No. 19-1385

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NORMA E. CAQUELIN,
Plaintiff/Appellee,

v.

UNITED STATES OF AMERICA,
Defendant/Appellant.

Appeal from the United States Court of Federal Claims
No. 1:14-cv-00037 (Hon. Charles F. Lettow)

APPELLANT UNITED STATES OF AMERICA'S OPENING BRIEF AND FEDERAL CIRCUIT RULE 35(a) REQUEST FOR EN BANC REVIEW

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STATEMENT OF RELATED CASES

This is the second appeal from the same civil action: the first resulted in an unreported decision, *Caquelin v. United States*, No. 16-1663, 697 F. App'x 1016 (Fed. Cir. June 21, 2017) (Appx0208-0215). Undersigned counsel is not aware of any pending related cases within the meaning of Federal Circuit Rule 47.5.

INTRODUCTION

This is the second appeal in a suit alleging a taking due to preliminary regulatory action related to railbanking under Section 8(d) of the National Trails System Act, 16 U.S.C. § 1247(d) ("Trails Act"). *See Caquelin v. United States*, No. 16-1663, 697 F. App'x 1016 (Fed. Cir. June 21, 2017) (Appx0208-0215) ("*Caquelin I*"). Under Section 8(d), a railroad that has requested federal authorization to abandon a rail line may agree to negotiate with a trail sponsor for interim recreational trail use in lieu of regulatory abandonment. In this case, the Surface Transportation Board ("STB") authorized the rail line to be abandoned subject to a notice of interim trail use ("NITU"). The NITU gave the railroad 180 days to negotiate an interim use agreement in lieu of abandonment. The railroad did not reach an interim use agreement, and it opted to consummate abandonment after the 180-day period expired.

The Court of Federal Claims ("CFC") held the United States liable for a taking on the view that the issuance of the NITU per se constituted physical taking. The CFC relied on this Court's holding in *Ladd v. United States*, 630 F.3d 1015, 1023-24 (Fed. Cir. 2010), that the NITU itself effects a physical taking by "block[ing]" reversion. *Ladd* relied, in turn, on *Caldwell v. United States*, 391 F.3d 1226, 1235 (Fed. Cir. 2004), which held that a takings claim relating to a rail-to-trail conversion accrues when a NITU is issued.

In the first appeal in this case, the United States urged this Court, under Circuit Rule 35(a), to sit en banc and overrule *Ladd* and *Caldwell* to the extent that those cases compel a ruling that a NITU alone constitutes a physical occupation and taking. The United States explained that in a NITU-only case, the government does not take physical possession of private property, cause third-party possession (e.g., through trail use), or permanently prevent the underlying owner from regaining unencumbered fee. Rather, the NITU is a step in the STB's administrative process (like many others) that might, but need not, delay the railroad's physical abandonment of its right-of-way. The NITU does not enlarge the railroad's existing property rights vis-à-vis the underlying landowner or otherwise constitute a physical occupation of the landowners' interest. At most, a NITU *might* cause a delay in a fee landowner's use and might possibly (if of extraordinary length and other essential elements of a takings liability are satisfied) constitute a regulatory taking. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002).

Alternatively, the United States urged this Court to rule that, even if a NITU-caused delay in a *railroad*'s abandonment of a right-of-way somehow could be equated with a *government* physical invasion or occupation, the occupation is necessarily temporary in nature. The Supreme Court's ruling in

Arkansas Game & Fish Commission v. United States, 568 U.S. 23 (2012), affirmed that courts must apply a multi-factor test to determine whether a government-caused temporary or transient occupation is so severe and disruptive as to constitute a physical taking.

In *Caquelin I*, this Court deferred consideration of those issues and instead remanded to the CFC for the development of a record. Appx0213-0215. This Court directed the CFC to conduct a "multi-factor analysis" on the view that "[s]uch a record would give the court a concrete basis for comparison of the competing legal standards as applied." Appx0214. On remand, the United States demonstrated that any NITU-caused delay in the railroad's abandonment of the right-of-way in this case was too inconsequential to amount to a taking under a multi-factor analysis. The CFC concluded otherwise only by failing to properly analyze the relevant factors and by improperly equating regulatory delay with permanent physical occupation and a per se taking.

The United States now again urges this Court to sit en banc to reverse *Ladd* and *Caldwell* to the extent necessary to hold that the STB's issuance of a NITU is not a government-authorized physical occupation and cannot constitute a physical taking. Alternatively, this Court should hold—in light of *Arkansas Game*—that the issuance of a NITU does not constitute a per se

permanent physical taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Instead, applying the *Arkansas Game* multi-factor analysis applicable to temporary physical takings, the Court should hold that the effect (if any) of the NITU issuance in this case was too inconsequential to amount to a taking. In all events, the judgment of the CFC should be reversed.

STATEMENT OF JURISDICTION

The CFC had jurisdiction under the Tucker Act, 28 U.S.C. § 1491, to hear Plaintiff's Fifth Amendment takings claim.

The CFC entered judgment under CFC Rule 54(b) in favor of Plaintiff on November 7, 2018 (Appx0025), following a published opinion, *Caquelin v. United States*, 140 Fed. Cl. 564 (2018) (Appx0001-0024). The judgment was final because it resolved all claims against the United States. This Court has jurisdiction to review the CFC's judgment under 28 U.S.C. § 1295(a)(3).

The United States filed its notice of appeal on January 2, 2019, or 56 days later. The appeal is timely under 28 U.S.C. § 2522 and Federal Rule of Appellate Procedure 4(a)(1)(B)(i).

STATEMENT OF THE ISSUES

1. a. Whether the CFC erred in holding that a NITU—which did not authorize third-party use of the railroad's right-of-way but merely imposed a short administrative hold in the railroad's voluntary abandonment of the

right-of-way—amounted to a government-authorized physical occupation of the underlying property for purposes of takings analysis, and whether this Court should sit en banc to overrule *Ladd* and *Caldwell* to the extent that those cases hold that a NITU invariably causes a physical occupation.

b. If a NITU can be deemed to cause a government-authorized physical occupation, whether the CFC erred in applying a per se rule to hold that any NITU-caused delay constituted a taking.

2. Whether, if the multi-factor analysis of *Arkansas Game* applies, the CFC erred in finding a taking under that framework.

STATEMENT OF THE CASE

A. Legal Background

The federal government has regulated the nation's rail system since the Interstate Commerce Act of 1887. *See Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981). Congress conferred exclusive and plenary authority on the Interstate Commerce Commission (now the STB) to regulate abandonment of nearly all of the nation's rail lines in the Transportation Act of 1920. *Id.* at 318; *see also* 49 U.S.C. §§ 10501(b); 10903. Under this longstanding authority, rail carriers under the STB's purview must "provide . . . transportation or service on reasonable request," 49 U.S.C. § 11101(a), unless the STB agrees to a temporary discontinuance or a

permanent abandonment of the rail line, *id.* § 10903. A discontinuance allows a rail carrier to "cease operating a line for an indefinite period while preserving the rail corridor for possible reactivation of service," while abandonment removes a line from the national transportation system, terminating the railroad's financial and managerial responsibilities for the line. *Preseault v. ICC*, 494 U.S. 1, 5 n.3 (1990).

A grant of abandonment authority to a rail carrier by the STB is permissive: under STB regulations in place since 1997, the carrier typically has one year to affirmatively decide to consummate an abandonment authorized by the STB, although an extension may be approved if the railroad requests it. 49 C.F.R. § 1152.29(e)(2); *see also Baros v. Texas Mexican Railway Co.*, 400 F.3d 228, 236 (5th Cir. 2005). The STB has a streamlined process for obtaining authorization to abandon where a rail line has been dormant for at least two years. *See* 49 U.S.C. § 10502(a); 49 C.F.R. § 1152.50. Under both standard and streamlined ("exempt") abandonment proceedings, railroads are given a one-year time period in which to exercise that abandonment authority; even once a railroad has initiated an abandonment process, it has complete discretion to reverse course (i.e., not consummate abandonment) or to seek an extension for completing an authorized abandonment.

In 1983, Congress enacted Section 8(d) of the Trails Act, creating an additional option for railroads wishing to terminate rail service, commonly known as railbanking. When a rail corridor is railbanked, the STB retains jurisdiction over the corridor so that it may be returned to active railroad use in the future, but the rail carrier transfers financial and managerial responsibility to a state or local government or private entity, allowing its use in the interim as a recreational trail. *See Preseault*, 494 U.S. at 6-7. Section 8(d) ensures that corridors remain available for future rail use: "if such interim [trail] use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d).

The government action at the center of this case—issuance of a NITU—is a regulatory action that may result in railbanking and the triggering of Section 8(d). When a rail carrier applies to abandon a rail line, a "state, political subdivision, or qualified private organization" may file a comment indicating an interest "in acquiring or using a right-of-way of a rail line . . . for interim trail use and rail banking." 49 C.F.R. § 1152.29(a). If the railroad agrees to negotiate, the STB "will issue a [NITU] to the railroad and to the interim trail sponsor for the portion of the right-of-way as to which both parties are willing to negotiate." *Id.* § 1152.29(d)(1); *see also* 16 U.S.C. § 1247(d). The

NITU provides a 180-day negotiation period, during which the rail carrier may "discontinue service, cancel any applicable tariffs, and salvage track and materials" after 30 days. 49 C.F.R. § 1152.29(d)(1).

If the railroad and prospective trail group reach a trail-use agreement, the parties notify the STB and the corridor is railbanked, remaining under STB jurisdiction and triggering Trails Act Section 8(d), which prevents a railroad easement from being abandoned as it might otherwise under applicable law. If the parties do not reach an agreement, the railroad has the option to permanently abandon the line within the authorized period (which can be extended), just as it would have if no NITU had been issued. *Id.* § 1152.29(d)(1), (e)(2); *see also Citizens Against Rails-to-Trails v. STB*, 267 F.3d 1144, 1150-53 (D.C. Cir. 2001).[1] If the railroad elects not to consummate abandonment within that permissive timeframe (or any extensions thereof), the abandonment authority granted by the STB expires, and the railroad may continue operating on the line and may restart abandonment proceedings again in the future. *See* 49 C.F.R. § 1152.29(e)(2).

[1] The STB regulates *rail line* abandonment for federal regulatory purposes, not *easement* abandonment under State property law. But once the STB's regulatory jurisdiction comes to an end, easement abandonment might occur under state law. *See Preseault*, 494 U.S. at 8.

B. Factual background

1. Plaintiff's ownership

In 1870, a predecessor of the North Central Railway Association ("North Central") acquired an easement for a rail line in rural Iowa. Appx0201. In 1892, Plaintiff's grandfather purchased land subject to the railroad easement in conjunction with a tract of farmland to the west of the rail line. Appx0201. Plaintiff's family has owned that property ever since. Appx0201; Appx1478.[2]

Plaintiff inherited her 44.66-acre agricultural property from her mother in 1982. Appx0202; Appx0203. Although there was a rail corridor immediately to the east of the farmed portion of her land, Plaintiff was unaware when she acquired the property that the railroad merely owned an easement and that her ownership extended to the centerline of the corridor adjacent to her property. Appx1478-79, Appx1481.

1. STB proceedings

North Central filed a notice of exemption under 49 C.F.R. § 1152.50 with the STB on May 16, 2013, indicating its intent to abandon a 10.46-mile segment of its rail line—including a 0.359-acre section adjacent to Plaintiff's

[2] Plaintiff Norma Caquelin owned the property with her husband, Kenneth Caquelin, from May 11, 2007 until his death on July 24, 2017. Appx0202.

44.66-acre property—and certifying that no local traffic had moved over the line for more than five years. Appx0204; Appx1331-1335. The STB issued a decision that in the absence of an offer of financial assistance (a procedure that allows a third party to keep a rail line operational), or another request (such as for a public use condition or rail-trail negotiation), North Central's one-year abandonment authority would be effective on July 5, 2013. Appx1400; 78 Fed. Reg. 33,891 (June 5, 2013).

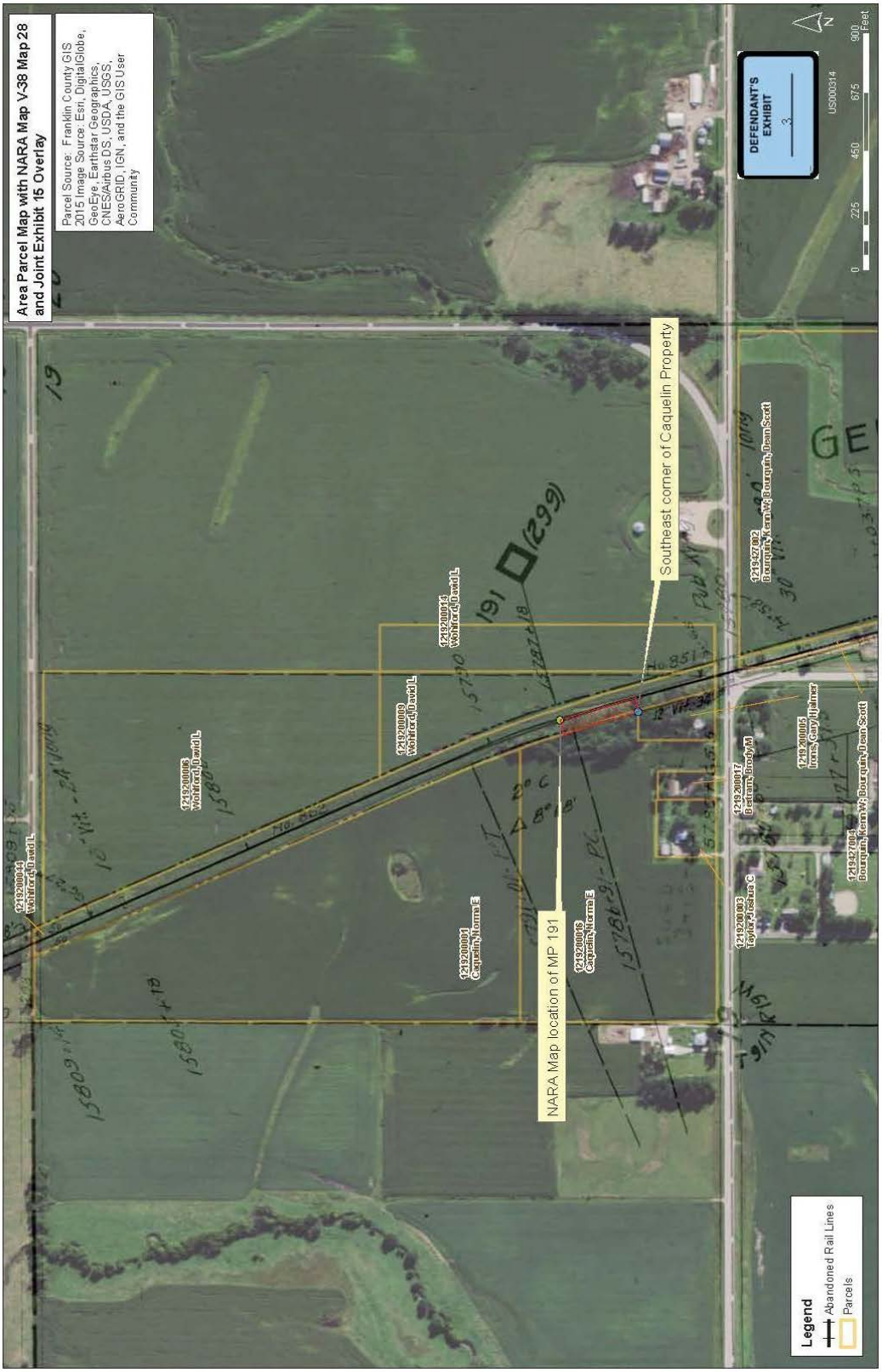
The City of Ackley and the Iowa Natural Heritage Foundation expressed interest in negotiating regarding converting the rail line to trail use, and the railroad agreed to negotiate a trail-use agreement. Appx0204; Appx1391-1393; Appx1395-1398. Accordingly, on July 3, 2013, the STB issued a decision imposing several conditions on the railroad's abandonment of the rail line, including a NITU that provided 180 days for negotiation of an interim trail-use agreement. Appx0205; Appx1402-1406. During the negotiation period, the railroad could take steps toward abandonment—i.e., removing rails and other fixtures from the corridor—but could not formally abandon the rail line. Appx1405. The NITU also did not permit third-party access to the property. Rather, if the parties reached an acceptable trail-use agreement, railbanking would occur, and Section 8(d) of the Trails Act would be triggered. *See* Appx1403; Appx1406 (directing the parties to notify STB if an

agreement is reached and trail use is thus established). If no trail-use agreement was reached within the 180-day negotiating period, the railroad was free to consummate abandonment. Appx1406.

The NITU expired by its own terms on December 30, 2013, as the potential trail operators and the railroad did not reach a trail-use agreement. Accordingly, rail-to-trail conversion never occurred, and the corridor was never railbanked. On April 24, 2014, the railroad notified the STB that as of March 31, 2014, it had "exercised the authority . . . [to] fully abandon[] the subject rail line" between Ackley and Geneva, Iowa. Appx0205; Appx1409. On May 9, 2014, the STB confirmed receipt of this notice and stated that the railroad's "[c]onsummation of the abandonment ended the Board's jurisdiction over the line." Appx1410; *see also* Appx0205.

2. The 0.359 acres covered by the NITU

Plaintiff first learned of her interest in a portion of the rail corridor from her attorneys in November 2013—after the NITU was issued. Appx1481; Appx1503. Only 0.359 acres of Plaintiff's property are covered by this NITU, consisting of a strip of land approximately 313 feet long and 50 feet wide. Appx0206; Appx1436 (hashed area indicates affected land); Appx1089 (same). This strip is separated from the 42.70 acres of Plaintiff's land that is actively farmed by a wooded area that Plaintiff has never farmed. *See* Appx1202 (areas



[Map from Appx1089]

not farmed); Appx1089; Appx0262; Appx0264. Both at the time of the NITU and as of trial in May 2018, the strip included an elevated rail bed with ballast, *see* Appx0399-0400, and there was no vehicular access through the wooded area to the 0.359 affected acres, *see* Appx0370-0371; Appx0453-0544.

Although the railroad's easement terminated under state law following the railroad's abandonment of its rail line in spring 2014, as of the May 2018 trial, Plaintiff had taken no steps toward reclaiming the affected strip to put it into agricultural (or other) use. Although Plaintiff was "unable and unwilling to come and testify" at trial, Appx0484; *see also* Appx0393, her interrogatory responses confirmed that she "had no plans to use the Railway Corridor for any purpose during the period the NITU was in effect," Appx1481; *see also* Appx1478-1485; Appx1492-1506 (reproducing responses).

C. Procedural background

Plaintiff filed suit in January 2014, after the NITU expired without a trail-use agreement, but before the railroad filed a notice of consummation, formally abandoning its line. Plaintiff alleged that the Trails Act caused a delay in the railroad's abandonment of its easement and therefore constituted a taking of Plaintiff's property for which compensation is due. Appx0231-0232.

1. The CFC's 2015 decision

The parties cross-moved for summary judgment. The United States argued that the issuance of the NITU unaccompanied by rail-to-trail conversion could not be a per se taking under Circuit precedent. The CFC disagreed, interpreting *Ladd* as holding that a per se physical taking occurs whenever the STB issues a NITU, whether or not a rail-to-trail conversion subsequently occurs. Appx0226-0228. After the parties reached an agreement regarding compensation—for $900, premised on the CFC's liability decision, *see* Appx0217—the United States appealed.

2. The 2016-2017 appeal and decision

On appeal, the United States argued that the mere issuance of a NITU does not expand the railroad's rights and therefore cannot be said to cause any new physical occupation or be deemed a per se physical taking. *See* Corrected Opening Brief and Federal Circuit Rule 35(a) Request for En Banc Review of Appellant United States, *Caquelin I*, No. 16-1663, 2016 WL 4419147, at *20-51 (Aug. 9, 2016). Pursuant to Circuit Rule 35(a), the United States urged this Court to reconsider *Ladd* and *Caldwell*, to the extent that these decisions compelled such a result. It argued that the issuance of a NITU may at most give rise to a regulatory takings claim, which is properly analyzed under the framework provided by *Penn Central Transportation Co. v. New York City,* 438

U.S. 104 (1978). Alternatively, the United States contended that, even if the bare NITU issuance may be said to cause a physical occupation, any such occupation necessarily would be temporary and consequently would not amount to a taking under the *Arkansas Game* multi-factor analysis.

This Court primarily addressed the alternative argument, noting that *Arkansas Game* "raise[d] questions about *Ladd*," which "supplement the questions raised . . . when *Ladd* was decided." *Caquelin I*, Appx0214. The Court did not decide whether NITU-only takings claims should be analyzed as "regulatory" or "physical" takings or whether the Court should revisit *Ladd* or *Caldwell* en banc. Instead, the Court stated that it would be "advisable to have the litigation record in this case further developed" to help it "decid[e] whether en banc review is worthwhile." Appx0214. The Court thus directed the CFC to "conduct such proceedings—pre-trial, trial, and post-trial—as are necessary for an adjudication of how the government-advanced multi-factor analysis applies in this case," culminating in an "opinion containing findings of fact and conclusions of law under such a standard." Appx0214-0215.

3. The CFC's decision on remand

On remand, the CFC permitted six months of fact and expert discovery and held a three-day trial in May 2018. On November 5, 2018, the CFC issued an opinion holding the United States liable under the multi-factor analysis of

Arkansas Game. Appx0001-0024. The CFC purported to apply each of the factors identified as potentially relevant in *Arkansas Game*, but repeatedly reverted to a "per se" analysis. For example, the CFC found that the NITU "blocked [Plaintiff's] reversionary interest" for 180 days (the entire negotiating period); however, it refused to consider whether some or all of the 180-day NITU period occurred before the railroad would have completed its rail-line abandonment and before easement abandonment would have occurred under Iowa law, such that no reversion of interest could have occurred regardless of NITU issuance. Appx0016-0017. Moreover, the CFC proclaimed that the duration of the delay of state-law abandonment (if any) was not "relevant" for determining whether a taking occurred, but only for "the calculation of just compensation." Appx0016-0017. Similarly, the CFC opined that the character of Plaintiff's property interest (which was subject to a railroad's voluntary decision to terminate its own use) was "only relevant for determining compensation." Appx0019. Finally, while recognizing the centrality of the "reasonable investment-backed expectations" factor, the CFC failed to identify any expectation in the expiration of the railroad's easement or any investment by Plaintiff that could satisfy this critical aspect of the analysis. Appx0020-0022.

Having ruled that each of the factors it identified as relevant weighed against the government, the CFC concluded that "a taking occurred when the STB issued a NITU that blocked Mrs. Caquelin's reversionary interest in the land." Appx0023. The CFC entered judgment accordingly.

SUMMARY OF ARGUMENT

1. In *Caquelin I*, this Court deferred answering the legal question regarding the proper framework for analyzing NITU-only takings claims. Instead, the Court remanded the case to the CFC for analysis under the multi-factor analysis generally described in *Arkansas Game*, on the assumption that this analysis might assist the Court in deciding how to address the unanswered legal question presented in the United States' first appeal. That question is whether the issuance of a NITU—an administrative action that does not constitute a physical invasion or occupation by the United States but instead allows for a negotiation period that (possibly) briefly extends a pre-existing perpetual easement—constitute a per se physical taking. The answer to that question is *no*. Unlike some situations where a rails-to-trails conversion later occurs, a NITU alone does not create a new use of a railroad easement, does not expand an existing easement (or create a new easement), and does not permanently prevent an underlying owner from regaining the unencumbered fee. Rather, the NITU simply allows a period for negotiations that might (or

might not) lead to an easement for interim trail use rather than a continuation of the abandonment process that might (or might not) result in the railroad easement's being abandoned under applicable law.

For this reason, the CFC's treatment of this NITU-only claim as per se physical taking is demonstrably wrong under established takings law, under which regulatory impositions that merely delay a property owner's full use of her property must be analyzed under a regulatory—not physical—takings framework. *See Tahoe-Sierra*, 535 U.S. 302. To correct this error, the Court should sit en banc to overturn *Ladd*, which held that a NITU alone can constitute a physical taking. The Court should instead recognize that where a NITU does not result in rail-to-trail conversion and railbanking, there is no physical occupation or invasion "hook" that might conceivably constitute a physical taking. Instead, a NITU is simply a regulatory action that in some instances may delay an underlying landowner's use of a portion of her property and therefore would be subject to a regulatory takings analysis under *Penn Central*.

This Court has previously indicated that *Ladd* was the necessary result of *Caldwell*, which linked the accrual of a trail conversion/railbanking-based takings claim to the NITU. If the Court continues to interpret *Caldwell* as requiring the result in *Ladd*, *Caldwell* should be overruled as well. The Court

should hold instead that a physical takings claim stemming from railbanking accrues only if and when a trail-use agreement is reached, which is a necessary condition for rail-to-trail conversion and the triggering of Section 8(d) of the Trails Act, which prevents the owner from gaining an unencumbered fee.

Alternatively, if the Court declines to correct its Trails Act precedent, it should nonetheless clarify that a takings claim based only on the bare issuance of a NITU does not present a *per se* permanent physical taking. Instead, such a claim belongs to the broad majority of takings claims that are subject to fact-specific analysis. *See Arkansas Game*, 568 U.S. at 38-39.

2. If the Court agrees that a fact-specific analysis (rather than per se takings liability) is applicable, it should determine that there is no takings liability here. Although the CFC failed to appropriately apply *Arkansas Game* on remand, the record developed in the CFC establishes that Plaintiff's claim is without merit.

At nearly every turn, the CFC failed to apply precedent directly relevant to its analysis, and it failed to hold Plaintiff to her burden to establish critical facts, e.g., establishing that the NITU caused a delay in the expiration of the railroad's easement or that the NITU thwarted her reasonable investment-backed expectations. Indeed, the CFC's analysis appears infected by its belief

that Plaintiff's claim is compensable per se and thus should not be subject to the multi-factor analysis ordered by this Court in *Caquelin I*.

On the facts developed in the CFC, this Court should conclude that no taking occurred. Plaintiff has not established that the NITU caused any delay in the expiration of the railroad's easement, that any such delay thwarted a reasonable investment-backed expectation in gaining unencumbered possession of the 0.359 affected acres, or that the impact of the NITU was so severe as to be akin to a permanent physical invasion of Plaintiff's property by the government. Whether viewed as a potential regulatory taking under *Penn Central* or as a potential temporary physical taking under *Arkansas Game*, the only available conclusion under the developed facts is that no compensable taking occurred here.

The judgment of the CFC should be reversed.

STANDARD OF REVIEW

In reviewing a decision of the CFC, this Court reviews legal conclusions de novo and factual findings for clear error. *Love Terminal Partners, LP v. United States*, 889 F.3d 1331, 1340 (Fed. Cir. 2018). Whether the United States has taken property is a legal question based on underlying facts. *Id*. The burden of proof for establishing required elements of a takings claim lies on the plaintiff. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 493 (1987);

CCA Associates v. United States, 667 F.3d 1239, 1253 (Fed. Cir. 2011); *Cienega Gardens v. United States*, 503 F.3d 1266, 1288 (Fed. Cir. 2007).

ARGUMENT

I. A takings claim where a NITU is issued but no trail-use agreement is reached and no trail use occurs should be analyzed as a regulatory taking, or, alternatively, as a temporary physical taking.

A critical legal question remains outstanding in this case: what is the appropriate framework for analyzing a taking claim based on the issuance of a NITU allowing for interim trail-use negotiations? Supreme Court precedent and most of this Court's takings jurisprudence hold that such a claim is properly analyzed as a potential regulatory taking under the framework provided in *Penn Central,* 438 U.S. 104, as the absence of physical invasion or occupation by the United States precludes the treatment of such a claim as presenting a potential physical taking. But even if NITU issuance is found to possibly constitute a temporary physical taking, the multi-factor framework described by the Supreme Court in *Arkansas Game,* 568 U.S. 23, would apply. Under either approach—whether the *Penn Central* test applied to regulatory takings claims or the *Arkansas Game* analysis applied to temporary physical takings claims—the United States is not liable for a taking here.

A. A claim based on a NITU alone does not present a potential physical taking; holdings to the contrary in *Ladd* and, if necessary, *Caldwell*, should be overturned.[3]

1. *Tahoe-Sierra* requires such a claim to be analyzed under a regulatory takings framework.

As the United States argued in *Caquelin I*, Plaintiff's takings claim should be analyzed under the well-established regulatory takings test because there is no physical taking here. Physical takings occur by means of "a direct government appropriation or [a] physical invasion of private property," *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005), and they are "relatively rare, easily identified, and usually represent a greater affront to individual property rights," than regulatory takings, *Tahoe-Sierra*, 535 U.S. at 324. Permanent physical takings are compensable per se. *See Loretto*, 458 U.S. at 428, 430 (distinguishing temporary physical takings claims). By contrast, regulatory takings involve "regulations prohibiting private uses" that go "too far," *Tahoe-Sierra*, 535 U.S. at 323, 326, and they require a fact-based analysis under *Penn Central* to determine just how far the regulatory action goes. A regulatory

[3] We raise these arguments pursuant to Federal Circuit Rule 35(a), which permits parties to present arguments to merits panels on issues foreclosed by circuit precedent but for which hearing en banc is requested. Rule 35(a) allows arguments "to overrule a binding precedent without petitioning for hearing en banc. The panel will decide whether to ask the regular active judges to consider the case en banc."

taking may result, for instance, when the government imposes a moratorium of "extraordinary" duration preventing the development of property, *cf. Tahoe-Sierra*, 535 U.S. at 332, or where the government denies a permit that prevents economic use of property, *see Lost Tree Village Corp. v. United States*, 787 F.3d 1111 (Fed. Cir. 2015).

Consistent with these fundamental principles, a government action that may result in some delay in a railroad's abandonment of its rail line is properly evaluated using a *regulatory*, not *physical*, takings analysis. Issuance of a NITU is, at most, a regulatory hold on the progress of a railroad's possible abandonment of a pre-existing rail easement. When a railroad seeks to abandon a line, it must initiate proceedings with the STB. 49 U.S.C. §§ 10903; 10502. Those regulatory proceedings, which *might* result in the STB approving rail line abandonment and *might* result in the railroad's ultimate decision to consummate that permitted abandonment, have many steps and take time. *See* 49 U.S.C. § 10903 (explaining the requirement to balance the need for continued service against the financial burden of continued service on the railroad when deciding whether to approve abandonment). If abandonment is approved, a railroad has one an entire year to decide whether it actually *will* abandon the line, and even that lengthy period is subject to extension. *See* 49 C.F.R. § 1152.29(e)(2). If the railroad agrees to issuance of a NITU (and it

must agree for a NITU to issue), the NITU becomes an additional step within the STB's broader abandonment process—a step that in some (but not necessarily all) instances may result in an incremental increase in the time before the railroad consummates abandonment.

Whether this step in the STB's regulatory abandonment process supports a takings claim at all is properly analyzed as a potential regulatory taking—premised upon an allegation of regulatory delay. If this step within the STB's abandonment authorization process lengthens the timeframe of a railroad's decision to consummate abandonment, a takings claim by the potentially affected underlying landowner must be analyzed through the lens of *Tahoe-Sierra*. *See* 535 U.S. 302 (holding that a regulation imposing a 32-month moratorium on any economic use of affected land is properly analyzed as a potential regulatory taking and that the regulation at issue was not a taking); *First English Evangelical Lutheran Church v. County of Los Angeles County*, 482 U.S. 304, 320 (1987) (holding that "preliminary activities" are not takings "absent extraordinary delay" (internal quotation marks omitted)).

Here, *Tahoe-Sierra* demonstrates why even if the NITU temporarily forestalls the railroad's abandonment, that effect would not transform the administrative action of NITU issuance into a physical taking. As held there, where a government action temporarily "preserve[s] the status quo" to allow

completion of government decision-making pertaining to the property's future use, that action must be analyzed as a potential regulatory taking under *Penn Central*, taking into consideration the duration of the restriction and the extent of the interference with the property owner's reasonable investment-backed expectations. *Tahoe-Sierra*, 535 U.S. at 337, 341-42. The Court distinguished a moratorium's regulatory hold on property use from the "classic [physical] taking in which the government directly appropriates private property for its own use." *Id.* at 306, 324 (internal quotation marks omitted).

The same conclusion applies here: any delay in abandonment caused by issuance of a NITU is properly viewed as a possible regulatory (not physical) taking that is subject to the multi-factor analysis established in *Penn Central*. At most, the government action here may have imposed (at the railroad's invitation) a temporary regulatory hold on the progress of the railroad's abandonment of a pre-existing easement, which "preserve[s] the status quo." *Tahoe-Sierra*, 535 U.S. at 337. Even if a NITU is characterized as temporarily maintaining the railroad's easement—if relevant state law bases easement expiration in part on the end of STB jurisdiction—that would not subject a taking claim based on the bare issuance of a NITU to a different legal analysis.

The NITU no more constitutes a physical invasion of Plaintiff's property than does any other STB regulatory action or requirement that could, in

theory, prolong a railroad's use of its easement. These include the process for entertaining an offer of financial assistance, *see* 49 U.S.C. § 10904; a request for a public use condition, *id.* § 10905; or delays connected to environmental or historic preservation conditions or labor protection conditions, *see id.* §§ 10903(e), 10903(b)(2); Consummation of Rail Line Abandonments That Are Subject to Historic Preservation and Other Environmental Conditions, 73 Fed. Reg. 22,002 (April 23, 2008). Nor is a NITU any more a physical invasion by the United States than any other decision by the railroad that would extend its ownership of its easement, such as seeking an extension of time for abandonment or deciding to reactivate rail service.

Further, it is well established that a takings claim challenging government action that affects an existing "voluntarily entered into" relationship should be analyzed as a potential regulatory (rather than physical) taking " 'under the multifactor inquiry generally applicable to nonpossessory governmental activity.' " *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987) (quoting *Loretto*, 458 U.S. at 440). Indeed, before the Supreme Court expressly articulated the concept of a regulatory taking, it weighed the impact of a government regulation that allowed a tenant to continue occupying an apartment after the expiration of its lease, rather than subjecting the regulation to a per se taking test. *See Block v. Hirsh*, 256 U.S. 135, 156 (1921) (regulation

was not taking because it did not go "too far"). Similarly, where an ordinance regulating the relationship between a mobile home park owner and its tenants "amount[ed] to compelled physical occupation because it deprive[d] petitioners of the ability to choose their incoming tenants," that did "not convert regulation into the unwanted physical occupation of land"; having "voluntarily open[ed] their property to occupation by others, petitioners [could not] assert a *per se* right to compensation based on their inability to exclude particular individuals." *Yee v. City of Escondido*, 503 U.S. 519, 530-31 (1992).

Here, Plaintiff's predecessors-in-interest voluntarily took title to property adjacent to a perpetual railroad easement, and they would take title to a portion of that corridor by operation of state law only if the railroad abandoned the corridor. The STB's issuance of a NITU that might possibly briefly prolong railroad use does not constitute a per se taking under Supreme Court precedent. Moreover, the NITU issuance is itself wholly consistent with the railroad's continued use of the corridor under its original easement, and so it cannot constitute a taking all by itself.

Critically, too, the NITU alone *does not* allow trail use or railbanking, which may happen only if other conditions are met (i.e. successful negotiation of a trail-use agreement), and it does not trigger Section 8(d) of the Trails Act, the operation of which the Supreme Court held may potentially result in a

physical taking. *See Preseault*, 494 U.S. at 12-17. Rather, Section 8(d) is triggered only "in the case of such interim use" as "trails . . . subject to restoration or reconstruction for railroad purposes," i.e. when railbanking and rail-to-trail conversion actually occurs. 16 U.S.C. § 1247(d). It is only when railbanking and rail-to-trail conversion actually occurs that a physical taking may result from preventing the easement from expiring under state law and the opening of the railroad easement to third parties.

But here, the developed record does not establish that government's regulation of the railroad caused *any* administrative delay, much less a brief one, in the railroad's voluntary abandonment of its rail line and the expiration of a 140-year-old easement. No third-party occupation occurred because no trail-use agreement was reached (and the NITU did not authorize third party access). The government administrative action at most imposed a condition on the railroad that collaterally affected an already-existing relationship between it and the underlying property owner (as in *Block*, *Yee*, or *Florida Power*), the result of which preserved the status quo (as with the development moratorium in *Tahoe-Sierra*). Accordingly, Plaintiff's NITU-only takings claim should be analyzed under a regulatory—not physical—takings rubric.

Importantly, too, Plaintiff never argued and cannot show that the STB's issuance of the NITU caused a regulatory takings under *Penn Central*, 438 U.S.

at 124. The economic impact of the delay in the railroad's abandonment of a 140-year-old easement over 0.359 acres was, at most, minimal (particularly when considered in the context of her 45 acres of adjacent farmlands, the use of which was not affected by the NITU), *see infra* Section II.E (pp. 54-61); the government action served only to preserve the status quo for a limited period of time, *see infra* Sections II.A (pp. 40-44) and II.C. (pp. 46-49); and Plaintiff has failed to establish that the NITU's issuance thwarted reasonable and distinct investment-backed expectations in the use of her reversionary property interest, *see infra* Sections II.B (pp. 45-46) and II.D (pp. 49-54).

2. Supreme Court precedent requires *Ladd*—and, if necessary, *Caldwell*—to be overruled.

Application of a regulatory takings framework to NITU-only cases requires overruling the inconsistent and incorrect holding in *Ladd,* 630 F.3d 1015. In that case, this Court ruled that all Trails Act takings claims are properly understood as *physical* takings claims, on the mistaken view that a NITU invariably blocks state law reversionary interests even when no agreement is reached or trail use is authorized. The *Ladd* Court believed the claim accrual holding of *Caldwell*, 391 F.3d 1226, compelled that result. Therefore, the United States respectfully requests this Court to overrule *Ladd* and, to the extent necessary, *Caldwell*. The Court should hold that any takings

claim premised on a NITU alone—which *may be* but not *necessarily* will be followed by a physical taking, and which does not on its own result in railbanking, trail use, or the triggering of Section 8(d) of the Trails Act—is properly analyzed under a regulatory takings framework.

Ladd held that because a takings claim accrues on the date that a NITU issues, events after that date "cannot be necessary elements of the claim." 630 F.3d at 1024. But even if *Caldwell* were correct that a trail use-based claim accrues when a NITU is issued, it does not follow that every NITU-based claim must be understood as a physical takings claim. Where a NITU is not followed by rail-to-trail conversion and railbanking (as it was in *Caldwell*), there is no physical invasion by the government that could support a physical takings claim. *Caldwell* itself plainly contemplated that post-NITU events can affect the nature of that taking claim: "the NITU operates as a single trigger to several possible outcomes," including that "a trail-use agreement is reached and abandonment of the right-of-way is effectively blocked"; or that, if negotiations fail, "the NITU would then convert into a notice of abandonment," in which case "a temporary taking *may* have occurred." *Caldwell*, 391 F.3d at 1234 (emphasis added). *Caldwell* involved only the first of these possible outcomes and expressly declined to address whether a NITU alone "in fact involves a compensable temporary taking when no agreement is reached." *Id.* at 1234 n.7.

If the Court nonetheless concludes that *Ladd* necessarily follows from *Caldwell*, it should overrule *Caldwell* and hold that a physical taking claim under the Trails Act can accrue only when an interim trail-use agreement is actually reached.[4] Indeed, a NITU provides time for the parties to negotiate a possible trail-use agreement and temporarily forestalls abandonment, but it is only when a trail-use agreement is concluded that Section 8(d) indefinitely blocks state-law reversionary interests by enabling trail use. Linking accrual of a physical takings claim to the event that actually begins a physical occupation (i.e. the indefinite prevention of abandonment and invitation of third parties onto the easement) accords with the precept that a takings claim accrues "when all events have occurred that fix the alleged liability of the Government and entitle the plaintiff to institute an action." *Creppel v. United States*, 41 F.3d 627, 631 (Fed. Cir. 1994); *see also Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994).

[4] When the Court denied rehearing en banc in *Ladd*, the dissenting Judges Gajarsa and Moore (author of the panel opinion) expressed the view that the "result in *Ladd* was required by this court's prior precedent in *Caldwell*" and its progeny. *Ladd v. United States*, 646 F.3d 910, 911 (Fed. Cir. 2011). The United States had argued (as in the text above) that *Caldwell* did not require the result in *Ladd*, but the United States did not also argue that *Caldwell* should be overruled. The dissenters observed that "some members of this court may have been reluctant to consider" rehearing *Ladd* en banc "because neither party directly challenged the holdings of those cases." *Id.*

Caldwell itself recognized this principle, i.e. that "a Fifth Amendment taking occurs *when*, pursuant to the Trails Act, state law reversionary interests are effectively *eliminated in connection with a conversion of a railroad right-of-way to trail use*." 391 F.3d at 1228 (emphasis added) (citing, *inter alia*, *Preseault v. United States*, 100 F.3d 1525, 1543 (Fed. Cir. 1996)), which results from the operation of Section 8(d), *id.* at 1229. But while *Caldwell* correctly recited these principles, it incorrectly linked claim accrual not to any rail-to-trail conversion under Section 8(d) but rather to the STB's regulatory action—issuance of a NITU—which is just a step in a process that may, but does not always (as in this case), result in conversion. *Id.* at 1233.[5]

Put another way, *Caldwell*'s holding that a permanent taking accrues when a NITU is issued incorrectly assumes that rail-to-rail conversion will

[5] In *Caldwell*, the United States argued—as it does here—that "the government's liability (if a taking occurred) was fixed" when a trail-use agreement was reached, "not when the [STB] issued the NITU." Brief of Appellee, 2004 WL 3763407, at *16; *see also id.* at *18-19. Dissenting Judge Newman opined that a taking could not have occurred merely upon NITU issuance, because "[n]egotiation of a possible future event may state a hope and a plan, but it is not a fixed, ripe, and compensable taking." *Caldwell*, 391 F.3d at 1237; *see also Barclay v. United States*, 443 F.3d 1368, 1378 (Fed. Cir. 2006) (Newman, J., dissenting) ("[T]he statute and the NITU do not make trail use mandatory, and if trail use is not achieved, the statute effects abandonment of railway use and reversion of the right-of-way easement."); *id.* at 1380 ("If the ensuing negotiations had failed, such that the trail did not come into being, there could be no taking based on trail use.").

actually occur, even though that result frequently does not occur. For instance, (1) as here, the NITU may not result in trail use and the railroad may abandon (such that the NITU may at most have *temporarily* forestalled the vesting of any state-law reversionary interests); or (2) the NITU may not result in trail use, and the railroad may exercise its option *not* to follow through with authorized abandonment (in which case the NITU cannot be fairly said to have "delayed" the railroad's abandonment at all). *See, e.g. Memmer v. United States*, 122 Fed. Cl. 350 (2015) (explaining that after a NITU and several extensions, the railroad elected not to consummate abandonment, yet the government is per se liable under *Ladd* for a taking).

Caldwell also relied on the Court's view that the NITU "is the only *government* action in the railbanking process that operates to prevent abandonment of the corridor." 391 F.3d at 1233-34.[6] But this mischaracterizes the workings of the Trails Act. The statute does not require agency action at all. Section 8(d) provides that qualifying interim trail-use agreements will preclude the abandonment of rail lines. 16 U.S.C. § 1247(d). Thus, the relevant government action for a rail-to-trail conversion takings claim is the operation

[6] *Caldwell* noted that contemporary STB regulations did not require the railroad and trail operator to notify the STB that an agreement had been finalized. 391 F.3d at 1234. Current STB regulations *do* require such notice. *See* 49 C.F.R. § 1152.29(h); Appx1406.

of Section 8(d), which is triggered by entering such an agreement, not by issuing a NITU. Tying a physical railbanking-based takings claim's accrual to the trail-use agreement is thus perfectly consistent with this Court's rule that "[w]hat a plaintiff 'may challenge under the Fifth Amendment is what the government has done, not what [third parties] have done.' " *Navajo Nation v. United States*, 631 F.3d 1268, 1274 (Fed. Cir. 2011) (quoting *Fallini v. United States*, 56 F.3d 1378, 1380-83 (Fed. Cir. 1995)).

For these reasons, if this Court determines that *Ladd*'s holding is compelled by *Caldwell*, the latter should be corrected by holding that a physical takings claim under the Trails Act accrues when a trail-use agreement is actually reached and railbanking consequently occurs.

* * *

The STB's issuance of a NITU is an administrative action that lacks the physical invasion hallmark of a physical taking. The Court, en banc, should hold that a NITU alone cannot support a physical takings claim, and that there was no regulatory taking in this case.

B. If the Court declines to overrule *Ladd*, it should nonetheless recognize that a NITU-only claim is subject to the multi-factor analysis of *Arkansas Game*.

Alternatively, if the Court determines that the issuance of a NITU can be construed as a government-authorized physical occupation of a railroad

easement, it should nonetheless reverse the CFC's determination that the issuance of NITU in this case effected a taking. The Supreme Court's decision in *Arkansas Game* makes abundantly clear that temporary physical takings claims require fact-specific consideration (rather than treatment as a taking per se). As discussed in Section II below (pp. 38-61), a proper analysis would result in no takings liability here.

In its initial decision, the CFC concluded that *Ladd* required a finding that issuance of a NITU is necessarily a taking. The CFC determined that factors such as duration of the impact and degree of interference were "unavailing because they address the issue of damages, rather than liability." Appx0227. On remand, the CFC repeated this error in its discussion of background takings principles, characterizing this claim as a "temporary categorical physical takings" under *Ladd*. Appx0009. In so doing, the CFC erred by overstating *Ladd*'s holding and by interpreting *Ladd* in a manner inconsistent with the Supreme Court's direction that temporary physical takings claims are subject to a multi-factor analysis.

Importantly, *Ladd* did not hold that the issuance of a NITU effects a physical taking per se. The Court merely reversed the CFC's judgment (on a motion to dismiss) that a plaintiff could not maintain a physical takings claim based on a NITU alone. *See Ladd v. United States*, 90 Fed. Cl. 221, 222 (2009);

Ladd, 630 F.3d at 1025. But the ability to *allege* a physical taking (i.e., to survive a motion to dismiss for failure to state a claim) is different from *establishing* a taking (i.e., to succeed on a motion for summary judgment or to obtain a liability judgment after trial). The question whether that plaintiff established a taking (or whether a NITU alone constituted a taking per se) was not before the Court.[7]

In any event, interpreting *Ladd* to require that the mere issuance of a NITU constitutes a per se physical taking is inconsistent with Supreme Court case law regarding temporary takings. In *Loretto*, the Supreme Court held that *permanent* physical occupations are per se takings, but in doing so distinguished *temporary* physical invasions of a more fleeting or transient character. 458 U.S. at 430, 435 n.12. "Temporary" takings claims not subject to *Loretto*'s narrow

[7] *Ladd* does suggest that the panel understood the mere ability to state a physical takings claim to be synonymous with its compensability; the panel stated that it was "remand[ing] for a determination of the compensation owed to the appellants for the taking." 630 F.3d at 1025. But in a later appeal about various threshold issues, this Court clarified that *Ladd* "did not decide the government's liability," because it merely reversed the CFC's dismissal of the plaintiffs' claims when that court concluded mere "issuance of the 2006 NITU *could not constitute a compensable taking*." *Ladd v. United States*, 713 F.3d 648, 652 (Fed. Cir. 2013) (emphasis added). *Ladd*'s language regarding compensability of a temporary takings claim language is therefore dicta that this Court "is free to reject," as it goes beyond the limited question that was before the Court. *In re McGrew*, 120 F.3d 1236, 1238 (Fed. Cir. 1997) (internal quotation marks omitted).

per-se taking rule include government actions with physical effects that are short-lasting, intermittent, or lesser in degree; they are subject to a multi-factor analysis. *See Arkansas Game*, 568 U.S. at 38-39. Indeed, permanent physical takings are the exception to the rule: outside of narrowly-defined situations like the permanent physical occupation in *Loretto*, the Supreme Court has eschewed bright-line tests, explaining that "most takings claims turn on situation-specific factual inquiries." *Id.* at 32 (citing *Penn Central*, 438 U.S. at 124); *see also Tahoe-Sierra*, 535 U.S. at 337 (declining to adopt a bright-line rule that a development moratorium was a taking per se). Bright-line cases presenting a per se taking, by contrast, are "narrow" and "few." *Lingle*, 544 U.S. at 538; *Arkansas Game*, 568 U.S. at 31. The mere fact that an "invasion" was "physical" in nature " 'cannot be viewed as determinative' " of a taking where it was "temporary and limited in nature." *Loretto*, 458 U.S. at 434 (quoting *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980)).

If a NITU may indeed be deemed to constitute a physical invasion or occupation such that it could support a physical takings claim, it falls within the broad majority of physical takings claims that "should be assessed with reference to the 'particular circumstances of each case,' " *Arkansas Game*, 568 U.S. at 37 (quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958)), as opposed to subject to *Loretto*'s narrow per se rule. A NITU's effect is

by definition transient, rather than enduring. Its interference with private property interests may be minimal or entirely absent (as here). Therefore, the question whether the regulation of rail lines potentially resulting in a brief delay in the expiration of a perpetual railroad easement constitutes a physical taking should be answered using the default multi-factor approach, rather than using the bright-line rule that the Supreme Court has held applicable only in situations not presented here.

Accordingly, if this Court concludes that *Ladd* correctly conceived of a NITU-only claim as presenting a potential physical taking, any such claim is subject to *Arkansas Game*'s requirement that courts "weigh carefully the relevant factors and circumstances" before determining takings liability. 568 U.S. at 36. As discussed below, such an analysis, if properly applied, would not result in takings liability in this case.

II. The record developed in the CFC makes plain that, if *Arkansas Game* applies here, there is no takings liability in this case.

In *Caquelin I*, this Court remanded this case for factual development and analysis under the "government-advanced multi-factor analysis," including a discussion of "what facts invoke which of the Supreme Court's standards" for reviewing takings claims of different types. Appx0214, Appx0215. Facts developed on remand make plain that even if Plaintiff's claim is viewed as presenting a potential physical taking, there is no takings liability.

The CFC interpreted this Court's remand to require strict application of factors identified in *Arkansas Game*, which are (1) "time"; (2) "the degree to which the invasion is intended or is the foreseeable result of the authorized government action"; (3) "the character of the land at issue and the owner's 'reasonable investment-backed expectations' regarding the land's use"; and (4) "[s]everity of the interference." 568 U.S. at 38-39. But *Arkansas Game* did not hold that these factors apply to every temporary takings claim or constitute the universe of relevant considerations. Rather, the Court observed that it "is of course incumbent on courts to weigh carefully the relevant factors and circumstances in each case, as instructed by our decisions." *Id.* at 36; *see also Tahoe-Sierra*, 535 U.S. at 334 (concepts of "fairness and justice" are served by inquiry into "all of the relevant circumstances in particular cases").

The CFC gave no consideration to whether the four factors from *Arkansas Game* (which the CFC transformed into six factors) were actually the "relevant factors" for consideration in this case, which involves a different type of temporary takings claim. The CFC provided no discussion of how this case might be analyzed under other "Supreme Court's standards," Appx0215, most obviously *Penn Central*'s framework for regulatory takings, which is the framework that the United States argues (primarily) should apply here. But even assuming that the CFC's selected constellation of factors is correct, it

failed to comply with well-established legal principles in conducting its analysis and failed to credit important and uncontroverted evidence weighing against takings liability. A proper analysis—which this Court can conduct without further remand on the record developed in the CFC—results in no takings liability here.

A. The CFC's analysis of the duration of the government action proceeds from the incorrect premise that the factor is irrelevant and ignores the context of the NITU.

The CFC's analysis of the "time" factor identified in *Arkansas Game* contains three errors: (1) in defiance of this Court's remand and of Supreme Court precedent, the analysis rejects the very notion that time is a factor to be considered in determining whether a temporary taking has occurred; (2) the analysis makes no effort to grapple with evidence that the NITU may have caused no delay in easement expiration at all; and (3) it violates the tenet that a property interest alleged to have been taken must not be temporally severed so as to make the taking "total," failing to credit precedent recognizing that short-duration occupations or restrictions are not compensable takings.

First, the CFC's analysis is framed by its wholesale rejection of the notion that a multi-factor analysis is appropriate for this case: "duration factors into the calculation of just compensation for Mrs. Caquelin, rather than into the existence *vel non* of a taking." Appx0016. Although the CFC purports to

conduct an analysis under this factor, that discussion is infected by the court's view of the propriety of the remand; indeed, in rejecting the United States' argument that 180 days was not long enough to weigh in favor of a taking, the CFC asserts that the "time is relevant only to the calculation of damages." Appx0017. It is apparent from the CFC's decision that the duration of the government action had no actual impact on the court's analysis, as the CFC opines that what matters (instead of the duration of the action or its effects) is that the government "completely deprived Mrs. Caquelin the use of her property." Appx0017.

Second, perhaps unsurprising given the CFC's holding that time is *not* a relevant factor, the CFC conducted only scant analysis of the duration of the NITU and whether that duration is sufficient to weigh in favor of takings liability. While there is no dispute that the NITU was in place for 180 days, analysis of duration requires consideration of the context of Plaintiff's ownership and the regulatory context surrounding the NITU. *See Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1350 (Fed. Cir. 2004) (federal regulations at time of the activity in question established the absence of reasonable expectations). Plaintiff's interest in the land underlying the railroad's easement was always subject to the railroad's voluntary decision to initiate abandonment

proceedings with the STB, its decision to actually consummate abandonment once it received regulatory approval, and its timeline for doing so.

Moreover, given the broader regulatory context of railroad abandonment, it is a fair inference that the NITU caused *no* delay at all. The railroad consented to the issuance of the NITU, which simply suspended for six months the period during which the railroad would otherwise have been authorized (*but not required*) to consummate its abandonment of the rail line adjacent to Plaintiff's property. *See* 49 C.F.R. § 1152.29(e)(2). The railroad chose to defer exercise of its option to abandon (by consenting to the NITU), and once the NITU expired, it chose to consummate abandonment. In other words, without the NITU, the railroad would have had one full year to consummate rail-line abandonment (if it chose to); with the NITU, the railroad likewise had one full year to consummate abandonment, and it chose to do so within that time. *See id.*

The CFC concluded that the NITU deprived Plaintiff of "useable time to reclaim the plot of land for the next planting season and also delayed her ability to harvest the valuable timber on the segment." Appx0017. But as discussed in Section II.E below (pp. 54-61), there was no evidence of any such effect from this supposed delay. Plaintiff admitted having no plans to use the Railway Corridor for any purpose during the period while the NITU was in

effect. Appx1491. Plaintiff introduced no evidence that in the absence of the NITU, the railroad would have abandoned the corridor sooner. In short, Plaintiff has not established that the NITU caused any delay at all in the abandonment of the railroad easement. Accordingly, while the formal duration of the NITU was 180 days, the actual duration of the *effect* of the NITU was zero in the absence of any evidence that the railroad would have consummated abandonment earlier in the one-year period. The CFC failed to account for this important regulatory context and for the complete absence of any evidence that the NITU caused *any* delay or incremental impact beyond the ordinary timeline for abandonment under STB regulations. That timeline is always subject not only to extension at the railroad's request *but also to the railroad's discretion whether to abandon at all*. Accordingly, the CFC's bare conclusion that the NITU "blocked" the easement's reversion for 180 days, Appx0016, is plainly wrong as a matter of both law and fact, and it should be rejected.

Third, the CFC improperly severed the six-month time period in which the NITU was in place from the remainder of Plaintiff's ownership, violating *Tahoe-Sierra*'s rejection of a "circular" approach that would "defin[e] the property interest taken" so that the government action by definition has "total" consequences. *Tahoe-Sierra*, 535 U.S. at 331. The CFC also ignored precedent strongly suggesting that a mere six-month delay in use does not favor takings

liability. Indeed, in *Tahoe-Sierra*, even a *multi-year* moratorium preventing all use of an entire parcel was not found to be a taking. *Id.* at 338 n.34; *see also Wyatt v. United States*, 271 F.3d 1090, 1097-98 (Fed. Cir. 2001) (ten-year delay in permitting process not a taking).[8] The failure to conduct an analysis that comports with this relevant precedent further undermines any usefulness of the CFC's discussion of the duration factor.

Instead, the brief tenure and inconsequential nature of the NITU here is more akin to the "parked truck of the lunchtime visitor," *Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991), than to the disruptive flooding and timber loss lasting seven years that weighed in favor of a taking on remand in *Arkansas Game*, 736 F.3d 1364, 1370 (Fed. Cir. 2013). Properly applied, the "time" factor weighs against a taking: there is no evidence that the NITU in fact delayed the railroad's abandonment of its pre-existing easement, and even if the NITU did cause a delay lasting 180 days, that does not suggest a taking.

[8] *Tahoe-Sierra* was a regulatory takings case, but the Supreme Court in *Arkansas Game* left no doubt about *Tahoe-Sierra*'s relevance to this factor in the analysis of temporary physical takings claims. *See Arkansas Game*, 568 U.S. at 38 (citing *Tahoe-Sierra*, 535 U.S. at 342).

B. The CFC failed to credit evidence that the NITU was not the cause of any delay in reversion of the railroad's easement.

Just as with the court's temporal analysis, the CFC's analysis of the "degree to which the invasion was intended" and was "the foreseeable result" of the government's actions, Appx0017–0018, failed to consider whether the government action *caused* the complained-of injury. Causation is an essential element of takings liability, and "a takings plaintiff bears the burden of proof to establish that the government action caused the injury. Causation requires a showing of 'what would have occurred' if the government had not acted." *St. Bernard Parish Government v. United States*, 887 F.3d 1354, 1362 (Fed. Cir. 2018) (quoting *United States v. Archer*, 241 U.S. 119, 132 (1916)).

The CFC did not address the United States' evidence and argument that the NITU made no difference to "what would have occurred" on Plaintiff's land. There is no dispute that in the absence of the NITU and under STB's ordinary abandonment procedures, the railroad would have had a full year (from July 2013 to July 2014) to consummate abandonment. *See* 49 C.F.R. § 1152.29(e)(2); Appx1402 (abandonment authorization would have been effective July 5, 2013). A railroad's consummation of abandonment (and its timing for doing so) is entirely discretionary during this period; and for that matter, the railroad could at all times during that period have elected to seek

an extension or to *not* abandon the line. Further, the NITU did not prevent the railroad from taking steps toward its ultimate abandonment, as it specifically allowed the railroad to remove track during this period if it chose. Appx1405.

As shown above, Plaintiff presented no evidence to establish that the NITU issuance *caused* the railroad to consummate abandonment later than it would have otherwise. Here, the NITU expired halfway through the one-year permissive abandonment period, and North Central consummated abandonment approximately nine months into that period. The CFC's failure to consider that critical absence of evidence or otherwise establish causation renders its ultimate liability conclusion untenable. A proper analysis would suggest no takings liability here given the lack of evidence regarding causation and the fact that the railroad consented to issuance of the NITU (meaning that the railroad chose to defer abandonment for the NITU's six-month duration), and that its abandonment occurred within the timeframe established by the ordinary rail-line abandonment process in any event.

C. In considering the "character of the land at issue," the CFC failed to consider the limited nature of Plaintiff's property interest.

The CFC's analysis of the "character of the land at issue" is also flawed. As with the "duration" factor, the CFC's opinion fundamentally rejects the application of this factor, which it viewed as "antagonistic to long-standing

takings principles" and "only relevant for determining *compensation*, rather than *liability*." Appx0019. In any event, the resulting analysis does not faithfully apply this factor.[9]

In *Arkansas Game*, the Supreme Court explained that the fact that the land at issue in that case had not been previously flooded to a similar degree weighed in favor of takings liability because the property owners lacked expectation or forewarning of the flooding that occurred as a result of the government action at issue. 568 U.S. at 39. To apply this factor to the present case, the CFC should have looked to whether the context of the complained-of government action (i.e., the character of the land before the government action) gave "forewarning" of the effects alleged to be a taking. Instead, the CFC's "analysis" simply describes a "bucolic segment of land," the fact that the land could potentially be reclaimed for farming, and the fact that soil in the area is generally of high quality; from these few facts, the analysis concludes that the character-of-the-land factor weighs in favor of a taking. Appx0019. But a proper application of this factor weighs against takings liability, as the railroad's lengthy and permissive occupation and the STB's authority over rail

[9] The Supreme Court suggested that the character of the land be considered along with reasonable investment-backed expectations. *Arkansas Game*, 568 U.S. at 39. Indeed, the two factors appear to be deeply related. Nevertheless, because the CFC considered them separately, we do so as well.

abandonments gave strong forewarning that the railroad easement might well never terminate.

The CFC erred in failing to consider Plaintiff's interest *before* the NITU, rather than focusing merely on what she might be able to do with the property after regaining possession. The CFC should have acknowledged that unlike a landlord with the right to evict a holdover tenant, Plaintiff's possible future interest in the 0.359 acres of rail corridor at issue here was always subject to the railroad's discretionary decision to stop using the corridor for rail traffic and to its compliance with laws governing abandonments. The railroad had the unilateral right to use its easement for its intended rail-related purpose in perpetuity, and it had already done so for more than a century by the time Plaintiff inherited her property. *See* Appx0201-0202. Indeed, Plaintiff had no expectation that the railroad would decide to end its use *at any point*. In other words, the character of Plaintiff's interest in the rail corridor—always conditional on the railroad's decision to terminate—gave fair warning that continued occupation by the railroad was very likely and that the timing of abandonment was not at all Plaintiff's choice.

The CFC's failure to consider the character of Plaintiff's land in the manner contemplated by the Supreme Court—to determine Plaintiff's expectations or forewarning—renders the CFC's analysis irrelevant to the

liability question posed by this Court. Properly applied, this factor weighs against takings liability, as Plaintiff's right to possible future possession of part of the rail corridor was always contingent on the voluntary decision by the railroad to abandon its rail line and easement and its timing for doing so.

D. The CFC's analysis of Plaintiff's "reasonable investment-backed expectations" failed to discuss her investment or her expectations, whether any investment or expectations were reasonable, and whether any reasonable expectation was the cause of the investment.

The CFC's approach to the "reasonable investment-backed expectations" factor is especially problematic, as it bears no resemblance to the established framework for evaluating this factor. The CFC ignored all relevant evidence of the absence of any actual (or reasonable) expectations about an earlier abandonment of the railroad easement; instead, the court focused on speculative future use of the 0.359 of covered land, which is irrelevant.

This Court has set forth a well-established process for evaluating the existence of reasonable investment-backed expectations. Such an analysis typically assesses a plaintiff's expectations, whether those expectations were backed by investment, the reasonableness of any expectations, and whether the plaintiff made the investment because of its reasonable expectation of receiving the benefits allegedly denied or restricted by the government action—with the plaintiff bearing the burden of establishing each element. *See Cienega Gardens*,

503 F.3d at 1288-89. A plaintiff's expectations are measured not in hindsight, but at the time that the plaintiff purchased or invested in the property. *Id.*; *Love Terminal Partners*, 889 F.3d at 1344-45. Where the factor is applicable, this Court treats the absence of reasonable investment-backed expectations as dispositive of a plaintiff's takings claim, "limit[ing] recovery to owners who can demonstrate that they bought their property in reliance" on non-interference by the government. *Creppel*, 41 F.3d at 632; *see also Love Terminal Partners*, 889 F.3d at 1346; *Good v. United States*, 189 F.3d 1355, 1363 (Fed. Cir. 1999).

The CFC erred in failing to recognize that Plaintiff had no "investment-backed" expectation in the expiration of (and her potential future use of) the railroad's perpetual easement, nor did her ancestors who purchased the land adjacent to the rail corridor. Instead, identifying no evidence of either investment or expectations, the CFC explained how the 0.359 acres of Plaintiff's property affected by the NITU *could* have been prepared for planting in the 2014 season and put into "very productive use," earning Plaintiff income through rental fees. Appx0020. The CFC also noted that walnut trees on Plaintiff's land were harvestable for their timber, Appx0021-0022, although it is not clear from the record that the trees were growing on acreage actually

affected by the NITU.[10] The CFC concluded from these suppositions that the NITU (in place from July 3 to December 30, 2013) denied Plaintiff "the opportunity to perform the economically viable action of reclaiming the land and putting it to productive agricultural use", and that "the presence of the harvestable walnut trees on the property would have covered the cost of reclamation, and this circumstance also bears on objectively reasonable investment-backed expectations." Appx0022. Regardless whether any of these findings are accurate, none of them has a bearing on the actual question to be answered—whether Plaintiff had a reasonable investment-backed expectation that she would remain free of the "burden" of a NITU (or, put another way, that the railroad's easement would expire sooner than it did).

A proper analysis based on the undisputed record evidence could yield only the conclusion that Plaintiff had no expectations whatsoever for the 0.359 acres affected by the NITU. That acreage was not conveyed by any of the deeds in her chain-of-title, and Plaintiff was not even aware that she held an

[10] The court's belief that the walnut trees may have been within the 0.359 affected acres was apparently based on rough estimates of the included acreage during a site visit. *See* Appx0396-0397. Yet even Plaintiff's characterization of the trees' location does not place them within the affected acreage, instead describing them as "*bordering* the area of take and/or in the wooded are[a] on the southeast portion of Mrs. Caquelin's property." Appx0174 (emphasis added); *see also* Appx0477 (court's characterizing location as "on the edge").

interest in the land on which the railroad held an easement until *after* the railroad agreed to trail negotiations and the STB issued a NITU. Appx1481; Appx1503; Appx1478-1479. Plaintiff offered no evidence that she had any expectation at the time she acquired the property (or at any other time until after being contacted by attorneys who informed her of her possible interest in the property) that she would regain unencumbered title to the railroad corridor or that her ancestors who initially purchased the property adjacent to the railroad's corridor had any such expectation. Nor did Plaintiff offer evidence that she (or her predecessors) made any investment in furtherance of any expectation of future use of that land during the NITU period or into the future. Indeed, Plaintiff stated definitively that she had *no* expectation or investment: "I had no plans to use the Railway Corridor for any purpose during the period the NITU was in effect." Appx1481.

In any event, it would not have been objectively reasonable for Plaintiff to make any investment in furtherance of an expectation that she would regain control over the 0.359 acres at issue, given the railroad's discretionary continued use, STB's regulation of abandonment, and the practical reality that the railroad had for over a century exercised its right to use this property. *See* Appx0201-0202; *Good*, 189 F.3d at 1361 (reasonable expectations must be analyzed in view of the regulatory climate); *Hayfield Northern Railroad Co. v.*

Chicago & North Western Transportation Co., 467 U.S. 622, 628 (1984) (describing history of ICC railroad abandonment regulation, beginning in 1920). Thus, even if Plaintiff had known that her property included part of the rail corridor next to her agricultural lands when she acquired it in the 1980s—which she did not, *see* Appx1478-1479)—it would have been unreasonable for her to expect to regain control of that property at any particular time, if ever. Plaintiff's property interest was always conditional on the railroad's voluntary decision to initiate abandonment proceedings and to follow through on an abandoning the line after receiving STB approval. *See* 49 C.F.R. § 1152.29(e)(2).

Further, in the complete absence of any evidence that Plaintiff or her predecessors made any investment in expectation of gaining possession of the rail corridor, there is likewise no evidence that her expectation was the "but for" cause of any investment, part of the investment-backed expectations analysis under *Cienega Gardens*, 503 F.3d at 1290.

Finally, the (incorrect) notion that Plaintiff might have ever had such expectations is severely undermined by the fact that at the time of trial—more than four years after the NITU expired and the railroad consummated abandonment of the rail line—Plaintiff *still* had not reclaimed the rail bed or harvested the trees between the bed and her tillable cropland. *See* Appx0282; Appx0310; Appx395-403 (transcript of site visit). If Plaintiff truly had any

expectation of returning her 0.359 acres to productive use and if those expectations were actually thwarted by a six-month NITU, one would have expected her to put the area into productive use in the last four years.[11]

This Court should hold that the absence of any reasonable investment backed expectation in an abandonment of the rail line and reversion of the easement is dispositive and forecloses any finding of a taking.

E. In considering the severity of the government action, the CFC improperly severed the affected 0.359 acres from the remainder of Plaintiff's property.

In weighing the severity of the government's interference with Plaintiff's property rights—the final factor in its analysis—the CFC again made legal errors that led to an erroneous result. As a preliminary matter, the CFC's consideration of this factor is again infected by its view that this claim presents a taking per se, as the CFC questioned whether the factor should be considered at all. Appx0023. Critically, in applying the factor, the CFC considered the severity of the government's action only as to the 0.359 acres in isolation,

[11] The walnut trees that the CFC opined Plaintiff had been prevented from harvesting during the NITU remain on Plaintiff's property, and their value (if any) is still available to her. Appx0478. The CFC's opinion that the NITU prevented Plaintiff from harvesting trees is also inconsistent with the record at trial showing that David Wohlford, the landowner located east of the subject right-of-way, had reclaimed and was farming the land up to edge of the rail bed even before abandonment. Appx0281-0282.

devoid of context. Just as the CFC had when it improperly made a temporal severance of the NITU's six-month duration, *see supra* Section II.A (pp. 40-44), this analytical failure led the CFC to find "the interference to be complete, *i.e.*, as severe as possible." Appx0023. Even viewed in isolation, the effects on the 0.359 acres were so minimal that this factor does not weigh in favor of liability.

The CFC's threshold error was its failure to consider "the parcel as a whole." *Penn Central*, 438 U.S. at 130-31. The parcel-as-a-whole consideration is a well-established cornerstone of the severity factor in a regulatory takings analysis, *see Keystone Bituminous Coal*, 480 U.S. at 496; *Tahoe-Sierra*, 535 U.S. at 326-27, which the Supreme Court adopted by reference in *Arkansas Game*, 568 U.S. at 39 (citing *Penn Central*, 438 U.S. at 130-31). To determine the severity of an interference, a court must first determine the relevant parcel as a whole before comparing the value of what has been taken from the property with the value that remains. *Keystone Bituminous Coal*, 480 U.S. at 497. Courts do this by inquiring "whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel or, instead, as separate tracts." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017). This larger parcel serves as the denominator of the fraction that will give an indication of the severity of the government's action. In this way, even a large dollar amount of loss may not suggest a taking. *See CCA Associates*, 667 F.3d at

1246 ($700,000 loss of income was so small in context as to not constitute a compensable taking).

The CFC did not use this established objective measure of severity and economic impact. Instead, it assumed that the larger parcel was the *same* as the affected parcel, namely, the 0.359 acres affected by the NITU. Defining the denominator this way deprived the court of any understanding of the severity of the government's action: "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993); *see also Murr*, 137 S. Ct. at 1944 (courts must be careful not to "limit the parcel in an artificial manner to the portion of property targeted" by the alleged taking); *Tahoe-Sierra*, 535 U.S. at 331 (rejecting the "circular" approach of "defining the property interest taken in terms of the very regulation being challenged"). Defining the property as the CFC did here will *always* lead to the conclusion that the CFC reached here—that the interference was "complete" and "as severe as possible," Appx0023—and render this factor a nullity.

A proper analysis would have led to the uncontroversial conclusion that the pertinent parcel in this case is the 45 acres of land including and adjacent to

the 0.359-acre segment of railroad corridor, as Plaintiff's ownership interest in the railroad corridor (by operation of a state-law centerline presumption) was entirely the legal consequence of her ownership of the adjacent parcel.[12] Thus, to objectively measure the severity of the government action, a court should look to the degree of impact on this entire property. It is undisputed that the NITU had no effect on 44.66 acres of this land. *See* Appx1497-1498. Before, during, and after the NITU, 42.7 acres of this land was tillable and earned income through agricultural rental payments paid at the start of each crop year. *See id.*[13] The only affected land was a narrow strip of former rail corridor that was separated from Plaintiff's productive crop lands by a wooded area and by a low, wet spot. *See* Appx0395-0403 (site visit transcript); Appx0262; Appx0282; Appx1088-1089; Appx1138 (looking north along former right-of-way; wooded area to left/west); Appx0721.

Moreover, even viewed in isolation (and not in the context of Plaintiff's adjacent property), the impact on that affected land was minimal. The NITU was in place from July 3 to December 30, 2013. Assuming (in the absence of evidence and contrary to common sense) that without the NITU the railroad

[12] Plaintiff's expert agreed that the relevant larger parcel was Plaintiff's total acreage, not just the affected 0.359 acres. Appx0587.

[13] Approximately two acres of Plaintiff's land were not farmed because they were rocky, wooded, or wet. Appx0257-0258; Appx0262; Appx1202.

would have chosen to remove its track and consummated abandonment *immediately* after the STB authorized this action, the 0.359 acres of land at issue still would not have produced income in 2013. The unrebutted testimony establishes that there would not have been sufficient time for Plaintiff to do all of the following in time to meet the July 10, 2013 deadline for soybean crop insurance that year, *see* Appx0454-0455:

- establish a new, wide access road through the wooded area on Plaintiff's property, *see* Appx0370-0371; Appx0453-0455; Appx0401 (indicating width of access necessary for farm equipment);
- remove ballast and conduct other reclamation activities along the former rail corridor, *see* Appx0281 (neighbor explaining reclamation of his portion of corridor); Appx0272-0273;
- receive USDA approval for putting new land into agricultural production, *see* Appx0453-0454; Appx0306; Appx0264; and
- plant a crop (well after the normal planting time), *see* Appx0453; Appx0283-0284.

Even if achieving all of this by the July 10, 2013 deadline were theoretically possible, the United States' appraiser offered uncontroverted testimony that the possibility of economic success from that crop at that date would be "extremely small," and the gamble would not be reasonable. Appx0455. Accordingly, the appraiser concluded that this acreage would not produce rental income between July 3 and December 30, 2013, and that there was accordingly no economic impact on that 0.359 acres as a result of the

NITU. Appx0458-0459. *Cf. Arkansas Game*, 736 F.3d at 1371-74 (discussing the particular timing of the government-caused flooding and explaining that growing-season flooding caused severe and cumulative effects on flooded trees).

Further, during the 180-day NITU, Plaintiff retained whatever rights that she previously had within the easement-encumbered area: the NITU merely preserved the status quo, imposed no new access or use restrictions or other limitations on the right-of-way, and allowed no public access or other new use of the easement. Plaintiff may have been unable to prepare the 0.359 acres for the 2014 growing season between July and December 2013, but there was no evidence at trial that the NITU prevented her from later reclaiming the affected area and from deriving income for this area during 2014. In other words, there was no evidence that any delay had any economic impact.[14]

The CFC did not determine that a farmer would have paid rent for the 0.359 acres between July and December 2013. Even if the court *had* made this

[14] Several witnesses testified that it would be economic to reclaim the 0.359 acres and put the land into crop production. But that is a separate question from whether the NITU in place from July to December 2013 had a severe economic impact.

determination, annual market rent for the segment would have been $116.32.[15] Any such speculative "lost" rent amounts to approximately 0.02% of the fair market value of the whole parcel.[16] That tiny increment does not weigh in favor of a taking, as this Court has recognized that "the economic impact must be more than a mere diminution" for a taking to have occurred. *CCA Associates*, 667 F.3d at 1246 (finding no taking where impact was 18% of value, and stating that Court was not aware of any case finding a taking where diminution in value was less than 50%); *see also Bass Enterprises Production Co. v. United States*, 54 Fed. Cl. 400, 404 (2002) (comparing cost of delay to value of property; concluding 5% economic impact (along with other factors) did not constitute compensable taking), *aff'd* 381 F.3d 1360 (Fed. Cir. 2004).

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[15] The only appraiser to determine market rent for this segment (the United States' retained appraiser, Gary Thein) opined that the agricultural lands had a market rent of $324 per tillable acre. Appx1171-1173. This means that after reclamation (which has still not occurred), fair rental value for 0.359 tillable acres would have been $116.32 per year.

Plaintiff retained an appraiser who provided an analysis whether "the typical market participant would convert the old railroad [right-of-way] into tillable cropland" (not an appraisal). Appx0581.

[16] Mr. Thein determined that the July 3, 2013, market value of Plaintiff's 44.66 acre property was $535,900. Appx1134-1135; Appx1171. $116.32 is 0.02% of this value: $116.32÷$535,900=0.0002. Even using the $900 stipulated compensation in this case (premised on the CFC's first challenged liability ruling), the impact would amount to just 0.17% of the property's total value: $900÷$535,900=0.0017.

In short, Plaintiff failed to establish *any* lost income or value due to the NITU. Even if she had, any such loss was small and objectively inconsequential, weighing against takings liability here.

* * *

Plaintiff was afforded all necessary opportunity to develop a factual record relevant to the *Arkansas Game* factors. Nevertheless, she failed to meet her burden to establish that the NITU caused a delay in her gaining possession of the 0.359 affected acres; that she lacked forewarning about the railroad's continued used of its perpetual easement; that she had any reasonable investment-backed expectation of gaining use of that land, and that the effect of the government action was so severe as to constitute a compensable taking. If this Court concludes that Plaintiff's claim is correctly viewed as a physical takings claim, *see supra* Section I.B (pp. 34-38), it should reject that claim because Plaintiff has failed to establish a government occupation of her land that is compensable under *Arkansas Game*.

CONCLUSION

For the foregoing reasons, the judgment of the CFC should be reversed.

Respectfully submitted,

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May 10, 2019
90-1-23-14122

DECISION OF COURT OF FEDERAL CLAIMS

In the United States Court of Federal Claims

No. 14-37L

(Filed: November 6, 2018)

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NORMA CAQUELIN,	)	Post-trial decision on remand in a rails-to-trails takings case; liability for a temporary taking arising upon issuance of a NITU by the Surface Transportation Board
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
UNITED STATES,	)	
	)	
Defendant.	)	
	)	
	)	
**********		

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OPINION AND ORDER

LETTOW, Senior Judge.

This rails-to-trails takings case is before the court after a trial held on remand from the United States Court of Appeals for the Federal Circuit. The remand directed the court to develop a factual record bearing on the government's contention that a set of precedents in the court of appeals should be overruled. *See Caquelin v. United States*, 697 Fed. Appx. 1016 (Fed. Cir. 2017) ("*Caquelin II*"), *vacating* 121 Fed. Cl. 658 (2015) ("*Caquelin I*"). The government had argued on appeal that a recent decision of the Supreme Court, *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012), had undercut prior decisions by the Federal Circuit (and, indeed, the Supreme Court) relating to the analysis of takings claims in the rails-to-trails context. *See Caquelin II*, 697 Fed. Appx. at 1019 ("*[E]n banc* review may be warranted" because the

"*Arkansas Game* decision does raise questions about *Ladd* [*v. United States*, 630 F.3d 1015 (Fed. Cir. 2010)]," and other earlier rails-to-trails decisions by the court of appeals.).

The case has its genesis in a Notice of Interim Trail Use ("NITU") issued by the federal Surface Transportation Board ("STB"), which authorized conversion of a portion of a railroad line located in Hardin and Franklin Counties, Iowa and its attendant right-of-way into a public recreational trail pursuant to Section 208 of the National Trails System Act Amendments of 1983, Pub. L. No. 98-11, § 208, 97 Stat. 42, 98 ("Trails Act") (codified at 16 U.S.C. § 1247(d)).[1] Plaintiffs, Kenneth Caquelin, now deceased,[2] and his wife, Norma Caquelin, owned two parcels of land adjacent to and under the railroad right-of-way on the date of the STB's action.[3] For one parcel, the predecessor railroad had acquired its interest by a right of way deed, and for the other parcel, the railroad had acquired its rights by condemnation. Stip. ¶ 1; *Caquelin I*, 121 Fed. Cl. at 660. The successor railroad held easements limited to railroad purposes that were exceeded by issuance of the NITU, rendering the government liable for taking plaintiffs' property without just compensation under the Fifth Amendment. *See, e.g.*, *Preseault I*, 494 U.S. at 12-13 (holding that the Tucker Act, 28 U.S.C. § 1491(a), provided a remedy for an alleged taking of a property

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[1]The original purpose of the Trails Act "was to preserve unused railroad rights-of-way by converting them into recreational trails." *Barclay v. United States*, 443 F.3d 1368, 1371 (Fed. Cir. 2006) (citing *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990) ("*Preseault I*")). The Trails Act Amendments in 1983 added new provisions that created a "railbanking" system that allowed rail carriers to transfer management of rail corridors to private or public entities for interim management as public recreational trails while preserving the ability to reactivate the abandoned rail corridors for potential future railroad use. 16 U.S.C. § 1247(d). A NITU serves as the mechanism that bars the fee owners' reversionary interest during the pendency of trail-use negotiations. *See Preseault I*, 494 U.S. 8, 10; *Barclay*, 443 F.3d at 1374.

[2]Mr. Caquelin died on July 24, 2017. Tr. 674:9-14; Corrected Stipulations of Fact for Trial ("Stip.") ¶ 5, ECF No. 51. On the date the NITU was issued, Mr. and Mrs. Caquelin held the property as joint tenants with full right of survivorship, Stip. Ex. 4, and Mrs. Caquelin as the surviving spouse succeeded to title upon her husband's death, *see id.*

The transcript of the trial will be cited as "Tr. __." The Stipulations incorporate extensive documentary exhibits, and citations to those exhibits will appear as "Stip. Ex. ___." Defendant's exhibits will be cited as "DX ___," and plaintiff's exhibits will be cited as "PX ___."

[3]Mrs. Caquelin is a widow in her 80s who was in ill health at the time of the trial and not able to testify despite having been called by the parties to do so. Tr. 445:22 to 447:8, 671:10 to 674:19. The property at issue was purchased by Mrs. Caquelin's great grandfather, William Summer Nobles in 1892. Stip ¶ 2. Mrs. Caquelin's family has owned the farmland since that purchase. Stip. ¶ 2. In Mrs. Caquelin's hands, the property thus qualifies as a "Century Farm" in Iowa parlance. The house in which Mrs. Caquelin was born and raised abuts her farmland and was viewed during the site visit. Tr. 672:22 to 673:9.

interest in land previously used as a railroad right-of-way that had been transferred to a public entity for use as a public trail).[4]

FACTS[5]

The parties' dispute concerns a 10.46-mile strip of land extending from milepost 201.46 near Ackley, Iowa, to milepost 191.0, outside Geneva, Iowa, upon which the North Central Railway Association, Inc. ("North Central Railway") previously acquired easements for railway purposes through a series of mesne conveyances. *Caquelin I*, 121 Fed. Cl. at 660. A railroad had been constructed by the Eldora Railroad and Coal Company in 1866 from approximately one mile north of Eldora, Iowa, to Ackley, Iowa for the purpose of transporting coal from the Coal Bank Hill area in the Iowa River valley near Eldora[6] to a connection at Ackley with an east-west railroad, then known as the Dubuque & Sioux City Railroad, which later became part of the Illinois Central Railroad. Stip. Ex. 11 at STB000023. Between 1868 and 1870, the line was extended north to Northwood, Iowa, and south to Marshalltown, Iowa, where it connected with the Chicago & North Western Railroad. *Id*. A predecessor extending the rail line, the Central Railroad of Iowa,[7] acquired rights in one of the parcels at issue by a right-of-way deed, *see Caquelin I*, 121 Fed. Cl. at 660 (citing Pls.' Mem. in Support of Mot. for Partial Summ. Judgment on Liability ("Pls.' Mot."), at 13 & Exs. A-2 (Maps of the Line) & J (Right of Way Deed by Henry and Maria Ihde to Central Railroad of Iowa (filed Apr. 30, 1870)), and rights to the second parcel by a condemnation, *see id*. (citing Pls.' Mot. at Ex. K (Latham Condemnation, Franklin County, Iowa (witnessed Aug. 31, 1870))). North Central Railway acquired property rights in the rail corridor in 1989. *See* United States' Cross-Mot. for Summ. Judgment & Mem. in Support, and Opp'n to Pls.' Mot. for Partial Summ. Judgment on Liability ("Def.'s Cross-Mot.") at 2-3, ECF No. 18. The rail corridor traverses a rural area of fertile agricultural land. *See id*. at 2; *see also* Stip. Ex. 6 (Franklin County Assessor's map of parcels). Indeed, the segment of the rail corridor at issue in this case is comprised of Klinger silty clay loam and

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[4]The Taking Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.

[5]The recitation of facts is drawn from the record of the trial held in Eldora, Iowa from May 30, 2018 through June 1, 2018, stipulations of fact filed by the parties in advance of trial, and uncontested facts developed during proceedings in 2015 related to the parties' cross-motions for partial summary judgment on liability.

[6]Mining was discontinued many years ago. The locality of the mine now is preserved in name by the Coal Bank Hill Bridge, which traverses the Iowa River between Fallen Rock State Preserve to the north and Pine Lake State Park to the south. The bridge is listed on the National Register of Historic Places.

[7]The Central Railroad of Iowa was succeeded by the Central Iowa Railway and eventually became part of the Minneapolis and St. Louis Railway system.

Dinsdale silty clay loam (designated soil types 184 and 337B, respectively), DX22, which both have a very high Corn Suitability Rating ("CSR") of 95, DX 11; *see also* Tr. 246:20 to 248:5.[8]

Ms. Caquelin is a resident of Cedar Falls, Iowa, who acquired the two parcels, numbered 1219200016 and 1219200001, in Franklin County, Iowa, through inheritance from her grandparents. Stip. ¶¶ 2-5 & Ex. 6 (map of parcels).[9] Plaintiff alleges that under Iowa law, she gained fee title up to the centerline of the rail corridor in question. Compl. ¶ 4; *see also* Pl.'s Mot. at 1-2, Exs. G (Warranty Deed (May 11, 2007)), H (Summary of Parcels (Jan. 15, 2015)), & I (Map of Parcels); Hr'g Tr. 5:21-25 (May 14, 2015).

On May 13, 2013, North Central Railway filed a Proposed Abandonment with the STB,[10] including a verified notice of exemption pursuant to 49 C.F.R. § 1152.50, seeking to abandon the railroad line on the grounds that "no local traffic [or overhead] has moved over the [l]ine for at least two years." Stip. Ex. 11 at STB000006, STB000009 (Notice of Exemption-Abandonment Exemption (May 9, 2013)).[11] Under STB's regulations, the abandonment exception for the

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[8]CSR ratings extend from 00 (nonexistent) to 100 (perfect). By comparison, CSR ratings for other good-to-excellent farmland that was at issue in another rails-to-trails case, located in the same general area of Iowa, ranged from 56 to 97.5. *See Sears v. United States*, 132 Fed. Cl. 6, 16 (2017), *aff'd*, 726 Fed. Appx. 823 (Fed. Cir. 2018). For a more detailed description of CSR ratings in Iowa, which are based on soil information generated by the United States Department of Agriculture and adapted by Iowa State University to take account of variables pertinent to land in the State, *see Sears*, 132 Fed. Cl. at 13-14 nn.11, 12.

[9]In 1982, Mrs. Caquelin inherited a real estate contract from her mother Lois R. Hoffman. Stip. ¶ 3; *see also* Stip. Ex. 1 (real estate contract between Lois R. Hoffman and Gary L. and Joyce M. Fairbanks (Mar. 13, 1981)). At that point, she held legal title but not equitable title. *See Installment Land Contract*, *Black's Law Dictionary* (10th ed. 2014). That conditional contract for sale was never fully implemented, and the equitable as well as legal title was fully vested in Mrs. Caquelin in 1986. Stip. ¶ 4; *see also* Stip. Exs. 2, 3 (deeds recorded Dec. 29 and 30, 1986).

[10]The STB has authority "to regulate the construction, operation, and abandonment of most railroad lines in the United States." *Caldwell v. United States*, 391 F.3d 1226, 1228 (Fed. Cir. 2004).

[11]49 C.F.R. § 1152.50 addresses abandonments and discontinuances of service and trackage rights that are exempt from the generally applicable procedures outlined under 49 U.S.C. § 10903 and provides, in pertinent part:

> An abandonment or discontinuance of service or trackage rights is exempt if the carrier certifies that *no local traffic has moved over the line for at least 2 years* and any overhead traffic on the line can be rerouted over other lines and that no formal complaint filed by a user of rail service on the line (or a state or local government entity acting on behalf of such user) regarding cessation of service

railroad line was scheduled to become effective July 5, 2013. *See* Stip. Ex. 11 at STB000074-75 (STB Notice (June 5, 2013)).

Shortly before the abandonment exception became effective, on June 24, 2013, the City of Ackley and the Iowa National Heritage Foundation (collectively "the City") filed a request for issuance of a Public Use Condition under 49 U.S.C. § 10905 and a NITU under the Trails Act. *See* Stip. ¶ 12.a & Ex. 11 at STB000066 (Pet. for Recons. (filed June 21, 2013 and entered June 24, 2013)); Hr'g Tr. 6:4-11 (May 14, 2015) (noting that "the railroad initially applied purely for abandonment").[12] Several days later, on June 27, 2013, a letter from North Central Railway was entered with the STB indicating its agreement with the requested public use condition and related restrictions and its willingness to negotiate with the Iowa Trails Council regarding acquisition of the railroad line. *See* Stip. ¶ 12.c; *see also* Stip. Ex. 11 at STB000073 (Letter to Chief, Section of Administration, Office of Proceedings, STB from Counsel for North Central Railway (filed June 24, 2013 and entered June 27, 2013)). On July 3, 2013, STB accordingly issued a NITU for the railroad line. Stip. Ex. 11 at STB000077 (STB Decision and Notice of Interim Trail Use or Abandonment (July 3, 2013)).[13] The NITU provided a 180-day period during which the railroad could negotiate with the potential trail group regarding "railbanking and interim trail use" of the corridor. *Id*. at STB000080. After the 180-day period, absent an extension, the NITU would expire by its own terms, at which point the railroad would be authorized to abandon the line. *See id.* at STB000081.

> over the line either is pending with the Board or any U.S. District Court or has been decided in favor of the complainant within the 2-year period. The complaint must allege (if pending), or prove (if decided) that the carrier has imposed an illegal embargo or other unlawful impediment to service.

49 C.F.R. § 1152.50(b) (emphasis added).

[12]49 U.S.C. § 10905 provides, in relevant part:

> When the [STB] approves an application to abandon or discontinue . . . , the [STB] shall find whether the rail properties that are involved in the proposed abandonment or discontinuance are appropriate for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the [STB] finds that the rail properties proposed to be abandoned are appropriate for public purposes and not required for continued rail operations, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the [STB].

49 U.S.C. § 10905.

[13]Mr. and Mrs. Caquelin maintained ownership over the two parcels in question on that date.

On October 15, 2013, the Iowa Trails Council filed a Trail Use Request with the STB, and negotiations over a Trail Use Agreement ensued, contemplating that the rail corridor would be used as a public recreational trail with railbanking for possible future activation as a railroad. *See Caquelin I*, 121 Fed. Cl. at 662.[14] No agreement was reached, however. On December 6, 2013, the Iowa National Heritage Foundation requested a 180-day extension to continue negotiations, *see* Stip. Ex. 11 at STB000082 (Letter to Cynthia T. Brown, STB, from President, Iowa Natural Heritage Foundation (Dec. 6, 2013)), but North Central Railway did not file a letter indicating its consent, and on December 30, 2013, the NITU expired, *see id.*; *see also* Hr'g Tr. 12:7-15, 29:22 to 30:4 (May 14, 2015). On March 31, 2014, the railroad consummated abandonment of its line and the STB's regulatory jurisdiction ended. Stip. ¶ 12.f & Ex. 11 at STB000085 (STB Decision (May 9, 2014)). On April 24, 2014, North Central Railway notified the STB that it had exercised the authority to fully abandon the line. *Id.* ¶ 12.f & Ex. 11 at STB000084 (Notice of Consummation (Apr. 24, 2014)).

On January 16, 2014, Mr. and Mrs. Caquelin filed suit in this court. Their complaint alleged an uncompensated taking of their property in contravention of the Fifth Amendment. Specifically, plaintiffs argued that cessation of railroad activities across the burdened property effected an abandonment under Iowa law of the railroad-purposes easement, leading to a taking when the STB forestalled plaintiffs from regaining use and possession of their property. Compl. ¶¶ 7-9. Plaintiffs averred the government's action "diminish[ed] the value of the remaining property[] and [engendered] delay damages based upon the delayed payment of compensation." Compl. ¶ 10. Plaintiffs requested damages equal to the "full fair market value of the property . . . on the date it was [allegedly] taken, including severance damages and delay damages, and costs and attorneys' fees" in addition to "such further relief as [the] [c]ourt may deem just and proper." Compl. at 3.[15]

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[14]The complaint incorrectly lists the date as October 15, 2001. Compl. ¶ 6.

[15]At trial, the parties conceded that the segment of the rail corridor at issue was limited to the west half of the corridor south of milepost 191, an area of .359 acres. *See* PX 2 (Expert Report of Dr. James B. Kliebenstein) at 7, 9; DX 18 (Expert Report of Gary Thien) at 7, 16; Tr. 204:15 to 207:18, 236:11 to 237:9, 511:4 to 516:20.

Mrs. Caquelin should have ownership of the west half of the corridor north of milepost 191 but for a cloud on title attributable to improper deeds transferring her interest to her neighbor to the east, David Wohlford. The corridor north of milepost 191 was subject to a NITU issued on October 23, 2001, Stip. Ex. 8 at STB000142, but no trail agreement was ever reached. The railroad quitclaimed its right-of-way in the entirety of that part of the corridor to D.W.R.R., LLC on October 21, 2002. Stip. Ex. 9 at US000033-34. D.W.R.R., LLC was controlled by Don Wohlford, David Wohlford's father. On December 18, 2003, D.W.R.R. LLC quitclaimed the former railroad corridor north of milepost 191 to Mrs. Caquelin's neighbor to the east, David Wohlford. Stip. Ex. 10 at US 000039. This set of quitclaim deeds inappropriately encompassed Mrs. Caquelin's residual fee interest as well as that of Mr. Wohlford.

On January 16, 2015, plaintiffs filed a motion for partial summary judgment on the issue of liability. *See* Pls.' Mot. On March 6, 2015, the government responded with a cross-motion for partial summary judgment on the same issue. *See* Def.'s Cross-Mot. These motions were thoroughly briefed and were argued at a hearing held on May 14, 2015. The court granted plaintiff's motion for summary judgment and denied defendant's cross-motion for summary judgment on June 17, 2015. *Caquelin I*, 121 Fed. Cl. at 658. In its opinion, the court concluded that the government was liable to the Caquelins under the three-part analysis outlined by the Federal Circuit in *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) ("*Preseault II*"). *See Caquelin I*, 121 Fed. Cl. at 663-67. Following this decision, on November 18, 2015, the two parties stipulated to the amount of just compensation, including principal and interest, of $900.00. Stipulation as to Just Compensation ("First Stip.") at 1, ECF No. 30. Judgment was entered under Rule 54(b) of the Rules of the Court of Federal Claims ("RCFC") on January 6, 2016. Judgment, ECF No. 32. A few months later, the government submitted a notice for appeal to the Federal Circuit. Notice of Appeal, ECF No. 35. In the appeal, the government argued "the 180-day blocking of reversion was not a *categorical* taking, but instead calls for a multi-factor analysis . . . invok[ing] the general 'regulatory takings' framework set forth to govern land-use restrictions in *Penn Central* . . . and the temporary-takings analysis set forth to govern the repeated controlled floodings . . . at issue in *Arkansas Game & Fish* . . . ." *Caquelin II*, 697 Fed. Appx. at 1019 (citing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Arkansas Game*, 568 U.S. 38-40). At bottom, the government's "principal argument is that *Ladd* should be overruled *en banc*" by the Federal Circuit and replaced by a more ad-hoc multi-factor analysis. *Id.*

In a short *per curium* opinion, the Federal Circuit vacated and remanded this court's decision to grant summary judgment in favor of the plaintiffs. The Federal Circuit opined that "[*e*]*n banc* review *may* be warranted" since "*Arkansas Game* does raise questions about *Ladd*," and instructed this court to further develop the litigation record to determine "how the government-advanced multi-factor analysis applies in this case, on the assumption that such an analysis is the governing standard." *Caquelin II*, 697 Fed. App. at 1019-20 (emphasis added). The appellate court noted that "this panel cannot declare *Ladd* no longer to be good law based on . . . *Arkansas Game*." *Id.* at 1019. The Federal Circuit also requested this court to "discuss[] what facts invoke which of the Supreme Court's standards" in order to "focus the appellate consideration of the issues raised by the government." *Id.* at 1020. In short, this court was charged with developing a conceptual framework followed by analysis of a factual record bearing on the government's proffered multifactor analysis approach.

Following this prime directive of the Federal Circuit, the court started the process of developing the requested factual record. In preparation for the trial, on April 3, 2018, the parties filed joint stipulations of fact. *See* Stipulations of Fact for Trial, ECF No. 48. This was followed by revised stipulations of fact for trial that corrected some minor errors, filed May 10, 2018. *See* Stip. A three-day trial was held in Eldora, Iowa from May 30, 2018 to June 1, 2018. At the trial, the court heard from both fact and expert witnesses and conducted a site visit on the second day of trial for the court to see and examine the land at issue and to hear testimony from witnesses about the land on site.

After the trial, the court requested post-trial briefing by the parties to further hone the factual record. Scheduling Order of June 11, 2018, ECF No. 61. Plaintiff filed her opening post-trial brief on July 20, 2018. Pl.'s Post-Trial Br., ECF No. 66. The government filed its responsive post-trial brief on August, 29, 2018. Def.'s Post-Trial Br., ECF No. 68. A reply brief was filed by the plaintiff on September 11, 2018, Pl.'s Post-Trial Reply Br., ECF No. 69, and a closing argument was held on September 19, 2018.

STANDARDS FOR DECISION

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. The inquiry into whether a compensable taking has occurred requires this court to resolve "a question of law based on factual underpinnings." *Wyatt v. United States*, 271 F.3d 1090, 1096 (Fed. Cir. 2001) (citations omitted); *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (stating that courts perform "an 'ad hoc, factual' inquiry" in analyzing whether a compensable taking has occurred (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979))). In this case, Mrs. Caquelin, as plaintiff, bears the burden of proving the relevant factual underpinnings of her claim against the United States, and must generally proffer "'evidence which is more convincing than the evidence which is offered in opposition to it.'" *Jazz Photo Corp. v. United States*, 439 F.3d 1344, 1350 (Fed. Cir. 2006) (quoting *Hale v. Department of Transp.*, 772 F.2d 882, 885 (Fed. Cir. 1985)).

To establish a viable takings claim, Mrs. Caquelin must prove two things. First, she must establish that she had "a property interest for purposes of the Fifth Amendment." *Members of the Peanut Quota Holders Ass'n v. United States*, 421 F.3d 1323, 1330 (Fed. Cir. 2005) (citing *Conti v. United States*, 291 F.3d 1334, 1339 (Fed. Cir. 2002); *Wyatt*, 271 F.3d at 1096 ("[O]nly persons with a valid property interest at the time of the taking are entitled to compensation.")).[16] Second, Mrs. Caquelin must establish that the government's actions "amounted to a compensable taking of that property interest." *American Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004).

ANALYSIS

The procedural posture of this case is unusual. The court is charged with developing a factual record, accompanied by legal analysis, to enable the Federal Circuit to make an informed decision regarding which analytical test should apply to temporary takings resulting from the issuance of a NITU. To complete this task, the court will first comply with the court of appeals' mandate to "discuss[] what facts invoke which of the Supreme Court's standards," *Caquelin II*, 697 Fed. Appx. at 1020, and develop a conceptual framework for takings analysis. After this framework is established, the court will apply the factual record of this case to the *Arkansas Game* multi-factor analysis as commanded. *See id*.

[16] That Mrs. Caquelin has the requisite property interest in the pertinent segment of the rail corridor is not disputed. *See Caquelin I*, 121 Fed. Cl. at 663-67.

I. Takings Principles

Generally, the government can take property by two means: physically or by regulation. Both types of takings can be further divided into two categories: categorical and non-categorical. Categorical takings deprive the owners of *all* economically viable use of their property. Non-categorical takings, on the other hand, deprive the owner of *some* amount of the economic use of their land, either through physical invasion or onerous regulation. Takings can be either permanent or temporary in duration.

A. Physical Takings

1. Categorical physical takings.

a. Permanent categorical physical takings.

The classic takings case – indeed, the salient exemplar of a taking under the Takings Clause of the Fifth Amendment – involves a categorical physical taking that is permanent in duration. This situation is also the most straightforward to analyze. In these cases, the government physically and permanently seizes possession of the entirety of a landowner's property for public use. *See, e.g.*, 28 U.S.C. § 1358 (relating to "proceedings to condemn real estate for the use of the United States or its departments or agencies"). Physical possession of land occurs when the "owner [is] deprived of valuable property rights, even [if] title ha[s] not formally passed." *Caldwell v. United States*, 391 F.3d at 1235 (citing *United States v. Dow*, 357 U.S. 17, 23 (1958)). In permanent categorical physical taking cases, the taking itself is often uncontested – the litigation instead typically focuses on "what compensation [is] just." *Hendler v. United States*, 952 F.2d 1364, 1371 (Fed. Cir. 1991). It does "no[t] matter how weighty the asserted 'public interests' involved" are – the government must pay compensation for a "permanent physical occupation." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 1028 (1992) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

b. Temporary categorical physical takings.

By contrast, a *temporary* categorical physical taking occurs when the government physically seizes the entirety of a landowner's property for public use, but returns it to the original owner after a period of time. "[C]ompensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321-23 (2002) (citing *United States v. General Motors Corp.*, 323 U.S. 373 (1945)). When a physical taking is categorical, courts look to the temporal element to determine the measure of just compensation under the Fifth Amendment, not whether a claim arose at all. *See Ladd*, 630 F.3d at 1025; *Yuba Nat. Res., Inc. v. United States*, 821 F.2d 638, 641-42 (1987).

For example, in *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), the government seized plaintiff's laundry facility during World War II to provide laundry and dry

cleaning services to the armed forces. The Supreme Court found the taking to be categorical, as the government possessed the entirety of plaintiff's property. *Id.* at 3. But it was ultimately temporary, as the government returned the property after the war ended. *Id*. at 3-4. Thus, the principal disagreement in *Kimball Laundry* was over how compensation should be calculated, not whether a taking occurred. *See id.* at 6 (stating that "the question of compensation for the temporary taking of petitioner's land, plant, and equipment" was at issue.).

Similarly, *United States v. Pewee Coal Co.* also involved a temporary categorical taking during World War II. 341 U.S. 114 (1951). In *Pewee Coal*, the government seized control of various coal mines across the country in 1943 to circumvent a nationwide strike of miners. *Id.* at 115. A mine was returned to the original owners after five and one-half months of government occupation, and the operators of the mine sued for compensation. *Id.* The Court found the seizure of the mine to be "'in as complete a sense as if the [g]overnment held full title and ownership.'" *Id.* at 116 (citing *United States v. United Mine Workers*, 330 U.S. 258 (1947)). Much like *Kimball Laundry*, the majority of the opinion was devoted to detailing *how much* compensation the mine owners were entitled to for the taking period, rather than if a taking had occurred at all. *Id.* at 116-17.

In sum, when the government physically seizes the entirety of a plaintiff's property, it is a categorical taking. Whether the government exercises permanent or temporary control is only relevant for the calculation of compensation, not whether a taking occurred. *See, e.g.*, *General Motors*, 323 U.S. at 378 ("Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest . . . , to amount to a [T]aking.").

2. Non-categorical physical takings.

Non-categorical physical takings also require proper compensation under the Takings Clause of the Fifth Amendment. *See, e.g.*, *Loretto*, 458 U.S. at 419. A non-categorical physical taking occurs when the government occupies part of an owner's property in some manner. The physical invasion could be as small as a single cable box, *see id.*, or as large as multiple wells, s*ee Hendler*, 952 F.2d 1364, 1375-78. And like categorical physical takings, non-categorical physical takings can be permanent or temporary in duration.

a. Permanent non-categorical physical takings.

Permanent, non-categorical physical takings are treated analytically the same as categorical physical takings, except for the calculation of damages. The Supreme Court has consistently drawn a bright line that *any* permanent physical invasion of property, no matter how negligible, constitutes a taking. *See Loretto*, 458 U.S. at 436 ("Th[is] traditional rule also avoids otherwise difficult line-drawing problems" with how much physical taking would be too much); *United States v. Causby*, 328 U.S. 256, 261-65 (1946) (holding that repeated flights by government planes through the plaintiffs' airspace constituted a permanent non-categorical physical taking); *Hendler* 952 F.2d at 1375-78 (finding government-drilled wells on a plaintiff's property constituted a permanent non-categorical physical taking that required compensation).

When physically, and permanently, taking a part of property, "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand. . . . it effectively destroys *each* of these rights." *Loretto*, 458 U.S. at 435 (emphasis in original).

The seminal case of this type in the Supreme Court is *Causby*. The plaintiffs in *Causby* were farmers who sued the government for "frequent and regular flights of army and navy aircraft over [plaintiffs'] land at low altitudes" that injured chickens and forced them to close the farm. 328 U.S. at 258. Despite the fact that the "enjoyment and use of the land [was] not completely destroyed," the Court found a physical taking because "the use of the airspace immediately above the land [] limit[ed] the utility of the land and cause[d] a diminution in its value." *Id.* at 262. And, "the fact that [the government planes] do[] not occupy [the land] in a physical sense – by the erection of buildings and the like – is not material. As we have said, the flight of airplanes [in this case] . . . is as much an appropriation of the use of the land as a more conventional entry upon it." *Id.* at 265. The Court in *Causby* effectively recognized the existence of a non-categorical physical taking, *i.e.*, one that does not completely deprive the owner of all economic value, but is of a permanent nature.

In *Loretto*, Court formally recognized the principle that *any* permanent physical invasion of property constitutes a taking, no matter how "minimal [the] economic impact on the owner." 458 U.S. at 434-35. The Court in *Loretto* found a non-categorical permanent physical taking from the imposition of cable boxes on the plaintiffs' property – despite the small impact on the property's value. *See id.* at 434, 441-42. "Once the fact of occupation is shown, of course, a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due. For that reason, moreover, there is less need to consider the extent of the occupation in determining whether there is a taking in the first instance." *Id.* at 437 (emphasis in original).

Public easements being imposed on a landowner can also constitute permanent non-categorical physical takings. *See Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (citing *Causby*, 328 U.S. at 265; *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922)). In *Kaiser Aetna*, the Court held that "even if the [g]overnment physically invades only an easement in property, it must nonetheless pay just compensation." *Id.* at 180. Similarly, in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1991), Justice Scalia wrote, "[t]o say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather . . . 'a mere restriction on its use,' . . . is to use words in a manner that deprives them of all their ordinary meaning." *Id*. The right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* (quoting *Loretto*, 458 U.S. at 433).

The Federal Circuit followed a similar path in recognizing permanent non-categorical physical takings. *See, e.g.*, *Hendler*, 952 F.2d at 1375-78. In *Hendler*, the Federal Circuit found ground wells drilled by the government on the plaintiffs' property to monitor pollution constituted a permanent non-categorical physical taking. *See* 952 F.2d at 1375-77. The wells were permanent because "[y]ears have passed since the [g]overnment installed the first wells . . .

[which are] 100 feet deep, lined with plastic and stainless steel, and surrounded by gravel and cement." *Id.* at 1376. The government's order also authorized state and federal officials to have continuing access to the property. *Id*. at 1374. Recognizing that on a long enough timeline, every government action could be considered "temporary,"[17] the court noted "[a]ll takings are 'temporary,' in the sense that the government can always change its mind at a later time." *Id.* at 1376. The court drew a distinction between "governmental activities which involve an occupancy that is transient and relatively inconsequential," such as the "parked truck of the lunchtime visitor," and the more "permanent" nature of the embedded wells. *Id.* at 1376-77. The court noted that "the concept of permanent physical occupation does not require that in every instance the occupation be exclusive, or continuous and uninterrupted." *Id*. at 1377. Rather, indefiniteness means permanency. *Id*. at 1376.

The Federal Circuit provided additional guidance on distinguishing between temporary and permanent non-categorical physical takings in *Otay Mesa Prop., L.P. v. United States*, 670 F.3d 1358, 1363 (Fed. Cir. 2012). The court concluded that takings are considered permanent even if the landowner could take "specified action" to terminate the taking. 670 F.3d at 1368-69 ("In *Loretto*, was possible for the landowner to act in a manner so as to avoid the taking . . . [because] a landlord could avoid the law's requirements by ceasing to rent the building to tenants, but [] this did not make the cable company's invasion of the property not permanent.") (citing *Loretto*, 458 U.S. at 421, 438-39). In *Otay Mesa*, the government installed roads, a tented structure, and underground sensors outside a previously-granted twenty-foot-wide easement on property in California adjacent to the border with Mexico. 670 F.3d at 1360-61. The Federal Circuit concluded that the taking by the government was permanent, even though the plaintiff in *Otay Mesa* could have "decide[d] to develop the entirety of its property, thereby terminating the sensor easement." *Id.* at 1368. Arbitrary end dates are similarly unpersuasive in finding whether an easement was temporary or permanent in nature. *Id.* at 1368. "[O]nly such activities [like] abandonment of the easement by the Border Patrol . . . can end the easement." *Id.*

b. Temporary non-categorical physical takings.

Ordinarily, temporary governmental action will give rise to a taking if permanent action of the same character would constitute a taking. *See Arkansas Game*, 568 U.S. at 26-27, 32-34; *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-20 (1987). That is true for non-categorical as well as categorical physical takings, but temporary non-categorical physical takings have to be differentiated from torts. *See Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003). That line-drawing exercise can be significant with government-induced flooding, *see*, e.g., *Arkansas Game*, 568 U.S. at 36, although "[t]here is thus no solid grounding in precedent for setting flooding apart from all other government intrusions on property," *id*.

In this context, the Supreme Court employed six interrelated factors in *Arkansas Game* to help determine if a temporary non-categorical physical taking occurred. 568 U.S. at 38-39.

[17]This echoes the famous economist John Maynard Keynes, who famously stated "[i]n the long run we are all dead."

Those factors were "time," "inten[t]," "forseeab[ility]," "character of the land," "reasonable investment-backed expectations," and "severity of the interference." *Id*. *Arkansas Game* involved the flooding and destruction of forest land caused by the Army Corps of Engineers through its operations of a dam during the period 1993 through 2000. *Id*. at 28. Those operations deviated from planned water-release rates to benefit farmers and recreational users. *Id*. at 27. Water was stored behind the Corps' dam from September to December, but was released above historical norms during the ensuing tree-growing season, *id*. at 28, saturating soil and weakening root systems of trees to the point the trees were destroyed, *id*. at 30. The Corps eventually ceased the deviations and returned to more normal water flows. *Id*. at 28. The Court found that the flooding could constitute a taking. *Id*. at 38-40.

Some of the factors employed in *Arkansas Game* have origins in accepted takings jurisprudence. For example, "inten[t]" seems to correlate with authorized government action, although that may not always be factually the case. Additionally, "character of the land" and "reasonable investment-backed expectations" have roots in regulatory takings jurisprudence, although "character of the *land*," *Arkansas Game*, 568 U.S. at 39 (emphasis added), is a reversal from the focus in regulatory takings on "character of the government *action,*" *Penn Central*, 438 U.S. at 124 (emphasis added). Contrastingly, factors relating to tort concepts, *i.e*., "forseeab[ility]" and "severity of the interference" were employed in *Arkansas Game*.[18] Finally, "time" concerns the duration of the temporary interference.

On the other hand, if landowners suffered "an incidental or consequential injury . . . caused, for example, by improvident conduct on the part of the government in managing its property," such landowners may have to look to tort law. *See Ridge Line*, 346 F.3d at 1356. In applying the distinction between a foreseeable injury and a merely incidental injury, the Federal Circuit requires plaintiffs to demonstrate that their injury was "the likely *result* of the [government's] act, not that the act was the likely *cause* of the injury." *Cary*, 552 F.3d at 1377 (citing *Moden*, 404 F.3d at 1343) (emphasis added).[19]

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[18]In this respect, it is not necessary to show that the government specifically intended to invade and injure the property. Rather, the standard allows recovery based on injuries that are the direct, natural, predictable, or probable result of governmental action (*i.e.*, foreseeable). *See Cary v. United States*, 552 F.3d 1373, 1377 (Fed. Cir. 2009); *see also Ridge Line*, 346 F.3d at 1356. That is, a court can infer governmental action for an invasion of a property interest where the plaintiff proves that "the government should have predicted or foreseen the resulting injury." *Cary*, 552 F.3d at 1377 (quoting *Moden v. United States*, 404 F.3d 1335, 1343 (Fed. Cir. 2005)).

[19]Foreseeability can be critical in governmental flooding cases. *See, e.g.*, *Arkansas Game*, 568 U.S. at 23; *Cary*, 552 F.3d at 1373; *Moden*, 404 F.3d at 1335; *Ridge Line*, 346 F.3d at 1346; *Cotton Land Co. v. United States*, 109 Ct. Cl. 816 (1948). In governmental flooding cases, liability can turn on whether the taking was predictable or whether an intervening cause broke the chain of causation. *See Arkansas Game & Fish Comm'n v. United States*, 87 Fed. Cl. 594, 621-24 (2009), *rev'd*, 637 F.3d 1366 (Fed. Cir. 2011), *rev'd & remanded*, 568 U.S. 23, *aff'd on remand*, 736 F.3d 1364 (Fed. Cir. 2013). Predictability focuses on the end-result, *i.e.*, whether the flooding should have been foreseen based on information available to the government at the

B. Regulatory Takings

Justice Holmes articulated the basic standard for regulatory takings in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922): "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." By this general formulation, Justice Holmes endeavored to balance the legitimate, regulatory needs of the state with the reasonable expectations of property owners. *Id.* at 413-15 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for each such change in the general law."). Following *Pennsylvania Coal*, courts have struggled to define a "set formula" for determining how much regulation is too much. *See Lucas*, 505 U.S. at 1015. In doing so, courts have engaged in "essentially ad hoc, factual inquires." *Id.* (citing *Penn Central*, 438 U.S. at 124). Over the years, the Court has recognized two types of regulatory takings – categorical and non-categorical. *See id.* at 1014-1020.

1. Categorical regulatory takings.

A categorical regulatory taking occurs when a "regulation denies *all* economically beneficial or productive use of land . . . for the common good." *Lucas*, 505 U.S. at 1015-16, 19 (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *abrogated by Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Nollan*, 483 U.S. at 834; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*., 452 U.S. 264, 295-96 (1981)) (emphasis added). As the Court observed in *Lucas*, the "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Id.* at 1017 (citations omitted). And like a categorical physical taking, courts do not need to run through the "case-specific inquiry into the public interest advanced in support of the restraint" to determine if the taking is compensable. *Id.* at 1015.

In *Lucas*, the regulation at issue prevented the development of certain coastal lots in South Carolina. 505 U.S. at 1006-07. Plaintiff, owner of two coastal lots on a barrier island, was prevented from building on or developing the two pieces of land. *Id.* After the South Carolina trial court found that the land was effectively rendered economically valueless, the Supreme Court held that the regulation would constitute a categorical regulatory taking. *Id.* at 1030-32.

Cases subsequent to *Lucas* have considered that a categorical regulatory taking is "limited to the 'extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.'" *Tahoe-Sierra*, 535 U.S. at 330 (quoting *Lucas*, 535 U.S. at 1017) (emphasis in original); *see also Lost Tree Village Corp. v. United States*, 787 F.3d 1111, 1116 (Fed. Cir. 2015) ("[A] *Lucas* [categorical regulatory] taking is rare."). Indeed, even a 93%

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time of action. *Id.* at 621-23. Relatedly, intervening causes might "break the 'chain of causation' between the governmental action and plaintiff's injury." *Id.* at 615, 623-24 (citing *Cary*, 552 F.3d at 1380.

reduction in land value is not enough to meet the *Lucas* standard for a categorical regulatory taking. *Palazzolo v. Rhode Island*, 533 U.S. 606, 616 (2001).

In *Lost Tree*, the Federal Circuit addressed noneconomic attributes. *See Lost Tree*, 787 F.3d at 1111. In that case, the Army Corps of Engineers denied a wetland fill permit to the plaintiffs to build on waterfront property. *Id*. at 1114. The land's value decreased by 99.4% due to the government action. *Id.* The government argued that since there was *some* (even if token) property value remaining (regardless of its source), the taking was not categorical and should instead be analyzed through the *Penn Central* lens. *Id.* at 1116. The Federal Circuit disagreed, holding that a purely nominal noneconomic residual value would not forestall a categorical regulatory taking. *Id.* at 1117.

2. *Non-categorical regulatory takings.*

If a regulation does *not* "den[y] all economically beneficial or productive use of land," courts turn to a "complex of factors," *Palazzolo*, 533 U.S. at 617, which together guide what is "essentially [an] ad hoc, factual inquir[y]," *Penn Central*, 438 U.S. at 124. *Penn Central* listed three factors to be considered in determining if a non-categorical taking occurred: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment backed expectations;" and (3) "the character of the government action." *Id.* "Each of these factors are considered in terms of the 'parcel as a whole.'" *Seiber v. United States*, 364 F.3d 1356, 1370 (Fed. Cir. 2004) (quoting *Penn Central*, 438 U.S. at 130-31). Although these factors provide "important guideposts . . . [, t]he Takings Clause requires careful examination and weighing of all the relevant circumstances." *Palazzolo*, 533 U.S. at 634, 636 (O'Connor, J., concurring); *see also Tahoe–Sierra*, 535 U.S. at 321 (Whether a taking has occurred "depends upon the particular circumstances of the case."); *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992) (Regulatory takings claims "entail[ ] complex factual assessments.").

A non-categorical taking does not require a complete economic loss; rather, a partial but substantial temporary taking may be compensable. *Palazzolo*, 533 U.S. at 617; *Cienega Gardens v. United States*, 331 F.3d 1319, 1343, 1345 (Fed. Cir. 2003).

C. The July 3, 2013 NITU Issued Regarding Mrs. Caquelin's Land

Mrs. Caquelin's reversionary property interest was blocked by the STB's imposition of the NITU pending consideration of authorizing a trail for public use. *See* Stip. ¶¶ 12-14. "In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession – the right to *exclude* strangers, or for that matter friends, but especially the government." *Hendler*, 952 F.2d at 1374-75 (Fed. Cir. 1991) (citing *Nollan*, 483 U.S. at 831; *Loretto*, 458 U.S. at 426) (internal citations omitted) (emphasis in original). Here, Mrs. Caquelin was prevented from using her land for *any* purpose for the duration of the NITU. *See* Stip. Ex. 11 at STB000077-81. It makes no difference that the NITU did not ultimately result in trail use of the railroad corridor. The court therefore determines that the NITU issued regarding Mrs. Caquelin's property represents a categorical physical taking, albeit a temporary one. In these

circumstances, the principles identified and applied in *Pewee Coal*, *Kimball Laundry*, and *General Motors* would govern the takings analysis, and the *Arkansas Game* factors would be inapplicable.

Nonetheless, as instructed by the Federal Circuit's mandate, the court will proceed to apply the factors identified in *Arkansas Game* to the factual record established by the trial held on remand.

II. Multi-Factor Analysis

The court here is charged with an atypical task. The Federal Circuit specifically instructed this court to determine "how the government-advanced multi-factor analysis applies in this case, on the assumption that such an analysis is the governing standard." *Caquelin II*, 697 Fed. Appx. at 1020. Thus, the court is to act in a supporting role – teeing up the problem for the Federal Circuit to determine if *en banc* review is necessary to examine the *Ladd* precedent and the earlier decisions by the Federal Circuit that provided antecedents for *Ladd*. As mandated, the court will address the six factors from *Arkansas Game* in turn.

Factor 1: Time and Duration of the Taking

In *Arkansas Game*, the Supreme Court advised that "time is indeed a factor in determining the existence *vel non* of a compensable taking." *Arkansas Game*, 568 U.S. at 38-39 (citing *Loretto*, 458 U.S. at 435, n.12; *Tahoe-Sierra*, 535 U.S. at 342; *National Bd. of YMCA v. United States*, 395 U.S. 85, 93 (1969) (finding the brief occupation of a building by the United States military during a riot in Panama did not constitute a taking because the building was already under attack)). Other temporary takings cases provide additional instruction as to how time factors into the overall calculus. *See First English*, 482 U.S. at 318 ("'[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."); *Tahoe-Sierra*, 535 U.S. at 322 ("[C]ompensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary."); *Yuba*, 821 F.2d at 641-42 ("[T]emporary reversible takings should be analyzed in the same constitutional framework applied to permanent irreversible takings.").

For this case, the duration and time of the taking is undisputed and uncontroversial. The taking began on the date the STB issued the NITU and blocked Mrs. Caquelin's reversionary interest in the property, *i.e.*, on July 3, 2013, and ended when the NITU expired, *i.e.*, on December 30, 2013, for a total period of 180 days. *See* Stip. Ex. 11 at STB000077, 80-81. The duration factors into the calculation of just compensation for Mrs. Caquelin, rather than into the existence *vel non* of a taking. *See First English*, 482 U.S. at 318-19; *Yuba*, 821 F.2d at 641-42. When the STB first issued the NITU and blocked Mrs. Caquelin's reversionary interest in the land at issue, it was indeterminate how long the taking would last. Stip. Ex. 11 at STB000080. As a factual matter, near the end of the six-month period of the NITU, the Iowa Heritage Council sought a 180-day extension to continue negotiations for a trial, Stip. Ex. 11 at STB000082, but no extension was granted, *see supra*, at 6.

The government, in its post-trial brief, emphasizes that the NITU "was in place for only 180 days," and that "there was no extraordinary delay in the regulatory abandonment proceeding." Def.'s Br. at 46-47; *see also id.* at 41-50. But as discussed previously, the NITU deprived Mrs. Caquelin of *all* use of the land at issue during the time it was in effect. *See* Stip. Ex. 11 at STB000077; *see also Caldwell*, 391 F.3d at 1235 (The "triggering event for any takings claim under the Trails Act occurs when the NITU is issued."). It does not matter for the takings analysis that the NITU was "only" in place for 180 days or that it was resolved without an "extraordinary delay." The time is relevant only to the calculation of damages. *See Yuba*, 821 F.2d at 641-42. What matters is on July 3, 2013, the government acted in a way that completely deprived Mrs. Caquelin the use of her property for what was then an unspecified amount of time. *See* Stip. Ex 11 at STB000077-81.

The court concludes that the time factor weighs in favor of finding a taking of Mrs. Caquelin's property. *See Banks v. United States*, 138 Fed. Cl. 141, 150 (2018) (citing *Kimball Laundry*, 338 U.S. 1) (additional citations omitted); *see also Balagna v. United States*, 138 Fed. Cl. 398, 403 (2018) ("[A]pplication of the *Arkansas Game* factors would not be likely to yield a result different from that reached under controlling precedent.") (internal citation omitted). Mrs. Caquelin was not deprived of her land by the mere "parked truck of the lunchtime visitor." *Hendler*, 952 F.2d at 1376. Rather, the NITU denied Ms. Caquelin useable time to reclaim the plot of land for the next planting season and also delayed her ability to harvest the valuable timber on the segment.

Factor 2: Degree to Which the Invasion was Intended

The next factor the Supreme Court lists as "relevant to the takings inquiry," is the "degree to which the invasion is intended." *Arkansas Game*, 568 U.S. at 39. This factor cannot be disputed. The STB issued the NITU with intent to block Ms. Caquelin from any use of the corridor segment while a potential trail use was being negotiated. *See Caldwell*, 391 F.3d at 1233-34 ("[G]overnment action . . . operates to . . . preclude the vesting of [the] reversionary interest."); *Banks*, 138 Fed. Cl. at 150 ("There was no inadvertence here."). The rails-to-trails program was specifically amended to prevent the railroad from abandoning the property and to block the owner's reversionary interest. *See Preseault I*, 494 U.S. at 8 ("By deeming interim trail use to be like discontinuance rather than abandonment, . . . Congress prevented property interests from reverting under state law.") (citing S. Rep. No 98-1, p.9 (1983)). The very purpose of the Act is to effectuate a taking to preserve the option for interim trail use and railbanking. *Id.*

Factor 3: The Foreseeable Result of Authorized Government Action

In related vein, *Arkansas Game* referred to consideration of whether the revision was "the foreseeable result of authorized government action." *Arkansas Game*, 568 U.S. at 39 (citing *John Horstmann Co. v. United States*, 257 U.S. 138, 146 (1921) (no takings liability when the government action, an increase of water in a lake due to an irrigation project in Nevada, was not foreseeable); *Ridge Line*, 346 F.3d at 1355-56 (requiring plaintiffs in a flooding case to establish

that "the effects [plaintiff] experienced were the predictable result of the government's action"); *In re Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 799 F.2d 317, 325-26 (7th Cir. 1986) (discussing how "[a]ccidental unintended injuries inflicted by governmental actors are treated as torts, not takings.")).

In *Moden*, 404 F.3d at 1343, the Federal Circuit held that "[a]n inverse condemnation plaintiff must prove that the government should have predicted or foreseen the resulting injury," and also that there were no intervening causes that might relieve the government of liability. *See also Cary*, 552 F.3d at 1379 ("Wherever there is an authorized action, the causation prong is satisfied for any injury which is the direct, natural, and probable result of that action."). At bottom, this factor "merely inquires into whether the 'invasion' is the foreseeable result of government action." *Banks*, 138 Fed. Cl. at 150 (citing *Arkansas Game*, 568 U.S. at 39).

Here, the result of the NITU was foreseeable, as the very point of a NITU is to prevent a landowner's reversionary interest from taking effect so the trail negotiating process can take place. *See Preseault I*, 494 U.S. at 7-9. No preternatural clairvoyance is needed in this case to predict that the outcome of the government action is the deprivation of Mrs. Caquelin's property interest. *See id.*; *see also* Stip. Ex. 9 at STB000077-81. It does not matter that there was no "physical presence of federal or third party actors." *Banks*, 138 Fed. Cl. at 150. In the words of Judge Bruggink, the fact that a NITU results in an owner's losing the rights to use their own land "requires no great foresight to anticipate." *Id.* And, no intervening cause that might relieve the government of liability is present here.[20]

Therefore, the court finds that the deprivation of property was a predictable and foreseeable consequence of issuing the NITU. None of the predictability or foreseeability issues present in inverse-condemnation flooding cases is present here.

Factor 4: Character of the Land at Issue

The fourth factor spelled out by the Supreme Court in *Arkansas Game* is the "character of the land at issue." 568 U.S. at 39 (citing *Palazzolo*, 533 U.S. at 618). In *Arkansas Game*, the Court noted that the trial court "found the [a]rea had not been exposed to flooding comparable to the 1990's accumulations in any other time span either prior to or after the construction of the [d]am." *Id.* In the eyes of the Court, the lack of prior comparable flooding made it more likely that a taking occurred – as the owners of the property had no forewarning of the potential for floodwaters to inundate their land. *See id.*

While this factor is ostensibly similar to one from *Penn Central*, a key difference exists between the test for non-categorical regulatory takings in *Penn Central* and the inquiry detailed by the Supreme Court in *Arkansas Game*. In *Penn Central*, the focus is on the character of the

[20]The government's post-trial brief does not address this factor except for a cursory acknowledgement. *See* Def.'s Br. at 34. Instead, the government attempts to shoehorn the non-categorical regulatory taking test from *Penn Central* into the current analysis. *See id.* at 34-67.

governmental action. *See Penn Central*, 438 U.S. at 123. But in *Arkansas Game*, the Supreme Court reverses the inquiry and directs courts to look to the "character of the *land* at issue." *See Arkansas Game*, 568 U.S. at 39 (emphasis added). When viewed in the government flooding context, and in conjunction with the other *Arkansas Game* factors, this change in the focus of the inquiry is cogent and instructive. The *Penn Central* factors are designed to determine if a non-categorical regulatory taking occurred, *Penn Central*, 438 U.S. at 124, or, in the words of Mr. Justice Holmes, whether a governmental regulation "goes too far," *Pennsylvania Coal*, 260 U.S. at 415. *Arkansas Game*, by contrast, points courts to determine whether a taking (as opposed to a tort) occurred by looking at the nature of the underlying land, *i.e.*, was it prone to repeated flooding or especially susceptible to flooding. 568 U.S. at 39. This factor, much like factors 2 and 3, seems specifically identified to be deployed in a governmental flooding context.

The character of the land at issue in this case is largely undisputed. The plot of land here is a 0.359 acre segment located adjacent to farmland in Franklin County, Iowa, measuring 313 linear feet in length from the location of the Milepost 191 marker extending to the southeastern corner of the Caquelin property, and fifty feet in width extending from the westerly line of the railroad corridor to the center line. Stip. ¶¶ 19-20 & Ex. 15 at US000288-89; *see also Caquelin I*, 121 Fed. Cl. at 660-61. At the time of the taking, the bucolic segment of land was covered with trees and residual ballast. Because of the ballast, the remainder of the plot was "a couple of feet lower than the rail[bed]." *See* Tr. 71:18 to 72:7, 91:7 to 93:25 (testimony of Mr. Abbas).[21] After a rain, the area could be briefly "wet" because of the slightly elevated railbed, but it is not "wetland," and reclamation of the corridor plus tiling could put the land into productive use. Tr. 71:18 to 72:7, 91:7 to 93:25 (Abbas). Dr. Kliebenstein, an expert who testified on behalf of Mrs. Caquelin, emphasized that the CSR of the soil involved is 95, indicating the soil is extremely productive for the growing of corn and other crops. *Id.* at 208:5-14, 218:24 to 222:1, 225:1-11, 277:7 to 278:4. The court therefore determines this factor also weighs in favor of finding a taking.[22]

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[21]Mr. Abbas farms Mrs. Caquelin's land under a leasehold. TR. 63:2-25.

[22]"Whether the plaintiffs' property was commercial, farm, or undeveloped land, the United States has no right to simply block control of the surface . . . ." *Banks*, 138 Fed. Cl. at 150. In a case of this type, character of the land is only relevant for determining *compensation*, rather than *liability*. *See id.* It is antagonistic to long-standing takings principles that a plaintiff would be required to demonstrate the various productive characteristics of his or her land in order to prove liability when faced with a categorical physical or regulatory taking. *See, e.g.*, *Loretto*, 458 U.S. 434-35; *Tahoe-Sierra*, 535 U.S. at 323-24; *Horne v. Department of Agriculture*, ___ U.S. ___, ___, 135 S. Ct. 2419, 2428-2430 (2015) ("[O]nce there is a taking, as in the case of a physical appropriation, any payment from the Government in connection with that action goes, at most, to the question of just compensation.") (citing *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 747-48 (1997)). Indeed, the government would *still* be liable for taking entirely unproductive land with little value – even if the compensation ultimately paid was nominal. Correspondingly, the fact that the corridor segment is relatively small does not affect liability, although it bears directly on compensation. *See Loretto*, 458 U.S. at 434-36.

Factor 5: Reasonable Investment-Backed Expectations

The fifth factor identified by the Supreme Court is "the owner's 'reasonable investment-backed expectations' regarding the land's use." *Arkansas Game*, 568 U.S. at 39 (citing *Palazzolo*, 533 U.S. at 618 (detailing the difference between a categorical regulatory taking where "a regulation has deprived a landowner of 'all economically beneficial use' of the property" and a non-categorical regulatory taking, when a regulation "defeated the reasonable investment-backed expectations of the landowners to the extent that a taking has occurred.")). This factor has its roots in *Penn Central*, where the Court stated it was necessary to determine the "extent to which the [governmental action] has interfered with distinct investment-backed expectations" when examining a non-categorical regulatory taking. 438 U.S. at 124 (citation omitted). And unlike the fourth factor of *Arkansas Game*, there is no reversal of the inquiry.

Other cases provide additional guidance regarding how the court should interpret "reasonable investment-backed expectations." *See Ruckelhaus*, 467 U.S. at 1006-07 (finding that reasonable investment-backed expectations "must be more than a 'unilateral expectation or abstract need'") (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 499 U.S. 155, 161 (1980)); *see also Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1345 (Fed. Cir. 2018) ("The reasonable, investment-backed expectation analysis is designed to account for property owners' expectation that the regulatory regime in existence at the time of their acquisition will remain in place, and that new, more restrictive legislation or regulations will not be adopted."); *Cienega Gardens*, 331 F.3d at1345-46 ("This factor also incorporates an objective test – to support a claim for a regulatory taking, an investment-backed expectation must be 'reasonable.'"); *but see Palm Beach Isles Assoc. v. United States*, 231 F.3d 1354, 1364 (Fed. Cir. 2000) ("[I]n accord with *Lucas*, and not inconsistent with any prior holdings of this court, when a regulatory taking, properly determined to be 'categorical,' is found to have occurred, the property owner is entitled to a recovery without regard to consideration of investment-backed expectations. In such a case, 'reasonable investment-backed expectations' are *not* a proper part of the analysis, just as they are not in physical takings cases.") (emphasis added).

Dr. Kliebenstein testified that the land at issue could be reclaimed as high quality farmland and put into very productive use. *See* Tr. 208:5-14; 218:24 to 222:1; 225:1-11; 277:7:7 to 278:4. According to Dr. Kliebenstein, the cost to reclaim the land would be approximately $1,120, Tr. 249:1 to 250:6, with a potential "$3 and $3.50 return for every dollar of investment," Tr. 251:2 to 252:14.

In early July 2013, with the issuance of the NITU, Mrs. Caquelin was denied the opportunity to prepare the land for productive use during the next planting season. *See* Tr. 802:8 to 807:13; Pl.'s Br. at 58-59. Mr. Abbas, who farms the land on a cash-rent basis, Tr. 72:15 to 73:9,[23] has been active in enhancing the productivity of the land by tiling and otherwise

[23] In 2012 and 2013, Mr. Abbas paid $18,000 to farm Mrs. Caquelin's property. Stip. Ex. 14 at PLT00020. In 2014 and 2015, the rent was raised to $25,000. *Id.* at PLT000019. But rent

improving it, Tr. 73:21 to 76:9. He had discussed potential tiling of the corridor segment at issue with the principal of a firm that had performed other reclamation work in the area. Tr. 80:14 to 81:8, 91:20 to 92:7. Plaintiff's experts, Mr. Matthews and Dr. Kliebenstein, had also discussed the cost of reclamation with this local contractor. *See* PX 1 (Matthews Expert Report) at 11; PX 2 (Kliebenstein Expert Report) at 13; Tr. 249:1 to 250:6, 322:2-23. Therefore, Mrs. Caquelin contends that additional rental income should be considered in her reasonable investment-backed expectations, if such a test were to apply. *See* Pl.'s Br. at 58-59.

The government, on the other hand, claims that due to the timing of the NITU and the unreclaimed nature of the property, Mrs. Caquelin could not have any reasonable investment-backed expectations. *See* Def.'s Br. at 29, 50-55; *see also* Tr. 811:1 to 813:14. Its argument emphasizes the fact that the timing of the NITU precluded Mrs. Caquelin from gaining any farm rental income from the unreclaimed plot in 2013, the year the NITU was issued. *See* Def.'s Br. at 62-65. The government acknowledges that Mrs. Caquelin could have started the reclamation process after the NITU expired in December 2013. *See* Tr. 801:15 to 802:3.[24]

The government further argues that Mrs. Caquelin did not have any reasonable investment backed expectations, as she "acquired her interest in the adjacent farmland by inheritance" with the railroad's easement still present on the property, and she could not have known when or if that easement would be abandoned. *See* Def.'s Br. at 50-55; *see also* Tr. 786:19 to 788:23. In addition, the government contends that Mrs. Caquelin "had no actual or objectively reasonable expectations about the use of the 0.359-acre segment of the railroad corridor at the time she acquired her interest in the adjacent property" or "at the time of the government's action." Def.'s Br. at 51.

The presence of walnut trees on the segment complicates the equation of reasonable investment-backed expectations. David Matthews, an expert appraiser, testified at trial that one of the walnut trees by itself was worth "several thousand dollars" in his estimation. Tr. 365:6-23, 368:3 to 370:8, 370:18 to 373:1. The court also observed the walnut trees on its site visit to the property. Tr. 461:22-25 to 462:6, 462:24 to 463:6.[25]

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was reduced back to $20,700 for 2016 and 2017. *Id.* at PLT000018. For 2018, the rent was further reduced to $19,200. *Id.* at PLT00017.

[24]Another lengthy argument made by the government is that the July 3, 2013 issuance date of the NITU precluded the planting of soybeans on the corridor segment in 2013. *See* Def.'s Br. at 61-65; *see also* Tr. at 547:19 to 548:5, 550:10 to 551:15, 555:8 to 557:13, 795:1 to 802:23. This argument misses the point – it is irrelevant if Mrs. Caquelin would have been able to reclaim the plot of land for productive use in 2013. What *is* relevant is that Mrs. Caquelin would have been able to *start* the reclamation process for the next planting season. *See* Tr. 796:8-19. As the court pointed out in closing argument, any "prudent landowner" would have used the time from July 3rd onward to clear the property to "prepare it for planting the next season." *Id.*

[25]The segment at issue is wooded and fairly flat. Tr. 222:2 to 224:22. The larger trees are growing at and near the fenceline that separated the railroad corridor from Mrs. Caqulin's

To the court, these trees signify an additional component of Mrs. Caquelin's investment-backed expectations independent of rental income from farming purposes. This undercuts the government's argument that STB's "interference . . . had no measurable economic impact." *E.g.*, Def.'s Br. at 54. The government's argument seems to be myopically focused on the economic viability of growing crops on the taken property during 2013, after the July 3, 2013 NITU issuance date. *See id*. at 62-67. Mr. Thien, an appraiser testifying as an expert on behalf of the government, was asked to provide a value for the entirety of the parcels owned by Ms. Caquelin and also to evaluate whether those was any loss of revenue or rent during the period of July 3 through December 30, 2013. Tr. 497:24 to 498:9. Despite the exhaustive exposition of Mr. Thien's methodology and his ultimate conclusion regarding the viability of farming the plot, neither the government in its brief, nor Mr. Thien in his testimony, addressed the impact of the walnut trees on the cost to reclaim Mrs. Caquelin's property or on the value of the segment at issue. *See generally* Def.'s Br. at 59-68; *see also* Tr. 641:12 to 644:24, 645:21 to 647:7, 647:18 to 649:2, 656:17 to 658:4. Correlatively, Mr. Thein did not consider the extent to which reclamation would provide a positive recovery to Mrs. Caquelin through the enhanced value of the segment.

Therefore, the court finds factor 5 cuts in favor of a taking. When the NITU was imposed on Mrs. Caquelin's property on July 3, 2013, it denied her the opportunity to perform the economically viable action of reclaiming the land and putting it to productive agricultural use. Moreover, the presence of the harvestable walnut trees on the property would have covered the cost of reclamation, and this circumstance also bears on objectively reasonable investment-backed expectations.

Factor 6: Severity of the Interference

For the last factor, the Supreme Court in *Arkansas Game* details that the "[s]everity of the interference figures in the calculus as well." 568 U.S. at 39 (citing *Portsmouth Harbor*, 260 U.S. at 329-30 ("[W]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [a taking]. Every successive trespass adds to the force of the evidence.")). In *Portsmouth Harbor*, the Court held the repeated firing of military guns over the plaintiff's beach resort could constitute a taking if the firings were numerous enough. 260 U.S. at 329-30. This fact pattern has a similarity to *Causby*, where repeated overflights of governmental aircraft over a farm constituted a taking. 328 U.S. at 258, 265.

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farmland to the west. Tr. 224:15-20. The larger trees included at least one walnut that could be harvested as part of the reclamation work, and sold to a veneer company. Tr. 368:4-22, 461:22 to 462:23. The price obtainable for the large walnut, apart from the other walnuts and hardwoods, Tr. 368:4 (conservatively, $2,000), would exceed the estimated reclamation cost. Tr. 82:5-25, 114:10 to 115:7, 249:3 to 250:6 (approximately $1,120); PX 1 at 11. Walnut trees are prized for their high quality wood and "bring premium prices, and have since the 1700s, with single trees bringing up to $20,000." Craig Wallin, *Growing Walnut Trees for Profit*, Profitable Plants Digest, https://www.profitableplantsdigest.com/growing-walnut-trees-for-profit/ (last accessed Nov. 5, 2018).

In a rail-to-trails case, however, this factor is less relevant. *See Banks*, 138 Fed. Cl. at 150. In rails-to-trails cases, the NITU acts as a complete interference to the plaintiff's use and enjoyment of their land. The segment here would have reverted to Mrs. Caquelin but for the issuance of the NITU. She was unable to harvest the valuable walnut trees, prepare the land for the next planting season, or exercise any other of her rights in the "bundle of sticks" that are inherent to landownership. "None of the rails to trails case precedent[s] with respect to liability has required an additional showing by landowners of what they would have done with the land if they could access it." *Id*.

For this factor, the court therefore finds the interference to be complete, *i.e.*, as severe as possible. The court also notes that this factor is redundant in a categorical takings analysis. If the taking is categorical, *see supra* Part I, the taking of the property is complete and the duration of the taking is only relevant regarding compensation. Consequently, any categorical taking would also necessarily result in a 100% interference in the use of land, the severest possible level.

III. SYNOPSIS

After addressing the *Arkansas Game* factors in the context of the facts of this case, the court concludes that a taking occurred when the STB issued a NITU that blocked Mrs. Caquelin's reversionary interest in the land. The STB's action delayed Mrs. Caquelin's reversion by 180 days. For that, the government owes just compensation, even if the amount is underwhelming in the circumstances. *See Loretto*, 458 U.S. at 434-35; *see also* First Stip. ("The parties have stipulated, based on the Court's liability decision, that the principal and interest of just compensation due to Plaintiffs Norma E. and Kenneth Caquelin is $900.00."). The taking was foreseeable, manifestly intended as a taking, and not mitigated by the character of the land or Mrs. Caquelin's reasonable investment-backed expectations. *See also Banks*, 138 Fed. Cl. at 150 (finding the same outcome with another NITU); *Balagna*, 138 Fed. Cl. at 403 (same).

Additionally, notwithstanding the foregoing takings analysis, if for whatever reason the court of appeals should conclude that no taking occurred, a tort claim under the Federal Torts Claim Act, 28 U.S.C. § 1346, would become applicable, but such a claim might actually establish that a taking was more appropriate. That Act provides that:

> "[D]istrict courts . . . shall have exclusive jurisdiction of civil actions or claims against the United States . . . for injury or loss of property . . . caused by the . . . wrongful act or omission of any employee of the [g]overnment . . . , under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1).

At issue in a tort claim would be the precepts set out in Chapter 7 of the *Restatement (Second) of Torts* (Am. Law Inst. 1965) (entitled "Invasions of the Interest in the Exclusive Possession of Land and its Physical Condition ('Trespass on

Land')."). Under the *Restatement*, "a person who is in possession" is someone who "has the right against all persons to immediate occupancy of land, if no other person is in possession." *Id.* § 157(c). With the abandonment by the railroad of its rail line, its easement was extinguished and Mrs. Caquelin was entitled to occupancy of her portion of the said corridor. "Liability for intentional intrusions on land" is covered by Section 158 of the *Restatement* (heading, capitals omitted), excepting "[c]onduct which would otherwise constitute a trespass if it is privileged." *Id.*, § 158 cmt. e. A privilege "may be given by law because of the purpose for which the actor acts or refrains from acting." *Id.* The STB's authorization to enter a NITU in anticipation of trail use and rail-banking may constitute such a privilege.[26] If so, the authorized action presumptively would give rise to a taking.

CONCLUSION

For the reasons stated, the government is liable for a taking of plaintiff's property on July 3, 2013, upon issuance of the NITU. In accord with the remand, the court concludes that final judgment for the stipulated amount of principal and interest, $900.00, shall be entered under RCFC 54(b) because there is no just reason for further delay. The clerk shall issue judgment consistent with this disposition.

The court will address attorneys' fees and expenses under the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4654 (c), after the judgment entered under RCFC 54(b) has become final as defined in 28 U.S.C. § 2412(d)(2)(G). *See* RCFC 54(d)(2)(B)

It is so **ORDERED**.

s/ Charles F. Lettow
Charles F. Lettow
Senior Judge

[26] *Restatement (Second) of Torts* § 163 pertains to "intended intrusions causing no harm." *Id.* (heading, capitals omitted). As the *Restatement* explains, "[t]he wrong for which a remedy is given under the rule stated in this Section consists of an interference with the possessor's interest in excluding others from the land." *Id.*, § 163 cmt. d.

STATUTORY AND REGULATORY ADDENDUM

Subsec. (e). Pub. L. 95–625, § 551(17), (19), inserted ''or national historic'' after ''scenic'' in two places and struck out from first proviso ''within two years'' before ''after notice of the selection of the right-of-way''.

Subsec. (g). Pub. L. 95–625, § 551(20), (21), as amended Pub. L. 96–87, § 401(m)(3), struck out second proviso '': *Provided further*, That condemnation is prohibited with respect to all acquisition of lands or interest in lands for the purposes of the Pacific Crest Trail'' after ''connecting trail right-of-way'' and inserted provisions that direct Federal acquisition for trail purposes be limited to high potential route segments or high potential historic sites and that no land or site located along a designated national historic trail or along the Continental Divide Scenic Trail be subject to the provisions of section 1653(f) of title 49 unless that land be deemed to be of historical significance under appropriate historical site criteria such as those for the National Register of Historic Places.

Pub. L. 95–248, § 1(4), substituted ''an average of one hundred and twenty-five acres per mile'' for ''twenty-five acres in any one mile'', and struck out limitation on exercise of authority with respect to a connecting trail right-of-way.

Subsec. (h). Pub. L. 95–625, § 551(17), substituted ''recreation, national scenic, or national historic'' for ''recreation or scenic'' in first sentence, and inserted ''or national historic'' after ''scenic'' in second sentence.

Subsec. (i). Pub. L. 95–625, § 551(17), substituted ''recreation, national scenic, or national historic'' for ''recreation or scenic''.

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of the Interior related to compliance with system activities requiring coordination and approval under this chapter and such functions of Secretary or other official in Department of Agriculture, insofar as they involve lands and programs under jurisdiction of that Department, related to compliance with this chapter with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§ 102(e), (f), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

§ 1247. State and local area recreation and historic trails

(a) Secretary of the Interior to encourage States, political subdivisions, and private interests; financial assistance for State and local projects

The Secretary of the Interior is directed to encourage States to consider, in their comprehensive statewide outdoor recreation plans and proposals for financial assistance for State and local projects submitted pursuant to the Land and Water Conservation Fund Act [16 U.S.C. 460*l*–4 et seq.], needs and opportunities for establishing park, forest, and other recreation and historic trails on lands owned or administered by States, and recreation and historic trails on lands in or near urban areas. The Secretary is also directed to encourage States to consider, in their comprehensive statewide historic preservation plans and proposals for financial assistance for State, local, and private projects submitted pursuant to the Act of October 15, 1966 (80 Stat. 915), as amended [16 U.S.C. 470 et seq.], needs and opportunities for establishing historic trails. He is further directed, in accordance with the authority contained in the Act of May 28, 1963 (77 Stat. 49) [16 U.S.C. 460*l* et seq.], to encourage States, political subdivisions, and private interests, including nonprofit organizations, to establish such trails.

(b) Secretary of Housing and Urban Development to encourage metropolitan and other urban areas; administrative and financial assistance in connection with recreation and transportation planning; administration of urban open-space program

The Secretary of Housing and Urban Development is directed, in administering the program of comprehensive urban planning and assistance under section 701[1] of the Housing Act of 1954, to encourage the planning of recreation trails in connection with the recreation and transportation planning for metropolitan and other urban areas. He is further directed, in administering the urban open-space program under title VII of the Housing Act of 1961 [42 U.S.C. 1500 et seq.], to encourage such recreation trails.

(c) Secretary of Agriculture to encourage States, local agencies, and private interests

The Secretary of Agriculture is directed, in accordance with authority vested in him, to encourage States and local agencies and private interests to establish such trails.

(d) Interim use of railroad rights-of-way

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

[1] See References in Text note below.

then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

(e) Designation and marking of trails; approval of Secretary of the Interior

Such trails may be designated and suitably marked as parts of the nationwide system of trails by the States, their political subdivisions, or other appropriate administering agencies with the approval of the Secretary of the Interior.

(Pub. L. 90–543, § 8, Oct. 2, 1968, 82 Stat. 925; Pub. L. 95–625, title V, § 551(22), Nov. 10, 1978, 92 Stat. 3516; Pub. L. 98–11, title II, § 208, Mar. 28, 1983, 97 Stat. 48; Pub. L. 104–88, title III, § 317(1), Dec. 29, 1995, 109 Stat. 949.)

REFERENCES IN TEXT

The Land and Water Conservation Fund Act, referred to in subsec. (a), is Pub. L. 88–578, Sept. 3, 1964, 78 Stat. 897, as amended, which is classified generally to part B (§ 460*l*–4 et seq.) of subchapter LXIX of chapter 1 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 460*l*–4 of this title and Tables.

Act of October 15, 1966, referred to in subsec. (a), is Pub. L. 89–665, as amended, popularly known as the ''National Historic Preservation Act'' which is classified generally to subchapter II (§ 470 et seq.) of chapter 1A of this title. For complete classification of this Act to the Code, see section 470 of this title and Tables.

Act of May 28, 1963, referred to in subsec. (a), is Pub. L. 88–29, May 28, 1963, 77 Stat. 49, as amended, which is classified generally to part A (§ 460*l* et seq.) of subchapter LXIX of chapter 1 of this title. For complete classification of this Act to the Code, see Tables.

Section 701 of the Housing Act of 1954, referred to in subsec. (b), was classified to section 461 of former Title 40, Public Buildings, Property, and Works, prior to repeal by Pub. L. 97–35, title III, § 313(b), Aug. 13, 1981, 95 Stat. 398.

The Housing Act of 1961, referred to in subsec. (b), is Pub. L. 87–70, June 30, 1961, 75 Stat. 149, as amended. Title VII of the Housing Act of 1961 was classified generally to chapter 8C (§ 1500 et seq.) of Title 42, The Public Health and Welfare, and was omitted from the Code pursuant to section 5316 of Title 42 which terminated authority to make grants or loans under such title VII after Jan. 1, 1975. For complete classification of this Act to the Code, see Short Title note set out under section 1701 of Title 12, Banks and Banking, and Tables.

The Railroad Revitalization and Regulatory Reform Act of 1976, referred to in subsec. (d), is Pub. L. 94–210, Feb. 5, 1976, 90 Stat. 31, as amended. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 45, Railroads, and Tables.

AMENDMENTS

1995—Subsec. (d). Pub. L. 104–88 substituted ''Chairman of the Surface Transportation Board'' for ''Chairman of the Interstate Commerce Commission'' and ''the Board'' for ''the Commission''.

1983—Subsecs. (d), (e). Pub. L. 98–11, § 208(2), added subsec. (d) and redesignated former subsec. (d) as (e).

1978—Subsec. (a). Pub. L. 95–625 inserted ''and historic'' after ''establishing park, forest, and other recreation'' and ''administered by States, and recreation'', and directed the Secretary to encourage States to consider in their plans and proposals the needs and opportunities for establishing historic trails.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–88 effective Jan. 1, 1996, see section 2 of Pub. L. 104–88, set out as an Effective Date note under section 701 of Title 49, Transportation.

§ 1248. Easements and rights-of-way

(a) Authorization; conditions

The Secretary of the Interior or the Secretary of Agriculture as the case may be, may grant easements and rights-of-way upon, over, under, across, or along any component of the national trails system in accordance with the laws applicable to the national park system and the national forest system, respectively: *Provided*, That any conditions contained in such easements and rights-of-way shall be related to the policy and purposes of this chapter.

(b) Cooperation of Federal agencies with Secretary of the Interior and Secretary of Agriculture

The Department of Defense, the Department of Transportation, the Surface Transportation Board, the Federal Communications Commission, the Secretary of Energy, and other Federal agencies having jurisdiction or control over or information concerning the use, abandonment, or disposition of roadways, utility rights-of-way, or other properties which may be suitable for the purpose of improving or expanding the national trails system shall cooperate with the Secretary of the Interior and the Secretary of Agriculture in order to assure, to the extent practicable, that any such properties having values suitable for trail purposes may be made available for such use.

(c) Abandoned railroad grants; retention of rights

Commencing October 4, 1988, any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in section 912 of title 43, shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof, except to the extent that any such right-of-way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such section.

(d) Location, incorporation, and management

(1) All rights-of-way, or portions thereof, retained by the United States pursuant to subsection (c) of this section which are located within the boundaries of a conservation system unit or a National Forest shall be added to and incorporated within such unit or National Forest and managed in accordance with applicable provisions of law, including this chapter.

(2) All such retained rights-of-way, or portions thereof, which are located outside the boundaries of a conservation system unit or a National Forest but adjacent to or contiguous with any portion of the public lands shall be managed pursuant to the Federal Land Policy and Management Act of 1976 [43 U.S.C. 1701 et seq.] and other applicable law, including this section.

(3) All such retained rights-of-way, or portions thereof, which are located outside the boundaries of a conservation system unit or National

Pub. L. 99–521, § 5(a), Oct. 22, 1986, 100 Stat. 2994, related to intervention in Commission proceedings.

Section 10329, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1351; Pub. L. 99–521, § 5(b), Oct. 22, 1986, 100 Stat. 2994, related to service of notice in Commission proceedings.

Section 10330, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1352, related to service of process in court proceedings.

Section 10341, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1352, authorized Commission to refer matters to joint boards.

Section 10342, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1353, related to establishment and membership of joint boards.

Section 10343, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1353, related to powers of joint boards.

Section 10344, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1354; Pub. L. 96–296, § 36, July 1, 1980, 94 Stat. 826, related to administration and proceedings of joint boards.

Section 10361, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1355, related to Rail Services Planning Office.

Section 10362, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1355; Pub. L. 98–216, § 2(5)–(7), Feb. 14, 1984, 98 Stat. 5; Pub. L. 99–509, title IV, § 4033(c)(7), Oct. 21, 1986, 100 Stat. 1909; Pub. L. 103–272, § 4(j)(13), July 5, 1994, 108 Stat. 1368, related to duties of Rail Services Planning Office.

Section 10363, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1356; Pub. L. 103–272, § 4(j)(14), July 5, 1994, 108 Stat. 1369, related to appointment and duties of Director of Rail Services Planning Office.

Section 10364, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1356; Pub. L. 103–272, § 5(m)(15), July 5, 1994, 108 Stat. 1377, related to powers of and assistance to Director.

Section 10381, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1357, related to Office of Rail Public Counsel.

Section 10382, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1357; Pub. L. 96–258, § 1(3), June 3, 1980, 94 Stat. 425, related to duties and standing of Office of Rail Public Counsel.

Section 10383, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1357; Pub. L. 103–272, § 4(j)(14), July 5, 1994, 108 Stat. 1369, related to duties and appointment of Director of Office of Rail Public Counsel.

Section 10384, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1358, related to staff of Office of Rail Public Counsel.

Section 10385, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1358; Pub. L. 103–272, § 5(m)(15), July 5, 1994, 108 Stat. 1377, related to powers of Office of Rail Public Counsel.

Section 10386, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1358, related to reports concerning activities of Office of Rail Public Counsel.

Section 10387, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1358, related to budget requests and estimates of Office of Rail Public Counsel.

Section 10388, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1358; Pub. L. 96–73, title III, § 301, Sept. 29, 1979, 93 Stat. 557, authorized appropriations for Office of Rail Public Counsel for fiscal year ending Sept. 30, 1980.

CHAPTER 105—JURISDICTION

§ 10501. General jurisdiction

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is—

(A) only by railroad; or

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in—

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country; or

(F) the United States and a place in a foreign country.

(b) The jurisdiction of the Board over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, 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.

(c)(1) In this subsection—

(A) the term ''local governmental authority''—

(i) has the same meaning given that term by section 5302(a)[1] of this title; and

(ii) includes a person or entity that contracts with the local governmental authority to provide transportation services; and

(B) the term ''mass transportation'' means transportation services described in section 5302(a)[1] of this title that are provided by rail.

(2) Except as provided in paragraph (3), the Board does not have jurisdiction under this part over—

(A) mass transportation provided by a local government authority; or

(B) a solid waste rail transfer facility as defined in section 10908 of this title, except as provided under sections 10908 and 10909 of this title.

(3)(A) Notwithstanding paragraph (2) of this subsection, a local governmental authority, described in paragraph (2), is subject to applicable laws of the United States related to—

(i) safety;

(ii) the representation of employees for collective bargaining; and

(iii) employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers.

(B) The Board has jurisdiction under sections 11102 and 11103 of this title over transportation

[1] See References in Text note below.

provided by a local governmental authority only if the Board finds that such governmental authority meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission that were in effect immediately before January 1, 1996. The enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act.

(Added Pub. L. 104–88, title I, §102(a), Dec. 29, 1995, 109 Stat. 807; amended Pub. L. 104–287, §5(21), Oct. 11, 1996, 110 Stat. 3390; Pub. L. 110–432, div. A, title VI, §602, Oct. 16, 2008, 122 Stat. 4900.)

REFERENCES IN TEXT

Section 5302 of this title, referred to in subsec. (c)(1)(A)(i), (B), was amended generally by Pub. L. 112–141, div. B, §20004, July 6, 2012, 126 Stat. 623, and, as so amended, no longer contains a subsec. (a) or a definition of ''mass transportation''. However, the term ''local governmental authority'' is defined elsewhere in that section.

The ICC Termination Act of 1995, referred to in subsec. (c)(3)(B), is Pub. L. 104–88, Dec. 29, 1995, 109 Stat. 803. For complete classification of this Act to the Code, see Short Title of 1995 Amendment note set out under section 101 of this title and Tables.

The Railway Labor Act, referred to in subsec. (c)(3)(B), is act May 20, 1926, ch. 347, 44 Stat. 577, as amended, which is classified principally to chapter 8 (§151 et seq.) of Title 45, Railroads. For complete classification of this Act to the Code, see section 151 of Title 45 and Tables.

The Railroad Retirement Act of 1974, referred to in subsec. (c)(3)(B), is act Aug. 29, 1935, ch. 812, as amended generally by Pub. L. 93–445, title I, §101, Oct. 16, 1974, 88 Stat. 1305, which is classified generally to subchapter IV (§231 et seq.) of chapter 9 of Title 45. For further details and complete classification of this Act to the Code, see Codification note set out preceding section 231 of Title 45, section 231t of Title 45, and Tables.

The Railroad Retirement Tax Act, referred to in subsec. (c)(3)(B), is act Aug. 16, 1954, ch. 736, §§3201, 3202, 3211, 3212, 3221, and 3231 to 3233, 68A Stat. 431, as amended, which is classified generally to chapter 22 (§3201 et seq.) of Title 26, Internal Revenue Code. For complete classification of this Act to the Code, see section 3233 of Title 26 and Tables.

The Railroad Unemployment Insurance Act, referred to in subsec. (c)(3)(B), is act June 25, 1938, ch. 680, 52 Stat. 1094, as amended, which is classified principally to chapter 11 (§351 et seq.) of Title 45, Railroads. For complete classification of this Act to the Code, see section 367 of Title 45 and Tables.

PRIOR PROVISIONS

Provisions similar to those in this section were contained in sections 10501 and 10504 of this title prior to the general amendment of this subtitle by Pub. L. 104–88, §102(a).

A prior section 10501, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1359; Pub. L. 96–448, title II, §214(c)(3)–(5), Oct. 14, 1980, 94 Stat. 1915; Pub. L. 103–272, §4(j)(15), July 5, 1994, 108 Stat. 1369, related to jurisdiction of the Interstate Commerce Commission, prior to the general amendment of this subtitle by Pub. L. 104–88, §102(a). See sections 10501 and 15301 of this title.

AMENDMENTS

2008—Subsec. (c)(2). Pub. L. 110–432 amended par. (2) generally. Prior to amendment, text read as follows: ''Except as provided in paragraph (3), the Board does not have jurisdiction under this part over mass transportation provided by a local governmental authority.''

1996—Subsec. (c)(3)(B). Pub. L. 104–287 substituted ''January 1, 1996'' for ''the effective date of the ICC Termination Act of 1995''.

EFFECTIVE DATE

Chapter effective Jan. 1, 1996, except as otherwise provided in Pub. L. 104–88, see section 2 of Pub. L. 104–88, set out as a note under section 701 of this title.

ABOLITION OF INTERSTATE COMMERCE COMMISSION

Interstate Commerce Commission abolished by section 101 of Pub. L. 104–88, set out as a note under section 701 of this title.

§ 10502. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—

(1) is not necessary to carry out the transportation policy of section 10101 of this title; and

(2) either—

(A) the transaction or service is of limited scope; or

(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

(b) The Board may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party. The Board shall, within 90 days after receipt of any such application, determine whether to begin an appropriate proceeding. If the Board decides not to begin a class exemption proceeding, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of an application under this subsection shall be completed within 9 months after it is begun.

(c) The Board may specify the period of time during which an exemption granted under this section is effective.

(d) The Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title. The Board shall, within 90 days after receipt of a request for revocation under this subsection, determine whether to begin an appropriate proceeding. If the Board decides not to begin a proceeding to revoke a class exemption, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of a request under this subsection shall be completed within 9 months after it is begun.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706 of this title. Nothing in this subsection or section 11706 of

AMENDMENTS

2008—Pub. L. 110–432, div. A, title VI, §§ 603(b), 604(b), 605(b), Oct. 16, 2008, 122 Stat. 4903, 4905, added items 10908 to 10910.

§ 10901. Authorizing construction and operation of railroad lines

(a) A person may—

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) provide transportation over, or by means of, an extended or additional railroad line; or

(4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line,

only if the Board issues a certificate authorizing such activity under subsection (c).

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Board shall give reasonable public notice, including notice to the Governor of any affected State, of the beginning of such proceeding.

(c) The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity. Such certificate may approve the application as filed, or with modifications, and may require compliance with conditions (other than labor protection conditions) the Board finds necessary in the public interest.

(d)(1) When a certificate has been issued by the Board under this section authorizing the construction or extension of a railroad line, no other rail carrier may block any construction or extension authorized by such certificate by refusing to permit the carrier to cross its property if—

(A) the construction does not unreasonably interfere with the operation of the crossed line;

(B) the operation does not materially interfere with the operation of the crossed line; and

(C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the parties are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Board for determination. The Board shall make a determination under this paragraph within 120 days after the dispute is submitted for determination.

(Added Pub. L. 104–88, title I, § 102(a), Dec. 29, 1995, 109 Stat. 822.)

PRIOR PROVISIONS

A prior section 10901, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1402; Pub. L. 96–448, title II, § 221, Oct. 14, 1980, 94 Stat. 1928, related to authorizing construction and operation of railroad lines, prior to the general amendment of this subtitle by Pub. L. 104–88, § 102(a).

EFFECTIVE DATE

Chapter effective Jan. 1, 1996, except as otherwise provided in Pub. L. 104–88, see section 2 of Pub. L. 104–88, set out as a note under section 701 of this title.

§ 10902. Short line purchases by Class II and Class III rail carriers

(a) A Class II or Class III rail carrier providing transportation subject to the jurisdiction of the Board under this part may acquire or operate an extended or additional rail line under this section only if the Board issues a certificate authorizing such activity under subsection (c).

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Board shall give reasonable public notice of the beginning of such proceeding.

(c) The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity. Such certificate may approve the application as filed, or with modifications, and may require compliance with conditions (other than labor protection conditions) the Board finds necessary in the public interest.

(d) The Board shall require any Class II rail carrier which receives a certificate under subsection (c) of this section to provide a fair and equitable arrangement for the protection of the interests of employees who may be affected thereby. The arrangement shall consist exclusively of one year of severance pay, which shall not exceed the amount of earnings from railroad employment of the employee during the 12-month period immediately preceding the date on which the application for such certificate is filed with the Board. The amount of such severance pay shall be reduced by the amount of earnings from railroad employment of the employee with the acquiring carrier during the 12-month period immediately following the effective date of the transaction to which the certificate applies. The parties may agree to terms other than as provided in this subsection. The Board shall not require such an arrangement from a Class III rail carrier which receives a certificate under subsection (c) of this section.

(Added Pub. L. 104–88, title I, § 102(a), Dec. 29, 1995, 109 Stat. 823.)

PRIOR PROVISIONS

A prior section 10902, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1403, related to authorizing action by rail carriers to provide adequate, efficient, and safe facilities.

§ 10903. Filing and procedure for application to abandon or discontinue

(a)(1) A rail carrier providing transportation subject to the jurisdiction of the Board under this part who intends to—

(A) abandon any part of its railroad lines; or

(B) discontinue the operation of all rail transportation over any part of its railroad lines,

must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out only as authorized under this chapter.

(2) When a rail carrier providing transportation subject to the jurisdiction of the Board under this part files an application, the application shall include—

(A) an accurate and understandable summary of the rail carrier's reasons for the proposed abandonment or discontinuance;

(B) a statement indicating that each interested person is entitled to make recommendations to the Board on the future of the rail line; and

(C)(i) a statement that the line is available for subsidy or sale in accordance with section 10904 of this title, (ii) a statement that the rail carrier will promptly provide to each interested party an estimate of the annual subsidy and minimum purchase price, calculated in accordance with section 10904 of this title, and (iii) the name and business address of the person who is authorized to discuss the subsidy or sale terms for the rail carrier.

(3) The rail carrier shall—

(A) send by certified mail notice of the application to the chief executive officer of each State that would be directly affected by the proposed abandonment or discontinuance;

(B) post a copy of the notice in each terminal and station on each portion of a railroad line proposed to be abandoned or over which all transportation is to be discontinued;

(C) publish a copy of the notice for 3 consecutive weeks in a newspaper of general circulation in each county in which each such portion is located;

(D) mail a copy of the notice, to the extent practicable, to all shippers that have made significant use (as designated by the Board) of the railroad line during the 12 months preceding the filing of the application; and

(E) attach to the application filed with the Board an affidavit certifying the manner in which subparagraphs (A) through (D) of this paragraph have been satisfied, and certifying that subparagraphs (A) through (D) have been satisfied within the most recent 30 days prior to the date the application is filed.

(b)(1) Except as provided in subsection (d), abandonment and discontinuance may occur as provided in section 10904.

(2) The Board shall require as a condition of any abandonment or discontinuance under this section provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under sections 11326(a) and 24706(c)[1] of this title before May 31, 1998.

(c)(1) In this subsection, the term ''potentially subject to abandonment'' has the meaning given the term in regulations of the Board. The regulations may include standards that vary by region of the United States and by railroad or group of railroads.

(2) Each rail carrier shall maintain a complete diagram of the transportation system operated, directly or indirectly, by the rail carrier. The rail carrier shall submit to the Board and publish amendments to its diagram that are necessary to maintain the accuracy of the diagram. The diagram shall—

(A) include a detailed description of each of its railroad lines potentially subject to abandonment; and

(B) identify each railroad line for which the rail carrier plans to file an application to abandon or discontinue under subsection (a) of this section.

(d) A rail carrier providing transportation subject to the jurisdiction of the Board under this part may—

(1) abandon any part of its railroad lines; or

(2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Board finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Board shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

(e) Subject to this section and sections 10904 and 10905 of this title, if the Board—

(1) finds public convenience and necessity, it shall—

(A) approve the application as filed; or

(B) approve the application with modifications and require compliance with conditions that the Board finds are required by public convenience and necessity; or

(2) fails to find public convenience and necessity, it shall deny the application.

(Added Pub. L. 104–88, title I, §102(a), Dec. 29, 1995, 109 Stat. 823; amended Pub. L. 112–141, div. C, title II, §32932(b), July 6, 2012, 126 Stat. 829.)

REFERENCES IN TEXT

Section 24706(c) of this title, referred to in subsec. (b)(2), was repealed by Pub. L. 105–134, title I, §142(a), Dec. 2, 1997, 111 Stat. 2576, effective 180 days after Dec. 2, 1997.

PRIOR PROVISIONS

A prior section 10903, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1403; Pub. L. 96–448, title IV, §402(a), Oct. 14, 1980, 94 Stat. 1941; Pub. L. 98–216, §2(14), Feb. 14, 1984, 98 Stat. 5; Pub. L. 103–272, §5(m)(24), July 5, 1994, 108 Stat. 1378, related to authorizing abandonment and discontinuance of railroad lines and rail transportation.

AMENDMENTS

2012—Subsec. (b)(2). Pub. L. 112–141 substituted ''24706(c) of this title before May 31, 1998'' for ''24706(c) of this title''.

EFFECTIVE DATE OF 2012 AMENDMENT

Amendment by Pub. L. 112–141 effective Oct. 1, 2012, see section 3(a) of Pub. L. 112–141, set out as an Effective and Termination Dates of 2012 Amendment note under section 101 of Title 23, Highways.

RAILROAD BRANCHLINE ABANDONMENTS BY BURLINGTON NORTHERN RAILROAD IN NORTH DAKOTA

Pub. L. 97–102, title IV, §402, Dec. 23, 1981, 95 Stat. 1465, as amended by Pub. L. 102–143, title III, §343, Oct. 28, 1991, 105 Stat. 948, provided that: ''Notwithstanding any other provision of law or of this Act, none of the funds provided in this or any other Act shall hereafter be used by the Interstate Commerce Commission to approve railroad branchline abandonments in the State of North Dakota by the entity generally known as the Burlington Northern Railroad, or its agents or assignees, in excess of a total of 350 miles, except that exempt abandonments and discontinuances that are effectuated pursuant to section 1152.50 of title 49 of the Code of Federal Regulations after the date of enactment of

[1] See References in Text note below.

the Department of Transportation and Related Agencies Appropriations Act, 1992 [Oct. 28, 1991], shall not apply toward such 350-mile limit: *Provided*, That this section shall be in lieu of section 311 (amendment numbered 93) as set forth in the conference report and the joint explanatory statement of the committee of conference on the Department of Transportation and Related Agencies Appropriations Act, 1982 (H.R. 4209), filed in the House of Representatives on November 13, 1981 (H. Rept. No. 97–331).'' [Section 311 of H.R. 4209 is section 311 of Pub. L. 97–102, title III, Dec. 23, 1981, 95 Stat. 1460, which is not classified to the Code.] Similar provisions were contained in Pub. L. 97–92, title IV, § 115, Dec. 15, 1981, 95 Stat. 1196.

[Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104–88, to Surface Transportation Board effective Jan. 1, 1996, by section 702 of this title, and section 101 of Pub. L. 104–88, set out as a note under section 701 of this title. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104–88, set out as a note under section 701 of this title.]

§ 10904. Offers of financial assistance to avoid abandonment and discontinuance

(a) In this section—

(1) the term ''avoidable cost'' means all expenses that would be incurred by a rail carrier in providing transportation that would not be incurred if the railroad line over which the transportation was provided were abandoned or if the transportation were discontinued. Expenses include cash inflows foregone and cash outflows incurred by the rail carrier as a result of not abandoning or discontinuing the transportation. Cash inflows foregone and cash outflows incurred include—

(A) working capital and required capital expenditure;

(B) expenditures to eliminate deferred maintenance;

(C) the current cost of freight cars, locomotives, and other equipment; and

(D) the foregone tax benefits from not retiring properties from rail service and other effects of applicable Federal and State income taxes; and

(2) the term ''reasonable return'' means—

(A) if a rail carrier is not in reorganization, the cost of capital to the rail carrier, as determined by the Board; and

(B) if a rail carrier is in reorganization, the mean cost of capital of rail carriers not in reorganization, as determined by the Board.

(b) Any rail carrier which has filed an application for abandonment or discontinuance shall provide promptly to a party considering an offer of financial assistance and shall provide concurrently to the Board—

(1) an estimate of the annual subsidy and minimum purchase price required to keep the line or a portion of the line in operation;

(2) its most recent reports on the physical condition of that part of the railroad line involved in the proposed abandonment or discontinuance;

(3) traffic, revenue, and other data necessary to determine the amount of annual financial assistance which would be required to continue rail transportation over that part of the railroad line; and

(4) any other information that the Board considers necessary to allow a potential offeror to calculate an adequate subsidy or purchase offer.

(c) Within 4 months after an application is filed under section 10903, any person may offer to subsidize or purchase the railroad line that is the subject of such application. Such offer shall be filed concurrently with the Board. If the offer to subsidize or purchase is less than the carrier's estimate stated pursuant to subsection (b)(1), the offer shall explain the basis of the disparity, and the manner in which the offer is calculated.

(d)(1) Unless the Board, within 15 days after the expiration of the 4-month period described in subsection (c), finds that one or more financially responsible persons (including a governmental authority) have offered financial assistance regarding that part of the railroad line to be abandoned or over which all rail transportation is to be discontinued, abandonment or discontinuance may be carried out in accordance with section 10903.

(2) If the Board finds that such an offer or offers of financial assistance has been made within such period, abandonment or discontinuance shall be postponed until—

(A) the carrier and a financially responsible person have reached agreement on a transaction for subsidy or sale of the line; or

(B) the conditions and amount of compensation are established under subsection (f).

(e) Except as provided in subsection (f)(3), if the rail carrier and a financially responsible person (including a governmental authority) fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Board establish the conditions and amount of compensation.

(f)(1) Whenever the Board is requested to establish the conditions and amount of compensation under this section—

(A) the Board shall render its decision within 30 days;

(B) for proposed sales, the Board shall determine the price and other terms of sale, except that in no case shall the Board set a price which is below the fair market value of the line (including, unless otherwise mutually agreed, all facilities on the line or portion necessary to provide effective transportation services); and

(C) for proposed subsidies, the Board shall establish the compensation as the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line.

(2) The decision of the Board shall be binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the Board's decision. In such a case, the abandonment or discontinuance may be carried out immediately, unless other offers are being considered pursuant to paragraph (3) of this subsection.

(3) If a rail carrier receives more than one offer to subsidize or purchase, it shall select the

offeror with whom it wishes to transact business, and complete the subsidy or sale agreement, or request that the Board establish the conditions and amount of compensation before the 40th day after the expiration of the 4-month period described in subsection (c). If no agreement on subsidy or sale is reached within such 40-day period and the Board has not been requested to establish the conditions and amount of compensation, any other offeror whose offer was made within the 4-month period described in subsection (c) may request that the Board establish the conditions and amount of compensation. If the Board has established the conditions and amount of compensation, and the original offer has been withdrawn, any other offeror whose offer was made within the 4-month period described in subsection (c) may accept the Board's decision within 20 days after such decision, and the Board shall require the carrier to enter into a subsidy or sale agreement with such offeror, if such subsidy or sale agreement incorporates the Board's decision.

(4)(A) No purchaser of a line or portion of line sold under this section may transfer or discontinue service on such line prior to the end of the second year after consummation of the sale, nor may such purchaser transfer such line, except to the rail carrier from whom it was purchased, prior to the end of the fifth year after consummation of the sale.

(B) No subsidy arrangement approved under this section shall remain in effect for more than one year, unless otherwise mutually agreed by the parties.

(g) Upon abandonment of a railroad line under this chapter, the obligation of the rail carrier abandoning the line to provide transportation on that line, as required by section 11101(a), is extinguished.

(Added Pub. L. 104–88, title I, §102(a), Dec. 29, 1995, 109 Stat. 825.)

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 10905 of this title prior to the general amendment of this subtitle by Pub. L. 104–88, §102(a).

A prior section 10904, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1404; Pub. L. 96–448, title IV, §402(b), Oct. 14, 1980, 94 Stat. 1941; Pub. L. 98–216, §2(4), Feb. 14, 1984, 98 Stat. 5, related to filing and procedure for applications to abandon or discontinue railroad lines or rail transportation, prior to the general amendment of this subtitle by Pub. L. 104–88, §102(a). See section 10903 of this title.

§ 10905. Offering abandoned rail properties for sale for public purposes

When the Board approves an application to abandon or discontinue under section 10903, the Board shall find whether the rail properties that are involved in the proposed abandonment or discontinuance are appropriate for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Board finds that the rail properties proposed to be abandoned are appropriate for public purposes and not required for continued rail operations, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Board. The conditions may include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the order, unless the properties have first been offered, on reasonable terms, for sale for public purposes.

(Added Pub. L. 104–88, title I, §102(a), Dec. 29, 1995, 109 Stat. 827.)

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 10906 of this title prior to the general amendment of this subtitle by Pub. L. 104–88, §102(a).

A prior section 10905, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1405; Pub. L. 96–448, title IV, §402(c), Oct. 14, 1980, 94 Stat. 1942; Pub. L. 103–272, §4(j)(26), July 5, 1994, 108 Stat. 1369, related to offers of financial assistance to avoid abandonment and discontinuance, prior to the general amendment of this subtitle by Pub. L. 104–88, §102(a). See section 10904 of this title.

§ 10906. Exception

Notwithstanding section 10901 and subchapter II of chapter 113 of this title, and without the approval of the Board, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

(Added Pub. L. 104–88, title I, §102(a), Dec. 29, 1995, 109 Stat. 827.)

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 10907 of this title prior to the general amendment of this subtitle by Pub. L. 104–88, §102(a).

A prior section 10906, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1406, related to offering abandoned rail properties for sale for public purposes, prior to the general amendment of this subtitle by Pub. L. 104–88, §102(a). See section 10905 of this title.

§ 10907. Railroad development

(a) In this section, the term ''financially responsible person'' means a person who—

(1) is capable of paying the constitutional minimum value of the railroad line proposed to be acquired; and

(2) is able to assure that adequate transportation will be provided over such line for a period of not less than 3 years.

Such term includes a governmental authority but does not include a Class I or Class II rail carrier.

(b)(1) When the Board finds that—

(A)(i) the public convenience and necessity require or permit the sale of a particular railroad line under this section; or

(ii) a railroad line is on a system diagram map as required under section 10903 of this title, but the rail carrier owning such line has not filed an application to abandon such line under section 10903 of this title before an application to purchase such line, or any required preliminary filing with respect to such application, is filed under this section; and

(B) an application to purchase such line has been filed by a financially responsible person,

(h) FEES.—The Board may charge permit applicants reasonable fees to implement this section, including the costs of third-party consultants.

(i) DEFINITIONS.—In this section the terms ''solid waste'', ''solid waste rail transfer facility'', and ''State requirements'' have the meaning given such terms in section 10908(e).

(Added Pub. L. 110–432, div. A, title VI, § 604(a), Oct. 16, 2008, 122 Stat. 4903.)

REFERENCES IN TEXT

The date of enactment of the Clean Railroads Act of 2008, referred to in subsecs. (a)(2), (b), and (e), is the date of enactment of title VI of div. A of Pub. L. 110–432, which was approved Oct. 16, 2008.

Public Law 108–421, referred to in subsec. (c)(2), is Pub. L. 108–421, Nov. 30, 2004, 118 Stat. 2375, known as the Highlands Conservation Act, which is not classified to the Code.

PRIOR PROVISIONS

For prior section 10909, see note set out under section 10907 of this title.

§ 10910. Effect on other statutes and authorities

Nothing in section 10908 or 10909 is intended to affect the traditional police powers of the State to require a rail carrier to comply with State and local environmental, public health, and public safety standards that are not unreasonably burdensome to interstate commerce and do not discriminate against rail carriers.

(Added Pub. L. 110–432, div. A, title VI, § 605(a), Oct. 16, 2008, 122 Stat. 4905.)

PRIOR PROVISIONS

For prior section 10910, see note set out under section 10907 of this title.

CHAPTER 111—OPERATIONS

SUBCHAPTER I—GENERAL REQUIREMENTS

SUBCHAPTER II—CAR SERVICE

SUBCHAPTER III—REPORTS AND RECORDS

SUBCHAPTER IV—RAILROAD COST ACCOUNTING

SUBCHAPTER I—GENERAL REQUIREMENTS

§ 11101. Common carrier transportation, service, and rates

(a) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request. A rail carrier shall not be found to have violated this section because it fulfills its reasonable commitments under contracts authorized under section 10709 of this title before responding to reasonable requests for service. Commitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable.

(b) A rail carrier shall also provide to any person, on request, the carrier's rates and other service terms. The response by a rail carrier to a request for the carrier's rates and other service terms shall be—

(1) in writing and forwarded to the requesting person promptly after receipt of the request; or

(2) promptly made available in electronic form.

(c) A rail carrier may not increase any common carrier rates or change any common carrier service terms unless 20 days have expired after written or electronic notice is provided to any person who, within the previous 12 months—

(1) has requested such rates or terms under subsection (b); or

(2) has made arrangements with the carrier for a shipment that would be subject to such increased rates or changed terms.

(d) With respect to transportation of agricultural products, in addition to the requirements of subsections (a), (b), and (c), a rail carrier shall publish, make available, and retain for public inspection its common carrier rates, schedules of rates, and other service terms, and any proposed and actual changes to such rates and service terms. For purposes of this subsection, agricultural products shall include grain as defined in section 3 of the United States Grain Standards Act (7 U.S.C. 75) and all products thereof, and fertilizer.

(e) A rail carrier shall provide transportation or service in accordance with the rates and service terms, and any changes thereto, as published or otherwise made available under subsection (b), (c), or (d).

(f) The Board shall, by regulation, establish rules to implement this section. The regulations shall provide for immediate disclosure and dissemination of rates and service terms, including classifications, rules, and practices, and their effective dates. Final regulations shall be adopted by the Board not later than 180 days after January 1, 1996.

(Added Pub. L. 104–88, title I, § 102(a), Dec. 29, 1995, 109 Stat. 830; amended Pub. L. 104–287, § 5(25), Oct. 11, 1996, 110 Stat. 3390.)

PRIOR PROVISIONS

A prior section 11101, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1419; Pub. L. 96–258, § 1(10), June 3, 1980, 94 Stat. 426; Pub. L. 96–448, title II, § 222, Oct. 14, 1980, 94 Stat. 1929; Pub. L. 99–521, § 9(a), Oct. 22, 1986, 100 Stat. 2997; Pub. L. 103–180, § 8, Dec. 3, 1993, 107 Stat. 2052, related to duties of carriers to provide transportation and service, prior to the general amendment of this subtitle by Pub. L. 104–88, § 102(a). See sections 11101, 13710, 14101, and 15701 of this title.

§ 1152.29 Prospective use of rights-of-way for interim trail use and rail banking.

(a) If any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line proposed to be abandoned for interim trail use and rail banking pursuant to 16 U.S.C. 1247(d), it must file a comment or otherwise include a request in its filing (in a regulated abandonment proceeding) or a petition (in an exemption proceeding) indicating that it would like to do so. The comment/request or petition must include:

(1) A map depicting, and an accurate description of, the right-of-way, or portion thereof (including mileposts), proposed to be acquired or used;

(2) A statement indicating the trail sponsor's willingness to assume full responsibility for:

(i) Managing the right-of-way;

(ii) Any legal liability arising out of the transfer or use of the right-of-way (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability); and

(iii) The payment of any and all taxes that may be levied or assessed against the right-of-way; and

(3) An acknowledgment that interim trail use is subject to the sponsor's continuing to meet its responsibilities described in paragraph (a)(2) of this section, and subject to possible future reconstruction and reactivation of the right-of-way for rail service. The statement must be in the following form:

STATEMENT OF WILLINGNESS TO ASSUME FINANCIAL RESPONSIBILITY

In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29 with respect to the right-of-way owned by _____ (Railroad) and operated by _____ (Railroad), _____ (Interim Trail Sponsor) is willing to assume full responsibility for: (1) Managing the right-of-way, (2) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability), and (3) the payment of any and all taxes that may be levied or assessed against the right of way. The property, known as _____ (Name of Branch Line), extends from railroad milepost _____ near _____ (Station Name), to railroad milepost _____, near _____ (Station name), a distance of _____ miles in [County(ies), (State(s)]. The right-of-way is part of a line of railroad proposed for abandonment in Docket No. STB AB _____ (Sub-No. _____). A map of the property depicting the right-of-way is attached.

_____ (Interim Trail Sponsor) acknowledges that use of the right-of-way is subject to the sponsor's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. A copy of this statement is being served on the railroad(s) on the same date it is being served on the Board.

(b)(1) In abandonment application proceedings under 49 U.S.C. 10903, interim trail use statements are due within the 45-day protest and comment period following the date the abandonment application is filed. See §1152.25(c). The applicant carrier's response notifying the Board whether and with whom it intends to negotiate a trail use agreement is due within 15 days after the close of the protest and comment period (i.e., 60 days after the abandonment application is filed).

(i) In every proceeding where a Trails Act request is made, the Board will determine whether the Trails Act is applicable.

(ii) If the Trails Act is not applicable because of failure to comply with §1152.29(a), or is applicable but the carrier either does not intend to negotiate an agreement, or does not timely notify the Board of its intention to negotiate, a decision on the merits will be issued and no Certificate of Interim Trail Use or Abandonment (CITU) will be issued. If the carrier is willing to negotiate an agreement, and the public convenience and necessity permit abandonment, the Board will issue a CITU.

(2) In exemption proceedings, a petition containing an interim trail use statement is due within 10 days after the date the notice of exemption is published in the FEDERAL REGISTER in the case of a class exemption and within 20 days after publication in the FEDERAL REGISTER of the notice of filing of a petition for exemption in the case of

a petition for exemption. When an interim trail use comment(s) or petition(s) is filed in an exemption proceeding, the railroad's reply to the Board (indicating whether and with whom it intends to negotiate an agreement) is due within 10 days after the date a petition requesting interim trail use is filed.

(3) Late-filed trail use statements must be supported by a statement showing good cause for late filing.

(c) *Regular abandonment proceedings.* (1) If continued rail service does not occur pursuant to 49 U.S.C. 10904 and Sec. 1152.27, and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a CITU to the railroad and to the interim trail sponsor for that portion of the right-of-way as to which both parties are willing to negotiate. The CITU will: Permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and material consistent with interim trail use and rail banking, as long as it is consistent with any other Board order, 30 days after the date the CITU is issued; and permit the railroad to fully abandon the line if no trail use agreement is reached 180 days after the CITU is issued, subject to appropriate conditions, including labor protection and environmental matters.

(2) The CITU will indicate that any interim trail use is subject to future restoration of rail service and to the sponsor's continuing to meet its responsibilities described in paragraph (a)(2) of this section. The CITU will also provide that, if an interim trail use agreement is reached (and thus interim trail use established), the parties shall file the notice described in paragraph (h) of this section. Additionally, the CITU will provide that if the sponsor intends to terminate interim trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of the CITU and request that it be vacated on a specified date. If a party requests that the CITU be vacated for only a portion of the right-of-way, the Board will issue an appropriate replacement CITU covering the remaining portion of the right-of-way subject to the interim trail use agreement. The Board will reopen the abandonment proceeding, vacate the CITU, and issue a decision permitting immediate abandonment for the involved portion of the right-of-way. Copies of the decision will be sent to:

(i) The abandonment applicant;

(ii) The owner of the right-of-way; and

(iii) The current trail sponsor.

(3) If an application to construct and operate a rail line over the right-of-way is authorized under 49 U.S.C. 10901 and 49 CFR part 1150, or exempted under 49 U.S.C. 10502, then the CITU will be vacated accordingly.

(d) *Exempt abandonment proceedings.* (1) If continued rail service does not occur under 49 U.S.C. 10904 and 1152.27 and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a Notice of Interim Trail Use or Abandonment (NITU) to the railroad and to the interim trail sponsor for the portion of the right-of-way as to which both parties are willing to negotiate. The NITU will: Permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and materials, consistent with interim trail use and rail banking, as long as it is consistent with any other Board order, 30 days after the date the NITU is issued; and permit the railroad to fully abandon the line if no agreement is reached 180 days after the NITU is issued, subject to appropriate conditions, including labor protection and environmental matters.

(2) The NITU will indicate that interim trail use is subject to future restoration of rail service and to the sponsor's continuing to meet its responsibilities described in paragraph (a)(2) of this section. The NITU will also provide that, if an interim trail use agreement is reached (and thus interim trail use established), the parties shall file the notice described in paragraph (h) of this section. Additionally, the NITU will provide that if the sponsor intends to terminate interim trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of the NITU and request that it be vacated on a specific date. If a party requests that the NITU be vacated for only a portion

of the right-of-way, the Board will issue an appropriate replacement NITU covering the remaining portion of the right-of-way subject to the interim trail use agreement. The Board will reopen the exemption proceeding, vacate the NITU, and issue a decision reinstating the exemption for that portion of the right-of-way. Copies of the decision will be sent to:

(i) The abandonment exemption applicant;

(ii) The owner of the right-of-way; and

(iii) The current trail sponsor.

(3) If an application to construct and operate a rail line over the right-of-way is authorized under 49 U.S.C. 10901 and 49 CFR part 1150, or exempted under 49 U.S.C. 10502, then the NITU will be vacated accordingly.

(e)(1) Where late-filed trail use statements are accepted, the Director (or designee) will telephone the railroad to determine whether abandonment has been consummated and, if not, whether the railroad is willing to negotiate an interim trail use agreement. The railroad shall confirm, in writing, its response, within 5 days. If abandonment has been consummated, the trail use request will be dismissed. If abandonment has not been consummated but the railroad refuses to negotiate, then trail use will be denied. If abandonment has not been consummated and the railroad is willing to negotiate, the abandonment proceeding will be reopened, the abandonment decision granting an application, petition for exemption or notice of exemption will be vacated, and an appropriate CITU or NITU will be issued. The effective date of the CITU or NITU will be the same date as the vacated decision or notice.

(2) A railroad that receives authority from the Board to abandon a line (in a regulated abandonment proceeding under 49 U.S.C. 10903, or by individual or class exemption issued under 49 U.S.C. 10502) shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line (e.g., discontinued operations, salvaged the track, canceled tariffs, and intends that the property be removed from the interstate rail network). The notice shall provide the name of the STB proceeding and its docket number, a brief description of the line, and a statement that the railroad has consummated, or fully exercised, the abandonment authority on a certain date. The notice shall be filed within 1 year of the service date of the decision permitting the abandonment (assuming that the railroad intends to consummate the abandonment). Notices will be deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation (such as outstanding conditions, including Trails Act conditions). If, after 1 year from the date of service of a decision permitting abandonment, consummation has not been effected by the railroad's filing of a notice of consummation, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. In that event, a new proceeding would have to be instituted if the railroad wants to abandon the line. Copies of the railroad's notice of consummation shall be filed with the Chief, Section of Administration, Office of Proceedings. In addition, the notice of consummation shall be sent to the State Public Service Commission (or equivalent agency) of every state through which the line passes. If, however, any legal or regulatory barrier to consummation exists at the end of the 1-year time period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier. For good cause shown, a railroad may file a request for an extension of time to file a notice so long as it does so sufficiently in advance of the expiration of the deadline for notifying the Board of consummation to allow for timely processing.

(f)(1) When a trail user intends to terminate trail use and another person intends to become a trail user by assuming financial responsibility for the right-of-way, then the existing and future trail users shall file, jointly:

(i) A copy of the extant CITU or NITU; and

(ii) A Statement of Willingness to Assume Financial Responsibility by the new trail user.

(iii) An acknowledgement that interim trail use is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

(2) The parties shall indicate the date on which responsibility for the right-of-way is to transfer to the new trail user. The Board will reopen the abandonment or exemption proceeding, vacate the existing NITU or CITU; and issue an appropriate replacement NITU or CITU to the new trail user.

(g) In proceedings where a timely trail use statement is filed, but due to either the railroad's indication of its unwillingness to negotiate interim trail use agreement, or its failure to timely notify the Board of its willingness to negotiate, a decision authorizing abandonment or an exemption notice or decision is issued instead of a CITU or NITU, and subsequently the railroad and trail use proponent nevertheless determine to negotiate an interim trail use agreement under the Trails Act, then the railroad and trail use proponent must file a joint pleading requesting that an appropriate CITU or NITU be issued. If the abandonment has not been consummated, the Board will reopen the proceeding, vacate the outstanding decision or notice (or portion thereof), and issue an appropriate CITU or NITU that will permit the parties to negotiate for a period agreed to by the parties in their joint filing, but not to exceed 180 days, at the end of which, the CITU or NITU will convert into a decision or notice permitting abandonment.

(h) When the parties negotiating for rail banking/interim trail use reach an agreement, the trail sponsor and railroad shall jointly notify the Board within 10 days that the agreement has been reached. The notice shall include a map depicting, and an accurate description of, the involved right-of-way or portion thereof (including mileposts) that is subject to the parties' interim trail use agreement and a certification that the interim trail use agreement includes provisions requiring the sponsor to fulfill the responsibilities described in paragraph (a)(2) of this section. Additionally, if the interim trail use agreement establishes interim trail use over less of the right-of-way than is covered by the CITU or NITU, the notice shall also include a request that the Board vacate the CITU or NITU and issue a replacement CITU/NITU for only the portion of the right-of-way covered by the interim trail use agreement. The Board will reopen the abandonment proceeding, vacate the CITU or NITU, issue an appropriate replacement CITU or NITU for only the portion of the right-of-way covered by the interim trail use agreement, and issue a decision permitting immediate abandonment of the portion of the right-of-way not subject to the interim trail use agreement. Copies of the decision will be sent to:

(1) The rail carrier that sought abandonment authorization;

(2) The owner of the right-of-way; and

(3) The current trail sponsor.

[61 FR 67883, Dec. 24, 1996, as amended at 62 FR 34670, June 27, 1997; 64 FR 53268, Oct. 1, 1999; 74 FR 52910, Oct. 15, 2009; 77 FR 25914, May 2, 2012]

Subpart D—Standards for Determining Costs, Revenues, and Return on Value

§ 1152.30 General.

(a) *Contents of subpart.* (1) 49 U.S.C. 10904 directs the Board to determine the extent to which the avoidable costs of providing rail service plus a reasonable return on the value of the line exceed the revenues attributable to the line. This subpart contains the methodology for such determinations and the standards necessary for application of those terms in the context of a particular proceeding. Such data will be used in reaching the Board's findings on the merits of an abandonment or discontinuance proceeding and in making the necessary financial assistance determinations.

(2) This subpart also sets forth a method by which the carrier may establish its Forecast Year estimates and Estimated Subsidy Payment to be included in its application (§ 1152.22(d) of this part). Furthermore, an offeror of financial assistance may use this method to formulate a subsidy offer and/or Proposed Subsidy Payment under 49 U.S.C. 10904 and § 1152.27 of subpart C of this part.

	Base year operations	Forecast year operations	Projected subsidy year operations
17. Avoidable loss from operations (line 4 minus line 7)			
18. Estimated forecast year loss from operations (line 4 minus lines 7 and 16)			
19. Estimated subsidy (line 4 minus lines 7, 11 and 16)			

[1] This projection shall be computed in accordance with § 1152.32(m).
[2] Omit in applications pursuant to §§ 1152.22 and 1152.23.
[3] If the amount in line 12c is a negative for the ''Forecast Year operations'' insert ''0'' in this line.

§ 1152.37 Financial status reports.

Within 30 days after the end of each quarter of the subsidy year, each carrier which is party to the financial assistance agreement shall submit to the subsidizer a Financial Status Report for each line operated under subsidy. Such Financial Status Report shall be in the form prescribed below. Significant deviations from the negotiated estimates must be explained. All data shall be developed in accordance with the methodology set forth in §§ 1152.31 through 1152.35. In the quarterly reports, the actual data for the year to date and a projection to the end of the subsidy year shall be shown for each item.

	Actual	Projected
Revenues for:		
1. Freight originated and/or terminated on branch		
2. Bridge traffic		
3. All other revenue and income		
4. Total revenues (lines 1 through 3)		
Avoidable costs for:		
5. On-branch costs (lines 5a through 5j)		
a. Maintenance of way and structures		
b. Maintenance of equipment		
c. Transportation		
d. General administrative		
e. Deadheading, taxi, and hotel		
f. Overhead movement		
g. Freight car costs		
h. Return on investment—locomotives		
i. Revenue taxes		
j. Property taxes		
6. Off-branch costs		
7. Total avoidable costs (line 5 plus line 6)		
Subsidization costs for:		
8. Rehabilitation		
9. Administrative costs		
10. Casualty		
11. Total subsidization costs (lines 8 through 10)		
Return on value:		
12. Valuation of property (lines 12a through 12c)		
a. Working capital		
b. Income tax consequences		
c. Net liquidation value		
13. Rate of return		
14. Total return on value (line 12 times line 13)		
Subsidy payment:		
15. Subsidy payment (line 4 minus lines 7, 11, and 14)		

Subpart E [Reserved]

Subpart F—Exempt Abandonments and Discontinuances of Service and Trackage Rights

§ 1152.50 Exempt abandonments and discontinuances of service and trackage rights.

(a)(1) A proposed abandonment or discontinuance of service or trackage

rights over a railroad line is exempt from the provisions of 49 U.S.C. 10903 if the criteria in this section are satisfied.

(2) Whenever the Board determines a proposed abandonment to be exempt from the requirements of 49 U.S.C. 10903, whether under this section or on the basis of the merits of an individual petition, the provisions of §§1152.27, 1152.28, and 1152.29 as they relate to exemption proceedings shall be applicable.

(b) An abandonment or discontinuance of service or trackage rights is exempt if the carrier certifies that no local traffic has moved over the line for at least 2 years and any overhead traffic on the line can be rerouted over other lines and that no formal complaint filed by a user of rail service on the line (or a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or any U.S. District Court or has been decided in favor of the complainant within the 2-year period. The complaint must allege (if pending), or prove (if decided) that the carrier has imposed an illegal embargo or other unlawful impediment to service.

(c) The Board has found:

(1) That its prior review and approval of these abandonments and discontinuances is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and

(2) That these transactions are of limited scope and continued regulation is unnecessary to protect shippers from abuse of market power. 49 U.S.C. 10502. A notice must be filed to use this class exemption. The procedures are set out in §1152.50(d). This class exemption does not relieve a carrier of its statutory obligation to protect the interests of employees. 49 U.S.C. 10502(g) and 10903(b)(2). This also does not preclude a carrier from seeking an exemption of a specific abandonment or discontinuance that does not fall within this class.

(d) *Notice of exemption.* (1) At least 10 days prior to filing a notice of exemption with the Board, the railroad seeking the exemption must notify in writing:

(i) The Public Service Commission (or equivalent agency) in the state(s) where the line will be abandoned or the service or trackage rights discontinued;

(ii) Department of Defense (Military Traffic Management Command, Transportation Engineering Agency, Railroads for National Defense Program);

(iii) The National Park Service, Recreation Resources Assistance Division; and

(iv) The U.S. Department of Agriculture, Chief of the Forest Service.

The notice shall name the railroad, describe the line involved, including United States Postal Service ZIP Codes, indicate that the exemption procedure is being used, and include the approximate date that the notice of exemption will be filed with the Board. The notice shall include the following statement ''Based on information in our possession, the line (does) (does not) contain federally granted rights-of-way. Any documentation in the railroad's possession will be made available promptly to those requesting it.''

(2) The railroad must file a verified notice using its appropriate abandonment docket number and subnumber (followed by the letter ''X'') with the Board at least 50 days before the abandonment or discontinuance is to be consummated. The notice shall include the proposed consummation date, the certification required in §1152.50(b), the information required in §§1152.22(a) (1) through (4), (7) and (8), and (e)(4), the level of labor protection, and a certificate that the notice requirements of §§1152.50(d)(1) and 1105.11 have been complied with.

(3) The Board, through the Director of the Office of Proceedings, shall publish a notice in the FEDERAL REGISTER within 20 days after the filing of the notice of exemption. The notice shall include a statement to alert the public that following any abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Petitions to stay the effective date of the notice on other than environmental or historic preservation grounds must be filed within 10 days of the publication. Petitions to stay the effective date of the notice on environmental or historic

preservation grounds may be filed at any time but must be filed sufficiently in advance of the effective date in order to allow the Board to consider and act on the petition before the notice becomes effective. Petitions for reconsideration, comments regarding environmental, energy and historic preservation matters, and requests for public use conditions under 49 U.S.C. 10905 and 49 CFR 1152.28(a)(2) must be filed within 20 days after publication. Requests for a trail use condition under 16 U.S.C. 1247(d) and 49 CFR 1152.29 must be filed within 10 days after publication. The exemption will be effective 30 days after publication, unless stayed. If the notice of exemption contains false or misleading information, the use of the exemption is void *ab initio* and the Board shall summarily reject the exemption notice.

(4) In out-of-service rail line exemption proceedings under 49 CFR 1152.50, the Board, on its own motion, will stay the effective date of individual notices of exemption when an informed decision on pending environmental and historic preservation issues cannot be made prior to the date that the exemption authority would otherwise become effective.

(5) A notice or decision to all parties will be issued if use of the exemption is made subject to environmental, energy, historic preservation, public use and/or interim trail use and rail banking conditions.

(6) To address whether the standard labor protective conditions set forth in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979), adequately protect affected employees, a petition for partial revocation of the exemption under 49 U.S.C. 10502(d) must be filed.

(e) *Consummation notice.* As provided in §1152.29(e)(2), rail carriers that receive authority to abandon a line under §1152.50 must file with the Board a notice that abandonment has been consummated.

[61 FR 67883, Dec. 24, 1996, as amended at 62 FR 34670, June 27, 1997]

Subpart G—Special Rules Applicable to Petitions for Abandonments or Discontinuances of Service or Trackage Rights Filed Under the 49 U.S.C. 10502 Exemption Procedure

§1152.60 Special rules.

(a) This section contains special rules applicable to any proceeding instituted under the 49 U.S.C. 10502 exemption procedure for either the abandonment of a rail line or the discontinuance of service or trackage rights over a rail line. General rules applicable to any proceeding filed under the 49 U.S.C. 10502 exemption procedure may be found at 49 CFR part 1121, but the rules in part 1152 control in case of any conflict with the general exemption rules. In the case of petitions for exemption for abandonment, notice of the filing of the petition will be published by the Board, through the Director of the Office of Proceedings, in the FEDERAL REGISTER 20 days after the petition is filed. There will be no further FEDERAL REGISTER publication later if and when a petition is granted.

(b) Any petition filed under the 49 U.S.C. 10502 exemption procedure for either the abandonment of a rail line or the discontinuance of service or trackage rights over a rail line must be accompanied by a map that meets the requirements of §1152.22(a)(4) of this part.

(c) A petitioner for an abandonment exemption shall submit, with its petition, a draft FEDERAL REGISTER notice of its petition according to the form prescribed below:

Draft FEDERAL REGISTER Notice. The petitioner shall submit a draft notice of its petition to be published by the Board within 20 days of the petition's filing with the Board. The petitioner must submit a copy of the draft notice as data contained on a computer diskette compatible with the Board's current word processing capabilities. The draft notice shall be in the form set forth below:

STB No. AB–_____ (Sub-No._____)

Notice of Petition for Exemption To Abandon or To Discontinue Service

On (insert date petition was filed with the Board) (name of petitioner) filed with the Surface Transportation Board, Washington, D.C. 20423, a petition for exemption for the

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Supplemental Environmental Impact Statement: I–70 Kansas City to St. Louis, MO

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Intent.

SUMMARY: The FHWA is issuing this notice to advise the public that a supplemental environmental impact statement (EIS) will be prepared for the approved I–70 First and Second Tier environmental documents. The I–70 corridor for this Supplemental EIS is from the I–470 interchange in Kansas City to near the Lake St. Louis interchange in St. Louis. The project length is approximately 199 miles.

FOR FURTHER INFORMATION CONTACT: Ms. Peggy Casey, Environmental Projects Engineer, FHWA Division Office, 3220 West Edgewood, Suite H, Jefferson City, MO 65109, Telephone: (573) 636–7104; or Mr. Kevin Keith, Chief Engineer, Missouri Department of Transportation, P.O. Box 270, Jefferson City, MO 65102, Telephone: (573) 751–2803.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Missouri Department of Transportation (MoDOT), will prepare a Supplemental EIS to consider the impacts of dedicated truck lanes. This Supplemental EIS will include all necessary environmental, cultural resource, social and economic studies and will be coordinated closely with the public, city and county officials, Metropolitan Planning Organizations, Regional Planning Commissions, and resource agencies, as appropriate.

The FHWA and MoDOT completed a First Tier EIS for the I–70 corridor in December, 2001. Subsequent to the First Tier, FHWA and MoDOT completed Second Tier environmental documents for seven sections of independent utility across the corridor. The Second Tier documents were completed in 2006. The First Tier evaluated the I–70 corridor in a general nature and recommended the improvement strategy of reconstructing and widening the existing facility. The Second Tier documents evaluated the environmental impacts of this strategy. The evaluations in these traditional environmental documents were based on the I–70 facility consisting of three 12-foot lanes in each direction with 12-foot shoulders along with a 124-foot grassed median. The only exceptions were in the urban areas approaching Kansas City, Columbia, through the Warrenton-Wright City-Wentzville area, and the area known as Mineola Hill.

A study Management Group (SMG) was assembled during the First Tier environmental process and was continued through the Second Tier process. Periodic SMG progress meetings were held during the First and Second Tier processes with resource agency personnel, including representatives from the Missouri Department of Natural Resources, the Missouri Department of Conservation, the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, the Natural Resources Conservation Service, and the Environmental Protection Agency. Coordination with the SMG has been re-initiated for the Supplemental EIS process.

This Supplemental EIS will begin with an evaluation and comparison of a truck-only strategy to the Preferred Strategy identified in the original EIS. If the evaluation process results in the recommendation of the truck-only strategy, several alternatives for implementing truck-only lanes will be developed and evaluated to determine which are reasonable and which, if any, are not. It is anticipated that truck-only alternatives will provide four lanes of travel in each direction—two lanes for truck and two lanes for general-purpose traffic. Also, there are several different methods for providing access at interchanges, ranging from simple merge options to more complicated truck/car interchanges. Interchange operations and their related impacts will be evaluated during the supplemental process. In addition, the Supplemental EIS will consider funding options for the project. The study will not recommend a specific option, but will look at the issues and challenges associated with applying these funding options.

To date, a preliminary coordination/scoping meeting was held on January 29, 2008. Resource agencies from the reconvened SMG attended and participated in the meeting. It was agreed that existing coordinating and cooperating agency agreements already in place from the first and second tier processes will remain in effect for the supplemental process. Numerous opportunities for public input will be provided. The Improve I–70 project website will be updated to include the Supplemental EIS and there will be regular outreach to both the local and state-wide media. There will be two separate series of public meetings. Each will have meetings at three locations along the study corridor. Community advisory groups will be re-established in Columbia and Kingdom City. A meeting with Kingdom City was held on January 23, 2008. Opportunities for briefing/listening sessions with key statewide stakeholders or groups will be provided. A formal location public hearing will take place at three locations along the corridor, along with informal two-hour drop-in centers prior to public meetings and hearing. Public notice will be given announcing the time and place of all public meetings and the hearings. The Supplemental Draft EIS will be available for public and agency review and comment prior to the public hearings.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues are identified, comments and suggestions are invited from all interested parties. Comments and questions concerning this proposed action and the Supplemental EIS should be directed to the FHWA or MoDOT at the addresses provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: April 17, 2008.

Peggy J. Casey,

Environmental Project Engineer, Jefferson City.

[FR Doc. E8–8761 Filed 4–22–08; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Ex Parte No. 678]

Consummation of Rail Line Abandonments That Are Subject to Historic Preservation and Other Environmental Conditions

AGENCY: Surface Transportation Board, DOT.

ACTION: Statement of board policy.

SUMMARY: The Surface Transportation Board is issuing this policy statement to clarify when, under the agency's regulation at 49 CFR 1152.29(e)(2), a carrier may ''consummate'' abandonment and file a ''notice of consummation'' of the abandonment of a rail line where the Board has imposed conditions on its abandonment authorization in order to satisfy section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. 470f, or the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (NEPA). In cases where a condition is imposed under NHPA, a notice of

consummation should not be filed for any part of the line until the historic review process is completed and the condition is removed. However, where a NHPA condition is needed only for a segment of the line or for a particular structure or structures, the railroad may request that the Board modify the condition to allow the railroad to salvage the portions of the line not affected by that condition. In contrast, a condition imposed under NEPA that is related to salvage activities is not a regulatory barrier to consummation of an abandonment.[1] A notice of consummation may be filed prior to satisfying such a salvage condition. However, filing a notice of consummation in that situation does not remove the condition, which must still be satisfied if and when salvage activities are conducted. If a property encumbered with salvage conditions changes ownership, the new owner must show that it agrees to abide by the salvage conditions at the time of conveyance by referencing the conditions in the instrument of conveyance, and providing a copy of the instrument of conveyance to the Board so that it can be filed in the pertinent abandonment proceeding. Additionally, railroads are cautioned to comply fully with section 106 of NHPA.

DATES: *Effective Date:* This policy statement is effective on April 23, 2008.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 245–0395, [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

SUPPLEMENTARY INFORMATION:

The Board is issuing this policy statement to address when a ''notice of consummation''—required under the agency's regulation at 49 CFR 1152.29(e)(2) to signify that a railroad intends to fully abandon a line and remove it from the national rail transportation system—may be filed in cases where the Board has imposed conditions on its abandonment authorization to satisfy section 106 of NHPA or to satisfy NEPA. This policy statement discusses each of these situations.

A railroad may not ''abandon'' a rail line (i.e., be relieved of its common carrier obligation to provide rail service over that line and dispose of the property for non-rail use) without express permission from the Board. *Chi. & N. W. Transp. Co.* v. *Kalo Brick & Tile Co.,* 450 U.S. 311, 321–22 (1981). Under 49 U.S.C. 10903, the Board may affirmatively approve the abandonment of a line by determining that the public convenience and necessity require or permit the proposed abandonment. Alternatively, the agency may authorize abandonment by granting an exemption (individually or by class of rail lines) under 49 U.S.C. 10502. *See* 49 CFR 1152.50 and 1152.60. Under either procedure, the Board must meet its responsibilities under other Federal statutes, including NEPA, NHPA, and the National Trails System Act (Trails Act) at 16 U.S.C. 1247(d). To meet those responsibilities, the Board may need to impose conditions that limit or postpone the carrier's ability to exercise its abandonment authorization in whole or in part.

The abandonment authority issued by the Board is permissive authority that the railroad may or may not decide to exercise. The agency retains jurisdiction over rail properties until abandonment authority has been consummated. *Hayfield N. R.R. Co.* v. *Chi. & N. W. Transp. Co.,* 467 U.S. 622, 633–34 (1984). Thus, it is important to be able to determine with certainty when abandonment authority is exercised.

To exercise the authority and ''consummate'' an abandonment, a railroad must manifest a clear intent to abandon through its statements and actions, including discontinuing operations and ''salvage'' of the line (removing rails and other materials from the property). *See Birt* v. *STB*, 90 F.3d 580, 585 (D.C. Cir. 1996) (*Birt*). Since 1997, under the Board regulation at 49 CFR 1152.29(e)(2), a railroad is required to file a ''notice of consummation'' with the agency within 1 year of the service date of the decision permitting abandonment to signify that it has exercised the authority granted and intends that the property be removed from the interstate rail network. Under the regulation, a notice of consummation is deemed conclusive on the issue of consummation if there are no legal or regulatory barriers to consummation (such as outstanding conditions, including Trails Act conditions that permit rail banking and interim trail use on railroad rights-of-way that would otherwise be abandoned). The regulation provides that if, after 1 year from the date of service of a decision permitting abandonment, consummation has not been effected by the railroad's filing of a notice of consummation, and there are no legal or regulatory barriers to consummation, the authority to abandon automatically expires (unless the Board has granted an extension). Once abandonment authority expires, a new proceeding would have to be instituted if the railroad wants to abandon the line. If, however, any legal or regulatory barrier to consummation exists at the end of the 1-year time period, the notice of consummation is due to be filed not later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier. A railroad can file a request for an extension of time to file a notice, for good cause shown, if it does so sufficiently in advance of the expiration of the deadline to allow for timely processing.

Until 49 CFR 1152.29(e)(2) was adopted, there was no rigid formula for determining whether a railroad intended to exercise its permissive abandonment authority; rather, where there was an issue regarding consummation, the Board and the courts examined the facts on a case-by-case basis. *Birt*, 90 F.3d at 585–86; *Black* v. *ICC*, 762 F.2d 106, 112–13 (D.C. Cir. 1985). Nor was there any specific time period during which abandonment had to be consummated. The notice of consummation requirement was added to provide certainty and reduce litigation (primarily in cases involving the Trails Act) regarding whether a railroad's actions demonstrated its intent to abandon the line after an abandonment authorization had become effective. *Compare Becker* v. *STB*, 132 F.3d 60, 63 (D.C. Cir. 1997) *and Fritsch* v. *ICC*, 59 F.3d 248, 253 (D.C. Cir. 1995) (trail conditions could not be imposed because abandonments had already been consummated) *with Birt*, 90 F.3d at 588 (Board retained jurisdiction to impose a trail condition because railroad's actions did not show an intent to abandon).

Recently, however, there has been some confusion regarding how the notice of consummation requirement applies to abandonment cases where conditions have been imposed to meet the Board's obligations under NHPA or NEPA. Because 49 CFR 1152.29(e)(2) does not specifically address those situations, the Board is issuing this policy statement to clarify when a notice of consummation may be filed (if the railroad wishes to consummate the abandonment) in such cases.

Historic Review Conditions Under NHPA. Where the historic review process is ongoing, the Board generally

[1] *See, e.g.*, Consummation notice filed by the Santa Clara Valley Transportation Authority (SCVTA) on May 8, 2007, in *Santa Clara Valley Transportation Authority—Abandonment Exemption—In Santa Clara and Alameda Counties, CA*, STB Docket No. AB–980X (notifying the Board of SCVTA's consummation of abandonment authority although it had not yet engaged in salvage activities and, therefore, had not yet complied with a salvage condition that the Board had attached to that authority).

imposes a condition prohibiting the railroad from selling the line, altering any sites or structures on the line, or conducting salvage activities on the line until the historic review process is complete and the Board removes the condition. This maintains the status quo pending completion of the historic review process. In some instances, where it becomes apparent that mitigation (i.e., documentation of the historic resources) is necessary only for a portion of the line or for a particular structure or structures, the Board may modify the condition to allow salvage of the rest of the line. But otherwise, abandonment may not be consummated, and potentially historic property may not be disturbed for any part of the line, until either there is a formal final determination by the Board's Section of Environmental Analysis (SEA) (acting on behalf of the Board) that the project would have no adverse effect on historic resources or a Memorandum of Agreement is entered into that sets forth the appropriate mitigation (i.e., documentation) to satisfy section 106 and the historic review condition is removed.

In some instances, railroads have sought to consummate the abandonment of part or all of a railroad line before the historic review process required by section 106 of NHPA is complete and the historic preservation condition imposed by the Board has been modified or removed. By this policy statement, the Board clarifies that, regardless of whether a section 106 condition applies to the entire line or is more limited, an historic preservation condition is a regulatory barrier to consummation. Therefore, a railroad should not file a notice of consummation seeking to remove the property from the Board's jurisdiction until the historic review process has been completed and the Board has removed the section 106 condition.

The Board recognizes that in some cases there can be an overriding need for partial consummation and that partial consummation could be in the public interest (for example, where a portion of the line is needed to complete a highway project that is important to the community and the historic preservation condition applies only to another part of the line or to a structure that would not be disturbed by the highway project), or could further a legitimate private interest. Therefore, the Board's policy will be that, for good cause shown, a railroad may make a request to file a notice of consummation for a portion of the line prior to formal removal of a section 106 condition. The Board would then consider, on a case-by-case basis, whether to waive its no-partial-consummation policy. The Board's primary concern in considering such requests will be to assure that partial consummation would not compromise satisfactory completion of the historic preservation process.

In some cases railroads have taken actions affecting rail property without first seeking abandonment authority. When this occurs on inactive lines, we generally do not discover these actions until after the fact when the carrier seeks abandonment authority. Such actions are unlawful. Not only is the rail line unlawfully severed from the national transportation system when this occurs, but the Board's ability to carry out its obligations under NEPA and NHPA may then be adversely affected. The Board will continue to carry out its obligations under those statutes and will take whatever steps necessary to enforce compliance with them. Railroads that take such actions may find not only that obtaining abandonment authority is delayed, but that the Board will require historic preservation training for the railroad's staff members who are involved with abandonment projects and require the railroad to document the in-house measures that it will implement to prevent such actions from occurring in the future. Other possible actions the Board may take include restricting the railroad's future ability to employ expedited procedures to obtain abandonment authority, imposing a financial penalty, and seeking a legal remedy against the railroad in a court of law.

Other Environmental Conditions. Most other environmental conditions imposed by the Board in abandonment cases relate to salvage activities. As discussed above, salvage activities can be one indicium of a railroad's intent to abandon. However, it is not necessary for a railroad to salvage a rail line in order to consummate abandonment authority. A railroad may decide not to salvage the line immediately upon being relieved of its service obligations, but rather to leave the track and ties in place. Therefore, the Board's policy is that a salvage condition,[2] unlike a section 106 condition, typically is not a regulatory barrier to the filing of a notice of consummation, and thus the existence of a salvage condition has no bearing on the consummation deadline. However, the salvage condition remains in place as a condition that attaches to the property and applies to salvage activities whenever they occur, even if salvage is conducted years later by a successor interest. Therefore, our policy will be to require any successor interest to agree to the condition by referencing the condition in the purchase contract or other instrument of conveyance, and by submitting a copy of that instrument of conveyance to the Board so that it can be filed in the docket of the relevant abandonment proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Regulatory Flexibility Certification

Pursuant to 5 U.S.C. 605(b), we conclude that our action in this proceeding will not have a significant economic impact on a substantial number of small entities. This action clarifies that conditions imposed by the Board under section 106 of NHPA are barriers to abandonment consummation, while NEPA salvage conditions are not. It also requires successor interests in properties encumbered with salvage conditions to reference the conditions in the instruments of conveyance, and to provide a copy of the instrument of conveyance to the Board so that it can be filed in the pertinent abandonment proceeding docket. These requirements will require little additional work and should not have a significant economic impact on a substantial number of small entities.

Decided: April 16, 2008.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan,

Acting Secretary.

[FR Doc. E8–8771 Filed 4–22–08; 8:45 am]

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[2] Salvage conditions are imposed on a case-by-case basis, but examples of conditions imposed in the past include permitting the railroad to salvage the line only during a particular time of year and requiring the railroad to provide notice to, or consult with, appropriate agencies prior to salvaging the line.

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Proposed Information Collection; Comment Request

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on a continuing

Environmental Impact Report/Supplemental Environmental Impact Statement, dated January 31, 2013, prepared by the City and County of San Francisco Planning Department pursuant to the California Environmental Quality Act and the environmental re-evaluation letter by SFMTA, dated April 17, 2013, and related documents evaluating any potential impacts.

Issued on: May 30, 2013.

Lucy Garliauskas,

Associate Administrator for Planning and Environment.

[FR Doc. 2013–13304 Filed 6–4–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2013–0126, Notice No. 3–8]

Safety Advisory: Compressed Gas Cylinders That Have Not Been Tested Properly

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Safety Advisory Notice.

SUMMARY: PHMSA has concluded that Shasta Fire Equipment, Inc. of Redding, CA, certified DOT-specification, exemption, and special permit cylinders with Requalification Identification Number (RIN) D183, between March 6, 2013 and May 6, 2013, without performing proper requalification testing to verify the suitability of the cylinders for continued service, as required by the Hazardous Materials Regulations (HMR; 49 CFR Parts 171–180).

FOR FURTHER INFORMATION CONTACT: PHMSA, DOT, 3401 Centrelake Drive, Suite 550B, Ontario, CA 91761, Telephone (909) 522–1901, Ms. Shelly Negrete, PHMSA Investigator; or Shasta Fire Equipment, Inc., 3092 Crossroads Drive, Redding, CA 96003, Telephone (530) 223–2492, Mr. Danniel Hoose, President.

SUPPLEMENTARY INFORMATION: Shasta Fire Equipment, Inc. marked DOT-specification 3AA, 3AL, 3HT, and exemption (DOT–E) and special permit (DOT–SP) cylinders, with RIN D183 between March 6, 2013 and May 6, 2013, certifying that they were successfully requalified accordance with HMR. After an inspection of Shasta Fire Equipment Inc., PHMSA has concluded that during this period, Shasta Fire Equipment, Inc. failed to requalify cylinders in compliance with the HMR. As a result, any tests performed during this period were unreliable and invalid.

Cylinders that have not been properly requalified in accordance with the HMR pose an unreasonable safety risk. Cylinders that are not properly tested may not have the structural integrity to contain hazardous materials safely under pressure during normal transportation and use and may leak or rupture, resulting in property damage, injuries, or death. The affected cylinders are used primarily in oxygen service but may also be used for other hazardous materials.

Additionally, it is a violation of the HMR to ship hazardous materials in a packaging or container that does not conform to requalification testing requirements. Shipping or transporting hazardous materials in a cylinder that does not meet the requirements of the HMR is unauthorized, unless and until the cylinder passes proper testing in accordance with the HMR.

If you identify a cylinder that is subject to this notice, you are advised to remove it from service and submit it to an authorized retester for proper testing. A list of retesters that PHMSA authorizes to perform requalification testing on DOT-specification and special permit cylinders is available on PHMSA's Web site under ''Cylinder Requalifiers'' at *http://www.phmsa.dot.gov/hazmat/permits-approvals/pressure-vessels*. Any cylinder purchased from or serviced by Shasta Fire Equipment, Inc. and marked with RIN D183 between March 6, 2013 and the date of this notice must be retested in accordance with the HMR requalification requirements before it is used. Cylinders described in this safety advisory that are filled with an atmospheric gas should be vented or otherwise safely discharged. Cylinders that are filled with a material other than an atmospheric gas should not be vented but should be safely discharged by authorized personnel.

Issued in Washington, DC, on May 30, 2013.

Magdy El-Sibaie,

Associate Administrator for Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration.

[FR Doc. 2013–13222 Filed 6–4–13; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 586 (Sub-No. 3X)]

North Central Railway Association, Inc.—Abandonment Exemption—in Franklin and Hardin Counties, Iowa

North Central Railway Association, Inc. (NCRA), has filed a verified notice of exemption under 49 CFR part 1152 subpart F–*Exempt Abandonments* to abandon 10.46 miles of rail line between milepost 201.46 at or near Ackley, and milepost 191.0 at or near Geneva, in Franklin and Hardin Counties, Iowa. The line traverses United States Postal Service Zip Codes 50633 and 50601.

NCRA has certified that: (1) No local traffic has moved over the line for at least two years; (2) there is no overhead traffic on the line; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the two-year period; and (4) the requirements at 49 CFR 1105.7(c) (environmental report), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on July 5, 2013, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Office of Environmental Analysis (OEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Serv. Rail Lines,* 5 I.C.C. 2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR. 1152.29 must be filed by June 17, 2013. Petitions to reopen or requests for public use conditions under 49 CFR. 1152.28 must be filed by June 25, 2013, with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to NCRA'S representative: T. Scott Bannister, 111 Fifty-Sixth Street, Des Moines, IA 50312.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

NCRA has filed a combined environmental and historic report that addresses the effects, if any, of the abandonment on the environment and historic resources. OEA will issue an environmental assessment (EA) by June 10, 2013. Interested persons may obtain a copy of the EA by writing to OEA (Room 1100, Surface Transportation Board, Washington, DC 20423–0001) or by calling OEA at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Information Relay Service at (800) 877–8339. Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), NCRA shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by NCRA's filing of a notice of consummation by June 5, 2014, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

Decided: May 30, 2013.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Raina S. White,

Clearance Clerk.

[FR Doc. 2013–13318 Filed 6–4–13; 8:45 am]

BILLING CODE 4915–01–P

[2] Each OFA must be accompanied by the filing fee, which is currently set at $1,600. *See* 49 CFR 1002.2(f)(25).

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Examination Questionnaire

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and Request for Comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35) (PRA).

Under the PRA, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information.

In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The OCC is soliciting comments concerning an information collection titled ''Examination Questionnaire.''

The OCC also is announcing that the proposed collection of information has been submitted to OMB for review and clearance under the PRA.

DATES: Comments must be submitted by July 5, 2013.

ADDRESSES: Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments by e-mail if possible. Comments may be sent to: Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Attention: 1557–0199, 400 7th Street SW., Suite 3E–218, Mail Stop 9W–11, Washington, DC 20219. In addition, comments may be sent by fax to (571) 465–4326 or by electronic mail to *regs.comments@occ.treas.gov.* You may personally inspect and photocopy comments at the OCC, 400 7th Street SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

All comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Additionally, please send a copy of your comments by mail to: OCC Desk Officer, 1557–0231, U.S. Office of Management and Budget, 725 17th Street NW., #10235, Washington, DC 20503, or by email to: *oira_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: You can request additional information of the collection from Johnny Vilela or Mary H. Gottlieb, Clearance Officers, (202) 649–5490, Legislative and Regulatory Activities Division (1557–0199), Office of the Comptroller of the Currency, 400 7th Street SW., Suite 3E–218, Mail Stop 9W–11, Washington, DC 20219.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, the OCC has submitted the following proposed collection of information to OMB for review and clearance.

Examination Questionnaire (OMB Control Number 1557–0199)—Extension

Title: Examination Questionnaire.

OMB Control No.: 1557–0199.

Affected Public: Businesses or other for-profit.

Type of Review: Extension of a currently approved collection.

Abstract: The OCC has revised its Examination Survey and updated the estimated burden hours to adjust for the current number of national banks and thrifts in the OCC's supervisory system. Completed Examination Surveys provide the OCC with the information needed to properly evaluate the content and conduct of OCC examinations. Completed Examination Surveys also help measure the OCC's performance and progress in improving the supervisory experience and agency communications. The OCC will use the information to identify problems or trends that may impair the effectiveness of the examination process, to identify ways to improve its service to the banking industry, and to analyze staffing and training needs. A survey is provided to each national bank or Federal savings association at the conclusion of its supervisory cycle. Bankers will now be able to complete this survey using a secure web-based data collection tool.

The OCC is conducting an Exit Survey of banks and thrifts after they exit the

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2019, I electronically filed the foregoing brief with the United States Court of Appeals for Federal Circuit by using the appellate CM/ECF system.

All case participants are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Erika B. Kranz
Erika B. Kranz

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

This brief complies with the type-volume limitation set forth in Federal Circuit Rule 32(a). Excepting the portions of the brief described in Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b), the brief contains 13,951 words.

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared using Microsoft Word 2013 in 14-Point Calisto MT, a proportionally-spaced font.

/s/ Erika B. Kranz
Erika B. Kranz