judge Moore: Our court [INDISCERNIBLE].

Mr. Hearne: Well, I shouldn't say.

Judge Moore: Our court has refused [INDISCERNIBLE].

Mr. Hearne: Refused to hear it-- rehear it in en banc.

Judge Moore: Alright.

Mr. Hearne: So, Caldwell and Barclay are the law, and the law that would be binding on this panel. We re not asking at all for the court to change that. We re simply saying whether it s under the claims suspension rule under Section 2501 or principles of due process, that the limitations period cannot begin running before the owner has notice or reason to know of the NITU s issuance.

Judge Lourie: Didn t the STB publish a notice on the federal register that the railroad had been authorized to abandon the line leading to the NITU process so that there was some constructive notice, there was public notice that it was about to happen?

Mr. Hearne: Three responses to that, Your Honor. First, there was a notice from the federal register in 1996, I believe, -

Judge Moore: February 14th of 97, I think.

Mr. Hearne: - which the railroad published, which if anybody read it would have said the railroad was abandoning this corridor, not that they were trying to convert it to any future use. One would have to then know that these ranchers in Arizona must then know the whole STB

[00:05:00]

process. But if they continued reading the federal register every single day, they would have never come across the NITU, because it was never issued there. It was just a filing in this private proceeding between the railroad and the STB [INDISCERNIBLE].

Chief Judge Rader: Said there might be a NITU, didn t it?

Mr. Hearne: It didn t say there might be an NITU in the federal register notice. What it did say is that there could be other proceedings affecting it.

Chief Judge Rader: Oh, it s good to hear [INDISCERNIBLE].

Mr. Hearne: So, I don t think that there s any way--

Judge Moore: I want to make sure I m talking about the same one though, because I m looking at one in my hand right now. Is it the one from Friday, February 14th of 1997? That s the only one I found.

Mr. Hearne: That is the only one, Valentine s Day publication, -

Judge Moore: Alright.

Mr. Hearne: - which is the only one we know of or the government has alleged.

Judge Moore: And it contains-- really just two sentences, the summary does, and is that it? Is that all there is to this thing?

Mr. Hearne: That is all there is to that, Your Honor. And--

Judge Moore: It says the Board exempts the railroad from prior approval requirements to abandon. It doesn't even say they re going to abandon, it just says if you later down the road choose to abandon, you re exempt from prior approval requirements.

Mr. Hearne: Correct.

Judge Moore: [INDISCERNIBLE].

Mr. Hearne: That s the only published notice. You re absolutely correct, Your Honor. And the final point in the response is we would say when an order of a government agency is taking the owner s property, the Supreme Court s jurisprudence requires actual notice or attempted actual notice.

Judge Moore: You don t need to fight that battle. Do you really want to fight the battle?

Mr. Hearne: I don t think I do. I don t know that I need to, but I make that point because it is one where in this case, it goes to the fact--I think the case most easily be decided under the accrual suspension rule, under Section 2501, simply saying merel on the facts of this case, there is no way that this was knowable to these owners in order to let them be informed of a fact, but giving rise to a cause of action.

Chief Judge Rader: Why about the line--excuse me, what about the line [INDISCERNIBLE] 11D with respect to the other properties?
Mr. Hearne: Yes, the deed itself is [INDISCERNIBLE] and it was to the original railroad, the El Paso. And under Arizona law, Arizona, like other states, should read the two cases, which interestingly Judge Hodges failed to mention in his decision, which are Boyd and Leisure, both have Arizona looking at railroad rights of way, strips of land for railroad as being an easement as opposed to a conveyance of fee. But when we look at the language in this instrument, when we look at what the grantor said, he said over, through, across and upon a strip of land for relocation of a railroad line. So, it was clearly defined, but from the words of the document and the context in which it was issued.
Judge Moore: But he always says in fee simple.
Mr. Hearne: Well, it does, but that is--
Judge Moore: That has very clear legal meaning.
Mr. Hearne: Well, I think fee simple, as we point out in the briefing referring to Professor Ely is that that term can t be taken--particularly at the time of 1911--that the word fee was often used to determine the tenor, to describe the term of the estate conveyed.
Chief Judge Rader: That s the problem here, that fee simple is too expansive and an easement doesn't give you the right to keep the cattle off the rail line. In other words, an easement lets the property owner have access, so it has to be more than an easement and less than fee simple, which there isn t a label for that, is there?

Mr. Hearne: Well, it s interesting you mention that point, Your Honor, because that s what the Arizona Supreme Court considered in the 1888 Boyd case, where they were describing what is the unique nature of an interest that a railroad holds in the land upon which it operates as a rail line. And the Arizona Supreme Court in Boyd looked exactly at that and said there s something a little more, because these railroad interests are a more encompassing interest. It s not as though a private transaction, as the court s familiar with the Preseault decision. Judge Plager s majority talked about they re issued in the context, the flavor of condemnation or potential eminent domain.

Judge Lourie: Isn t there more language than fee simple? Does bargain, sell, grant, convoy, alien, etc? It s pretty compulsive of language.

Mr. Hearne: And that would be the language you would find in quick claim deeds or easements or indentures of the day. I mean, that is basically boiler plate form language that you can find in many instruments that are construed properly to be an easement. And I think, you know, we have to--the only way to read this is an actual conveyance, saying that the grantor Cummings 00:09:28] intended to convey to the railroad--

Chief Judge Rader: And a fee simple deed isn t going to talk about over, across and through, is it?

Mr. Hearne: Correct, it wouldn't.

Chief Judge Rader: I mean, it s gone. So, you don t talk about over, across, through stuff if it s a fee simple. They re trying to get somewhere less than a fee simple and more than an easement, so they keep the cattle off the railroads.

Mr. Hearne: Correct, and that was--the only interest the railroad needed in this transaction was to acquire easement across a top-rated railroad line. And I think again, when you look at this court s

[00:10:00]

decision in Preseault. We look at the Boyd case in Arizona, and I don t see that Arizona would have a law different from what this court found to be the presumptions of Vermont law in Preseault. And I will reserve the balance of my time for--

Chief Judge Rader: Mr. Gray.

Mr. Gray: May it please the court, my name is Michael Gray here on behalf of the United States. I think--

Chief Judge Rader: The trains are running up and down these lines until 2005, and yet you re saying at that point, the statute of limitations had already expired.

Mr. Gray: Indeed--

Chief Judge Rader: How could that be right?

Mr. Gray: Well, indeed in Barclay, this court said just that, that it did not matter the statute of limitations commences, and it did not matter that, in that case, the trains--the railroad was still operating. So, this court has, in fact--

Chief Judge Rader: How can I ask you to notice that the line s abandoned when they re running trains on it, until after the time you d have a chance to even raise a claim.

Mr. Gray: I think it d be helpful in answering that, to just back up and describe the process here and what actually happens, because what happened in

this case is actually not any different than what happens in the normal case where an NITU is issued. And the way the process--

Chief Judge Rader: It sounds to me like you re going to argue NITU is the wrong thing to satisfy a newer should have known accrual standard then, isn t it?

Mr. Gray: No, I m going to argue that you cannot rule for the plaintiff in this case without completely eviscerating the rule announced in Caldwell and Barclay, -

Chief Judge Rader: [INDISCERNIBLE]--

Mr. Gray: - which we are bound by.

Chief Judge Rader: - Caldwell and Barclay had pretty clear public notice. There was at least newspapers, which isn t here.

Mr. Gray: I don t believe that s correct, Your Honor.

Judge Moore: There was no allegation in Caldwell or Barclay that they didn t have notice. Like here we have affidavits from them saying, We have no notice . That was not disputed in Caldwell or Barclay.

Mr. Gray: Again, I think it s helpful to back up--

Judge Moore: [INDISCERNIBLE] it was not disputed in Caldwell or Barclay.

Mr. Gray: That particular point was not disputed; but the facts of this case are the issuance of the NITU happens in the exact same way that it happened in Caldwell and Barclay.

Judge Moore: Yeah, but there they didn t argue they didn t know. Here they didn t know, and for a taking, you ve got to have actual or constructive knowledge. So, where is the constructive knowledge of this [PH]dismissal?

Chief Judge Rader: I m looking at this document that Judge Moore has talked about a couple of times. Where in this do I get noticed if I m a land owner?
Mr. Gray: Okay, if you re a land owner, you have a couple of things. You have a railroad running through your property, -
Chief Judge Rader: I do.
Mr. Gray: - which you are on notice of, correct? Then, you also have--
Chief Judge Rader: The trains were still running there till 2005.
Mr. Gray: But it s incumbent upon you when you have a railroad running through your property that the corridor is governed by the Surface Transportation Board, to pay attention to what s happening with the railroad.
Chief Judge Rader: Okay, I m paying attention, where does this--
Mr. Gray: Okay.
Chief Judge Rader: - give me notice?
Mr. Gray: The federal register, the railroad filed--the STB then says, a notice of exemption from the abandonment proceedings, which specifically says that the notice is--and I m quoting from the federal register notice here-- subject to historic preservation, trail use, public use and standard labor protective conditions and that additional requests for interim trail use, railbanking under the Rails to Trails statute must be filed by a particular date . So, if you are a land owner who has a railroad running through your property and you are paying attention, you know that there s an abandonment that might happen. You re interested in the land reverting to you, so you re paying attention to know that in the federal register, they said, This proceeding has started . At that point, you can sign up with the Surface Transportation Board in the notice. In that notice, they described the rail

operator, the county through which it runs, the terminus points that are proposed to be abandoned. They provide the names and addresses of who to call for further information, and at that point, you can contact the STB and ask to be put on the service list. Then, as the proceeding goes forward, if a notice of interim trail use is issued and you are on the service list, then you will have notice. That is--

Chief Judge Rader: This document could lead to continued use of the railway, right? They may decide not to abandon it.

Mr. Gray: It could.

Chief Judge Rader: And so I see the trains running by until 2005. I conclude--

Mr. Gray: You conclude--

Chief Judge Rader: You conclude it wasn t abandoned, the trains are still running.

Mr. Gray: Again, -

Chief Judge Rader: You re telling me--

Mr. Gray: - the court rejected that explicitly in Barclay.

Chief Judge Rader: I don t think so. That where I m--I don t read Barclay as expansively as you do. I m reading [OVERLAY]

Mr. Gray: The language in Barclay was that--the Barclay says explicitly [00:15:00] it does not matter, that in that case that the railroad continued operating, that the notice--the date the notice of interim trail use is issued is what matters.

Judge Moore: Well, because there was no dispute, that the land owners in that case had notice. So, you re right it didn t matter that the trains continued to operate, because that wasn t the trigger for giving them notice. That wasn t the dispute.

Mr. Gray: Let s--let me back up here. The standard that you re applying--if the taking accrues, it happens and accrues on the day the notice of interim trail use issues, which they don t contest and which Caldwell and Barclay clearly hold that that happened. Then the standard is--but the notice of interim trail use concealed or inherently unknowable for accrual suspension, this notice of interim trail use was issued in the exact same way that they all are. If you say it s inherently unknowable--

Judge Moore: No, aren t you supposed to publish [INDISCERNIBLE].

Mr. Gray: If you say it s inherently unknowable, you ve gutted the rule--you ve gutted Caldwell, you ve gutted Barclay, because--

Chief Judge Rader: [INDISCERNIBLE]--

Mr. Gray: - if it s inherently unknowable then it s--

Chief Judge Rader: What is unjust about that?

Mr. Gray: Well--

Chief Judge Rader: Because then we would have the government issuing newspaper notices, as they should.

Mr. Gray: Well, I don t know that you can require that. What you would have is plaintiff [INDISCERNIBLE]

Chief Judge Rader: No [INDISCERNIBLE].

Mr. Gray: You have the CFC having to examine in every single case.

Chief Judge Rader: [INDISCERNIBLE]. We can require that they give notice in a way that is publicly ascertainable.

Mr. Gray: In Barclay and in Ladd, this court has clearly expressed a preference for a bright line rule because of the problems you would have with so many land owners with so many interests. I mean, here you have some with a few simple interests, some without, some that may have reversionary interest, all on-- you re talking about hundreds or thousands of land owners. You re talk about a rule that says you have to ascertain whether each individual potential plaintiff was--when they knew about it; and that completely guts the rule from Caldwell and Barclay.

Judge Moore: No, it can t. That s the rule, the rule you have to have constructive of actual notice. We re not making this stuff up as we go along. I mean, these are the Supreme Court dictates on what claim can accrue.

Mr. Gray: I think that the only way that you can read Caldwell and Barclay is that because the notice of interim trail use happens as part of a public process, that that is sufficient for constructive notice; and it s sufficient in all cases for constructive notice, because if it s not, then you can t say that the notice of interim trail use starts--in the previous appeal in this case--

Judge Moore: It can, because the litigants in Barclay and Caldwell were on top of it and ware of those things.

Mr. Gray: No, they weren t because they were--those cases were dismissed for failure to comply with statute of limitations.

Chief Judge Rader: By the way, the newspaper is required by regulation, right?

Mr. Gray: The newspaper--if a newspaper--
Chief Judge Rader: [INDISCERNIBLE]
Mr. Gray: - knows of the abandonment here--
[OVERLAY]
Chief Judge Rader: --so you violated your own reg.
Mr. Gray: We don t have in the record evidence of the newspaper notice. There certainly haven't been--
Chief Judge Rader: So, you have violated your reg.
Mr. Gray: The reg doesn't require us to--if the reg requires notice in the newspaper, it doesn't require that, you know, we manage to make it in the record in this case--
[OVERLAY]
Mr. Gray: They certainly haven t proven that no notice was given.
Judge Moore: Hello? You didn t even allege that there was, in fact, a newspaper publication in this instance. Forget about whether it s in the record, you didn t even make that allegation in this case.
Mr. Gray: Caldwell and Barclay adopted such a bright line rule that I don t think anybody thought it was going to be necessary to go back and search the newspapers records from 1997 to see if the railroad published a notice. The regulation--and let s be clear, the notice is not of the interim trail--
Chief Judge Rader: We ve got this thing we ve got the internet now. You can plug it in and it finds it in about 20 seconds.
Mr. Gray: I--
Chief Judge Rader: You re making this sound a little more difficult that it probably is.

Mr. Gray: I m not sure if that s--I m not sure how well the internet records go back for newspaper publications in Arizona in the mid-90s, but that s beside the point. Let s keep in mind that the newspaper notice that we re talking about is the same notice that s published in the federal register. It s of the commencement of the abandonment proceedings. It s not of the notice of interim trail use. There is not a newspaper publication required by the regs for the notice of interim trail use itself in any case. So, the federal register notice was sufficient, regardless of whether there was a newspaper notice, to put the plaintiff on notice that the proceeding was going forward. That is enough to make it not inherently unknowable. That s the standard, is it inherently unknowable? That s this court s articulation of the standard in the Ingram case, which in footnote one, this court says is the same standard, that they don t mean to be stating a different standard from knew or should have known . If you--

[00:20:00]

if this court decides that the normal route of publication of a notice of interim trail use, which is the publication of the proceeding in the federal register, then issuance without actual notice, if the court decides that is inherently unknowable, then again, we believe that completely guts the rule from Caldwell and Barclay.

Judge Moore: So, tell me how, in your mind, they would have to find out about the issuance of the NITU, the day it issued? What would individual land owners have to do, and what s your view is it that they should have done to be on notice?

Mr. Gray: What they would need to do is keep abreast of the STB proceedings that go on with their--I mean, one way to do it is to stay in contact with the railroad, right? You know you have a railroad. You can stay in contact with the railroad and say, What should we be doing? Once they know--
Judge Moore: [OVERLAY 00:20:54]
Mr. Gray: - about the federal register notice--
Judge Moore: I know. Slow down, let me get some words in here. So, when they have to stay in contact with the railroad, do you envision weekly, monthly, yearly? What is your view of the obligation on the land owner to apprise itself when the government issues this NITU, which it doesn't publish anywhere and which isn t distributed to anybody?
Mr. Gray: They have a six-year limitations period. They need to apprise themselves at least every six years, to make sure that they are within their limitations period. And, you know, it is not uncommon to require land owners to remain abreast of what s going on, on their property. An affirmative obligation on a land owner to make sure that it knows what s happening with its property is common in the law of property. And so, what they should be doing--
Judge Moore: Not when there s already been an easement and they continue to operate the trains every day. We have lots of cases, I ve been on many of them, that says the land owners should have apprised itself, how did you not notice the government drove a giant backhoe onto your land and dug out half of it? Well, there hadn t been an easement to their understanding.
Mr. Gray: Well, but I think when there s a railroad going, then that puts you on--

Chief Judge Rader: Caldwell [INDISCERNABLE] Barclay isn t it? There s instances of the government bombing the land or taking fill from it. This is considerably different, isn t it?

Mr. Gray: I don t think--I don t think it is in principle. There s also--it s akin to if a municipality were to pass a regulation that says, you know, you can have no development of this property at all, and doesn't provide any actual notice, and the statute of limitations period has run, you would say it s incumbent on the land owner to pay attention to the regulations that affect its property. And this is not a different situation.

Judge Lourie: [INDISCERNIBLE] 11D. I think at least [INDISCERNIBLE] you re entitled to an opportunity to deal with that issue as well.

Mr. Gray: I do, and--our view on that issue is that in fee simple means--in fee simple, it says, you know, it s conveyed in fee simple--the in fee simple [OVERLAY]

Chief Judge Rader: Why do we have across and--

Mr. Gray: - all of the property [PH] or something.

Chief Judge Rader: - over and through--

Mr. Gray: It s in the--it s in the--

Chief Judge Rader: - and upon and all these limitations that are easement language.

Mr. Gray: I don t--I think that--

Chief Judge Rader: [OVERLAY] try to find something.

Mr. Gray: - you know, right of way is an easement language. I don t think that those are easement languages. I think it s describing a strip of land, and I think it s describing it as, you know, this is a strip of land that

we re giving up that s part of the parcel that goes through our parcel . It s a strip of land in fee simple that we re conveying, and I that s sufficient. If using the words in fee simple in a state where even without it, the presumption is you give a fee grant isn t enough, I m not sure what they would have said to grant a fee simple interest here. I do want to go back though and just make clear again, because I m not sure I got to completely address Judge Moore s question about what we expect them to do. And again, when the federal register notice is issued--which this court has said publication in the federal register is sufficient notice--on interested parties, no matter any injustice that results. When that notice is issued, all they have to do is come and ask to be put on the service list with the STB when a NITU is issued as part of the process, they will receive notice of it. That is not much to ask a land owner that has a railroad running through his property. Therefore, we ask that this court affirm.

Chief Judge Rader: Thank you, Mr. Gray, and thank you for responding to many questions there. You did a fine job. Mr. Hearne.

Mr. Hearne: Thank you, Your Honor. What the government is asking this court to do, and what they asked Judge Hodges to do, is to impose on these Arizona ranchers a standard of

[00:25:00]

basically omniscience that the Justice Department themselves, the STB themselves--as I mentioned 10 different Department of Justice lawyers, two different Assistant Attorney Generals, two different General Counsels from the Service Transportation Board--in an affirmative declaration from one of the commissioners--

Chief Judge Rader: But Mr. Hearne, I think you really need to deal with the key point from what Mr. Gray told us, and that is if we depart from this bright line NITU rule, don t we have to then start analyzing each individual land owner independently for when they knew or should have known with different facts and the complexities of administrative--complexity that would mean?

Mr. Hearne: Sure. Two answers, Your Honor. First off, on the facts of this case, the court is certainly able to rule on the facts of this case following settled principles under the accrual suspension rule that these owners did not have--this was inherently unknowable to these owners based on these facts. That would be a very limited ruling that would apply to these owners. The broader point is that maybe this will come up in other Trails Act cases, because for whatever reason, the Surface Transportation Board has chosen, which they can, to not require either themselves or the railroad to ever directly inform an owner when this--an NITU is issued. But that s a situation entirely of the government s making. Under the Constitution, this is the taking of these people s property. It s had a tremendous effect on these Arizona owners. They would have brought an action had they known about this--and they couldn't have. They didn t have--unlike other cases--the knowledge that perhaps Caldwell did, General Caldwell did in that case where there was discussions about when the deed was recorded and there was some knowledge. So, I think in those cases, to answer your question, Your Honor, in those cases where an owner such as this does not ever have a reason to know or have a reasonable knowledge of issuance of an NITU, you could have another case where the accrual suspension or principles of due process would delay the

beginning of the running of the limitation period until such time as the owner did have knowledge. But we don t dispute the bright line rule at all in Caldwell and Barclay. That is the rule, that is when the claim accrued, that s what this court has held, and it makes sense, because that order did have the effect of depriving them of the unencumbered possession of their property. Now the fact that it wasn t implemented, they didn t have knowledge of it, doesn't change that fact.

Judge Moore: But couldn't your clients have simply gone down to the STB and put themselves on some sort of notice list and thereby forever, whenever a NITU is issued, they would have gotten a copy of it?

Mr. Hearne: Well, no, the government makes it sound as though all they had to do--they would have had to read, even under the government s supposition, they would have been reading the federal register every day, and--

Judge Moore: Hold on now. If a NITU had issued in the federal register for the whole world to see, would you still be arguing they didn t have constructive knowledge?

Mr. Hearne: I m sorry, are you hypothesizing that, in fact, they did publish a NITU--

Judge Moore: Yeah, if a NITU had been published in the federal register. Are you saying that would not have been adequate to put them on constructive notice?

Mr. Hearne: It - there certainly would be a much better argument that they were on constructive notice. As we ve made clear in our briefing, we think that publication doesn't satisfy the constitutional standard under the Mullane and New York Central cases, and Mennonite, when the government

agencies orders taking the property. But I don t--as you mentioned, Your Honor, I don t know that we need to go to that point. In this case, there was not even a basis for constructive notice on these facts.

Judge Moore: So, what they have had to do to put themselves on a notification list?

Mr. Hearne: Well, I think at minimum, they would have--they should have mailed a notice to the property owners. That they didn t do that, they could have published it in the newspaper in that community so that owners in that community could have read it, and they would have had a publication that the owners have a claim; much as required in the opt-in class action procedures in these Trails Act cases, the Court of Claims routinely requires publish a notice in the local newspaper. It cost a couple of hundred, a couple of thousand bucks. You publish it a couple of times, everybody knows what s going on; and if they have a claim, the ability to participate or not. That wasn t done here, and these people had no ability to protect their rights, because they didn t have the knowledge of the basic facts necessary to do so. Thank you, Your Honor.

Chief Judge Rader: Thank you, Mr. Hearne, and that concludes our morning.

Bailiff: All rise -

No. 08-852

In the Supreme Court of the United States

SARAH ILLIG AND GALE ILLIG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
JOHN C. CRUDEN
Acting Assistant Attorney General
KATHRYN E. KOVACS
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Blank Page

QUESTION PRESENTED

Whether petitioners' claim for just compensation in connection with the preservation of a railroad right-of-way and its interim use as a recreational trail was time-barred under 28 U.S.C. 2501, because the claim was filed more than six years after the date on which the Interstate Commerce Commission issued a Notice of Interim Trail Use or Abandonment.

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and regulations:

Regulations—Continued: Page

Blank Page

In the Supreme Court of the United States

No. 08-852

SARAH ILLIG AND GALE ILLIG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the *Federal Reporter* but is reprinted in 274 Fed. Appx. 883. The opinion of the United States Court of Federal Claims (Pet. App. 5a-29a) is reported at 67 Fed. Cl. 47.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2008. A petition for rehearing was denied on October 1, 2008 (Pet. App. 112a-113a). The petition for a writ of certiorari was filed on December 30, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under federal law, the Surface Transportation Board (STB), the successor agency to the Interstate Commerce Commission (ICC),[1] has exclusive and plenary authority over the construction, operation, and abandonment of virtually all of the Nation's rail lines. *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 319 (1981). A rail carrier providing transportation service subject to the STB's jurisdiction may not abandon or discontinue service on any part of its railroad lines without the STB's express consent. *Id.* at 320; 49 U.S.C. 10903(a)(1).

In 1976, concerned about the loss of railroad trackage nationwide, Congress passed the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, 90 Stat. 31, in part to promote the public use, including recreational use, of rail lines that would otherwise be abandoned. See *Preseault* v. *ICC*, 494 U.S. 1, 5 (1990) (*Preseault I*). The 4-R Act authorized the ICC to delay disposition of rail lines subject to abandonment for a period of time to allow for the sale of the line for public purposes. *Id.* at 6; see 4-R Act § 809(b) and (c), 90 Stat. 145.

Congress later found that the 4-R Act had not been successful in preserving railroad rights-of-way. *Preseault I*, 494 U.S. at 5. In 1983, Congress enacted the National Trails System Act Amendments of 1983 (Trails Act), Pub. L. No. 98-11, Tit. II, 97 Stat. 42, "to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corri-

---

[1] In the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (49 U.S.C. 701 *et seq.*), Congress abolished the ICC and replaced it with the STB. See 49 U.S.C. 702.

dors, and to encourage energy efficient transportation use," as well as to promote the development of recreational trails. *Preseault I*, 494 U.S. at 17-18 (internal quotation marks and citations omitted); see 16 U.S.C. 1247(d). Section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d), provides an alternative to regulatory abandonment, commonly known as "railbanking." Under Section 1247(d), the STB retains jurisdiction so that the corridor may be returned to railroad use in the future, but the rail carrier transfers financial and managerial responsibility to a state or local government or qualified private organization, allowing its use in the interim as a recreational trail. See *Preseault I*, 494 U.S. at 6-7. Section 1247(d) provides that "if such interim [trail] use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. 1247(d).

A railroad corridor may be railbanked when the rail carrier files either an abandonment application under 49 U.S.C. 10903 or seeks an exemption from that provision under 49 U.S.C. 10502 (previously 49 U.S.C. 10505 (1994)). Section 10903(d) allows the STB to authorize abandonment or discontinuance if the Board finds that "the present or future public convenience and necessity require or permit the abandonment or discontinuance." Section 10502 allows the STB to exempt a rail carrier from the requirements of Section 10903 and other statutory provisions upon a showing that (1) the statutory requirement in question is "not necessary to carry out [general] transportation policy" under 49 U.S.C. 10101, and (2) the service being exempted is "of limited scope" or the statutory requirement is "not needed to protect

shippers from the abuse of market power." 49 U.S.C. 10502(a).

When a rail carrier has filed an abandonment application or request for an exemption, a party interested in acquiring or using the right-of-way for interim trail use may file a request or petition that includes: (1) a map and description of the right-of-way, or portion thereof, that the party proposes to acquire or use; (2) a statement of willingness to assume full responsibility for the right-of-way, including management, legal liability, and payment of taxes; and (3) an acknowledgment that interim trail use is subject to the "possible future reconstruction and reactivation of the right-of-way for rail service." 49 C.F.R. 1152.29(a).

In exemption proceedings, if the STB receives a complete railbanking request or petition and if the railroad agrees to negotiate, then the STB issues a Notice of Interim Trail Use or Abandonment (NITU). 49 C.F.R. 1152.29(d)(1).[2] The NITU allows the rail carrier to discontinue service and salvage the track, but delays the effective date of the abandonment of the rail line for 180 days to allow the rail carrier and the trail operator time to negotiate a railbanking and interim trail use agreement. *Ibid.* If the parties do not reach an agreement within the time allowed, then the railroad may "fully abandon the line" and terminate STB jurisdiction by filing a notice with the STB. 49 C.F.R. 1152.29(d)(1) and (e)(2). On the other hand, if the parties reach an agreement, the NITU authorizes the interim trail user to take over management of the right-of-way, subject only to the right of a rail carrier to reassert control over the

[2] In abandonment application proceedings, the STB issues a Certificate of Interim Trail Use or CITU. 49 C.F.R. 1152.29(b)(1)(ii). There is no substantive difference between a NITU and a CITU.

property to restore rail service. 49 C.F.R. 1152.29(d)(2); see *Preseault I*, 494 U.S. at 7 n.5 ("If agreement is reached, interim trail use is thereby authorized."). Once an agreement is reached, interim trail use continues until the STB vacates all or part of the NITU to (1) permit the reactivation of service, or (2) reinstate the exemption, thereby permitting full abandonment under federal law. 49 C.F.R. 1152.29(d)(2) and (3).

2. Petitioners own land in which the Missouri Pacific Railroad (MoPac) held a right-of-way for railroad purposes. Pet. App. 7a. On February 7, 1992, MoPac sought the ICC's authorization to abandon a 6.2-mile segment of rail line, portions of which pass over petitioners' land. *Ibid.*

On March 25, 1992, the ICC issued a NITU authorizing MoPac and a private trail operator to negotiate an interim trail use agreement. Pet. App. 48a-51a; see *id.* at 8a. The ICC extended the NITU until December 31, 1992. On December 30, 1992, MoPac and the trail operator finalized a trail use agreement, under which the trail operator assumed all economic and legal responsibility for maintaining the trail, and MoPac reserved a right of reentry for purposes of reactivating rail service. MoPac then executed a quitclaim deed transferring its interest in the right-of-way to the trail operator. *Id.* at 8a, 43a-44a.

In 1997, MoPac requested that the ICC reopen the proceeding and partially vacate the NITU, because MoPac needed to continue railroad operations over a .21-mile portion of the covered right-of-way. On April 18, 1997, the ICC issued a decision reopening the proceeding and vacating the NITU with respect to that segment. Pet. App. 9a.

3. a. On December 28, 1998, petitioners filed a class action complaint in the United States Court of Federal Claims (CFC), in which they alleged that their property was taken by operation of the Trails Act when it "pre-empted [their] rights to * * * property which they enjoy under state law." Compl. ¶ 16. Petitioners sought compensation for the alleged taking of their property under the Tucker Act, 28 U.S.C. 1491(a). Compl. ¶¶ 18-21; see Pet. App. 9a.

The government moved to dismiss the complaint on the ground that it was time-barred under 28 U.S.C. 2501, since it was filed more than six years after issuance of the NITU. Pet. App. 9a-10a; see 28 U.S.C. 2501 (establishing a six-year statute of limitations for claims over which the CFC has jurisdiction). The court initially denied the motion to dismiss. Pet. App. 42a-47a. The court held that the claim accrued on December 30, 1992, when MoPac finalized a trail use agreement with the trail operator, and the complaint was therefore timely. *Id.* at 46a.

In 2004, while this case was still pending, the Federal Circuit issued its decision in *Caldwell* v. *United States*, 391 F.3d 1226, cert. denied, 546 U.S. 826 (2005). In *Caldwell*, the Federal Circuit held that a Fifth Amendment takings claim under the Trails Act accrues when the STB "issues an NITU that operates to preclude abandonment under section [1247(d)]," and thereby "preclude[s] the vesting of state law reversionary interests in the right-of-way." *Id.* at 1233-1234.

After *Caldwell* was decided, the government renewed its motion to dismiss petitioners' complaint. The CFC granted the renewed motion. Pet. App. 5a-29a. The CFC held that "*Caldwell* imposes a new, blanket rule that the accrual of *any* takings claim under the Trails

Act is the issuance date of the NITU," *id.* at 19a, and that the statute of limitations therefore expired six years after the ICC issued the NITU on March 25, 1992, rendering plaintiffs' December 28, 1998 complaint untimely, *id.* at 28a-29a. The CFC further held that, because the complaint was untimely, it lacked jurisdiction. *Id.* at 22a-28a.

b. The court of appeals summarily affirmed. Pet. App. 1a-4a.

ARGUMENT

Petitioners renew their contention (Pet. 16-31) that the CFC erred in dismissing their takings claim as untimely under 28 U.S.C. 2501. The courts below correctly held that petitioners' claim was untimely because it was filed more than six years after the ICC issued a NITU, which authorized interim trail use and delayed abandonment of the railroad easement while the rail carrier and a trail operator negotiated a final interim trail use agreement. This Court has recently denied certiorari in two other cases raising the same contention. *Barclay* v. *United States*, 549 U.S. 1209 (2007); *Caldwell* v. *United States*, 546 U.S. 826 (2005). Further review in this case is likewise unwarranted.

1. a. In *Preseault* v. *ICC*, 494 U.S. 1 (1990), this Court rejected a challenge to the Trails Act on the ground that it violates the Fifth Amendment's prohibition against the taking of property without just compensation. *Id.* at 4-5. Without deciding whether the Trails Act effected a taking of property in that case, the Court held that the statute does not violate the Just Compensation Clause because it does not forbid claimants from

seeking just compensation under the Tucker Act, 28 U.S.C. 1491(a). *Preseault I*, 494 U.S. at 11-17.[3]

The petitioners in *Preseault I* subsequently filed a Tucker Act suit. By a divided vote, the en banc Federal Circuit answered the takings question this Court had declined to answer in *Preseault I*. *Preseault* v. *United States*, 100 F.3d 1525 (1996) (*Preseault II*). The plurality held that a Fifth Amendment taking occurs under the Trails Act when the Act precludes the abandonment and extinguishment of a railroad easement under state law, and thus prevents any state-law reversionary interests from vesting in a property owner. *Id.* at 1550-1551, 1552.[4]

In *Caldwell* v. *United States*, 391 F.3d 1226 (2004), cert. denied, 546 U.S. 826 (2005), the Federal Circuit held that such a claim accrues when "the railroad and trail operator communicate to the STB their intention to negotiate a trail use agreement and the agency issues an NITU that operates to preclude abandonment under [16

---

[3] As petitioners note (Pet. 17-18), the *Preseault I* Court stated that the Trails Act "prevent[s] property interests from reverting under state law," 494 U.S. at 8, and suggested in dicta that "some rail-to-trail conversions will amount to takings," *id.* at 16; see also *id.* at 16 & n.9 (providing examples of applications of the Trails Act that would not amount to takings). But the Court explicitly reserved the question whether a taking had in fact occurred, *id.* at 17, and did not further address the contours of a Trails Act takings claim.

[4] As the plurality noted in *Preseault II*, it is commonly said that interest in an easement "reverts" to a property owner upon termination of the easement, although it would be more accurate to say that, when the easement is extinguished, the interest in the easement "vest[s]" in the property owner. See 100 F.3d at 1533-1534. Consistent with common usage, however, this brief refers to a property owner's retained interest following conveyance of an easement as a "reversionary" interest.

U.S.C. 1247(d)]." *Id.* at 1233. The court concluded that it is at that moment that "state law reversion interests [are] forestalled by operation of Section 8(d) of the Trails Act." *Ibid.* The court explained that, under the procedures the STB now uses to implement the Trails Act, the NITU is "the only *government* action in the railbanking process that operates to prevent abandonment" and any resulting state-law reversion of the right-of-way, since the STB plays no role in finalizing the trail use agreement. *Ibid.*

The court held in *Caldwell* that, although issuance of a NITU does not inexorably lead to interim trail use, it nevertheless marks the beginning of a federal-law preclusion of state-law reversionary rights. The court explained:

> [T]he NITU operates as a single trigger to several possible outcomes. It may, as in this case, trigger a process that results in a permanent taking in the event that a trail use agreement is reached and abandonment of the right-of-way is effectively blocked. Alternatively, negotiations may fail, and the NITU would then convert into a notice of abandonment. In these circumstances, a temporary taking may have occurred. It is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues.

391 F.3d at 1234 (citations and footnotes omitted).

b. Consistent with *Preseault II*, petitioners in this case alleged in their complaint that their property interest in a former railroad right-of-way was taken when the Trails Act prevented the vesting of the "rights to th[eir] property which they enjoy under state law." Compl. ¶ 16. The court in this case correctly concluded that peti-

tioners' claim accrued, and the statute of limitations began to run, when the ICC issued the NITU on March 25, 1992. See Pet. 3a-4a.

As the court explained in *Caldwell*, when the ICC issued the NITU, it simultaneously authorized railbanking and interim trail use, and delayed consummation of abandonment under federal law pending negotiations between the rail carrier and the trail operator. At that point, the ICC's involvement in the disposition of the railroad easement was at its end; no further approval would be required for the trail operator to commence interim trail use. Issuance of the NITU thus marked the moment at which federal law (1) at least temporarily forestalled the vesting of any state-law reversionary interests, and (2) authorized indefinite preclusion of such reversionary interests, contingent on the finalization of an interim trail use agreement. See *Caldwell*, 391 F.3d at 1233-1234.

Petitioners' claim, which was filed more than six years after Section 1247(d) first operated to preclude the reversion of their state-law interests in the former railroad right-of-way, was untimely under 28 U.S.C. 2501.

2. Although petitioners argue at length (Pet. 19-23) that the court of appeals erred in attributing any significance to the issuance of the NITU, they ultimately acknowledge that, "[i]f the easement would otherwise have been abandoned (by means other than conversion to interim trail use) before or during" the period in which the NITU is in effect, "the NITU might effect a taking for the duration of the negotiations." Pet. 27.[5] Petitioners

[5] Petitioners do not dispute that, in this case, "the easement would otherwise have been abandoned" under state law "before or during" the

contend, however, that they are seeking compensation for a *different* taking of their property: a *permanent* taking that, in their view, commenced approximately six years before they filed their complaint in this case. Pet. 27-28. Petitioners' contention is incorrect.

As petitioners elsewhere make clear, their claim rests on the proposition that "the Trails Act effects a taking when it prevents an abandoned railroad easement from reverting under state law to the owner of the servient estate." Pet. 17.[6] To be sure, under federal

---

period in which the NITU was in effect. See Pet. 27. They note, however, that in some cases, reversion does not occur under state law until after federal authorization of abandonment. But contrary to petitioners' argument, even in those cases, a NITU effectively delays state-law reversion by authorizing federal-law abandonment, but only after 180 days, and only if no interim trail use agreement is reached. See 49 C.F.R. 1152.29(c)(1) and (d)(1).

[6] To the extent petitioners contend that a Trails Act takings claim should be conceptualized not as the blocking of reversionary interests but as the subsequent physical invasion of the easement by the public, see Pet. 28 (citing *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)), that contention does not find support in this Court's cases. Although the Court in *Preseault I* reserved the question whether operation of the Trails Act necessarily results in *any* compensable taking, see 494 U.S. at 17, to the extent that it identified a potential takings question, that question concerned the blocking of reversionary interests, see *id.* at 8.

Moreover, unless the STB has already authorized abandonment under federal law, a railroad easement remains subject to the exclusive and plenary authority of the STB. Unlike the usual physical invasion case, the landowner in a Trails Act takings case is already deprived of possession and control over the property; the decision to authorize interim trail use of a railroad right-of-way, subject to later reactivation of rail use, represents a change in the set of applicable regulatory conditions, but it does not result in a new deprivation of possession and control. In any event, this case would not be an appropriate vehicle for consideration of broader questions concerning the nature and scope of

law, land subject to a railroad easement may not revert to the adjacent property owner while the easement is actually being used as a recreational trail. 16 U.S.C. 1247(d). But, as petitioners appear to recognize (Pet. 27), by the time a trail use agreement is signed, federal law has *already* forestalled any such reversion. As the Federal Circuit has explained, a NITU stands as a "barrier to reversion" so long as it is in effect. *Barclay* v. *United States*, 443 F.3d 1368, 1374 (2006), cert. denied, 549 U.S. 1209 (2007).

Petitioners contend that any taking that commences upon issuance of the NITU is "temporary at the outset," and that their takings claim should not accrue until the taking is "transformed into a permanent interference." Pet. 31 n.4. The court of appeals has correctly rejected that contention. See *Caldwell*, 391 F.3d at 1235. As the court explained, under the current regulations implementing the Trails Act, "issuance of the NITU is the only *government* action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way." *Id.* at 1233-1234. To the extent the government's action results in a taking of property, it is a "single taking," *id.* at 1235, of a "single reversionary interest," *Barclay*, 443 F.3d at 1378.

The issuance of the NITU thus "marks the 'finite start' to either temporary or permanent takings claims." *Caldwell*, 391 F.3d at 1235. When the NITU is issued, all the events have occurred that entitle the claimant to institute an action based on federal-law interference

---

Fifth Amendment liability under the Trails Act. The course of litigation in this case has narrowed the issues to the question when the statute of limitations begins to run on a claim that the Trails Act has blocked the vesting of state-law property interests. See Pet. App. 1a-4a; cf. Pet. i.

with reversionary interests, and any takings claim premised on such interference therefore accrues on that date. *John R. Sand & Gravel Co.* v. *United States*, 457 F.3d 1345, 1355-1356 (Fed. Cir. 2006), aff'd, 128 S. Ct. 750 (2008) (internal quotation marks and citations omitted). The fact that any taking resulting from the interference may later prove to have been temporary is irrelevant; as the court of appeals has explained, "[i]t is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues." *Caldwell*, 391 F.3d at 1234.

Finally, accepting the proposition that the NITU marks the "finite start" of their claim based on the preclusion of reversionary interests, petitioners contend that the preclusion does not "stabilize[]," and the claim thus does not accrue, until the rail carrier and the trail operator enter into a trail use agreement. Pet. 31. Petitioners rely for that contention on *United States* v. *Dickinson*, 331 U.S. 745 (1947), in which the Court held that the statute of limitations did not bar a claim for a taking of property by gradual flooding "when it was uncertain at what stage in the flooding operation the land had become appropriated to public use." *United States* v. *Dow*, 357 U.S. 17, 27 (1958). In this case, however, petitioners do not dispute that the preclusion of reversionary interests on which their takings claim rests occurred immediately upon issuance of the NITU, rather than gradually, as in *Dickinson*. That it may not have been clear at the outset whether the preclusion was indefinite or merely temporary does not change the fact that the NITU marked the "finite start" to the preclusion. *Caldwell*, 391 F.3d at 1235.

3. Petitioners (Pet. 32) contend that this Court's review is warranted to resolve a conflict with *National*

Ass'n of Reversionary Property Owners v. *Surface Transportation Board*, 158 F.3d 135 (D.C. Cir. 1998), in which the court stated that "[b]ut for the negotiation of a trail use agreement, state property law would be revived and, possibly, trigger the extinguishment of rights-of-way and the vesting of reversionary interests." *Id.* at 139. As petitioners themselves note (Pet. 32), *National Ass'n of Reversionary Property Owners* concerned a challenge to the denial of a request for rulemaking; the accrual date of a takings claim was not at issue. In any event, the District of Columbia Circuit's statement is not inconsistent with *Caldwell*, which held that a "permanent taking" may be consummated once "a trail use agreement is reached and abandonment of the right-of-way is effectively blocked," 391 F.3d at 1234 (citing *Preseault II*, 100 F.3d at 1552), but emphasized that issuance of the NITU is the event that "trigger[s that] process," *ibid.*

Petitioners also err in contending (Pet. 32-33) that the *Caldwell* rule conflicts with earlier decisions of the Federal Circuit. As the *Caldwell* court itself noted, no earlier Federal Circuit decision had ever addressed the question when a Trails Act takings claim accrues. 391 F.3d at 1228 ("This case requires us, for the first time, to determine when the Fifth Amendment takings claim accrues for purposes of the six-year statute of limitations under the Tucker Act.") (citations omitted). The Federal Circuit has consistently adhered to *Caldwell*'s conclusion that a takings claim under *Preseault II* accrues when the NITU is issued. See *Barclay*, *supra*; Pet. App. 1a-4a.[7]

---

[7] Petitioners rely (Pet. 32-33) on language in *Preseault II* and other Federal Circuit opinions suggesting that "the establishment of the rec-

In any event, even if there were an intra-circuit conflict between later and earlier cases on this issue, it would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Petitioners claim that any intra-circuit conflict in this area is "uniquely important" because the Federal Circuit has "exclusive appellate jurisdiction over takings claims against the federal government." Pet. 33 n.5. But as *Caldwell* and Federal Circuit cases following it (including this case) make clear, the Federal Circuit now consistently applies the *Caldwell* rule. There thus is now clear precedent for trial courts to follow in Trails Act cases under the Tucker Act, and landowners have a clear and simple rule for determining when a just compensation claim accrues.

4. Finally, petitioners err in suggesting (Pet. 35-37) that the decision below has important practical consequences that warrant this Court's intervention.

Although petitioners repeatedly criticize (Pet. 19, 35) the court of appeals for adopting a "one-size-fits-all 'bright-line rule,'" that bright-line rule has the singular virtue of providing certainty to prospective claimants of when their claims accrue and when the limitations period expires. See *Barclay*, 443 F.3d at 1378. Notably,

---

reational trail" results in a taking of property under the Fifth Amendment. *Preseault II*, 100 F.3d at 1531 (plurality opinion); see also *Hash* v. *United States*, 403 F.3d 1308, 1318 (Fed. Cir. 2005); *Toews* v. *United States*, 376 F.3d 1371, 1381 (Fed. Cir. 2004). *Preseault II*, however, held that a taking occurred when the Trails Act operated to prevent a property owner's interests in a railroad right-of-way from reverting to the owner in accordance with state law. 100 F.3d at 1550-1551, 1552; see *Caldwell*, 391 F.3d at 1233. The court in *Preseault II* had no occasion to consider whether the preclusion of reversionary interests occurred simultaneously with "the establishment of the recreational trail," or upon issuance of a NITU.

the government is not aware of any currently pending case that is subject to dismissal under *Caldwell*.[8]

Petitioners also err (Pet. 36) in predicting that the *Caldwell* rule will lead to a proliferation of unnecessary litigation. In this case, the difference between the accrual date identified by the court of appeals and the accrual date petitioners urge is a matter of months; and in most cases, the difference between the two dates will not meaningfully alter property owners' litigation incentives. It is true that, under *Caldwell*, landowners may seek compensation for an alleged taking immediately upon issuance of the NITU, even though no trail use agreement is reached, and any taking that may later be found would only have been temporary. But a landowner has six years within which to file suit, which is ample time for the landowner to know whether an agreement was reached before filing suit. Moreover, the prospect of the litigation petitioners hypothesize is hardly unique to the Trails Act context. See *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 334-335 (2002). And this Court has made clear that such allegations "require[] careful examination and weighing of all of the relevant circumstances," *id.* at 335 (internal quotation marks and citation omitted), with due regard for the principle that not "every delay in the use of prop-

[8] The government is, however, aware of one case pending in the Federal Circuit in which the *Caldwell* rule is otherwise relevant. In *Fauvergue* v. *United States*, No. 2009-5048 (filed Feb. 26, 2009), the Federal Circuit is considering the question whether putative class members are allowed to opt in after the six-year statute of limitations has expired, when the class-action complaint was filed before the expiration as to one plaintiff and was amended after expiration of the limitations period to add other plaintiffs as putative class members. A similar question is presented in other cases now pending before the United States Court of Federal Claims.

erty" will require compensation, *ibid.*; cf. *Caldwell*, 391 F.3d at 1234 n.7 (reserving the question whether "the issuance of the NITU in fact involves a compensable temporary taking when no agreement is reached").

Finally, there is no merit to petitioners' suggestion (Pet. 35) that the decision below raises justiciability questions that warrant further review. Petitioners acknowledge that a claim becomes ripe, and that a landowner has standing, when Section 1247(d) has "interfere[d] with the abandonment and reversion that would otherwise occur under state law." Pet. 35. For the reasons explained above, see pp. 8-10, *supra*, that interference begins on the date when the STB issues a NITU, which "halt[s] abandonment and the vesting of state law reversionary interests when issued." *Caldwell*, 391 F.3d at 1235. This Court has twice before denied review of that conclusion, in *Caldwell* and *Barclay*, and there is no reason for a different result in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
JOHN C. CRUDEN
Acting Assistant Attorney General
KATHRYN E. KOVACS
Attorney

MAY 2009

Blank Page

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
Caquelin v. US, 2016-1663

CERTIFICATE OF SERVICE

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by ARENT FOX LLP, counsel for Amici Curiae to print this document. I am an employee of Counsel Press.

On **December 28, 2016** counsel has authorized me to electronically file the foregoing **Brief for National Association of Reversionary Property Owners, National Cattlemen's Beef Association, and Public Lands Council as Amici Curiae in Support of Appellees Caquelins Urging Affirmance** with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users, including any of the following:

Elizabeth McCulley
Thomas S. Stewart
Stewart Wald & McCulley, LLC
2100 Central
Kansas City, MO 64108
mcculley@swm.legal
stewart@swm.legal
Counsel for Appellee

Erika Kranz
Katherine J. Barton
Department of Justice,
Environment and Natural
Resources Division
PO Box 7415
Washington, DC 20044
202-307-6105
erika.kranz@usdoj.gov
katherine.barton@usdoj.gov
Counsel for Appellant

Any counsel for Amicus Curiae, Appearing at the time of this filing, will be served via CM/ECF Notice only. Paper copies will also be mailed to the above principal counsel for the parties at the time paper copies are sent to the Court.

Upon acceptance by the Court of the e-filed document, six paper copies will be filed with the Court within the time provided in the Court's rules.

December 28, 2016

/s/ Robyn Cocho
Counsel Press

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) or Federal Rule of Appellate Procedure 28.1(e)

__X__ The brief contains 7,000 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii),or

____ The brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) or Federal Rule of Appellate Procedure 28.1(e) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6)

__X__ The brief has been prepared in a proportionally spaced typeface using MS Word 2016 in a 14 point Times New Roman font or

____ The brief has been prepared in a monospaced typeface using _____ _____in a ___ characters per inch_____ font.

December 28, 2016

/s/ Mark F. (Thor) Hearne, II
Mark F. (Thor) Hearne, II
ARENT FOX LLP
Counsel for Amici Curiae