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)

REPLY BRIEF OF APPELLANT UNITED STATES

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SUMMARY OF ARGUMENT

1. Section 8(d) of the Trails Act encourages railroads, in lieu of abandoning valuable rights-of-way on the cessation of rail service, to enter "rail banking" agreements that enable the rights-of-way to be used as recreational trails until they are needed again for railroad purposes. 16 U.S.C. § 1247(d). Under Section 8(d), if and when a railroad enters a qualifying agreement with a local trail sponsor, the interim trail use "shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." *Id.* Where interim trail use is within the scope of a railroad's property rights—i.e., if the original grant to the railroad, whether easement or fee, was sufficiently broad to permit the rail-to-trail conversion—trail use does not alter the status quo or prevent abandonment of those property rights. In contrast, where trail use is outside the scope of the railroad's property rights and otherwise would constitute abandonment or reversion of underlying property interests—e.g., because the use is deemed incompatible with the original railroad purpose—Section 8(d) operates to preclude abandonment of the property interest and to create a new easement. In such event, Section 8(d) may effect a taking. *Preseault v. United States,* 100 F.3d 1525 (Fed. Cir. 1996) ("*Preseault II*").

In the present case, however, there was no rail-to-trail conversion at all. Plaintiff owns property adjacent to a former right-of-way owned by the North Central Railway Association, which instituted proceedings in 2013 to abandon the rail line. As part of these proceedings, with the railroad's express approval, the Surface Transportation Board ("STB") issued a "Notice of Interim Trail Use," or "NITU." Such a notice is inaptly named because the issuance of a NITU does not itself dictate or even indicate *trail use* of the rail corridor. Rather, the NITU affords time for voluntary negotiations between the railroad and a trail sponsor about entering into an interim trail use use agreement. Here, negotiations to establish interim trail use of a portion of the rail corridor did not result in an interim-use agreement, and the railroad abandoned the rail line within the one-year timeframe provided in STB regulations even absent the negotiation period. Upon the railroad's affirmative steps indicating the abandonment of its rail line—filing a notice of the consummation of its rail line abandonment under 49 C.F.R. § 1152.29(e)(2), resulting in the end of STB jurisdiction—the railroad's easement in the corridor expired, and Plaintiff gained a right to unencumbered possession to the centerline of the corridor adjacent to her property.

The United States' opening brief (at 21-37) demonstrated that the NITU could not have caused a physical occupation or invasion of Plaintiff's property,

because it did not effect trail use. The NITU simply required the railroad (at its own invitation, as it had consented to the NITU's issuance) to refrain from formally abandoning its rail line during negotiations with a potential local trail sponsor over possible interim trail use. Moreover, because the railroad was *never* under any obligation to abandon its perpetual easement, the NITU could not extend the duration of the easement or interfere with Plaintiff's interest, even if the NITU had delayed the date of abandonment. And the status of the rail corridor did not change during the NITU negotiation period: it was still the location of a rail line under STB's jurisdiction, which had not yet been abandoned by the railroad.

Plaintiff's answering brief offers no rejoinder to any of these points. Rather, notwithstanding the absence of any physical impact on Plaintiff's property use by the NITU, Plaintiff and her amici argue that the NITU must be deemed a categorical physical taking in light of this Court's decision in *Ladd v. United States,* 630 F.3d 1015 (Fed. Cir. 2010), and its progeny. The United States' opening brief (at 22-29) showed that *Ladd* erred in determining that a NITU—as opposed to actual authorizaton of interim trail use via a qualifying trail use agreement—triggers Section 8(d)'s rule preventing rail corridor abandonment. *Ladd* wrongly construed the NITU as the event that "blocks" reversion of the subject right-of-way because this Court had previously held, in

Caldwell v. United States, 391 F.3d 1226 (Fed. Cir. 2004), that a Trails Act takings claim accrues upon the issuance of the NITU. In so holding, however, *Caldwell* expressly declined to address whether there could be takings liability from a NITU alone (without any actual rail-to-trail conversion).

Under its plain terms, Section 8(d) of the Trails Act precludes the abandonment of a railroad right-of-way only when trail use is established under a qualifying interim use agreement. *See* 16 U.S.C. § 1247(d). Here, the CFC disregarded the statute's language and mandated compensation for a phantom physical taking in holding that the NITU took Plaintiff's right of reversion where there was no impact on Plaintiff's property rights and no meaningful delay in the vesting of Plaintiff's reversionary interest. This Court should review the present appeal en banc for purposes of reversing *Ladd* and *Caldwell*, to the extent that either case holds—contrary to the plain terms of the Trails Act—that a NITU alone constitutes a physical taking. Such a reversal would not upset the Court's longstanding precedent that actual rail-to-trail conversions under the Trails Act (when outside the scope of railroads' easements) constitute physical takings. There was simply no physical taking here, as there was no conversion to trail use.

2. Alternatively, even if this Court declines to reverse *Ladd*'s determination that a NITU alone effects some sort of physical occupation, it

should reverse the CFC's ruling that the NITU in this case effected a taking. The Supreme Court's decision in *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012)—which post-dates *Caldwell* and *Ladd*—reaffirmed that not every physical occupation of a landowners' property constitutes a categorical taking. Rather, a categorical taking occurs only in the case of "permanent" physical invasions. In contrast to the perpetual trail easement that results from a qualifying interim-use agreement under Section 8(d) of the Trails Act, a NITU alone does not authorize trail use and is temporary from the outset. In the present case, a NITU-caused physical invasion (if any) was limited to a brief delay (if any) in the railroad's relinquishment of the right-of-way and thus a brief continuing occupation by the railroad (consistent with its property rights), which did not interfere with Plaintiff's investment-backed expectations or impact the use of Plaintiff's property in any fashion. For these reasons, there plainly was no taking.

The judgment of the CFC should be reversed.

ARGUMENT

I. The NITU did not cause any physical occupation or use of Plaintiff's property beyond the pre-existing railroad easement.

Plaintiff's reversionary interest in the right-of-way in this case was not precluded from reverting by operation of Section 8(d) of the Trails Act, and her property was never subject to a new government-created easement for a

recreational trail, held to constitute a permanent physical taking in *Preseault II*, 100 F.3d 1525.[1] She accordingly could not have suffered a permanent physical occupation resulting in possible per se takings liability. The CFC nonetheless permitted Plaintiff to maintain a permanent physical takings claim where *none of those things* has happened: there is no "interim use" of the right-of-way, there is no new easement, and there is no triggering of the preclusion of reversion under 16 U.S.C. § 1247(d).

In *Ladd*, this Court erroneously held that a NITU alone—not the interim trail use and state-law preclusion that *may* (but here did not) follow from the negotiations signified by the NITU's issuance—"prevents the landowners from possession of their property unencumbered by the [right-of-way] easement." 630 F.3d at 1023. The *Ladd* panel considered itself bound by *Caldwell*, 391 F.3d 1226, to reach that result; if the Court continues to take that view of *Caldwell*, then *Caldwell* should be overruled as well. Plaintiff's brief presents no persuasive reason to preserve either ruling.

[1] Plaintiff's property interest at the time of the NITU was effectively a fee simple interest burdened by the railroad's easement during the life of that easement. We use "reversionary interest" as a shorthand to describe that interest, which was effectively a future contingent interest in an unencumbered fee if and when the railroad's easement expired.

A. *Preseault* linked Trails Act takings liability to interim trail use and the triggering of the Trails Act's preclusion of the expiration of an easement under state law.

The Supreme Court's seminal decision in *Preseault v. ICC,* 494 U.S. 1 (1990) ("*Preseault I*"), and this Court's en banc ruling in *Preseault II* established the core framework for analyzing a claim that a reversionary interest in a right-of-way is taken by operation of the Trails Act. Plaintiff insists that the United States in this case seeks to depart from this long-established precedent, but that incorrect proposition rests on a fundamental mischaracterization of *Preseault*, its progeny, and this case.

Preseault I was not an action for just compensation; it was an action filed in district court to invalidate a ruling of the Interstate Commerce Commission ("ICC"), the predecessor of the STB, which "allowed the railroad to discontinue service" on a rail line across the Preseaults' land and "approved the agreement between the State [of Vermont] and the city [of Burlington, Vermont] for interim trail use." *Preseault I*, 494 U.S. at 9.[2] The Preseaults alleged that the ICC's approval of the trail use agreement was unconstitutional under the Fifth Amendment because it took their reversionary interest in the right-of-way without just compensation. The Supreme Court unanimously upheld the ICC's

[2] The State functioned as the "railroad" because it held title to the right-of-way, and the City of Burlington sponsored the trail. *See Preseault I*, 494 U.S. at 9.

decision: if indeed the Preseaults' reversionary interest was taken by virtue of the ICC's approval of the interim trail use agreement and the operation of Section 8(d)—which the Court did not determine, *id.* at 17—then the Tucker Act waiver of immunity supplied a constitutionally adequate means for the Preseaults to get just compensation in the CFC. *Id.* at 12.

Justice O'Connor concurred, expressly disagreeing with the holding of the court of appeals that "no takings claim could arise" by operation of the Trails Act because "the ICC's actions forestalled [the Preseaults] from possessing the asserted reversionary interest." *Id.* at 20. Justice O'Connor noted the government's acknowledgment that "the existence of a taking will rest upon the nature of the state-created property interest that [the Preseaults] would have enjoyed absent the federal action and upon the extent that the federal action burdened that interest." *Id.* at 24. Importantly, the "federal action" at issue was not a NITU. *See id.* at 7 n.5 (noting that the ICC "had not yet promulgated its final regulations implementing" the Trails Act, and there was no such thing as a NITU when the ICC issued the challenged decision). Instead, the federal action that the government conceded might effect a taking was the ICC's "approv[al of] the agreement between the State and the city for interim trail use." *Id.* at 9. Justice O'Connor opined that, because *such actual interim trail use* might trigger the statutory preclusion of reversion, the Preseaults

might have suffered a taking when the ICC approved the agreement for interim trail use, after which authorized trail use could occur under the statute. *Id.* at 21-24.

After losing in the Supreme Court, the Preseaults filed a takings action in the CFC; on appeal, this Court held en banc that a taking "resulted from the establishment of the recreational trail." *Preseault II*, 100 F.3d at 1531 (plurality opinion of Plager, J.). The plurality concluded that the trail agreement effected a "physical taking" because the trail use was not within the scope of an existing easement and was therefore a "physical entry upon the private lands of the Preseaults." *Id.* at 1550-51; *accord id.* at 1554 (Rader, J., concurring) (stating that "present use of that property inconsistent with the easement . . . demands compensation"). *Preseault II* thereby established the rule that a rail-to-trail conversion under the Trails Act—where the trail use is outside the scope of the original grant to the railroad and where the railroad's interest in the right-of-way would have been extinguished under state law but for Section 8(d) of the Trails Act—causes the physical taking of a new trail easement. *See also Hash v. United States*, 403 F.3d 1308, 1311 (Fed. Cir. 2005) (noting that reversion was precluded by "legislative act," i.e., the operation of the Trails Act); *Toews v. United States*, 376 F.3d 1371, 1374, 1381 (Fed. Cir. 2004) (recognizing a taking

due to "imposition of [a] recreational trail" pursuant to "agreement for interim use" between railroad and trail sponsor).

But this Court was not presented in *Preseault II*, nor could this Court have decided, the very different question that is presented here: what sort of taking, if any, may occur in a NITU-only situation where the preclusive effect of Section 8(d) is never triggered because the railroad's negotiations *do not* result in railbanking or interim trail use under a qualifying trail agreement? Because *Preseault II* did not address this question, there is no occasion to revisit that ruling in this case. But as argued below and in our opening brief, this Court should revisit *Ladd*, which misapplied the teaching of *Preseault II* to a situation in which the STB issued a NITU but the Trails Act *did not* operate to preclude reversion of any interests in a right-of-way or otherwise impose a "new easement," because the railroad and trail sponsor *did not* reach an agreement on "interim use of any established railroad rights-of-way," 16 U.S.C. § 1247(d), and interim trail use *did not* occur.

Plaintiff and her Amici sound the refrain that the United States is seeking to undermine effectively all Trails Act precedent. *See* Brief of Appellee 13-22; Brief for National Association of Reversionary Property Owners, et al. ("NARPO Brief") 14-15; Brief of Iowa Farm Bureau Federation, et al. ("Farm Bureau Brief") 11-17. But that is a fundamental misrepresentation of the

United States' argument in this case. Accepting our narrow argument would have no effect on *Preseault I*, *Preseault II*, or the majority of this Court's Trails Act precedent, which largely addresses permanent *trail-conversion* takings claims that are fundamentally unlike this case. Here, we argue only that there is no taking from a *NITU alone*, because a *NITU alone* does not trigger the preclusive effect of Section 8(d) or otherwise alter the correlative property interests of the railroad and the underlying fee owner.

B. *Ladd* incorrectly applied principles from trail-conversion cases to cases lacking the features that made *Preseault* a permanent physical takings case.

The United States is asking this Court to sit en banc to correct a critical error in its jurisprudence. But crucially, that critical error is not an error in *Preseault II* (as Plaintiff insists) but rather in *Ladd,* 630 F.3d 1015. The Court in *Ladd* failed to appreciate that the takings liability holding in *Preseault II*—which resulted from trail conversion and the preclusion of easement expiration—does not extend to situations where there is no trail conversion and, consequently, no preclusion of easement reversion under Section 8(d) of the Trails Act. This misstep—erroneously treating a NITU-only case as though it in fact involves a permanent physical occupation, invasion, or seizure when it does not—has led the CFC to impose per se physical takings liability on the United States where there has been no physical invasion at all.

1. A NITU is not the same as rail-trail conversion and does not trigger Section 8(d).

This Court's fundamental error in *Ladd* was to overgeneralize its prior holdings from trail-conversion cases. Under this Court's long-established law, *Preseault*-type trail-conversion/reversion-blocking cases are treated as presenting permanent physical takings claims. But in cases like this one and *Ladd*, the government action is merely regulatory in nature: the complained-of government action helps facilitate negotiations that *might* lead to a future physical invasion, but the government action is not on its own tantamount to a physical invasion. Put another way, unlike the situation in *Preseault* in which a trail use agreement was approved, a NITU by itself *does not* result in trail use or railbanking, which happens only if other conditions are met (i.e., successful negotiation of a qualifying trail use agreement).

A NITU *does not* trigger Section 8(d) of the Trails Act, which is effective only "in the case of interim use" as "trails," pursuant to "donation, transfer, lease, sale, or otherwise" and "subject to restoration or reconstruction for railroad purposes," i.e., when railbanking and rail-to-trail conversion actually occurs. 16 U.S.C. § 1247(d). Plaintiff and her Amici wrongly contend that the NITU is an "invocation" of Section 8(d). Brief of Appellee 12; NARPO Brief 9-11; Farm Bureau Brief 13. But Section 8(d) has no operative effect unless and

until *other* conditions are fulfilled. In other words, the suggestion of the possibility of a future invasion (which is the NITU's essence) is not itself a physical invasion.[3]

2. A NITU does not expand the railroad's pre-existing right.

The railroad here fully consented to the negotiation period signified by the NITU, and the fact that it did so did not expand its easement in any way, nor did it gain new rights beyond those already held or transform its private interest into a public interest. *See* NARPO Brief 13. The NITU did not invite third parties onto the land, and it did not preempt state-law abandonment. In the Supreme Court's parlance from *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the NITU did not amount to a "leasehold," because it did not give "the government possession of the property, the right to admit and exclude others, and the right to use it for a

[3] The STB's recent decision in *City of Fishers* evinces the agency's consistent view that a trail use agreement—not a NITU—effects "railbanking." *See* STB Docket No. FD 36137 (served July 31, 2019) (attached as the Addendum hereto). In that proceeding, a third-party railroad wished to reactivate a rail line, i.e., remove it from interim trail use under 16 U.S.C. § 1247(d). The STB held that the line could not be reactivated because, although a NITU had been issued (providing time for voluntary negotiations), trail use agreements had not yet been reached and provided to the agency under its regulations. Decision at 7. In so holding, the STB rejected the third-party railroad's argument that the right to seek rail reactivation under the statute is triggered when the STB issues a NITU. Decision at 4.

public purpose." *Id.* at 324 n.19 (holding that a lengthy moratorium preventing all development of property was not a taking). The railroad's voluntary decision to engage in trail negotiations, *see* 49 C.F.R. §§ 1152.29(c), (d), no more "preempts" Plaintiff's interest in future unencumbered possession of a section of rail corridor than would the railroad's voluntary decision to not immediately abandon the line for any other reason. The right-of-way remained the site of a rail line during the NITU negotiation period, and any preemption of state law existed simply as part of the STB's pre-existing plenary authority over rail transportation. *See* 49 U.S.C. §10501(b).

3. A NITU is akin to any other STB regulatory action and does not present a physical taking.

The NITU no more constitutes a physical invasion of Plaintiff's property than does any other STB regulatory action or requirement that could, in theory, prolong a railroad's use of its easement. *See* Brief of Rails-to-Trails Conservatory 8-9, 22-23 (explaining other regulatory processes that occur before the end of STB's jurisdiction over a rail line). Nor is a NITU any more a physical occupation, invasion, or seizure by the United States than any other decision by the railroad itself that would extend ownership of its easement, such as seeking an extension of time to file a notice of abandonment consummation or deciding to continue rail service rather than consummate abandonment. The Supreme Court has long held that takings claims regarding

the application of regulation are subject to a regulatory (not physical) takings analysis. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

Moreover, during the NITU's life, Plaintiff's rights were no more limited than at all other times of her (and her predecessor's) ownership, as her potential future use of the land without the encumbrance of the railroad's easement was *always* conditioned on the railroad's decision to stop its use of that land. *Tahoe-Sierra*, 535 U.S. at 323-24, rejected the argument that Plaintiff makes here, namely, that the application of a regulation in effect transforms private property into public property and therefore constitutes a physical taking. Brief of Appellee 12-13. Plaintiff provides no serious argument to distinguish *Tahoe-Sierra*, nor does Plaintiff explain why in the absence of *physical* occupation, invasion, or seizure, this case should nonetheless be treated as presenting a potential *physical* taking.

Likewise, Plaintiff entirely disregards the law that government regulation that affects an existing relationship between private parties does not amount to a physical taking. *See* Opening Brief 26-27. Instead, government action affecting an existing "voluntarily entered into" relationship can support only a regulatory (and not a physical) takings claim, to be analyzed " 'under the multifactor inquiry generally applicable to nonpossessory governmental

activity.' " *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)); *see also Yee v. City of Escondido*, 503 U.S. 519, 530-31 (1992) (rejecting the contention that an ordinance "amount[ed] to compelled physical occupation because it deprive[d] petitioners of the ability to choose their incoming tenants," because any such deprivation did "not convert regulation into the unwanted physical occupation of land").

4. A railroad's initiation of the regulatory rail-line abandonment process is not the same as consummating that process or abandoning its easement.

The Farm Bureau Amici incorrectly represent that the rail corridor is "abandoned" as of the date of the railroad's petition or the STB's grant of such a petition. Farm Bureau Brief 9. To the contrary, abandonment of a rail line and release from STB jurisdiction occurs only after the railroad takes the additional, voluntary steps to fulfill any conditions imposed by the STB and actually consummates rail line abandonment. *See* 49 C.F.R. §§ 1152.29(d) (allowing railroad to fully abandon if trail negotiations fail and fulfilling any such conditions), 1152.29(e)(2) (describing steps a railroad must take before it has "exercised the authority granted and fully abandoned the line"); *Baros v. Texas Mexican Railway Co.*, 400 F.3d 228, 235-36 (5th Cir. 2005) (rejecting

landowners' argument that rail line abandonment was automatically consummated and explaining that a letter confirming consummation of abandonment is required). Only at this point could the railroad easement also be deemed abandoned under applicable state property law or federal law. *See Chadeck v. Alberhasky*, 111 N.W.2d 297, 298 (Iowa 1961); *Grantwood Village v. Missouri Pacific Railroad Co.*, 95 F.3d 654, 659 (8th Cir. 1996) ("State law claims can only be brought *after* the [STB] has authorized an abandonment and after the railroad has consummated the abandonment authorization."); *City of South Bend, Indiana v. STB*, 566 F.3d 1166, 1168 (D.C. Cir. 2009) ("Abandonment frees subservient landowners to exercise reversionary rights in, and local governments to condemn, the railroad's right-of-way.").

5. Even if *Caldwell* were correct, it does not compel the erroneous holding in *Ladd*.

Our opening brief explained that *Ladd*'s erroneous holding that a NITU may constitute a per se physical taking rested on an erroneous reading of the claim-accrual holding of *Caldwell*, 391 F.3d 1226, which in turn misapplied *Preseault*'s liability holding to reach an incorrect claim-accrual rule. *See* Opening Brief 30. *Caldwell* neither concerned nor considered the situation presented in *Ladd* and in this case—where a NITU does not lead to rail-to-trail conversion. *Caldwell* instead involved the blocking of reversionary interests

through the conversion to interim trail use; it did not direct that where reversionary interests are *not blocked*, a NITU necessarily presents a physical taking.

* * *

For these reasons, the United States respectfully asks this Court to overrule *Ladd*. Plaintiff's argument against doing so—that *Preseault II* holds that the conversion to a recreational trail and triggering of Section 8(d) can be a permanent physical taking—is a non sequitur. This is not a trail-conversion case, and the United States is not asking this Court to overrule *Preseault II*. Instead, the United States merely asks this Court to correct its erroneous precedent in *Ladd* and to recognize that a NITU alone—which does not on its own result in railbanking, trail use, or the triggering of Section 8(d) of the Trails Act—cannot constitute a physical taking.

C. If necessary to correct *Ladd*, this Court should also overrule its precedent holding that a takings claim based on the Trails Act accrues when a NITU issues.

Although we believe this Court may adopt our position that a bare NITU does not effect a physical taking without also overruling *Caldwell*'s trail-conversion accrual holding, *see* Opening Br. 30, this Court has indicated that *Ladd* ineluctably follows from *Caldwell*. We do not lightly request that this Court reconsider its precedent, but if this Court decides that *Caldwell* and its

progeny—including *Barclay v. United States*, 443 F.3d 1368 (Fed. Cir. 2006)—compelled the erroneous holding in *Ladd*, the Court should also correct the "egregious legal error" underlying *Caldwell*'s claim-accrual rule. *Ladd v. United States*, 646 F.3d 910, 911 (Fed. Cir. 2011) (Gajarsa and Moore, JJ., dissenting from denial of rehearing); *see also* Opening Brief 29-34.[4]

Plaintiff's argument for preserving *Caldwell* has nothing to do with the merits of that decision, instead focusing on practical and preclusion arguments (addressed in the next section). In particular, Plaintiff provides no serious argument to rebut the government's argument that it is the triggering of Section 8(d) and the imposition of trail use—not the NITU—that constituted the physical taking in *Preseault II* and progeny. Plaintiff insists that a physical taking occurs when the STB "invokes" Section 8(d), Brief of Appellee 3, 20,

[4] Plaintiff criticizes the United States for not highlighting that *Barclay*, as *Caldwell*'s progeny, would also be affected by a decision overruling *Caldwell*. Brief of Appellee 27. *Barclay* merely repeated *Caldwell*'s holding that a trail-conversion claim accrues when the government issues a NITU. 443 F.3d at 1378. It goes without saying that a decision overruling *Caldwell*'s holding regarding the accrual of a trail-conversion claim would also overrule *Barclay*. As for this Court's decision in *Illig v. United States,* 247 F. App'x 883 (2008), much discussed by Plaintiff, it is non-precedential, nonbinding, and need not be overruled. Fed. Cir. R. 32.1(d); Fed. Cir. IOP #13 (requiring en banc consideration to overrule a prior holding "expressed in an opinion having precedential status").

but she fails to recognize that the NITU, on its own, does not actually effect the trail use that *actually triggers* (or "invokes") Section 8(d).

Plaintiff and her Amici observe that there are advantages to a bright-line rule for physical takings claim accrual. Brief of Appellee 34; NARPO Brief 21; Farm Bureau Brief 23. But the NITU is not a proper bright line for Trails Act takings claims. Section 8(d) of the Trails Act provides that interim trail use under a qualifying agreement, "shall not be treated . . . as an abandonment" of a railroad right-of-way, notwithstanding state law or terms of the railroad grant that might dictate otherwise. 16 U.S.C. § 1647(d). Interim trail use cannot occur until "an interim trail use agreement is reached (and thus interim trail use established)." 49 C.F.R. §1152.29(d)(2); *see also id.* §1152.29(c)(2). Under the plain terms of the statute and the regulations, it is the execution of an interim use agreement that blocks reversion and results in the taking of an easement for trail purposes, and such execution is accordingly the appropriate "bright line" for the accrual of Trails Act takings claims.

Moreover, this Court in *Caldwell* wrongly viewed the NITU as the "only *government* action in the railbanking process that operates to prevent abandonment of the corridor." 391 F.3d at 1233-34. Importantly, the STB does not, in issuing a NITU, effect interim trail use or guarantee that a qualifying interim-use agreement will be reached. Rather, the government action effecting

any possible taking is not the NITU, but rather the statute's provision in Section 8(d) that preserves the right-of-way from abandonment under otherwise applicable law when an interim trail use agreement is reached and the statutory conditions are met. This accrual rule, premised on the application of federal law to the circumstances governed by that law, is in perfect harmony with the requirement in *Navajo Nation v. United States*, 631 F.3d 1268, 1274 (Fed. Cir. 2011), that a takings claim must be predicated on "what the government has done."

Moreover, the Amici are incorrect in stating that STB has no involvement with and there is no public notice of a trail use agreement. NARPO Brief 22; Farm Bureau Brief 10. STB regulations (which were not in effect when *Caldwell* was decided) specifically require a railroad and trail sponsor to "notify the [STB] . . . that the agreement has been reached" "within 10 days" of doing so, 49 C.F.R. §1152.29(h), and the STB posts the notification on its publicly available docket for the abandonment proceeding. *See* "Search STB Actions," https://www.stb.gov/home.nsf/enhancedsearch?OpenForm (search "Filing Type" for "Trail Use Agreement Reached"); Abandonment & Discontinuance of Rail Lines & Rail Transportation under 49 U.S.C. 10903, 61 Fed. Reg. 67,876, 67,877 (Dec. 24, 1996) (finding that "actual notice to each adjoining landowner" is not "necessary to ensure that affected

landowners . . . receive adequate notice" of filings in abandonment proceedings); *National Association of Reversionary Property Owners v. STB*, 158 F.3d 135 (D.C. Cir. 1998) (declining to disturb the STB's finding). Further, under claim accrual principles, if the execution of an interim trail use agreement is inherently unknowable until such posting, claim accrual is suspended until such later date. *See Holmes v. United States*, 657 F.3d 1303, 1317 (Fed. Cir. 2011).

Plaintiff argues that *United States v. Dow*, 357 U.S. 17, 24 (1958), compels the claim-accrual rule announced in in *Caldwell*. Brief of Appellee 35-36. In *Dow*, the Supreme Court addressed who was entitled to a condemnation award: either those who owned the property at the time the government instituted condemnation proceedings to acquire a pipeline right-of-way and actually entered the property, or those who subsequently owned the property at the time the government formally filed a declaration of taking three years later. 357 U.S. at 18. The Supreme Court held that a single taking was initiated on the date of physical entry, entitling the original owner to the compensation award. *Id.* at 23-27. In *Caldwell*, by contrast, the NITU did not initiate any physical occupation. Rather, per Section 8(d) of the Trails Act, trail conversion under an interim trail use agreement precluded abandonment and effected the taking of a new easement for trail use. Because the physical taking in *Caldwell* did not occur until

the execution of the agreement, nothing in *Dow* required this Court to reach back to the NITU as the date for claim accrual. To be consistent with *Dow*, this Court should have held in *Caldwell* that the taking was initiated (and the taking claim accrued) upon the date of the interim trail use agreement.

Plaintiff's supplemental citation of *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), is likewise inapt. *See also* Farm Bureau Brief 17-20; NARPO Brief 8. It goes without saying that a "right to full compensation arises" if and when the United States takes property for public use. 139 S. Ct. at 2170. But the question in this case is whether a NITU that does not result in any rail-to-trail conversion *causes a taking*, not whether (as in *Knick*) state-court remedies must be exhausted before a plaintiff may file a claim in federal court.

At bottom, the NITU in this case did not cause a physical occupation of Plaintiff's property or interfere in any way with her reversionary interest. To the extent *Ladd* or *Caldwell* require this Court to find a per se physical taking on these facts, those precedents should be overruled.

D. The government is not estopped from arguing that *Caldwell* be overruled.

Contrary to Plaintiff's suggestion, Brief of Appellee 22; *see also* Farm Bureau Brief 14-16, the United States is not barred from asking this Court to reconsider *Caldwell* en banc. Although the United States initially acquiesced to

this Court's claim-accrual ruling in *Caldwell*, such acquiescence provides no basis for judicial estoppel. This is so for four reasons.

First, it is doubtful that judicial estoppel is ever appropriate against the government. *Cf. Office of Personnel Management v. Richmond*, 496 U.S. 414, 423 (1990).

Second, the United States' current position—that a Trails Act takings claim accrues only when a qualifying interim trail use agreement is reached—is precisely the position that the government advocated in *Caldwell*. Brief of United States 16-17, *Caldwell v. United States*, No. 03-5152, (Fed. Cir. Feb. 20, 2004) (positing that "the government's liability (if a taking occurred) was fixed when the [interim-trail sponsor] and the [railroad] entered into a trail use agreement, *not when the ICC issued the NITU*" (emphasis added)). In holding that a Trails Act takings claim accrues upon the issuance of a NITU, this Court *rejected* the United States' position. *Caldwell*, 391 F.3d at 1234.

Binding the United States to a position adopted by this Court that was contrary to the United States' argument before it would not serve the purpose of judicial estoppel: "to protect the courts rather than the litigants." *Data General Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996); *cf. Zedner v. United States*, 547 U.S. 489, 505 (2006) (refusing to estop a party from taking a position contrary to that adopted by a court sua sponte in a prior suit involving the

same party). Rather the doctrine "only binds a party to a position that it [both] *advocated* and *successfully achieved*." *SkyHawke Technologies, LLC v. Deca International Corp.*, 828 F.3d 1373, 1376 (Fed. Cir. 2016) (emphasis added). "Acquiescence" in a court's holding "is not congruent to a disavowal" of the party's initial position and thus "cannot form the basis for judicial estoppel." *Haggart v. Woodley*, 809 F.3d 1336, 1346 (Fed. Cir. 2016).

Third, the United States' decision to no longer acquiesce in *Caldwell*'s holding is justified "by an intervening change in the law." *Biomedical Patent Management Corp. v. California Department of Health Services*, 505 F.3d 1328, 1342 (Fed. Cir. 2007). When the United States opposed reconsideration of *Caldwell*, this Court had not yet ruled in *Ladd* (or in any other case) that *Caldwell* compelled the conclusion that a bare NITU effects a physical taking. Indeed, in *Caldwell*, this Court announced that its ruling did "not involve, . . . [or] address, whether the issuance of the NITU in fact involves a compensable temporary taking when no agreement is reached." 391 F.3d at 1234 n.7. This Court's contrary ruling in *Ladd*—that *Caldwell* does compel the finding of physical taking from a NITU alone—opened the door to litigation and liability that the United States reasonably did not expect to flow from the plain language of *Caldwell*.

Fourth, the government should not be estopped from questioning *Caldwell*'s claim-accrual rule in this case because the United States' prior acquiescence in the rule did not "impose an unfair detriment" on the Plaintiff. *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001). Plaintiff was not party to any prior suit where the accrual date was at issue, and to the extent she has a takings claim in this case, it is not time-barred. Nor is there any risk that post-*Caldwell* litigants were or will be deprived of valid claims, because the government is asking this Court to delay, not accelerate, the accrual date for a takings claim based on operation of the Trails Act.

For these reasons, judicial estoppel is no bar to this Court's reconsidering and reversing *Caldwell*'s claim-accrual rule, to the extent necessary to hold that a NITU alone does not effect a physical occupation or taking.

E. This Court should reverse *Ladd* to prevent a growing tide of meritless takings claims.

Plaintiff's claim—alleging a physical taking based on a NITU alone—is the first such claim to reach a final judgment in the CFC since *Ladd*. The United States sought rehearing in *Ladd* to correct the erroneous holding of that case as soon as it was apparent. Now, at its first opportunity to do so in the intervening years, United States presents the Court with that question again.

This case is part of a growing trend. The United States is aware of 51 cases now pending that include claims alleging a taking premised on a NITU alone. In some of these cases (as in the present case), the railroad consummated abandonment of its rail line (and thus its easement) following failed negotiations over interim trail use. In other cases, the railroad elected not to exercise its authority to abandon the rail line. *See Memmer v. United States*, 122 Fed. Cl. 350 (2015) (now on remand from this Court, No. 17-2230, for further analysis consistent with the remand in the present case). In yet others, the NITU included an erroneous description that the CFC determined included part of a rail line that the subject railroad never intended to abandon. *See Hardy v. United States*, 131 Fed. Cl. 534 (2017), *appeal pending*, No. 19-1793. In still others, the NITU remains pending and it is unclear whether trail use will result, whether negotiations will fail and the railroad will consummate line abandonment, or whether upon failed negotiations the railroad will elect not to abandon the line. *See, e.g.*, *Oldham v. United States*, CFC No. 18-1961 (filed December 21, 2018, the same day that a NITU was issued); *Zinser v. United States*, CFC No. 18-306 (filed February 28, 2018, the same day that a NITU was issued).

In each of these scenarios, the CFC has imposed (or seems poised to impose) per se liability based on *Ladd* and on the assumption that every NITU

constitutes a physical taking. This Court should sit en banc to overrule *Ladd* and preclude these patently meritless claims.

Contrary to Plaintiff's bare assertion, Brief of Appellee 11, most NITUs *do not* result in trail conversion. Brief of Rails-to-Trails Conservatory 26. But plaintiffs bringing NITU-only takings claims generally will be entitled to attorneys' fees (based on the erroneous liability principles in *Ladd*), notwithstanding the absence of actual damages. *See* Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4654(c). In this context, treating NITUs as per se takings, notwithstanding the absence of impact on the underlying landowners, will simply encourage litigation that only benefits counsel while burdening the United States and the courts.

* * *

In sum, the NITU here did not cause any physical occupation or use of Plaintiff's property beyond the pre-existing railroad easement, and the Court should overrule any precedent that suggests otherwise.

II. Even if the NITU effected a physical occupation, it did not amount to a taking under the multi-factor analysis of *Arkansas Game*.

Even if this Court declines to revisit its holding in *Ladd*, it should reject the CFC's conclusion that a NITU alone effects a categorical taking and

should hold, under the multi-factor analysis of *Arkansas Game*, that no taking occurred from the NITU in this case.

A. Any NITU-based physical takings claim must be analyzed under the default multi-factor framework.

Unlike an interim trail use agreement—which is designed to preserve a right-of-way in perpetuity—a NITU alone is at most a temporary hold on the conclusion of abandonment proceedings. A "categorical" taking only occurs in the event of a "permanent" physical occupation. *Loretto*, 458 U.S. at 426.[5] Where a government-caused physical invasion is fleeting or temporary in nature, takings liability (if any) depends upon the application of a multi-factor test. Opening Brief 34-38. That default analytical framework applies to all physical takings claims apart from the narrow set of claims qualifying for categorical treatment. *Arkansas Game*, 568 U.S. at 32 (explaining that, with rare exception, "takings claims turn on situation-specific factual inquiries").

Contrary to the arguments of Plaintiff and her Amici, the multi-factor test of *Arkansas Game* is not limited to flooding cases. The categorical rule of *Loretto* is limited to "permanent" physical invasions, 458 U.S. at 426, and the

[5] The other limited situation where a categorical taking may occur—where regulation permanently leaves zero residual value of the property, *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)—is not at issue in this case.

Supreme Court has never "abrogat[ed] the permanency requirement." *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1356 (Fed. Cir. 2002); *see also, e.g.*, *Nollan v. California Coastal Commission*, 483 U.S. 825, 832 (1987) (stating that a taking would occur "where individuals are given a *permanent and continuous* right to pass to and fro" (emphasis added)).

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

B. There is no taking here under such a multi-factor framework.

In this Court's previous opinion in this case, it directed the CFC to conduct fact-finding and analysis that would illuminate whether correcting the legal framework for this type of case would make a practical difference in the outcome of this case (and presumably cases like it). As explained in the Opening Brief (at 38-61), the CFC erred in applying that multi-factor analysis under *Arkansas Game*. Instead of evaluating each factor on its own terms, the CFC repeatedly relied on precedent and analysis pertinent to permanent

physical takings, allowing its analysis to be infected with its assumption that Plaintiff's claim should be treated as a per se taking.

Duration: As explained in the Opening Brief (at 40-44), there is no evidence that the NITU extended the railroad's occupation of the right-of-way or delayed Plaintiff's use of her property. Plaintiff provides no rejoinder. Instead, Plaintiff insists that this factor should not apply because this is a "categorical" taking. Brief of Appellee 46-48. But Plaintiff ignores this Court's instructions to apply a multi-factor analysis—under which the CFC by definition was to assume the claim was *not* "categorical" in nature—as well as the Supreme Court's clear mandate that "time is indeed a factor" in a takings liability analysis. *Arkansas Game*, 568 U.S. at 38-39. Moreover, Plaintiff fails to confront the fact that she cannot establish that the NITU delayed the railroad's abandonment *at all*, particularly given that the railroad consummated abandonment within the one-year period it would have had to do so even in the absence of the NITU. Plaintiff provides no argument in support of the CFC's erroneous temporal severance of the NITU's brief duration in order to make the NITU's effects appear "total," in direct violation of *Tahoe-Sierra*, 535 U.S. at 331.

Purpose and Intent: As explained in the Opening Brief (at 45-46), Plaintiff cannot show intent to defeat her property interest where she cannot even

demonstrate any *effect* on that property interest. In response, Plaintiff insists that the United States has improperly imported a causation question into this analysis, but of course causation must be established in every takings claim for liability to attach. Plaintiff's odd complaint, *see* Brief of Appellee 50, that *St. Bernard Parish Government v. United States*, 887 F.3d 1354 (Fed. Cir. 2018), is a flooding case does not undermine the "well established" fundamental premise of takings law "that a takings plaintiff bears the burden of proof to establish that the government action caused the injury." *Id.* at 1362. Plaintiff makes no effort to establish that "what would have occurred" absent the NITU is any different than what did occur here. *Id.* (quoting *United States v. Archer*, 241 U.S. 119, 132 (1916)).

Character of the Land: The Opening Brief (at 46-49) established that the character of Plaintiff's interest in a portion of the rail corridor was always conditioned on the voluntary decision of the railroad to abandon its easement, such that Plaintiff had no expectation that she would *ever* take possession. Again, Plaintiff simply and erroneously insists that this factor does not apply, despite the clear direction in *Arkansas Game*, 568 U.S. at 39. Moreover, Plaintiff's insistence that this factor is not about "foreseeability," Brief of Appellee 51, contravenes the *Arkansas Game*'s instruction to weigh the extent to

which a property owner had forewarning, tempering the expectations that were (allegedly) thwarted by government action. 568 U.S. at 39.

Reasonable Investment-Backed Expectation: As explained in the Opening Brief (at 49-54), Plaintiff has failed to produce *any* evidence of reasonable investment-backed expectations that she would gain possession of the rail corridor on a particular timeline. In response, *see* Brief of Appellee 52-53, Plaintiff once more ignores the Supreme Court's clear mandate that this factor applies in physical takings cases, *see Arkansas Game*, 568 U.S. at 39. Plaintiff's one effort to argue that her expectations were thwarted highlights the absurdity of her claim, as she insists that she could not have known of "the future presence of a recreational trail that prevents plaintiffs from using their land." Brief of Appellee 53. It cannot be gainsaid: *no recreational trail was ever established on the corridor*. Thus, establishment of a recreational trail cannot possibly be the basis of a viable takings claim here.[6] Instead, the question is whether Plaintiff has demonstrated that she or her predecessors made an investment in furtherance of an expectation that she would receive possession of a portion of the railroad corridor on some timeline more accelerated than

[6] Even so, Plaintiff insists that the "presence of the railroad easement" is also not the basis of her takings claim. Brief of Appellee 53-54. If her claim is not based on the railroad's easement, and cannot be based on a trail that never existed, it is unclear what exactly *is* the basis of her claim.

she actually did. Plaintiff has offered zero evidence that would allow that question to be answered in her favor.

Severity of Economic Impact: Finally, the Opening Brief (at 55-61) established that any (hypothetical) effect on Plaintiff's property interest was so limited as to weigh against takings liability. Once again, Plaintiff's main argument in response eschews any analysis under this factor for "categorical" claims, Brief of Appellee 54-55, a non sequitur given the CFC's assigned hypothetical analysis on remand. As the Supreme Court directed, this factor is critical to assessing whether liability inheres for a non-per se physical taking. *Arkansas Game*, 568 U.S. at 39 (citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130-31 (1978)). The parcel-as-a-whole approach provides an objective means of weighing severity, and it is routinely applied in cases where the government's actions affect less than a party's entire parcel. Applied here, the analysis makes plain the negligible (at most) impact of the NITU here, assuming causation could even be established.

* * *

Whether analyzed under *Arkansas Game* (if this Court concludes that Plaintiff's claim is correctly viewed as a physical takings claim) or under *Penn Central* (if this Court overrules *Ladd* and concludes that Plaintiff presents a regulatory takings claim—which Plaintiff itself has not argued), the Court

should reject Plaintiff's claim because she has failed to establish a compensable taking of her limited (and conditional on voluntary decisions by the railroad) property interest.

CONCLUSION

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

Respectfully submitted,

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August 7, 2019
90-1-23-14122

ADDENDUM

47145
EB

SERVICE DATE – JULY 31, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36137

CITY OF FISHERS, CITY OF NOBLESVILLE, & HAMILTON COUNTY, IND.—PETITION FOR PARTIAL REVOCATION OF EXEMPTION

Docket No. AB 290 (Sub-No. 117X)[1]

NORFOLK & WESTERN RAILWAY—ABANDONMENT EXEMPTION—BETWEEN INDIANAPOLIS & TIPTON IN MARION, HAMILTON, & TIPTON COUNTIES, IND.

Digest:[2] The Board denies as premature a request from US Rail Holdings, LLC (US Rail), for the Board to vacate three notices of interim trail use or abandonment and to permit rail service to be reactivated over portions of a rail line in Indiana. The Board also denies US Rail's motion for preliminary injunction to prohibit the removal of track and other rail assets along the line.

Decided: July 29, 2019

On December 21, 2018, pursuant to Section 8(d) of the National Trail Systems Act (Trails Act), 16 U.S.C. § 1247(d), and the Board's interim trail use regulations, 49 C.F.R. § 1152.29, the Board issued three notices of interim trail use or abandonment (NITUs) covering three connected segments of a 37.56-mile rail line that extends between milepost I-2.13 at Indianapolis, Ind., and milepost I-39.69 at Tipton, Ind. (the Line). The Line is jointly owned by the cities of Fishers, Ind. (Fishers) and Noblesville, Ind. (Noblesville), and Hamilton County, Ind. (Hamilton County) (collectively, the Owners).[3] On March 29, 2019, US Rail Holdings,

[1] These proceedings have not been consolidated but are being addressed in the same decision for administrative convenience.

[2] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[3] As explained further in the Board's May 31, 2018 decision in Docket No. FD 36137, slip op. at 5, the Owners' purchase of the Line in 1995 was not subject to licensing authority from the Interstate Commerce Commission, the Board's predecessor agency, pursuant to

(continued . . .)

LLC (US Rail), moved to vacate the NITUs and reactivate rail service. Also on March 29, 2019, US Rail filed a motion for preliminary injunction pursuant to 49 U.S.C. § 1321(b)(4) seeking to prohibit the Owners from removing track and other rail assets along the segments of the Line subject to the NITUs. As discussed below, the Board will deny both motions.

BACKGROUND[4]

By decision served December 21, 2018, the Board explained the path by which US Rail could obtain the Board's authority to purchase and operate the Line. See City of Fishers—Pet. for Partial Revocation of Exemption (December 2018 Decision), FD 36137 et al. (STB served December 21, 2018). The Board further explained that, because NITUs had been requested, if US Rail wished to seek to restore service on the Line, the appropriate path would be "by seeking to vacate a NITU or NITUs to reactivate service, after a NITU or NITUs has or have been issued and the Board is notified that a Trails Act agreement has been reached." Id. at 9. The Board also noted that a bona fide third-party petitioner for reactivation of rail service "is one that has sufficient financing and demonstrates sufficient shipper demand to warrant the proposed reactivation." Id. (quoting Ballard Terminal R.R.—Aquis. & Operation Exemption—Redmond Spur & Woodinville Subdivision, FD 35731 et al., slip op. at 4-5 (STB served Dec. 30, 2014)).

In the December 2018 Decision, the Board also denied US Rail's motion for preliminary injunction, which sought to enjoin the Owners from removing track and other rail assets along the Line and to stay the trail use process. In that decision, the Board issued three NITUs covering three contiguous segments, for a total of approximately 20.87 miles of the 37.56-mile Line, between milepost I-2.13 and milepost I-23 (the NITU Line).[5]

(. . . continued)
Common Carrier Status of States, State Agencies & Instrumentalities, & Political Subdivisions (Common Carrier Status of States), 363 I.C.C. 132 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). Under that precedent, where a state entity acquires a line approved for abandonment and the abandonment has not been consummated, the acquisition is exempt from agency regulation, as is the state entity after the acquisition has taken place.

[4] A more detailed history of these proceedings is contained in the Board's May 31, 2018 decision in Docket No. FD 36137 and December 21, 2018 decision in Docket Nos. FD 36137 and AB 290 (Sub-No. 117X), respectively.

[5] The Board received three requests for issuance of NITUs in Docket No. AB 290 (Sub-No. 117X): (1) Fishers and the other Owners jointly requested a NITU between milepost I-14 and milepost I-19, with Fishers as the proposed interim trail sponsor; (2) Noblesville and the other Owners jointly requested a NITU between milepost I-19 and milepost I-23, with Noblesville as the proposed interim trail sponsor; and (3) the City of Indianapolis (Indianapolis) and the Owners jointly requested a NITU between approximately milepost I-2.13 and milepost I-14, with Indianapolis as the proposed interim trail sponsor.

On March 29, 2019, US Rail filed a motion to vacate the NITUs and reactivate rail service on the NITU Line.[6] According to US Rail, on January 14, 2019, the City of Fishers Board of Public Works & Safety approved a resolution providing that the Hoosier Heritage Port Authority (HHPA),[7] acting on behalf of the Owners, would enter into an interim trail use/railbanking agreement with Fishers in its individual capacity as trail sponsor (Fishers Trail Use Agreement). (US Rail Mot. to Vacate 6.) US Rail asserts that the Fishers Trail Use Agreement was consummated the same day. (Id.) US Rail contends that the Fishers Trail Use Agreement states that the HHPA has decided to remove all trackage and other rail assets on the NITU Line. (Id.; see also id. at Ex. B, Res. City of Fishers Bd. Pub. Works & Safety.) In addition, US Rail asserts that it has sufficient financing to purchase and operate the NITU Line and that there is sufficient shipper demand on the NITU Line to warrant reactivation. (US Rail Mot. to Vacate 7-9.)

Along with its motion to vacate, US Rail also filed a motion for preliminary injunction pursuant to 49 U.S.C. § 1321(b)(4), seeking to enjoin the Owners and their agents, including the HHPA, from removing track and other rail assets along the NITU Line. (US Rail Mot. for Prelim. Inj. 1, Mar. 29, 2019.) US Rail argues that it would be irreparably harmed if the Board denies the motion for preliminary injunction because, if the Owners remove track and other rail assets, reactivating service along the NITU Line would become prohibitively expensive. (Id. at 5, 7.) Moreover, US Rail asserts that the harm is imminent, since the Fishers Trail Use Agreement has been reached and provides for removal of the track and other rail assets along the entire NITU Line. (Id. at 7.) US Rail also argues that there is a strong likelihood that it will succeed on the merits of proving that it is a bona fide third-party petitioner, by demonstrating that it has sufficient financing and that there is sufficient shipper demand to warrant reactivation. (Id. at 9-12.)

On April 22, 2019, in Docket No. AB 290 (Sub-No. 117X), the Owners filed a consolidated reply to US Rail's March 29, 2019 motions. The Owners argue that US Rail's motion to vacate the NITUs and reactivate rail service is premature because no portion of the NITU Line is the subject of an executed trail use agreement. (Owners Reply 4-5, Apr. 22, 2019.) As a result, the Owners assert that no one has had occasion to notify the Board of a finalized interim trail use/railbanking agreement. (Id. at 5.) The Owners argue that, even if the Board were to address the merits of US Rail's motion to vacate, US Rail's case for vacating the NITUs and reactivating service is "grossly inadequate" because (1) US Rail has not proven that it possesses financial wherewithal, (2) US Rail's evidence of shipper and passenger demand is

[6] Unless otherwise noted, the filings submitted beginning March 29, 2019 were filed in both Docket No. FD 36137 and Docket No. AB 290 (Sub-No. 117X).

[7] According to US Rail, the HHPA was created in 1995 to own, protect, and preserve the Line. (US Rail Mot. to Vacate 3.) US Rail represents that each of the Owners owns a one-third interest in the Line through the HHPA. (Id.)

neither sufficient nor credible, and (3) the Owners are not interested in engaging in, or promoting, a financially reckless rail service operation. (Id. at 5-11.)

As to the motion for preliminary injunction, the Owners contend that the Board would not need to consider the merits of the motion if the Board were to deny the motion to vacate the NITUs as premature or without merit. (Id. at 12.) The Owners also argue that US Rail is reiterating the same arguments as it made in its previous motion for preliminary injunction, which the Board denied in its December 2018 Decision. (Id.)

On May 10, 2019, the Board received three additional filings from U.S. Rail: a rebuttal to the Owners' April 22, 2019 reply, a motion for leave to file that rebuttal, and a motion for protective order.[8] In its rebuttal, US Rail argues that its motion to vacate the NITUs and reactivate rail service is not premature because the Board's role under the Trails Act is solely ministerial. (US Rail Rebuttal 3.) According to US Rail, the real trigger of the right to seek rail reactivation is when parties invoke the Trails Act by seeking a NITU, or at least when the Board issues a NITU. (Id. at 5.) Additionally, US Rail provides further evidence of its financial resources, in an effort to demonstrate that it has sufficient financing, and reiterates that there is sufficient shipper demand to warrant reactivation. (Id. at 6-9.)

On May 17, 2019, in Docket No. AB 290 (Sub-No. 117X), the Owners filed a motion to reject US Rail's May 10, 2019 filings and strike US Rail's rebuttal from the record on grounds that US Rail is not entitled to file a rebuttal and is attempting to present additional evidence that it had a full and fair opportunity to present when it filed its motion to vacate the NITUs and reactivate rail service in March 2019. (Owners Mot. to Reject & Strike 1-2.)

On May 22, 2019, in Docket No. AB 290 (Sub-No. 117X), US Rail filed a reply to the Owners' motion to strike and to reject. US Rail urges the Board to accept its rebuttal, including the confidential evidence it submitted, because the Owners' consolidated reply calls into question the adequacy of US Rail's evidence of financial ability. (US Rail Reply to Mot. to Reject & Strike 1-2.)

In addition, on April 15, 2019, and April 24, 2019, the Board received comments from Linda J. Kraatz and First Transit, Inc., respectively, in support of US Rail's motion to vacate the NITUs and reactivate rail service and motion for preliminary injunction. On May 30, 2019, in Docket No. AB 290 (Sub-No. 117X), Gary Davis filed a comment in support of US Rail's motion to vacate the NITUs and reactivate rail service.[9]

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[8] By decision served June 17, 2019, US Rail's motion for protective order was granted.

[9] On June 7, 2019, the Owners filed a letter in response to Mr. Davis's comment, arguing that the Board should disregard the comment since Mr. Davis did not seek leave to intervene and noting that they would not respond substantively to the comment unless the Board requested that

(continued . . .)

On June 24, 2019, in Docket No. AB 290 (Sub-No. 117X), a group of residents of Fishers, Noblesville, and Hamilton County filed a request for the Board to expedite its consideration of US Rail's motion for preliminary injunction, presenting evidence that the HHPA has issued a request for proposals seeking bids for the purchase and removal of 22 miles of rail assets on the NITU Line, with work to begin on or before July 29, 2019. (Residents Letter 1-2; see also id., Attachment 1.) On July 1, 2019, in Docket No. AB 290 (Sub-No. 117X), Tina Siefert, a resident of Fishers, filed a letter raising concerns that the Indiana Department of Transportation's planned construction of a highway overpass over the NITU Line would impede any future plans to reactivate service and urging the Board to grant US Rail's motion for preliminary injunction.[10]

PRELIMINARY MATTERS

US Rail's Rebuttal

Under 49 C.F.R. § 1104.13(c), a reply to a reply is not permitted. However, in the interest of a more complete record, the Board will accept US Rail's May 10, 2019 rebuttal. See Soo Line R.R.—Pet. for Declaratory Order & Prelim. Inj.—Interchange with Canadian Nat'l, FD 36299, slip op. at 2 n.2 (STB served May 9, 2019). Accordingly, the Board will grant US Rail's motion for leave to file rebuttal and deny the Owners' motion to reject and to strike.

Docket No. FD 36137

In their April 22, 2019 reply, the Owners note that US Rail's motion to vacate the NITUs and reactivate rail service and its motion for preliminary injunction were filed in both Docket No. FD 36137 and Docket No. AB 290 (Sub-No. 117X). (Owners Reply 2, Apr. 22, 2019.) The Owners object to US Rail's filing in both dockets. (Id.) For their part, the Owners indicate that they have filed their reply only in Docket No. AB 290 (Sub-No. 117X) because that docket involves the Owners' efforts to implement interim trail use/railbanking. (Id. at 2-3.) According to the Owners, many of the parties in Docket No. FD 36137 have expressed confusion and anger at receiving the recent filings, and the Owners claim some have demanded that the Owners cease and desist from sending them copies of any material related to that docket. (Id. at 3.)

(. . . continued)
they do so. Given the outcome of this decision, the Owners need not file a substantive response to Mr. Davis's comment.

[10] On July 15, 2019, the Owners filed a response to the residents' June 24, 2019 letter and Ms. Siefert's July 1, 2019 letter, arguing that there is no basis for the Board to enjoin its future removal of track.

The Board will close Docket No. FD 36137 and will direct the parties to make any future filings in only Docket No. AB 290 (Sub-No. 117X). Docket No. FD 36137 was opened when the Owners filed a petition on August 1, 2017 to partially revoke their exempt status under Common Carrier Status of States for the purpose of invoking the Trails Act. By decision served May 31, 2018, the Board denied that petition as unnecessary and permitted the Owners to pursue interim trail use/railbanking under 49 C.F.R. § 1152.29. Because the Line was authorized for abandonment and the NITUs were filed in Docket No. AB 290 (Sub-No. 117X), it is the appropriate docket in which the Board can consider the Owners' efforts to pursue interim trail use/railbanking for the NITU Line and US Rail's efforts to reactivate service on the NITU Line. Therefore, it is no longer necessary for the parties to file in both dockets.

DISCUSSION AND CONCLUSIONS

Motion to Vacate the NITUs and Reactivate Rail Service

As the Board has previously stated, under appropriate circumstances, a bona fide third-party petitioner can request that a NITU be vacated to permit the reactivation of rail service. Ballard Terminal R.R., FD 35731 et al., slip op. at 4-5; see also GNP Rly, Inc.—Aquis. & Operation Exemption—Redmond Spur & Woodinville Subdivision, FD 35407 et al., slip op. at 5 (STB served June 15, 2011). A bona fide petitioner is one that has sufficient financing and demonstrates sufficient shipper demand to warrant the proposed reactivation. Ballard Terminal R.R., FD 35731 et al., slip op. at 5. Whether a petitioner is bona fide is a fact-bound determination. Id.

The Board need not address the merits of US Rail's motion because it is premature. As the Board indicated in the December 2018 Decision, if US Rail wishes to restore service on the NITU Line, "the appropriate path is by seeking to vacate the NITU or NITUs to reactivate service, after a NITU or NITUs has or have been issued and the Board is notified a Trails Act agreement has been reached." December 2018 Decision, FD 36137 et al., slip op. at 9 (emphasis added). At this juncture, the Board has issued three NITUs, but the Board has not been notified that any interim trail use/railbanking agreement has been reached. In the case of the segment of the NITU Line between milepost I-14 and milepost I-19, although Fishers has been authorized to enter an interim trail use/railbanking agreement with the HHPA, and both Fishers and the HHPA were presented with the Fishers Trail Use Agreement on January 14, 2019, no agreement has been reached since both parties have not executed the Fishers Trail Use Agreement. (See Owners Reply 2, Apr. 22, 2019; US Rail Mot. to Vacate, Ex. B, License Agreement by & Among HHPA & Fishers, at 12-13 (showing that the HHPA has not executed the Fishers Trail Use Agreement).) As to the segments of the NITU Line between milepost I-19 and milepost I-23 and between milepost I-2.13 and milepost I-14, there is no evidence in the record that agreements for interim trail use/railbanking have been reached. Accordingly, because no agreement has been reached between the Owners and the proposed interim trail sponsors, no part of the NITU Line has yet been railbanked and made available for interim trail use, and US Rail may not presently seek to reactivate service.

US Rail's argument in its rebuttal that the Board's issuance of the NITUs in the December 2018 Decision triggered its right to seek reactivation of service on the NITU Line is misplaced. Under the Trails Act and the Board's implementing regulations, interim trail use/railbanking must be established, meaning an interim trail use/railbanking agreement has been reached, before an entity may seek to reactivate service on a railbanked right-of-way. See 16 U.S.C. § 1247(d) (stipulating that a railbanked right-of-way shall not be considered abandoned "if such interim [trail] use is subject to restoration or reconstruction for railroad purposes"); 49 C.F.R. § 1152.29(d)(2) (instructing that a NITU in an exemption proceeding shall require the parties to notify the Board "if an interim trail use agreement is reached (and thus interim trail use established) . . . .") (emphasis added). By issuing a NITU, the Board provides time for voluntary negotiations for interim trail use/railbanking. See 49 C.F.R. § 1152.29(d)(1). Because the negotiations are voluntary, the abandoning railroad (or the railroad's successor, such as the Owners) may end the negotiations at any time and request that the Board vacate the NITU, thereby reinstating the abandoning railroad's authority to abandon the line. See CSX Transp., Inc.—Aban. & Discontinuance of Serv. Exemption—in City of Richmond & Henrico Cty., Va., AB 55 (Sub-No. 726X) et al., slip op. at 2 (STB served Apr. 15, 2015) (vacating a NITU during negotiating period upon carriers' request and reinstating carriers' authority to abandon and discontinue service). However, a third-party petitioner like US Rail seeking to vacate a NITU to permit the reactivation of rail service can only do so after an interim trail use/railbanking agreement has been reached, thereby allowing interim trail use/railbanking to be established.

Therefore, the Board will deny as premature US Rail's motion to vacate the NITUs and reactivate rail service, without prejudice to refiling with respect to any portion(s) of the NITU Line over which the Board may be notified in the future that an interim trail use/railbanking agreement has been reached.

Motion for Preliminary Injunction

Under 49 U.S.C. § 1321(b)(4), the Board may issue an appropriate order, such as a preliminary injunction, when necessary to prevent irreparable harm. A party seeking a preliminary injunction must establish that (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be preliminarily enjoined, (2) it will suffer irreparable harm in the absence of a preliminary injunction, (3) other interested parties will not be substantially harmed by a preliminary injunction, and (4) the public interest supports granting the preliminary injunction. See, e.g., Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958); see also Union Pac. R.R.—Pet. for Declaratory Order & Prelim. Inj., FD 36197, slip op. at 3 (STB served June 29, 2018); Richard Best Transfer, Inc. v. Union Pac. R.R., NOR 42149, slip op. at 4 (STB served Dec. 22, 2016). A preliminary injunction is an extraordinary remedy and will generally not be granted unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by

an injunction. Am. Chemistry Council v. Ala. Gulf Coast Ry., NOR 42129, slip op. at 4 (STB served May 4, 2012).

US Rail's motion for preliminary injunction will be denied. In its December 2018 Decision, the Board denied US Rail's previous motion for preliminary injunction, in which US Rail made essentially the same arguments that it makes here. Because it is still true that no interim trail use/railbanking agreements have been reached, US Rail's position with respect to the Line is no different than it was when the Board issued the December 2018 Decision. As the Board previously explained, US Rail's interest in the Line remains speculative. Only if the Owners reach agreements for interim trail use/railbanking can US Rail possibly seek to reactivate service on what would then be a railbanked right-of-way. December 2018 Decision, FD 36137 et al., slip op. at 7. Moreover, as the Board further noted, economic loss alone does not typically qualify as irreparable harm. Id. In addition, because the Board is denying as premature US Rail's motion to vacate the NITUs and reactivate rail service, US Rail cannot presently show a likelihood that it will prevail on the merits of that motion.

Because U.S. Rail has failed to demonstrate that it will suffer irreparable harm in the absence of a preliminary injunction or that it has a likelihood of success on the merits of its motion to vacate the NITUs and reactivate rail service, the Board need not address its arguments regarding the other requirements for a preliminary injunction. Union Pac. R.R., FD 36197, slip op. at 5; N. Coast R.R. Auth. v. Sonoma-Marin Area Rail Transit Dist., NOR 42148, slip op. at 4 (STB served Oct. 21, 2016); Am. Chemistry Council, NOR 42129, slip op. at 5.

It is ordered:

1. US Rail's motion for leave to file rebuttal is granted.

2. The Owners' motion to reject and to strike is denied.

3. US Rail's motion to vacate the NITUs and reactivate rail service is denied without prejudice.

4. US Rail's verified motion for preliminary injunction is denied.

5. Docket No. FD 36137 is closed. Any future filings related to rail banking of, and possible reactivation of rail service on, the NITU Line shall be filed in Docket No. AB 290 (Sub-No. 117X).

6. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2019, I electronically filed the foregoing brief with the United States Court of Appeals for Federal Circuit by using the appellate CM/ECF system.

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

/s/Erika B. Kranz
Erika B. Kranz

CERTIFICATE REGARDING
FEDERAL RULE OF APPELLATE PROCEDURE 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 7,988 words. The United States is filing an unopposed motion, concurrent with the filing of this brief, for leave to exceed the type-volume requirements for a reply brief in Federal Circuit Rule 32(a).

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 2016 in 14-Point Calisto MT, a proportionally-spaced font.

/s/Erika B. Kranz
Erika B. Kranz