Receipt number AUSFCC-8356350

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOHN A. and SUZANNE D. AGOSTA,

JOHN E. and JULIA P. BEACH, JERRY BEACH, MATTHEW and ELIZABETH MCHALE, and ROBYN REED,

BEN and JAMIE COHOON,

DIANE COLYEAR READE, as Trustee of the Diane Colyear Reade Family Trust, dated November 4, 1991,

ROBERT M. DAVIS and KIRK ALLEN PELARDE,

SHIRLEY L. HINDS,

DONALD A. and ANNETTE K. LOZENSKY, TRUSTEES,

BARBARA A. MCCULLOCH,

GENE C. and DOROTHY L. ROEDIGER, as Trustees of the Roediger Family Trust, dated May 12, 2004,

FREEMAN D. and PAMELA K. RUTLEDGE, as Trustees of the Rutledge Family 2020 Trust, dated November 13, 2020,

MICHAEL J. SANDERS,

EDWARD J. and ERLYNE SCHMIDBAUER, as Trustees of the Edward and Erlyne Schmidbauer Trust, dated March 25, 1998,

MELANIE ULVILA,

PAUL O. WEBB,

BRYAN WHEELESS, and

FORREST C. and PATRICIA A. WILLIS

Plaintiffs,

v.

No. 22-1756 L

UNITED STATES OF AMERICA,)
)
Defendant.)

COMPLAINT

SUMMARY OF THIS LAWSUIT[1]

The federal government violated the United States Constitution when it took private property from Humboldt, Mendocino, and Trinity County, California, landowners without paying the landowners. The government took this private property to create a more-than 175-mile-long public recreational and future-railroad corridor between Willits running north up the Eel River Canyon through Mendocino, Trinity, and Humboldt counties to Eureka, including the land under three branch lines. See ***Exhibit 1*** *(map of the right-of-way). When the government takes private property, the government has a "categorical" obligation to pay the owner. These landowners ask this Court to order the federal government to pay them "just compensation" for that private property the federal government took from each of them.*

The federal government took these owners' private property for the Great Redwood Trail. The Great Redwood Trail is a public recreational trail and future railroad corridor the federal government created pursuant to the National Trails System Act Amendments of 1983 (Trails Act) when the federal Surface Transportation Board issued an order on October 24, 2022, invoking the federal Trails Act to create this public rail-trail corridor.[2]

An owner's right to his or her private property is a fundamental civil right guaranteed by the Just Compensation Clause of the Fifth Amendment to the United States Constitution.[3] *The government may not take private property without*

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[1] This summary is provided as a convenience for the Court and the parties and is not intended as part of the complaint except for the reference to Exhibit 1 and the citations in the footnotes, which are referenced in the complaint in the short-form citation.

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

[3] The Fifth Amendment provides, "No person shall be…deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Consider also Justice Holmes's decision in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416 (1922) ("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."), and the Supreme Court's decision in *Armstrong v. United States,* 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should

complying with the Just Compensation Clause and the Due Process Clause of the Fifth Amendment. The Supreme Court and lower federal courts have explained that the federal government's invocation of the Trails Act takes an owner's private property, and the federal government must pay the owner.[4] *The federal government must make the owner whole, which includes reimbursing the owner's legal fees and litigation expenses and paying the owner interest for the government's delay in paying the owner compensation. See* Seaboard Air Line Railway Co. v. United States*, 261 U.S. 299, 304 (1923) ("The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. He is entitled to the damages inflicted by the taking.").*[5]

The sixteen landowners bringing this lawsuit ask this Court to order the federal government to pay them for that property the federal government took from them. And these owners ask this Court to order the government to fairly compensate them for the government's delay in paying them and to reimburse their legal fees and litigation expenses as the federal government is required to do under the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §4601, et seq.

JURISDICTION AND VENUE

1. The Fifth Amendment to the United States Constitution provides "No person shall…be deprived of life, liberty or property without due process of law; not shall private property be taken for public use without just compensation."

2. The Tucker Act, 28 U.S.C. §1491(a), provides, "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States

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be borne by the public as a whole."). See also *Knick v. Township of Scott*, 139 S.Ct. 2162, 2177 (2019) ("government violates the Takings Clause when it takes property without compensation").

[4] See *Preseault v. Interstate Commerce Comm'n,* 494 U.S. 1, 8 (1990) (*Preseault I*); *Preseault v. United States*, 100 F.3d 1525, 1533 (Fed. Cir. 1996) (*Preseault II*) (*en banc*); *Toews v. United States*, 376 F.3d 1371, 1376-77 (Fed. Cir. 2004); *Caldwell v. United States*, 391 F.3d 1226, 1228 (Fed. Cir. 2004); *Barclay v. United States*, 443 F.3d 1368, 1373 (2006); *Illig v. United States*, 274 Fed. App'x 883 (2008), *cert. denied*, 557 U.S. 935 (2009); *Ladd v. United States*, 630 F.3d 1015, 1020 (Fed. Cir. 2010), *reh'g denied* 646 F.3d 910 (Fed. Cir. 2011) (*Ladd I*); *Ladd v. United States*, 713 F.3d 648, 652 (Fed. Cir. 2013) (*Ladd II*).

[5] Citations omitted. See also *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893), and *United States v. Miller*, 317 U.S. 369, 373 (1943).

founded upon the Constitution." These owners' claims are founded upon the Takings/Just Compensation Clause and Due Process Clause of the Fifth Amendment of the United States Constitution and upon the Uniform Relocation Assistance and Real Property Acquisition Act.

3. Congress adopted the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §4601, *et seq*. (Pub. L. 91-646; 84 Stat. 1894) (URA), to make owners financially whole when the federal government takes private property. This includes the legal fees and litigation expenses an owner incurs because the government took the owner's property. The URA requires the federal government to pay the legal fees and litigation expenses, including the expert and appraisal fees, these owners incur in this lawsuit vindicating their right to be paid for that property the federal government took from them.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS GOVERNING THIS LAWSUIT

4. The following provisions of the United States Constitution and the United States Code define the obligation the federal government owes these California landowners.

(a) The Fifth Amendment to the United States Constitution provides, "No person shall…be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(b) Section 8(d) of the Trails Act, codified as 16 U.S.C. §1247(d), provides, "interim use [of abandoned railroad right-of-way easements for public recreation] 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."

(c) Section 4654(c) of the URA requires the federal government to pay these owners' "reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred because of this proceeding."

(d) Section 4622(a) of the URA requires the Federal Government must, among other things, pay the expenses and costs an owner incurs when the government takes private property, including all the: "(1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property; (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation … [and] (3) actual reasonable expenses in searching for a replacement business or farm."

STATEMENT OF FACTS

A. The history of the land the federal government took for the Great Redwood Trail.

(i) The creation of the railway line from Sausalito to Eureka.

5. A railroad right-of-way is like a turtle on a fence post. It doesn't get there by itself. The land now owned by the present-day landowners bringing this lawsuit was once owned by their predecessors-in-title who granted a right-of-way easement across their land for the construction and operation of a railway line to transport lumber harvested in the Northern California redwood forests to markets throughout the nation.

6. Ancient redwood forests grew in the Northern California Coast. Redwood is especially valuable because it is naturally moisture resistant, resists decay and rot, and is a softwood that is lightweight that can be easily milled with hand and machine tools. The largest trees in this region are massive. The General Sherman giant redwood is 275-feet-tall with a girth of 103-feet, which equates to about 6,500 board-feet of lumber.[6] This is a tree the size of a Saturn 5 Rocket. The typical redwood tree would yield between 2,000 and 3,000 board-feet of lumber. See **Exhibit 2** (excerpt from Lynwood Carranco and John Labbe, LOGGING THE REDWOODS (2019). The principle species of redwoods were the Giant Sequoia (*Sequoiadendron Giganteum*)

[6] A board-foot of lumber is one square foot that is one inch thick.

and the *Sequoia Sempervirens* that grows almost 400-feet tall and lives for more than 2,000 years. In the late 1800s and early 1900s, the technology to harvest these trees and transport the lumber from these ancient forests to a national market was primitive. See *id.* at 8-11. Mendocino, Humboldt, and Trinity counties are located in the northern Pacific Coast region of California where the climate and geography allowed these massive, and magnificent trees to grow and flourish. As Carranco and Labbe write, "Because of its rough and rocky nature, land travel along the Mendocino coast was very difficult. It was therefore necessary for each mill operator to develop some means for getting his product aboard a ship in the vicinity of his mill." See **Exhibit 3**.

7. The late-1800s were the dawn of the national railroad expansion. Abraham Lincoln's 1960 presidential platform declared, "That a railroad to the Pacific Ocean is imperatively demanded by the interests of the whole country; that the Federal Government ought to render immediate and efficient aid in its construction." *Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93, 96 (2014) (citing James W. Ely, Jr., RAILROADS & AMERICAN LAW (2001), p. 51). In 1908, Henry Ford was just inventing the Model T. The Interstate Highway System would not be created until the 1950s under President Eisenhower. And, in the early-1900s, airlines were inconceivable. The Wright Brothers first flew at Kitty Hawk in December of 1903, and Charles Lindbergh did not fly the *Spirit of St. Louis* across the Atlantic until May 1927. In the late 1800s and early 1900s the only way to travel faster than a horse could gallop and the only way to transport any significant amount of goods to market was by steam-powered railroad or by a steamship. At that time the only railroads in Northern California were nascent narrow-gage logging railways that could transport limited amounts of timer short distances.

8. The late 1800s and early 1900s were the dawn of America's railroads. The Pacific Railway Act was signed by President Lincoln in July 1862.[7] See, generally, Ely, RAILROADS & AMERICAN LAW, *supra*, ¶7, Christian Wolmar, THE GREAT RAILROAD REVOLUTION: THE HISTORY OF TRAINS IN AMERICA (2012), and John F. Stover, AMERICAN RAILROADS (2nd ed. 1997). San Francisco was then the hub of the Californian railroads connecting with the Heartland and the East Coast cities.[8]

9. Landowners in Northern California possessed valuable resources the rest of the nation needed and desired, especially gold and timber. Northern California's redwood forests could be harvested and the lumber sold throughout the nation. But these massive trees could only be harvested and sold if they could be transported from the Northern California Coast to cities on the East Coast and the country's heartland in St. Louis, Chicago, Detroit, Cincinnati, New York, and other population centers where the lumber could be used for the construction of homes, offices, and other buildings.

10. Beginning in the late 1900s the State of California and the federal government have taken large tracts of redwood forests as protected parks. See Redwood National Park Expansion Act of 1978, Pub. L. No. 95-250, 92 Stat. 163 (Redwood Act). This law was enacted to increase the land taken for the Redwood National Park. The Redwood Act, in addition to taking substantial

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[7] Ely, RAILROADS & AMERICAN LAW, p. 295, n.34, n.35 (citing *An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean*, July 1, 1862, 12 Stat. 489; *An Act to Amend an Act Entitled*...., July 2, 1864, 13 Stat. 356).

[8] See, Pulitzer Prize winning authors Bill Dedman and Paul Clark Newell, Jr's book *EMPTY MANSIONS* about Senator William Clark and his daughter Hughette. Senator Clark built a rail line from Los Angeles through Las Vegas to the Midwest. Senator Clark was one of the Nation's wealthiest businessmen, was a Senator for Montana and earned the nation's copper market. Until Clark built the railroad line between Los Angeles and Denver, all the railroad traffic from the Midwest and East Coast ran through San Francisco.

tracts of private property for the Redwood National Park, also displaced many workers in the forest services industry who were dependent upon timber harvesting in this region, including railroad and lumber-mill employees located outside the land taken for the National Park expansion whose businesses depended on the timber harvested from the land the Government took for the Redwood National Park.[9]

11. Gold was discovered at Sutter's Mill in 1848, and the Gold Rush began. California was admitted to the Union in 1850. Timber and gold were the two resources essential to Northern California's economy. Later, Northern California's economy has grown with wine from the Napa Valley, technology from Silicon Valley, cannabis, and tourism. But, in the early 1900s, transporting timber to market required railroads. See Carranco, LOGGING THE REDWOODS, ch. 7-8 (attached as **Exhibit 4**).

12. Following the Civil War, in the late 1800s, the Pacific Lumber Company and other timber companies in Northern California's redwood forest region built small, mostly narrow-gage, railway lines to transport lumber to Humboldt Bay and, from there, by ship, to national markets. These short narrow-gage railway lines did not connect to San Francisco, which was California's major rail hub to the East Coast and Midwest. And at the time, ships needed to sail all the way around the southern tip of South America to reach the East Coast (the Panama Canal was not opened until 1916).

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[9] See, *e.g.*, *PVM Redwood Co., Inc. v. United States*, 686 F.2d 1327 (9th Cir. 1982), *Tuey v. Donovan*, 726 F.2d 537 (9th Cir. 1984), *Rains v. Donovan*, 702 F.2d 182 (9th Cir. 1983), *Bradford v. Donovan*, 695 F.2d 409 (9th Cir. 1982), and *Luedemann v. Donovan*, 724 F.2d 1371 (9th Cir. 1984).

13. The railroad's Narrative History of the Line, which is attached as Exhibit N to the railroad's Verified Notice of Exemption, p. 237 (of 300), is attached as **Exhibit 5**. Carranco further provides:

> In the early 1880s, various interests began to plan a large operation on the Eel River at a place called Forestville, now known as Scotia. This became the Pacific Lumber Company plant, which developed into one of the major concerns in the redwood industry. The location of the sawmill was some distance from a port, and a railroad was necessary before operations could begin. In 1882 the company incorporated the Humboldt Bay & Eel River RR. and grading was started from the bay. However, John Vance, William Carson, and others, had incorporated the Eel River & RR. to build south to the Van Duzen River in the same year, and the Pacific Lumber Company arranged for this company to handle their lumber trains. In 1885, they built their own line from Alton Junction, on the Van Duzen River, to the mill site. Logging extensions continued the road some distance south along the Eel River from Scotia.
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> In 1900, A.B. Hammond appeared on the scene. He bought out the Vance interests, including the Eureka & Klamath River RR. He was already deeply involved in railroad building in Oregon, where he was closely associated with the Huntington interests of the Southern Pacific. It was at this period that the Southern Pacific and the Santa Fe were gathering their forces to do battle for the lumber trade from the Humboldt area. In 1903, Southern Pacific acquired the California & Northwestern, which had built north from San Francisco Bay to the Willits area. And in an attempt to block the Santa Fe in the north, the Southern Pacific acquired the Eureka & Klamath River from Hammond. At this time the name was changed to the Oregon & Eureka RR., and the road was leased back to Hammond.
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> Meanwhile, in May, 1903, the Santa Fe formed the San Francisco & Northwestern to handle their interests in the redwood battle. They immediately purchased the Eel River & Eureka RR., as well as several smaller companies struggling to meet the competition of the Hammond lines around Humboldt Bay. Santa Fe also acquitted the Pacific Lumber Company lines up the Eel River. Hammond made a bold attempt to acquired control of the Pacific Lumber Company, but was unable to get more than forty-eight percent of the stock. With the sale of the railroad to the Santa Fe, Hammond disposed of his interest in the Pacific Lumber Company.
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> LOGGING THE REDWOODS, pp. 112-14 (attached as **Exhibit 4**).

Keith Bryant, Jr., of Texas A&M University, in his work, HISTORY OF THE ATCHISON, TOPEKA & SANTA FE RAILWAY (1974), p. 190, further explained:

> On January 8, 1907, they formed the Northwestern Pacific Railroad to build from Willits to Chiveley, some 103 miles, and absorb the almost 500 miles of track owned by the two parents. Construction of the connecting line, delayed by the panic of 1907, was not completed until July 1, 1915. While the panic caused the parent companies to reduce the flow of dollars needed to build the connection, the terrain crossed by the NWP also retarded construction. The unstable mountains received heavy snowfalls in the winter and spring thaws throned the Eel River and its tributaries into raging torrents; the Eel often rose 20 to 30 feet overnight. Wagon roads were few, and construction crews found it very difficult to haul in supplies for the massive tunnel work. Thirty tunnels, one 4,000 feet in length, connected the deep cuts and fills along the route. When the NWP opened in 1915, it stretched from Sausalito on the bay, north to Trinidad near the Oregon line. The ATSF used tugs and ferries to move freight from the Sausalito terminal to the Santa Fe slips at Point Richmond, but the water connection did not function smoothly, and in 1928 the Atchison sold its half of the NWP to the Southern Pacific. Only the NWP portion of Ripley's expansion program failed to provide a long-range return.

14. Thus, in the early 1900s, the Southern Pacific Railroad and the Atchison, Topeka & Santa Fe Railway (the Santa Fe), which were competing railroad companies, each wanted to build a railway line from San Francisco to Eureka and serve the Northern California Coast. The principle commodity to be transported on this railroad line (and the principle source of revenue to fund the railroad) was lumber from California's northern redwood forests. But it became apparent to the Southern Pacific and Santa Fe that building and maintaining a railway line through the Eel River Canyon would not be profitable if the railroads built two separate railway lines, so these competitors entered into a joint venture to build a single railway line. The entity was the Northwest Pacific Railroad.

> Although considerable capital was invested in construction, the route chosen rendered the line "high maintenance"…. The geography [of this part of Northern California] meant that the railroad was at risk of costly and disruptive tunnel collapse in the event of fires or earthquakes. The geology meant that the line was subject to a need for constant realignment, as well as slide removal and prevention. The accompanying flood hazard meant the line was subject to expensive and disruptive wash-outs, as well as loss of bridges.
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> During the glory years of the timber industry, the line generated the traffic necessary to sustain a high maintenance operation. But as highways improved, truck competition increased, limiting the ability of a rail carrier to increase or even

> to maintain adequate tariffs to cover maintenance costs. Even worse, the railroad's frequent embargoes due to tunnel files, mudslides, and wash-outs made it a less reliable transportation supplier than trucks. Ultimately NWP's market share of redwood and timber production dropped to the point that the line became speculative rather than profitable.
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> **Exhibit 5** (Narrative History of the Line, Exhibit N to the railroad's Verified Notice of Exemption), p. 17.

15. In 1906, the Southern Pacific and the Santa Fe merged more than forty existing short-line railway lines and created a single railway line from Sausalito to Eureka with several spur lines into the adjoining interior portions of Mendocino, Humboldt, and Trinity counties. See **Exhibit 1.** The consolidated railroad corporation, the Northwestern Pacific Railroad, was marginally profitable through the 1950s and included some passenger trains to increase revenue. But when former railroad passengers shifted to traveling by automobile and the timber mills began shipping lumber by truck instead of train, the demand for railroad transportation on this railway line dramatically decreased. See **Exhibit 5** (Exhibit N to the railroad's Verified Notice of Exemption). Additionally, due to the terrain of Northern California, this railway line along the Eel River Canyon was extremely expensive to maintain due to landslides, earthquakes, and flooding. The railway line required many tunnels, and the tunnels were prone to collapse and fire during earthquakes. See *id*.

(ii) The decline and abandonment of the railway line.

16. With the decreased timber harvesting in the Northern California region, decrease in passenger traffic due to the Interstate Highway System and the timber mills shipping lumber by truck, a railroad line between San Francisco and Eureka was no longer needed nor profitable. The Redwood National Park Expansion Act also substantially reduced the land used to harvest timber.

17. In 2007, the two leading timber firms, Pacific Lumber Company (Palco) and Scotia Pacific, LLC (Scopac), filed for Chapter 11 bankruptcy. "Palco and Scopac maintained separate

corporate structures but were an integrated company." *In re Pacific Lumber Co.*, 584 F3d. 229-37 (5th Cir. 2009). Their business was "the growing, harvesting, and processing of redwood timber in Humboldt County, California." *Id.* at 236. The reason for the bankruptcy was, as Judge Edith Jones explained in the Court's decision,

> The Timberlands are heavily regulated by federal and state agencies. The U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the California Department of Fish and Game vigorously administer federal and state endangered species regulations. Any new owner of the Timberlands must obtain Regional Water Quality Control Board permits that regulate waste discharge, clean-up and abatement, and site remediation. The California Department of Forestry and Fire Protection requires a timber harvesting plan covering issues like restocking, mitigating the effects of harvesting and erosion, road maintenance and sustainable yield requirements. Under the Timberlands' conservation plan, a transfer of ownership must run the gamut of pre-approval by all of these agencies.

Id. at 237.

18. The railway line – with all of its tunnels, trestles, and bridges – was no longer maintained and fell into disrepair. The railway line was no longer functional or profitable, and trains no longer operated across the right-of-of-way. The railroad's verified notice of exemption explained:

> operation of the Line in and around the Eel River Canyon was extremely challenging due to the unstable soils and other terrain features. These and features elsewhere on the Line rendered the Line unreliable, and too costly to maintain (due inter alia to frequent tunnel fires, flood events, and soil movement) for competitive freight rail operations.

Verified Notice of Exemption,
STB Docket No. AB-1305-X (May 14, 2021), p. 4.

The railroad line had fallen into such a state of disrepair and neglect that in 1998, the railway line was embargoed by the Federal Railroad Administration barring operations on much of the railway line because it was unsafe to operate trains on the railway line. No freight has been transported on this railway line in decades. See *id.* at 1.

19. The Mendocino County economy has shifted from redwoods to cannabis. See Bill Swindell, *North Coast Cannabis Sector Bright Economic Spot in Pandemic, Poised for Strong 2021*, THE PRESS DEMOCRAT (Jan. 22, 2021).[10] "While most local businesses struggled last year amid the coronavirus pandemic, the North Coast's legal cannabis industry grew." *Id.*

20. The fate that befell the railroad line between San Francisco and Eureka was not unique. As the Supreme Court noted, "[i]n 1920, the Nation's railway system reached its peak of 272,000 miles; today [in 1990] only about 141,000 miles are in use, and experts predict that 3,000 miles will be abandoned every year through the end of this century." *Preseault I*, 494 U.S. at 5. See also John F. Stover, AMERICAN RAILROADS (2nd ed. 1997), pp. 192-93, stating:

> Ever since the first World War American railroads have experienced a general decline. The year 1916 in several ways marked the end of the golden age of railroading. In that year the nation reached an all-time high in rail mileage with 254,000 miles of line in service…. As the railroads lost freight and passenger business to the better service and sometimes better rates and fares offered by the new forms of transportation, the national rail network naturally declined. By 1966 total rail mileage had dropped to less than 213,000 miles with most of the abandonment taking place in the 1930s.

21. The Southern Pacific and Santa Fe transferred whatever interest they had in the right-of-way or trackage rights to other railroads. The other railroads went bankrupt and dissolved. Ultimately the responsibility for the railroad right-of-way between Willits and Eureka was transferred to the North Coast Railroad Authority (the NCRA or Railroad Authority). The Railroad Authority is an agency of the State of California.

22. The Southern Pacific, Santa Fe, Northwest Pacific Railroad, and their predecessor-railroads had no authority to transfer any interest in the land greater than a right-of-way easement

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[10] Available at: https://www.pressdemocrat.com/article/business/north-coast-cannabis-sector-a-bright-economic-spot-in-pandemic-poised-for/. See also https://static.business.ca.gov/wp-content/uploads/2022/05/County-of-Mendocino-Equity-Assessment.pdf.

for a railway line – *nemo dat quod non habet* ("one cannot convey what one does not own"). See *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.").

(iii) The railway line was abandoned, and the right-of-way easement terminated.

23. The Railroad Authority filed a petition with the federal Surface Transportation Board (the Board) to abandon the railway line and asked the Board to invoke the Trails Act and impose a new easement for public recreation and future "railbanking" across the strip of land previously used for the railroad right-of-way. See Verified Notice of Exemption, STB Docket No. AB-1305-X (May 14, 2021). The Railroad Authority acknowledged that it (and its predecessor-railroads) did not own the land across which the railroad line had been built. "NCRA believes that the property may be subject to reversionary interests that may affect the transfer of the corridor for non-rail purposes." *Id.* at 4. The Railroad Authority told the Board,

> On May 14, 2021 (or sixty days after posting of this Environment Report/Historic Report, whichever is later), we expect to be filing with the Surface Transportation Board an abandonment proceeding pursuant to 49 C.F.R. 1152.50 (two-year out-of-service exempt abandonments) seeking authority to abandon and to railbank (per 16 U.S.C. 1247(d) for interim rail use subject to rail reactivation) a line of railroad located in Mendocino, Trinity and Humboldt Counties, CA, between Willits at Commercial Street (MP 139.5) to Eureka (approximately MP 284.1) including the entirety of the Samoa, Korblex and Carlotta Branches (ending at approximately MP 302.9, 295.6 and 267.7 respectively, and also inclusive of North Coast Railroad Authority's (NCRA's) Arcata and Mad River Subsidiary which extends through Blue Lake (approximately MP 300.8) to Korbel, ending at approximately MP 301.8. Attached is an Environmental Report and Historic Report (ER/HR)

> describing the proposed action and any expected environmental (and/or historic) effects, as well as a map of the affected area (Exhibit A in the ER/HR).
>
> Notice of Proposed Abandonment,
> STB Docket No. AB-1305-X (March 9, 2021).[11]

24. Importantly, the railroad did not acquire title to the fee estate in the land across which the railway line was built. The railroad was never granted a right to use the strip of the owners' land for anything other than the operation of a railway line. And, when the railroad no longer operated its railway, the right-of-way easement terminated, and the landowner (or the landowner's successors-in-title) owned unencumbered title to the land. See *Brandt Trust*, 572 U.S. at 105 ("[w]hen the [railroad] abandoned the right of way…the easement…terminated. [The owner's] land become[s] unburdened of the easement, conferring on him the same full rights over the [right-of-way land] as he enjoy[s] over the rest of [his land]");[12] *United States Forest Service v. Cowpasture River Preservation Ass'n*, 140 S.Ct. 1837, 1845 (2020) ("The Trails Act refers to the granted interests as 'rights-of-way,' both when describing agreements with the Federal Government and with private and state property owners. When applied to a private or state property owner, 'right-of-way' would carry its ordinary meaning of a limited right to enjoy another's land.") (citation omitted); Ely, RAILROADS & AMERICAN LAW, pp. 197-98 ("Prominent experts took the position that, absent statutory provisions expressly authorizing the taking of a fee simple, railroads should receive just an easement in land condemned for their use.") (citing, *inter alia*, Simon F. Baldwin, AMERICAN RAILROAD LAW (1904), p. 77; Isaac F. Redfield, 1 THE LAW OF RAILROADS 270 (6th ed. 1888)); RESTATEMENT (THIRD) PROPERTY: SERVITUDES §2.2,

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[11] The Notice of Proposed Abandonment is a lengthy document with many exhibits. The full copy of this document is available on the Board's docket, which is available electronically at STB Docket No. AB-1305-X.

[12] Quoting RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §1.2).

Comment g ("The fact that the grantee is a railroad may also tend to indicate that the instrument should be construed to convey an easement only. The narrowness of the parcel, the consideration paid, and the frequency with which railroad uses have been abandoned often lead to the conclusion that the grantor, as a reasonable person dealing with a railroad, intended to grant no more than an easement for the right of way, retaining ownership of the land. The fact that an amount approaching full value of the fee has been paid, however, does not necessarily lead to the conclusion that a fee was intended because an easement will also deprive the grantor of any ability to use the land for an indefinite period of time. If less than full market value has been paid for conveyance of land for a railroad station or depot, that fact together with the fact that proximity to a functioning railroad was a significant part of the consideration to the grantor, tends to indicate that the instrument was intended to convey an easement rather than an estate. The superior sophistication and drafting opportunity of the railroad vis-à-vis the grantor may buttress this conclusion.").

B. The federal government took these owners' private property for the Great Redwoods Trail.

25. The rule is simple. "[W]hen the government physically takes possession of property without acquiring title to it.... [or] when the government likewise effects a physical taking when it occupies property[, t]hese sorts of physical appropriations constitute the clearest sort of taking, and we assess them using a simple, *per se* rule: The government must pay for what it takes." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021) (internal citations and quotations omitted). See also *Horne v. Department of Agriculture*, 576 U.S. 350, 358 (2015) (government has a "categorical" duty to compensate the owner when it "depriv[es] the owner of the right to possess, use and dispose of the property").

26. When the Board issued the October 24, 2022, order invoking Section 8(d) of the

federal Trails Act, the federal government took private property for which the government must now pay the landowners. See **Exhibit 6** (Decision and Notice of Interim Trail Use or Abandonment, STB Docket No. AB-1305-X (Oct. 24, 2022)). In *Preseault I*, 494 U.S. at 8, Justice Brennan explained that the language of section 8(d) of the Trails Act "gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests." See also *Preseault II*, 100 F.3d at 1533, 1551, and *Toews*, 376 F.3d at 1376-77.

27. On May 14, 2021, the Railroad Authority asked the Board to issue an order authorizing abandonment of the railway line and invoking Section 8(d) of the federal Trails Act. See Verified Notice of Exemption, STB Docket No. AB-1305-X (May 14, 2021).

28. On October 24, 2022, the Board granted the Railroad Authority's request and issued an order invoking Section 8(d) of the Trails Act and creating a federal rail-trail corridor across a 175.84-mile-long strip of land through Mendocino, Trinity, and Humboldt counties.[13] See Exhibit 6 (Decision and Notice of Interim Trail Use, STB Docket No. AB-1305-X (Oct. 24, 2022)). The Board's order described the land as beginning at "milepost 139.5 at Commercial Street in Willits to milepost 284.1 near Eureka and including the land under the appurtenant branch lines extending to milepost 267.72 near Carlotta, milepost 295.57 near Korblex, milepost 300.5 near Samoa, and milepost 301.8 near Korbel, in Mendocino, Trinity and Humboldt Counties." *Id.* at 1.

29. Congress amended the Trails Act in 1983 to provide that, "in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or

[13] The Trails Act provides that the Board my invoke section 8(d) of the Trails Act by issuing an order called a Notice of Interim Trail Use or Abandonment (NITU) or a Certificate of Interim Trail Use or Abandonment (CITU). In this case the Board issued a NITU.

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." 16 U.S.C. §1247(d).

30. The Railroad Authority and its predecessor-railroads did not own the land across which the railway line was built and operated. See, *supra*, ¶24. The railroads and their final successor, the Railroad Authority, only had a right-of-way easement to use the land for the limited and specific purpose of operating a railway line across a strip of the land. See id. By definition, an easement is a limited right to use the land owned by another for a specific defined purpose and, when the railroad no longer operates, the easement is abandoned and the railroad's right (including any successor-railroad's right) to use the strip of land terminates, and the owner of the fee estate has unencumbered right and title to the land, including the right to exclude others from the property. See *id*.[14] An easement is a servitude imposed upon land owned by another. An easement grants the easement-holder a limited right to use the land for a specific purpose. An easement is not title to the land itself. Furthermore, the rights of the easement-holder (the dominant estate) to use land owned by another (the servient estate) are defined by the purpose for which the easement was originally granted.

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[14] See also THOMPSON ON REAL PROPERTY (2nd ed.) §60.02(c) ("The right in land held by an easement holder differs from the fee interest or even the leasehold interest in that it is a 'use' interest, but not a 'possessory' interest in the land. Thus, the easement holder has neither the permanent possession of even a single molecule of the land itself...the easement holder has the right to make or control a particular use of the land that remains owned by another."). See also Jon Bruce & James W. Ely, Jr., THE LAW OF EASEMENTS AND LICENSES IN LAND §1.1 ("An easement is commonly defined as a nonpossessory interest in the land of another. … [T]he nonpossessory feature of an easement differentiates it from an estate in land. … [T]he holder of an affirmative easement may only use the land burdened by the easement; the holder may not occupy and possess the realty as does an estate owner.").

31. The imposition of an easement for public recreation and so-called "rail-banking" is a taking of the owner's private property. See *Preseault I*, 494 U.S. at 8; *Preseault II*, 100 F.3d at 1331.

C. The government must pay landowners just compensation when the government takes private property by invoking the Trails Act.

32. The Fifth Amendment provides, "No person shall…be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

33. In *Preseault I*, the Supreme Court held the federal government could use the government's eminent domain power to take private property for a public recreational trail and a future railroad right-of-way. 494 U.S. at 17 ("[W]e must defer to a congressional finding that a regulated activity affects interstate commerce if there is any rational basis for such a finding, and we must ensure only that the means selected by Congress are reasonably adapted to the end permitted by the Constitution. The [Trails Act] Amendments clearly pass muster.") (internal quotations and citations omitted). However, the Supreme Court in *Preseault I*, 494 U.S. at 8, and the Federal Circuit sitting *en banc* in *Preseault II*, 100 F.3d at 1531, 1550, held that the Fifth Amendment requires the United States to pay property owners for the private property the federal government takes when the government invokes the Trails Act. See also *Toews*, 376 F.3d at 1376-77, 1381.

34. The Board's invocation of Section 8(d) of the Trails Act is a per se physical taking of private property for which the federal government has a "categorical" constitutional duty to pay the owner. The Federal Circuit in *Caldwell*, 391 F.3d at 1229, *Barclay*, 443 F.3d at 1378, *Illig*, 274 Fed. App'x at 883, *Ladd I*, 630 F.3d at 1019, and *Ladd II*, 713 F.3d at 652, held that an owner's right to compensation (and the government's constitutional obligation to pay the owner) arise on

the date the Board (or its predecessor, the Interstate Commerce Commission) issues an order invoking section 8(d) of the Trails Act. In her brief opposing Certiorari, then-Solicitor General Kagan (now Justice Kagan) wrote, "[w]hen the [order invoking section 8(d) of the Trails Act] 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." Brief for the United States in Opposition to Petition of Writ of Certiorari, *Illig v. United States*, 2009 WL 1526939. The Federal Circuit reaffirmed this point in *Caquelin v. United States*, 959 F.3d 1360, 1370 (Fed. Cir. 2020) ("We conclude that *Ladd I* remains governing precedent and has not been undermined by *Arkansas Game* in favor of a non-categorical approach.").

35. Under California law, the terms of the original right-of-way easements, and principles of property law established before Blackstone, the original railroad right-of-way easement terminated, and the landowners had the exclusive right to physical possession of their land free of any future railroad right-of-way easement and free of any right of the public to use the land for recreation. See, *supra*, ¶24. Absent the federal government's invocation of the Federal Trails act, these owners would have enjoyed the unencumbered use of their land and could exclude the public and strangers from their land. See *id.* See also *Cedar Point Nursery*, 141 S.Ct. at 2066 ("The right to exclude is 'a fundamental element of the property right.'") (citing and quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). A landowner's right to exclude others from the owner's land is an essential feature of private property. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987) ("We have repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude [others is] "one of the most essential sticks in the bundle of rights that are commonly characterized as property.'") (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982), and *Kaiser Aetna*, 444 U.S. at 176).

36. Creating a public-access recreational trail across these owners' land and encumbering their land with a new easement for public recreation and a future railroad line has taken from these owners their private property and taken the value of that land physically encumbered with this public rail-trail corridor. The government's taking has also greatly diminished the value of the owners' remaining property adjoining this trail corridor.

37. The federal government took these owners' land, imposing an easement across the owners' land allowing strangers and a railroad to use these owners' private property. And, for this, the federal government paid these owners absolutely nothing. As Justice Thomas said, this left the owners with the "so sue me" recourse to vindicate their constitutional right to be justly compensated. See *Knick v. Township of Scott*, 139 S.Ct. 2162, 2180 (2019) ("This 'sue me' approach to the Takings Clause is untenable. The Fifth Amendment does not merely provide a damages remedy to a property owner willing to shoulder the burden of securing compensation after the government takes property without paying for it. Instead, it makes just compensation a prerequisite to the government's authority to take property for public use.") (Thomas, J., concurring) (internal quotations and citations omitted).

38. Furthermore, because the Board did not comply with the due process requirements of the URA, the government made these owners incur the cost of this litigation. See *United States v. Clarke*, 445 U.S. 253, 257 (1980) (landowners forced to bring an inverse condemnation lawsuit against the United States are "placed at a significant disadvantage" and must bear "the burden to…take affirmative action to recover just compensation"). See also *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 712 (1999) ("When the government takes property without initiating condemnation proceedings, it shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation.") (internal quotation omitted). As Judge Wolski explained during oral argument in *Campbell v. United States*, a South

Carolina Trails Act case, the Trails Act "basically enlists" owners' counsel as "private attorneys general." *Campbell v. United States*, No. 13-324L, Argument Tr., pp. 80-81 (March 17, 2017). Judge Wolski noted that landowners and their counsel's work on "even unsuccessful claims" was necessary to the successful claims because "the whole process of working through [title research] for a whole corridor is important to any of the property owners who ultimately prevail because unless somebody had undertaken that process for everyone, they wouldn't have undertaken it individually for anyone." *Id.* at 81. Thus, "in other words, because [trail conversion] was chosen by the Government to be accomplished by means other than direct condemnation, a lot of the sort of research costs by lawyers on behalf of unsuccessful claimants really is part of determining how successful claimants should be compensated." *Id.*

39. The federal government's taking of these owners' private property is a *per se* taking, for which the federal government has a "categorical" constitutional obligation to pay the owner. See, *supra*, ¶25. The federal government must pay these owners compensation when the Government takes private property. See *Preseault II*, 100 F.3d at 1531 ("we conclude that the taking that resulted from the establishment of the recreational trail is properly laid at the doorstep of the Federal Government."). As the Federal Circuit sitting *en banc* explained, but for the Board's invocation of the federal Trails Act imposing a new easement across their land. *Id*. These Humboldt, Trinity, and Mendocino County landowners would have enjoyed unencumbered title to their property and had the exclusive right to use and occupy their land and to exclude others from the land were it not for the Board's order invoking the federal Trails Act. See, *supra*, ¶24.

40. The Supreme Court has reminded lower courts that adherence to precedent and respect for the principle of *stare decisis* is of particular importance in cases, such as this one, that involve an owner's interests in his or her private property. See *Leo Sheep Co. v. United States*, 440 U.S. 668, 687-88 (1979) ("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."). In THE LAW OF JUDICIAL PRECEDENT, Bryan Garner and his co-authors, including then-circuit judges Neil Gorsuch, Brett Kavanaugh, William H. Pryor, Jr., and Jeffrey Sutton, instructed,

> The "rule-of-property doctrine…holds that stare decisis applies with 'peculiar force and strictness' to decisions governing real property…. Stability in rules governing property interests is particularly important because those rules create unusually strong reliance interests…. As the Supreme Court explained in a mid-19th-century case: 'Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change.'"[15]

41. In *Preseault I*, 494 U.S. at 8, the Supreme Court held that the language of 16 U.S.C. §1247(d) "gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests." See, *supra*, ¶26. Justices O'Connor, Scalia, and Kennedy concurred in *Preseault I* to emphasize that "[p]roperty interests...are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" 494 U.S. at 20 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

42. In *Preseault II* the Federal Circuit, sitting *en banc*, held the Takings Clause of the Fifth Amendment requires the federal government to pay landowners for the private property the federal government takes when the Board invokes section 8(d) of the Trails Act. See, *supra*, ¶26 (quoting *Preseault II*, 100 F.3d at 1531) ("[W]e conclude that the taking that resulted from the

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[15] *Id.* at 421-22 (quoting *Minnesota Mining Co. v. National Mining Co.*, 70 U.S. 332, 334 (1865)).

establishment of the recreational trail is properly laid at the doorstep of the Federal Government." See also *Toews*, 376 F.3d at 1376-77 ("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").[16] *Toews* was another California Trails Act taking case.

43. The Federal Circuit held the federal government's liability for a Trails Act taking turns upon three points:

> (1) [W]ho owns the strip of land involved, specifically, whether the railroad acquired only an easement or obtained a fee simple estate;
>
> (2) [I]f the railroad acquired only an easement, were the terms of the easement limited to use for railroad purposes, or did they include future use as a public recreational trail (scope of the easement); and
>
> (3) [E]ven if the grant of the railroad's easement was broad enough to encompass a recreational trail, had this easement terminated prior to the alleged taking so that the property owner at the time held a fee simple unencumbered by the easement (abandonment of the easement).[17]
>
> *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009) (citing and summarizing *Preseault II*, 100 F.3d at 1533).

44. The federal government is unquestionably obligated to pay the California landowners whose private property was taken for the Great Redwood Trail. The government is liable under the Federal Circuit's *Preseault II* and *Ellamae Phillips* three-point inquiry. This point

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[16] See, *infra*, ¶107.

[17] The third point in this inquiry (whether the easement was abandoned) only arises if the right-of-way easement originally granted the railroad included a right for a non-railroad to use the land for a public recreational trail. This third inquiry is not applicable here because Adrian Honoré's 1910 easement did not grant the public the right to use the strip of land for recreation and, even more, explicitly prohibited any use other than the operation of a railway.

is beyond cavil. The plaintiffs own the land that is now subject to and encumbered by the federal government's order invoking the Trails Act. As explained above, the railroad had an easement to operate a railway across the land and that easement terminated. Neither the Railroad Authority, nor any of its predecessor-railroads, ever acquired title to the fee estate in the strip of land across which the railway line was built. See, *supra*, ¶22 (quoting *East Alabama Railway*, 114 U.S. at 354). But the federal government wanted to take these owners' land for a public recreational trail and possible future railroad line. So, the federal government issued an order taking these owners' private property. The United States Constitution and federal law require the federal government to pay these owners for that private property the government took.

THE PARTIES

A. The landowners bringing this lawsuit own the land the Federal Government took.

45. The named individuals, families, and small businesses bringing this lawsuit are the present-day owners of sixteen properties in Mendocino, Trinity, and Humboldt counties, which property the federal government took for Great Redwood Trail. Each of these plaintiffs owned the fee estate in land which is now subject to and encumbered by the Board's October 24, 2022, order invoking section 8(d) of the Trails Act. The Board's invocation of the Trails Act "destroyed" and "effectively eliminated" these owners' private property.[18]

46. The federal government has not paid any of these owners compensation for that

[18] "It is settled law that a Fifth Amendment taking occurs in Rails-to-Trails cases when government action *destroys* state-defined property rights by converting a railway easement to a recreational trail, if trail use is outside the scope of the original railway easement." *Ladd I*, 630 F.3d at 1019 (citing *Ellamae Phillips*, 564 F.3d at 1373) (emphasis added). See also *Caldwell*, 391 F.3d at 1228 ("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") (citing *Preseault II*, 100 F.3d at 1543 (emphasis added).

property the federal government took. Furthermore, the federal government failed to comply with the statutory requirements of the URA, failed to provide these owners notice of the government's taking of their property, and has violated the Due Process requirement and the Takings Clause of the Fifth Amendment.

(1) John A. and Suzanne D. Agosta (The Agosta Family)

47. John A. and Suzanne D. Agosta (the Agosta Family) own land that is now encumbered by the federal rail-trail easement and subject to the Board's perpetual jurisdiction due to the Board's October order invoking section 8(d) of the Trails Act.

48. The Agosta Family owned this land on October 24, 2022. See **Exhibit 7** (Deed No. 1989-15293 and the Humboldt County 2022-2023 Property Tax Bill). The Agosta Family property includes the land now subject to an easement for public recreation and railbanking the federal government established. This federal rail-trail easement requires the Agosta Family to allow strangers, the general public, and a future railroad to use their land.

49. The government has not paid (nor offered to pay) the Agosta Family for that property the government took from the Agosta Family. The government has not complied with the requirements of the URA or the Fifth Amendment.

(2) John E. and Julia P. Beach, Jerry Beach, Matthew and Elizabeth McHale and Robyn Reed (The Beach, McHale and Reed Family)

50. John E. and Julia P. Beach, Jerry Beach, Matthew and Elizabeth McHale and Robyn Reed (the Beach, McHale and Reed Family) own land that is now encumbered by the federal rail-trail easement and subject to the Board's perpetual jurisdiction due to the Board's October order invoking section 8(d) of the Trails Act.

51. The Beach, McHale, and Reed Family owned this land on October 24, 2022. See **Exhibit 8** (Deed No. 1999-28446-2, Deed 1999-28449-3 and the Humboldt County 2022-2023

Property Tax Bill). The Beach, McHale, and Reed Family property includes the land now subject to an easement for public recreation and railbanking the federal government established. This federal rail-trail easement requires the Beach, McHale, and Reed Family to allow strangers, the general public, and a future railroad to use their land.

52. The government has not paid (nor offered to pay) the Beach, McHale, and Reed Family for that property the government took from the Beach, McHale, and Reed Family. The government has not complied with the requirements of the URA or the Fifth Amendment.

(3) Ben and Jamie Cohoon (The Cohoon Family)

53. Ben and Jamie Cohoon (the Cohoon Family) own land that is now encumbered by the federal rail-trail easement and subject to the Board's perpetual jurisdiction due to the Board's October order invoking section 8(d) of the Trails Act.

54. The Cohoon Family owned this land on October 24, 2022. See **Exhibit 9** (Humboldt County 2022-2023 Property Tax Bill). The Cohoon Family property includes the land now subject to an easement for public recreation and railbanking the federal government established. This federal rail-trail easement requires the Cohoon Family to allow strangers, the general public, and a future railroad to use their land.

55. The government has not paid (nor offered to pay) the Cohoon Family for that property the government took from the Cohoon Family. The government has not complied with the requirements of the URA or the Fifth Amendment.

(4) Diane Colyear Reade, as Trustee of Diane Colyear Reade Family Trust, dated November 4, 1991 (Colyear Reade)

56. Diane Colyear Reade (Colyear Reade) owns land that is now encumbered by the federal rail-trail easement and subject to the Board's perpetual jurisdiction due to the Board's October order invoking section 8(d) of the Trails Act.

57. Colyear Reade owned this land on October 24, 2022. See **Exhibit 10** (Deed Book 1957, Page 301 and the Mendocino County 2022 Secured Property Tax Bill). The Colyear Reade property includes the land now subject to an easement for public recreation and railbanking the federal government established. This federal rail-trail easement requires Colyear Reade to allow strangers, the general public, and a future railroad to use their land.

58. The government has not paid (nor offered to pay) Colyear Reade for that property the government took from Colyear Reade. The government has not complied with the requirements of the URA or the Fifth Amendment.

(5) Robert M. Davis and Kirk Allen Pelarde (The Davis-Pelarde Family)

59. Robert M. Davis and Kirk Allen Pelarde (the Davis-Pelarde Family) own land that is now encumbered by the federal rail-trail easement and subject to the Board's perpetual jurisdiction due to the Board's October order invoking section 8(d) of the Trails Act.

60. The Davis-Pelarde Family owned this land on October 24, 2022. See **Exhibit 11** (Deed Book 2019, Page 06853 and the Mendocino County Secured Property Tax Bill). The Davis-Pelarde Family property includes the land now subject to an easement for public recreation and railbanking the federal government established. This federal rail-trail easement requires the Davis-Pelarde Family to allow strangers, the general public, and a future railroad to use their land.

61. The government has not paid (nor offered to pay) the Davis-Pelarde Family for that property the government took from the Davis-Pelarde Family. The government has not complied with the requirements of the URA or the Fifth Amendment.

(6) Shirley L. Hinds (Hinds)

62. Shirley L. Hinds (Hinds) owns land that is now encumbered by the federal rail-trail easement and subject to the Board's perpetual jurisdiction due to the Board's October order invoking section 8(d) of the Trails Act.

63. Hinds owned this land on October 24, 2022. See **Exhibit 12** (Deed No. 2013-011486-2 and the Humboldt County 2022-2023 Property Tax Bill). The Hinds property includes the land now subject to an easement for public recreation and railbanking the federal government established. This federal rail-trail easement requires Hinds to allow strangers, the general public, and a future railroad to use her land.

64. The government has not paid (nor offered to pay) Hinds for that property the government took from her. The government has not complied with the requirements of the URA or the Fifth Amendment.

(7) Donald A. and Annette K. Lozensky, Trustees (The Lozensky Family)

65. Donald A. and Annette K. Lozensky, Trustees (the Lozensky Family), own land that is now encumbered by the federal rail-trail easement and subject to the Board's perpetual jurisdiction due to the Board's October order invoking section 8(d) of the Trails Act.

66. The Lozensky Family owned this land on October 24, 2022. See **Exhibit 13** (Deed Vol. 1732, Page 251 and the Humboldt County 2022-2023 Property Tax Bill). The Lozensky Family property includes the land now subject to an easement for public recreation and railbanking the federal government established. This federal rail-trail easement requires the Lozensky Family to allow strangers, the general public, and a future railroad to use their land.

67. The government has not paid (nor offered to pay) the Lozensky Family for that property the government took from the Lozensky Family. The government has not complied with the requirements of the URA or the Fifth Amendment.

(8) Barbara A. McCulloch (McCulloch)

68. Barbara A. McCulloch (McCulloch) owns land that is now encumbered by the federal rail-trail easement and subject to the Board's perpetual jurisdiction due to the Board's October order invoking section 8(d) of the Trails Act.

69. McCulloch owned this land on October 24, 2022. See **Exhibit 14** (Affidavit Book 2013, Page 14372, Death Certificate of James Edward McCulloch and the Mendocino County 2022 Secured Property Tax Bill). The McCulloch property includes the land now subject to an easement for public recreation and railbanking the federal government established. This federal rail-trail easement requires McCulloch to allow strangers, the general public, and a future railroad to use her land.

70. The government has not paid (nor offered to pay) McCulloch for that property the government took from her. The government has not complied with the requirements of the URA or the Fifth Amendment.

(9) Gene C. and Dorothy L. Roediger as Trustees of the Roediger Family Trust dated May 12, 2004 (The Roediger Family)

71. Gene C. and Dorothy L. Roediger (the Roediger Family) own land that is now encumbered by the federal rail-trail easement and subject to the Board's perpetual jurisdiction due to the Board's October order invoking section 8(d) of the Trails Act.

72. The Roediger Family owned this land on October 24, 2022. See **Exhibit 15** (Deed Book 2022, Page 02393, Deed Book 2004, Page 14745 and the Mendocino County 2022 Secured Property Tax Bill). The Roediger Family property includes the land now subject to an easement for public recreation and railbanking the federal government established. This federal rail-trail easement requires the Roediger Family to allow strangers, the general public, and a future railroad to use their land.

73. The government has not paid (nor offered to pay) the Roediger Family for that property the government took from the Roediger Family. The government has not complied with the requirements of the URA or the Fifth Amendment.

(10) Freeman D. and Pamela K. Rutledge as Trustees of the Rutledge Family 2020 Trust dated November 13, 2020 (Rutledge)

74. Freeman D. and Pamela K. Rutledge (the Rutledge Family) own land that is now encumbered by the federal rail-trail easement and subject to the Board's perpetual jurisdiction due to the Board's October order invoking section 8(d) of the Trails Act.

75. The Rutledge Family owned this land on October 24, 2022. See **Exhibit 16** (Deed Book 2021, Page 06482 and the Mendocino County 2022 Secured Property tax record). The Rutledge Family property includes the land now subject to an easement for public recreation and railbanking the federal government established. This federal rail-trail easement requires the Rutledge Family to allow strangers, the general public, and a future railroad to use their land.

76. The government has not paid (nor offered to pay) the Rutledge Family for that property the government took from the Rutledge Family. The government has not complied with the requirements of the URA or the Fifth Amendment.

(11) Michael J. Sanders (Sanders)

77. Michael J. Sanders (Sanders) owns land that is now encumbered by the federal rail-trail easement and subject to the Board's perpetual jurisdiction due to the Board's October order invoking section 8(d) of the Trails Act.

78. Sanders owned this land on October 24, 2022. See **Exhibit 17** (Deed Book 2013, Page 04406 and the Mendocino County 2022 Secured Property Tax Bill). The Sanders property includes the land now subject to an easement for public recreation and railbanking the federal government established. This federal rail-trail easement requires Sanders to allow strangers, the general public, and a future railroad to use his land.

79. The government has not paid (nor offered to pay) Sanders for that property the government took from him. The government has not complied with the requirements of the URA

or the Fifth Amendment.

(12) Edward J. and Erlyne Schmidbauer, as Trustees of the Edward and Erlyne Schmidbauer Trust Dated March 25, 1998 (The Schmidbauer Family)

80. Edward J. and Erlyne Schmidbauer (the Schmidbauer Family) own land that is now encumbered by the federal rail-trail easement and subject to the Board's perpetual jurisdiction due to the Board's October order invoking section 8(d) of the Trails Act.

81. The Schmidbauer Family owned this land on October 24, 2022. See **Exhibit 18** (Deed Book 2491, Page 539 and the Mendocino County 2022 Secured Property Tax Bill). The Schmidbauer Family property includes the land now subject to an easement for public recreation and railbanking the federal government established. This federal rail-trail easement requires the Schmidbauer Family to allow strangers, the general public, and a future railroad to use their land.

82. The government has not paid (nor offered to pay) the Schmidbauer Family for that property the government took from the Schmidbauer Family. The government has not complied with the requirements of the URA or the Fifth Amendment.

(13) Melanie Ulvila (Ulvila)

83. Melanie Ulvila (Ulvila) owns land that is now encumbered by the federal rail-trail easement and subject to the Board's perpetual jurisdiction due to the Board's October order invoking section 8(d) of the Trails Act.

84. Ulvila owned this land on October 24, 2022. See **Exhibit 19** (Deed Book 2021, Page 16283 and the Mendocino County 2022 Secured Property Tax Bill). The Ulvila property includes the land now subject to an easement for public recreation and railbanking the federal government established. This federal rail-trail easement requires Ulvila to allow strangers, the general public, and a future railroad to use her land.

85. The government has not paid (nor offered to pay) Ulvila for that property the

government took from her. The government has not complied with the requirements of the URA or the Fifth Amendment.

(14) Paul O. Webb (Webb)

86. Paul O. Webb (Webb) owns land that is now encumbered by the federal rail-trail easement and subject to the Board's perpetual jurisdiction due to the Board's October order invoking section 8(d) of the Trails Act.

87. Webb owned this land on October 24, 2022. The Webb property includes the land now subject to an easement for public recreation and railbanking the federal government established. This federal rail-trail easement requires Webb to allow strangers, the general public, and a future railroad to use his land.

88. The government has not paid (nor offered to pay) Webb for that property the government took from him. The government has not complied with the requirements of the URA or the Fifth Amendment.

(15) Bryan Wheeless

89. Bryan Wheeless (Wheeless) owns land that is now encumbered by the federal rail-trail easement and subject to the Board's perpetual jurisdiction due to the Board's October order invoking section 8(d) of the Trails Act.

90. Wheeless owned this land on October 24, 2022. See **Exhibit 20** (Mendocino County 2022 Secured Property Tax Bills). The Wheeless property includes the land now subject to an easement for public recreation and railbanking the federal government established. This federal rail-trail easement requires Wheeless to allow strangers, the general public, and a future railroad to use his land.

91. The government has not paid (nor offered to pay) Wheeless for that property the government took from him. The government has not complied with the requirements of the URA

or the Fifth Amendment.

(16) Forrest C. and Patricia A. Willis (the Willis Family)

92. Forrest C. and Patricia A. Willis (the Willis Family) own land that is now encumbered by the federal rail-trail easement and subject to the Board's perpetual jurisdiction due to the Board's October order invoking section 8(d) of the Trails Act.

93. The Willis Family owned this land on October 24, 2022. See **Exhibit 21** (Deed Vol. 1606, Page 637, Deed Vol. 1733, Page 801, Deed Vol. 1799, Page 494, Deed Vol 1839, Page 472 and the Humboldt County 2022-2023 Property Tax Bill). The Willis Family property includes the land now subject to an easement for public recreation and railbanking the federal government established. This federal rail-trail easement requires the Willis Family to allow strangers, the general public, and a future railroad to use their land.

94. The government has not paid (nor offered to pay) the Willis Family for that property the government took from the Willis Family. The government has not complied with the requirements of the URA or the Fifth Amendment.

B. The federal government is the Defendant.

95. The United States of America is the Defendant. The federal Surface Transportation Board (the Board) is an agency of the federal government and is the successor to the Interstate Commerce Commission (ICC).[19] The federal government took these California owners' private property and did not pay these owners that "just compensation" the Takings Clause of the Fifth Amendment requires the government to pay owners when the government takes private property.

[19] See I.C.C. Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803.

96. More specifically, the federal government violated these owners' constitutional rights to just compensation and due process when, on October 24, 2022, the Board issued an order invoking section 8(d) of the Trails Act, taking these owners' land for a public rail corridor without paying the owners "just compensation." The federal government further violated these landowners' constitutional due process rights by failing to comply with the URA.

97. The Supreme Court held that the federal government's invocation of the Trails Act is a taking of private property for which the Constitution requires the government to pay the landowner "just compensation." See *Preseault I*, 494 U.S. at 8. The Federal Circuit, sitting *en banc*, explained that Trails Act takings were the responsibility of the federal government, stating, "we conclude that the taking that resulted from the establishment of the recreational trail is properly laid at the doorstep of the Federal Government. … The Federal Government authorized and controlled the behavior of the State [here the Railroad Authority] in this matter, and the consequences properly fall there." *Preseault II*, 100 F.3d at 1531.

98. Congress adopted the URA to provide a statutory requirement that when the government takes private property (or authorizes another agency to take private property by eminent domain authority), the federal government must make the owner whole, which includes reimbursing the owner's legal fees and litigation expenses and paying the owner interest for the government's delay in paying the owner compensation. See *Seaboard Air Line Railway*, 261 U.S. at 304 ("The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. He

is entitled to the damages inflicted by the taking.").[20]

99. The URA requires the federal Surface Transportation Board, as a "displacing agency," make owners whose property is taken under the federal programs whole and comply with the laws governing federal acquisition of private property. The Board failed to comply with these laws.[21]

COUNT I

An action for "Just Compensation" under the Takings Clause of the Fifth Amendment to the United States Constitution

100. The federal government took these California owners' private property. The Just Compensation Clause of the Fifth Amendment of our Constitution requires the federal government to pay these owners just compensation when the government took their private property. See U.S. Const., Amend. V ("No person shall be…deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

101. Congress amended the Trails Act in 1983 for the explicit purpose of authorizing the federal government, by order of the Interstate Commerce Commission (now the Surface Transportation Board) to take an owner's land and encumber the owner's land with a federal rail-trail corridor easement under the Board's perpetual jurisdiction and authority. Congress intended section 8(d), when invoked, to encumber the owner's private property with a rail-trail corridor easement allowing strangers to use the owner's land for a public recreational corridor and to allow the federal government to authorize a railroad to build a railway line across the owner's land in the future. The Board's order invoking the Trails Act subjected these owners' land to the Board's

[20] Citations omitted. See also *Monongahela*, 148 U.S. at 327, and *Miller*, 317 U.S. at 373.

[21] See Count II, *infra*, for a summary of the relevant provision of the URA.

perpetual jurisdiction over these owners' private property.[22] The federal government took these owners' right to their land, and these owners lost their right under California state law to exclude others from their land. The federal government took these owners' state law property rights in their land when the Board issued an order invoking the Trails Act on October 24, 2022. The federal government's taking of these owners' private property could be an episode in the popular *Yellowstone* series with Kevin Costner.

102. In *Preseault I*, the Supreme Court found that, by exercising the federal government's eminent domain power, the Interstate Commerce Commission (now the Board) could, in fact, extinguish and destroy an owner's state-law property interests and take private property for public recreation and so-called "railbanking." 494 U.S. at 8. But the Supreme Court held that, when the Federal Government does so, it is a taking of private property for which the government must pay the owner "just compensation." *Id.* The Federal Circuit held that the Board's invocation of the Trails Act "destroys" and "essentially eliminates" the owner's state law rights to the land subject to the Board's order.[23] The Board's October 24, 2022, order invoking section 8(d) is the cause of, and reason why, these California landowners lost their state-law rights

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[22] See *Preseault I*, 494 U.S. at 8, and *Trevarton v. South Dakota*, 817 F.3d 1081, 1087 (8th Cir. 2016) (holding the invocation of section 8(d) imposes a new and different easement upon the owner's land). See also *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1149 (D.C. Cir. 2001). and *Nat'l Wildlife Found. v. Interstate Commerce Comm'n*, 850 F.2d 694, 697-98 (D.C. Cir. 1988) (explaining that Congress intended to extinguish owners' state-law property rights).

[23] "It is settled law that a Fifth Amendment taking occurs in Rails-to-Trails cases when government action *destroys* state-defined property rights by converting a railway easement to a recreational trail, if trail use is outside the scope of the original railway easement." *Ladd I*, 630 F.3d at 1019 (citing *Ellamae Phillips*, 564 F.3d at 1373) (emphasis added). See also *Caldwell*, 391 F.3d at 1228 ("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") (citing *Preseault II*, 100 F.3d at 1543) (emphasis added).

to the possession and use of their land, and it is why these owners cannot exclude strangers from their land. See *Caldwell*, 391 F.3d at 1228; *Barclay*, 443 F.3d at 1373; *Illig*, 274 Fed. App'x at 883. See also Solicitor General Kagan's Brief for the United States in Opposition to Petition of Writ of Certiorari, *Illig v. United States*, 2009 WL 1526939, *supra*, ¶34. In *Barclay*, the Federal Circuit held that an owner's right to compensation arises when the Board *first issues* its order invoking section 8(d). Judge Dyk of the Federal Circuit wrote:

> 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 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.

Barclay, 443 F.3d at 1373.[24]

In *Knick*, 139 S.Ct. at 2170, the Supreme Court declared, "because a taking without compensation violates the self-executing Fifth Amendment *at the time of the taking*, the property owner can bring a federal suit at that time." The Supreme Court continued and held that it has "long recognized that property owners may bring Fifth Amendment claims…as soon as their property has been taken." *Id*. at 2172 (emphasis added).

103. The federal government's taking of private property for the Great Redwood Trail took the entire value of that strip of land physically encumbered by the easement and greatly

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[24] See also *Ladd I*, 630 F.3d at 1020; *Ladd II*, 713 F.3d at 652. While the government's lability for a Fifth Amendment taking arises when the Board first issues an order invoking section 8(d) of the Trails Act, the six-year statute of limitations under 28 U.S.C. §2415 does not begin to un until the owner has actual notice of the Board's order. See *Ladd II*, 713 F.3d at 653.

damaged and reduced the value of each owner's remaining property that cannot now be developed or used in a manner that allows the owner to realize the property's highest and best value. It also damaged these owners' property by allowing strangers to use and trespass upon each owner's land and, among other things, requires the owner to incur significant expense to mitigate the damages the federal government's new easement inflicted upon each owner's land. See, *e.g.*, *Childers v. United States*, 116 Fed. Cl. 486, 524, 541, 580, 582, 588 (2014) (plaintiffs entitled to recover compensation of 99% of the fee interest value for the strip of land physically encumbered by a rail-trail corridor easement); *McCann Holdings v. United States*, 111 Fed. Cl. 608, 626 (2013) ("the parties agree that the Government took 99% of the value of the land underlying the corridor"). See also *Jackson v. United States*, 155 Fed. Cl. 689, 702 (2021) ("In Rails-to-Trails cases, the Court has consistently held that the owners of land subject to a trail easement retain virtually no rights in the encumbered land and awarded the plaintiffs the fee simple value of the encumbered parcel.") (citing, *inter alia*, *Childers*, 116 Fed. Cl. at 524, and *McCann Holdings*, 111 Fed. Cl. at 626).

104. In addition to paying each owner "just compensation" for the value of the strip of land physically encumbered by the government's new public rail-trail corridor easement, the government must pay each owner for the diminution in value to each owner's remaining property that now adjoins this federal rail-trail corridor easement. *Jackson*, 155 Fed. Cl. at 694 ("In addition to the value of the property actually taken, just compensation also includes severance damages, which is the diminution in value in the owner's remaining property resulting from the taking.") (citing *Hendler v. United States*, 175 F.3d 1374, 1383 (Fed. Cir. 1999) ("[J]ust compensation under the takings clause of the Constitution includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking.") (internal quotation omitted); *United States v. Grizzard*, 219 U.S. 180, 183 (1911) ("When the part not taken is left in

such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account."); *Childers*, 116 Fed. Cl. at 497; *Miller v. United States*, 223 Ct. Cl. 352, 383-84 (1980)). Furthermore, the government's "Yellow Book states that the United States must include severance damages in just compensation." *Id.* (quoting the Yellow Book, which provides, "Plaintiff has the burden of proof with respect to severance damages and must offer evidence that the remainder lost market value.").

105. The Supreme Court held the Trails Act

> gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests. While the terms of these easements and applicable state law vary, frequently the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations. State law generally governs the disposition of reversionary interests....

Preseault I, 494 U.S. at 8. See, *supra*, ¶¶26.

The Supreme Court held the federal government's exercise of this power to take owners' private property was only constitutional because the federal government must also justly compensate the owner for that property the government took. In other words, the constitutionality of the Trails Act was predicated upon the absolute obligation of the federal government to fully compensate the owner whose property was taken for the federal rail-trail corridor. See, *supra*, ¶33, and *Preseault I*, 494 U.S. at 17.

106. The Federal Circuit followed *Preseault I*, and sitting *en banc*, ruled that,

> if [an owner has] interests under state property law that have traditionally been recognized and protected from governmental expropriation, and if, over their objection, the Government chooses to occupy or otherwise acquire those interests, the Fifth Amendment compels compensation. … The taking of possession of the lands owned by the [owner] for use as a public trail was in effect a taking of a new easement for that new use, for which the landowners are entitled to compensation. … [This is] a new easement for the new use, constituting a physical taking of the right of exclusive possession that belonged to the [landowner].

Preseault II, 100 F.3d at 1550.

Judge Rader further explained,

> while federal legislation may alter the terms of the [a landowner's] property rights defined and created by state law, it cannot do so without giving just compensation. The Federal Government has the power to enact legislation that affects the [owner's] right to freely use or possess land. But the Government cannot use this power for uncompensated, piecemeal usurpation of the rights of property owners, such that with each transfer of the property the purchaser loses sticks within the original bundle of rights yet remains without Constitutional recourse. Simply, when the Federal Government intrudes upon a property owner's right of use or possession of property, the Federal Government must pay just compensation.

Id. at 1553.

The Federal Circuit further held:

> [W]e conclude that the taking that resulted from the establishment of the recreational trail is properly laid at the doorstep of the Federal Government. … In the case before us there was a similar physical entry upon the private lands of the [property owners], acting under the Federal Government's authority pursuant to the ICC's [now STB's] Order. That it was for a valued public use is 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 1531.

107. In *Ellamae Phillips*, 564 F.3d at 1373, a panel of the Federal Circuit summarized the Federal Circuit's *en banc* holding in *Preseault II*, noting that the federal government's liability in Trails Act taking cases turns upon three questions:

> (1) [W]ho owns the strip of land involved, specifically, whether the railroad acquired only an easement or obtained a fee simple estate;
>
> (2) [I]f the railroad acquired only an easement, were the terms of the easement limited to use for railroad purposes, or did they include future use as a public recreational trail (scope of the easement); and
>
> (3) [E]ven if the grant of the railroad's easement was broad enough to encompass a recreational trail, had this easement terminated prior to the alleged taking so that the property owner at the time held a fee simple unencumbered by the easement

(abandonment of the easement).[25]

108. The Fifth Amendment's Just Compensation Clause requires the federal government to pay the owner promptly when the government takes private property. While the government may take private property without paying the owner before or at the moment the government takes the owner's property, the government must promptly pay the owner. In *Bragg v. Weaver*, the Supreme Court stated, "where adequate provision is made for the certain payment of the compensation *without unreasonable delay* the taking does not contravene due process of law in the sense of the Fourteenth Amendment merely because it precedes the ascertainment of what compensation is just." 251 U.S. 57, 62 (1919) (emphasis added). Likewise, in *Joslin Mfg. Co. v. City of Providence*, the Court explained, "the taking of property for public use...need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when the public faith and credit are pledged to a *reasonably prompt* ascertainment and payment, and there is adequate provision for enforcing the pledge." 262 U.S. 668, 677 (1923) (citing *Sweet v. Rechel*, 159 U.S. 380, 400, 404, 407 (1895)) (emphasis added).

109. The North Coast Railroad Authority (Railroad Authority) and its predecessor-railroads, including the Southern Pacific, Santa Fe, and the Northwestern Pacific Railroad, did not own the land across which the railway line was built. The Railroad Authority and its predecessor-railroads only held a limited easement to use the strip of land for the operation of a railway line granted for the purpose of transporting lumber from California's northern timber forests to Humboldt Bay, San Francisco, and the national market. See, *supra*, ¶24.

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[25] See, *supra*, ¶43. This third inquiry only arises if the original easement granted the right to use the land for public recreation.

110. The present-day California landowners bringing this lawsuit are entitled to just compensation under the Supreme Court's and Federal Circuit's Trails Act jurisprudence because: 1) the plaintiffs own the land and hold title to that land across, which the railroad held only an easement; 2) the railroads' interest was limited to a right to operate a railway line across the strip of land, and the railroad did not have any right to sell or transfer the land to a non-railroad for public recreation or railbanking;[26] and 3) the railroads' interest in the right-of-way easement terminated when the railroad no longer operated a railway across the strip of land and the Railroad Authority petitioned the Board to abandon the railway line. See, *supra*, ¶24.

111. An easement for the operation of a railroad is entirely different than an easement for public recreation. The Federal Circuit explained this fundamental point when it held:

> It is elementary law that if the Government uses (or authorizes the use of — a point to be considered later) 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. The consent of the railroad to the new use does not change the equation — the railroad cannot give what it does not have. And 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. The different uses create different burdens. In the one case there was an occasional train passing through (no depots or turntables or other appurtenances are involved on these rights of way). In the other, individuals or groups use the property, some passing along the trail, others pausing to engage in activities for short or long periods of time. In the one case, the landowner could make such uses of the property as were not inconsistent with the railroad's use, crossing over the tracks, putting a fruit stand on one edge of the property, or whatever. In the other, the government fenced the trail in such a way as to deny that access.
>
> Some might think it better to have people strolling on one's property than to have a freight train rumbling through. But that is not the point. The landowner's grant authorized one set of uses, not the other. Under the law, it is the landowner's

[26] See *East Alabama Railway*, 114 U.S. at 354 ("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."), *supra*, ¶22.

> intention as expressed in the grant that defines the burden to which the land will be subject. The Government does not dispute this proposition — the Government agrees that, consistent with the state's law, the landowner's grant defines the burden with which the land is burdened.

Toews, 376 F.3d at 1376-77.[27]

112. Had the federal Surface Transportation Board not issued an order invoking section 8(d) of the Trails Act, these California landowners would have held and enjoyed unencumbered title to their land, would have enjoyed the exclusive right to use and possess their land free of any easements or encumbrances for public recreation or a railroad and these owners could exclude strangers from using the land they own.

113. The government's liability for a Fifth Amendment taking is defined by what the owner lost, not what the taker gained. Justice Holmes explained in *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910) ("And the question is, What has the owner lost? Not, What has the taker gained?"). See also *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 321-22 (1987) ("a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change") (quoting *Pennsylvania Coal*, 260 U.S. at 416). Justice Brennan dissented in *San Diego Gas & Electric v. San Diego*, 450 U.S. 621, 654 (1981), explaining that the Fifth Amendment guarantee of just compensation is self-executing:

> As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has already suffered a constitutional violation, and the self-executing character of the constitutional provision with respect to compensation is triggered. This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a "taking" compensation must be

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[27] See, *supra*, ¶25 (citing and quoting *Brandt Trust*, 572 U.S. at 105; *Cowpasture*, 140 S.Ct. at 1845; Ely, RAILROADS & AMERICAN LAW, pp. 197-98; RESTATEMENT (THIRD) PROPERTY: SERVITUDES §2.2, Comment g).

awarded.

Although Justice Brennan's view in *San Diego Gas* was stated in dissent, this Court later recognized its wisdom, expressly adopting it in *First English*, 482 U.S. at 315. As this Court explained in *Knick*,

> In holding that a property owner acquires an irrevocable right to just compensation immediately upon a taking, *First English* adopted a position Justice Brennan had taken in an earlier dissent. In that opinion, Justice Brennan explained that "once there is a 'taking,' compensation *must* be awarded" because "[a]s soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation."
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> 139 S.Ct. at 2172 (emphasis in original).

114. The Federal Circuit and the Supreme Court hold the Board's invocation of the Trails Act is the federal government action that takes an owner's state-law right to the owner's land. In *Ladd I*, 630 F.3d at 1024-25, the Federal Circuit held:

> Hence it is irrelevant that no trail use agreement has been reached and that no recreational trail has been established. …"a taking occurs when the owner is deprived of use of the property...by blocking the easement reversion. While the taking may be abandoned...by the termination of the NITU[,] the accrual date of a single taking remains fixed." *Caldwell*, 391 F.3d at 1235. We further explained: "The NITU marks the 'finite start' to either temporary or permanent takings claims by halting abandonment and the vesting of state law reversionary interests when issued." *Id.* Thus, the NITU forestalls or forecloses the landowners' right to unencumbered possession of the property. *Cf. Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831, (1987) ("To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather...'a mere restriction on its use,' is to use words in a manner that deprives them of all their ordinary meaning.").[28]

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[28] Internal citations omitted. See also *Navajo Nation v. United States*, 631 F.3d 1268, 1275 (2011), in which the Federal Circuit affirmed its holding in *Ladd I* as "explaining that a takings claim accrues when the government takes action which deprives landowners of 'possession of their property unencumbered by [an] easement,' regardless of whether third parties ever take physical possession of that easement" and its holding in *Caldwell* as "concluding that any taking occurred when the government took action preventing landowners' state law reversionary interests in a

115. That this land was taken from these owners for a public amenity such as a public recreational trail (here the Great Redwood Trail) and a possible future railroad corridor does not mitigate the Federal Government's constitutional obligation to justly pay these owners. Justice Holmes cautioned, "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal*, 260 U.S. at 415. Justice Black similarly wrote, "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). See also *Monongahela*, 148 U.S. at 324-25 ("the right to compensation is an incident to the exercise of that power [of eminent domain]; that the one is so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle").[29] In *Seaboard*, 261 U.S. at 304, the United States Supreme Court held,

> "The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. He is entitled to the damages inflicted by the taking."[30]

116. The federal government must compensate each of these named plaintiff-landowners and all other owners of land taken for this more than 175-mile-long corridor for the

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railroad right-of-way from vesting, not when subsequent actions by third parties caused the right-of-way to be converted to an interim trail for recreational use."

[29] Citing, *inter alia*, *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 178 (1871).

[30] Citing *Monongahela*, 148 U.S. at 327.

government's delay in paying the owner for the property on October 24 when the Board issued its order taking each of these owners' private property. This compensation the government owes each owner is the fair market value of the property the government took on the date the Board issued the order taking the owners' property and the owner's loss of use of the money the government should have paid each owner on October 24 when the government took these owners' property.

COUNT II

An action for that compensation and reimbursement of expenses the federal government owes these owners because the government failed to comply with the Uniform Relocation Assistance Act and denied these owners' constitutional right to due process

117. The URA requires the federal government to reimburse the owners of private property for all of the "reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred because of [the] proceeding." 42 U.S.C. §4654(c).

118. Congress adopted the URA to "ensure that [displaced] persons shall not suffer disproportionate injuries as a result of programs and projects designed for the benefit of the public as a whole and to minimize the hardship of displacement on such persons." 42 U.S.C. §4621(b). "It is the intent of Congress that…uniform procedures for the administration of relocation assistance shall, to the maximum extent feasible, assure that the unique circumstances of any displaced person are taken into account and that persons in essentially similar circumstances are accorded equal treatment under this chapter." *Id*. §4621(c)(2). Senator Edmund Muskie, Chairman of the Senate Committee on Government Operations, opened hearings on the URA, stating:

> In my opinion, this is as high priority a measure as stands before the Senate today. There are more than 50 federal programs which result in the condemning of land and, literally, the bulldozing of hundreds of thousands of people from their homes

> and businesses each year. A large number of these people are low-income families. They are the elderly. They are small farmers and small businessmen. Most of their entire lives and economic wellbeing have centered around the property or neighborhoods which are being uprooted. We know what we are doing to these people, but what are we doing for them? ….
>
> The supreme irony of this is the fact that these were problems caused by federal programs where federal taxpayer money was involved. ….
>
> The uprooting of an individual, his family, his business or farm, and the taking of his land is a very personal matter. We cannot make the process painless, but we can insure fair and even-handed administration, consistent with protection of individual rights and community needs, no matter what agency is involved.[31]

119. The congressional intent to fully compensate landowners, including any expenses the owner incurs in holding the federal government responsible to honor the Fifth Amendment remains the intent of Congress. Members of Congress have reaffirmed the federal government's obligation to pay owners for property the federal government takes. See *Miscellaneous National Parks Legislation: Hearing Before the Subcomm. on National Parks of the S. Comm. on Energy and Natural Resources*, 110th Cong. 29 (2008) (statement of Sen. Richard Burr, Member, Subcomm. on National Parks).[32]

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[31] S. Rep. 91-488, 91st Cong., 1st Sess. 1969, pp. 6-8.

[32] Senator Burr stated:

> Mr. Chairman, my last statement is not a question, but it is a statement. I understand it's appropriate for the Park Service to come here and say that the issue of rails to trails and the clarification that's needed is not a National Parks Service issue. I can appreciate that.
>
> I hope you would take back to the individuals at the Justice Department that made this determination, that I take very seriously of takings [*sic*.]. I think that when somebody's land is taken there has to be compensation for that. I'm not an expert on what statute of limitations we've got currently or what triggers the clock starting.
>
> I have always found regardless of what I look at, the Federal Government's clock usually starts well before people on the other side. It's only because we get to interpret. They have to guess.

120. Section 4601 of the URA provides,

> (1) The term "Federal agency" means any department, agency, or instrumentality in the executive branch of the Government, any wholly owned Government corporation, the Architect of the Capitol, the Federal Reserve banks, and branches thereof, and any person who has the authority to acquire property by eminent domain under Federal law. ...
>
> (5) The term "person" means any individual, partnership, corporation, or association.
>
> (6)(A) The term "displaced person" means...
>
> (i) any person who moves from real property, or moves his personal property from real property —
>
> > (I) as a direct result of a written notice of intent to acquire or the acquisition of such real property in whole or in part for a program or project undertaken by a Federal agency or with Federal financial assistance; or
> >
> > (II) on which such person is a residential tenant or conducts a small business, a farm operation, or a business defined in paragraph (7)(D), as a direct result of rehabilitation, demolition, or such other displacing activity as the lead agency may prescribe, under a program or project undertaken by a Federal agency or with Federal financial assistance in any case in which the head of the displacing agency determines that such displacement is permanent.

121. The Surface Transportation Board is a "Federal agency" subject to the URA. The owners bringing this action are "displaced persons" subject to the URA. The Board's 2022 order invoking section 8(d) of the Trails Act is an order that took these owners' state-law property interest and displaced these owners from their property used for their homes and businesses.

> I truly believe that we have people that were engaged in what they thought was an honest negotiation. If for some reason we found a technical reason to run the clock out and now the position of the Justice [Department] is oops, so sorry. You missed out on compensation. That's not the American way.
>
> So, you might send a message to the Justice Department. I would advise finding a way to settle this. If not legislatively, we will accommodate the needs of those property owners that have not been compensated.

122. Section 4651 of the URA provides,

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices, heads of Federal agencies shall, to the greatest extent practicable, be guided by the following policies:

(1) The head of a Federal agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

(2) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property, except that the head of the lead agency may prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value.

(3) Before the initiation of negotiations for real property, the head of the Federal agency concerned shall establish an amount which he believes to be just compensation therefor and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the agency's approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. The head of the Federal agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

(4) No owner shall be required to surrender possession of real property before the head of the Federal agency concerned pays the agreed purchase price, or deposits with the court in accordance with section 3114(a) to (d) of title 40, for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.

(5) The construction or development of a public improvement shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling as required by subchapter II will be available), or to move his business or farm operation, without at least ninety days' written notice from the head of

the Federal agency concerned, of the date by which such move is required.

(6) If the head of a Federal agency permits an owner or tenant to occupy the real property acquired on a rental basis for a short term or for a period subject to termination by the Government on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

(7) In no event shall the head of a Federal agency either advance the time of condemnation or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.

(8) If any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(9) If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire that remnant. For the purposes of this chapter, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property and which the head of the Federal agency concerned has determined has little or no value or utility to the owner.

123. The Trails Act is a federal program intended to acquire property to create public recreational trails and encumber land with easements for future railway lines. See *Preseault I*, 494 U.S. at 17-18 ("First, Congress intended to 'encourage the development of additional trails' and to 'assist recreation[al] users by providing opportunities for trail use on an interim basis.' Second, Congress intended '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.'") (internal citations omitted).

124. At the time the Board issued its order invoking the Trails Act, the Board *knew* it was taking private property. The Verified Notice of Exemption the Railroad Authority filed with the Board stated, "[The Railroad Authority] believes that the property may be subject to reversionary interests that may affect the transfer of the corridor for non-rail purposes." Verified

Notice of Exemption, STB Docket No. AB-1305-X (May 14, 2021), p. 4.

125. Despite knowing that its order invoking the Trails Act was taking private property, the Board did not comply with the URA when it issued its October 24, 2022, order taking these owners' property. Indeed, in absolute and knowing disregard of the constitutional and statutory obligations governing the government's acquisition of private property, the Board issued an order taking these owners' property and did not even provide the owners notice that the Board had done so.

126. Among other violations of the URA, the Board: (a) did not attempt to acquire these owners' property by negotiation; (b) did not appraise these owners' property before the Board issued its order imposing the rail-trail corridor easement upon these owners' land; (c) did not deposit the appraised value of the owners' property into the Court registry; or (d) allow the owners to retain possession of their property until the owners had been paid. The Board's failure to comply with the URA meant that, contrary to the URA, these owners were forced to file this lawsuit in this Court under the Tucker Act and incur the significant cost of this litigation and endure the delay in receiving that compensation the Constitution requires the federal government to pay each owner.

127. Having had to file this lawsuit against the federal government, section 4622(a) of the URA requires the federal government to pay the expenses and costs these owners incur, including: "(1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property; (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation … [and;] (3) actual reasonable expenses in searching or a replacement business or farm." Section 4622(d) of the URA provides the federal government must also pay the costs of relocating "utility facilities," including: "(i) any electric, gas, water, steam power, or materials transmission or distribution system; (ii) any transportation system; (iii) any communication system (including cable television); and (iv) any

fixtures, equipment, or other property associated with the operation, maintenance, or repair of any such system."

128. The URA also requires the federal government to reimburse these owners' attorney fees and litigation expenses. See 42 U.S.C. §4654(c).

129. These owners have incurred all of those costs and expenses which the URA requires the federal government to pay and reimburse these owners.

RELIEF REQUESTED

The sixteen California landowners bringing this lawsuit ask this Court to enter an order granting the following relief:

A. Declare that the federal government took each of these owner's private property in violation of the Fifth Amendment when the Board issued its October 24, 2022, order invoking section 8(d) of the Trails Act without paying the owner "just compensation."

B. Enter judgment against the United States directing the United States Treasury to pay each of these owners the full fair-market value of that property the federal government took from each of these California landowners. This "just compensation" includes the value of the land physically encumbered by the new federal rail-trail easement as well as the diminution in the value of each owner's remaining property and compensation each owner's loss of the use of those funds the government should have paid each owner on October 24, 2022.

C. Order the United States to pay these owners compensation for the delay between when the government took the owners' property on October 24, 2022, and the date when the government finally honors its constitutional obligation to pay each of these owner's compensation for the property the government took.

D. Reimburse these owners' litigation expenses and attorney fees as required by the URA, 42 U.S.C. §4654(c), including, "reasonable costs, disbursements and expenses, including

reasonable attorney, appraisal and engineering fees, actually incurred because of [the] proceeding."

E. Award such further relief as this Court may deem just and proper.

Date: December 1, 2022

Respectfully submitted,

/s/ Mark F. (Thor) Hearne, II

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