No. 19-1385

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 RAILS-TO-TRAILS CONSERVANCY AS *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES

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FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Norma E. Caquelin **v.** United States

Case No. 19-1385

CERTIFICATE OF INTEREST

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Andrea C. Ferster

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1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Rails-To-Trails Conservancy	Same	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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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

Counsel is aware that several pending cases iwill be directly affected by this court's decision int eh pending appeal, including but not limited to Memmer v. United States, 1:14-cv-00135 (Fed. Cl. Feb. 18, 2014)

7/8/2019
Date

/s/ Andrea Ferster
Signature of counsel

Please Note: All questions must be answered

Andrea C. Ferster
Printed name of counsel

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1
SUMMARY OF THE ARGUMENT 2
STATEMENT OF THE CASE 5
I. Federal Railbanking Act – Legislative Origins. 5
II. Implementation of Railbanking 7
A. STB Abandonment Proceedings. 7
B. "Private Railbanking." 11
ARGUMENT 13
I. THE *LADD* DECISION CONFLATES PHYSICAL AND REGULATORY TAKINGS CONCEPTS AND MUST BE OVERTURNED. 13
A. When Properly Analyzed as a Regulatory Taking, a NITU Fails to Satisfy the *Penn Central* Test. 13
B. Ladd Improperly Applied Physical Takings Principles Holding that a NITU Results in Per Se Taking. 15
C. Caldwell Improperly Mixes Claims Raising Regulatory "Takings" With Physical Occupation Claims in Determining that a "Takings" Claim Accrues Upon Issuance of a NITU. 17
II. EVEN WHEN ANALYZED UNDER THE TEMPORARY PHYSICAL TAKINGS TEST OF *ARKANSAS GAME*, A NITU DOES NOT CONSTITUTE A TAKING 20
A. The CFC Misapplied the Time/Duration Factor in Determining the Existence of a Compensable Taking 20
B. The CFC Misapplied the Degree to which the Invasion is Intended or is the Foreseeable Result Factor 25
C. RTC Agrees with the United States Analysis of the Remaining *Arkansas Game* Factors. 27
CONCLUSION 27
CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) 28

TABLE OF AUTHORITIES

Page(s)

Cases

Arkansas Game & Fish Commission v. United States,
568 U.S. 23 (2012).....5, 20, 27

Barclay v. United States,
443 F.3d 1368 (Fed. Cir. 2006) .....*passim*

BG & CM Railroad, Inc.--Exemption From 49 U.S.C. Subtitle IV,
No. 34399, 2003 WL 22379168 (S.T.B. Oct. 17, 2003) 6

Black v. ICC,
762 F.2d 106 (D.C. Cir. 1985).....14

Block v. Hirsh,
256 U.S. 135 (1921).....16

Buffalo Twp. v. Jones,
813 A.2d 659 (Pa. 2002).....12, 18

Caldwell v. United States,
391 F.3d 1226 (Fed. Cir. 2004) .....*passim*

Caquelin v. United States,
140 Fed. Cl. 564 (2018).....3, 20

Caquelin v. United States,
697 Fed. Appx. 1016 (Fed. Cir. 2017).....2, 17

Georgia Great Southern Division, South Carolina Central Railroad Co., Inc.--Abandonment and Discontinuance Exemption--Between Albany and Dawson, In Terrell, Lee and Dougherty Counties, GA, No. AB-389, 2003 WL 21132515 (S.T.B. May 9, 2003) 6

Goodrich v. United States,
434 F.3d 1329 (Fed. Cir. 2006) 18

Goos v. ICC,
911 F.2d 1283 (8th Cir. 1990) 9, 10, 15, 18

Hayfield Northern R.R. v. Chicago and N.W. Transp. Co.,
467 U.S. 620 (1984).....14

Iowa Power, Inc.--Construction Exemption--Council Bluffs, IA,
8 I.C.C.2d 858 (1990) 7

John R. Sand & Gravel Co v. United States,
457 F.3d 1345 (Fed. Cir. 2006), *aff'd*, 552 U.S. 130 (2008).....18

Ladd v. United States,
630 F.3d 1015 (Fed. Cir. 2010), *reh'g and reh'g en banc denied*,
646 F.3d 910 (2011).....*passim*

Lingle v. Chevron U.S.A. Inc.,
544 U.S. 528 (2005).....13

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982).....20

Moody v. Allegheny Valley Land Trust,
976 A.2d 484 (Pa. 2009), *cert. denied*, 559 U.S. 537 (2010).....12

Norfolk & Western Railway Co.--Abandonment Between St. Marys and Minister in Auglaize County, OH,
9 I.C.C.2d 1015 (1993) 7

Owensville Terminal Co., Inc.--Abandonment Exemption--In Edwards and White Counties, IL and Gibson and Posey Counties, IN,
No. AB-477, 2005 WL 2292012 (S.T.B Sept. 20, 2005) 6

Penn Central Transp. Co. v. New York City,
438 U.S. 104 (1978).....13, 15, 19

Preseault v. Interstate Commerce Comm'n,
494 U.S. 1 (1990).....5, 6, 19

Preseault v. United States,
100 F.3d 1525 (Fed. Cir. 1996) 19

Reed v. Meserve,
487 F.2d 646 (1st Cir. 1973).....6

Southern Pacific Transportation Co. – Exemption – Abandonment of Service in San Mateo County, CA, Dkt. No. AB-12, 1991 WL 108272 (February 20, 1991) 12

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,
535 U.S. 302 (2002).....15, 16, 17

Tuthill Ranch, Inc. v. United States,
381 F.3d 1132 (Fed. Cir. 2004), *rehearing en banc denied* (Dec. 6, 2004) 16

United States v. Clarke,
445 U.S. 253 (1980).....18

Statutes

16 U.S.C. § 1247(d) 1, 12, 19

49 U.S.C. § 10903.....2

49 U.S.C. § 10904.....8

Coastal Zone Management Act.....23

Federal Railbanking Act 1, 2, 8

January 1, 1996 in the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) 2

National Trails Systems Act Amendments Section 8(d) 1

Trails Act.....3

Other Authorities

49 C.F.R. 1152.50(b) 7

49 C.F.R § 1105.10 22

49 C.F.R. § 1125.29(b)(1)(ii).....9

49 C.F.R. § 1152.27(c 23

49 C.F.R. § 1152.29(a).....8

49 C.F.R. § 1152.29(b)(2).....8

49 C.F.R. § 1152.29(d)(1).....8, 9, 10

49 C.F.R. § 1152.29(d)(2).....10, 25

49 C.F.R. § 1152.29(d)(2) and (h) 3

49 C.F.R. § 1152.29(e)(1) 9

49 C.F.R. § 1152.29(e)(2) .....*passim*

49 C.F.R. § 1152.50 7

49 C.F.R. § 1152.50(c).....7

49 C.F.R. § 1152.50(d) 7

49 C.F.R. § 1152.50(d)(3).....8, 9, 10

49 C.F.R. § 1152.50(e).....14

INTEREST OF *AMICUS CURIAE*

The Rails-to-Trails Conservancy ("RTC") is a non-profit corporation with more than more than 158,000 members and supporters and a grassroots network of over one million nationwide that facilitates the preservation of inactive rail corridors through conversion for trails and other compatible public uses. RTC seeks to present its additional perspective on why this Court should overrule the decision in *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010), *reh'g and reh'g en banc denied*, 646 F.3d 910 (2011), holding that the mere issuance of a Notice of Interim Trail Use ("NITU") by the Surface Transportation Board ("STB") was a *per se* taking by way of a physical occupation of Plaintiffs' property, even though the NITU lapsed and no rails-to-trails conversion ever occurred. *Ladd* made this determination even though the nature of the railroad's occupation of the corridor had not changed, plaintiff's prospective reversionary rights were not affected, no interim trail use agreement was reached, and no physical occupation of Plaintiffs' property for trail use occurred.

RTC has a significant interest in the interpretation and implementation of the federal law at issue in this case, Section 8(d) of the National Trails Systems Act Amendments, 16 U.S.C. § 1247(d) ("Federal Railbanking Act"). RTC has participated as an *amicus curiae* in numerous takings cases arising under the Federal Railbanking Act, including *amicus* briefs before the Federal Circuit panel

in *Ladd v. United States*, 630 F.3d 1015 (Fed. Cir. 2010), and the United States petition for rehearing in *Ladd* in 2011 and in this case. *See Caquelin v. United States*, 697 Fed. Appx. 1016 (Fed. Cir. 2017) *vacating* 121 Fed. Cl. 658 (2015)[1]

SUMMARY OF THE ARGUMENT

RTC contends, as does the United States, that this Court should overrule *Ladd*, as well as this Court's predicate decision in *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004) and *Barclay v. United States*, 443 F.3d 1368, 1378 (Fed. Cir. 2006), holding that a takings claim relating to a rail-to-trail conversion accrues when a NITU is issued. Based on *Caldwell*, *Ladd* holds that a *per se* compensable "taking" occurs when the STB[2] issues a NITU , even though the NITU lapsed without any rails-to-trails conversion.[3] *Ladd* represented a turning point in the takings jurisprudence related to the Federal Railbanking Act, extending

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[1] Acting under authority of the litigation intervention policy approved by RTC's board of directors, RTC's president approved the filing of this *amicus curiae* brief in support of the United States' brief seeking reversal of the decision below. No part of this brief was authored in whole or part by counsel for a party. No party, party's counsel, or any person other than RTC, its members, or its counsel contributed money intended to fund preparing or submitting this brief.

[2] Prior to 1996, the STB was the Interstate Commerce Commission ("ICC"). 49 U.S.C. § 10903. Congress abolished the ICC effective January 1, 1996 in the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) and replaced it with the STB. The STB exercises all the powers and functions of the former ICC that are relevant to the issues in this case.

[3] A NITU begins the railbanking process in an exempt abandonment proceeding. In a non-exempt proceeding, the railbanking process begins with a Certificate of Interim Trail Use ("CITU").

takings liability not just to actual rails-to-trails conversion facilitated by the federal Railbanking Act, but to the mere issuance of a NITU, which does nothing more than place the public on notice that a railroad company and a potential trail manager are negotiating an agreement that may or may not lead interim trail use.

Seeking a reversal of *Ladd* and its predicate *Caldwell* is appropriate because the decisions are wrong on their face and conflict with several principles of takings law applied by the Supreme Court and prior Federal Circuit panels. *Ladd* and *Caldwell* incorrectly conclude that the NITU itself precludes a fee holder's reversionary interest, despite the fact that a NITU has no actual effect on a fee holder's interest. Contrary to the characterization by the U.S. Court of Federal Claims ("CFC"), a NITU does not "block" the Plaintiffs' reversionary interest. *Caquelin v. United States*, 140 Fed. Cl. 564, 570, 578, 579, 584 (2018). Nor does the NITU "forestall[] the plaintiffs from regaining use and possession of their property. *Id.* at 470. It is therefore not the "triggering event for any takings claim under the Trails Act." *Id.* at 570, 578. Rather, the triggering event is the filing of a notice with the STB that an interim trail use/railbanking agreement has been reached. *See* Appx. 1406 ("If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached); 49 C.F.R. § 1152.29(d)(2) and (h). If no agreement is reached, the railroad may fully abandon the line." Appx. 1406

The United States' opening brief and Federal Circuit Rule 35(a) request for *en banc* review demonstrates the error in these holdings. The Government's brief explains that in *Ladd* the Panel apparently believed that the Court's precedent in *Caldwell* and *Barclay* bound it to hold that the issuance of a Notice of Interim Trail Use ("NITU") alone can constitute a *per se* physical taking, despite the absence of any physical invasion or occupation. *See Ladd v. United States*, 630 F.3d at 1023. *En banc* review therefore is warranted to address this tension between *Caldwell* and *Barclay* and jurisprudence governing permanent and temporary takings claims.

The initial decision by CFC in this case was the first final decision applying this Court's decision in *Ladd v. United Sates, supra*, but other cases are pending in which raise the same arguments. According to RTC's database of railbanking decisions, over the last six years, only 32 of 82 NITUs issued by the STB resulted in a rails-to-trails conversion. (*See* page 24, *infra*.) The remaining fifty NITUs have either expired without a rails-to-trails conversion, or negotiations over a trail use agreement are ongoing.

Continued application of *Ladd* will burden the courts and the government with costly and time-consuming litigation, while undermining federal policies favoring preservation of our Nation's limited rail infrastructure. Moreover, a NITU is no different from many other conditions that delay railroad abandonment or extend the STB's preemptive jurisdiction over the corridors. If *Ladd* is

extended to these other conditions, the STB's ability to carry out its regulatory mission will be severely hampered.

In the alternative, if this Court declines to overturn *Ladd* and *Caldwell*, the mere issuance of a NITU does not constitute a temporary physical taking under the standard set forth in *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012).

STATEMENT OF THE CASE

RTC relies on the factual and procedural background in the brief of the United States. In addition, RTC provides the following discussion of the history, purpose and implementation of the federal Railbanking Law.

I. Federal Railbanking Act – Legislative Origins.

The construction and development of a nationwide system of rail lines, assembled with great governmental assistance through federal land grants and state-conferred powers of eminent domain, helped transform the United States into an economic power at the turn of the last century. In 1920, at the peak of the rail era, 272,000 miles of track crisscrossed the United States, carrying freight and passengers from one end of the country to the other. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 5 (1990). But just as the miles of rail line peaked, other methods of transportation emerged and a long period of decline began. By 1990, our nation's rail system had shrunk to 141,000 miles and experts were

predicting that 3,000 more miles would be abandoned every year through the end of the century. *Id.* Thus, our nation's rail corridor infrastructure, "painstakingly created over several generations" was at risk of becoming irreparably fragmented. *Reed v. Meserve*, 487 F.2d 646, 649-50 (1st Cir. 1973) ("To assemble a right of way in our increasingly populous nation is no longer simple.").

To prevent the irreplaceable loss of these valuable national assets, Congress enacted the Federal Railbanking Act in 1983 "to preserve for possible future railroad use rights-of-way not currently in service and to allow interim use of the land as recreational trails." *Preseault v. ICC*, 494 U.S. at 6. Under the Railbanking Act, a railroad wishing to cease operations along a route may negotiate with a state or local government or private group to transfer the corridor for interim trail use, subject to future restoration for railroad use. *Id.* at 6-7. If an agreement is reached with the railroad, the interim trail manager maintains these corridors as an interim trail for public recreation and non-motorized transportation use until such time as the right-of-way is again needed for rail use. The Federal Railbanking Law has been effective in preserving our nation's rail corridors for future transportation purposes, with a number of railbanked corridors already reactivated by railroads for railroad use.[4]

[4] *See Owensville Terminal Co., Inc.--Abandonment Exemption--In Edwards and White Counties, IL and Gibson and Posey Counties, IN*, No. AB-477 (Sub-No. 3X), 2005 WL 2292012 (S.T.B Sept. 20, 2005); *BG & CM Railroad, Inc.*--

II. Implementation of Railbanking

An inactive railroad corridor proposed for abandonment may be "railbanked" for interim trail use and future rail service through the issuance of a trail use condition by the STB. However, a corridor may be "privately railbanked" without any action by the STB through the actions of the interim trail manager, the railroad, or both, to secure the protections of the Federal Railbanking Act. Each of the mechanisms for securing the protections of the Federal Railbanking Act is described below.

A. STB Abandonment Proceedings.

A railroad seeking to abandon a rail line must apply to the STB for approval. *See Barclay v. United States*, 443 F.3d 1368, 1371 (Fed. Cir. 2006). Under the exemption procedures applicable in this case, the railroad submits a notice to the STB, which publishes a notice in the Federal Register.[5] 49 C.F.R. § 1152.50(d).

Exemption From 49 U.S.C. Subtitle IV, No. 34399, 2003 WL 22379168 (S.T.B. Oct. 17, 2003); *Georgia Great Southern Division, South Carolina Central Railroad Co., Inc.--Abandonment and Discontinuance Exemption--Between Albany and Dawson, In Terrell, Lee and Dougherty Counties, GA*, No. AB-389 (Sub-No. 1X), 2003 WL 21132515 (S.T.B. May 9, 2003); *Norfolk & Western Railway Co.--Abandonment Between St. Marys and Minister in Auglaize County*, OH, 9 I.C.C.2d 1015 (1993); *Iowa Power, Inc.--Construction Exemption--Council Bluffs, IA*, 8 I.C.C.2d 858 (1990).

[5] There are two forms of exemption for which a railroad may apply to abandon a rail line; individual exemption and class exemption. 49 C.F.R. § 1152.50. Railroads that follow the individual exemption must establish that the transaction is of limited scope or when regulation of the transaction is not needed to protect shippers from abuse of market power. *Id.* § 1152.50(c). Class exemptions, the

Potential trail operators may then file a petition under the Federal Railbanking Act indicating a desire for interim trail use. *Id.* § 1152.29(a).[6]

But that is only one process that affects the amount of time between a railroad filing an application for abandonment and actual consummation of the abandonment that vests a fee holder's property rights. Interested parties may also seek to stay the effective date of the exemption based on energy, environmental impact or historic preservation concerns. 49 C.F.R. §1152.50(d)(3). The STB must also be satisfied with the railroad's labor protection measures before it authorizes abandonment. 49 C.F.R. §1152.29(d)(1). Often times, several of these issues overlap on the same application, all requiring resolution before abandonment or railbanking of the line may be consummated. *See* pages 24, *infra* citing several abandonment applications delayed for one or more conditions. These conditions must be satisfied before the railroad can consummate abandonment authorization, and therefore before any other person could occupy the rail line, whether an interim trail manager or the underlying fee owner.

The railroad has complete discretion as to whether to enter interim trail use and railbanking negotiations under the STB procedures. *Barclay*, 443 F.3d at

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most common option, apply if the line has not been in use for two or more years, or if the STB finds there is no vital interest in continuing rail service on that line. *Id.* § 1152.50(b).

[6] Rail carriers or shippers may also submit an "offer of financial assistance" to subsidize or purchase the rail line for continued service. *See* 49 U.S.C. § 10904.

1371. 49 C.F.R. §1152.29(b)(2). If the railroad chooses not to do so, and if energy, labor protection, environmental impact and historic preservation conditions are met, its exemption from regulated abandonment is effective 30 days after publication in the Federal Register notice. 49 C.F.R. §1152.50(d)(3). If the railroad chooses to enter negotiations with a potential trail manager, the STB "will issue" a NITU for the portion of the right-of-way the trail manager seeks to operate.[7] 49 C.F.R. §1152.29(d)(1). Once the railroad notifies STB that it agrees to negotiate an interim trail use agreement, STB has no discretion whether it issues an NITU. *Id.* §1152.29(d)(1). *See Goos v. ICC*, 911 F.2d 1283, 1295 (8th Cir. 1990).

"The NITU is itself not a guarantee of eventual trail use," but instead "serves only to provide an opportunity for the railroad and prospective trail users to negotiate an agreement." *Id.* at 1293.The NITU does this by "suspending [its own] exemption proceedings for 180 days," to allow the railroad to negotiate a trail use agreement, and to permit the railroad in the meantime to proceed with actions consistent with abandoning the line, i.e. discontinue rail service, cancel tariffs, and salvage tracks and materials. *Barclay*, 443 F.3d at 1371. The STB can extend the NITU if the railroad wishes to continue negotiations. 49 C.F.R. §1152.29(e)(1).

[7] In an abandonment by application proceeding, this is called a Certificate of Interim Trail Use or Abandonment ("CITU"). 49 C.F.R. § 1125.29(b)(1)(ii).

The railroad retains sole discretion whether to enter a private agreement with a trail operator, and the STB has "no power to compel a conversion between unwilling parties." *Goos*, 911 F.2d. at 1295. Thus, at the time of the NITU's issuance, "there is only a possibility that a particular right-of-way actually will be used as a recreational trail." *Id.* at 1293.

If the railroad and the interim trail user reach a trail use agreement, the parties are required to notify then STB within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h). Only then is the railroad's right-of-way railbanked and subject to interim trail use, continued STB jurisdiction, and "future restoration of rail service." 49 C.F.R. §1152.29(d)(2).

If no agreement is reached, the NITU expires after 180 days. 49 C.F.R. §1152.29(d)(1). However, even on the expiration of a NITU, the railroad company may still need to satisfy energy, labor protection, environmental impact, historic preservation or other conditions before receiving authorization to fully abandon a rail line. 49 C.F.R. §1152.29(d)(1) and §1152.50(d)(3). Or the railroad may simply choose not to consummate the abandonment. STB jurisdiction continues until the railroad, in its sole discretion, files a notice with the STB indicating that it has "consummated" abandonment. *Id.* §1152.29(e)(2); *Barclay*, 443 F.3d at 1376 n.10. If the railroad fails to consummate abandonment within a one year period following the expiration of any conditions or any extensions thereof, the

abandonment authorization expires, and the railroad retains its common carrier obligation to provide rail service on the corridor. 49 C.F.R. §1152.29(e)(2).

Thus, a railroad's opportunity to negotiate a rail use agreement is only one of several post-abandonment conditions or circumstances that may simultaneously apply to extend the STB's jurisdiction over a rail line following initial abandonment authorization by the STB. In many if not most circumstances, it is not possible to state that issuance of a trail use condition that expires without resulting in a rails-to-trails conversion is responsible for any delay in the consummation of a rail abandonment. Only the filing of the required notice that a railbanking agreement has been reached definitively establishes the date of any taking.

B. "Private Railbanking."

The foregoing pertains to the STB's railbanking procedures, but a NITU is not necessary to railbank a corridor under the Federal Railbanking Act. A corridor can also be privately railbanked directly under the Federal Railbanking Act—*i.e.*, without formal petition or action by the STB.

After considering the broad purposes and statutory language of Railbanking Law, the Pennsylvania Supreme Court held that "there is nothing in the language of the statute requiring a trail owner . . . to comply with the ICC regulations. . . . We refrain from reading such a requirement into the statute where the language of

the statue itself does not make such a requirement mandatory for trail conversion." *Buffalo Twp. v. Jones*, 813 A.2d 659, 668 (Pa. 2002). *See also Moody v. Allegheny Valley Land Trust*, 976 A.2d 484, 489-90 (Pa. 2009), *cert. denied*, 559 U.S. 537 (2010). These cases demonstrate that a NITU is not a necessary part of, nor required to secure, a rail-to-trail conversion. Rather, consistent with the STB's regulations, it is the execution of a railbanking agreement that marks the date that a rails-to-trails conversion has occurred.

Further support for the Pennsylvania Supreme Court's ruling came from the ICC itself, which "indicated that the statute in and of itself supported a finding that railroad rights-of-way could be preserved in the absence of ICC authorization." *Buffalo Twp. v. Jones*, 813 A.2d at 668 (citing *Southern Pacific Transportation Co. – Exemption – Abandonment of Service in San Mateo County, CA*, Dkt. No. AB-12 (Sub-No. 118X), 1991 WL 108272, at *4 (February 20, 1991) ("[T]he underlying right-of-way can be preserved under 16 U.S.C. § 1247(d) without ICC authorization."). As this order makes clear, the STB has no jurisdiction over privately railbanked corridors. Nonetheless, these corridors may not be deemed abandoned for purposes of any state law or principle of law. 16 U.S.C. § 1247(d).

ARGUMENT

I. THE *LADD* DECISION CONFLATES PHYSICAL AND REGULATORY TAKINGS CONCEPTS AND MUST BE OVERTURNED.

Supreme Court precedent limits physical takings to direct "government appropriation[s] or physical invasion[s] of private property" and "where government requires an owner to suffer a permanent physical invasion of her property—however minor." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537-38 (2005). Because a NITU does not itself result in any physical invasion, or fall into the category of "regulations that completely deprive an owner of all economically beneficial use of her property," Supreme Court precedent requires that any takings challenge arising from the issuance of the NITU must be analyzed under the fact-based regulatory takings test of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. at 538.

A. When Properly Analyzed as a Regulatory Taking, a NITU Fails to Satisfy the *Penn Central* Test.

In *Penn Central*, the Supreme Court set forth three factors to be considered in determine 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." *Penn Central*, 438 U.S. at 124. When the *Penn Central* test is applied to the mere issuance of a NITU, it is clear that no "taking" occurs

because a ministerial act that does not change the existing property rights, which remain solely in control of the railroad, does not satisfy the "character of the government action" element.

A fundamental flaw in the reasoning of the CFC is its failure to understand the longstanding principle that the underlying landowners have no property rights that can be asserted to a railroad corridor until the abandonment has been consummated. *See Black v. ICC,* 762 F.2d 106 (D.C. Cir. 1985). Since 1997, railroads have been required to demonstrate their intent to consummate abandonment authority by filing a notice of consummation with the Board signifying that the railroad has exercised its authority to abandon and intends the property to be removed from the national rail transportation network. 49 C.F.R. §§ 1152.29(e)(2) and 1152.50(e). It is consummation of abandonment authorization that marks the end of the STB's regulatory authority over the rail line. *See Hayfield Northern R.R. v. Chicago and N.W. Transp. Co.* 467 U.S. 620, 634 (1984) (A full abandonment must occur before the ICC loses jurisdiction over the proceeding). *See also Caldwell*, 391 F.3d at 1236-37 (Newman, J., dissenting) (explaining that a takings claims accrues only when the liability of the government is fixed, not simply prospective, and that this only occurs after the transfer of the deed at the legal closing from the railroad to the government entity).

Thus, the issuance of a NITU has no economic impact whatsoever on the underlying property unless and until a railbanking agreement is reached. Nor does it interfere with any investment-backed expectations of the underlying property owner, as this condition is no different from other post-abandonment conditions that may be imposed by the STB prior to the consummation of either the abandonment or railbanking agreement. Finally, because a NITU is a purely ministerial actions, the NITU fails the "character of the government action" element of the Penn Central analysis. *See Goos*, 911 F.2d at 1295.

B. Ladd Improperly Applied Physical Takings Principles Holding that a NITU Results in Per Se Taking.

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Supreme Court held that "the temporary nature of a land-use restriction" precludes application of a *per se* takings rule and instead requires application of the regulatory takings analysis of *Penn Central*. 535 U.S. at 337.

Ladd suggested that the NITU resulted in a *per se* taking because the "NITU is the government action that prevents the landowners from possession of their property unencumbered by the easement." *Ladd*, 630 F.3d at 1023. But as discussed above, a NITU is nothing more than a notice that identifies the parties attempting to negotiate a trail use agreement and sets the time frame within which they are to complete those negotiations. A NITU, which merely describes that a

railroad will continue use of its long-existing easement, does not amount to a new occupation by the government.

Even if a NITU could be understood as a government action that may prolong a long-held railroad easement, the NITU itself does not replace that railroad easement with a trail easement where it expires without any rails-to-trails conversion. In a similar context, the Supreme Court has held that a government action that continues a previously-established use does not constitute a *per se* physical taking. *Block v. Hirsh*, 256 U.S. 135 (1921) (a statute that permitted tenants to continue to occupy property for two years despite expiration of their leases was just a "temporary measure" within the government's police power); and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. at 322-23; see also *Cienega Gardens v. United States*, *supra.;* and *;; Ranch, Inc. v. United States*, 381 F.3d 1132 (Fed. Cir. 2004), *rehearing en banc denied* (Dec. 6, 2004). The issuance of a NITU, like any other post-abandonment condition, at best prolongs the duration of the pre-existing railroad use; it does not establish a new trail use until an interim trail use/railbanking agreement is reached and the required notice that such an agreement is reached is provided to the STB.

C. Caldwell Improperly Mixes Claims Raising Regulatory "Takings" With Physical Occupation Claims in Determining that a "Takings" Claim Accrues Upon Issuance of a NITU.

Ladd and *Caquelin* cannot be reconciled with *Tahoe-Sierra*. These cases reflect the tension between physical takings concepts and regulatory takings concepts. *Ladd* first found it "settled law" that railbanking gives rise to a "physical taking claim" when trail use is outside the scope of the railway easement. *Ladd v. United States*, 630 F.3d at 1023-24. *Ladd* applied the *Caldwell*/*Barclay* claim accrual analysis to conclude that this "physical takings claim" accrues with issuance of the NITU – a regulatory action. *Id*. The net result was *Ladd*'s holding that the STB issuing a NITU alone constitutes a *per se* physical taking, regardless of whether the railroad and trail manager reach agreement or establish a trail, and that "physical occupation is not required." *Id.* at 1024. The *Ladd* panel made clear that it did not necessarily believe this was the right result, but instead that it was the result dictated by the precedent the panel felt "bound" to apply. *Id.* at 1023.

The Government's brief demonstrates why the *Ladd* decision incorrectly found that this case was controlled by *Caldwell*/*Barclay*'s accrual analysis. But because the panel in *Ladd* believed that its holding was dictated by prior panel decisions, *en banc* review should be undertaken of *Caldwell* if necessary to clarify whether physical or regulatory takings principles govern takings claims under the Federal Railbanking Act.

In *Caldwell* and *Barclay*, this Court held that the takings claim accrues with the issuance of the NITU because this "is the only government action in the railbanking process that operates to prevent abandonment of the corridor and to preclude vesting of state law reversionary interests in the right-of-way." *Caldwell*, 391 F.3d at 1233.[8] As discussed previously, this conclusion is wrong because a NITU is incidental to the abandonment process and merely allows the parties to negotiate a trail use agreement, not constituting a government action. *Goose*, 911 F. 2d at 1293. Nevertheless, tying accrual to the time of a "government action," rather than the physical invasion, reflects regulatory takings principles. *Compare*, *Goodrich v. United States*, 434 F.3d 1329 (Fed. Cir. 2006); and *John R. Sand & Gravel Co v. United States*, 457 F.3d 1345 (Fed. Cir. 2006), *aff'd*, 552 U.S. 130 (2008). The anomaly of permitting a physical taking claim to accrue before the landowner suffers any physical invasion or occupation is most apparent in cases of private railbanking, where the railroad and trail user reach an agreement without an STB order or involvement. *See Buffalo Twp.*, 813 A.2d at 670 ("[A] railroad right-of-way can be converted to a recreational trail where there is a failure to file an

[8] Since the conversion to trail use constitutes the physical invasion under this Court's precedent, a physical takings claim could not accrue before the conversion of the railroad easement to interim trail use and railbanking—no earlier than the execution of the trail use agreement. *See United States v. Clarke*, 445 U.S. 253, 258 (1980) ("When a taking occurs by physical invasion . . . the usual rule is that the time of the invasion constitutes the act of taking, and . . . gives rise to the claim for compensation . . ." (quotations omitted)).

application with the ICC, so long as the proposed trail user complies with the requirements of section 1247(d).”). In these circumstances, a physical invasion is present that this Court’s *en banc* plurality decision in *Preseault v. United States* held could give rise to a physical takings claim. *Preseault v. United States*, 100 F.3d 1525, 1540 (Fed. Cir. 1996).[9] Here, however, there is no NITU to mark the accrual date for the statute of limitations, as *Caldwell* and *Barclay* discussed.

Contrary to *Caldwell*/*Barclay*, a physical taking claim accrues, if at all, no earlier than the trail use agreement, rather than with issuance of the NITU, which is a purely a non-discretionary ministerial action. A ministerial regulatory action such as a NITU should only be analyzed as a potential regulatory “taking” under *Penn Central* factors. The improper mixing of these distinct principles in *Caldwell*/*Barclay* lead to the panel’s holding in *Ladd* that a physical taking can occur merely with issuance of the NITU in the absence of a physical invasion, which is contrary to authority from the Supreme Court and this Court.

[9] RTC disagrees with the holding of the plurality decision in *Preseault* as applied in these subsequent Federal Circuit decision, which has never been substantively revisited by this Court, that the railbanking of a corridor constitutes a physical occupation and *per se* taking of any underlying property interests. Instead, even when interim trail use occurs, the change in use from railroad to railbanking is at most a potential regulatory taking. Moreover, as noted above, even where a corridor is railbanked for interim trail use, such use is temporary, and subject to dispossession at any time if any railroad seeks to reactivate rail service on the line.

II. EVEN WHEN ANALYZED UNDER THE TEMPORARY PHYSICAL TAKINGS TEST OF *ARKANSAS GAME*, A NITU DOES NOT CONSTITUTE A TAKING

In the alternative, if this Court declines to reverse *Ladd*, it should reverse the CFC's incorrect ruling that a NITU constitutes a physical taking under the multi-factor test set forth in *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012). Unlike permanent physical takings, temporary invasions "are subject to a more complex balancing process to determine whether they are a taking." *Arkansas Game,* 568 U.S. at 36 (quoting *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982)). The Supreme Court explained that to determine whether a taking has occurred, a court must consider: (1) the duration of the invasion that caused the injury in question; (2) whether the injury was the foreseeable result of that action; (3) the character of the land; and (4) whether the injury constituted a sufficiently severe invasion that interfered with the landowner's reasonable investment-backed expectations as to the use of the land. *Id.* at 38-39.

A. The CFC Misapplied the Time/Duration Factor in Determining the Existence of a Compensable Taking

The CFC summarily concluded that the time/duration factor weighs in favor of finding a taking of Mrs. Caquelin's property based upon its mistaken conclusion that the NITU "blocked" appellee's reversionary interest in the property for 180 days. *Caquelin v. United States,* 140 Fed. Cl. at 578-579.

The CFC came to this conclusion by incorrectly presuming that, but for the NITU, railroad would have immediately consummated abandonment and the rail corridor would have reverted to Mrs. Caquelin. Contrary to this presumption, the consummation of abandonment --- like the consummation of a railbanking agreement -- is largely within the railroad's control – not the STB. Thus, the NITU itself does not result in a temporal taking when there are numerous other factors which may delay consummation of the abandonment, and therefore, the corridor's reversion to the underlying property owner, over and beyond the timeframe established by the NITU.

Where no post-abandonment condition exists, including a trail use condition signified by a NITU, STB regulations require the railroad to file a notice that abandonment has been consummated within one year of abandonment authorization. 49 C.F.R. § 1152.29(e)(2) . "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*). *Id.* (emphasis added). "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." *Id.* Railroads may request extensions of that period. *Id.* If the railroad fails to notify the STB that abandonment is

consummated within the relevant time period, abandonment authorization lapses and the railroad retains its obligation to provide rail service on the line. 49 C.F.R. § 1152.29(e)(2).

While the STB's final action may be either the issuance of a notice of exempt abandonment authorization or railbanking, numerous regulatory and non-regulatory requirements affect when the railroad files the required notice that it has either consummated abandonment or alternatively, entered into an interim trail use agreement. Thus, it cannot be said that the mere issuance of a NITU delays a landowner from repossessing the corridor given the number of conditions a railroad must satisfy before consummating abandonment or entering into an interim trail use agreement.

Specifically, railroads often must address labor protection, environmental impact and historic preservation conditions prior to consummation of abandonment. 49 C.F.R § 1105.10 (The STB "will decide what, if any, environmental, historic preservation, [Coastal Zone Management Act], and endangered species issues will be part of the record . . . The Board will withhold a decision, stay the effective date of an exemption, or impose appropriate conditions upon any authority granted when an environmental or historic preservation issue has not yet been resolved.") Consummation of either abandonment or railbanking may also be delayed by a shipper or another carrier filing of an offer of financial

assistance ("OFA") seeking to subsidize or purchase the line for continued rail service. *Id.* § 1152.27(c).

Even where a NITU has been issued, the railroad will continue to engage in activities that are preparatory to consummating abandonment, such as arranging for the salvage of the tracks, ties, and ballast, the sale or removal of bridges, signals and crossing equipment, and other rail structures, and the cancellation of tariffs. These actions would need to take place prior to consummation of abandonment regardless of the NITU, and, as the examples noted below demonstrate, can often take up to a year or more after the abandonment is authorized to complete.

It is therefore not possible to say with any certainty that the issuance of a NITU that subsequently expired without a railbanking agreement in any way delayed consummation of abandonment authorization. The railroad may simply decide to take the ***full time*** allotted in the regulations to file a notice of consummation, even if the NITU expires earlier, as occurred in this case. Or the railroad could change its plans and decide not to consummate the abandonment the corridor, as occurred in the STB proceeding underlying *Ladd v. United States.* It is therefore not possible to say with any certainty that a delay in the filing of a notice of consummation is ever attributable to the issuance of a NITU.

RTC's database of railbanking decisions demonstrates numerous examples in which consummation of railroad abandonment has been delayed long after the

initial notice of exempt abandonment would have otherwise taken effect. A few examples follow where the notice of consummation remains outstanding for reasons other than trail use conditions:

- AB-6 sub 485x (filed in 2012): Historic preservation and PUC conditions (both removed in 2013); salvage condition identified as main reason for consummation delay in several extension requests (most recent in 2019)
- AB-290 sub 341x (filed in 2013): salvage conditions identified as main reason for consummation delay in several extension requests (most recent in 2018)
- AB-290 sub 361x (filed in 2014): Historic preservation conditions (removed in 2014); salvage delays identified as barrier to consummation in several extensions requests (most recent in 2019)
- AB-1032 sub 0x (filed in 2015): environmental and salvage conditions; the railroad has repeatedly requested and received extensions to their consummation deadline without any reason for delays provided (most recent in 2019)
- AB-290 sub 378x (filed in 2015): salvage conditions identified as main reason for consummation delay in several extension requests (most recent in 2018)
- AB-33 sub 324x (filed in 2017): Historic preservation and environmental conditions (historic preservation condition removed in 2018) related to a bridge along the line; no extension requests yet
- AB-6 sub 494x (filed in 2017): Historic preservation and NITU conditions (NITU expired May 2018); BNSF requested a consummation extension, but the STB ruled that it was unnecessary, as the historic preservation condition still applies

These examples demonstrate that simply because a railroad applies for permission to abandon a rail line, there is no guarantee when or if the railroad will consummate the abandonment.

In this case, the NITU expired on December 30, 2013, six months after its issuance, but the railroad did not consummate abandonment authorization until April 30, 2014. CFC Slip Opinion, at 6. Because it is consummation that signals the point at which the STB's preemptive regulatory authority over the corridor ends, Mrs. Caquelin's reversionary interest could not have vested until that time – April 30, 2014 – and not before.

Accordingly, it is simply not possible to say with any certainty that the NITU delayed or blocked Mrs. Caquelin's ability to repossess her land or that the railroad would have consummated abandonment any sooner without the NITU. Rather, the only point that can establish a reliable date for determining the impact or railbanking on the underlying fee owner is the required filing of a notice with the STB that an interim trail use agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h).

B. The CFC Misapplied the Degree to which the Invasion is Intended or is the Foreseeable Result Factor

A NITU does not foreseeably result in a delay in the consummation of abandonment where, as explained above, the railroad would have had a full year to consummate abandonment under the statute,[10] and where numerous intervening factors could have delayed or even withdrawn consummation altogether.

Even where a railroad satisfies all conditions and the STB authorizes it to

[10] *See* 49 C.F.R. 1152.29(e)(2).

abandon a rail line, if the railroad does not consummate abandonment in one year, its authority to abandon the rail line automatically expires. 49 C.F.R. §1152.29(e)(2). Whether attempting to negotiate a trail use agreement or satisfy any of the other potential conditions, the entire process is solely under the control of the railroad and may never result in reversion of state law property rights.

To underscore the fact that a NITU has no foreseeable impact on a property owner's reversionary rights, railbanking data collected by RTC reflects that a majority of NITUs do not result in a rail-to-trail conversion.[11] According to statistics compiled by RTC, STB issued 82 NITUs in the last six years, which places them within the Tucker Act's six-year statute of limitations for a "takings" claim. Of these 82 NITUs, only 32 resulted in a rails-to-trails conversion. The remaining 50 NITUs either expired without the parties reaching a railbanking agreement or remain in effect while negotiations for a rails-to-trails conversion continue. Of these remaining 50 NITUs, the property owner's state law interest will vest upon the railroad's notice of consummation of abandonment or will

[11] RTC maintains a database of railbanking order and rails-to-trails conversions, compiled from public information made available through the STB and independently verified with trail managers to track railroad abandonments and railbanking negotiations. While RTC works to improve data accuracy and inclusiveness, RTC makes no guarantee as to the accuracy or completeness of the data collected herein. Nonetheless, it is the most comprehensive database tracking railbanking activities in existence.

potentially accrue a takings case upon the filing of the required notice that a railbanking agreement has been reached.

Thus, it is simply not possible to say that delay in the ability of the underlying fee holder to repossess their land is the foreseeable result of issuance of a NITU that expires without a railbanking agreement.

C. RTC Agrees with the United States Analysis of the Remaining *Arkansas Game* Factors.

RTC agrees with the United States analysis of the CFC's misapplication of the remaining Arkansas Game factors, nature of the land at issue and the property owner's reasonable investment-backed interest in the property.

CONCLUSION

For these reasons, RTC urges the Court to hear this case *en banc* and overrule the panel decision in *Ladd* and the decision below.

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Respectfully submitted,

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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 29(a)(5) and Federal Circuit Rule 32(b), the brief contains 6,494 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.

Andrea Ferster

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2019, I electronically filed the

foregoing corrected *amicus* 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.

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