No. 19-1385

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NORMA E. CAQUELIN,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

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

CORRECTED BRIEF OF APPELLEE

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FORM 9. Certificate of Interest

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Caquelin v. United States

Case No. 19-1385

CERTIFICATE OF INTEREST

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

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Norma Caquelin	None	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:
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None.

6/21/2019
Date

/s/ Thomas S. Stewart
Signature of counsel

Thomas S. Stewart
Printed name of counsel

Please Note: All questions must be answered

cc: Elizabeth A. McCulley

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STATEMENT OF RELATED CASES

This is the second appeal to this Court. The Court's Opinion from the first appeal resulted in an unreported decision, *Caquelin v. United States,* 697 Fed. Appx1016 (Fed. Cir. 2017) ("*Caquelin II*"), which was issued on June 21, 2017 (Prost, Taranto, Hughes). Undersigned counsel is not aware of any pending related cases within the meaning of Federal Circuit Rule 47.5.

INTRODUCTION

The Supreme Court decided *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990) (*"Preseault I*") in 1990. After the Supreme Court analyzed the Preseaults' claim challenging the constitutionality of the Trails Act,[1] it went on to analyze whether a takings claim was a viable cause of action against the government for the blocking of the Preseaults' reversionary interest in their land. The Supreme Court unequivocally stated that Rails-to-Trails conversions giving rise to just compensation claims were clearly authorized by the Trails Act and affirmed that state property laws dictate whether the railroad held an easement or fee interest and, thus, dictated the nature of the property interests held by property owners. *See Preseault I,* 494 U.S. at 17. In keeping with takings jurisprudence, the Supreme Court placed the Trails Act in the category of physical takings because it dispossesses owners of their state law property interest. *Id.* at 23.

[1] *See* National Trails System Act, 16 U.S.C. § 1247(d) ("Trails Act").

This Court then decided *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) ("*Preseault II*") in 1996. In *Preseault II,* the key issue was whether authorization for the conversion of a railroad right-of-way to a public recreational hiking and biking trail by issuance of a Notice of Interim Trail Use ("NITU") constituted a taking when the owners' reversionary interest is blocked under the authority of the Trails Act. This Court decided that a Plaintiff is entitled to compensation in a Rails-to-Trails case when the NITU is issued if the railroad only held an easement and if the terms of the easements were limited to use for railroad purposes, such that a new use for a hiking and biking trail exceeds the scope of the railroad's easement or if the railroad's easement was abandoned prior to the issuance of the NITU. *See Preseault II,* 100 F.3d at 1533. A taking occurs under the Trails Act when the NITU is issued because it blocks the vesting of the landowners' reversionary rights.

This Court also concluded that the conversion of a railroad purposes easement to a trail is a physical occupation of the landowners' property interest that is categorical in nature. *Id.* at 1540. In doing so, the Court specifically distinguished governmental actions that restrain an owner's uses of property, which are regulatory takings, from physical takings that categorically disturb the owner's possession of the land. *Id.*

This Court has, on at least 8 separate occasions since 1996, affirmed the principles set forth in *Preseault II* that a categorical physical taking occurs pursuant to the Trails Act when the Surface Transportation Board ("STB") invokes § 8(d) of the Trails Act.[2] This Court has always held that a categorical physical taking occurs when the STB issues a NITU because the NITU is the only governmental action that blocks or destroys the reversionary interest of the property owner's rights to use their land during the pendency of the NITU.

In all of the precedent from this Court for at least 23 years, including *Caldwell, Barclay, Illig,* and *Ladd,* the invocation of § 8(d) of the Trails Act blocks the landowners' reversionary interests and a categorical physical taking occurs "even though no trail use agreement is reached, and any taking that may later be found would only have been temporary."[3] In fact, this Court has previously held *en banc* that the government's invocation of § 8(d) of the Trails Act gives rise to a categorical physical taking even if the duration is temporary.

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[2] *See Toews v. United States*, 376 F.3d 1371 (Fed. Cir. 2004); *Caldwell v. United States*, 391 F.3d 1229 (Fed. Cir. 2004) *cert. denied*, 547 U.S. 826 (2005); *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005); *Barclay v. United States*, 443 F.3d 1368 (Fed. Cir. 2006) *cert. denied,* 549 U.S. 1209 (2007); *Illig v. United States,* 274 Fed. Appx. 883 (Fed. Cir. 2008), *cert. denied*, 129 S. Ct. 2860 (2009); *Ellamae Phillips Co. v. United States*, 564 F.3d 1367 (Fed. Cir. 2009); *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010); *Ladd v. United States*, 630 F.3d 1015 (Fed. Cir. 2010), *reh'g and reh'g en banc denied*, 646 F.3d 910 (Fed. Cir. 2010).

[3] *See Ladd,* 630 F.3d at 1025.

This appeal by the government is a frontal assault on all precedent from this Court since *Preseault II* was decided in 1996 and is also contrary to decades of precedent from the Supreme Court. The government has merely repackaged and regurgitated tired and worn-out arguments they made both before the Supreme Court in *Preseault I* and this Court in *Preseault II*, that the issuance of the NITU does not trigger a takings in a Rails-to-Trails case, that the taking is not a physical taking at all but is a regulatory taking, and that the taking is not categorical in nature if it is temporary in duration.

This repeated attempt by the government to overturn long-standing takings jurisprudence must fail for the following reasons:

1) The taking that occurs when the NITU is issued is a categorical physical taking, even if temporary in duration, and is not a regulatory taking at all;

2) Although the government candidly admits that it wants to overturn *Caldwell* and *Ladd,* the reality is that it would need to overturn this Court's precedent in *Preseault II, Barclay,* and *Illig* as well in order to prevail in this appeal because this Court has repeatedly and consistently held that the taking is a categorical physical taking when the NITU is issued even if it is temporary in duration;

3) The government wrongly desires to apply a "multi-factor test" as if the taking in a Rails-to-Trails case is actually a temporary non-categorical regulatory taking when the NITU is issued, rather than a temporary categorical physical taking, when neither the Supreme Court or this Court has ever applied a multi-factor test to a categorical physical taking even if temporary in duration;

4) The government is wrongly attempting to create a standard of two takings based on one governmental act, a temporary non-categorical

regulatory taking if no trail use agreement is reached and a permanent categorical physical taking if a trail use agreement is ultimately signed;

5) Any modification to the bright-line rule established by this Court over decades would result in great uncertainty and chaos; and

6) Even if a multi-factor test is wrongly applied to a temporary categorical physical taking, under these facts, the end result is the same.

The government's attempt to ignore and misapply decades of precedent from the Supreme Court concerning categorical physical takings, and to overturn 23 years of precedent from this Court, should be rejected. There is no need for this Court to sit *en banc* to reverse *Ladd* and *Caldwell* because this Court has already held on numerous occasions that the issuance of the NITU by the STB triggers a categorical physical taking even if temporary in duration. Since the CFC thoroughly analyzed and correctly followed all of the precedent from the Supreme Court and this Court on taking jurisprudence in general and in Rails-to-Trails cases in particular, the Judgment of the CFC should be affirmed. In fact, the Judgment of the CFC should be summarily affirmed.

STATEMENT OF THE ISSUES

1. Whether decades of precedent should be reversed to hold that liability for a taking under the Trails Act when the NITU is issued should be treated as a regulatory taking instead of a physical taking.

2. Whether decades of precedent should be reversed to hold that liability for a taking under the Trails Act when the NITU is issued should be treated as a non-categorical regulatory taking instead of a categorical physical taking.

3. Whether the taking under the Trails Act when the NITU is issued should be treated as two takings depending on whether a trail use agreement is ultimately signed, a temporary non-categorical regulatory taking if no trail use agreement is signed and a permanent categorical physical taking if a trail use agreement is ultimately signed.

4. Whether a multi-factor test should be applied for the first time to a temporary categorical physical taking after the NITU is issued and no trail use agreement is signed and, if so, whether the result is any different.

STATEMENT OF THE CASE

The railroad acquired an easement for their railroad purposes in rural Iowa in approximately 1870. Appx0201. Norma Caquelin's great grandfather purchased a farm adjacent to the railroad corridor in 1892 and Mrs. Caquelin's family has owned the farmland since that time. Mrs. Caquelin owned two parcels of land adjacent to and under the railroad's right-of-way when the NITU was issued. The total acreage adjacent to the right-of-way at this location was 44.66 acres, including the 0.359-acre section underlying the right-of-way, and both the entire

farm and the right-of-way itself consist of very high-quality agricultural land in north central Iowa. Appx0001-0003.

The railroad filed a Notice of Exemption with the STB, seeking permission to abandon the corridor adjacent to Mrs. Caquelin's property, on May 13, 2013. Appx1331-1384. Under the STB's regulations, the abandonment exemption for the railroad line was scheduled to become effective on July 5, 2013 but, on June 21, 2013, potential trail operators filed a request for a NITU under the Trails Act. Appx1391-1393. On July 3, 2013, accordingly, the STB issued a NITU for the railroad line. Appx1402-1406.

The NITU provided a 180-day period during which the railroad could negotiate with the potential trail users under the Trails Act. After the 180-day negotiating period, absent an extension, the NITU would expire by its own terms, at which point the railroad could again formally consummate abandonment of the line. On October 15, 2013, a trail use request was filed with the STB, negotiations over a trail use agreement ensued, another 180-day extension to continue negotiations was requested on December 6, 2013, but no agreement was reached, and the NITU expired on December 30, 2013. Appx1407-1408.

During the negotiation process with the potential trail operators, instead of negotiating for a trail, the railroad quit claimed their easement interest to an entity owned by an adjacent farmer, who in turn quit claimed the property to other

adjacent owners, such that many farmers bought their own land back in order to avoid a hiking and biking trail. After the sale back to other adjacent landowners was completed, the railroad consummated their abandonment of the corridor on March 31, 2014. Appx1409.

After cross-motions for summary judgment were filed, the CFC granted Plaintiff's motion for summary judgment and denied the government's cross-motion for summary judgment on June 17, 2015. *See Caquelin v. United States,* 121 Fed. Cl. 658 (Fed. Cl. 2015) ("*Caquelin I*"). In its Opinion, the CFC concluded that the government was liable to Ms. Caquelin under the precedent set forth in *Preseault II* and its progeny. *Id.* at 663-67. The parties then stipulated to the amount of just compensation, including principal and interest, of $900, and the government filed its first appeal to this Court.

This Court vacated and remanded the CFC's grant of summary judgment in favor of the Plaintiffs on June 21, 2017. *See Caquelin II,* 697 Fed. Appx. 1016. This Court opined that "the government does not deny that such a Trail Agreement would properly be deemed a categorical taking," "the government argues that the 180-day blocking of reversion was not a categorical taking but instead calls for a multi-factor takings analysis," "perhaps *en banc* review might not be warranted, for example, if an appropriate multi-factor analysis were to lead to the same conclusion as the one *Ladd* drew," the CFC should conduct such proceedings "as

are necessary for an adjudication of how the government-advanced multi-factor analysis applies in this case," and "we recognize that, under *Ladd* as the current governing law in this Court, it does not appear that this remand could result in a different Court of Federal Claims judgment." *Id.* at 1018, fn. 2, 1019-20.

Following the directive from this Court, the CFC developed the factual record as instructed. The parties filed detailed Stipulations of Fact for Trial (Appx1515-1521) and a 3-day trial was held in Eldora, Iowa from May 30, 2018 to June 1, 2018. After extensive post-trial briefing and oral argument, the CFC entered its Opinion and Order on November 6, 2018. *See Caquelin v. United States,* 140 Fed. Cl. 564 (Fed. Cl. 2018) ("*Caquelin III*"). In a thorough and exhaustive analysis of both the facts and the law, the CFC held that a temporary categorical physical taking occurred when the NITU was issued and that a proper application of a multi-factor test under these facts did not change that result. The CFC entered Judgment accordingly (Appx0025) and the government's second notice of appeal started this second appeal.

SUMMARY OF THE ARGUMENT

Ever since *Preseault I* in 1990 and *Preseault II* in 1996, the authorization for the conversion of a railroad right-of-way to a public recreational hiking and biking trail by issuance of a NITU constituted a taking because the owner's reversionary interest was blocked under the authority of the Trails Act. The nature of the taking

is both physical rather than regulatory and is categorical instead of non-categorical. *See Preseault I,* 494 U.S. at 23; *Preseault II,* 100 F.3d at 1540.

In all of the precedent from this Court since *Preseault II* in 1996, including *Caldwell, Barclay, Illig,* and *Ladd,* the invocation of § 8(d) of the Trails Act blocks the landowners' reversionary interests and a categorical physical taking accrues. The categorical physical taking occurs with the issuance of the NITU, as this Court stated in *Ladd,* "even though no trail use agreement is reached, and any taking that may later be found would only have been temporary." *See Ladd,* 630 F.3d at 1025. Under binding precedent from this Court, it simply does not matter whether the temporary categorical physical taking lasts only 6 months or more than 6 years because the duration of the temporary categorical physical taking under the Trails Act when the NITU is issued goes to the issue of damages and not the issue of liability.

Not only is this appeal by the government a frontal assault on all precedent from this Court since *Preseault II*, any modification to the bright-line rule set forth by this Court in *Preseault II, Caldwell, Barclay, Illig,* and *Ladd,* that a temporary categorical physical taking occurs when the NITU is issued and no trail use agreement is ultimately signed, would result in great uncertainty and chaos. The government is attempting to recast takings jurisprudence under the Trails Act to mean that two different takings of the same property can occur depending on

whether a trail use agreement is ultimately signed. In essence, the government is attempting to treat a temporary taking when no trail use agreement is ultimately reached as a temporary non-categorical regulatory taking even though the vast majority of takings result in a permanent categorical physical taking when a trail use agreement is ultimately signed.

The government's attempt to create two different takings with two different standards has already been rejected by the Supreme Court and this Court. *See United States v. Dow,* 357 U.S. 17, 24 (1958); *Caldwell,* 391 F.3d at 1235; *Barclay,* 443 F.3d at 1378. If a multi-factor test is now applied as if the taking is a temporary regulatory taking, each case would require extensive factual records on each factor and disparate results on various factors would occur when none of the factors actually apply to a temporary categorical physical taking in the first place.

This Court's remand of the first Judgment in this case directed the CFC to answer the question of "how the government-advanced multi-factor analysis applies in this case?" *See Caquelin II,* 697 Fed. Appx. at 1020. As a result, the ultimate question posed to the CFC was how does the multi-factor analysis apply to a temporary categorical physical taking? Simply put, a multi-factor analysis does not apply to a temporary categorical physical taking and, as the CFC correctly noted, the entire exercise, based on established precedent from both the Supreme Court and this Court, was an "atypical task." *See Caquelin III,* 140 Fed. Cl. at 578.

Ultimately, when a multi-factor test is properly applied to a temporary categorical physical taking, the result is exactly the same because the duration of the taking goes to the issue of damages and not liability, the factor of reasonable investment-backed expectations does not apply to a categorical physical taking as a matter of law, and the severity during the pendency of the NITU is categorical and complete.

ARGUMENT

I. INVOCATION OF § 8(d) OF THE TRAILS ACT TRIGGERS A CATEGORICAL PHYSICAL TAKING EVEN IF TEMPORARY IN DURATION

The Takings Clause in the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." *See* U.S. Const. Amend. V. Under well-established takings jurisprudence, the government can take property physically or by regulation, and both categories can then be further sub-divided into categorical or non-categorical based on whether all uses are prohibited or not during the pendency of the taking, and then also whether the taking is permanent or temporary. Under well-established precedent from both the Supreme Court and this Court, the NITU triggers a categorical physical taking even if temporary in duration.

A. The Taking Under the Trails Act When the NITU is Issued is a Categorical Physical Taking and Not a Regulatory Taking At All

A categorical physical taking occurs whenever the government confiscates or directly appropriates an owner's property, physically occupies the owner's land,

dispossesses the owner by practically ousting the owner from the land, or transforms private property into public property. The leading examples of physical takings are *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982) (physical occupation of private rental property for installation of cable television) and *Kelo v. City of New London,* 545 U.S. 469 (2005) (city's exercise of eminent domain for economic development).

The physical taking is categorical whenever the government occupies, acquires, confiscates, or destroys all of the owner's state law rights to use, possess, and dispose of the owner's property. *See Caldwell,* 391 F.3d at 1235 (citing *Dow,* 357 U.S. at 23). In permanent categorical physical takings cases, liability for a taking is normally uncontested and the litigation typically focuses on "what compensation [is] just." *See Hendler v. United States,* 952 F.2d 1364, 1371 (Fed. Cir. 1991).

A regulatory taking differs from a physical taking and is generally defined by two essential features: (1) it is an exercise of the government's police power to limit the "evil" or prohibit a nuisance; and (2) does not dispossess the owner from the property. *See Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 414-15 (1922). Regulatory takings, unlike categorical physical takings, do not take or destroy all of an owner's state-law rights to use and possess their land and do not oust the owner from his property or deny the owner his right to exclude others from the

owner's land. An owner whose property is subject to a regulatory taking still enjoys the state-law right to use and possess their land and the owner has the right to exclude others from using the land. A regulatory taking, unlike a categorical physical taking, involves any situation where the government exercises its police power (typically a zoning or land use regulation) to limit the manner in which an owner may use or develop their property. *See Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978).

Permanent categorical physical takings present the most straight-forward scenario to analyze under the takings clause of the Fifth Amendment. In a permanent categorical physical takings situation, the government physically and permanently seizes possession of the entirety of the landowners' property for public use. The taking is physical in nature when the "owner is [deprived] of valuable property rights, even [if] title ha[s] not formally passed." *See Caldwell,* 391 F.3d at 1235.

A temporary categorical physical taking occurs when the government physically seizes the entirety of a landowners' property for public use but returns it after a period of time. Whenever the government physically seizes the entirety of a landowner's property or blocks all uses of the land, it is a categorical taking whether it is temporary or not. Whenever the taking is categorical in nature, whether permanent or temporary, there is no issue pertaining to liability and the

temporary nature of the taking is only relevant for the calculation of compensation. *See Kimball Laundry Co. v. United States,* 338, U.S. 1, 7, 16 (1949); *United States v. Pewee Coal Co.,* 341 U.S. 114, 117 (1951); *United States v. General Motors Corp.,* 323 U.S. 373, 382-83 (1945); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 318-20 (1987); *Yuba Nat. Resources v. United States,* 904 F.2d 1577, 1580-81 (Fed. Cir. 1990).

Physical takings that are partial but categorical in nature, meaning the government physically occupies or blocks all uses of part of an owner's property in some manner, also require just compensation under the takings clause of the Fifth Amendment. *See Loretto,* 458 U.S. at 419; *Hendler,* 952 F.2d at 1375-78. If the taking is a partial categorical physical taking, the taking is still compensable and it does not matter if the taking merely involves a single cable box as in *Loretto* or multiple wells as in *Hendler.* Partial categorical physical takings can also be permanent or temporary in duration but, whether temporary or permanent, compensation is still required. *See Loretto,* 458 U.S. at 436; *United States v. Causby,* 328 U.S. 256, 261-65 (1946); *Hendler,* 952 F.2d at 1375-78; *Kaiser Aetna v. United States,* 444 U.S. 164, 179-80 (1979); *Nollan v. California Coastal Comm'n.,* 483 U.S. 825, 831 (1991).

Regulatory takings differ substantially from physical takings. The standard for regulatory takings was first articulated in *Mahon* where the Court attempted to

balance the legitimate, regulatory needs of the state with the reasonable expectations of property owners and concluded that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *See Mahon,* 260 U.S. at 413-15. The Supreme Court struggled in *Mahon* to define a "set formula" for determining how much regulation was too much and, in essence, have always engaged in "essentially ad hoc, factual inquiries" ever since. *See Penn Central,* 438 U.S. at 124.

Regulatory takings can also be categorical and non-categorical. A categorical regulatory taking occurs when a "regulation denies all economically beneficial or productive use of land… for the common good." *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015-16 (1992) (citing *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980); *Loretto,* 458 U.S. 419). 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." *See Lucas,* 505 U.S. at 1017. Cases subsequent to *Lucas* have considered that a categorical regulatory taking is "limited to the 'extraordinary circumstances when no productive or economically beneficial use of land is permitted.'" *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 330 (2002) (quoting *Lucas,* 535 U.S. at 1017).

Under a non-categorical regulatory takings situation, as opposed to a temporary or permanent categorical physical takings situation, if a regulation does not "den[y] all economically beneficial or productive use of land," Courts turn to a "complex of factors," which is essentially the multi-factor test espoused by the government, which requires the *ad hoc*, factual inquiry. *See Penn Central,* 438 U.S. at 124; *Palazzolo v. Rhode Island,* 533 U.S. 606, 617 (2001). The factors enunciated in *Penn Central* have evolved into the "multi-factor test" and, if considered as a non-categorical regulatory taking, "each of these factors are considered in terms of the 'parcel as a whole.'" *See Seiber v. United States,* 364 F.3d 1356, 1370 (Fed. Cir. 2004) (quoting *Penn Central,* 438 U.S. at 130-31).

The government's attempt to ignore and eliminate decades of precedent from this Court to transform a temporary categorical physical taking under the Trails Act into a non-categorical regulatory taking must fail. This Court has previously, consistently, and specifically held that the issuance of a NITU triggers a categorical physical taking, even if temporary in duration, rather than a regulatory taking at all. Most importantly, neither the Supreme Court nor this Court has ever utilized or applied a multi-factor test on the issue of liability to either a permanent or a temporary taking if the taking was categorical in nature. Simply put, the government's repeated argument conflates categorical physical takings and regulatory takings, seeks to avoid decades of precedent from this Court

with respect to Trails Act takings cases, and is inconsistent with their own prior arguments.

B. The Taking in this Case is Actually a Temporary Categorical Physical Taking Under *Preseault II* and All of its Progeny

As stated by the Supreme Court in *Preseault I,* under § 8(d)[4] of the Trails Act when a NITU is issued, Congress intentionally prevented property interests from reverting to adjacent property owners under state law, which would occur absent the Trails Act. *See Preseault I,* 494 U.S. at 17. As the Supreme Court repeatedly stated, takings under the Trails Act are in the category of physical takings because the conversion of a railroad purposes easement to a hiking and biking trail completely dispossesses the owner of the owner's state law property interest. *Id.* at 8, 11, 13, 19, 22-24.

Although the government's focus has been directed at overturning *Caldwell* and *Ladd,* the fact is that *Caldwell, Barclay, Illig,* and *Ladd* all emanated from *Preseault II,* and *Preseault II* rejected the arguments now advanced by the government. This Court, relying on *Loretto,* concluded that the conversion to a trail is a **physical occupation** of the landowners' property interests that is

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[4] Section 8(d) of the Trails Act provides that, notwithstanding contrary state law, the right-of-way easement is authorized to be converted for public recreation. As a result, it redefines established state property laws thereby denying the owner his reversionary right to the land. *See National Wildlife Federation v. I.C.C.,* 850 F.2d 694 (D.C. Cir. 1988); *Citizens Against Rails-to-Trails v. Surface Transp. Bd.,* 267 F.3d 1144, 1149 (D.C. Cir. 2001).

categorical in nature and specifically distinguished governmental actions that restrain an owner's uses of property, which are regulatory takings, from physical takings that categorically disturb the owner's possession of the land: "**The Government's attempt to read the concept of "reasonable expectations" as used in regulatory takings law into the analysis of a physical occupation case would undermine, if not eviscerate, long-recognized understandings regarding protection of property rights; it is rejected categorically.**" *See Preseault II,* 100 F.3d at 1540 (emphasis added).

Caldwell was decided 8 years after *Preseault II,* in 2004, and again reached the conclusion that a categorical physical taking begins when the NITU is issued. First, this Court concluded that the categorical physical taking begins when the NITU is issued because physical possession of land occurs when the "owner [is] deprived of valuable property rights, even [if] title ha[s] not formally passed." *See Caldwell,* 391 F.3d at 1235 (citing *Dow,* 357 U.S. at 23). Second, this Court also specifically rejected the government's argument that there was or could be any difference whether a trail use agreement is ultimately reached or not—"alternatively, negotiations may fail, and the NITU would then convert into a Notice of Abandonment. In these circumstances, a temporary taking may have

occurred. It is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues."[5]

Barclay and *Illig* followed *Caldwell,* in 2006 and 2008 respectively, and announced a "bright-line rule" that a Trails Act taking occurs when the STB first invokes § 8(d) by stating that "we concluded that '[t]he issuance of the NITU is the only government action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way. Thus, a Trails Act taking begins and a takings claim accrues, if at all, on issuance of the NITU."[6]

Not only has the accrual date for a taking claim, whether permanent or temporary, been established by the Court on numerous occasions, this Court has also made it clear that it does not matter from a liability standpoint whether the taking is temporary or permanent in nature. In *Ladd,* the government once again argued that, contrary to its prior arguments which they won, that the issuance of the NITU alone, absent a Trail Use Agreement, merely provides a regulatory negotiating period, never implicates § 8(d) of the Trails Act, and does not fix the government's liability for a physical taking. The government's argument was specifically and directly rejected by this Court in *Ladd*—"we reject the

[5] *See Caldwell,* 391 F.3d at 1234 (footnotes omitted) (citing *Seiber,* 364 F.3d at 1365; *Cooley v. United States,* 324 F.3d 1297, 1299-300 (Fed. Cir. 2003)).
[6] *See Barclay,* 443 F.3d at 1373 (citations omitted).

government's present suggestion that the NITU is nothing more than a temporary regulatory hold on the railroad's authority to abandon its railway."[7]

Based on *Caldwell, Barclay, Illig,* and *Ladd,* a categorical physical taking begins when the NITU is issued. Furthermore, and most importantly, not only is the takings a physical taking and not regulatory at all, liability attaches immediately upon the issuance of the NITU and it simply does not matter whether the categorical physical taking is temporary or permanent. Simply put, just as this Court stated in *Caldwell,* if the taking occurs upon the issuance of the NITU, the liability attaches at that point even if the taking ultimately turns out to be temporary in nature. The taking is deemed to be permanent for liability purposes, because that is what the Trails Act intends, until it ultimately becomes temporary, because even all permanent takings may eventually end.[8] Under 29 years of precedent from the Supreme Court and 23 years of precedent from this Court, the issuance of a NITU "blocks" or "destroys" the landowners' reversionary property interests and triggers a categorical physical taking and it simply does not matter if the taking is ultimately permanent because a trail use agreement is reached or temporary if no trail use agreement is reached.

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[7] *See Ladd,* 630 F.3d at 1025.

[8] As this Court acknowledged in *Hendler,* every taking may end up being temporary, because "All takings are 'temporary' in the sense that the government can always change its mind at a later time." *See Hendler*, 952 F.2d at 1376.

C. Although the Government Won the Accrual and Statute of Limitations Issues, the Government Now Wants to Overrule *Preseault II, Caldwell, Barclay, Illig*, and *Ladd* Pertaining to Temporary Takings

The government's attempt to characterize the issuance of a NITU without an ultimate trail use agreement as a temporary regulatory taking instead of a temporary categorical physical taking is contrary to their own prior positions and arguments they made when the accrual and statute of limitations issues were litigated, which they won. It also is a blatant attempt to create a totally unworkable situation where the issuance of a NITU without a trail use agreement constitutes a temporary non-categorical regulatory taking and the issuance of a NITU that results in an ultimate trail use agreement creates a permanent categorical physical taking.

The government in *Caldwell* attempted to argue that the 6-year limitation period began to run when the STB first invoked § 8(d) for statute of limitations purposes but that there could be no ultimate takings liability unless and until an actual trail use agreement was signed.[9] This Court rejected the government's argument by announcing and affirming that "the issuance of the NITU is the only government action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way." *See Caldwell,* 391 F.3d at 1233-34.

[9] *See* U.S. Br. at 32.

The landowners in *Caldwell* sought rehearing on the accrual and statute of limitations issues and the government opposed it. The government argued that unlike the usual physical occupation case, the landowners in Trails Act takings cases are already deprived of physical possession of the land so the question is not when the landowner loses the right to possess the property (since he is already not in possession) but rather when he would otherwise have recovered ownership of the easement were it not for the operation of the Trails Act. The government specifically argued that the landowners' argument that the NITU works a regulatory taking and that a single government action under the Trails Act might work two separate takings, a regulatory taking when the NITU is issued and a physical taking when a Trail Use Agreement is signed, is clearly incorrect because the government action cannot trigger two separate takings, one regulatory and one physical. This Court rejected the landowners' arguments and denied rehearing with no dissent and the landowners sought a writ of certiorari to the Supreme Court which was denied.[10]

This Court then revisited the government's same arguments in *Barclay,* which was combined on appeal with *Renewal Bodyworks, Inc. v. United States,* 64 Fed. Cl. 609 (Fed. Cl. 2005), one year later. The landowners argued on appeal that, until an abandoned railroad right-of-way is actually physically converted to

[10] *See Caldwell,* 547 U.S. 826 (2005).

recreational trail use, there is no physical appropriation of the landowners' property. The landowners argued that a Trails Act takings claim could not accrue until the railroad transferred its interests to the ultimate trail user pursuant to an order invoking § 8(d) and that the trail user physically occupied the landowners' land. This Court rejected the landowners' arguments and affirmed its decision in *Caldwell:* **"The issuance of the NITU is the only event that must occur to "entitle the plaintiff to institute an action…. Accrual is not delayed until a trail use agreement is executed or the trail operator takes physical possession of the right-of-way**." *See Barclay*, 443 F.3d at 1373 (emphasis added) (citations omitted).

Even though *Barclay* confirmed *Caldwell* in every respect, the government almost completely ignores it.[11] After this Court's decision in *Barclay,* the Plaintiffs sought *en banc* review. The government opposed rehearing and argued that the NITU was the only federal action that might allegedly constitute a taking by preventing the reversion of property rights under state law, again attempting to advance the notion that the claim accrued when the NITU was issued but that liability was only fixed if a trail use agreement was ultimately signed. The government, quoting *Caldwell,* actually stated that a taking occurs when the owner is deprived of use of the property, which in the context of the Trails Act occurs by

[11] *Barclay* is only mentioned one time in the government's brief, in a footnote, and only refers to the dissenting opinion. *See* U.S. Br. at 32, fn. 5.

blocking the reversion, and that the question is not when the owner loses the right to physically occupy the property but, rather, when the owner would otherwise have recovered full possession of the easement were it not for the operation of the Trails Act. After considering the government's arguments, this Court denied rehearing without dissent. The Plaintiffs filed a petition for a writ of certiorari to the Supreme Court that was denied.[12]

The *Illig* case followed a similar path. *Caldwell* was decided two days before the hearing to approve the settlement and, on the basis of *Caldwell*, the government withdrew from the settlement because the landowners' claims were now time-barred. The CFC followed the holdings in *Caldwell* and *Barclay* and dismissed the landowners' claims.[13] After the landowners appealed in a unanimous decision, this Court affirmed the controlling authority of *Caldwell* and *Barclay* and summarily affirmed the CFC's dismissal of the claims as time-barred.[14]

The landowners again sought rehearing *en banc*, which was denied without dissent. The landowners then petitioned for a writ of certiorari to the Supreme Court. The government presented its argument in its response to the landowners' petition for certiorari by and through Elena Kagan, who was then Solicitor

[12] *See Barclay,* 549 U.S. 1209 (2007).
[13] *See Illig v. United States*, 67 Fed. Cl. 47, 56 (Fed. Cl. 2005).
[14] *See Illig*, 274 Fed. Appx. at 883-884.

General. In the government's brief opposing certiorari, Solicitor General Kagan wrote: **"The fact that any taking resulting from the interference may later prove to have been temporary is irrelevant**; as the court of appeals has explained, "[i]t is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues."[15]

It is ironic that the United States now wants to overturn *Caldwell, Barclay,* and *Illig* when the government argued that the NITU marks the accrual of a Trails Act taking in all previous cases—**and won that argument**! As confirmed by this Court and previously argued by the Department of Justice over and over again, "[t]he NITU marks the 'finite start' to either temporary or permanent takings claims by halting abandonment and the vesting of state law reversionary interests when issued." *See Ladd*, 630 F.3d at 1025 (holding a takings occurs even when no trail use agreement is reached and the NITU expires). As a result, the NITU blocks the landowners' rights, all uses have been taken, whether permanent or ultimately temporary, and a categorical physical taking begins.

Incredibly, the government now wants to distinguish *Caldwell* by observing that the STB's issuance of a NITU actually led to an interim trail use agreement in *Caldwell*, making it permanent, and no such agreement was reached in this case,

[15] Brief of the United States in Opposition to Petition for Writ of Certiorari in *Illig v. United States*, Supreme Court No. 08-852, at 9, citing *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1355-1356 (Fed. Cir. 2006), *aff'd*, 128 S. Ct. 750 (2008) and *Caldwell*, 391 F.3d at 1234 (emphasis added).

making it temporary.[16] But, this Court shut that door in *Barclay* two years later, which the government fails to even acknowledge. *Barclay* unequivocally and expressly affirmed *Caldwell* and made it perfectly clear that the issuance of a NITU, which blocks the landowners' reversionary interest, triggers accrual of a Trails Act taking. The government's failure to address *Barclay,* which expressly affirmed *Caldwell* and held that the issuance of a "NITU triggers the accrual of the cause of action… emphasize[s] the correctness of the *Caldwell* rule" and "**supplies a single bright-line rule**[17] for accrual that avoids consequences," is disingenuous at best. *See Barclay*, 443 F.3d at 1378 (emphasis added).

The government now once again posits the proposition that a compensable taking does not occur until the railroad and trail user reach a trail use agreement.[18] This Court rejected virtually identical arguments to those the government is now making in *Ladd*—**"We reject the government's present suggestion that the NITU is nothing more than a temporary regulatory hold** on the railroad's authority to abandon its railway." *See Ladd,* 630 F.3d at 1025 (emphasis added). This Court then basically chastised the government's argument: "To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather… '**a mere restriction on its**

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[16] *See* U.S. Br. at 30 (citing *Caldwell,* 391 F.3d at 1234) (emphasis in original).

[17] A "bright-line rule," consistent with all the precedent from the Supreme Court, is the definition of a categorical taking.

[18] *See* U.S. Br. at 30-32.

use' is to use words in a manner that deprives them of all their ordinary meaning." *Id., citing Nollan*, 483 U.S. at 831 (emphasis added).

This Court's decision in *Ladd* is and should be dispositive here.[19] After affirming *Caldwell* and *Barclay, Ladd* specifically addressed the circumstance where a NITU is issued and no trail use agreement is reached: "**Because according to our precedent, a takings claim accrues on the date that a NITU issues, events arising after that date—including entering into a trail use agreement and converting the railway to a recreational trail—cannot be necessary elements of the claim. Hence it is irrelevant that no trail use agreement has been reached and that no recreational trail has been established.**" *See Ladd*, 630 F.3d at 1024 (emphasis added). As this Court specified, the action by the government that gives rise to a takings claim is the issuance of a NITU by the STB, regardless of the events that follow. *Id.* In addition, this Court added that "where no trail use agreement is reached, the taking may be temporary…. However, physical takings are compensable, even when temporary." *Id.* at 1025 (citing *Caldwell,* 391 F.3d at 1234; *Barclay,* 443 F.3d at 1348; *Hendler,* 952 F.2d at 1376).

The government's attempted assertion that the opinions in *Caldwell, Barclay,* and *Illig* do not really address or opine on whether the issuance of a NITU

[19] The government's attempt to seek rehearing *en banc* was denied. *See Ladd,* 646 F.3d at 912. The government did not seek certiorari to the Supreme Court.

involves a compensable temporary taking when no agreement is reached is unavailing because, in *Ladd,* this Court concluded that "the duration of the taking goes to damages, not to whether a compensable taking has occurred." *See Ladd,* 630 F.3d at 1025. The government's attempt to portray the "accrual" cases of *Caldwell, Barclay,* and *Illig* as being limited to situations where a trail use agreement is ultimately signed is contrary to all precedent from this Court. Despite the government's protestations to the contrary, it is immaterial to liability whether the blocking of the reversionary interest was six months or six years because the duration of the blocking goes to the issue of damages and not to whether a taking has occurred.

D. The Government's Attempted Reliance on *Arkansas Game* and *Tahoe-Sierra* is Misplaced Because Neither Taking was Categorical in Nature and the Taking in *Tahoe-Sierra* was Not Even Physical

The government relies almost exclusively on the Supreme Court decisions in *Arkansas Game*[20] and *Tahoe-Sierra*[21] to argue that a temporary taking under the Trails Act which is temporary in nature must be analyzed as a regulatory taking and that, as a result, a multi-factor analysis must be applied. According to the government, "the Supreme Court's decision in *Arkansas Game* makes abundantly clear that temporary physical takings claims require fact-specific consideration

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[20] *See Arkansas Game & Fish Comm'n. v. United States,* 568 U.S. 23 (2012); *see also* U.S. Br. at 35-38.
[21] *See* U.S. Br. at 22-25.

(rather than treatment as a taking *per se*),"[22] such that a multi-factor test must be applied in any temporary physical takings situation whether the taking is actually categorical in nature or not.

Then, relying on *Tahoe-Sierra*, the government argues that a temporary taking case under the Trails Act "is properly viewed as a possible regulatory (not physical) taking that is subject to the multi-factor analysis established in *Penn Central,*"[23] when the taking in *Tahoe-Sierra* was neither physical or categorical. Although *Arkansas Game* ultimately applied a multi-factor test, unlike Trails Act takings, the taking in *Arkansas Game* was not categorical. In addition, the government's attempted argument that a multi-factor test must be applied based on the decision in *Tahoe-Sierra* is misplaced because the taking in *Tahoe-Sierra* was neither physical nor categorical.

The Supreme Court in *Arkansas Game* simply ruled that government-induced flooding which is temporary in duration gains no automatic exemption from the Takings Clause and remanded the case back to this Court.[24] After remand from the Supreme Court, this Court recognized that intermittent temporary flooding can give rise to a temporary taking and ultimately affirmed. Although this Court recognized that the intermittent flooding was a physical taking, the

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[22] *Id.* at 35.
[23] *Id.* at 25.
[24] *See Arkansas Game,* 568 U.S. at 32.

entire focus was on the fact that the intermittent flooding was temporary in nature and non-categorical rather than permanent and categorical. After relying on the Supreme Court's conclusion that government-induced flooding can constitute a taking even if it is temporary in duration, this Court utilized and multi-factor test because "[u]nlike permanent physical takings… temporary invasions 'are subject to a more complex balancing process to determine whether they are a taking.'"[25]

This Court was correct to use a multi-factor balancing test upon remand but the reason to utilize a multi-factor test really had to do with the fact that the intermittent flooding did not result in a categorical taking as opposed to the fact that it was temporary in duration. Although the Court seemed to imply that a multi-factor test should be utilized anytime the physical taking is temporary in nature, as evidenced by this Court's interpretation of the directive from the Supreme Court, a multi-factor test should be utilized, whether physical or regulatory, only when the taking is not categorical. In fact, without ever saying it, this Court repeatedly made statements and pointed out evidence that supported the conclusion that the temporary taking in *Arkansas Game* was not categorical at all.[26]

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[25] *See Arkansas Game & Fish Comm'n v. United States,* 736 F.3d 1364, 1369 (Fed. Cir. 2012).

[26] *Id.* at 1368-1372. The trees may have been damaged but the flooding did not result in a total destruction of the trees, the roots of the trees were damaged and injured but the trees themselves were not permanently or categorically taken, and the use of the land for the growing of the trees was not categorically taken either.

Not only does *Arkansas Game* not support the government's theory that a multi-factor test must be applied to a temporary categorical physical taking, *Arkansas Game* actually repudiates the government's new theory because this Court, after reviewing the overwhelming evidence presented at trial in *Arkansas Game* that the trees were damaged as a result of the intermittent temporary taking due to flooding, correctly applied a multi-factor test in a flooding case because the taking was not categorical in nature. The government's attempt to now argue that all temporary takings of any type, including takings that are categorical in nature, must now be analyzed under some multi-factor test actually ignores over 100 years of takings jurisprudence from the Supreme Court, over two decades of precedent from this Court, and this Court's actual language and holding of *Arkansas Game.*[27]

The government's argument that *Tahoe-Sierra* requires a temporary takings case under the Trails Act to be analyzed under a regulatory takings framework such that a multi-factor analysis must be applied is completely misplaced.[28] Since *Tahoe-Sierra* involved a moratorium on development rather than any direct appropriation of property, physical invasion, or change from a private use to a

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[27] As the CFC pointed out, temporary governmental action will give rise to a taking if permanent action of the same character would constitute a taking, which is true for non-categorical as well as categorical physical takings, but temporary non-categorical physical takings have to be differentiated from torts. *See Caquelin III,* 140 Fed. Cl. at 581.

[28] *See* U.S. Br. at 22. The government actually cites *Tahoe-Sierra* over a dozen times even though *Tahoe-Sierra* considered a temporary non-categorical regulatory taking instead of a temporary categorical physical taking.

public use, the Supreme Court had no difficulty whatsoever elaborating on the fundamental principle that the case presented a temporary regulatory taking as opposed to a temporary physical taking.[29]

Not only is the holding in *Tahoe-Sierra* inapposite because it pertained to a regulatory taking instead of a physical taking, but it is also inapposite because the taking in *Tahoe-Sierra* was not "categorical" either. Although the basic principles involving categorical and non-categorical takings in a temporary taking situation were originally set forth in *First English,* and even though the Supreme Court in *Tahoe-Sierra* went out of its way to not criticize or overrule the result in *First English,*[30] the result in *Tahoe-Sierra* necessarily distinguished the result in *First English* by using the term "categorical" differently in each context. *First English* used the term "categorical" in the context of possible uses of land, or the proverbial "bundle of sticks," and relied on the lower Court's conclusion that the landowners had been denied "all uses of their land, which would make it categorical." In *Tahoe-Sierra,* however, the Supreme Court repeatedly utilized "categorical" to mean a *per se* rule[31] and recognized that the moratorium on development was

[29] *See Tahoe-Sierra,* 535 U.S. at 314, 318, 321-22, 323-24.

[30] *Id.* at 328.

[31] *Id.* at 320, 322, 326 ("for Petitioners, it is enough that a regulation imposes a temporary deprivation—no matter how brief—of all economically viable use to trigger a *per se* rule that a taking has occurred"); ("when the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner") ("indeed, we still resist

actually not categorical because it did not actually deprive the owner of the entire bundle of sticks.[32] As a matter of fact and law, the temporary deprivation of development rights in *Tahoe-Sierra* was neither a physical taking or a categorical taking.

The government's attempt to utilize either *Arkansas Game* or *Tahoe-Sierra* for the proposition that a temporary taking under the Trails Act should be analyzed as a temporary non-categorical regulatory taking must fail under decades of precedent and analysis from both the Supreme Court and this Court. In fact, there has never been a case from either the Supreme Court or this Court that applied a multi-factor test to a temporary categorical physical taking.

E. Any Modification to the Bright-Line Rule Set Forth by this Court in *Preseault II, Caldwell, Barclay, Illig,* and *Ladd* Would Result in Great Uncertainty and Chaos

The government is attempting to separate the "accrual" rulings from this Court from a liability determination under the Trails Act when the NITU is issued by attempting to convert a physical taking into a regulatory taking. Since the vast

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the temptation to adopt *per se* rules in our cases involving partial regulatory takings").

[32] *Id.* at 327, 330, 332 ("in each of these cases, we affirmed that where an owner possesses a full bundle of property rights, the destruction of one strand of the bundle is not a taking") ("but our holding was limited to 'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted'") ("hence, a permanent deprivation of an owner's use of the entire area is a taking of 'the parcel as a whole,' whereas a temporary restriction that merely causes a diminution in value is not").

majority of Trails Act takings cases ultimately become permanent when a trail use agreement is signed, the government is also attempting to separate permanent takings from temporary takings and treat them differently. In essence, the government is attempting to treat a temporary taking when no trail use agreement is ultimately reached as a temporary non-categorical regulatory taking even though the taking when a trail use agreement is reached is definitely a permanent categorical physical taking. The government's entire position is "bizarre,"[33] both legally and factually, and the ultimate implementation of it would result in great uncertainty and chaos for Trails Act takings as both the Supreme Court and this Court have already ruled.

The government's attempt to separate the accrual of a cause of action from a liability determination for that action has already been rejected by the Supreme Court. In *Dow,* the Supreme Court wrestled with the issue of when a takings claims accrued in conjunction with the government's argument that there was no permanent taking unless and until the government physically occupied the property. *See Dow,* 357 U.S. at 23. The Supreme Court held that the taking occurred when the landowner was deprived of valuable property rights, like in a Trails Act takings case when the NITU is issued, and rejected as "bizarre" the

[33] *See Dow,* 357 U.S. at 24; *Caldwell,* 391 F.3d at 1235.

government's argument that there could possibly be "two different takings" of the same property. *Id.* at 24.

This Court confirmed the principles of *Dow* in a Trails Act takings case in *Caldwell.* This Court not only rejected the concept of the possibility of "two different takings," one regulatory and one physical, but specifically stated that "it is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues."[34] After commenting on *Dow,* this Court rejected the notion that there could be two different takings from the same governmental action: **"The Court rejected, as "bizarre," the argument that there were "two different 'takings' of the same property"** and **"the Court endorsed a rule similar to the one that we adopt here, namely that a taking occurs when the owner is deprived of use of the property, there by physical possession, here by blocking the easement reversion."** *See, Caldwell,* 391 F.3d at 1235 (emphasis added) (citations omitted).

This Court then reaffirmed its holding in *Caldwell* and rejected the notion of "multiple takings" in *Barclay.* The Court said that the government's argument was simply a recreation of arguments previously made, that the NITU should not be viewed as the taking because subsequent events might render the NITU only temporary, and reaffirmed the bright-line rule: **"Appellants' arguments lead**

[34] *See Caldwell,* 391 F.3d at 1234.

potentially to multiple takings of a single reversionary interest and endless litigation concerning the appropriate date for accrual, **thus leaving landowners and the government in a state of great uncertainty as to their respective rights and obligations**. Here, as in *Caldwell,* **we conclude that takings law supplies a single bright-line rule for accrual that avoids these adverse consequences**." *See Barclay,* 443 F.3d at 1378 (emphasis added).

One form of uncertainty identified in *Barclay* relates to the notion that "subsequent events might render the NITU only temporary." In other words, when the NITU is issued, even though it is everyone's intention to enter into a trail use agreement, those negotiations might fail and the taking could end up being temporary in nature. Nobody really knows what is going to transpire after the NITU is issued but, since it is certainly everyone's intention to ultimately sign an agreement, the taking is really permanent in nature until it ultimately becomes temporary, and it is always categorical in nature. Any effort by the government to apply a standard of multiple takings, the first being a temporary regulatory taking when the NITU is issued and another being a permanent physical taking when a trail use agreement is signed, would result in uncertainty and chaos.[35]

[35] This Court specifically recognized the uncertainty which would ensue in *Ladd* because the government actually made the argument. *See Ladd,* 630 F.3d at 1025.

The uncertainty and chaos would even be worse if a temporary taking under the Trails Act was analyzed under a multi-factor test as if the taking was a temporary regulatory taking, whether categorical or not. For example, where and how would anyone be able to draw the line between a temporary regulatory taking of six months or six years in the context of the Trails Act? Although the taking in this case was only six months in duration, the Supreme Court had no difficulty determining damages for a temporary categorical physical taking that lasted only 5½ months in *Pewee Coal.*[36] The parties had no difficulty determining damages for a temporary categorical physical taking in this case either under the Trails Act and, in fact, stipulated to them at $900.

The uncertainty and chaos would be exacerbated in temporary takings under the Trails Act depending on the duration of the taking. The duration of the take can last anywhere from six months, like this case, to over six years or more, like *Caldwell* and *Barclay.* For any period of time in between, even the application of a multi-factor test would have to wait to see if the taking ultimately becomes permanent. Although judges on the CFC, like Judge Bruggink in *Banks*,[37] and Judge Kaplan in *Balagna*,[38] have refused to apply a multi-factor test in a temporary Trails Act takings case under binding precedent from this Court, if they applied a

[36] *See Pewee Coal,* 341 U.S. at 115.
[37] *See Banks v. United States,* 138 Fed Cl. 141 (Fed. Cl. 2018).
[38] *See Balagna v. United States,* 2017 WL5952123 (Fed. Cl. Dec. 1, 2017).

multi-factor test as if the taking was a temporary regulatory taking instead of a temporary physical taking, all of the judges would have to create extensive factual records and would render opinions with disparate results depending on the various factors when none of the factors actually apply to a temporary categorical physical taking in the first place.

A taking under the Trails Act is a categorical physical taking even if it is temporary in duration. Since the taking is a categorical physical taking even if temporary in duration, a multi-factor test should not apply because a multi-factor test only applies to a temporary regulatory taking and most of the specific factors which are analyzed in a regulatory context are simply inapplicable to a temporary physical categorical taking.

II. EVEN IF A MULTI-FACTOR TEST IS WRONGLY APPLIED TO A TEMPORARY CATEGORICAL PHYSICAL TAKING, THE RESULT IS THE SAME

The entire premise of the government's brief is improperly based on the assumption that the multi-factor test should be applied as a temporary non-categorical regulatory taking instead of a temporary categorical physical taking, which in turn is based on a misinterpretation of this Court's remand. Not only does the government's entire argument require the repudiation and reversal of all of this Court's precedent in Rails-to-Trails cases, but the government's application of the various factors within a multi-factor test is also misplaced and misapplied

because the government attempts to apply the factors as if the taking is a temporary non-categorical regulatory taking instead of a temporary categorical physical taking.

A. The Multi-Factor Test Must Be Applied as a Temporary Categorical Physical Taking Under the Trails Act and This Court's Remand as a Matter of Law

The government's attempt to wrongly apply the multi-factor test as if the taking under the Trails Act is a temporary non-categorical regulatory taking is nothing more than smoke and mirrors. Although the government correctly states that this Court's remand included instructions to assume that a multi-factor analysis applies,[39] the government blindly jumps to the conclusion that the multi-factor test must be applied as a temporary non-categorical regulatory taking instead of a temporary categorical physical taking. The government's quantum leap in logic and law not only ignores overwhelming precedent but also represents a complete misinterpretation of this Court's remand.

This Court's remand simply did not make any distinction or make any reference about applying a multi-factor test as a temporary non-categorical regulatory taking as opposed to a temporary categorical physical taking. The primary statements by this Court upon remand are very appropriate to review in this context:

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[39] *See* U.S. Br. at 38.

1) This Court stated that "**the government does not deny that such a Trail Agreement would properly be deemed a categorical taking**—without a multi-factor analysis looking beyond the fact that the government-authorized trail use exceeded the scope of the easement";[40]

2) "Rather, **the government argues that the 180-day blocking of reversion was not a categorical taking** but instead calls for a multi-factor takings analysis";[41]

3) "**Perhaps *en banc* review might not be warranted, for example, if an appropriate multi-factor analysis were to lead to the same conclusion as the one *Ladd* drew—that a NITU like the one here constitutes a taking for reasons common to many rails-to-trails cases (leaving only the question of proper compensation, which is not at issue here)**";[42]

4) This Court remanded the case back to the CFC to conduct such proceedings "**as are necessary for an adjudication of how the government-advanced multi-factor analysis applies in this case**, on the assumption that such an analysis is the governing standard";[43] and

5) "**[W]e recognize that, under *Ladd* as the current governing law in this Court, it does not appear that this remand could result in a different Court of Federal Claims judgment.**"[44]

This Court recognized that the taking under the Trails Act is a permanent categorical physical taking if a trail use agreement is ultimately signed, recognized the government's argument that the 180-day blocking of reversion was purportedly

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[40] *See Caquelin II,* 697 Fed. Appx. at 1018, fn. 2 (emphasis added). This is the entire key to the remand. This Court pointed out in footnote 2 that the term "categorical taking" has been used by the Supreme Court to refer to physical appropriations of real property that have been deemed takings based on "*per se*" or relatively "bright-line" rules, which is exactly what this Court has previously called takings in a Rails-to-Trails context.

[41] *Id.* at 1019 (emphasis added).

[42] *Id.* at 1020 (emphasis added).

[43] *Id.* (emphasis added).

[44] *Id.* (emphasis added).

not a categorical taking, which is contrary to precedent from this Court, remanded for further proceeding based on a multi-factor analysis without stating whether a temporary taking under the Trails Act is physical or categorical or not, and recognized that remand would not result in a different result before the CFC under *Ladd*. It is incredible, in that context, that the government automatically leaps to the conclusion that a multi-factor analysis should be applied as if the taking was a temporary non-categorical regulatory taking instead of a temporary categorical physical taking. The ultimate question for the CFC to answer upon remand was expressly posed by the remand—how does the multi-factor analysis apply to a temporary categorical physical taking?[45]

When a temporary categorical physical taking occurs, the landowners must be compensated. That is exactly what occurs when a NITU is issued under binding precedent. At that point in time, a taking is the result, whether it is permanent or ultimately becomes temporary, and not only *can* the Court ascertain damages but the Court *must* ascertain damages.[46] Once a taking occurs under the Trails Act when the NITU is issued, liability is established and the various factors of a multi-factor test, particularly "severity" and "duration," only go to the issue of damages

[45] *Id.* ("how the government-advanced multi-factor analysis applies in this case?")

[46] *See General Motors,* 323 U.S. at 381-83 ("As soon as private property has been taken… the landowner has already suffered a constitutional violation, and 'the self-executing character of the constitutional provision with respect to compensation' is triggered").

and others, like "reasonable investment-backed expectations," do not apply at all. In this case, since damages are not even at issue, the various factors in a multi-factor test are immaterial on the issue of liability and irrelevant on the issue of damages.

This Court's decision in *Ladd* should be dispositive here because the Court in *Ladd* specifically addressed and contemplated the circumstance when a NITU was issued and no trail use agreement is reached. *See Ladd,* 630 F.3d at 1025. As this Court specifically held, the action by the government that gives rise to a takings claims is the issuance of a NITU by the STB, regardless of the events that follow. As this Court stated, "where no trail use agreement is reached, the taking may be temporary… however, physical takings are compensable, even when temporary." *Id.* (citing *Caldwell,* 391 F.3d at 1234; *Barclay,* 443 F.3d at 1348, *Hendler,* 952 F.2d at 1376). In fact, in *Ladd,* this Court specifically concluded that "**the duration of the taking goes to damages, not to whether a compensable taking has occurred.**" *Id.* (emphasis added). Despite the government's misinterpretation of the law and this Court's remand, and despite the government's attempts to argue that the various factors of a multi-factor test go to the issue of liability instead of damages, it is simply immaterial to liability whether the blocking of the reversionary interest was six months or six years.

It is in that context, after reviewing all precedent from the Supreme Court and this Court pertaining to physical and regulatory takings, categorical and non-categorical takings, and temporary and permanent takings, that the CFC concluded that the NITU started a temporary categorical physical taking. *See Caquelin III*, 140 Fed. Cl. at 578.[47] Then, after concluding that a multi-factor test should not be applied to a temporary categorical physical taking, the CFC proceeded with its "atypical task" involving the application of a multi-factor test to a temporary categorical physical taking, and the end result was exactly the same. *Id.* at 578-584.

B. When a Multi-Factor Test is Properly Applied to a Temporary Categorical Physical Taking, the Result is the Same

The government's discussion concerning the application of a multi-factor test is a jumbled mess. First, the government insinuates that the multi-factor test should be applied to a "physical taking"[48] when they are really attempting to apply the factors as if the taking was a "regulatory taking,"[49] and they completely ignore

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[47] The CFC concluded that Ms. Caquelin was prevented from using her land for *any* purpose for the duration of the NITU, which makes it a categorical taking, and that it makes no difference that the NITU did not ultimately result in trail use.

[48] *See* U.S. Br. at 38 ("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").

[49] *Id.* at 39 ("the CFC provided no discussion of how this case might be analyzed under other 'Supreme Court's standards,' Appx0215, most obviously *Penn*

the entire well-established point of law that the taking is also categorical in nature.[50]

Since the taking in this case is a temporary physical taking that is also categorical in nature, meaning all uses of the property were blocked during the pendency of the NITU,[51] the government is merely attempting to jumble takings jurisprudence to avoid liability in this case. As a result, the entire discussion by the government mixes different legal concepts related to physical takings versus regulatory takings, temporary categorical physical takings versus temporary non-categorical physical takings, and has misapplied the multi-factor test as if the taking was regulatory instead of physical and non-categorical instead of categorical.

Even assuming that a multi-factor test is wrongly applied to a temporary categorical physical taking as if it is a regulatory taking instead, the government's analysis of the various factors within a multi-factor test mixes and misapplies several well-established legal principles. The government first attempts to address the "duration" factor by utilizing an economic impact study, which is really

Central's framework for regulatory takings, which is the framework (that the United States argues) primarily should apply here").

[50] The government never mentions the fact that the taking is "categorical" in nature as opposed to "non-categorical" in nature let alone how the various factors would or should be applied in such a situation.

[51] Even the government's only witness, Mr. Thien, testified that Ms. Caquelin was blocked from all uses of her property during the duration of the NITU. *See* Appx0463-0464.

relevant only when a taking is a temporary non-categorical regulatory taking, in order to establish that there is no liability for a taking in the first place. The government also totally misapplies the "severity" component of a multi-factor test, which should also be applied on the issue of damages only, and not liability, when the taking is a temporary categorical physical taking.[52] In addition, the government's portrayal of the "reasonable investment-backed expectations" is misapplied and misplaced because it too does not apply to a temporary categorical physical taking.[53] In short, the government's attempt to apply a multi-factor test to a temporary categorical physical taking under the Trails Act is wrong at every level.

1. The Government Has Totally Distorted the "Duration" Factor in an Attempt to Make it Applicable to Liability Instead of Damages

The entire discussion of the duration factor by the government totally ignores that the taking is categorical in nature during the pendency of the NITU under overwhelming binding precedent from this Court. This Court stated in *Arkansas Game* that "the question whether a taking has occurred does not turn

[52] All of the government's arguments pertaining to damages are completely flawed. In general, the government's arguments based on the "definition of the relevant parcel" and/or the "parcel as a whole" only apply to non-categorical regulatory takings. There would never be a taking under the government's construct because the "severity" would never approach anything close to 90% or 95% of value when dealing with a small partial taking. *See* Appx0386-0389.

[53] *See Preseault II,* 100 F.3d at 1540; *Palm Beach Isles Assoc. v. United States,* 231 F.3d 1354, 1363-1364 (Fed. Cir. 2000).

solely on the duration of the invasion that caused the injury in question."[54] This Court should have stated that liability does not turn solely on the duration of the invasion in a non-categorical temporary taking caused by flooding and that the duration factor is not even relevant on the issue of liability when the taking is categorical in nature. In *Ladd,* since the taking was categorical in nature under the Trails Act, this Court specifically concluded that "**the duration of the taking goes to damages, not to whether a compensable taking has occurred**."[55] The duration factor relates to liability only when the taking is not categorical, does not apply when considering a temporary categorical physical taking, and does not even apply to the issue of damages when the damages have been stipulated to in this case.

The government's brief attempts three jumbled arguments against the CFC's analysis of the duration factor. First, the government attempts to argue that the CFC completely ignored this Court's remand instructions by stating that the duration of the taking goes to the issue of liability instead of damages[56]—the CFC correctly treated the taking as a categorical taking instead of a non-categorical regulatory taking and correctly noted that the duration of the taking is relevant only to the calculation of damages. Second, the government regurgitated its old and

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[54] *See Arkansas Game,* 736 F.3d at 1370.
[55] *See Ladd,* 630 F.3d at 1025 (emphasis added).
[56] *See* U.S. Br. at 40-41.

worn-out argument that a 180-day delay did not cause any damages because the NITU only resulted in a short administrative or regulatory delay[57]—this is a repeat of the argument advanced by the government that "you didn't have anything in the before so you haven't lost anything in the after," which was rejected by the Supreme Court in *Preseault I* and by this Court in *Ladd.* Third, the government relies on *Tahoe-Sierra* for the proposition that the CFC ignored the impact on the parcel as a whole and *Arkansas Game* because there was no evidence that the NITU in fact delayed the railroad's abandonment[58]—this is a blatant attempt to treat the taking as a temporary non-categorical regulatory taking instead of a temporary categorical physical taking and represents yet another frontal assault against all of this Court's precedent that the NITU blocks the landowners' reversionary interest when it is issued.

The government's attempt to totally distort the duration factor in an attempt to make it applicable to liability instead of damages must be rejected. The government insists on arguing that the NITU in this case was only in place for 180 days, such that the intrusion and economic harm was *de minimis* as if that goes to the issue of liability, when the duration of 180 days goes to the issue of damages instead. Since the issue of damages is not at issue in this case as stipulated to and

[57] *Id.* at 41-43.
[58] *Id.* at 43-44.

admitted by the government, it is simply immaterial to liability whether the blocking of the reversionary interest was 180 days or 6 years.[59]

2. The Very Purpose of the Trails Act is to Intentionally Invade the Landowners' Property By Changing the Nature of the Property Interest

The next factor addressed by the CFC, which was set forth by the Supreme Court in *Arkansas Game,* was the "degree to which the invasion was intended." *See Arkansas Game,* 568 U.S. at 39. As the CFC correctly pointed out, "this factor cannot be disputed" because "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 Caquelin III,* 140 Fed. Cl. at 580 (citing *Caldwell,* 391 F.3d at 1233-34). As the CFC pointed out, the NITU operates to block the landowners' reversionary interest because the Trails Act "was specifically amended to prevent the railroad from abandoning the property and to block the owner's reversionary interest." *Id.* (citing *Preseault II,* 494 U.S. at 8). The very purpose of the Trails Act is to ultimately effectuate a taking to preserve the option for interim trail use and railbanking.

Although this factor was not addressed by the government during trial, the government actually ignores the subject entirely and attempts to convert the factor

[59] If the taking is categorical in nature, compensation is owed based on the rent value for the use of the land during the pendency of the use, and it does not matter if the land is taken for a relatively short duration. The categorical taking was 5½ months in *Pewee Coal* and was 12 months in *General Motors.*

into a question of "causation."[60] In support of their argument that "causation is an essential element of takings liability" and "causation requires a showing of 'what would have occurred' if the government had not acted," the government cites *St. Bernard Parish v. United States*, 887 F.3d 1354, 1362 (Fed. Cir. 2018).[61] The *St. Bernard Parish* case, which involves flooding due to Hurricane Katrina, is totally inapposite because it is not a categorical taking at all, and the case focused on whether or not there was any governmental "action" that caused the taking. In *St. Bernard Parish,* there was no governmental "action" because the Plaintiffs' liability theory was actually one of governmental "inaction" due to the "failure of the government to take action."[62] The "causation" argument made by the government in *St. Bernard Parish* simply has no applicability whatsoever to a categorical physical taking under the Trails Act.

3. The Government's Discussion of the "Character of the Land at Issue" is Very Puzzling

The next factor identified by the government pertains to the "character of the land at issue."[63] *See Arkansas Game,* 568 U.S. at 39. As the CFC correctly pointed out, this factor is derived from non-categorical regulatory takings and is

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[60] *See* U.S. Br. at 45-46.
[61] *Id.* at 45.
[62] *See St. Bernard Parish,* 887 F.3d at 1360.
[63] *Id.* at 46-49. The next factor identified by the Supreme Court in *Arkansas Game* and discussed by the CFC is actually the "foreseeability" factor, but it was not the subject of testimony at trial and has been completely ignored by the government.

particularly relevant in flooding cases. *See Caquelin III,* 140 Fed. Cl. at 581. As pointed out by the CFC in this case and applied by the Supreme Court in *Arkansas Game,* the factor actually permits Courts to determine whether a taking has occurred, as opposed to a tort, by looking at the nature of the underlying land. *Id.*

The government is apparently confused by this entire factor because they raise issues relating to foreseeability, whether the governmental action "gave 'forewarning' of the effects alleged to be a taking,"[64] and issues potentially related to reasonable investment-backed expectations, "Plaintiff had no expectation that the railroad would decide to end its use *at any point*."[65] In this case, not only is this factor irrelevant under binding authority from this Court, but the character of the land involved in this case is undisputed too because the soil within the right-of-way "is extremely productive for the growing of corn and other crops"[66] and the "character of the land is only relevant for determining compensation rather than liability."[67]

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[64] *See* U.S. Br. at 47.
[65] *Id.* at 48 (emphasis in original).
[66] *See Caquelin III,* 140 Fed. Cl. at 581.
[67] *Id.*, fn. 22.

4. The Government's Reliance on the "Reasonable Investment-Backed Expectations" Factor is Misplaced as a Matter of Law

The government has also distorted the factor of reasonable investment-backed expectations in a Trails Act takings case.[68] The government also attempted to argue in *Arkansas Game* that the landowners did not have "reasonable investment-backed expectations" because they did not have a reasonable expectation that the Management Area would be free of significant flooding during the growing seasons.[69] In essence, the government contended that, due to pre-existing flooding conditions, "the Commission's property interest does not include the right to be free of artificially imposed excess flooding in the Management Area."[70] Although this Court noted the government's argument on appeal that the Commission "did not purchase" the property until after the Clearwater Dam was built, the government's argument concerning reasonable investment-backed expectations was not raised at the trial court level and, therefore, this Court did not address it.

Despite the fact that the factor identified as "reasonable investment-backed expectations" was not addressed in *Arkansas Game,* it is also irrelevant in a Trails Act takings case for two reasons. First, it does not apply when there is a categorical taking. Second, it applies to the temporal situation where a landowner

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[68] *See* U.S. Br. at 49-54.
[69] *See Arkansas Game,* 736 F.3d at 1375.
[70] *Id.*

knows of a use restriction prior to purchasing land, which obviously cannot have application to the present case where the landowner had no knowledge of the use restriction, that is, the future presence of a recreational trail that prevents Plaintiffs from using their land for whatever purposes they desire but for the issuance of the NITU.

Both the inapplicability of this factor to categorical takings and the nature of this factor were discussed at length by this Court in *Palm Beach Isles*. This Court concluded that "**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.**" *See Palm Beach Isles,* 231 F.3d at 1363-1364 (emphasis added).

Utilizing a regulatory takings framework, the government has attempted to argue that Ms. Caquelin did not have any reasonable investment-backed expectations because she bought the land with the knowledge that it was burdened by an existing railroad easement and the railroad easement was in place during the time her family owned the property. That argument is a complete slight of hand argument by the government. The railroad easement is not relevant to the takings analysis because the presence of the railroad easement is not the taking. The

taking is the fact that the land would have been free of any easement whatsoever had the railroad abandonment process not been blocked by the imposition by the federal government for a recreational trail, thus blocking the landowners' reversionary interest to possess, occupy, and use the land. Ms. Caquelin, when she acquired the land, certainly could have had no expectation that her reversionary interest would be blocked by the imposition of a recreational trail.

5. The "Severity" Factor is Easily Established Because the Taking is Categorical and is a Complete Interference with Ms. Caquelin's Use of Her Land

The government makes a classic "parcel as a whole" argument in an attempt to establish that there is no liability for a taking as if the taking is a temporary non-categorical regulatory taking.[71] The government's attempt to separate the .359 acres that have been taken from the rest of the larger parcel that has not been taken, which is improper both as a question of fact and law, fundamentally fails to recognize that the "severity" factor cannot and does not apply in a categorical taking situation. This Court's discussion of the "severity" factor in *Arkansas Game* demonstrates the irrelevant nature of the factor in a categorical taking situation. The government argued in *Arkansas Game* that the intermittent flooding was not a severe enough invasion of the Commission's property rights to support a

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[71] *See* U.S. Br. at 54-61.

takings claim.[72] This Court rejected the government's argument because the facts in *Arkansas Game* did not support a conclusion "that the property owner could have reasonably expected to experience in the natural course of things."[73]

This Court's analysis in *Arkansas Game* described a non-categorical taking situation without calling it that. Relying on the Supreme Court's analysis, this Court specifically described a non-categorical taking because there was damage to the trees that impacted the "customary use" of the landowners' land, which is a classic regulatory taking that is not categorical in nature. As repeatedly stated by this Court for over two decades, the issuance of the NITU "blocks" or "destroys" the landowners' reversionary rights, which is a categorical taking, and does not change or alter the "customary use" of the landowners' land. The degree of the "severity" of the taking in a partial diminution of the "customary use" of the land is simply not a factor in a categorical taking situation because the "severity" is total under this Court's "bright-line rule."[74]

Even though this Court remanded this case to see if the application of a multi-factor test changes the outcome, the application of the "severity" factor does not change the outcome at all because there is no dispute that 100% of the

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[72] *See Arkansas Game,* 736 F.3d at 1374.

[73] *Id.* at 1375.

[74] There is never a question of severity in any Rails-to-Trails case because the landowners are completely excluded from their property during the pendency of the NITU as repeatedly stated by this Court in *Caldwell, Barclay, Illig,* and *Ladd.*

landowners' use of their own land is blocked by operation of the law,[75] because it is a categorical taking under this Court's precedent. Since the severity factor is "as severe as possible," the "factor is redundant in a categorical takings analysis."[76] The government's attack on the "severity" factor is really circular in nature because the "severity" is 100% by operation of law, which makes it categorical, and the result is therefore exactly the same when the "severity" factor is applied under these facts as long as 100% of the uses are blocked by operation of law, and that will always be the case unless decades of precedent from this Court are overturned.

CONCLUSION

The CFC's Opinion and the resulting Judgment should be affirmed.

Respectfully submitted,

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[75] *See Caquelin III,* 140 Fed. Cl. at 584 ("for this factor, the Court therefore finds the interference to be complete, *i.e.*, as severe as possible").
[76] *Id.*

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2019, I electronically filed the foregoing brief with the United States Court of Appeals for the 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.

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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 13,712 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 Times New Roman, a proportionally spaced font.

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