THE TRAILS ACT: RAILROADING PROPERTY OWNERS AND TAXPAYERS FOR MORE THAN A QUARTER CENTURY

Mark F. (Thor) Hearne, II*
Lindsay Brinton
Meghan Largent

Editors' Synopsis: In this Article, the Authors present a practitioner's view of the conflict between the worthy objective the Trails Act was intended to achieve and the realities of how the Act serves to take property from landowners without providing the just compensation the Fifth Amendment requires. The authors argue that several recommended changes to the Trails Act can reduce the inequities that result from its implementation.

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* Thor Hearne is a litigation and political law partner in the Washington office of Arent Fox with more than fifteen years of experience successfully representing local government, businesses, and individuals in Fifth Amendment taking cases and other constitutional and civil rights litigation. He has represented more than 1,000 property owners nationwide in cases involving eminent domain claims against the federal government and has served as lead counsel for property owners in several landmark Trails Act taking cases. Mr. Hearne currently represents property owners in Trails Act taking cases in Missouri, Kansas, Florida, Michigan, Arizona, South Carolina and other states.

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I. PUBLIC RECREATIONAL TRAILS AND PRESERVATION OF RAILROAD CORRIDORS ARE WORTHY OBJECTIVES

Add our voices to the choir. A well-administered public recreational trail can be a valuable and appreciated public amenity.

The National Trails System Act Amendments of 1983 (1983 Amendments)[1] were adopted for the purpose of converting abandoned rail lines into public recreational trails and preserving the otherwise abandoned easements by allowing the federal Surface Transportation Board (STB) to grant any railroad the ability to build a new rail line across this land at some indefinite date in the future.

However, the fact that the object of legislation benefits the public does not excuse the government from its constitutional obligation to compensate a landowner whose land the government takes in pursuit of this objective. The Fifth Amendment to our Constitution requires the government to pay "just compensation" to a citizen whose property it takes for the benefit of the public.[2]

Justice Holmes noted this point in *Pennsylvania Coal Co. v. Mahon*,[3] writing, "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."[4]

Currently, more than fifty Trails Act Fifth Amendment takings cases are pending in the U.S. Court of Federal Claims (CFC) and federal district courts. These pending cases involve title to more than 780 miles of abandoned rail lines and more than 85,400 acres of land[5] owned by thousands of American citizens.

The Trails Act is legislation with a worthy objective, but the Trails Act is seriously flawed in the means by which it seeks to accomplish this objec-

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[1] Pub. L. No. 98-11, 97 Stat. 42, *National Trails System Act of 1968*, Pub. L. No. 98-11, Title II, § 201, 97 Stat. 42 (codified, as amended) at 16 U.S.C.S. § 1241 et seq. (2006).

[2] U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"); *see also* David A. Thomas, *Why the Public Plundering of Private Property Rights is Still a Very Bad Idea*, 41 REAL PROP. PROB. & TR. J. 25 (2006).

[3] 260 U.S. 393 (1922).

[4] *Id.* at 416.

[5] Railroad easements typically vary in width from 50 feet to 200 feet. In eastern states and urban areas, the easement is normally 50 to 100 feet wide, while in western states and rural communities, the easements are typically 200 feet wide. The most common width is 100 feet. Assuming a uniform 100-foot width, more than 780 miles of abandoned rail line are currently the subject of pending Trails Act taking cases, and 85,400 acres of land are involved in this litigation. Because many of the pending cases involve abandoned rail lines in the Western United States, the actual acreage likely is greater.

tive. The flaws in the Trails Act, combined with the STB's implementation of the Act and the Department of Justice's (DOJ) legal strategy defending against claims arising under the Trails Act, have made the Trails Act massively and needlessly more costly for American taxpayers.

Defenders of the Trails Act respond to criticisms of the law in its current form by extolling the virtues of public recreation. This response is like recommending we take an ocean voyage from Liverpool to New York because New York offers such fine entertainment. All true. But, accepting that premise does not mean we should make the voyage aboard the R.M.S. Titanic. So too the Trails Act. Granting the premise that creating public recreational trails and preserving otherwise abandoned rail corridors for possible future use are worthy objectives, it does not follow that the Trails Act in its current form is the most effective vehicle to achieve this objective.

Fortunately, the legitimate objectives of the Trails Act—establishing public recreational trails and preserving railroad corridors—may be achieved fairly and cost-effectively. But this can only be accomplished if Congress, the STB, and the DOJ change how the Trails Act is written, administered, and defended. If these changes are made, it will result in an act that treats landowners fairly, establishes more and better trails, and spends less of the taxpayers' money.

II. A TRAILS ACT PARABLE

Suppose you own a home. This home has been in your family for generations and is of cultural and historic interest—legend is that George Washington once spent the night and wrote his farewell address in this house. This home is on land your family has owned for generations and is next door to the house in which you live. You are not currently using this home, and a businessman would like to buy it. But you don't want to sell and would prefer to keep the home in your family. You do think it would be good for the neighborhood to have someone living in the home, and this businessman is a nice fellow—he is a retired railroad executive and would be a responsible neighbor who would maintain the home while he lives in it. So you agree to sell him a life estate in the home. The businessman can live in the home for the rest of his life; when the businessman dies—whether in a week or in thirty years—you (or your heirs) get the home back.

Several decades later, Congress passes a "historic preservation" law, which says a federal agency may authorize those living in historic homes to sell them to private groups or to local governments that will operate the homes as public museums. This law further allows the person living in the home to sell it, notwithstanding any principle of state property law (such as

a life estate) that would otherwise prevent that person from selling the home.

The businessman who bought your home has become quite sick and fallen on hard times. So he tells the federal agency that he is terminally ill and soon will no longer need the home. The federal agency, without ever telling you, issues an edict authorizing the businessman to sell the home to a private group that wants to operate a public museum in it. Under this arrangement the private group gets the home when the businessman dies, notwithstanding state law that says the businessman has only a life estate and that you receive the home back upon his death. The businessman's only heirs are some estranged third cousins. A provision of this federal historic preservation law allows these estranged third cousins to move into the house in the future if the federal agency grants them permission to do so.

You, as the owner of this home, don't know anything about any of these arrangements. No one—not the businessman, not the private group, and not the federal government—ever told you about this scheme to sell your home and convert it to a museum, with the possibility of the businessman's third cousins moving in at some future date.

Fortunately for the businessman, he survives for several more years. When he finally does succumb, sad as you are at his passing, you go to reclaim your home. But when you do so, a private group comes to the door and tells you that they now own the land by reason of this federal historic preservation law and the order of the federal agency. This private group plans to operate a public museum in the home. It will charge admission and have a concession stand and bookstore in the home.

You protest. This is your home. The businessman had only a life estate. You argue that this law is unconstitutional. The U.S. Supreme Court hears your case and rules that Congress may constitutionally convert your home into a museum because Congress has the power of eminent domain. But the Supreme Court rules that the Fifth Amendment requires the federal government to pay you just compensation for the home it has taken from you.

We all agree—you most of all—that the home is of great historic and cultural importance. This importance is why you wanted to keep it in your family. Remembering where our first president slept and displaying dioramas portraying the event and books recounting his life are all of great national importance. After all, where would we be without George Washington? But none of these considerations change the fact that you owned the home until the federal law preempted your state law title to the home.

You would rather have your home back. Lacking that possibility, you would like to receive the just compensation that you are constitutionally entitled to receive. So you file a claim in the CFC seeking compensation.

The DOJ (funded by your tax payments) appears in court to prevent you from being paid compensation. The DOJ argues, "It may be true that the businessman only had a life estate in your home, but we have decided that a life estate in a historic home has been 'redefined' or has 'shifted' to include the right of a private museum group to operate the home as a public museum—including a concession stand and bookstore."

After five years of litigation with the federal government, you and the DOJ reach a settlement specifying the amount of compensation you are to receive for this home. A federal judge reviews this settlement and approves the compensation. But just two days before this order approving the settlement is final, the court of appeals issues a ruling in a different case involving a house the federal government has taken from a famous general in Georgia. (The federal government also took this Army general's home without paying him.) Under the court of appeals' new rule, a homeowner must file a claim for compensation within six years of when the federal agency issued its edict authorizing the sale of the house to the businessman. You protest, "This is not fair. No one ever told me about the federal agency's order. I didn't know anyone had taken my home until I heard about the deal between the businessman and the museum group, and even then I only heard about it because it was in the newspaper. Plus, I filed my claim before this new rule was announced and under the old rule I couldn't even file a claim until the businessman had died, and I had the right to my home under state law."

"Too bad," the DOJ says. In effect, "Gotcha. You're out of luck. The museum group gets your home, and we get out of our settlement agreement so the federal government doesn't have to pay you. Sometimes life is just not fair."[6]

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[6] The DOJ argued before the CFC that although the government had admitted liability for taking the land of more than 100 Missouri property owners, the decision in an unrelated case retroactively changed the statute of limitations and the government was no longer bound to honor the settlement nor pay these citizens. The DOJ argued:

> [T]he extent that some of this discussion is really turning on the perceived equities, or inequities, of the government raising the statute of limitations' [sic] issue again after having litigated the case for a number of years, we have quoted in one or both of our brief [*sic*]. . . . It states: that age-old rule that a court may not, in any case, even in the interest of justice, extend its jurisdiction where none exists has always worked injustice in particular cases.

Transcript of Record at 33–34, Biery v. United States, 86 Fed. Cl. 516 (2009) (Nos. 07-693L, 07-675L) (on file with Real Property, Trust & Estate Law Journal).

You cannot believe this result. So you ask if any other citizens have had the same thing happen to their homes. You learn that a lot of other citizens have also lost their homes under this federal program and very few have been paid.

One homeowner tells you that he lost his home under this program when the federal agency granted a county government the right to take the family home for a museum, but the county has never used the home as a museum. Rather, the home has been neglected and vandalized and the grounds are littered with trash. The county government that received the right to use this home had said it wanted the home for a museum, but the county really had no interest in opening a museum. Rather, the county wanted to use the federal law to acquire title to the land so the county could make money by leasing the home to a cell tower company and digging a sewage lagoon in the back yard for a community septic system.[7] The property owners complained to the federal agency about this abuse of the federal historic preservation law. But, the federal agency told them it had no statutory authority to regulate how a "museum group" used the land.[8] The DOJ says the museum group can use the land for anything it wants—it does not have to be a museum.[9] The only requirement is that the museum group not do something that would make it impossible for the estranged third cousins to move back to the land and build a new home. No one really knows what would make it "impossible" for the third cousins to do so. In one case the museum group tore down the home and built a heliport.[10]

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[7] *See* Letter from Cecile B. Kellenbarger, Treasurer, Prairie Travelers, Inc., to Vernon A. Williams, Secretary, Surface Transportation Board (July 28, 2004) (on file with Real Property, Trust & Estate Law Journal). ("The County only intends to railbank the line for possible use as a corridor for underground utilities.")

[8] *See* Citizens Against Rails to Trails v. Surface Transp. Bd., 267 F.3d 1144 (D.C. Cir. 2001) (finding that STB's role granting trail use application is merely ministerial and STB has no authority to review fitness of trail group or desirability of trail).

[9] When the DOJ was asked whether the government would allow "concessionaires set up along the strip and sell things to these hikers," the DOJ responded, "I don't believe that they could be prevented from putting up a concession stand." Transcript of Record at 91, Biery v. United States, 86 Fed. Cl. 516 (2009) (Nos. 1:07cv00693, 1:07cv00675) (on file with Real Property, Trust & Estate Law Journal). A concession stand has been built on the High Line Trail in New York City, and parking lots and other facilities have been built in Florida on the Legacy Trail.

[10] *See Twenty-Five Years of Railbanking: A Review and Look Ahead, Hearing Before the Surface Transp. Bd.*, Ex Parte No. 690, 51–55 (July 8, 2009) (testimony of Marianne Wesley Fowler, Senior V.P. of Fed. Relations, Rails-to-Trails Conservancy) (mentioning Texas mayor who had heliport built on land supposed to be used as trail under authority of Trails Act), *available at* http://www.stb.dot.gov/TransAndStatements.nsf/transcriptsand

In yet another case, the heirs of the deceased life estate tenant are using this program to try and get money for the home in a scheme to sell it to a Mexican corporation.[11] In the meantime, the home has fallen into disrepair, the pool has overflowed and flooded the owner's adjoining home, and a group of illegal aliens are using what is left of the home as a meth lab. Every few days, the police are called to break into the house and arrest them, but the house continues to be used as a meth lab and a shelter for illegal aliens. Whenever the owners try and lock the home and prevent it from being used for illegal activity, the police run them off, saying that under this federal program, the owners have no right to go onto the land, not even to protect their adjoining land from being flooded.[12]

For those fortunate enough to learn that the federal agency has issued an edict authorizing their home to be converted into a museum in time to file a claim for compensation, the DOJ will claim the government does not need to pay them for taking their ancestral home. In its defense of these "Museum-Act taking cases," the DOJ has pursued a litigation strategy that is both very expensive and greatly delays a homeowner being paid compensation. The DOJ makes three arguments:

Argument 1: The businessman still lives in the home and, therefore, the life estate is still in force. True enough, the DOJ concedes, the businessman is dead and buried, and he only had a life estate to use the property; but, because the federal agency may grant his estranged third cousins the right to move into the house sometime in the future, the businessman is really still living in the house.

If you don't buy Argument 1, the DOJ offers Argument 2 as justification for taking your home without having to pay you.

Argument 2: Your home is really a museum and was a museum all along. The original owners of the home allowed George Washington to sleep there because George Washington was a public figure. Therefore, a public museum commemorating George Washington's slumber in the home is a use of the property consistent with the original owner's invitation to

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statements?openview (follow "07/08/2009 Full Transcript" hyperlink; then select "Ex Parte No. 690 Transcript.pdf).

[11] *See* Environmental Assessment, San Pedro R.R., No. AB-1081X (Sub-No. 4X) (Surface Transp. Bd. Nov. 9, 2005) (abandonment exemption in Cochise County, AZ) (San Pedro Railroad attempted to use the Trails Act as a means to hold an abandoned rail line easement as part of a deal with Ferromex, a Mexican railroad, to operate a cross-border railroad).

[12] *See* Affidavit of John Ladd, et al. at 2–3, Ladd v. United States, 90 Fed. Cl. 221 (2009) (No. 07-271L) (ranchers describing how illegal immigrants and suspected drug smugglers use abandoned and neglected rail line to cross border).

George Washington to spend the night. George Washington was a *public* figure so a *public* museum commemorating this event are both similarly permitted *public* uses of this home within the scope of the original invitation to George Washington. Additionally, because you granted the businessman the right to use this home for a single-family residence as long as he lived, you cannot complain about the use of your land as a public museum because, if the businessman had not died, he still could be living in the home. Therefore, the public museum imposes no "greater burden" on your ownership of the reversionary right to this home than was the case when the businessman used it.

Okay, okay. So that argument is an invalid syllogism on the order of: "God is love, love is blind; therefore, Stevie Wonder is God." But the DOJ has one last argument it marshals in its effort to avoid compensating property owners in Museum-Act taking cases.

Argument 3: The federal government still can take your property without having to pay compensation because the government—or a judge sympathetic to the government—can "redefine" or "shift" your property interest in your home. The argument goes like this: When you and the businessman negotiated the original agreement, he obtained a life estate to use your home. The life estate did not allow him to sell your home to a museum—nor did it allow his estranged third cousins to use the home after he died. "But," the DOJ argues, "Times have changed. It was several decades ago that you and the businessman negotiated the life estate. Since then, we have all come to share a much greater appreciation of George Washington and the importance of preserving our historical connection with our first president." It is, therefore, appropriate for the federal government—or a judge sympathetic to the federal government—to redefine the life estate granted the businessman in light of the current reality of our appreciation of George Washington. Thus, a life estate granted for the life of the businessman who lived in a home in which George Washington once slept should be redefined or "shifted" to be a life estate that endures so long as we remember the life of George Washington.

The preceding parable of a private home taken for a public museum is precisely analogous to the situation that property owners experience in "rails-to-trails" takings of their land under the federal Trails Act. If you substitute railroad for businessman, recreational trail for museum, easement for life estate and reversionary interest[13] for original landowner, you have an accurate statement of how the Trails Act functions.

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[13] Throughout this Article, we use the term *reversionary* in the generic sense used by the Federal Circuit: "We note in passing that as a matter of traditional property law

III. IN REALITY, THE TRAILS ACT IS ALL ABOUT CREATING NEW PUBLIC RECREATIONAL TRAILS, NOT PRESERVING RAILROADS

The Trails Act is not, in reality, about preserving railroad corridors. This ostensible purpose is a fiction. The Trails Act is, in practice, about converting land the site of a now abandoned rail line to a new and different use as a public recreational trail. And, as the Federal Circuit and other courts have made clear, public recreational use is quite different from operating a railroad.[14]

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terminology, a termination of the easements would not cause anything to 'revert' to the landowner. Rather, the burden of the easement would simply be extinguished, and the landowner's property would be held free and clear of any such burden." Toews v. United States, 376 F.3d 1371, 1376 (Fed. Cir. 2004).

Judge Plager made some interesting comments on this topic:

> There is an alternative way, frequently used today . . . to describe property transactions involving easements. Instead of calling the property owner's retained interest a fee simple burdened by the easement, this alternative labels the property owner's retained interest following the creation of an easement as a "reversion" in fee. Upon the termination, however achieved, of the easement, the "reversion" is said to become fully possessory; it is sometimes loosely said that the estate "reverts" to the owner.
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> Under traditional common law estates terminology, a "reversion" is a future interest remaining in the transferor following the conveyance of certain lesser estates to a transferee, typically when the transferee takes a possessory estate of freehold, for example a life estate. An easement is not such a possessory estate of freehold. Traditional characterization describes an easement as a "use" interest, sometimes an "incorporeal hereditament," but not a "possessory" interest in the land. Therefore labeling the retained interest a "reversion" is not consistent with the traditional classification scheme, which views the retained interest as a present estate in fee simple, subject to the burden of the easement.
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> Be that as it may, whether the property owner's retained interest following the conveyance of an easement is denominated a fee simple estate or a reversion, it is uniformly treated at common law as a vested estate in fee. Under either characterization the result upon termination of the easement is the same. For consistency we use the traditional terminology which recognizes that the transferor remains seized of the freehold estate, and thus labels the owner's estate as a fee simple, burdened, during the life of the easement, by the easement-holder's rights.

Preseault v. United States, 100 F.3d 1525, 1533–34 (Fed. Cir. 1996) [hereinafter *Preseault III*].

[14] In *Toews*, the Federal Circuit noted:

> And it appears beyond cavil that use of these easements for a recreational trail—for walking, hiking, biking, picnicking, frisbee

In *National Wildlife Federation v. Interstate Commerce Comm'n*,[15] the D.C. Circuit described the history and purpose of the 1983 Amendments to the Trails Act:[16] "As originally enacted, the Trails Act made no specific provision for the conversion of abandoned railroad rights-of-way to trails. Congress's first effort to encourage this type of adaptive re-use appeared in section 809 of the Railroad Revitalization and Regulatory Reform [(4-R)] Act of 1976."[17] Section 809 of the 4-R Act authorized the Interstate Commerce Commission (ICC) to delay disposition of abandoned railroad corridors for up to 180 days after an effective abandonment order "unless the property at issue had been first offered on reasonable terms for sale for public purposes."[18] This section is referred to as a "Public Use Condition."[19]

This section did not, however, achieve Congress's desired result. As the D.C. Circuit noted, "Section [10905] has no railbanking provision that

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> 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 access.
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> 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 intention as expressed in the grant that defines the burden to which the land will be subject.

376 F.3d at 1376–77.

[15] 850 F.2d 694 (D.C. Cir. 1988).

[16] *See* National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 42 (codified as amended at 16 U.S.C. §§ 1241 to 1247, 1249 (2009).

[17] *Id.* at 697; *see also* Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, tit. VIII, 90 Stat. 144 (current version at 49 U.S.C. § 10905 (2009).

[18] *Nat'l Wildlife Fed'n*, 850 F.2d at 697.

[19] Section 809 was originally codified as 49 U.S.C. section 10906, but was subsequently renumbered, and is now at 49 U.S.C. section 10905. *See* I.C.C. Termination Act of 1995, P.L. No. 104-88, 109 Stat 803.

would preempt state laws that could otherwise result in reversion of rights-of-way to abutting landowners upon a cessation of rail service."[20]

The lack of a railbanking provision preempting state laws created a problem in that the railroad would lose its rights of way under state law when the railroad abandoned the line. For this reason, "Congress renewed its effort to promote the conversion of railroad rights-of-way to trail use when it enacted the current [section] 8(d) as part of the 1983 Trails Act Amendments."[21] Section 8(d) was…. added to:

> reflect[] the concern that previous congressional efforts have not been successful in establishing a process through which railroad rights-of-way which are not immediately necessary for active service can be utilized for trail purposes . . . . [This provision] should eliminate many of the problems with this program. The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use.[22]

The Eighth Circuit noted:

> One of the major impediments to preserving these rights-of-way existed in state property laws which prescribed that once rail service is discontinued after the ICC's approval of abandonment, such easements would automatically expire and the rights-of-way would revert to adjacent property owners. In response to this problem, Congress enacted the Trails Act Amendments of 1983.[23]

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[20] *Nat'l Wildlife Fed'n*, 850 F.2d at 701. For an explanation of the term "railbanking," see *infra* note 119 and accompanying text.

[21] *Id.*

[22] H.R. Rep. No. 98-28, at 8–9 (1983), *as reprinted in* 1983 U.S.C.C.A.N. 112, 119–20. Congress adopted the Trails Act and the 4-R Act to address the loss of railroad rights of way. Congress was not alone in noting the decline of railroads in the 1970's. *See* STEVE GOODMAN, *The City of New Orleans* (1970) ("And the steel rails still ain't heard the news/The conductor sings his song again/The passengers will please refrain/This train's got the disappearing railroad blues." (Sung most famously by Arlo Guthrie on the album HOBO'S LULLABY (Rising Son 1972)).

[23] Town of Grantwood Vill. v. Mo. Pac. R.R. Co., 95 F.3d 654, 658 (8th Cir. 1996) (citation omitted).

As the D.C. Circuit explained, "By deeming interim trail use to be like discontinuance rather than abandonment, Congress sought to prevent property interests from reverting to the landowners under state law."[24]

Section 8(d) of the 1983 Trails Act Amendments provides:

> Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.[25]

The Trails Act was codified at Title 16.[26] This section of the United States Code concerns "conservation." The provisions before and after the Trails Act concern estuaries and rivers.[27] By contrast, regulation of railroads and the STB's authority and procedures are codified under Title 49, which concerns "transportation."[28]

The Trails Act does not even come into play until the railroad and the STB first have concluded the property has no current or foreseeable future use as a rail line.[29] After a railroad has sought authority to abandon a rail line and the STB has determined that no current or foreseeable future use of the land for a rail line exists, a private or public group may request the authority to negotiate with the railroad to acquire the easement pursuant to the Trails Act.[30] If such a trail group requests the opportunity to negotiate a

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[24] Citizens Against Rails-to-Trails v. Surface Transp. Bd., 267 F.3d 1144, 1149 (D.C. Cir. 2001) (citing Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 8 (1990)); *see also Nat'l Wildlife Fed'n*, 850 F.2d at 702.

[25] 16 U.S.C. § 1247 (2006) (codifying the National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 42).

[26] *See id.* §§ 1241–1251.

[27] *See id.* §§ 1221, 1271.

[28] *See* 49 U.S.C. §§ 10101, 10502 (2006).

[29] Before the Trails Act can be invoked, section 10905 of the 4-R Act requires that the STB find there is no public interest in the current or future use of the rail line for transportation.

[30] *See* 49 C.F.R. 1152, 29.

Trail Use Agreement with the railroad and if the railroad agrees to these negotiations, the STB will issue a Notice of Interim Trail Use or Abandonment (NITU).[31] The STB has no discretion over whether or not to issue a NITU.[32] If the railroad agrees to negotiate, the STB must issue a NITU.

The Legacy Trail running between Sarasota and Venice, Florida is a typical example. Seminole Gulf Railway, L.P. (SGLR) sought to abandon a twelve-mile long decrepit and unused segment of rail line it had acquired from CSX Transportation in 1987.[33] SGLR noted, "there has been no traffic on the line [for over two years] and there have been no rail movements over the last three miles of the line for over 10 years."[34] SGLR told the STB "there is little likelihood of traffic returning to the line."[35] The railroad and the STB agreed that:

> All of the former shippers have moved elsewhere or use other arrangements for their traffic. . . . Because of residential and recreational development of the land along the right-of-way there are few, if any, parcels available for industrial development for new rail shippers. . . . It is clear that the lack of traffic, and the development of the area around the Subject Line that there is little likelihood of there ever being a future demand for local rail service over

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[31] *See id.* The typical Trails Act arises in the course of an exempt abandonment under 49 U.S.C. section 10502. A parallel provision for non-exempt abandonments is found under 49 U.S.C. section 10903. The order of the STB authorizing Trails Use in a non-exempt abandonment is called a Certificate of Interim Trail Use or Abandonment (CITU). *See* 49 C.F.R. § 1011.7(a). We refer throughout to a NITU; however, the terms CITU and NITU can be used interchangeably, as used in this Article.

[32] *See Jost v. Surface Transp. Bd.* 194 F.3d 79 (D.C. Cir. 1999) (stating that the STB "'shall' impose a trail condition, and not permit abandonment of a line, whenever a railroad is prepared to convey the right-of-way" to a trail sponsor, and that the statute gives the STB "little, if any, discretion to forestall a voluntary agreement to effect a conversion to trail use."); *see also Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1152 (D.C. Cir. 2001) (STB's issuance of NITU is ministerial and is not subject to National Environmental Policy Act (NEPA)); *Goos v. Interstate Commerce Comm'n*, 911 F.2d 1283, 1295–96 (8th Cir. 1990) (STB's issuance of NITU is ministerial and is not subject to NEPA.).

[33] *See* Seminole Gulf Ry., No. AB-400 (Surface Transp. Bd. Apr. 1, 2004) (decision in abandonment exemption in Sarasota County, Fla.).

[34] *Id.* at *1.

[35] *Id.* at *2.

> the Subject Line . . . there are no shippers remaining on the Subject Line, and no prospects of future shippers.[36]

The STB approved the abandonment of the rail line and issued a NITU. The Trust for Public Land, a 501(c)(3) public charity and land conservation group, negotiated with the railroad and acquired the easement under the Trails Act. The Trust for Public Land then assigned the trail to Sarasota County. The Legacy Trail is now a mostly paved public recreational trail with parking, rest room facilities, and a museum in the old depot.

Thus, while the Trails Act preserves the *hypothetical* possibility that the STB at some future time may grant some as-yet unidentified railroad the authority to build a new rail line across the land, the reality is that this grant rarely happens. In the vast majority of cases, the land has been converted permanently to public recreational use and never has or will be the site of a future railroad.

According to testimony submitted to the STB, out of 5,079 miles of track subject to a NITU, only 2,764 have been converted to trail use.[37] Of these 2,764 miles of trails, a rail line has been rebuilt on the land only nine times.[38] And, often only a small segment of the former rail line has been reactivated.[39] Many of the abandoned rail lines converted to public recreational use are spur lines or dead-end lines[40] that do not run anywhere any railroad will ever be needed again.[41] Most of these abandoned rail lines are not of significant value as a rail corridor.

Notably, the NITU does not guarantee there will be a trail or that a Trail Use Agreement will be reached within the six-month initial negotiating period. The NITU merely authorizes the railroad and trail group to negotiate for a possible Trail Use Agreement. The initial negotiating period is for six

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[36] *See* Petition of Seminole Gulf Railway, L.P. for Exemption of Abandonment at 4–6, No. AB-400 (Sub-No. 3X) (Surface Transp. Bd. Dec. 12, 2003) (on file with Real Property, Trust & Estate Law Journal).

[37] *See Twenty-Five Years of Railbanking*, *supra* note 10, (written statement of Marianne Wesley Fowler, Senior V.P. of Fed. Relations, Rails-to-Trails Conservancy).

[38] *See id.*

[39] *See e.g.*, *Glosemeyer v. United States*, 45 Fed. Cl. 771, 774 (2000) (reactivation of 1,100 feet of 6.2 miles of abandoned line).

[40] *See* Burlington N. & Santa Fe Ry. Co., No. AB-6 (Sub-No. 406X) (Surface Transp. Bd. Apr. 5, 2004) (notice of interim trail use or abandonment in Reno County, Kan.); *see also* Butler County, Kan., No. AB-870X (Surface Transp. Bd. July 2, 2004) (notice of interim trail use or abandonment).

[41] *See* Seminole Gulf Ry., L.P., No. AB-870X (Surface Transp. Bd. Apr. 1, 2004) (notice of interim trail use or abandonment in Sarasota County, Fla.).

months, but this period often is extended repeatedly. In some cases the negotiating period has been extended for more than eleven years.[42]

IV. THE TRAILS ACT PROVIDES PRIVATE "TRAIL GROUPS" A MECHANISM TO TAKE LAND AND SELL THAT INTEREST TO A THIRD PARTY FOR PROFIT

All too often the Trails Act serves, not to build trails, but as a tool for a private or public "trail group" to acquire the rights to profit from the land. This use is especially outrageous because while landowners are not paid unless they pursue long and expensive litigation against the federal government, the trail group is able to sell the landowners' property for substantial profit.[43]

Consider the economics of a single two-mile long segment of abandoned rail line converted to trail use under the Trails Act. The STB issued a NITU on April 18, 1999. A not-for-profit, privately controlled trail group negotiated with the railroad to acquire the easement pursuant to the Trails Act. The Missouri Pacific Railroad appraised the easement as worth $3.5 million for tax purposes.[44] The private trail group paid the railroad only $330,000.[45] The railroad received a tax deduction worth more than $1.1 mil-

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[42] *See*, *e.g.*, Wisconsin Cent. Ltd., No. AB-303 (Sub-No. 18X) (Surface Transp. Bd. July 28, 2009) (final extension of negotiation for abandonment exemption in Polk County, Wis.; NITU issued Mar. 1998 ultimately extended until Jan. 2010).

[43] "[I]n an abandonment proceeding the STB determines whether an abandonment is appropriate by weighing the potential harm to affected shippers and communities against the burden of continued operation of the railroad in interstate commerce. By contrast, under section 1247(d), the STB *must* issue a NITU or CITU when a private party files a statement of willingness to assume financial responsibility and the railroad agrees to negotiate." Goos v. Interstate Commerce Comm'n, 911 F.2d 1283 (8th Cir. 1990).

[44] *See* Ken Leiser, *Park District Ditches Offer to Buy Trail: Officials Discover Nonprofit Had Paid Much Less*, ST. LOUIS POST-DISPATCH, Dec. 4, 2003, at C1. The appraised interest in the corridor is not the value of the land but the value of the railroad's easement interest in the corridor that it was able to sell by reason of the Trails Act. *Id.* Under Missouri law, the Missouri Pacific Railroad had no interest in the land and had nothing it could sell. The only "interest" the Missouri Pacific Railroad had to sell was the interest created by operation of the federal Trails Act. *See* Town of Grantwood Vill. v. Mo. Pac. R.R. Co., 95 F.3d 654 (8th Cir. 1996). Essentially, the Trails Act created an easement interest that the Missouri Pacific could sell and donate for which it received a tax deduction. This same interest was then resold and leased by the private trail group for a substantial profit. The proposed $1.6 million sale did not go through. When the park department learned that the trail group was trying to reap a $1.3 million windfall from the sale, the sale was canceled. *See* Leiser, *supra*. However, the private trail group still received substantial funds from utilities for use of the corridor. *See* Illig. v. United States, 58 Fed. Cl. 619, 623–24 (2003).

[45] *See* Leiser, *supra* note 44.

lion for the difference.[46] The private trail group also received at least $200,000 from a utility company in payment for licensing a high-power electric line built on the property.[47] The private trail group then leased (for an undisclosed amount) the trail to the county park department.[48] The private trail group also tried to sell the two-mile segment of the rail line to the park department for $1.6 million.[49] The park department and private trail group received funds from the state transportation department (a part of which are from the federal government) to develop a trail across this two-mile long segment. Seven years after the NITU was issued, and three years after the lawsuit was filed in the CFC, the property owners were paid almost $4.7 million for the value of their land, $2.7 million in interest, and $800,000 in reimbursed attorney fees and litigation expenses.[50] The amount the DOJ paid in costs and expenses in this case is unknown.

So, this two-mile segment of recreational trail cost the federal government more than $10 million.[51] Additionally, the DOJ paid its own attorneys salaries and overhead, and it paid the government's litigation expenses, including appraisal fees and any federal funds appropriated to build the trail. The cost to the taxpayers is more than $5 million per mile.

The economics of this single two-mile segment illustrate how miserably inefficient and costly the Trails Act is in its current form. Had the federal government, directly or through the county park department, acquired the land, paid the landowners upfront, and built the trail, it could have been accomplished more quickly and at one-half the expense to taxpayers. This case also illustrates how private trail groups are able to use the Trails Act to make millions in profits by selling trail corridors to county or state parks departments and granting utility easements over the land, all at the expense of the American taxpayer and property owners.

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[46] The railroad never disclosed the amount of the deduction it took for this contribution. We estimate the cost of the tax deduction to the government using the 35% corporate tax rate.

[47] *See Illig*, 58 Fed. Cl. at 623–24 (The record is unclear whether this sum is a one-time payment or an annual payment.).

[48] Letter from Buzz Westfall, Saint Louis County Executive to members of Saint Louis County Council (Sept. 3, 1998) (on file with Real Property, Trust & Estate Law Journal).

[49] *See* Leiser, *supra* note 44.

[50] *See* Miller v. United States, 67 Fed. Cl. 542 (2005).

[51] $4,691,244 for the land, $1,109,500 in tax deduction to the railroad, $2,690,439 in interest and $770,000 in litigation expenses reimbursed the property owners. *See* Miller v. United States, No. 03-2489L (Fed. Cl. Nov. 17, 2006) (order adopting proposed settlement) (on file with Real Property, Trust & Estate Law Journal).

V. THE TRAILS ACT CREATES A LEGAL PURGATORY FOR PROPERTY OWNERS WHEN A NITU IS ISSUED BUT A TRAIL USE AGREEMENT HAS NOT BEEN REACHED WITH A RESPONSIBLE TRAIL GROUP

In some cases the Trails Act results in a well-managed, attractive recreational trail that is maintained and managed by a responsible trail group. Unfortunately, in many cases the results are different. For many landowners, the STB's issuance of a NITU is the beginning of a nightmare that relegates their land to a legal purgatory.

The Trails Act has created a nightmare for the Ladd family and their neighboring ranchers in southern Arizona.[52] The Ladd family has owned a ranch on the Arizona-Mexico border since Teddy Roosevelt originally granted their family a land patent.[53] An abandoned eighty-mile long rail spur the El Paso & Southwestern Railroad Company once used to haul freight crosses their ranch.[54] Years ago, monsoon floods washed out the rail line, and the STB authorized the railroad to abandon the rail line and the rails and ties were removed. The now-abandoned rail line parallels the U.S.–Mexican border for forty miles and then turns north and runs forty miles toward Tucson.[55] Trail groups have expressed, and continue to express, interest in a possible trail on the forty-mile north-south segment.[56] However, more than three years after the NITU was issued, no trail has been built.[57] The abandoned railroad ballast provides an easy route for drug smugglers and illegal immigrants to enter the United States. The Ladds have tried to fence and build barriers across the abandoned rail line, but the border patrol and smugglers continue to cut the fence and remove the barriers.[58] The neglected railroad bed also has caused flooding of the Ladds' adjoining ranch property.[59] Because the Trails Act perpetuates an otherwise abandoned easement, the Ladds lack the ability to exclude others from this land.

National Public Radio reported in April 2010 on the murder of Robert Krentz, the Ladd's neighbor and fellow rancher. Mr. Krentz was "shot and killed along with his dog—presumably by a drug smuggler." NPR described

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[52] *See* Ladd v. United States, 90 Fed. Cl. 221 (2009), *appeal filed*, No. 2010-5010, 2010 WL 464245 (Fed. Cir. Jan. 20, 2010).

[53] *See* Apellants' Opening Brief at 4, *Ladd*, No. 2010-5010, 2010 WL 464245.

[54] *See id.*

[55] *See id.* at 6.

[56] *See id.* at 6–7.

[57] *See id.* at 8, 18–19.

[58] *See id.* at 9.

[59] *See id.*

how trails in this border community are now used by drug smugglers and illegal immigrants. "A century and a half ago, the Apache warrior Geronimo used the area's trails to elude the U.S. cavalry for decades. Now, the same trails are corridors for drug cartels using illegal immigrants who can't afford to pay for a guide."[60] NPR reported, "Ladd says he has counted 47 groups crossing onto his land in just the past three weeks—more than 300 people."

The Ladd family is not alone. Jerramy Pankratz is a Kansas landowner near Wichita.[61] The Trails Act was invoked to convert an abandoned ten-mile long rail spur to a recreational trail.[62] Butler County, Kansas used the Trails Act to acquire the easement from the railroad.[63] Trains have not run over the land in more than a decade and the rails and ties have been removed.[64] Since it reached a Trail Use Agreement on June 3, 2005, the County has done nothing to the land other than post several signs saying it is a "trail."[65] The STB filings suggest that the real reason the County was interested in acquiring the easement was not to develop a trail, but rather to profit from selling an easement across the land to a fiber-optic firm.[66]

The abandoned rail line has been neglected and is now used by motorcycles and other recreational off-road vehicles. The adjoining landowners complained about litter and wanted to restrict access to this strip of land. The county sent the property owners a letter denying them any use of the land over which the county now claimed an easement under the Trails Act. The county wrote, "[Y]ou do not have the right to make any improvements to the land within the right of way (including fencing, erecting structures, or grading out the rail bed). . . . [Y]ou can clean out the right of way of weeds, debris, etc.; however, no further improvements can be made."[67]

Totally apart from taking these landowners' state law ownership of this strip of land, the Trails Act has created a situation in which their remaining

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[60] *NRP: Ariz. Ranchers Caught Up In Mexican Drug Violence* (Apr. 12, 2010), Transcript and audio recording *available at* http://www.http://www.npr.org/templates/story/story.php?storyId=125844450; last visited May 10, 2010.

[61] *See* Plaintiff's Proposed Findings of Uncontroverted Fact, Biery v. United States, 86 Fed. Cl. 516, No. 07-675L (April 14, 2008) (on file with Real Property, Trust & Estate Law Journal) (filed by co-plaintiffs Jerramy and Erin Pankratz).

[62] *See id.*

[63] *See id.*

[64] *See id.*

[65] *See id.*

[66] *See* Kellenbarger Letter, *supra* note 7.

[67] Letter from Rod Compton, AICP, Director, Butler County Planning & Development, to Jerramy Pankratz (April 2, 2008) (on file with Real Property, Trust & Estate Law Journal).

adjoining property is devalued by the neglected condition of the abandoned rail line.

VI. ALMOST EVERY TIME IT IS INVOKED, THE TRAILS ACT TAKES A CITIZEN'S LAND

It is now settled law that in the great majority of cases, the Trails Act operates to take a compensable interest in land.

A. Railroads Typically Hold Only An Easement In Land Used For A Rail Line

Justice Brennan observed in *Preseault v. United States* (*Preseault II*)[68] that "many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests . . . [and] frequently the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations."[69] As noted by the Florida court in *Davis v. MCI Telecommunications Corp.*,[70] "Except to site a station house or similar land use here and there, the railroads had no need or desire for any interest except 'right-of-way.'"[71] Likewise, in *Dean v. MOD Properties, Ltd.*,[72] another Florida court noted, "[O]nly an easement is needed to lawfully construct and maintain a road right-of-way on and over land."[73]

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[68] 494 U.S. 1 (1990) (Brennan, J.) [hereinafter *Preseault II*].

[69] *Id.* at 9.

[70] 606 So. 2d 734 (Fla. Dist. Ct. App. 1992).

[71] *Id.* at 738.

[72] 528 So. 2d 432 (Fla. Dist. Ct. App. 1988).

[73] *Id.* at 434. Danaya C. Wright, an expert hired by the government to argue against landowners' right to be paid compensation in Trails Act cases, testified before the STB:

> I have examined over probably 3,000 and my students and I have examined over 7,000 railroad deeds from the 19th century, and I can attest that over 80 percent of those from states like Pennsylvania, New York, Ohio, Indiana, Kansas, Missouri, Iowa, Idaho, and Washington are clear, unambiguous fee simple absolute deeds in the railroads. Most of the remaining 20 percent were intended to be fee simple deeds, but contain what would later become in this later period of case law ambiguous elements, like use of the term "right-of-way."

Twenty-Five Years of Railbanking (testimony of Danaya C. Wright, Univ. of Fla. Levin School of Law), *supra* note 10, at 170–71.

Ms. Wright bases this statement on her research involving law students reviewing deeds and opining whether the instrument granted a fee simple interest or an easement. Any conclusion based upon this method of reviewing railroad conveyances is of dubious value. The more appropriate method would be to review cases in which the conveyance instruments by which a rail line was established actually were litigated. Whether a judge interprets an instrument as conveying an easement or fee simple, absolute title is more meaningful than

The Federal Circuit has construed instruments conveying a "right of way" to a railroad as granting the railroad only an easement to use the land for the construction and operation of a rail line, even when the instrument otherwise purported to convey a fee simple estate in the land and did not use the term right of way.[74] In *Preseault v. United States* (*Preseault III*), the court considered the "Manwell deed." The Federal Circuit ruled, "The deed appears to be the standard form used to convey a fee simple title from grantor to grantee. But did it? . . . [D]espite the apparent terms of the deed indicating a transfer in fee, the legal effect was to convey only an easement."[75]

Despite more than a century of settled law in almost every state holding that an instrument granting a right-of-way to a railroad grants the railroad only an easement, the government still frequently argues that such an instrument conveyed the railroad a fee simple estate in the land. Courts rightly reject such an interpretation. For example, in *Rogers v. United States*,[76] the court properly applied this principle and rejected the government's argument. "[T]he conveyance does not refer to the outright transfer of land; it refers to a 'right of way for railroad purposes over and across the . . . parcels of land,' thereby indicating that the grantor retained an interest in the land referenced in the conveyance and granted an easement to [the railroad]."[77]

Many states have provisions in their state constitutions or statutes that specify that a railroad corporation obtains only an easement to use the land, even when the document purported to be a conveyance in fee simple absolute.[78] For example, the Kansas Supreme Court repeatedly has held a rail-

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what a first-year law school student might think. When we consult a judge's view of these instruments, we find Justice Brennan's observation validated. For example, in *Miller v. United States*, 67 Fed. Cl. 542 (2005), the rail line involved more than 100 separate parcels of land. In only two of these properties did the court find that the railroad had acquired fee simple absolute title. In *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005), the court found the vast majority of an 83.1 mile-long right of way to be only an easement. Thus, Ms. Wright's conclusion that railroads acquire fee simple estate in the land upon which they build a rail line is wrong in practice and is based upon faulty research. Further, Ms. Wright's statement that the term *right-of-way* is ambiguous is incorrect. Most courts, including the U.S. Supreme Court, when confronted with the term *right-of-way*, rule that it is the grant of an easement, not a conveyance of a fee simple estate in the land itself.

[74] *See* Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) (en banc) [hereinafter *Preseault III*].

[75] *Id.* at 1535–36.

[76] 90 Fed. Cl. 418 (2009).

[77] *Id.* at 429.

[78] *See, e.g.*, Brown v. Weare, 152 S.W.2d 649 (Mo. 1941); Boyles v. Missouri Friends of the Wabash Trace Nature Trail, Inc., 981 S.W.2d 644 (Mo. Ct. App. 1998).

road obtains only an easement in a strip of land used for a rail line, no matter what the conveyance document states.[79]

In *Penn Central Corp. v. U.S.R.R. Vest Corp.*,[80] Judge Posner referred to the fundamental presumption (recognized in almost every state) that a railroad's interest in land used for a rail line is only an easement granting the railroad use of the land, not a fee simple estate in the land itself. Judge Posner explained the public policy underlying this presumption:

> The presumption is that a deed to a railroad or other right of way company (pipeline company, telephone company, etc.) conveys a right of way, that is, an easement, terminable when the acquirer's use terminates, rather than a fee simple. . . Transaction costs are minimized by undivided ownership of a parcel of land, and such ownership is facilitated by the automatic reuniting of divided land once the reason for the division has ceased. If the railroad holds title in fee simple to a multitude of skinny strips of land now usable only by the owner of the surrounding or adjacent land, then before the strips can be put to their best use there must be expensive and time-consuming negotiation between the railroad and its

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[79] The Kansas Supreme Court has written:

> [W]hen land is devoted to railroad purposes it is immaterial whether the railroad company acquired it by virtue of an easement, by condemnation, right-of-way, deed or other conveyance. If or when it ceases to be used for railway purposes, the land concerned returns to its prior status as an integral part of the freehold to which it belonged prior to its subjection to use for railway purposes [citation omitted]. This court has uniformly held that railroads do not own fee titles to narrow strips taken as right-of-way, regardless of whether they are taken by condemnation or right-of-way deed. The rule is in conformity with this state's long-standing public policy and gives full effect to the intent of the parties who execute right-of-way deeds rather than going through lengthy and expensive condemnation proceedings.

Harvest Queen Mill & Elevator Co. v. Sanders, 370 P.2d 419 (Kan. 1962) (citing Abercrombie v. Simmons, 81 P. 208 (Kan. 1905); Bowers v. Atchinson, T. & S. Ry. Co., 237 P. 913 (Kan. 1925); Federal Farm Mortgage, 89 P.2d 858 (Kan. 1939); Disney v. Lang, 133 P. 572 (Kan. 1913)). It is important to distinguish between a strip of land upon which a railroad corporation builds a rail line and a parcel of land a railroad acquires for other uses. For example, a railroad may acquire fee simple title to parcels of land purchases for depots, grain elevators, stations, and similar improvements. (The railroad's interest in land used for these can also be an easement.).

[80] 955 F.2d 1158 (7th Cir. 1992).

> neighbor—that or the gradual extinction of the railroad's interest through the operation of adverse possession. It is cleaner if the railroad's interest simply terminates upon the abandonment of railroad service. A further consideration is that railroads and other right of way companies have eminent domain powers, and they should not be encouraged to use those powers to take more than they need of another person's property—more, that is, than a right of way.[81]

The public policy identified by Judge Posner is an extension of the policy disfavoring creation of "strips" or "gores" of land identified by Judge Taft. Judge Taft noted this in his decision in *Paine v. Consumers Freight Forwarding & Storage Co*:[82]

> "The existence of 'strips or gores' of land along the margin of non-navigable lakes, to which the title may be held in abeyance for indefinite periods of time, is as great an evil as are 'strips and gores' of land along highways or running streams. The litigation that may arise therefrom after long years, or the happening of some unexpected event, is equally probable, and alike vexatious in each of the cases, and that public policy which would seek to prevent this by a construction that would carry the title to the center of a highway, running stream, or non-navigable lake that may be made a boundary of the lands conveyed applies indifferently, and with equal force, to all of them. It would seem, also, that whatever inference might arise from the presumed intention of the parties against the reservation of the land underlying the water would be as strong in one case as in either of the others."
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> . . .
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> The evils resulting from the retention in remote dedicators of the fee in gores and strips, which for many years are valueless because of the public easement in them, and

[81] *Id.* at 1160 (citing Highland Realty Co. v. City of San Rafael, 298 P.2d 15, 20 (Cal. 1956); Johnson v. Ocean Shore R.R., 94 Cal. Rptr. 68 (Cal. Ct. App. 1971); Brown v. Penn Cent. Corp., 510 N.E.2d 641, 644 (Ind. 1987); Ross, Inc. v. Legler, 199 N.E.2d 346 (Ind. 1964); Sherman v. Petroleum Exploration, 132 S.W.2d 768 (Ky. Ct. App. 1939); Henry v. Columbus Depot Co., 20 N.E.2d 921 (Ohio 1939)).

[82] 71 F. 626 (6th Cir. 1895).

> which then become valuable by reason of an abandonment of the public use, have led courts to strained constructions to include the fee of such gores and strips in deeds of the abutting lots. And modern decisions are even more radical in this regard than the older cases.[83]

The Trails Act exacerbates this concern about legally "orphaned" strips and gores of land. As the Arizona ranchers in *Ladd*, the Kansas farmers in *Biery*, and many landowners in other Trails Act taking cases can attest, perpetuating an easement across their land can be an evil.

B. An Easement Granted a Railroad for the Operation of a Railway Does Not Include the Right of a Non-Railroad to Use the Land for Public Recreation

When a railroad stops using a rail line and removes the tracks and ties, the easement is abandoned according to the law in essentially every state.[84] Literally hundreds of decisions of the various state supreme courts and courts of appeal hold that a railroad has abandoned an easement when the railroad no longer runs trains across the land and removes the tracks and ties.[85]

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[83] *Id.* at 629–30, 632 (quoting Lembeck v. Nye, 24 N.E. 686, 689 (Ohio 1890)).

[84] *See* Cannco Contractors, Inc. v. Livingston, 669 S.W.2d 457 (Ark. 1984); Harvest Queen Mill & Elevator Co. v. Sanders, 370 P.2d 419 (Kan. 1962); Abercrombie v. Simmons, 81 P. 208 (Kan. 1905).

[85] *See, e.g.*, *Preseault III*, 100 F.3d 1525, 1547–48 (Fed. Cir. 1996) (holding, under the law of Vermont, that the railroad had abandoned the railroad easement when the railroad "ceased using the easement for active transport operations and used the tracks solely to store railroad cars . . . [and] removed the rails and other track materials from the segment of line crossing the Preseaults' property". The concurring opinion noted that "[w]hile it is not disputed that an easement will not be extinguished through mere non-use, removing the tracks and switches from a railway cannot be termed non-use. Non-use of the easement began in 1970; abandonment occurred, as evidenced by the more permanent lack of operability, in 1975 [upon removal of the tracks]." *Id.* at 1553 (J. Rader, concurring); Cannco Contractors, Inc., 669 S.W.2d 457 (holding that the railroad had abandoned the easement when it deeded all of its interest in the easement to a private company—even though track remained and trains continued to use the line to service a private business); Loveland v. CSX Transp., Inc., 622 So. 2d 1120, 1121–23 (Fla. Dist. Ct. App. 1993) (holding that the railroad's sale of its easement to a non-railroad constituted abandonment of the easement); Michigan Dep't of Natural Res. v. Carmody-Lahti Real Estate, 699 N.W.2d 272 (Mich. 2005) (railroad's conveyance of railroad easement to state department of natural resources for a snowmobile trail was an abandonment of the easement); Seventy-Ninth St. Improvement Corp. v. Ashley, 509 S.W.2d 121, 123 (Mo. 1974) ("An offer to sell [a right of way for use other than that for which is granted] is totally inconsistent with any position

Other states have passed statutes expressly providing that a railroad is abandoned when the railroad is authorized to cease rail service over the line and removes the rails and ties.[86]

The DOJ often cites *Chevy Chase Land Co. v. United States*,[87] *Washington Wildlife Preservation, Inc. v. State*,[88] and *Moody v. Allegheny Valley Land Trust*[89] for the proposition that a railroad easement includes the right to use the land for a public recreational trail or that a railroad easement is not abandoned when the land is converted to a public recreational trail. These cases do not so hold. In *Chevy Chase Land*, *Washington Wildlife*, and *Moody*, each court specifically held that the easements in those cases—which were acquired by voluntary conveyance and not condemnation—were *not* limited to use of the land for a railroad. In *Washington Wildlife*, the court premised its holding upon the finding that:

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other than the use of the strip for railroad purposes has been abandoned."); Lawson v. State, 730 P.2d 1308, 1312 (Wash. 1986) (holding that the "change in use of railroad right of way to recreation trail or nature trail is a change of use evidencing abandonment of the right of way," where easement was granted for railroad purposes only); Marthens v. B & O R.R. Co., 289 S.E.2d 706, 710 (W.Va. 1982) (noting that the property was abandoned or no longer used for railroad purposes because "the property [has] actually been alienated by sale or lease"); Pollnow v. State Dep't of Natural Res., 276 N.W.2d 738 (Wis. 1979) (railroad had abandoned the rail line when it removed the tracks and applied to the governing authority for permission to abandon, and as a result, the railroad could not subsequently transfer title to the state for use as a recreational trail); *see also* Boyles v. Missouri Friends of the Wabash Trace Nature Trail, Inc., 981 S.W.2d 644, 648–49 (Mo. 1998). The *Boyles* court held that "'[a]bandonment is complete when the privilege of use authorized by the easement wholly and permanently ceases.' 'Abandonment is proven by evidence of an intention to abandon without an intention to again possess it.' 'An easement for a railroad right-of-way is extinguished or abandoned when the railroad ceases to run trains over the land.' 'An intention to abandon is inferred by the discontinuance of rail service with no prospect for resumption.'" (citing Kansas City Area Transp. Auth. v. 4550 Main Assoc., Inc., 742 S.W.2d 182, 189 (Mo. Ct. App. 1986); Schuermann Enter., Inc. v. St. Louis County, 436 S.W.2d 666, 668 (Mo. 1969); Quinn v. St. Louis-San Francisco Ry. Co., 439 S.W.2d 533, 535 (Mo. 1969) (en banc)); Brown v. Weare, 152 S.W.2d 649, 652 (Mo. 1941). The *Boyles* court further held that use of the right-of-way as "a hiking, biking, cross-country skiing, and nature trail" was not a "use of the land for the purpose of operating a railroad" under Article I, section 26, of the Missouri Constitution and was "consistent only with an intent to wholly and permanently cease railway operations." *Id.* at 649–50.

[86] *See, e.g.*, KAN. STAT. ANN. §§ 66-525(a)(1) (2002).

[87] 733 A.2d 1055 (Md. 1999) (answering certified questions from 158 F.3d 574 (Fed. Cir. 1998)).

[88] 329 N.W.2d 543 (Minn. 1983).

[89] 976 A.2d 484 (Pa. 2009).

> It is assumed that the deeds conveyed only an easement. Significantly, however, *none of the deeds expressly limit the easement to railroad purposes*, provide that the interest conveyed terminates if use for railroad purposes ceases, or provide that the easement would exist only for so long as the right-of-way was used for railroad purposes. While the grantors were undoubtedly aware that a railroad would be constructed on the land, *none of the deeds limit the use to railroad purposes*.[90]

Moody involved landowners suing a railroad and a private trail group for trespass.[91] This case was *not* a Fifth Amendment takings case against the federal government; instead the plaintiffs' objective was to prevent the federal Trails Act from preempting their reversionary interest in their land. The *Moody* plaintiffs wanted their land returned, and they wanted a state court to issue an order barring a federally authorized trail group from using their property.[92]

As an initial matter, we note that the *Moody* appellants were in the wrong court. Because the Trails Act preempts state law, a state court does not possess the authority to hear a trespass action against a trail group.[93] The *Moody* plaintiffs should have addressed their taking claim to the federal courts.[94]

The four-judge majority in *Moody* held that the "plain language" of the easement was for a "Road" across the land, which was a broadly stated right-of-way across the land.[95] The majority held that the "broad terms" of the easement did not limit it to use of the land for a rail line.[96] On this basis, the majority held use of the land for a public trail was within the broadly stated grant of an easement for a road.[97]

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[90] 329 N.W.2d at 546 (emphasis added).

[91] *See Moody*, 976 A.2d at 484.

[92] *See id.*

[93] *See, e.g.*, Town of Grantwood Vill. v. Missouri Pac. R.R. Co., 95 F.3d 654, 658 (8th Cir. 1996) (only federal circuit courts have jurisdiction to review ICC decisions involving rail lines).

[94] *See Preseault III*, 100 F.3d at 1531 (although challenge was to actions of state government concerning state property rights, these actions derived from federal law, and thus "[t]he taking that resulted from the establishment of the recreational trail is properly laid at the doorstep of the federal government").

[95] *Moody*, 976 A.2d at 491.

[96] *See id.*

[97] *See id.* at 492.

Given its finding that the easement was granted for a road, the *Moody* majority held that interim trail use was "not a departure from the broadly-stated terms of the easement."[98] In so holding, the majority reached the same unremarkable conclusion that was reached in *Chevy Chase Land* and *Washington Wildlife*: an easement that is not limited to use of the land for the operation of a railroad may be used for purposes other than operating a railroad across the land.[99]

The Federal Circuit had certified several questions for decision by the Court of Appeals of Maryland,[100] that state's highest court. The Federal Circuit read the response of the Court of Appeals of Maryland, in *Chevy Chase Land*, as:

> The court unanimously held that the 1911 conveyance was an easement, and held that the terms of the original conveyance were sufficiently broad to embrace its use as a recreational trail. . . . Citing its law, the court held that *since the easement is not limited in scope to railroad purposes*, and embraces the current trail use, "a party alleging abandonment must show more than an intent to abandon railroad service."[101]

Public recreational use of land by a non-railroad (or even by a railroad) is not a "railroad purpose." The *Oxford English Dictionary* defines *recreation* as "an activity or pastime pursued"[102] and *trail* as "a beaten track or path or track, esp. in a wild or uninhabited region. Also, a marked route through countryside, around a town, etc., indicating points of interest or historical significance."[103] *Hiking* is defined as "to walk vigorously,"[104] and *biking* is described as "ride on a bike."[105] *Concessionaire* is defined as "[t]he holder of a concession or grant, esp. of the use of land or trading

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[98] *Id.*

[99] *See Chevy Chase Land*, 733 A.2d 1055; *Washington Wildlife*, 329 N.W.2d 543.

[100] *See* Chevy Chase Land Co. v. United States, 158 F.3d 574 (Fed. Cir. 1998), *certifying questions to Chevy Chase Land*, 733 A.2d 1055.

[101] Chevy Chase Land Co. v. United States, Nos. 97-5079, 97-5083, 1999 U.S. App. Lexis 32838, at *5–6 (Fed. Cir. Dec. 17, 1999) (emphasis added) (quoting *Chevy Chase Land*, 733 A.2d at 1059); *see also* Toews v. United States, 376 F.3d 1371, 1380 (Fed. Cir. 2004) (noting that the easement in *Chevy Chase Land* was not limited to railroad purposes).

[102] The New Shorter Oxford English Dictionary 2508 (1993).

[103] *Id.* at 3361.

[104] *Id.* at 1234.

[105] *Id.* at 226.

rights."[106] None of these terms includes or references anything that can be remotely characterized as relating to the operation of a railroad.

Congress has defined a *railroad* as follows: "The term 'railroad' means common carrier by railroad engaged in the transportation of individuals or property or owner of trackage facilities leased by such a common carrier."[107] State law also defines *railroad* in similar manner.[108]

The Federal Circuit, in *Toews v. United States*,[109] recognized that recreational activities are very different from those of a railroad:

> [I]t 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.[110]

No court—state or federal—has ever accepted the DOJ's argument that public recreational use of land by a non-railroad is within the limited railroad purposes allowed under an easement granted to a railroad for the construction and operation of a rail line.

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[106] *Id.* at 468.

[107] 11 U.S.C. § 101(44) (2006).

[108] For example, in Kansas, the state statute defines *railroad train* to "mean a steam engine, electric or other motor, with or without cars coupled thereto, operated upon rails." KAN. STAT. ANN. § 8-1454 (2002). "'Railroad' means a carrier of persons or property upon cars operated upon stationary rails." *Id.* § 8-1452. Kansas provides a specific criminal statute, section 21-3761, prohibiting trespass upon or damage to "railroad property." That statute defines *railroad property* as:

> includ[ing] but not limited to, any train, locomotive, railroad car, caboose, rail-mounted work equipment, rolling stock, work equipment, safety device, switch, electronic signal, microwave communication equipment, connection, railroad track, rail, bridge, trestle, right of way or other property that is owned, leased, operated or possessed by a railroad company.

Florida law defines a *Railroad* as "[a] carrier of persons or property upon cars operated upon stationary rails." FLA. STAT. ANN. § 316.003 (35) (West 2006). A *Railroad Train* is defined as "[a] steam engine, electric or other motor, with or without cars coupled thereto, operated upon rails, except a streetcar." FLA. STAT. ANN. § 316.003 (37) (West Supp. 2009).

[109] 376 F.3d 1371 (Fed. Cir. 2004).

[110] *Id.* at 1376.

C. Railbanking Is Not a Railroad Purpose

The government argued in *Preseault III*[111] that "railbanking" and recreational trail use were railroad purposes within the scope of the easement granted for the operation of a railroad under state law (in that case, Vermont law). The Federal Circuit rejected this argument, stating, "We find no support in Vermont law for the proposition . . . that the scope of an easement limited to railroad purposes should be read to include public recreational hiking and biking trails."[112]

In *Glosemeyer v. United States*[113] the government argued railbanking and recreational trail use were railroad purposes under Missouri law. The Court of Federal Claims rejected this argument, noting that "trail use, by itself, would not constitute a railroad purpose. The transportation use contemplated by a railroad purpose would clearly be the movement of trains over rails. Recreational hiking, jogging and cycling are not connected with railroad use in any meaningful way."[114] The court also stated:

> The term 'railroad purposes' . . . does not encompass other forms of transportation, such as walking or bicycling. . . . The proposed development of a hiking, biking, cross-country skiing, and nature trail is completely unrelated to the operation of a railway and consistent only with an intent to wholly and permanently cease railway operations.[115]

The concurrence in *Preseault III*[116] likewise stated:

> Realistically, nature trails are for recreation, not transportation. Thus, when the State sought to convert the easement into a recreational trail, it exceeded the scope of the original easement and caused a reversion.
>
> . . . [T]he State's transparent attempt to retain property condemned for a narrow transportation use crumbled when it converted that property to a recreational use. . . . [T]he United States and Vermont have converted a right to use

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[111] 100 F.3d 1525 (Fed. Cir. 1996).

[112] *Id.* at 1530 (citing Pollnow v. State Dep't of Natural Res., 276 N.W.2d 738 (Wis. 1979) and Lawson v. State, 730 P.2d 1308 (Wash. 1986) as also rejecting this argument).

[113] 45 Fed. Cl. 771 (2000).

[114] *Id.* at 779.

[115] *Id.* at 779 (quoting Boyle v. Missouri Friends of the Nobosh Trace Nature Trail, Inc., 981 S.W.2d 644, 649–50 (Mo. App. 1998).

[116] 100 F.3d at 1554 (Rader, J., concurring).

> the [landowners'] land for a railroad into a right to hold the land in perpetuity. The vague notion that the State may at some time in the future return the property to the use for which it was originally granted, does not override its present use of that property inconsistent with the easement. That conversion demands compensation.[117]

The *Oxford English Dictionary* does not define *railbanking*. The term does not even appear in the text of the Trails Act.[118] *Railbanking* is the shorthand term that describes the operation of section 1247(d) of the 1983 Amendments to the Trails Act.[119]

Railbanking is "the conversion and use of the right of way for non-railroad purposes."[120] *Railbanking* does not refer to situations in which the railroad that had been using the rail line (or some other railroad corporation) continues to hold an interest in the land but simply chooses not to run trains over the railway. *Railbanking* also does not refer to the situation where a railroad company is holding a railroad easement over property with plans to build or construct a railway over the easement at some time in the future. *Railbanking* is not even the situation in which a non-railroad is holding the easement with a plan or hope of restoring railroad service across the land. By definition, *railbanking* is the use of a former rail line by a non-railroad for public recreational purposes with the possibility that at some indefinite time in the future, the STB may authorize some unidentified railroad to build a new rail line on that land.[121]

Before any rail line may be railbanked and converted to recreational trail use, railroad use over the rail line first must be abandoned. Abandonments are governed by 49 U.S.C., sections 10903 through 10904, which allow a rail carrier to abandon an existing line only if the STB finds "that the present or future public convenience and necessity require or permit the abandonment or discontinuance."[122] To assess "the present or future public convenience, the [STB] weighs the potential harm to affected shippers and

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[117] *Id.*

[118] *See* National Trails System Act of 1968, 16 U.S.C. §§ 1241–51 (2006).

[119] *See* National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 42 (codified as amended, at 16 U.S.C. 1241 et seq.) (2006). *See generally* Goos v. Interstate Commerce Comm'n, 911 F.2d 1283 (8th Cir. 1990); Nat'l Wildlife Fed'n v. Interstate Commerce Comm'n, 850 F.2d 694 (D.C. Cir. 1988).

[120] *Goos*, 911 F.2d at 1295.

[121] *See, e.g.*, 65 Am. Jur. 20 *Railroads* § 63 (2001).

[122] 49 U.S.C. § 10903.

communities against the burden of continued operation on the railroad and on interstate commerce."[123]

"The [STB] views abandonment and conversion as separate proceedings."[124] As a matter of federal law, railbanking can occur only after both the railroad and the STB first have determined that the easement is no longer needed for railroad service,[125] more than two years have passed since the easement was last used for railroad service,[126] and a non-railroad agrees to use the land for a public recreational purpose.

Although the term *rail* is used in the word *railbanking*, the use of the land during the time it is railbanked has absolutely nothing to do with a railroad. No railroad has an interest in the land.[127] The railroad tracks and ties are removed from the land.[128] A nonrailroad is using it for a purpose that has nothing to do with trains. At most there is a vague existential notion that perhaps someday a railroad will return.

"[The government] contends that holding out the possibility of a reactivation, even if remote and indefinite, is a railroad purpose in and of itself. This future potentiality thus becomes a present railroad purpose in the view of the [g]overnment."[129] The CFC rejected this contention: "In sum, neither component of railbanking—the preservation of the rail line for future use nor the 'interim' use of the easement as a recreational trail—constitutes a railroad purpose under Missouri law."[130] To contend "railbanking" is a railroad purpose recalls Alice's conversation in Wonderland.

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."[131]

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[123] *Goos*, 911 F.2d at 1293; *see also* Colorado v. United States, 271 U.S. 153 (1926).
[124] *Goos*, 911 F.2d at 1293.
[125] *See* 49 U.S.C. § 10903.
[126] *See* 49 C.F.R. § 1132.50(b) (2009).
[127] *See* RLTD Ry. Corp v. Surface Transp. Bd., 166 F.3d 808, 811 (6th Cir. 1999).
[128] *See* 49 C.F.R. § 1152.29(d)(i).
[129] Glosemeyer v. United States, 45 Fed. Cl. 771, 780 (2000).
[130] *Id.* at 781.
[131] LEWIS CARROLL, THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE 66 (Selwyn H. Goodcare ed., Univ. of Cal. Press 1983 (1871)).

The parody, *Lawyers Handbook*, teaches that "[w]ith regard to definitions, do not hesitate to define things in improbable ways. A good lawyer feels no compunction about defining 'person' to mean 'corporations, partnerships, and livestock'; 'automobile' to mean 'airplanes, submarines, and bicycles'; and 'cash' to mean 'stocks, bonds, and whiskey.'"[132]

Were we to follow the counsel of Humpty Dumpty or the *Lawyers Handbook* it might be possible to contend that a locomotive is a "bike," a railroad is a "hiking trail," and railbanking—the non-use of an abandoned right of way by a non-railroad—is a "railroad purpose."

Such use of language, however, empties words of their meaning and is an attempt to do precisely that which the Supreme Court has said the sovereign cannot do—redefine state property interests by *ipse dixit* in an effort to avoid paying compensation. The sovereign may indeed redefine state property interests. But, when doing so destroys a citizen's property interest, it must pay just compensation.

D. The 1983 Amendments to the Trails Act Were Adopted Precisely Because Railbanking Is Not a Railroad Purpose Under State Law

When the DOJ (or others) argue that both railbanking and recreational trail use are railroad purposes, the government is attempting to bootstrap into state law a concept invented by Congress in the 1983 Amendments to the Trails Act. This effort fails for the additional reason that it misinterprets the intent and meaning of the 1983 Trails Act Amendments. Congress adopted the 1983 Amendments precisely because it understood that railbanking and recreational trail use were *not* railroad purposes under state law. If railbanking and recreational trail use were railroad purposes under state law, the 1983 Amendments to the Trails Act would have been unnecessary.

The Supreme Court and the courts of appeal have detailed at length the intent and operation of the 1983 Amendments and how the Trails Act operates to work a taking of landowners' reversionary rights in their property.[133]

Congress itself has made clear that it intended the 1983 Amendments to the Trails Act to preempt state law and that, when the Trails Act operated to preempt property rights enjoyed by landowners under state law, just compensation would be paid to the landowners. Congressman Barr, then Chair-

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[132] D. ROBERT WHITE, ESQ., THE OFFICIAL LAWYER'S HANDBOOK 185–86 (Simon & Schuster 1983).

[133] For a discussion of Congress's intent, see *supra* notes 15–23 and accompanying text.

man of the House Judiciary subcommittee holding hearings into the Trails Act, noted:

> At first glance, it may appear Congress did not consider the fact that if the railroad land was not transferred in fee simple it may belong to the property owner, and not the railroad. However, Congress intended the railbanking aspect of this Federal law would preempt State law and hold the land essentially in perpetuity, until possible rail reactivation.
>
> In the 1996 en banc decision in *Preseault v. United States*, involving the same plaintiffs as in the Supreme Court case I just mentioned, the U.S. Court of Appeals for the Federal Circuit held that railroad abandonment constituted a per se taking, and therefore would require payment of just compensation to the affected landowners, under the Fifth Amendment.[134]

Here is the point: It is beyond dispute that Congress, the U.S. Supreme Court, and the various courts of appeal all understand that the railbanking provision of the 1983 Trails Act amendments was intended to preempt contrary state law and, in so doing, to take a property owner's reversionary interest in their land. If railbanking and interim recreational trail use were understood to be railroad purposes under existing state law, there would have been no "problem" Congress needed to fix with the 1983 Amendments.

VII. THE FEDERAL GOVERNMENT MAY NOT ESCAPE ITS CONSTITUTIONAL OBLIGATION TO PAY JUST COMPENSATION BY REDEFINING OR SHIFTING THE DEFINITION OF PROPERTY

The government argued in *Preseault I* that the Trails Act did not take a compensable interest in the land because the government had redefined railroad to include "trail use" as a matter of federal regulatory law.[135] The Second Circuit accepted this argument,[136] but the Supreme Court, *Preseault II*, unanimously rejected this view.[137] Justice O'Connor concurred separate-

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[134] *Litigation and Its Effect on the Rails-to-Trails Program: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 107th Cong. 2 (2002) (statement of Bob Barr, Chairman, H. Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary).

[135] *See* Preseault v. Interstate Commerce Comm'n, 853 F.2d 145, 150 (2nd Cir. 1988).

[136] *See id.* at 151.

[137] *See* Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 15–16 (1990).

ly, joined by Justice Scalia and Justice Kennedy, to emphasize the point that property interests are created by state law. Justice O'Connor wrote:

> In determining whether a taking has occurred, "we are mindful of the basic axiom 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.'" . . . Determining what interest petitioners would have enjoyed under Vermont law, in the absence of the ICC's recent actions, will establish whether petitioners possess the predicate property interest that must underlie any takings claim.[138]

The Supreme Court has rejected the notion that either Congress or a state may redefine existing property interests without violating the Fifth Amendment's obligation to pay just compensation for the taking of property.[139]

The government also argued that because the railroad held a perpetual easement, landowners are "not deprived of a property interest by [the Trails Act]. . . [it] takes nothing and changes nothing. [The Trails Act] leaves the landowners where they would be if the ICC had ordered the railroad to keep running."[140]

The courtroom broke into laughter when, in response to this argument, Chief Justice Rehnquist commented, "That is like saying if my aunt were a man she would be my uncle."[141] Justice Scalia similarly responded:

> The ICC didn't order the railroad to keep running. Saying the railroad could have continued using [the land] for rail purposes so you really haven't lost anything. In fact, they

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[138] *Id.* at 23 (O'Connor, J., concurring) (citations omitted); *see also* Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (stating "[p]roperty interests, of course, 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 . . .").

[139] *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."); s*ee also* Hastings v. Whitney, 132 U.S. 357 (1889); *Preseault III,* 100 F.3d 1525, 1539 n. 13 (1996) ("[property] interests were fixed at the time of their creation").

[140] Oral Argument, *Preseault II*, 494 U.S. 1 (No. 88-1076) (statements of John Dunleavy), *available at* http://www.oyez.org/cases/1980-1989/1989/1989_88_1076/argument.

[141] *Id.* (statements of Chief Justice William Rehnquist).

> didn't, but they might have. Even though you have a deed that says if we stop using it for rail purposes it's yours, you say, well you haven't lost anything because, yeah, they have stopped using it for rail purposes, but they might not have . . . . that's not very appealing to me.[142]

Yet, the DOJ, in its defense of the government taking citizens' land without paying compensation, continues to make variations of this argument and invite courts to engage in such a judicial taking for the benefit of the federal government. The Fifth and Fourteenth Amendments prohibit this attempted end-run around the constitutional obligation to pay compensation.

Justice Stewart's concurrence in *Hughes v. Washington*[143] provides clear authority against the so-called "shifting public use" argument the government advocates. Justice Stewart emphasized that a property owner has a valid Fifth Amendment claim when a state court departs from settled law to redefine property interests:

> [T]o the extent that [the Washington Supreme Court's decision] constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.[144]

Webb's Fabulous Pharmacies v. Beckwith[145] is also instructive. In *Webb*, the Supreme Court's analysis focused more on the Florida Supreme Court's opinion than on the action of the Florida legislature. The Court held "[n]either the Florida [l]egislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal [private funds paid into court pending settlement of litigation] as 'public money' because it is held temporarily by the court."[146] The Court concluded with the rule (affirmed in *Preseault II* in the context of

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[142] *Id.* (statements of Justice Antonin Scalia).
[143] 389 U.S. 290 (1967).
[144] *Id.* at 296–97.
[145] 449 U.S. 155 (1980) (Stewart, J., concurring).
[146] *Id.* at 164.

the Trails Act) that "a State, by *ipse dixit*, may not transform private property into public property without compensation."[147]

VIII. THE FIFTH AMENDMENT REQUIRES THE FEDERAL GOVERNMENT TO PAY THE LANDOWNER JUST COMPENSATION FOR THE REVERSIONARY INTEREST TAKEN BY THE TRAILS ACT

Originally, the ICC argued the Trails Act did not take the reversionary owners' interest in land upon which the abandoned rail line had once been located.[148] The ICC was, of course, wrong on this point.[149] The U.S. Supreme Court and the U.S. Court of Appeals for the D.C. Circuit and Federal Circuit each have rejected the ICC's original position and ruled that the Trails Act can and does operate to take a landowner's reversionary interest in their land.[150] A taking caused by the Trails Act is a per se physical taking

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[147] *Id.* The Supreme Court heard oral arguments Dec. 2, 2009 in another judicial taking case, *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot.*, 129 S. Ct. 2792 (2009), *granting cert. to Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008) (The Florida Supreme Court redefined Florida property law concerning littoral rights in oceanfront property.).

[148] *See* Nat'l Wildlife Fed'n v. Interstate Commerce Comm'n, 850 F.2d 694 (D.C. Cir. 1988). That court stated the ICC's position:

> [T]he Commission suggests that the Trail Act Rules do not authorize a taking of that property, because, "[i]n contrast to the railroad, which has a vested (i.e., present) right to dispose of its interest in the right-of-way . . ., the holder of a reversionary interest has nothing more than a future interest which might never mature and which is simply postponed in the event of a trail use arrangement."

Id. at 704 (citation omitted).

[149] *See id.* at 708.

[150] *See Preseault II*, 494 U.S. 1 (1990); Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) (*Preseault III*). The advocacy group Rails-to-Trails Conservancy is fond of characterizing the *Preseault II* and *Preseault III* decisions as "non-precedential." For example, in her written testimony presented to the STB, Marianne Wesley Fowler, Senior Vice President of Federal Relations for the Rails-to-Trails Conservancy, testified:

> There has been much sound and fury over the purported impact of railbanking orders on the putative "property rights" of adjacent landowners, or so-called "reversionary property owners." These adjacent landowners point to a questionable, and, most importantly, non-precedential decision rendered by the U.S. Court of Appeals for the Federal Circuit [in *Preseault III*].

See Written Testimony of M. Fowler, at STB hearing, *supra* note 10, at 7.

This statement is, frankly, absurd. To characterize the decisions of a unanimous U.S. Supreme Court and a majority of the U.S. Court of Appeals for the Federal Circuit sitting en

for which the Fifth Amendment requires compensation.[151] (The distinction between a per se physical taking and a regulatory taking is discussed in Part IX.B.)

In *Preseault II*, Justice Brennan, writing for a unanimous Supreme Court, explained the nature of the taking that resulted from the Trails Act:

> This language [of 16 U.S.C. section 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. 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.[152]

This compensable taking occurs when the STB issues a Notice of Interim Trail Use. This event is what triggers the taking.[153] Solicitor General Kagen affirmed that a compensable Trails Act taking occurs when a NITU

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banc as "non precedential" is to make a statement that is jurisprudentially illiterate. Whether one agrees or disagrees with the decisions in *Preseault II* and *Preseault III*, they are settled law. The Federal Circuit itself has dismissed this mischaracterization of its decision in *Preseault III*:

> Since there was a written concurrence by two of the majority judges, the Government throughout its brief insists on referring to the opinion of the *en banc* court in *Preseault* as a "plurality" opinion, presumably to weaken its precedential value. Even a cursory reading of the concurrence shows that there was no disagreement on any of the issues, as well as on the result. Whether denominated as a "concurrence" or as "additional views," an appellation used in other cases under similar circumstances, the holding of the case reflects the considered view of a substantial majority of the court.

Toews v. United States, 376 F.3d 1371, 1380, n.6 (Fed. Cir. 2004).

[151] *See* Barclay v. United States, 443 F.3d 1368 (Fed. Cir. 2006) (rejecting the argument that the STB's issuance of a NITU is a regulatory taking); Caldwell v. United States, 391 F.3d 1226 (Fed. Cir. 2004). A Trails Act taking is a physical taking as in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (stating permanent physical occupation authorized by government is a taking regardless of the public interest it may serve); *Kaiser-Aetna v. United States*, 444 U.S. 164 (1979) (stating government attempt to create public right of access to dredged private pond exceeded regular necessity so as to amount to a taking requiring just compensation).

[152] *Preseault II*, 494 U.S. at 8.

[153] *See Caldwell*, 391 F.3d 1226; *Barclay*, 443 F.3d 1368.

is issued, not when—or if—a trail is actually built.[154] The taking is of the property owner's reversionary interest in the land. This taking occurs when the STB "preempts" and "appropriates" the owner's reversionary interest by issuing a NITU—whether or not a trail subsequently is built on their land.[155]

IX. THE COMPENSABLE TAKING OCCURS WHEN THE STB ISSUES THE NITU EVEN IF THE RAILROAD HAS NOT YET CONSUMMATED ABANDONMENT AND EVEN IF A TRAIL GROUP HAS NOT YET ACQUIRED THE RIGHT TO BUILD A TRAIL ACROSS THE LAND

A. A Taking Occurs When the NITU Is Issued, Even If the Railroad Has Not Yet Consummated Abandonment of the Rail Line

The date of taking is important because it is the date when the claim accrues.[156] The date of claim accrual determines several important issues in any Trails Act taking case. The date of claim accrual is: (1) the date when the statute of limitations begins to run,[157] (2) the date when a party must be the owner of the land that has been taken—that is a property owner who sold the land prior to the date of taking or acquired title to the land after the date of taking is not eligible to make a claim for compensation;[158] (3) the date when the government's obligation to pay interest begins to accrue;[159]

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[154] Brief for the United States in Opposition to Petition for Writ of Certiorari at *12–13, Illig v. United States, 129 S. Ct. 2860 (May 29, 2009) (No. 08-852), 2009 WL 1526939 [hereinafter Brief for the United States]. Solicitor General Kagen wrote:

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

Id.

[155] *See id.*

[156] *See, e.g.*, *Barclay*, 443 F.3d at 1379 ("[A] takings claim accrues when 'all events which fix the government's alleged liability have occurred. . . .'" (quoting Boling v. United States, 220 F.3d 1365, 1370 (Fed. Cir. 2000))).

[157] *See Barclay*, 443 F.3d 1368; *Renewal* 64 F. Cl. 609; Caldwell v. United States, 391 F.3d 1226 (Fed. Cir. 2004).

[158] *See* United States v. Dow, 357 U.S. 17, 20–21 ("For it is undisputed that '[since] compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment.'" (quoting Danforth v. United States, 308 U.S. 271, 284 (1939))).

[159] *See* Order, Miller v. United States, No. 03-2489L (Fed. Cl. Aug. 22, 2006) (Bruggink, J.) (granting in part and denying in part plaintiffs' motion for summary judgment).

and, (4) the date when property value is determined for the purpose of establishing just compensation.[160] In his opinion in *Palazzolo*, Justice Stevens noted that "[p]recise specification of the moment a taking occurred and of the nature of the property interest taken is necessary in order to determine an appropriately compensatory remedy."[161]

The Federal Circuit wrote in *Preseault III*, "[W]e find the question of abandonment is not the defining issue, since whether abandoned or not the government's use of the property for a public trail constitutes a new, unauthorized use."[162] The Federal Circuit reiterated this point in *Toews*:

> Further, it is the government's view that, under California law, there was no abandonment or extinguishment of the easements caused by the federal actions under section 8(d) of the [Trails Act]. [T]he trial court concluded that, as a factual matter, the railroad's management had acted in an unequivocal and decisive manner clearly showing an intention to abandon that section of the line . . . However, just as the trial court itself indicated that its conclusion on this matter was not necessary to the result reached, for the reasons that follow we need not definitively decide this issue either.[163]

The Federal Circuit expressly held the landowners' taking claims arose upon issuance of the NITU, even though "the railroad continued to use the right-of-way for railroad purposes after the NITU was issued" and the railroad had not abandoned the right of way.[164] The court stated:

> But even if under Kansas law, the reversion would not occur until after federal authorization of abandonment, that state law reversion was still delayed by the issuance of the NITU, and the claim still accrued with the issuance of the NITU. It similarly makes no difference that the railroad use may have continued after the NITU issued. The

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[160] *See id.*

[161] Palazzolo v. Rhode Island, 533 U.S. 606, 639 (2001) (Stevens, J., concurring in part and dissenting in part).

[162] *Preseault III*, 100 F.3d at 1549.

[163] Toews v. United States, 376 F.3d 1371, 1375–76 (Fed. Cir. 2004).

[164] Barclay v. United States, 443 F.3d 1368, 1374 (Fed. Cir. 2006), *aff'g sub nom.* Renewal Body Works v. United States, 64 Fed. Cl. 69 (Fed. Cl. 2005), *aff'g*, 351 F. Supp (D. Kan. 2004). These consolidated cases involved trails in both California and Kansas.

> termination of railroad use was still delayed by the NITU.[165]

In both the main case in *Barclay* and the second, *Renewal Body Works Inc. v. United States*,[166] the landowners argued that a Trails Act taking does not occur until the railroad easement has been abandoned and the property converted to recreational trail use. The *Renewal* landowners argued their "claim did not accrue until [they were] physically ousted from the property when trail use began."[167] The Federal Circuit rejected this argument, writing, "The barrier to reversion [of the *Renewal* landowners' property] is the NITU, not physical ouster from possession."[168] Similarly, the court held:

> [The *Barclay* landowners] insist that the NITU would not itself block a reversion if the railroad continued to use the right-of-way for railroad purposes after the NITU was issued. They argue that . . . the taking can occur only after federal law authorized abandonment—that is, when the railroad ceases operations and the trail operator assumes physical possession. They thus urge that the trail operator's physical occupation, and not the Meadowlark trail NITU, blocked reversion.[169]

The Federal Circuit wrote that "state law reversion was still delayed by the issuance of the NITU, and the claim still accrued with the issuance of the NITU."[170] The Federal Circuit held thusly even though the railroad had not yet consummated its abandonment of the rail line.[171]

In *Barclay* the Federal Circuit relied on its holding in *Caldwell* that a Trails Act taking "occurs when state law reversionary property interests that would otherwise vest in the adjacent landowners are blocked from so vesting."[172] The court in that case held "the appropriate triggering event for any takings claim under the Trails Act occurs when the NITU is issued."[173]

In *Caldwell*, the Federal Circuit held the Trails Act works only a single taking and this taking occurs when the original NITU is issued—not when

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[165] *Id.*
[166] 64 Fed. Cl. 609 (2005), *aff'd sub nom. Barclay* 443 F.3d 1368.
[167] *Barclay*, 443 F.3d at 1372.
[168] *Id.*
[169] *Id.* at 1374.
[170] *Id.*
[171] *See id.*
[172] *Id.* at 1373 (quoting Caldwell v. United States, 391 F.3d 1226, 1233 (Fed. Cir. 2004)).
[173] *Caldwell*, 391 F.3d at 1235.

the Trail Use Agreement is reached or a trail is subsequently constructed.[174] The Federal Circuit reaffirmed in *Bright v. United States* that the taking claim arose upon the STB's issuance of the NITU.[175] "A further effect of the NITU was to accrue an action for compensation by any affected landowners based on a Fifth Amendment taking."[176]

Solicitor General Kagen has embraced *Caldwell* as adopting a single "bright line one size fits all" role that the Trails Act taking occurs when the NITU is issued, even if no trail is yet established.[177] "It is true that, under Caldwell, landowners may seek compensation for an alleged taking immediately upon issuance of the NITU, even though no trail use agreement is reached, and any taking that may later be found would only have been temporary."[178]

B. The Trails Act Is a Per Se Physical Taking of the Owner's Property, Not a Regulatory Taking

In *Pennsylvania Coal Co. v. Mahon*,[179] Justice Holmes wrote that "if regulation goes too far it will be recognized as a taking."[180] As Justice Scalia has noted, "[P]rior to Justice Holmes's exposition in [*Mahon*], it was generally thought that the Takings Clause reached only a 'direct appropriation' of property . . . or the functional equivalent of a 'practical ouster of [the owner's] possession.'"[181]

Since *Mahon*, taking jurisprudence has fallen into one of two categories. The first category—per se takings—involves government "acquisition"

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[174] *See id.*

[175] *See* Bright v. United States, No. 2009-5048, 2010 WL 1740825 (Fed. Cir. May 3, 2010). On the Federal Circuit's website, http://www.cafc.uscourts.gov/dailylog.html, the case is styled as *Fauvergue v. United States*.

[176] *Id.* at *5.

[177] *See* Brief for the United States, *supra* note 154.

[178] Brief for the United States in Opposition, *Illig v. United States*, 129 S.Ct. 2860 (U.S. May 29, 2009) (No. 08-852), 2009 WL 1526939.

[179] 260 U.S. 393 (1922).

[180] *Id.* at 415. Holmes also authored the majority opinion in *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922). In *Portsmouth*, Holmes wrote the government had taken the owner's land (a summer resort) when the government established a naval gun battery at a nearby fort and could fire the guns "over and across" the land. *Id.* at 329. There was no allegation the government ever had—or would—fire a projectile onto the land. Nonetheless this government action was a taking even though there was no physical invasion of the land itself.

[181] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992) (citations omitted).

of property or "practical ouster" of the owner. The second category involves government "regulation ban[ning] certain private uses of a portion of an owner's property."[182]

Per se takings are occasionally labeled *physical*. But, we need to be careful to not let the label define the category. Per se takings are not limited only to cases in which government physically invades an owner's land. Justice Holmes included the circumstance when an owner is "practically ousted" from possession in the category of "traditional" (what we now call per se) takings.

In *Tahoe*, the majority described per se takings as "when the government appropriates"[183] or obtains "an interest in property,"[184] and—of particular note—when the government "redefine[s] the range of interests included in the ownership of property."[185] All of these events can happen without any physical possession or occupation of the land by the government. In other words, there can be a per se taking without having government "boots on the ground."[186]

Per se takings occur when the government requires the owner to grant a public easement across their land. In *Nollan v. California Coastal Commission*[187] and *Dolan v. City of Tigard*,[188] the taking occurred when the government issued orders compelling fee owners to grant public easements across their lands in exchange for permits allowing them to develop their lands. In *Kaiser-Aetna v. United States*,[189] the taking occurred when the

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[182] Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323 (2002). These two categories are occasionally labeled *physical* and *regulatory*. *See, e.g.*, *id.* at 321 ("The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings.") (Stevens, J.).

[183] *Id.* at 322 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)) (compensable taking "when the government appropriates part of a roof top . . . to provide cable TV").

[184] *Id.* at 322 (citing United States v. Pewee Coal Co., 341 U.S. 114 (1951) (stating presidential order nationalizing mines was per se taking even though owners left with day-to-day operations).

[185] *Id.* at 326 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)).

[186] *See, e.g.*, Kimball Laundry Co. v. United States, 388 U.S. 1 (1949) (stating government's temporarily taking tenant's leasehold interest in warehouses was taking); United States v. Causby, 328 U.S. 256 (1946) (stating that government planes flying over property was per se taking; although "planes never touched the surface," the property owner's "beneficial ownership . . . would be destroyed"); United States. v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945).

[187] 483 U.S. 825 (1987).

[188] 512 U.S. 374 (1994).

[189] 444 U.S. 164 (1979).

government issued an order that imposed a navigational servitude upon the property. In these three easement cases the compensable taking occurred before there was any physical occupation of the owner's land.

Per se takings also occur when government redefines property interests. For example, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*,[190] a law deeming interest on funds deposited with the court to be state property was a Fifth Amendment taking. The Court wrote, "A State, by *ipse dixit,* may not transform private property into public property without compensation."[191] The Court later elaborated on this holding in *Phillips v. Washington Legal Foundation*,[192] stating, "In other words, at least as to confiscatory regulations (as opposed to those regulating the use of property), a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law."[193]

In *United States v. Security Industrial Bank*,[194] the Court, in dicta, reasoned that a federal bankruptcy law that abrogated or invalidated state lien rights would be an unconstitutional per se taking if "applied retrospectively to destroy pre-enactment property rights."[195]

The government in this case argued that the law impairing the liens was a regulatory taking to be evaluated under *Penn Central* factors and not a classical per se taking.[196] The government further argued that in a classical or per se taking, "the government acquire[s] for itself the property in question while in [*Security Industrial*] the government has simply imposed a general economic regulation which in effect transfers the property interest from a private creditor to a private debtor."[197]

The Court in *Security Industrial* rejected the government's regulatory taking argument: "While the classical taking is of the sort the government

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[190] 449 U.S. 155 (1980).

[191] *Id.* at 162.

[192] 524 U.S. 156 (1998).

[193] *Id.* at 167 (citing *Webb's*, 449 U.S. at 163–64). During the oral argument for *Webb's*, Justice Stewart noted, "the state legislature can't just by calling something public money take private property without compensation for it. He couldn't just take somebody's house in Florida and say, hereafter John Jones' house will be public property. He's just got to pay John Jones if he wants to take it, under the Constitution." Transcript of Oral Argument, *Webb's*, 449 U.S. 155 (Oct. 13–14, 1980) (No. 79-1033), *available at* http://oyez.org/cases/1980-1989/1980/1980_79_1033/argument1.

[194] 459 U.S. 70 (1982).

[195] *Id.*

[196] *See* Brief of the United States, *supra* note 154, at 10, *Sec. Indus. Bank*, 459 U.S. 70 (Feb. 22, 1982) (No. 81-184), 1982 WL 608667 (citing Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

[197] *Sec. Indus. Bank*, 459 U.S. at 77–78.

describes, our cases show that takings analysis is not necessarily limited to outright acquisitions by the government for itself."[198] The Court noted that "[s]ince the government action here would result in a complete destruction of the property right of the secured party, the case fits but awkwardly into the analytical framework employed in *Penn Central* where government action affected some but not all of the 'bundle of rights.'"[199]

A significant factor common to per se takings (but not present in regulatory takings) is the government denying a landowner the right to exclude others from their property. The Court in *Kaiser-Aetna* stated, "we hold that the 'right to exclude,' so universally held to be a fundamental element of a property right, falls within this category of interests that the government cannot take without compensation."[200] In *Nollan*, the Court noted that "the right to exclude [is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[201]

In *Tahoe*, the Court noted this distinction between per se and regulatory takings: "A regulatory taking . . . does [not] dispossess the owner or affect her right to exclude others."[202]

The court in *R.J. Widen Co. v. United States*,[203] noted:

> [T]o constitute a taking under the Fifth Amendment it is not necessary that property be absolutely "taken" in the narrow sense of that word to come within the protection of this constitutional provision; it is sufficient if the action by

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[198] *Id.* at 78 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Prune Yard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).).

[199] *Id.* at 75–76; *see also* Armstrong v. United States, 364 U.S. 40, 48 (1961) ("The total destruction by the Government of all value in these [state law materialmen] liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure."); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 590–93 (1935) (holding a federal act was an unconstitutional Fifth Amendment taking of a state law interest in property because the Act took "substantive rights in specific property" when it allowed a mortgagee to stay a foreclosure for five years and then negotiate to purchase the property for less than the value of the mortgage).

[200] Kaiser-Aetna v. United States, 444 U.S. 164, 179–80 (1979).

[201] Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987) (citations omitted); *see also* Dolan v. City of Tigard, 512 U.S. 374, 393 (1994).

[202] Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency, 533 U.S. 302, 324 n.19 (2002).

[203] 375 F.2d 988 (Ct. Cl. 1966).

> the government involves a direct interference with or disturbance of property rights.[204]

As these cases demonstrate, it is not necessary to have government "boots on the ground" for a per se taking to have occurred. A government act that destroys or impairs an owner's state law interest in property or effects a transfer of that interest to a third party by redefining the range of state law property interests is a per se taking.

In a per se taking the Fifth Amendment mandates that the government "has a categorical duty to compensate the former owner."[205] This duty applies

> regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary . . . [The government] is required to pay for that share [of property taken] no matter how small.[206]

The second category of takings are regulatory takings—the spawn of *Pennsylvania Coal Co. v. Mahon*.[207] The Supreme Court describes these takings as "regulations prohibiting private uses," and as arising from a "public program adjusting the benefits and burdens of economic life to promote the common good."[208]

"A regulatory taking, by contrast [with a per se taking,] does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others."[209] Typically, a regulatory taking claim involves land-use regulations and a permitting process.[210] As the Supreme Court observed, since *Mahon*, "neither a physical appropriation

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[204] *Id.* at 993 (citations omitted).

[205] United States v. Pewee Coal Co., 341 U.S. 114, 115 (1951).

[206] *Tahoe-Sierra*, 535 U.S. at 332.

[207] 260 U.S. 393 (1922).

[208] *Tahoe-Sierra*, 535 U.S. at 323, 324–25 (quoting Penn Cent. Transp. Co. v New York City, 483 U.S. 104, 124 (1978)).

[209] *Id.* at 324, n.19.

[210] *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (permitting process required for filling wetlands to build beach club); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (coastal development permit process that prohibited any economically viable development); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (zoning regulations governing expansion of buildings designated historic landmarks).

nor a public use has ever been a necessary component of a 'regulatory taking.'"[211]

The *Penn Central* factors are used to evaluate whether a regulatory taking is compensable. "When presented with a regulatory taking claim, [the] court analyzes three separate criteria: (1) the character of the governmental action; (2) the economic impact of the regulation on the claimant; and, (3) the extent that the regulation interferes with distinct investment-backed expectations of the property owner."[212]

1. Because the Trails Act Redefines and Effectively Eliminates the Landowner's Reversionary Interest It is a Per Se Taking

In *Preseault I*, the government argued that the Trails Act did not take a compensable interest in land because the government had redefined railroad purposes to include public trail use as a matter of federal regulatory law.[213] The Second Circuit accepted this argument.[214] The Supreme Court unanimously rejected this view, while affirming the Second Circuit on other grounds.[215]

The Supreme Court had previously rejected the contention that either Congress or a state may redefine existing property interests without violating the Fifth Amendment's obligation to pay just compensation for the taking of property.[216]

The Federal Circuit has described the fee owner's reversionary interest in their land as being "effectively eliminated,"[217] perpetually "precluded,"[218] or "destroyed."[219] The Supreme Court has clearly held that when the gov-

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[211] *Tahoe-Sierra*, 533 U.S. at 326.

[212] Creppel v. United States, 41 F.3d 627, 631 (Fed. Cir. 1994) (citing Penn Central, 438 U.S. at 124).

[213] *See Preseault I*, 853 F.2d 145, 150 (2d Cir. 1988).

[214] *See id.* at 151.

[215] *See Preseault II*, 494 U.S. 1, 4 (1990).

[216] *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."); s*ee also* Hastings v. Whitney, 132 U.S. 357 (1889).

[217] Caldwell v. United States, 391 F.3d 1226, 1228 (Fed. Cir. 2004).

[218] Barclay v. United States, 443 F.3d 1368, 1373 (Fed. Cir. 2006).

[219] *Preseault III*, 100 F.3d at 1552.

ernment "impairs," "redefines," or "destroys" an owner's interest in property it is a per se taking.[220]

The Federal Circuit has ruled Trails Act takings are physical—not regulatory—takings.[221] The Federal Circuit (sitting en banc) rejected the government's argument that the Trails Act involves a regulatory taking to be analyzed under *Penn Central* factors, stating that "[t]he trial court erred in accepting the government's effort to inject into the analysis of this *physical taking case* the question of the owner's 'reasonable expectations.'"[222]

2. *The NITU Takes a Landowner's Interest in Land and Gives It to a Railroad*

In *United States v. General Motors Corp.*,[223] the Court held that property "denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to . . . dispose of it."[224]

A NITU takes a landowner's right to use or sell his or her reversionary interest and gives this right to a railroad. The railroad now has the right—by reason of the NITU and not state law—to sell an interest in the landowner's property.

This redistribution of wealth from landowners to railroad corporations is not inconsequential. In the classic property law analogy, the fee owner holds the full bundle of sticks, less one (an easement held by the railroad allowing the railroad to operate a railroad across the land). The Trails Act takes this entire bundle of sticks from the owner and gives them to the railroad to sell or donate for a tax deduction. The landowner is left with nominal title, but the railroad and trail user—by reason of this federal law—have gained "virtual" fee title to the land.

The owner of land subject to a NITU issued under the Trails Act is no different from the owners in *Nollan* when "the taking occurred when the state agency compelled the petitioners to provide an easement of public access. . . . That event—a compelled transfer of an interest in property—

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[220] *See, e.g.*, United States v. Sec. Indus. Bank, 459 U.S. 70 (1982); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980); Armstrong v. United States, 364 U.S. 40 (1961); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).

[221] *See Preseault III*, 100 F.3d 1525, 1540 (Fed. Cir. 1996) ("The trial court erred in accepting the Government's effort to inject into the analysis of this physical taking case the question of the owner's reasonable expectations.").

[222] *Id.* (emphasis added); *see also* Forest Products v. United States, 177 F.3d 1360, 1364 (Fed. Cir. 1999) (citing *Preseault III* as an example of per se taking).

[223] 323 U.S. 373 (1945).

[224] *Id.* at 377–78.

occurred after the petitioners had become the owner of the property and unquestionably diminished the value of petitioner's property."[225]

3. The Trails Act Takes a Landowner's Right to Exclude Others From His or Her Property

"[T]he right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[226] Landowners whose property is subject to a NITU are in the same situation as was Florence Dolan, the property owner in *Dolan*:

> [T]he city wants to impose a permanent recreational easement upon petitioner's property. . . . Petitioner would lose all rights to regulate the time in which the public entered onto the greenway, regardless of any interference it might pose with her retail store. Her right to exclude would not be regulated, it would be eviscerated.[227]

The taking in *Dolan* occurred when the city sought to impose this burden on Mrs. Dolan's property, not when the pedestrian and bicycle pathway was actually created.[228] In *Dolan*—like *Nollan*—there had been no physical invasion of the property at the time the Supreme Court found the taking to have occurred.[229]

4. The Trails Act Takes a Landowner's State Law Right To A Quiet Title Action

When the STB issues a NITU, it perpetually extends the Trails Act's preemption of the landowner's reversionary interest until the STB's jurisdiction over the land terminates. The STB's jurisdiction is exclusive and plenary,[230] and section 8(d) of the Trails Act extends this jurisdiction to the

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[225] Palazzolo v. Rhode Island, 533 U.S. 606, 642–43 (2001) (Stevens, J., concurring in part and dissenting in part) (citing Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)).

[226] *Nollan*, 483 U.S. at 831 (quoting Kaiser-Aetna v. United States, 444 U.S. 164, 176 (1979)).

[227] Dolan v. City of Tigard, 512 U.S. 374, 394 (1994).

[228] *See id.*

[229] *See id.*

[230] *See* Hayfield N. R.R. v. Chicago & N.W. Transp. Co., 467 U.S. 622, 635 (1984); Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 319 (1981); Colorado v. United States, 271 U.S. 153 (1926).

land itself.[231] The Trails Act specifically preempts the landowner's right to pursue a quiet title action under state law.[232]

5. The Trails Act Is Not a Regulation of the Landowners' Interest in Their Land

Regulatory takings involve some limitation upon owners' use of their property. Regulatory taking claims arise commonly in the context of permitting schemes.[233]

An essential feature of these regulatory taking cases is that the owners retain title to their land and may make use of their property, subject to first obtaining a permit.[234] Of course, the permit process itself may rise to the level of a compensable temporary or permanent taking.[235]

The Trails Act, by contrast, does not regulate the owners' use of their land, nor does it impose a permitting requirement on the owners. The owners never receive notice that an NITU affecting their land has been issued and there is no opportunity for the landowners to seek a permit from the STB.[236] The Trails Act is an unqualified preemption of the owners' state law reversionary right to their property.

6. The Government Agrees Trails Act Takings Are Per Se, Not Regulatory, Takings

The government has acknowledged that Trails Act takings are per se physical, not regulatory takings. In *Barclay*, the government argued, "The Circuit has held that this conversion is not a regulatory taking. . . . Since the

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[231] *See generally supra* Part III.

[232] *See* Town of Grantwood Vill. v. Missouri Pac. R.R. Co., 95 F.3d 654 (8th Cir. 1996).

[233] *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978); *see also* City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999); Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

[234] *See id.*

[235] *See Del Monte Dunes*, 526 U.S. 687; First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 687 (1987).

[236] S*ee* Nat'l Ass'n of Reversionary Prop. Owners v. Surface Transp. Bd., 158 F.3d 135, 139 (D.C. Cir. 1998) ("The notice provisions did not (as they do not today) provide for individual notice to holders of reversionary interest of abandonment proceedings, or of the subset of abandonment proceedings involving interim trail use proposals.").

Court's precedent identifies this type of claim as a physical taking, the landowners' lengthy discussion of regulatory takings law is irrelevant. . . ."[237]

Similarly, the government noted in its Opposition to Petition for Rehearing en banc in *Renewal Body Works*:

> Unlike the usual physical occupation case, the landowner in a Trails Act takings case has already been deprived of exclusive possession. Thus, in a Trails Act taking case, the question is not when the owner loses the right to exclusively occupy the property, but rather, when the owner would otherwise have recovered full possession of the easement, were it not for operation of the Trails Act.[238]

The government stated in opposition to a rehearing en banc in *Barclay*, "The landowners' argument about the potential for a temporary regulatory takings claim is inapposite in the context of a rails-to-trails conversion, which this Court's precedent seems to have characterized as a physical takings claim."[239]

In *Tahoe*, the Court wrote, "[T]his longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa."[240]

Thus, when considering the Trails Act, it is important to do so in light of the precedent established in per se taking cases and not try to analyze a Trails Act taking under the *Penn Central* factors, which apply only to regulatory takings.

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[237] Corrected Brief of Appellee at 24, Barclay v. United States, 443 F.3d 1368 (Fed. Cir. 2006) (No. 05-1255), 2005 WL 2156907. *See also* "The landowners' arguments about the potential for a temporary regulatory takings claim is inapposite in the context of a rails-to-trails conversion, which this Court's precedent seems to have characterized as a physical takings claim." (citing *Preseault II*) *id.* at 10.

[238] Appellee's Opposition to Rehearing en banc at 6, Renewal Body Works, Inc. v. United States, 64 F. Cl. 609 (2005) (No. 05-5109), 2006 WL 2351228.

[239] Opposition of Federal Appellee to Appellant's Petition for Rehearing en banc at 11, *Barclay*, 443 F.3d 1368 (No. 05-1255), 2006 WL 2351315 [hereinafter Opposition to Rehearing].

[240] Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323 (2002).

C. A Trails Act Taking May Be Only Temporary

In *Palazzolo*, Justice Stevens wrote, "A taking is a discrete event, a governmental acquisition of private property for which the State is required to provide just compensation. Like other transfers of property, it occurs at a particular time, that time being the moment when the relevant property interest is alienated from its owner."[241]

Justice Stevens went on to note that the date of taking is important because "it is the person who owned the property at the time of taking that is entitled" to receive payment.[242] The date of taking is when the property taken is valued and "interest on the award runs from that date."[243] The date of taking is also important because it determines when the statute of limitations for an owner to bring their claim begins to run.

Prior to the Federal Circuit's decision in *Caldwell,* the DOJ and counsel for landowners accepted the date of the Trail Use Agreement as the date of taking.[244] As discussed in detail in Part IX.A, this date changed in *Caldwell* when the Federal Circuit announced a new rule—the date of taking for both permanent and temporary Trails Act takings claims was the date on which the STB issued the original NITU.[245] The Federal Circuit emphatically reaffirmed this holding in the consolidated cases of *Barclay* and *Renewal*.[246]

The Federal Circuit ruled that the fact that "subsequent events might render the NITU only temporary"[247] does not change the fact that the land-

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[241] *Palazzolo*, 533 U.S. at 638–39 (Stevens, J., concurring in part and dissenting in part).

[242] *Id.* at 639 (citing Danforth v. United States, 308 U.S. 271, 284 (1939).

[243] United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984) (holding just compensation is "market value of the property at the time of the taking," quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)); *see also* Kirby Forest Industries, Inc. v. United States, 467 U.S. 1, 10 (1984); United States v. 564.54 Acres of Monroe and Pike County Land, 441 U.S. 506, 511 (1979); Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474 (1973); United States v. Commodities Trading Corp., 339 U.S. 121, 130 (1950); United States v. New River Collieries Co., 262 U.S. 341, 344 (1923).

[244] *See* Brief of Appellee at 15, Caldwell v. United States, 391 F.3d 1226 (Fed. Cir. 2004) (No. 03-5152), 2004 WL 3763407 (arguing that the date the taking claim accrued was the date the trail-use agreement was reached).

[245] *See Caldwell*, 391 F.3d at 1235.

[246] *See* Barclay v. United States, 443 F.3d 1368, 1373 (Fed. Cir. 2006) (en banc), *aff'g* Renewal Body Works, Inc. v. United States, 64 Fed. Cl. 609 (2005), Barclay v. United States, 351 F. Supp. 2d 1169 (D. Kan. 2004) (quoting *Caldwell*, 391 F.3d at 1233–34).

[247] *Barclay*, 443 F.3d at 1378.

owners' reversionary rights to their land were taken upon the issuance of the NITU.[248]

This discussion in *Caldwell* and *Barclay* is important because it affirms the point that a landowner's right to be paid compensation is fully ripe upon the STB issuing the NITU.[249] A property owner need not wait for the railroad to consummate its abandonment of the rail line or the trail group to build the trail.[250] Indeed, the lesson of *Caldwell* and *Barclay* is that if a property owner waits until the railroad has consummated abandonment or until the trail group has acquired its interest (whether by quit claim deed from the railroad or a private Trail Use Agreement), the statute of limitations may already have run and the landowner will be denied their constitutional right to be paid just compensation.

Even when the Trails Act temporarily takes a landowner's reversionary interest, compensation is due. Justice O'Connor noted in *Preseault II* that "[t]he Court recently concluded that the government's burdening of property for a distinct period, short of a permanent taking, may nevertheless mandate compensation."[251] Justice O'Connor referred to *First English*, where the Court held, "'[T]emporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[252]

The Federal Circuit ruled similarly in *Yuba Natural Resources v. United States*[253] that the duration of a taking goes to the issue of damages, not whether a compensable taking has in fact occurred, stating: "The [Supreme] Court has recognized that temporary reversible takings should be analyzed

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[248] The Federal Circuit made clear that a Trails Act taking may be either permanent or temporary depending upon whether a Trails Use Agreement is subsequently reached between the railroad and the trail user. *See Caldwell* at 1234. However, this issue—temporary versus permanent taking—is a question for the damages phase of a Trails Act taking case, not the liability phase. As the Federal Circuit made clear in *Preseault III* all Trails Act takings—whether temporary or permanent—are physical, not regulatory takings. *See Preseault III*, 100 F.3d 1525, 1540 (Fed. Cir. 1996).

[249] *See Barclay*, 443 F.3d at 1371 (citing *Caldwell*, 391 F.3d at 1235).

[250] *See id.*

[251] *Preseault II*, 494 U.S. 1, 24 (1990) (O'Connor, J., concurring) (citing First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 318–19 (1987)).

[252] *First English*, 482 U.S. at 318 (citing San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting) (arguing "[n]othing in the Just Compensation Clause suggest that 'takings' must be permanent and irrevocable")); *see also* Nollan v. California Coastal Council, 483 U.S. 825, 866–67 (1987) (Stevens, J., dissenting) (noting that Justice Brennan's dissenting opinion in *San Diego Gas* was endorsed by a majority in *First English*).

[253] 821 F.2d 638 (Fed. Cir. 1987).

in the same constitutional framework applied to permanent irreversible takings and has fashioned appropriate remedies."[254]

In *Caldwell*, the Federal Circuit applied this principle to Trails Act takings:

> Thus, the NITU operates as a single trigger to several possible outcomes. It may, as in this case, trigger a process that results in a permanent taking in the event that a trail use agreement is reached and abandonment of the right-of-way is effectively blocked. . . . Alternatively, negotiations may fail, and the NITU would then convert into a notice of abandonment. In these circumstances, a temporary taking may have occurred. . . . 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.[255]

The D.C. Circuit has agreed with this reasoning:

> Nor does the [ICC] offer support for its suggestion that the reversionary interests are not taken merely because they are postponed indefinitely rather than terminated outright. This proposition is similarly problematic; as the Supreme Court recently reminded, "Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable."[256]

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[254] *Id.* at 641 (citing *San Diego Gas*, 450 U.S. at 657) (Brennan, J., dissenting); *see also* Hendler v. United States, 952 F.2d 1364, 1367 (Fed. Cir. 1991) ("'[P]ermanent' does not mean forever, or anything like it. A taking can be for a limited term—what is 'taken' is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute. (While called an estate for years, the term can be for less than a year. . . .)").

[255] *Caldwell*, 391 F.3d at 1234–35 (citations omitted).

[256] Nat'l Wildlife Fed'n v. Interstate Commerce Comm'n, 850 F.2d 694, 705 (D.C. Cir. 1988) (citing *First English*, 482 U.S. at 318 (quoting *San Diego Gas*, 450 U.S. at 657 (Brennan, J., dissenting))).

X. THE TRAILS ACT FAILS TO PROVIDE A FAIR AND COST EFFICIENT METHOD FOR LANDOWNERS TO BE PAID THE COMPENSATION THEY ARE CONSTITUTIONALLY ENTITLED TO RECEIVE. THIS FAILURE SUBSTANTIALLY INCREASES THE COST OF THE TRAILS ACT TO TAXPAYERS

A. Landowners Never Receive Actual Notice Their Lands Have Been Taken

Originally, the limitations clock in a Trails Act taking did not begin to run until the Trail Use Agreement had been reached. But, in December 2004 the Federal Circuit announced a new rule that retroactively started this clock ticking many months, and—in some cases—years earlier, when the NITU was issued.[257]

A landowner whose property has been taken by a NITU is never given actual notice that the STB has been issued.[258] The NITU grants a trail group the right to negotiate with a railroad to acquire a new easement for a recreational trail over a property owner's land. These negotiations may take many years, with the NITU being extended repeatedly. In some cases, the NITU has been extended for more than ten years—well past the expiration of the seven-year limitations period.[259]

A landowner has no reason to know their land is subject to a NITU during the time between the STB issuing a NITU and the trail group beginning construction of a trail. While the STB has taken the landowner's reversionary right to his or her property, the landowner is never told about this secret taking. When the NITU is issued, the railroad has not yet consummated the agreement by which it conveys the easement to the trail group. Typically, the railroad salvages the tracks and ties during this negotiating period but there is no activity on the land inconsistent with a property owner's understanding that the rail line has been abandoned and the landowner's fee interest in the land now is unburdened by the former railroad easement. The trail group does not begin building a trail across the land until some time after the Trail Use Agreement has been reached. In many cases, the trail construction does not begin until many years after a Trail Use Agreement has been reached. Even the Trail Use Agreement is a secret document. Occa-

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[257] *See Caldwell*, 391 F.3d at 1235.

[258] *See* Nat'l Ass'n of Reversionary Prop. Owners v. Interstate Commerce Comm'n, 70 F.3d 638 (D.C. Cir. 1995) (declining to review I.C.C. decision not to initiate rulemaking that would give reversionary interest owners actual notice of proposed trail conversions).

[259] *See, e.g.*, Wisconsin Cent. Ltd., No. AB-303 (Sub-No. 14x) (Surface Transp. Bd. July 28, 2009) (final extension of negotiation for abandonment exemption in Polk County, Wis.) (NITU issued Mar. 1998 ultimately extended until Jan. 2010).

sionally, after a Trail Use Agreement is reached, the railroad will record a quit claim deed. Should it do so, this deed would be the first recorded public document evidencing the taking. And, even this recordation does not really put a landowner on effective notice the property has been taken because the quit claim deeds used in rail-to-trail conversions describe the land as a railroad right-of-way between two designated mileposts.

B. There Is No Fair and Cost-Efficient Method for Landowners to Be Paid Compensation

When Congress created the Trails Act, even though Congress understood it would take some citizens' reversionary interest in their land, Congress did not provide a means to pay these landowners compensation when their land was taken. Instead, Congress left landowners with an inverse condemnation action under the Tucker Act[260] as the only means to vindicate their constitutional right to be paid compensation for the land taken from them. Claims under the Tucker Act have proven to be time consuming and expensive to bring and to defend.[261]

When the government takes land for a recreational trail it must pay (1) severance damages, which are calculated as the difference in value of the specific parcel of land before the taking (with no easements) and the value of the land after the taking (with two new easements on the property—one for public recreational use and a second easement held by the STB allowing it to authorize future building of a new rail line across the land); (2) attorneys fees and costs;[262] and (3) interest from the date the STB issues the NITU until compensation is finally paid.[263]

C. The Costly Nature of Tucker Act Claims Is Compounded By the Justice Department's Scorched Earth Litigation Strategy

As President Lincoln wrote, "It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same, between private individuals."[264]

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[260] 28 U.S.C. § 1491(a) (2006).

[261] *See Litigation and Its Effect on the Rails-to-Trails Program*, *supra* note 134, at 45–54 (prepared statement of Nels Ackerson, Chairman, The Ackerson Group, Chartered).

[262] *See* Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4654(c) (2006).

[263] *See* Order, Miller v. United States, No. 03-2489L (Fed. Cl. Aug. 22, 2006) (Bruggink, J.) (granting in part and denying in part plaintiffs' motion for summary judgment).

[264] President Abraham Lincoln, State of the Union Address (Dec. 3, 1861).

Congress has been critical of the DOJ's litigation strategy in Trails Act taking cases. The House Judiciary Committee held hearings into the DOJ's handling of Trails Act taking claims[265] and the excessive cost and expense the government has paid to litigate Trails Act taking cases. During these hearings, witnesses described the DOJ's strategy as "unrestrained litigation."[266] In other Trails Act taking cases the court has criticized the DOJ for trying to re-litigate the same issue repeatedly and needlessly.[267] The CFC repeatedly has criticized the Justice Department for a similar scorched earth litigation strategy in the *Winstar* cases.[268]

Chief Judge of the CFC, Loren Smith, wrote:

> It is the obligation of the United States to do right. Every free government can be judged by the degree to which it respects the life, liberty and property of its citizens. The United States stands tall among the Nations because it is a just Nation. In the instant cases the United States has not acted in a manner worthy of the great just

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[265] *See Litigation and Its Effect on the Rails-to-Trails Program*, *supra* note 134.

[266] *See id.* at 41–54 (statement and prepared statement of Nels Ackerson, Chairman, The Ackerson Group, Chartered).

[267] See *Blendu v. United States*, 75 Fed. Cl. 543 (2007), where the court stated:

> In other words, what needs to be decided—again, in defendant's words—is "the nature and scope of the easement and, correspondingly, the nature and scope of the plaintiff's property interest." As the excerpt block-quoted above makes clear, that is exactly what the Federal Circuit decided in *Hash II*, a case that, as both parties agreed, presented the same legal questions as the ones posed here.

Id. at 547 (citations omitted).

[268] See *Anchor Savings Bank, FSB v. United States*, 63 Fed. Cl. 199 (2004), where the court stated:

> [The government] has endured a host of criticisms during recent years for the manner in which it has defended the *Winstar* cases in this court. Its tactics have been regarded as a type of "scorched earth policy," as the government concedes no ground regarding the applicability of established law or the implications of factual distinctions from one case to another. This court has at times regarded defendant's approach with skepticism or even disdain. Regrettably, that trend continues with defendant's Motion for Reconsideration of liability issues in this case. One judge of this court long ago lamented that "the government persists in ignoring or misrepresenting the law while failing to distinguish the cases factually." Cal. Fed. Bank v. United States, 39 Fed. Cl. 753 (1997). As the instant motion makes clear, reform is slow to come by.

Id. at 200.

> Nation it is. Because the dollars at stake appear to be so large the government has raised legal and factual arguments that have little or no basis in law, fact or logic.
>
> While the court can appreciate the concerns of the government's attorneys to protect the public treasury, and they are honorable people, it must severely criticize the tactics and approach of the government in these motions for summary judgment.
>
> . . . .
>
> If the arguments put forth here are the strongest the United States can muster against liability then the government has a moral obligation to seek a fair and equitable settlement from the parties whose contracts were breached. If this cannot be achieved then the court is here to resolve these cases. However, the court is a tool of last resort. Where the government has violated rights it should first attempt to do justice without judicial prompting.
>
> Maybe these ideas are old-fashioned, but they strike the court as particularly applicable to a department that bears the sacred name of Justice.[269]

Taxpayers end up paying not only for the DOJ's litigation expenses,[270] but also for the landowners' litigation expenses responding to these argu-

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[269] California Fed. Bank v. United States, 39 Fed. Cl. 753, 754–755 (1997) (L. Smith, C.J.).

[270] The cost of litigating Trails Act cases is a significant expense for the federal government. Assistant Attorney General Thomas Sansonetti told Congress:

> The defense of the rails-to-trails cases poses special challenges for the Environment Division. Although the total potential monetary exposure from these cases is only about one per cent of the total potential monetary exposure of the entire takings litigation docket presently being handled by the Environment and Natural Resources Division, three of the nine attorneys assigned to our ''Takings Team'' devote the majority of their time to these cases, along with two others who devote a considerable portion of their time as well.
>
> These cases require a deed-by-deed liability analysis and a parcel-by-parcel valuation analysis. Therefore, while a class action of 1,000 individuals may technically constitute just one case, they in reality must be defended as if they were 1,000 separate cases.

ments. Only the federal government is capable of devising a system in which taxpayers would pay more than $300,000 in attorney fees and costs in a dispute over a $19,000 piece of land.[271]

Apart from the cost that this approach imposes on taxpayers, this strategy also frustrates the citizens' constitutional right to compensation. Congress has condemned the DOJ's use of the statute of limitations as a "gotcha game" to deny deserving citizens their right to compensation. During a Senate hearing, Senator Burr was harshly critical of the DOJ.[272]

See Litigation and Its Effect on the Rails-to-Trails Program, *supra* note 134, at 39 (prepared statement of Thomas L. Sansonetti, Asst. Att'y General, Environment and Natural Resources Division, U.S. Dept. of Justice).

[271] See *Grantwood Vill.*, 95 F.3d 654 (1996), where the government paid $19,000 for the value of the land and reimbursed the property owner $300,000 in attorney fees and costs. This sum does not include the DOJ's cost litigating this case, which likely equals or exceeds the $300,000 incurred by the landowner.

[272] *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). At this April 23, 2008 hearing, Senator Burr rebuked the DOJ:

> 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.
>
> 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.

Id.

The DOJ has attempted to prevent the use of class-action procedures as a judicial tool to resolve Trails Act taking claims efficiently.[273] The DOJ argued that filing a class-action lawsuit does not satisfy the statute of limitations, and the "clock" continues to run until each class member individually and separately satisfies the limitation period. Judge Christine Miller of the CFC described the government's position as "draconian" and recognized that the government's theory would effectively eliminate use of class-actions against the federal government.[274] Nonetheless, Judge Miller accepted their argument. The DOJ celebrated this win as one of their "significant litigation accomplishments" in 2009, which was a "victor[y that] will help to limit the bringing of future claims and protect the United States against millions of dollars in liability."[275]

This legal strategy, quite simply, makes no sense. The class-action procedure frequently is the most cost-efficient manner to resolve Trails Act taking claims.[276] And, it is questionable whether the DOJ should be pursuing a litigation strategy intended "to limit the bringing of future claims" by citizens whose land the government has taken. The better course is to pursue the prompt, fair and cost-efficient resolution of these claims.

Judge Miller's decision was appealed to the Federal Circuit, which rejected the government's argument and held class action-tolling does apply to claims against the United States.[277]

In addition to the litigation expense, the delay in resolving Trails Act taking cases imposes substantial interest costs on the federal government. The Fifth Amendment requires the government to pay compensation for the

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[273] *See* Bright v. United States, No. 2009-5048, 2010 WL 1740825 (Fed. Cir. May 3, 2010); *see also* Mike Scarcella, *Big Class Actions Against the Feds May Falter*, NAT'L L.J., June 22, 2009.

[274] *See id.*

[275] http://www.justice.gov/enrd/ENRDFiles/ENRD_FY2009_Accomplishments_Report_Text_Only.pdf.

[276] In *Carl Junction R-1 School Dist. v. United States* (05-3L & 05-4L) (Fed. Cl. 2008) (Judgment and other filings available on PACER), the government paid $155,183 for the land, $43,000 interest, and $423,727 in attorneys' fees. Compare these individual cases—*Carl Junction* and *Grantwood Village*—with *Miller v. United States*, 67 Fed. Cl. 542 (2005), a class-action involving 116 parcels of land brought as a class-action. The government paid almost $7.4 million (including interest) for the land. The individual landowners' claims ranged from $6,000 to more than $1 million. *See* Joint Proposed Settlement, Miller v. United States, No. 03-24891 (Nov. 15, 2006) (on file with Real Property, Trust & Estate Law Journal). Yet, the government reimbursed landowners only $770,000 in legal fees and expenses. The conclusion is obvious. Resolving such cases using a class action procedure is substantially less expensive to both landowners and, ultimately, the government.

[277] *See Bright*, 2010 WL 1740825 (Fed. Cir. May 3, 2010).

delay between when the government takes a citizen's land and when it pays compensation. Interest begins to run when the NITU is issued, and because it frequently takes more than five years of litigation to resolve a Trails Act claim, the government's interest obligation can be equal to or more than the value of the land taken.[278]

Costs incurred by resolving Trails Act taking claims through bringing inverse condemnation claims pursuant to the Tucker Act in the CFC are substantial and could be avoided by reforming the Trails Act.[279]

XI. RECOMMENDATIONS TO IMPROVE IMPLEMENTATION OF THE TRAILS ACT

Four reforms would greatly improve the Trails Act and allow it to achieve its objective at less expense to taxpayers, and in a constitutionally fair manner for landowners.

A. Property Owners Should Be Provided Timely Notice of a NITU (or CITU) that Affects Their Property

Currently, landowners receive no actual notice that their lands have been taken in a rail-to-trail conversion.[280] This is wrong. The STB should provide notice to property owners whose land is subject to a NITU within thirty days after issuing a NITU.[281] The name and mailing address of every affected property owner is available in every county tax assessor's or recorder of deeds' office. Moreover, the railroads and federal government may already have in their possession valuation maps and other documents that describe the conveyances or condemnation decrees by which the rail line was originally established and identify each parcel of land across which the rail line is located. The cost of mailing notices to the landowners would be nominal, but the benefit substantial. Fundamental fairness requires that landowners receive timely notice of the NITU, which is the event giving rise to their constitutional claims for compensation.

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[278] This delayed resolution is due in part to the DOJ's scorched-earth strategy. However, this delay also is due in part to repeated extensions that the DOJ typically seeks and the traditionally slower resolution of cases in the CFC compared to federal district courts. *See* "United States Court of Federal Claims Termination Act of 2004." Introduced in the 108th Congress as S.2293 and H.R. 4946. The Act did not pass but referenced a study on the efficiency of the CFC resolving claims.

[279] *See* 143 CONG. REC. H8950-02 (1997) (statement of Rep. Ryun).

[280] *See* Part X.A. *supra*.

[281] Reference to a "NITU" applies equally to a CITU. *See supra* note 31 and accompanying text.

B. The Trail Use Agreement Should Be Filed With the STB

The Trails Act and the STB's issuance of a NITU creates the right of a railroad to sell an easement across land.[282] Absent the Trails Act and NITU, the railroad would have nothing to sell. The Trail Use Agreement is the event that consummates creation of a recreational trail under the Trails Act and defines the terms of the railroad's interest.[283] The Trail Use Agreement should be a public document that is available to landowners and any other interested parties. There is no rational reason why the Trail Use Agreement should be a secret document, unavailable to the landowners and interested public.

C. More Timely and Cost-Efficient Resolution of Fifth Amendment Takings Claims

It should never take more than two years to resolve a Fifth Amendment takings claim under the Trails Act. In some cases, the DOJ and counsel for the landowners have used alternative dispute resolution and common appraisal methods to determine the value of the land taken quickly and efficiently.[284] However, the DOJ's scorched-earth litigation strategy and the lengthy time to resolve a case in the CFC frustrates a timely and efficient resolution of the property owner's claim.[285] This delay also greatly increases the cost to the taxpayers. The government must pay both the litigation costs and interest. Lengthy litigation contesting every legal issue and every possible argument substantially increases this expense to taxpayers.

D. Independent Review of the Trail Operator's Capacity and Ability to Develop the Abandoned Rail Line As a Recreational Trail of Public Value

The Trails Act is indiscriminate. Even when an abandoned rail line has no legitimate value for trail use it still can be attractive to a trail group because the organization can profit by taking control of the land under the Trails Act and licensing the use of the land to a utility. In a Missouri case, the private trail group received $200,000 from a licensing agreement with an electric company that otherwise would have been paid to the landowners. In other cases, private trail groups do not have the capacity to maintain the land and the land is neglected and left to become a public nuisance.[286] The

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[282] *See supra* Part IX.B.
[283] *See supra* text accompanying note 31.
[284] *See Litigation and Its Effects on the Rails-to-Trails Program*, *supra* note 134.
[285] *See id.* at 17–19 (statement of Nels Ackerman).
[286] *See* Compton Letter, *supra* note 67 and accompanying text.

STB should review the abilities of each potential trail operator to develop responsibly and maintain a recreational trail *before* a NITU is issued. Trail sponsors should submit a proposed Trail Development Plan to the STB describing the proposed trail-related improvements and the funding needed to accomplish these improvements. This plan should be available for public comment and notice of the plan provided to all affected landowners. Should the trail not be developed as specified in the plan, the STB should have the authority to revoke the NITU. After all, if taxpayers are paying for the property, we should be sure that land is responsibly developed as a public trail consistent with the objective of the Trails Act.

XII. CONCLUSION

We like trails and appreciate the objective of the Trails Act—to provide well-maintained and well-managed public recreational trails over land once used for now-abandoned railroad lines. However, it is wrong to seek to accomplish this worthy public objective in a manner that denies landowners their constitutional right to be paid just compensation for the taking of their property.

The government's efforts to circumvent the Fifth Amendment are, in the majority of cases, not successful, and attempting to do so ends up substantially increasing cost of the Trails Act to taxpayers. Public support for this program is undermined when the STB issues orders which take American citizens' land without notice, the DOJ repeatedly litigating the same meritless arguments, and the DOJ endlessly delaying resolution of landowners' claims. In addition, these tactics wind up costing American taxpayers millions of dollars. Americans support the creation of well-designed, appropriately located public recreational trails. Americans do not, however, like to see the Trails Act administered in a manner that (1) unfairly denies fellow landowners their constitutional right to compensation; (2) greatly and needlessly inflates legal fees and other costs of the program; and (3) allows some special interests to misuse the Trails Act as a pretext to obtain profit at the expense of our fellow citizens.

Over the past twenty-five years, the Trails Act has accomplished some of its intended purpose. Some great recreational trails have been established. But these trails were established at substantially greater expense than necessary, and the constitutional right of American citizens to be compensated for the government taking their lands has been trampled.

For the Trails Act to succeed in accomplishing its objective we must recognize that, in its current form, the Trails Act is deeply flawed. Fortunately, we can fix these flaws. Congress should consider legislation that will amend the Trails Act to fix those flaws. Additionally, both the STB and the

DOJ should adopt measures to more fairly and cost-effectively administer the Trails Act, especially because the constitutional right of American citizens to be paid for land the government has taken is involved.