NO. 16-1663

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NORMA E. CAQUELIN AND KENNETH CAQUELIN,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendants-Appellees.

Appeal from the United States Court
of Federal Claims in Case Co. 1:14-cv-00037
(Hon. Charles F. Lettow)

BRIEF OF RAILS-TO-TRAILS CONSERVANCY AS *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES

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August 15, 2016

FORM 9. Certificate of Interest

Form 9
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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Caquelin **v.** United states

Case No. 16-1663

CERTIFICATE OF INTEREST

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

Rails-to-Trails Conservancy

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
Rails-to-Trails Conserancy	none	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:

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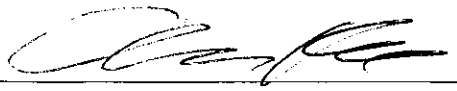
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

DECISIONS OF THE SURFACE TRANSPORTATION BOARD

STATUTES AND REGULATIONS

INTEREST OF *AMICUS CURIAE*

The Rails-to-Trails Conservancy ("RTC") is a non-profit corporation with more than 111,453 members nationwide that facilitates the preservation of unneeded rail corridors through conversion for public trails and other public uses. RTC seeks to present its additional perspective on why this Court should overrule the decision in *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010), *reh'g and reh'g en banc denied*, 646 F.3d 910 (2011), holding that the mere issuance of the NITU was a *per se* taking by way of a physical occupation of Plaintiffs' property, even though no interim trail use agreement was reached, no trail use occurred, and therefore no physical occupation of Plaintiffs' property occurred.

RTC has a significant interest in the interpretation and implementation of Section 8(d) of the National Trails Systems Act Amendments, 16 U.S.C. § 1247(d) ("Federal Railbanking Act"). As described in more detail in the accompanying motion for leave to file this brief, RTC has participated as an *amicus curiae* in numerous takings cases arising from this law, and has filed *amicus* brief before this Court, including an *amicus* brief before the Federal Circuit panel in *Ladd v. United States,* as well as an *amicus* brief supporting the United States petition for rehearing in the *Ladd* case in 2011.[1]

[1] No part of this brief was authored in whole or part by counsel for a party. No party, party's counsel, or any person other than RTC, its members, or its counsel contributed money intended to fund preparing or submitting this brief.

SUMMARY OF THE ARGUMENT

RTC supports the United States' reasoned arguments calling on this Court to overrule *Ladd,* as well as this Court's predicate decision in *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004), holding that a "takings" claims based on a rails to trails conversion accrues when a Notice of Interim Trail Use ("NITU")[2] is issued by the Surface Transportation Board ("STB").[3] The *Ladd* decision represented a turning point in the takings jurisprudence related to the Federal Railbanking Act, extending takings liability not just to railbanking and interim trail use, but also to the mere issuance of a NITU, which starts a negotiating period that may or may not lead to railbanking and interim trail use.

The United States request for *en banc* is proper because the *Ladd* and the predicate *Caldwell* decisions are wrong on their face and conflict with several different principles of general takings law applied by the Supreme Court and prior Federal Circuit panels. The errors in *Ladd* stem from larger problems in the

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[2] A NITU begins the railbanking process in an exempt abandonment proceeding. In a non-exempt proceeding, the railbanking process begins with a Certificate of Interim Trail Use ("CITU").

[3] **Prior to 1996, the STB was the Interstate Commerce Commission ("ICC"). 49 U.S.C. § 10903.** Congress abolished the ICC effective January 1, 1996 in the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) and replaced it with the STB. The STB exercises all the powers and functions of the former ICC that are relevant to the issues in this case.

Federal Circuit's takings jurisprudence under the Federal Railbanking Act, which improperly apply a physical takings framework to analyze the claim while applying a regulatory takings claim accrual principle.

The United States' opening brief and Federal Circuit Rule 35(a) request for *en banc* review demonstrates the error in this holding. This error was caused not by some isolated mistake in reasoning, but instead reflects the difficulties in applying this Court's conflicting railbanking precedent. Specifically, in *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (*en banc* plurality), the Court applied a physical takings analysis to determine whether a rails-to-trails conversion resulted in a taking. But in *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004) and *Barclay v. United States*, 443 F.3d 1368, 1371 (Fed. Cir. 2006), the Court applied a regulatory takings analysis to determine the accrual date for purposes of the statute of limitations. The Supreme Court and this Court have cautioned against just such a mixing of physical and regulatory takings concepts. Further, the decision in *Ladd* is in conflict with Supreme Court authority in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002),

The Government's brief explains why both *Ladd* and *Caldwell* are wrongly decided.. The panel in *Ladd* apparently believed that the Court's precedent in *Caldwell/Barclay* "bound" it to hold that the issuance of a Notice of Interim Trail Use ("NITU") alone can constitute a *per se* physical taking, despite the absence of

any physical invasion or occupation. *Ladd.* 603 F.3d at 1023. *En banc* review therefore is warranted to address this tension between physical and regulatory takings analysis.

The decision below by the U.S. Court of Federal Claims ('CFC") is the first final decision applying this Court's decision in *Ladd v. United Sates, supra,* but other cases are pending in which the same arguments are raised. According to the database maintained by RTC', which tracks railbanking orders and rails-to-trails conversions facilitated by the RailbankingLlaw, the *Ladd* decision will incentivize the filing of additional compensation cases, even where the compensation awarded to the plaintiffs is trivial compared to the attorneys' fees awarded to their lawyers. As the $900 in compensation awarded to the plaintiffs in this case illustrates, the main beneficiaries of the *Ladd* decision are the lawyers bringing these cases.

If allowed to stand, continued application of the *Ladd* decision will burden the courts and the government with costly and time-consuming litigation, while undermining the federal policies favoring preservation of our Nation's limited rail infrastructure. Moreover, the issuance of a NITU is no different from many other conditions imposed by the STB that delay railroad abandonment or extend the STB's preemptive jurisdiction over the corridors. If the reasoning in the *Ladd* case is extended to these other conditions, the STB's ability to carry out its regulatory mission will be severely hampered.

STATEMENT OF THE CASE

RTC relies on the factual background in the brief of the United States. In addition, RTC provides the following discussion of the history, purpose and implementation of the federal Railbanking Law.

I. Federal Railbanking Act – Legislative Origins.

The construction and development of a nationwide system of rail lines, assembled with great governmental assistance through federal land grants and state-conferred powers of eminent domain, helped transform the United States into an economic power at the turn of the last century. In 1920, at the peak of the rail era, 272,000 miles of track crisscrossed the United States, carrying freight and passengers from one end of the country to the other. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 5 (1990). But just as the miles of rail line peaked, other methods of transportation emerged and a long period of decline began. By 1990, our nation's rail system had shrunk to 141,000 miles and experts were predicting that 3,000 more miles would be abandoned every year through the end of the century. *Id.* Thus, our nation's rail corridor infrastructure, "painstakingly created over several generations" was at risk of becoming irreparably fragmented. *Reed v. Meserve*, 487 F.2d 646, 649-50 (1st Cir. 1973) ("To assemble a right of way in our increasingly populous nation is no longer simple.").

In order to prevent the irreplaceable loss of these valuable national assets, Congress enacted the Federal Railbanking Act in 1983 "to preserve for possible future railroad use rights-of-way not currently in service and to allow interim use of the land as recreational trails." *Preseault v. ICC*, 494 U.S. at 6 Under the Act, a railroad wishing to cease operations along a route may negotiate with a state or local government or private group to transfer the corridor for interim trail use, subject to future restoration of for railroad use. *Id.* at 6-7. If an agreement is reached with the railroad, the interim trail manager maintains these corridors as an interim trail for public recreation and non-motorized transportation use until such time as the right-of-way is needed for rail use. Indeed, the Federal Railbanking Law has been effective in preserving our nation's rail corridors for future transportation purposes. Already, a number of railbanked corridors have been reactivated by railroads for railroad use.[4]

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[4] *See Owensville Terminal Co., Inc.--Abandonment Exemption--In Edwards and White Counties, IL and Gibson and Posey Counties, IN*, No. AB-477 (Sub-No. 3X), 2005 WL 2292012 (S.T.B Sept. 20, 2005); *BG & CM Railroad, Inc.--Exemption From 49 U.S.C. Subtitle IV*, No. 34399, 2003 WL 22379168 (S.T.B. Oct. 17, 2003); *Georgia Great Southern Division, South Carolina Central Railroad Co., Inc.--Abandonment and Discontinuance Exemption--Between Albany and Dawson, In Terrell, Lee and Dougherty Counties, GA*, No. AB-389 (Sub-No. 1X), 2003 WL 21132515 (S.T.B. May 9, 2003); *Norfolk & Western Railway Co.--Abandonment Between St. Marys and Minister in Auglaize County*, OH, 9 I.C.C.2d 1015 (1993); *Iowa Power, Inc.--Construction Exemption--Council Bluffs, IA*, 8 I.C.C.2d 858 (1990).

II. Implementation of Railbanking

An inactive railroad corridor proposed for abandonment may be "railbanked" for interim trail use and future rail service though the issuance of a trail use condition by the STB. However, for corridors that may not be subject to STB abandonment proceedings (such as spur lines), a corridor may be "privately railbanked" through the actions of the interim trail manager, the railroad, or both, to secure the protections of the Federal Railbanking Act. Each of the mechanisms for securing the protections of the Federal Railbanking Act is described below.

A. STB Railbanking Procedures.

A railroad seeking to abandon a rail line must apply to the STB for approval. *See Barclay v. United States*, 443 F.3d at 1371. Under the exemption procedures applicable in this case, the railroad submits a notice to the STB, which publishes a notice in the Federal Register. 49 C.F.R. § 1152.50(d). Potential trail operators may then file a petition under the Federal Railbanking Act indicating a desire for interim trail use. *Id.* § 1152.29(a).[5]

The railroad has complete discretion as to whether to enter interim trail use and railbanking negotiations. *Id.* § 1152.29(b)(2). If the railroad chooses not to do

[5] Rail carriers or shippers may also submit an "offer of financial assistance" to subsidize or purchase the rail line for continued service. *See* 49 U.S.C. § 10904.

so, abandonment is effective 30 days after the Federal Register notice (subject to certain conditions). *Id.* § 1152.50(d)(3). If the railroad chooses to enter negotiations, the STB issues a NITU for the portion of the right-of-way at issue.[6] *Id.* § 1152.29(d)(1). The NITU "suspend[s] exemption proceedings for 180 days," and permits the railroad to discontinue rail service and pull up track. *Barclay*, 443 F.3d at 1371. The STB can extend the NITU if the railroad wishes to continue negotiations. *Caldwell*, 391 F.3d at 1230.

"The NITU is itself not a guarantee of eventual trail use," but instead "serves only to provide an opportunity for the railroad and prospective trail users to negotiate an agreement." *Goos v. ICC*, 911 F.2d 1283, 1293 (8th Cir. 1990). The railroad retains sole discretion whether to enter a private agreement with a trail operator, and the STB has "no power to compel a conversion between unwilling parties, and, conversely, no discretion to refuse one if voluntarily negotiated." *Id.* at 1295. Thus, at the time of the NITU's issuance, "there is only a possibility that a particular right-of-way actually will be used as a recreational trail. *Id.* at 1293.

If the railroad and the interim trail user reach a trail use agreement, the railroad's right-of-way is railbanked and becomes subject to interim trail use, continued STB jurisdiction, and "future restoration of rail service." 49 C.F.R.

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[6] In an abandonment by application proceeding, this is called a Certificate of Interim Trail Use or Abandonment ("CITU"). 49 C.F.R. § 1125.29(b)(1)(ii).

§ 1152.29(d)(2). If no agreement is reached, the NITU terminates and converts to a Notice of Abandonment, which "permit[s] the railroad to fully abandon the line." *Id.* § 1152.29(d)(1). STB jurisdiction continues until the railroad, in its sole discretion, "consummates" abandonment authorization by filing a notice with the STB. *Id.* § 1152.29(e)(2); *Barclay*, 443 F.3d at 1376 n.10. If the railroad fails to do so within one year, the abandonment authorization expires, and the railroad retains its common carrier obligation to service the corridor. 49 C.F.R. § 1152.29(e)(2).

B. "Private Railbanking."

The foregoing pertains to the STB's railbanking procedures, but an STB order is not necessary to railbank a corridor under the Federal Railbanking Act. A corridor can also be privately railbanked directly under the Federal Railbanking Act—*i.e.*, without formal petition or action by the STB.

After considering the broad purposes and statutory language of Railbanking Law, the Pennsylvania Supreme Court held that "there is nothing in the language of the statute requiring a trail owner . . . to comply with the ICC regulations. . . . We refrain from reading such a requirement into the statute where the language of the statue itself does not make such a requirement mandatory for trail conversion." *Buffalo Twp. v. Jones*, 813 A.2d 659, 668 (Pa. 2002). *See also Moody v. Allegheny Valley Land Trust*, 976 A.2d 484, 489-90 (Pa. 2009), *cert. denied*, 559

U.S. 537 (2010) (applying Federal Railbanking Act based on deed executed by trail manager committing to re-convey corridor if needed for future rail service.

Further support for the Pennsylvania Supreme Court's ruling came from the ICC itself, which "indicated that the statute in and of itself supported a finding that railroad rights-of-way could be preserved in the absence of ICC authorization." *Buffalo Twp. v. Jones*, 813 A.2d at 668 (citing *Southern Pacific Transportation Co. – Exemption – Abandonment of Service in San Mateo County, CA*, Dkt. No. AB-12 (Sub-No. 118X), 1991 WL 108272, at *4 (February 20, 1991) ("[T]he underlying right-of-way can be preserved under 16 U.S.C. § 1247(d) without ICC authorization."). As this order makes clear, the STB has no jurisdiction over privately railbanked corridors. Nonetheless, these corridors may not be deemed abandoned for purposes of any state law or principle of law. 16 U.S.C. § 1247(d).

ARGUMENT

I. THE *LADD* DECISION IS CONTRARY TO U.S. SUPREME COURT JURISPRUDENCE AND CONFUSES PHYSICAL AND REGULATORY TAKINGS CONCEPTS IN THIS COURT'S RAILBANKING PRECEDENT.

In *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, the U.S. Supreme Court described a "fundamental" and "longstanding" distinction that "makes it inappropriate to treat cases involving physical takings as controlling precedent for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." 535 U.S. at 323, 325; *see also Cienega Gardens v. United States*,

265 F.3d 1237, 1281-82 (Fed. Cir. 2001) (holding that a Supreme Court "physical takings case" "does not govern the regulatory takings context"). The panel decision in *Ladd* disregards this important principle.

A. The *Ladd* decision Improperly Applied Physical Takings Principles In Suggesting That Issuance of a NITU Results in Per Se Taking.

The *en banc* plurality decision in *Preseault* analyzed whether the Federal Railbanking Act works a taking as a "physical taking case." *Preseault v. United States,* 100 F.3d at 1540. It focused on the alleged "physical entry" and "occupation of the Preseaults' property by the City of Burlington under the authority of the Federal Government" when "pursuant to ICC Order, the City of Burlington *established the public recreational trail.*" *Id.* at 1550-52 (emphasis added). The Court expressly noted that the effect of the mere issuance of a railbanking order "is a question not now before us," and stated "[w]e do not hold that every exercise of authority by the Government under the Rails-to-Trails Act necessarily will result in a compensable taking." *Id.* at 1552.

Subsequent panel decisions by this Court that have addressed whether railbanking resulted in a taking have involved railbanking orders that, unlike here, actually resulted in a rails-to-trails conversion, and therefore have assumed the application of physical takings concepts. *See, e.g., Hash v. United States*, 403 F.3d 1308, 1318 (Fed. Cir. 2005); *Toews v. United States*, 376 F.3d 1371, 1381 (Fed.

Cir. 2004); *Ellamae Phillips Co. v. United States*, 564 F.3d 1367 (Fed. Cir. 2009).[7]

Supreme Court precedent limits physical takings to direct "government appropriation[s] or physical invasion[s] of private property" and "where government requires an owner to suffer a permanent physical invasion of her property—however minor." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537-38 (2005). Because the issuance of the NITU does not itself result in any physical invasion, or fall into the category of "regulations that completely deprive an owner of all economically beneficial use of her property," Supreme Court precedent dictates that any takings challenge arising from the issuance of the NITU must be analyzed under the regulatory takings test of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. at 538.

A trail use condition defers the effective date of the abandonment for a finite length of 180-days. Although the condition may be extended by the STB with the railroad's consent, it does not ever authorize a physical invasion of the property, either temporarily or permanently, by the interim trail user seeking to negotiate a

[7] RTC disagrees with the holding of the plurality decision in *Preseault* as applied in these subsequent Federal Circuit decision, which has never been substantively revisited by this Court, that the railbanking of a corridor constitutes a physical occupation and *per se* taking of any underlying property interests. Instead, even when interim trail use occurs, the change in use from railroad to railbanking is at most a potential regulatory taking. Moreover, as noted above, even where a corridor is railbanked for interim trail use, such use is temporary, and subject to dispossession at any time if any railroad seeks to reactivate rail service on the line.

rails-to-trails conversion. As the data maintained by RTC demonstrates (*see infra,* at 19), the majority of NITUs issued by the STB never result in a rails-to-trails conversion, and therefore, do not result in any physical occupation, temporary or otherwise, of the railroad corridor.

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Supreme Court held that "the temporary nature of a land-use restriction" precludes application of a *per se* takings rule and instead requires application of the regulatory takings analysis of *Penn Central*. 535 U.S. at 337. Even if the NITU could be characterized as authorizing a physical invasion, the physical invasion is temporary in cases where the railroad and the proposed interim trail manager fail to reach an interim trail use/railbanking agreement and NITU expires. The Supreme Court has made clear that a physical invasion must be "permanent" to constitute a *per se* taking. *See Lingle*, 544 U.S. at 538. The Federal Circuit has similarly held that "only a permanent physical occupation is a *per se* taking" and that "temporary physical invasions of property by the government" are analyzed under *Penn Central*. *See Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1353 (Fed. Cir. 2002).

The *Ladd* decision suggested that the NITU resulted in a *per se* taking because the "NITU is the government action that prevents the landowners from possession of their property unencumbered by the easement." *Ladd,* 630 F.3d at

1023. But under Supreme Court precedent, government action such as the NITU, which merely continues or extends the railroad's existing physical occupation of the property, does not constitute a *per se* physical taking. In *Block v. Hirsh*, 256 U.S. 135 (1921), a statute permitted tenants to continue to occupy property for two years despite expiration of their leases, and, as a result, "the use of the land and the right of the owner to do what he will with his own and to make what contracts he pleases are cut down." *Id.* at 154, 157. But the Supreme Court found no taking, concluding instead that it was just a "temporary measure" within the police power. *Id.* at 156-57. And in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Supreme Court confirmed that "a government regulation that merely prohibits landlords from evicting tenants unwilling to pay a higher rent . . . does not constitute a categorical taking." 535 U.S. at 322-23.

Federal Circuit precedent is in accord. In *Cienega Gardens v. United States*, *supra*, the Federal Circuit held that government action that served "merely to enhance an existing tenant's possessory interest" and prevent a landowner from evicting tenants did not constitute a *per se* physical taking. *Id.* at 1248. Similarly, in *Tuthill Ranch, Inc. v. United States*, 381 F.3d 1132 (Fed. Cir. 2004), *rehearing en banc denied* (Dec. 6, 2004), the plaintiff's predecessor-in-interest had granted the government a perpetual easement for power and communications lines, but the plaintiff claimed a *per se* taking based on the government's installment of fiber

optic cables greater than its own needs and renting of space on these cables to private parties. *Id.* at 1138. The Federal Circuit disagreed, concluding that the plaintiff's "predecessor in interest already received just compensation for the entire physical occupation" resulting from the easement and that the government's use of this existing easement did not give rise to a takings claim "because there is no change of use and no expansion of the easement." *Id.* at 1139. *Tuthill Ranch* is directly applicable to the issuance of the NITU, which merely maintains, and does not change or expand, the preexisting railroad easement voluntarily undertaken by the landowner.

B. *Caldwell* Improperly Mixes Claims Raising Regulatory "Takings" With Physical Occupation Claims In Determining that a "Takings" Claim Accrues Upon Issuance of a NITU.

While the panel's decision in *Ladd* cannot be reconciled with *Tahoe-Sierra* in any event, the panel's untenable outcome also reflected the tension between physical takings concepts and regulatory takings concepts in this Court's precedent. The panel decision in *Ladd* first found it "settled law" that railbanking gives rise to a "physical taking claim" when trail use is outside the scope of the railway easement. *Ladd v. United States,* 630 F.3d at 1023-24. The *Ladd* panel then applied the *Caldwell/Barclay* claim accrual analysis to conclude that this "physical takings claim" accrues with issuance of the NITU – a regulatory action--. *Id.*. The net result was the holding that the issuance of the NITU alone constitutes

a *per se* physical taking, regardless of whether a trail use agreement has been reached or a trail established, and that "physical occupation is not required." *Id.* at 1024. The *Ladd* panel made clear that it did not necessarily believe this was the right result, but instead that it was the result dictated by the precedent the panel felt "bound" to apply. *Id.* at 1023.

The Government's brief demonstrates why the *Ladd* decision incorrectly found that this case was controlled by *Caldwell/Barclay*'s accrual analysis. But because the panel in *Ladd* believed that its holding was dictated by prior panel decisions, *en banc* review should be undertaken of *Caldwell* if necessary to clarify whether physical or regulatory takings principles govern takings claims under the Federal Railbanking Act.

In *Caldwell* and *Barclay*, this Court held that the takings claim accrues with the issuance of the NITU because this "is the only government action in the railbanking process that operates to prevent abandonment of the corridor and to preclude vesting of state law reversionary interests in the right-of-way." *Caldwell*, 391 F.3d at 1233. However, since the conversion to trail use constitutes the physical invasion under this Court's precedent, a physical takings claim could not accrue before the conversion of the railroad easement to interim trail use and railbanking—no earlier than the execution of the trail use agreement. *See United States v. Clarke*, 445 U.S. 253, 258 (1980) ("When a taking occurs by physical

invasion . . . the usual rule is that the time of the invasion constitutes the act of taking, and . . . gives rise to the claim for compensation . . ." (quotations omitted)).

Tying accrual to the time of the "government action," rather than the physical invasion, reflects regulatory takings principles. *Goodrich v. United States*, 434 F.3d 1329 (Fed. Cir. 2006) addressed a takings claim based on government permission for cattle to graze on the plaintiff's land. *Id.* at 1331-32. The plaintiff alleged a physical taking accruing at the time of the physical invasion, *i.e.*, "when Kennedy's cattle first entered the Whitetail Allotment for the grazing season." *Id.* at 1333. The Court held that it was actually a regulatory takings claim that accrued at the time of the government's regulatory decision that allowed the grazing. *Id.* at 1333-34. Subsequently, *John R. Sand & Gravel Co v. United States*, 457 F.3d 1345 (Fed. Cir. 2006), *aff'd*, 552 U.S. 130 (2008), distinguished *Goodrich* because "unlike Goodrich, JRS&G's claim is for a physical taking, rather than a regulatory taking." *Id.* at 1357 n.10. It held that this claim accrued when "the EPA took possession of the property" by erecting a fence, rather than with the regulatory decision permitting erection of the fence. *Id.* at 1357 & n.10.

The anomaly of permitting a physical takings claim to accrue before the landowner suffers any physical invasion or occupation is most apparent in cases of private railbanking, where the railroad and trail user reach an agreement without any STB order. *See Buffalo Twp.*, 813 A.2d at 670 ("[A] railroad right-of-way can

be converted to a recreational trail where there is a failure to file an application with the ICC, so long as the proposed trail user complies with the requirements of section 1247(d)."). In these circumstances, the physical invasion that *Preseault* held could give rise to a physical takings claim is present, but, under *Caldwell* and *Barclay*, there is no NITU to mark the accrual date for the statute of limitations.

Accordingly, contrary to *Caldwell/Barclay*, a physical taking claim should accrue no earlier than the trail use agreement, rather than with issuance of the NITU, which is a purely regulatory action. By the same token, a regulatory action such as the issuance of a NITU should only be analyzed as a potential regulatory "taking" under *Penn Central* factors. The improper mixing of these distinct principles in *Caldwell/Barclay* contributed to the panel's holding in *Ladd* — contrary to authority from the Supreme Court and this Court—that a physical taking can occur merely with issuance of the NITU, without any physical invasion or occupation.

II. THE *LADD* DECISION OPENS THE DOOR TO BURDENSOME AND COSTLY LITIGATION THAT EXPOSES STB'S AUTHORITY TO REGULATE RAILROAD ABANDONMENTS BEYOND RAILBANKING TO NEW *PER SE* "TAKINGS" CLAIMS.

A. The *Ladd* Decision Incentivizes Costly And Burdensome Litigation Benefiting Primarily Plaintiffs' Attorneys.

The significant impact of the *Ladd* panel's error warrants *en banc* review. The *Ladd* panel was the first court to hold that a brief delay in the STB's

abandonment authorization as a result of railbanking negotiations can work a *per se* taking even though negotiations failed to produce any physical occupation of the property by the would-be interim trail user. This decision has opened the door for takings claims alleging a *per se* taking upon issuance of the NITU, even though the NITU lapsed without a trail use agreement, or even if the STB abandonment authorization itself expired and the corridor returns to active rail service.

The *Ladd* case and the decision below will encourage a significant increase in the filing of compensation cases involving the Railbanking Law. Only a fraction of railbanking orders issued by the STB actually result in a rails-to-trails conversion. According to statistics compiled by RTC, 82 railbanking orders were issued by the STB in the last six years, and are therefore within the Tucker Act's six-year statute of limitations for a "takings" claim. Of these 82 railbanking orders, only 32 resulted in a rails-to-trails conversion. The remaining 50 railbanking orders either expired without reaching an agreement, or remain in effect, signifying that negotiations for a rails-to-trails conversion are still ongoing.[8]

[8] RTC maintains a database of railbanking order and rails-to-trails conversions, compiled from public information made available through the STB to track railroad abandonments. Each week, RTC program staff monitors filings submitted to the STB, maintaining records of corridors proposed for abandonment, noting the status of Interim Trail Use agreements, and tracks filings, decisions and notices related to corridors under railbanking negotiations. RTC attempts to verify the existence of final interim trail use/railbanking agreements where necessary to supplement STB records and periodically updates this information through direct communications with trail managers. While RTC works to improve data accuracy

These 50 corridors represent hundreds of parcels of land and potentially thousands of individual claimants, each of which has a potential "takings" claim against the United States, despite the fact that trail use of these corridors may never occur.

In each case, the courts will face fact-intensive, claimant-specific, and complex legal issues, often involving the unclear application of state law to centuries-old deeds, to determine the precise property interest held by the railroad, the scope of the easement, the valuation of the property, and amount of compensation due. *See Ellamae Phillips Co. v. United States*, 564 F.3d at 1373. In addition to the compensation awarded to the claimants, each of these claims entitles the attorneys representing the plaintiffs to thousands or even millions of dollars in court-awarded attorneys' fees under Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4654(c). *See, e.g., Haggart v. Wooley,* 809 F.3d 1336 (Fed. Cir. 2016) (reversing CFC's approval of $35 million attorneys' fee award under Uniform Act *and* under common fund theory). The decision below, in which extensive litigation was brought for a claim valued at only $900, well illustrates the true beneficiaries of the *Ladd* decision.

Accordingly, the nature of these cases will be a significant burden on the lower courts, this Court, and the government's coffers. These large compensation

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and inclusiveness, RTC makes no guarantee as to the accuracy or completeness of the data collected herein. Nonetheless, it is the most comprehensive database tracking railbanking activities in existence.

awards often have a chilling effect on the willingness of local governments to fund railbanked corridors. The Federal Railbanking program will ultimately suffer from this burden.

B. The Reasoning in the *Ladd* Case Could Be Extended to Other Conditions Imposed by the STB's in Carrying Out Its Mission to Regulate Railroad Abandonments.

A "trail use" condition is one of many conditions that may be imposed by the STB during the course of an abandonment proceeding. As the U.S. Court of Appeals for the D.C. Circuit held, "[t]here is no restriction placed on the conditions the ICC can impose other than that they must be required by the public convenience and necessity.'" *Consolidated Rail Corp. v. I.C.C.,* 29 F.3d 706 (D.C. Cir. 1994) (conditioning abandonment of New York City's elevated "Highline" rail corridor upon the filing, by adjacent property owners of a $7 million bond for demolition costs). *See also Hayfield N. R.R. Co., Inc. v. Chicago & North Western Transp. Co.*, 467 U.S. 622 (1984) (ICC maintains jurisdiction over a corridor even after abandonment is authorized to enforce such post-abandonment conditions).

There are numerous regulatory actions that the STB takes during the course of an abandonment proceeding in addition to the issuance of a NITU that can delay a railroad's abandonment request before the STB or prevent consummation of abandonment authorization. These actions include the imposition of environmental and historic preservation, labor protection conditions, delays from

the filing of an "offer of financial assistance" ("OFA") by third parties under 49 U.S.C. § 10904, or other conditions that defer abandonment authorization or extend STB jurisdiction over a corridor. *See, e.g. Friends of Atglen-Susquehanna Trail v. STB,* 252 F.3d 246, 262 (3d Cir. 2001) (STB has jurisdiction to enforce historic preservation condition); *State of Idaho v. ICC,* 35 F.3d 585 (D.C. Cir. 1994) (ICC had jurisdiction to enforce environmental conditions attached to abandonment authorization).

These various conditions are routinely imposed by the STB during the course of any abandonment proceeding. The STB maintains jurisdiction over the corridor, preempting any state law rights that might be held by adjacent landowners while the condition is extant. The reasoning in *Ladd* could very well extend to any of these actions, exposing the full panoply of STB abandonment regulation to potential *per se* "takings" claims.

In *Burrough of Columbia v. STB,* 342 F.3d 222 (3d Cir. 2003), a decision preceding *Ladd,* the U.S. Court of Appeals for the Third Circuit rejected the argument, applying *Penn Central's* three-part regulatory takings test, that the STB's approval of an OFA made by a salvage company during the course of railroad abandonment proceedings constituted a "taking" of private property. However, the reasoning underlying *Ladd* that the issuance of one such condition --- a NITU – constitutes a *per se* physical occupation could be applied to any of these

situations or to the many conditions that the STB is authorized to impose in order to carry out its obligations under federal law. The resulting litigation could exponentially expand the liability of the United States for the payment of compensation claims and associated attorneys' fees, ultimately impairing the STB's ability to carry out its regulatory mission of protecting the public convenience and necessity during the course of railroad abandonment proceedings.

CONCLUSION

For these reasons, RTC urges the Court to hear this case *en banc* and overrule the panel decision in *Ladd* and the decision below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

The undersigned certifies that the foregoing brief of *amicus curiae* Rails-To-Trails Conservancy complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 5,010 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b). The brief has been prepared using Microsoft Word 2010 in 14-Point Times New Roman font, a proportionally-spaced font

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