IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CHESHIRE HUNT, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 18-111L
	)	
UNITED STATES OF AMERICA,	)	Hon. Edward Meyers
	)	
Defendant.	)	

LANDOWNERS' RESPONSE TO GOVERNMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

MARK F. (THOR) HEARNE, II
Stephen S. Davis
True North Law, LLC
112 S. Hanley, Suite 200
St. Louis, MO 63105
(314) 296-4000
thor@truenorthlawgroup.com

Counsel for the Landowners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

This is a Trails Act taking case. The government admits it took these owner's property for a federal rail-trail corridor easement. The only outstanding issue is the amount of compensation these owners are due under the Fifth Amendment and the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §4601, *et seq*. (the URA). All of the properties have been appraised and the government and owners were discussing a final settlement when the government filed a motion for partial summary judgment on the issue of "the scope of the trail sponsor's interest obtained by operation" of the Trails Act.

The government argues, especially as to four owners, the interest the government took is "non-exclusive" and the government's invocation of section 8(d) of the Trails Act "does not preclude the servient estate holder's other uses that do not conflict with railbanking and interim trail use." The government's fundamental error is confusing the interest the government took from these owners with that property interest the Board gave Sarasota County. This Court should deny the government's motion and this case should proceed to final judgment.

The government never explains what legally enforceable right the owners have to use that land subject to the government's easement. This Court has held (and the government has agreed) that when the Board invokes section 8(d) of the Trails Act, the government takes ninety-nine percent of the value of the land subject to the rail-trail easement. This Court should deny the government's motion.

BACKGROUND

In the early 1900s much of the land in what is now Sarasota County, Florida was owned by Bertha Palmer and members of her family including her son Adrian Honore.[1] The Palmer family wanted to develop Sarasota as a destination for residents from Chicago and other northern locations to escape cold winters. To facilitate the development of Sarasota and Venice, the Palmer family wanted the Seaboard Air Line Railway and the Tampa Southern Railroad to build a railway line between Sarasota and Venice. In November 1910, Adrian Honore granted Seaboard Air Line Railway a right-of-way easement across his land allowing Seaboard to build and operate a railway line from Sarasota to Venice. Adrian Honore is the predecessor-in-title to the present-day owners bringing this case. A copy of the right-of-way easement Adrian Honore granted Seaboard Air Line Railway is attached as **Exhibit 1**. Honore's easement provided, "if at any time [following construction of the railroad] the said [railroad] shall abandon said land for railroad purposes[,] the above described pieces and parcels of land shall ipso facto revert to and again become the property of the undersigned, his heirs, administrators and assigns."

As the Supreme Court explained in *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 8 (1990) (*Preseault I*), "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,

[1] What is now Sarasota County was originally part of Manatee County. Sarasota County was established in 1921.

frequently the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations." In *Marvin M. Brandt Revocable Trust v. United States,* 572 U.S. 93, 104-05 (2014), Chief Justice Roberts explained,

> the essential features of easements — including, most important here, what happens when they cease to be used — are well settled as a matter of property law. An easement is a "nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." "Unlike most possessory estates, easements ... may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude." In other words, if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land.[2]

The government agrees the railroad held only an easement limited to use of the land for the operation of a railway line. "The parties agree that under Florida law, the railroad originally acquired only an easement for railroad purposes … and that Plaintiffs own the fee underlying the corridor to the centerline." Gov. motion, ECF 120, p. 1.

In the 1980s Congress became concerned about the loss of railroad right-of-way easements and wanted otherwise abandoned railroad rights-of-ways to be used for public recreation. So, in 1983, Congress amended the Trails Act and adopted section 8(d), which provided, "interim use [of abandoned railroad right-of-way easements for public recreation] shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. §1247(d).

---

[2] Quoting RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§1.2(1), 7.4, Comments a, f, and d (1998).

By 2004 the railway line between Sarasota and Venice was no longer needed and trains no longer operated across the railway. Seaboard's successor railroad was CSX Transportation. CSX leased the right-of-way to Seminole Gulf Railroad. In 2004 CSX and Seminole Gulf petitioned the Board to authorize the abandonment of the southern segment of the right-of-way between Venice and Culverhouse Park. Then, in December 2017, the railroads asked the Board to allow them to abandon the rail line between Culverhouse Park and Ashton Road. Finally, in the spring of 2019, CSX and Seminole Gulf petitioned the Board for authority to abandon the final segment of the railway line between Ashton Road and Fruitville Road in downtown Sarasota. The Board granted all three of the railroads' requests to abandon the Sarasota-to-Venice railroad line.

Sarasota County, working with the Trust for Public Land as an intermediary, asked the Board to impose two new easements upon the owners' land allowing Sarasota County to use the land for public recreation and the Board to allow a railroad to build a railway across the land in the future. The Board agreed and invoked section 8(d) of the Trails Act, imposing two new easements across the strip of land – one easement for public recreation and a second easement enabling the Board to authorize a railroad to build a future railway across these owners' land. The history of the Sarasota-to-Venice railway line, the abandonment of this railway line, and the creation of the Legacy Trail is available in the documents filed with the Board. See Surface Transportation Board Docket No. AB-400 (Sub-No. 3X). See also Second Amended Complaint, ECF No. 14 ¶¶3-28.

This same rail-trail corridor easement was the subject of prior litigation. See *Rogers v. United States*, 90 Fed. Cl. 418, 432 (2009) ("[T]he governmental action converting the railroad right-of-way to a public trail right-of-way imposed a new easement on the landowners and effected a Fifth Amendment taking of their property.") (citing *Preseault v. United States*, 100 F.3d 1525, 1550 (Fed. Cir. 1996) (*en banc*) (*Preseault II*)). See also *McCann Holdings, Ltd. v. United States*, 111 Fed. Cl. 608, 613 (2013) ("As established in this Court's liability decision, Plaintiff's property was taken [for the Legacy Trail] when the railroad easement on Plaintiff's land was converted to a recreational trail easement under the Rails to Trails Act.") (citing *Rogers*, 90 Fed. Cl. at 433); *Childers v. United States*, 116 Fed. Cl. 486, 496-97 (2014) ("In a rails-to-trails case, the imposition of a recreational trail creates a new easement for a new purpose across the landowner's property, which constitutes a taking entitling the landowners to just compensation") (citing *Rogers*, 90 Fed. Cl. at 433, and *Preseault II*, 100 F.3d at 1542-43).

In *Rogers*, this Court held "the terms of the [original right-of-way easement granted the railroad] were limited to use for railroad purposes and did not contemplate use for public trails. Thus, the governmental action converting the [otherwise abandoned] railroad right-of-way to a public trail right-of-way imposed a new easement on the landowners and effected a Fifth Amendment taking of their property." 90 Fed. Cl. at 432.

The Fifth Amendment provides "[n]o person shall … be deprived of life, liberty or property without due process of law, nor shall private property be taken for public

use without just compensation." The Supreme Court held that the federal government's invocation of section 8(d) of the Trails Act takes private property for which the government must pay the owner just compensation.

> This language [section 8(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. … By deeming interim trail use to be like discontinuance rather than abandonment Congress prevented property interests from reverting under state law.
>
> *Preseault I*, 494 U.S. at 8.

The Federal Circuit, sitting *en banc*, explained, "the occupation of the [landowners'] property by the [trail-users] under the authority of the Federal Government constituted a taking of their property for which the Constitution requires that just compensation be paid." *Preseault II*, 100 F.3d at 1552. The Federal Circuit held, "we conclude that the taking that resulted from the establishment of the recreational trail is properly laid at the doorstep of the Federal Government." *Id.* at 1531. In their concurring opinion, Judges Rader and Lourie explained,

> While federal legislation may alter the terms of the [owners'] property rights defined and created by state law, it cannot do so without giving just compensation. Certainly, the Federal Government has the power to enact legislation that affects the [owners'] right to freely use or possess land. But the Government cannot use this power for uncompensated, piecemeal usurpation of the rights of property owners, such that with each transfer of the property the purchaser loses sticks within the original bundle of rights yet remains without Constitutional recourse. Simply, when the Federal Government intrudes upon a property owner's right of use or possession of property, the Federal Government must pay just compensation.
>
> *Id.* at 1553.[3]

[3] Citing *Kaiser Aetna v. United States*, 444 U.S. 164, 178-80 (1979). In *Toews v. United States,* 376 F.3d 1371, 1376-77 (Fed. Cir. 2004), the Federal Circuit explained,

The federal government's obligation to compensate a landowner arises when the Board first issues an order invoking section 8(d). See *Caldwell v. United States*, 391 F.3d 1226, 1229 (Fed. Cir. 2004) ("A Fifth Amendment taking occurs if the original easement granted to the railroad under state property law is not broad enough to encompass a recreational trail."); *Barclay v. United States*, 443 F.3d 1368, 1378 (Fed. Cir. 2006) ("the issuance of the original NITU triggers the accrual of the cause of action" for a taking); *Illig v. United States*, 274 Fed. App'x 883 (Fed. Cir. 2008), *cert. denied*, 557 U.S. 935 (2009); *Ladd v. United States*, 630 F.3d 1015, 1023-24 (Fed. Cir. 2010) (*Ladd I*), *reh'g and reh'g en banc denied*, 646 F.3d 910 (Fed. Cir. 2011) ("[I]t is settled law. A taking occurs when state law reversionary property interests are blocked. … The issuance of the NITU is the only event that must occur to entitle the plaintiff to institute an action.") (internal quotations omitted); *Ladd v. United States*, 713 F.3d 648, 652 (Fed. Cir. 2013) (*Ladd II*) ("In the context of Trails

---

> it appears beyond cavil that use of these easements for a recreational trail — for walking, hiking, biking, picnicking, frisbee playing, with newly-added tarmac pavement, park benches, occasional billboards, and fences to enclose the trailway — is not the same use made by a railroad, involving tracks, depots, and the running of trains. The different uses create different burdens. … 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.

See also *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.").

Act cases, the cause of action accrues when the government issues the first NITU that concerns the landowner's property."); *Caquelin v. United States*, 959 F.3d 1360, 1367, 1370 (Fed. Cir. 2020) ("The NITU ... was a government action that compelled continuation of an easement for a time; it did so intentionally and with specific identification of the land at issue; and it did so solely for the purpose of seeking to arrange, without the landowner's consent, to continue the easement for still longer, indeed indefinitely, by an actual trail conversion. … We conclude that *Ladd I* remains governing precedent and has not been undermined by *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012)] in favor of a non-categorical [taking] approach.").

In *Knick v. Scott Township*, 139 S.Ct. 2162, 2170, 2172 (2019), the Supreme Court reaffirmed the principle that "because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time." When the government issues an order taking private property without paying the owner the government violates the owner's constitutional right and this is an *ongoing* constitutional violation that is not remedied until the government pays the owner for what the government has taken.

The value of the property the government took from these owners was appraised more than a year ago and found to be worth $4,397,400. See **Exhibit 2** (schedule of the appraised amount due each owner).[4] The appraiser who valued these

[4] This amount does not include the interest the government owes these owners for the government's delay in paying the owners or the attorney fees, litigation expenses,

properties is the same appraiser this Court relied upon to determine the value of the property taken for the southern segment of the Legacy Trail. See, *e.g.*, *McCann*, 111 Fed. Cl. at 622 ("The Court finds Mr. Durrance's appraisal more persuasive [than the government's appraisal] for several reasons. As a threshold matter, the Court found Mr. Durrance's overall methodology for analyzing properties' fair market values to be more compelling than [the government's appraiser]. Mr. Durrance's approach was more comprehensive in that he addressed the presence of environmental lands and easements/encumbrances that affected potential development….").

The government does not dispute its liability. But, rather than pay these owners that compensation the government admits they are owed, the government filed a motion for partial summary judgment concerning the "scope of the trail sponsor's interest obtained by operation of section 8(d) of the Trails Act." ECF No. 120. The government's motion concerns primarily four properties where existing structures including buildings, radio towers, and fences are located on land now subject to the rail-trail corridor easement. Sarasota County is demanding the owners remove these structures. The government argues the Board's invocation of section 8(d) "does not preclude the servient estate holder's other uses [of the land] that do not conflict with railbanking and interim trail use." *Id.* at 23.

---

and other amounts the government must pay the owners under the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §4654(c).

SUMMARY OF ARGUMENT

The government's motion is premised upon a misunderstanding of the Trails Act and is contrary to the Fifth Amendment and Trails Act jurisprudence. The government's motion is also contrary to the Board's own interpretation of the Trails Act. When the Board invoked the Trails Act, the federal government took these owners' right under Florida law to use and occupy their land and to exclude others from their land. The federal government imposed two new perpetual easements upon these owners' land. The Board granted Sarasota County, as a trail user, the right to use these owner's land for public recreation. The Board also retained authority to authorize a railroad to build a railway line across these owners' land in the future. What the Board took from these owners is not defined by just that lesser interest the Board granted Sarasota County (a right to use these owners' land for public recreation) but is defined by what these owners lost.

Before the Board invoked the Trails Act, these owners held unencumbered title to the fee estate in the land and enjoyed the exclusive right to possess this land and to exclude others from using their land. After the Board invoked the Trails Act, the Board acquired jurisdiction over this land including the right to authorize a trail-user to build and operate a public recreational trail across the land and the Board retained authority to authorize a railroad to build a railway line across the land. The government fails to comprehend the difference between that interest the federal government took from these owners and the lesser interest the federal government granted Sarasota County to use these owners' land for public recreation.

The Fifth Amendment requires the federal government to pay landowners for what the *owner lost*, not what the *government gained*. *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910) ("And the question is, What has the owner lost? Not, What has the taker gained?") (Holmes, J.).

The government raises four points in its motion: (1) "the Trails Act's plain language does not provide the trail sponsor an exclusive right to use the corridor" (2) "Congress did not intend for Section 8(d) to impose exclusive trail use," (3) this "Court should afford substantial deference to the United States' position about what interest the trail sponsor obtained by operation of Section 8(d);" and, (4) "Florida law presumes that easements are non-exclusive and recognizes a servient estate owner may use their land without interfering with the easement." ECF No. 120, pp. 3-4. The government is wrong on all four points. We explain why below.

THE STANDARD FOR DETERMINING THE JUST COMPENSATION THESE OWNERS ARE DUE

"In a rails-to-trails case, the imposition of a recreational trail creates a new easement for a new purpose across the landowner's property, which constitutes a taking entitling the landowners to just compensation." *Childers* , 116 Fed. Cl. at 496-97 (citing *Preseault II*, 100 F.3d at 1542-43). See also *Trevarton v. South Dakota*, 817 F.3d 1081, 1087 (8th Cir. 2016) (the Board's invocation of section 8(d) encumbers the owners' land with "a new easement for the new use") (citing *Preseault II*, 100 F.3d at 1550).

When the government takes private property, the standard for determining that compensation the government owes the owner is the value of what the owner

lost, not what the government has gained. See *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923); *United States v. Virginia Elec. & Power Co.*, 365 U.S.624, 635 (1961); *Boston Chamber of Commerce*, 217 U.S. at 195. See also *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999) ("the question is what has the owner lost, not what has the taker gained.'"). The Constitution compels the government to pay a landowner "a full and perfect equivalent" of value for that property the owner lost. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893). A "full and perfect equivalent" is compensation sufficient to "place the owner in the same pecuniary position he would have occupied had the government not taken his property." *Id.*

"'Just compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken." *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973) (internal quotation marks and citation omitted). The Just Compensation Clause compels the government to pay these owners "the full and perfect equivalent in money of the property taken." *United States v. Miller*, 317 U.S. 369, 373 (1943). See also *McCann*, 111 Fed. Cl. at 614 ("Where the property interest permanently taken is an easement, the conventional method of valuation is the before-and-after method, *i.e.*, the difference between the value of the property before and after the Government's easement was imposed.") (internal quotations omitted); *Childers*, 116 Fed. Cl. at 497 (holding the same and adding, "In addition to the value of the property actually taken, just compensation

includes severance damages – the diminution in value of the owner's remaining property resulting from the taking.") (citing *United States v. Grizzard*, 219 U.S. 180, 185 (1911), and *Miller*, 317 U.S. at 376).[5] In *Grizzard*, 219 U.S. at 184, the Supreme Court held, "[t]he 'just compensation' thus guaranteed obviously requires that the recompense to the owner for the loss caused to him by the taking of a part of a parcel, or single tract of land, shall be measured by the loss resulting to him from the appropriation." See also *Otay Mesa Property, LP v. United States*, 670 F.3d 1358, 1364 (Fed. Cir. 2012).

This Court is asked to decide what "just compensation" the government owes these owners for that property the government took from them for two easements the federal government imposed upon these owners' land. This analysis considers the fair market value of each owner's property before the government took the owner's land, and the value of the owner's land after the government encumbered the owner's land with a new rail-trail easement. *McCann Holdings, Ltd. v. United States*, 111 Fed. Cl. 608, 614 (2013) ("Where the property interest permanently taken is an easement, the conventional method of valuation is the before-and-after method, *i.e.*, the difference between the value of the property before and after the Government's easement was imposed.") (internal quotations omitted).[6]

---

[5] See also this Court's unpublished decisions in *Glosemeyer v. United States*, No. 93-126L, *Dorothy Moore v. United States*, No. 93-134L, *Grantwood Village v. United States*, No. 98-176L, *Robert Miller v. United States*, and *Illig v. United States*.

[6] See also *Childers v. United States*, 116 Fed. Cl. 486, 497 (2013) (holding the same and adding, "In addition to the value of the property actually taken, just compensation includes severance damages – the diminution in value of the owner's remaining property resulting from the taking.") (citing *United States v. Grizzard*,

The question is what a knowledgeable buyer would pay for the property in both the "before-taken" and "after- taken" condition. The "after-taken" condition is the matter of immediate interest. A knowledgeable buyer would not pay the same amount for a property encumbered by an easement for public recreation and a future railroad as the buyer would pay for the same property unencumbered by these easements. In the after-taken condition a knowledgeable buyer would pay significantly less for property because the owner of the land has no established legally enforceable right to use the land encumbered by the federal rail-trail corridor easement, nor does the owner have a legally-enforceable right to exclude the public or a future railroad from using the land.

In 16 U.S.C. §1247(d), Congress provided, "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 … 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." And in 49 U.S.C. §10501(b), Congress provided, "The jurisdiction of the [Board] over [rail transportation, construction, operation, and abandonment] is exclusive" and "the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law."

---

219 U.S. 180, 185 (1911), and *United States v. Miller*, 317 U.S. 369, 376 (1943)).

> A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement. We discussed its character in *New Mexico v. United States Trust Co*. 172 U. S. 171. We there said that if a railroad's right of way was an easement it was "one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property."
>
> *Western Union Tel. Co. v. Pennsylvania R. Co.*, 195 U.S. 540, 569-70 (1904).

The federal government took these owners' right to exclude others from their property. The "right to exclude" is "universally held to be a fundamental element of the property right…." *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979)). "We have repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Hendler*, 952 F.2d at 1377 (quoting *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-32 (1987)).

Here, as in past Trails Act cases, including the litigation involving the southern segment of the Legacy Trail, the federal government took ninety-nine percent of these owners' interest in their property, and the federal government must fully compensate these owners for that interest the government took.

ARGUMENT

I. The United States took these owners' state-law right to use their land and took their right to exclude others from their land.

A. When it adopted the 1983 amendments to the Trails Act, Congress intended to take private property for future railroads and public recreation.

Congress amended the Trails Act in 1983 because Congress was concerned about the loss of railroad rights-of-way across the country. See *Preseault I*, 494 U.S. at 4. Congress wanted the land under abandoned railroad right-of-way easements to be available for construction of future railroad corridors without a future railroad having to pay the landowner to acquire a right-of-way easement. Congress also wanted the public to use the land for recreational trails until a future railroad was built across the owner's land. *Id.* at 5-9.

Congress' past efforts to preserve otherwise abandoned railroad rights-of-way and use these corridors for public recreation were unsuccessful because, under state law, when a railroad right-of-way easement is no longer used for the operation of a railroad the easement terminates, and the owner of the fee estate holds unencumbered title to the land. Chief Justice Roberts recognized this fundamental principle of property law in *Brandt*, explaining that "[u]nlike most possessory estates, easements … may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude." 572 U.S. at 105.[7]

---

[7] Quoting RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §1.2(1) (1998) §1.2, Comment d; and §7.4, Comments a, f). See also Bruce & Ely, THE LAW OF EASEMENTS & LICENSES IN LAND, §1:1 (an easement is "a nonpossessory interest in the land of another. … the holder of an affirmative easement may only use the land burdened by

So, in 1983, Congress amended the Trails Act and adopted section 8(d). "Section 8(d) provides that interim trail use 'shall not be treated, for any purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.'" *Preseault I*, 494 U.S. at 8. Congress adopted section 8(d) to preempt and eliminate "any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." *Id.* The Supreme Court explained:

> [Section 8(d) of the Trails Act] is the culmination of congressional efforts to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails. … Concerned about the loss of trackage, Congress included in the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), 49 U.S.C. §10902) several provisions aimed at promoting the conversion of abandoned lines to trail.
>
> *Preseault I*, 494 U.S. at 4.

The Supreme Court explained that "[b]y 1983, Congress recognized that these [prior] measures 'ha[d] not been successful in establishing a process through which railroad rights-of-way which are not immediately necessary for active service can be utilized for trail purposes.'" *Preseault I*, 494 U.S. at 8 (quoting H.R. Rep., pp. 8-9, U.S.C.C.A.N. 1983, pp. 119, 120). Congress found that, "[t]he 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." *Id.*

---

the easement; the holder may not occupy and possess the realty as does an estate owner….").

The federal government possesses the power of eminent domain, and the federal government's control of railroads is plenary and exclusive. The Federal Circuit explained,

> There can be no denying that the Federal Government, beginning as early as 1920, has occupied the field of regulation of interstate railroad operations, preempting any pattern of conflicting state regulation. … And there can be no question that if the Federal Government wishes to create a national network of public recreational biking and hiking trails, it is within its power to do so.

Preseault II, 100 F.3d at 1537.[8]

The Federal Circuit continued, "that power includes the power to preempt state-created property rights, including the rights to possession of property when railroad easements terminate." *Preseault II*, 100 F.3d at 1537. "However, as Justice O'Connor succinctly pointed out in her concurring opinion in *Preseault I*, having and exercising the power of preemption is one thing; being free of the Constitutional obligation to pay just compensation for the state-created rights thus destroyed is another." *Id.* See also *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 319-20 (1981) (quoting *Palmer v. Massachusetts*, 308 U.S. 79, 85 (1939), and *Hayfield Northern R. Co., Inc. v. Chicago & North Western Transp. Co.*, 467 U.S. 622, 635-36 (1984)).

[8] Citing Transportation Act of 1920, ch. 91, 41 Stat. 456 (1920); Rail Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94–210, 90 Stat. 31 (1976) (4-R Act); 49 U.S.C. §101, *et seq.*; *Preseault I*, 494 U.S. at 1.

B. Using its plenary jurisdiction over railroad lines, Congress "preempted" and "destroyed" an owner's state-law right in the land subject to the Board's authority.

Beginning with the Transportation Act of 1920 Congress granted the Interstate Commerce Commission (now the Surface Transportation Board) broad and exclusive jurisdiction over railroads, including the land used for the construction, design, and operation of railroad rights-of-way. See 49 U.S.C. §10501.[9] The Supreme Court explained, "The [Interstate Commerce] Commission's power to regulate abandonments by rail carriers stems from the Transportation Act of 1920 … which added 49 U.S.C. §10903(a)." *Kalo*, 450 U.S. at 319-20 (quoting *Palmer*, 308 U.S. at 85, and *Hayfield Northern*, 467 U.S. at 635-36). The Court continued, "The Commission's authority over abandonments is also plenary. So broad is this power that it extends even to approval of abandonment of purely local lines operated by regulated carriers when, in the Commission's judgment, 'the over-riding interests of interstate commerce requir[e] it.'" *Id.*

The Supreme Court, in *Kalo*, further explained that "when Congress has chosen to legislate pursuant to its constitutional powers, then a court must find local law pre-empted by federal regulation whenever the 'challenged state statute' stands as an obstacle to the accomplishment and execution of the full purposes and objectives

[9] Section 10501(b) provides, "The jurisdiction of the [Board] over [rail transportation, construction, operation, and abandonment] is exclusive" and "the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law."

of Congress.'" 450 U.S. at 317-19.[10] In *Kalo* the Supreme Court held,

> The Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes and has consequently presented recurring pre-emption questions from the time of its enactment. Since the turn of the century, we have frequently invalidated attempts by the States to impose on common carriers obligations that are plainly inconsistent with the plenary authority of the Interstate Commerce Commission or with congressional policy as reflected in the Act.[11]

The Supreme Court further explained in *Kalo*, "The exclusive and plenary nature of the Commission's authority to rule on carriers' decisions to abandon lines is critical to the congressional scheme, which contemplates comprehensive administrative regulation of interstate commerce." 450 U.S. at 320. The Court characterized the federal regulation of the construction, operation, and abandonment of railroad rights-of-way as "among the most persuasive and comprehensive of federal regulatory schemes." *Id.* at 318. And the Supreme Court has repeatedly recognized the preclusive effect of federal railroad legislation. See, *e.g.*, *Colorado v. United States,* 271 U.S. 153, 165-66 (1926) (abandonment authority is plenary and exclusive); *Transit Comm'n v. United States*, 289 U.S. 121, 127-28 (1933) (authority over interstate rail construction is exclusive); *City of Chicago v. Atchison, T&SF Ry.*, 357 U.S. 77, 88-89 (1958) (local authorities have no power to regulate interstate rail passengers).

---

[10] Citing and quoting *Perez v. Campbell*, 402 U.S. 637, 649 (1971), and *Hines v. Davidowitz*, 312 U.S. 52, 87 (1941).

[11] 450 U.S. at 318.

Congress adopted section 8(d) for the explicit purpose of perpetuating the Board's exclusive jurisdiction and plenary control of railroad rights-of-way (and the land across which these rights-of-way were built) that would otherwise be lost when the railroad abandoned use of the land for operation of a railway. In the 1983 amendments to the Trails Act, Congress explicitly preempted owners' state-law rights and state-law remedies.[12] Once it invokes section 8(d),

> [t]he [Board] retains jurisdiction over [the land once used for] a rail line throughout the CITU/NITU negotiating period, any period of rail banking/interim trail use, and any period during which rail service is restored. It is only upon a railroad's lawful consummation of abandonment authority that the Board's jurisdiction ends. At that point, the right-of-way may revert to reversionary landowner interest, if any, pursuant to state law.
>
> *National Trails System Act and Railroad Rights-of-Way*, 2012 WL 1498609, *5 (Board Decision April 25, 2012).[13]

The Board has declared that state law is preempted beginning with the Board's original invocation of section 8(d) and state law is continually and perpetually preempted thereafter. "Congress made it clear that there can be no abandonment if there is interim trail use on the line. … if the parties are still negotiating a trail agreement at the end of the Trails Act negotiating period (or are continuing to

---

[12] See *National Ass'n of Reversionary Property Owners v. Surface Transportation Board*, 158 F.3d 135, 137 (DC Cir. 1998); *National Wildlife Federation v. Interstate Commerce Commission*, 850 F.2d 694 (DC Cir. 1988); *Citizens Against Rails-to-Trails v. Surface Transportation Board*, 267 F.3d 1144, 1149 (DC Cir. 2001) ("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."). See also Hearne, *et al.*, *The Trails Act: Railroading Property Owners and Taxpayers for More than a Quarter Century*, REAL PROP., TRUST & ESTATE LAW JOURNAL, 45:1 (Spring 2010) (providing an overview of Trails Act jurisprudence).

[13] Citing section 8(d) and *Preseault I*, 494 U.S. at 6.

negotiate the implementation of any other of our conditions that preclude consummation), the line will not be considered to be fully abandoned until a consummation notice is filed as required under our rules."[14]

The Board aggressively asserts its authority over landowners' state-law rights that interfere with the Board's dominion of land subject to a railroad right-of-way. The Board also regulates use of land now subject to these federal rail-trail corridors.[15] *Tubbs v. Surface Transportation Board*, 812 F.3d 1141 (8th Cir. 2015), is a recent demonstration of the Board's broad assertion of its preemptive authority over state law and state law remedies.

The Burlington Northern Railroad (BNSF) negligently constructed and maintained a railway line causing the Tubbs family's farm to flood. The Tubbs family sued BNSF in Missouri state court alleging a number of state law remedies including trespass, nuisance, statutory trespass, negligence and inverse condemnation. The Missouri court stayed proceedings allowing the parties to seek a declaratory decision from the Board.[16] The Board declared the Tubbs' state-law claims were preempted by federal law. "Section 10501(b) categorically preempts states or localities from

---

[14] *Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903*, 2 S.T.B. 311, n.6, 1997 WL 351419 (June 18, 1997).

[15] The government prohibits motorized vehicles from using federally-subsidized trails except for limited and specified purposes, such as maintenance vehicles, snowmobiles, motorized wheelchairs, electric bicycles, and for "such other circumstances as the [U.S.] Secretary [of Transportation] deems appropriate." 23 U.S.C. §217(h). See also *Framework for Considering Motorized Use on NonMotorized Trails and Pedestrian Walkways*, available at: http://bit.ly/2rZtcwQ.

[16] *Tubbs v. BNSF Railway Company, Inc.*, No. 12HO-CC00010 (Circuit Court of Holt County, Order of Dec. 9, 2013).

intruding into matters that are directly regulated by the Board" and "Petitioners' state law claims are federally preempted … because they have the effect of regulating and interfering with rail transportation."[17] The state court then dismissed the Tubbs' state-law trespass, nuisance, and inverse condemnation claims because they were preempted by 49 U.S.C. §10501 and by the Board's plenary and exclusive jurisdiction over railroad rights-of-way.[18]

The Tubbs family appealed the Board's declaration to the Eighth Circuit.[19] The Board told the Eighth Circuit that the Board's authority to preempt state law and regulate railroad rights-of-way is "among the most pervasive and comprehensive of federal regulatory schemes." Board Brief, *Tubbs v. Surface Transportation Board*, 2015 WL 2159810, at *4 (8th Cir. 2015) (quoting *City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998). The Board said "Congress' regulation of railroads is well established, and that the Supreme Court has recognized the preclusive effect of federal legislation in this area." *Id.* at *3-4 (internal quotations omitted). The Board argued for an extraordinarily broad and pervasive view of federal preemption of landowners' state-law rights or remedies including "trespass," "statutory trespass," and any other state law right or remedy incidentally affecting "how the railroads design, construct, maintain and repair their track." *Id.* at *9.[20]

---

[17] *Thomas Tubbs, et al., Petition For Declaratory Order*, 2014 WL 5508153, *3-4 (Surface Transportation Board Decision Oct. 29, 2014).

[18] *Tubbs*, No. 12HO-CC00010 (Order of Nov. 18, 2016).

[19] See 28 U.S.C. §2321.

[20] The Board also asserted that, under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984), "[a]s to the preemption provision involved

In *Tubbs* the Board told the Eighth Circuit:

> [Title 49 U.S.C. §]10501(b) gives the [Surface Transportation] Board "exclusive" jurisdiction over "transportation by rail carrier," and this exclusive jurisdiction explicitly preempts state law remedies. … Thus, state law claims … that have the effect of managing or governing rail transportation – which includes activities that take place on, and are related to, a rail carrier's lines and associated facilities – or otherwise unreasonably burdening or interfering with such transportation are preempted.
>
> The Board properly determined that §10501(b) preempts Petitioners' state law claims because those claims attempt to address how a rail carrier designs, constructs, maintains, and repairs its rail line and associated embankment. … [A]s the Board explained, the main purpose of main purpose of §10501(b) is "to prevent a patchwork of state and local regulation from unreasonably interfering with interstate commerce." Section 10501(b) thus maintains uniformity of regulation throughout the interstate rail system. As the Board stated, "[t]he interstate rail network could not function properly if states and localities could impose their own potentially differing standards" for the design, construction, maintenance, and repair of rail lines. These "important activities … are an integral part of, and directly affect, rail transportation." Indeed, consistent with the Board's decision, many courts have found similar state and local attempts to regulate the

---

here, the Board 'is uniquely qualified to determine whether state law is preempted by Section 1051(b).'" Board Br., 2015 WL 2159810, at *20 (Exhibit 2, p. 11) (citations omitted). According to the Board, the Courts of Appeals' authority to review the Board's decisions is "quite narrow" and the Board's decision "can be overturned only if it is arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or otherwise not in accordance with law." *Id.* at *11. The Eighth Circuit agreed with the Board's assertion of *Chevron* deference. "The scope of judicial review is therefore quite narrow, and we are not allowed to substitute our judgment for that of the Board." *City of Lincoln v. Surface Transportation Board*, 414 F.3d 858, 860-61 (8th Cir. 2005) (citing 5 U.S.C. §706(2) of the Administrative Procedures Act, *Middlewest Motor Freight Bureau v. I.C.C.*, 867 F.2d 458, 460 (8th Cir. 1989), and *Trans-Allied Audit Co. v. ICC,* 33 F.3d 1024, 1030 (8th Cir. 1994)). The Eighth Circuit held that "as long as the Board's findings of fact are supported by substantial evidence in the record as a whole, we will accept its findings and the reasonable inferences it drew from them."

> design, construction, maintenance, and repair of rail lines federally preempted by §10501(b).
>
> Surface Transportation Board Brief, 2015 WL 2159810, at *21-22.[21]

The Eighth Circuit accepted the Board's argument and affirmed the Board's position that an owner's "state-law claims would unreasonably burden or interfere with rail transportation." *Tubbs*, 812 F.3d at 1145-46.[22]

In *Grantwood Village v. MoPac*, 95 F.3d 654, 656 (8th Cir. 1996), the village filed a quiet title action in state court seeking to define the nature and extent of that interest the Board took when the Board invoked section 8(d) of the Trails Act. The village's state court action asserted its right under state law to use the land and asked the state court to declare the respective interests held by the village, the railroad, a trail-user, and a utility company. The trail-user removed the case to federal district court and argued the federal government's invocation of the Trails Act denied the village any legally-enforceable right to the property and denied the village even the right to pursue a state quiet title action.

---

[21] Footnotes omitted.

[22] The Supreme Court of Arkansas confronted the same situation and wrote, "We hold that the ICCTA preempts the [Arkansas State Highway] Commission's jurisdiction over this private railroad crossing dispute. … Federal law preemption deprives the [state] Commission's jurisdiction … and invests exclusive jurisdiction in the [Surface Transportation Board]." *Anderson v. BNSF Rwy. Co.*, 291 S.W.3d 586, 594 (Ark. 2009). The most compelling authority supporting the government's position are two Fifth Circuit decisions in *Franks Investment Co. v. Union Pacific RR Co.*, 593 F.3d 404 (5th Cir. 2010) (*en banc*), and *New Orleans & Gulf Coast Rwy. Co. v. Barrios*, 533 F.3d 321 (5th Cir. 2008). These cases involve an *existing* crossing the railroad and ICC and the Board recognized for eighty years. See also *DeBruce Grain Inc. v. Union Pacific R.R.*, 149 F.3d 787, 788 (8th Cir. 1998) (Congress granted the Board "broad exclusive jurisdiction over questions of rates, services, tracks and rail operations….").

The district court held, "the ICC had retained jurisdiction over the right-of-way by authorizing interim trail use and that federal law preempts state law on the question of abandonment. … the district court concluded it lacked jurisdiction to review the ICC order." *Grantwood Village*, 95 F.3d at 657. The Eighth Circuit affirmed, holding, "a [state-law] challenge to [the trail-user's] interest in the right-of-way necessarily includes a review of the ICC's decision. … Because the ICC has exclusive and plenary authority to determine whether a rail line has been abandoned the question of whether MoPac abandoned the right-of-way necessarily involves federal law. *Id.* The Eighth Circuit concluded, "[s]tate law claims can only be brought after the ICC has authorized an abandonment and after the railroad has consummated that abandonment authorization." *Id.* at 659.

The Board's invocation of section 8(d) completely preempted Grantwood Village's state-law rights and remedies denying the village even the ability to file a quiet title action in state court seeking to define the respective parties' rights and claims. See *Glosemeyer v. United States*, 45 Fed. Cl. 771 (2000), and *Grantwood Village v. United States*, 45 Fed. Cl. 771 (2005), in which Judge Bruggink ultimately awarded the village compensation for that property the government took.

The other circuits have similarly concluded "the congressional intent to preempt this kind of state and local regulation of rail lines is explicit in the plain language of the ICCTA [(Interstate Commerce Commission Termination Act)] and the statutory framework surrounding it." *City of Auburn*, 154 F.3d at 1031.

"Preemption of state law is compelled if Congress command is explicitly stated in the federal statute's language or implicitly contained in its structure or purpose." *Id.*[23]

The Board's preemptive authority and its exclusive jurisdiction over railroad rights-of-way includes corridors that are railbanked when the Board invokes section 8(d). Jie Ao and Xin Zhou own land in King County, Washington. In September 2008 BNSF petitioned the Board to abandon a railway line that crossed the Zhous' land. The King County Port Authority petitioned the Board to invoke section 8(d), and the railroad agreed to negotiate a trail use agreement. More than a year later, in September 2009, the railroad "consummated the donation of the real property and physical assets of the line to the Port and entered into a rail banking/interim trail use agreement with King County under the Trails Act." *Jie Ao and Zin Zhou* –

---

[23] See also *Union Pacific R. Co. v. Chicago Transit Authority*, 647 F.3d 675, 678 (7th Cir. 2011) ("Congress expressly conferred on the Board 'exclusive' jurisdiction over the regulation of railroad transportation. … Congress also defined 'transportation' to include railroad property, facilities, and equipment 'related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use.' Congress's intent in the Act to preempt state and local regulation of railroad transportation has been recognized as broad and sweeping."); *City of Lincoln*, 414 F.3d at 861 (As to a bicycle and pedestrian trail to be located on a railway line, "the Board has broad authority over the operation of railways and associated property. The ICCTA gives the Board exclusive jurisdiction over rail transportation … [and] defines rail transportation expansively to encompass any property, facility, or equipment related to the movement of passengers and property by rail and any related services, … Courts have recognized that Congress intended to give the Board extensive authority in this area."); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2nd Cir. 2005) ("Section 10501 vests the Transportation Board with exclusive jurisdiction over 'transportation by rail carriers' and 'the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, even if the tracks are located, in intended to be located, entirely in one State." … '[S]tate and local permitting or preclearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce.'") (citations omitted).

Petition for Declaratory Order, Surface Transportation Board Docket No. FD 35539, 2012 WL 2047726, *2 (June 6, 2012). The right-of-way included land upon which the Ao and Zhou built improvements including a retaining wall, a garage, and a driveway. The thirty-five-foot-wide area where the improvements were located had "never been used for rail operations and the retaining wall, garage and driveway have been located in this area for many years." *Id.* at n.8. Another portion of the right-of-way was crossed by a private driveway and utilities.

Ao and Zhou filed a quiet title action in Washington state court "based on the state property law theory of adverse possession" claiming ownership of that portion of the right-of-way where the improvements were located "under the state property law theory of prescriptive easement to use [the] private roadway within the ROW." 2012 WL 2047726, at *2. Washington state court "determined the Board should decide the question of federal preemption and dismissed the state property law action." *Id.* at *3.[24] The Board ruled the owners' state-law adverse possession claim to the land upon which the retaining wall, garage, and driveway were located was "preempted under either the 'categorical' or 'as applied' preemption analysis." *Id.* The Board found "that the application of adverse possession to this strip of rail-banked ROW would amount to regulation of rail transportation because it would confer exclusive control to the Petitioners over property that is part of the national rail network." *Id.* The Board continued and held, "the application of state adverse

[24] The Board has discretionary authority to "issue a declaratory order to eliminate a controversy or remove uncertainty" under 5 U.S.C §554(e) and 49 U.S.C. §721.

possession law would unreasonably interfere with potential future railroad operations." *Id.*

As to Jie Ao and Xin Zhou's other state-law claim of a right of access by prescriptive easement, the Board held the owners could ask the "state court to interpret the threshold issue of whether the Petitioners obtained a prescriptive easement." 2012 WL 2047726, at *3. But, the Board held open the question of whether §10501(b) would nonetheless preempt a "non-exclusive prescriptive easement" should the state court find that one existed. *Id.*

The Board ruled its exclusive authority broadly preempts state-law including state-law adverse possession actions. "The agency's broad and exclusive jurisdiction over railroad operations and activities prevents application of state laws that would otherwise be available, including condemnation to take rail property for another use that would conflict with the rail use." *Id.* (citing, *inter alia*, *City of Lincoln*, 414 F.3d at 861). The Board noted "Adverse possession has the same legal effect on the property as condemnation – elimination of a prior ownership interest in the property." *Id.* at n.4. The Board ruled that "the fact that this ROW is rail banked, and there are currently no specific plans to reactivate this property, does not mean that the property is not within the Board's jurisdiction and might not be reactivated for future rail service." *Id.* at *6.

Thus, the Board's invocation of section 8(d) is a complete taking of the landowners' state-law right to use and possess the land and takes essentially the entirety of the owners' state-law right to their property.

II. The government's motion is premised upon four points that are contrary to more than thirty years of Trails Act jurisprudence.

The government premises its motion upon four points. The government argues: (1) the Trails Act does not grant the trail-user exclusive use of the corridor; (2) Congress didn't intend exclusive trail use of the land; (3) this Court should defer to the Board to interpret what property interest the Board took from these owners; and (4) Florida state law allows a servient estate owner to use the land subject to an easement. The government is wrong on all four points.

A. Congress did intend to take an owner's state law right to use and possess their land.

The government confuses the *federal Surface Transportation Board* with the *trail-user*. The rights the Board grants a *trail-user* do not define that property interest the federal government took from the *landowner*. The government compounds this error by misstating the, text, purpose, and operation of the Trails Act.

As we explain above, the entire point of the Trails Act amendments of 1983, specifically section 8(d), was to preempt landowners' rights under state law. See *Ladd I*, 630 F.3d at 1019 ("It is settled law that a Fifth Amendment taking occurs in Rails-to-Trails cases when government action *destroys* state-defined property rights by converting a railway easement to a recreational trail, if trail use is outside the scope of the original railway easement.") (emphasis added) (citing *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009)). See also *Caldwell*, 391 F.3d at 1228 ("a Fifth Amendment taking occurs when, pursuant to the Trails Act,

state law reversionary interests are *effectively eliminated* in connection with a conversion of a railroad right-of-way to trail use") (emphasis added) (citing *Preseault II*, 100 F.3d at 1543). The "problem" Congress sought to remedy with the 1983 amendments to the Trails Act was to invalidate landowners' state-law rights to use land under the otherwise-abandoned railroad right-of-way easements. As Justice Holmes explained in *Boston Chamber of Commerce*, 217 U.S. at 195, the question is what the owner lost, not what the government gained.

In *Preseault I*, the government argued the Board's invocation of section 8(d) did not take the owner's state-law interest in their property because there was a railroad easement across the owners' land before the federal government imposed two new easements upon the owners' land. The Supreme Court literally laughed at this assertion. During oral argument in *Ladd I*, Judge Moore of the Federal Circuit reminded the government this argument does not work.

> Government counsel (12:37-12:47): "The [landowners] enjoy a fee interest burdened only by the railroad's right to run a railroad. That was the pre-existing situation before the NITU; that's the same situation today."
>
> Judge Moore (12:47-13:02): "That's the argument you made unsuccessfully in the Supreme Court where Justice Scalia seemed to actually make fun of you? I mean, I don't think that's going to work on us at this point. You can't say 'oh yeah, well they didn't lose anything because they didn't have anything the day before.'"[25]

[25] *Ladd v. United States* (Fed. Cir. No. 2010-5010), oral argument held Sept. 7, 2010, available at: http://cafc.uscourts.gov/oral-argument-recordings?title=ladd&field_case_number_value=2010-5010&field_date_value2%5Bvalue%5D%5Bdate%5D=.

Judge Moore was recalling Justice Rehnquist and Scalia's response to this argument that the Trails Act "takes nothing because it changes nothing." The Courtroom broke into laughter when Justice Rehnquist described this argument as, "That is like saying if my aunt were a man she would be my uncle." Justice Scalia then responded describing the argument as:

> 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 didn't, but they might have. Even though you have a deed that says if we stop using it for rail purposes its 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.[26]

The government cannot run with the fox and hunt with the hounds. The government cannot take an owner's property and then evade its constitutional obligation to pay the owner for what the government has taken by arguing the government didn't really take anything or by arguing that what the government took was not what the owner lost but was what the government gave the trail-user.

B. The federal government's new rail-trail corridor easement was for both interim public recreation and a future railroad.

The government frames its second point by saying, "Congress did not intend for Section 8(d) to impose exclusive trail use." This construction of the issue is wrong for two reasons. First, Congress *did* intent to take all of the owner's state law right to the property. The entire reason Congress adopted section 8(d) of the Trails Act was to take from owners those rights the owners had to use their property under state

---

[26] Oral argument, *Preseault I*, 494 U.S. 1 (No. 88-1076), available at: http://www.oyez.org/case/1980-1989/1989/1989_88_1076 /argument.

law. Second, the easement the Board imposed upon these owners' land was not just the authority of Sarasota County (as a trail-user) to use the owners' land for a public recreational trail but also included the Board's continuing authority to authorize a railroad to build a railroad across these owners' land in the future without the railroad having to pay the owner. These two easements denied the owner the right to use the land and denied the owner the ability to exclude others from using the land. Any buyer of these owners' property would pay substantially less for land subject to both an easement for public recreation and a future railroad.

C. This Court owes no deference to the Board's interpretation of the Trails Act.

The government's third point – some variant of *Chevron* deference – argues this Court must defer to the Board to define the nature of that property interest the Board took from these owners. The government is wrong for three reasons.

First, this Court owes the Board no *Chevron* deference in defining the nature of the property interest the government took from these owners. The nature of an owner's interest in his property is defined by state law not by the Board's administrative rulings. See *Preseault I*, 494 U.S. at 20 ("[W]e 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.") (O'Connor, Scalia, and Kennedy, JJ., concurring) (internal quotations omitted).

Second, even if we consider the Board's interpretation of the interest it takes when it invokes the Trails Act, the Board has, itself, said that when it invokes section

8(d) of the Trails Act it takes exclusive use and control of the owner's property. See, *supra*, pp. 27-29.

Third, the government continues its persistent error of trying to define the interest it took from these owners by reference to that interest the Board granted Sarasota County as the trail-user. The property interest taken from the *owner* is not that interest the Board granted the *trail-user*. As the Federal Circuit explained in *Barclay* there can be multiple trail-users but the right to use the property for both interim public recreation and a future railway is vested in the Board.

D. Florida law does not define the scope of the easement because federal law preempted Florida state law.

The government argues, "Florida law presumes that easements are non-exclusive and recognizes a servient estate owner may use their land without interfering with the easement." This point provides the government no succor because: (a) Florida law does not make this presumption of non-exclusivity for railroad right-of-way easements; and (b) even if Florida law did, the entire point of section 8(d) is to preempt an owner's state-law right to property.

As Justice O'Connor noted in her concurrence in *Preseault I*, state law defines an owner's property interest but the federal government can through its power of eminent domain redefine state law property interests. And, when the federal government does so, that is a taking of private property for which the Fifth Amendment compels the government to justly compensate the owner. Congress granted the Board authority to redefine and preempt these Florida landowners' rights to possess their property. If we looked to Florida law to define the owners' interest

in this land, these owners' would have the exclusive right to use the land and exclude others from the land. If we looked to Florida law to define these owners' interest in this land, there would be no easement for a recreational trail nor for a future railroad.

Furthermore, even if we look to Florida law, railroad right-of-way easements are exclusive and deny the owner of the fee estate any right to use the land. See *McIlvaine v. Florida East Coast Ry. Co.*, 568 So.2d 462, 464 (Fla. Ct. App. 1990) ("Because the railroad is held to a high degree of care in transporting goods and people, the carrier is granted what is essentially exclusive possession of its easement…."); *Dean v. MOD Props., Ltd.*, 528 So.2d 432, 434 (Fla. Ct. App. 1988). See also *Illig v. United States*, 58 Fed. Cl. 619, 630-31 (2003) (Missouri law stating "an easement for railroad use is exclusive" comports with the Supreme Court's holding in *Western Union*, 195 U.S. at 570); *Kaseburg v. Port of Seattle*, 2015 WL 6449305, at *5 (W.D. Wash. Oct. 23, 2015) ("It is well established that a railroad easement grants the easement holder "exclusive control of all the land within the lines of its roadway.") (quoting *Grand Trunk R. Co. v. Richardson*, 91 U.S. 454, 455 (1875), and *Illig*, 58 Fed. Cl. at 631).

This Court held in Illig:

> The Trails Act and its implementing regulations require trail sponsors to assume "full responsibility" for managing the right-of-way and for any legal liability arising out of the right-of-way. 49 C.F.R. § 1152.29(a)(2). As part of this responsibility, a trail sponsor must also make assurances that the right-of-way is kept available for "future reconstruction and reactivation ... for rail service." *Id.* § 1152.29(a)(3).
>
> In order to meet these requirements, we believe the Trails Act and its implementing regulations require that a trail sponsor must have the same control over the entire right-of-way corridor that would be held by

> a railroad in order that the trail sponsor can ensure that any and all uses made of the right-of-way are consistent with the restoration of rail service. As discussed above, under Missouri law, *such control is exclusive*. We therefore conclude that the Trails Act imposed a new easement across plaintiffs' properties which retained essentially the same characteristics as the original easement, both in its location and *exclusivity*.

58 Fed. Cl. at 631 (emphasis added).

In addition, in *Palmetto Conservation Foundation v. Smith*, the U.S. District Court for the District of South Carolina held the new rail-trail easement is exclusive. 642 F. Supp.2d 518, 532 (D.S.C. 2009). The district court examined the Board's continuing jurisdiction over the rail-trail corridor and the trail-user's exclusive right to use and control the new easement. *Id.* In *Palmetto*, the trail-user sued an adjacent landowner to permanently enjoin that landowner from cutting down vegetation within the new rail-trail easement or from "interfering with the [trail-user's] *exclusive use*" of the rail-trail corridor, including "interfering with the [trail-user's] activities on the subject property for the purpose of developing, constructing, *maintaining, and using* the recreational trail or for future rail reactivation." *Id.* (emphasis added). The district court granted the trail-user's requested permanent injunction against the adjacent landowner, stating, "[u]nder the logic of *Toews*, as long as the [trail-user] is utilizing the subject property for purposes of the trail, the [trail-user] *can utilize all of it for that purpose*, including retaining the flora and fauna in its natural state." *Id.* at 531 (emphasis added).

Thus, as held by the district court in *Palmetto*, when the Board invokes section 8(d), adjacent landowners have no rights in the new rail-trail corridor and cannot

even remove plants or buffer their property from the public recreational trail. 642 F. Supp.2d at 531. The district court further held that the landowner's "sole remedy" for the trail-user's exclusive use of the easement was a taking claim "under the Tucker Act." *Id.* And the court enjoined the landowner even though the court "agree[d] that the [trail-user's] use of the subject property exceed[ed] the scope of the original easement…." *Id.*

E. The *Grames v. Sarasota County* litigation does not support the government's motion.

Grames v. Sarasota County is brought by the owners of five properties whose land was taken for the northern extension of the Legacy Trail. The case asked the Middle District of Florida to resolve five owners' title as against Sarasota County. The owners in this case are not parties to the *Grames* litigation. *Grames* was filed as a class action but Judge Honeywell has not granted class certification and, from her statements during a recent hearing, it appears unlikely that she will grant class certification. The United States asked the district court to dismiss the declaratory judgment and quiet title counts brought against the United States. Judge Honeywell granted the United States motion dismissing both counts against the United States but allowed the plaintiffs to amend the quiet title count.

The government earlier asked this Court to stay this litigation to await further proceedings in *Grames*. See ECF No. 92. This Court denied the government's motion for a stay. ECF No. 100, pp. 6-7 ("Here, determining just compensation is not dependent on resolution of *Grames*. None of the plaintiffs in *Cheshire Hunt* are party to *Grames* and the issue and putative class in *Grames* is narrow. … Since the

Government has already stipulated to liability, it is clear that property rights do exist."). The *Grames* litigation involving five owners who are not parties in this case does not provide any reason to delay this case.

F. The government fails to specify what legally enforceable rights these owners have to use the land.

Finally, the government says, "Section 8(d) does not preclude the servient estate holder's other uses" of the land. But the government never defines what legally-enforceable right these owners have to use the land.

This Court has held (and the government agreed) that the government has taken ninety-nine percent of these Legacy Trail owners' interest in their land. See *McCann*, 111 Fed. Cl. at 626 ("the parties agree that the Government took 99% of the value of the land underlying the corridor"); *Childers*, 116 Fed. Cl. at 551 ("The parties agree that the conversion of the rail corridor to a recreational trail was a taking of 99% of the fee interest."); see also *Childers*, 116 Fed. Cl. at 524, 541, 580, 582, 588 (plaintiffs entitled to recover compensation of 99% of the fee interest value). The federal government's appraiser in the *McCann* and *Childers* litigation was John Underwood. In a subsequent Trails Act taking case, Underwood admitted his appraisal reports in the Legacy Trail litigation stated, "The permanent easement would not have allowed development within the easement area…. As a result, it's my opinion that the permanent easement takes 99 percent of the value of the area encumbered by the easement." *Jackson v. United States*, U.S. Court of Federal Claims No. 14-316, trial transcript, p. 597 (ln. 2021), p. 599 (lns. 15-17).

So what legally-enforceable rights does the government believe these owners possess to use the land subject to the government's new rail-trail corridor easement? The government never says. Can these owners construct and maintain a radio tower on the land? Can these owners have a building or septic field on the land? Can these owners have a fence on the land? Again, the government never says.

CONCLUSION

Each day that passes without the government honoring its constitutional obligation to pay these owners "just compensation" is a further violation of these owners' Fifth Amendment right to be justly compensated for that private property the government took from them. The government's motion for partial summary judgment on what the government calls the "exclusivity" of the rail-trail corridor easement is without merit and should be denied. This case should proceed to final judgment and these owners should be paid.

Respectfully submitted,

/s/ Mark F. (Thor) Hearne, II
MARK F. (THOR) HEARNE, II
Stephen S. Davis
True North Law, LLC
112 S. Hanley, Suite 200
St. Louis, MO 63105
(314) 296-4000
thor@truenorthlawgroup.com

Counsel for the Landowners