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United States Court of Appeals for the Federal Circuit

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Plaintiffs-Appellants,

– v. –

UNITED STATES,

Defendant-Cross-Appellant.

On Appeal from the United States Court of Federal Claims in Case No. 1:14-cv-00135-MMS, Honorable Margaret M. Sweeney, Senior Judge

RESPONSE AND REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. CAUSATION IS A NECESSARY ELEMENT FOR A TRAILS ACT TAKING UNDER *CAQUELIN II* AND IT IS EASILY ESTABLISHED UNDER THESE FACTS 4

A. Causation Is a Necessary Element in a Trails Act Taking Because *Caquelin II* is Binding in This Appeal 5

B. The Evidence of Causation in This Case is Overwhelming and Unrefuted 9

II. THE GOVERNMENT REPEATEDLY MISCHARACTERIZES THE INTERPLAY BETWEEN STATE LAW PROPERTY RIGHTS AND ABANDONMENT UNDER FEDERAL LAW AND STATE LAW 20

A. The Government Completely Discounts the Significance and Relevance of State Law Abandonment in the Takings Analysis 20

B. State Law Abandonment Has Been Relevant on Liability Since *Preseault II* Was Decided in 1996 and is Relevant on the Issue of Causation Since this Court Said So in *Caquelin II* 23

III. UNDER THESE UNIQUE FACTS, THE TAKING BEGAN WHEN THE NITU WAS ISSUED AND LASTED UNTIL THE RAILROAD FINALLY CONSUMMATED ABANDONMENT 24

A. The Taking Began When the NITU Was Issued and the Duration Lasted as Long as the Federal Intervention With State Law Property Rights Existed 25

B. The Government Misstates the Obvious Point That the Existence of Federal Law Preemption Applied to State Law Abandonment is Why the Taking Continued After the NITU Expired 27

IV. CONCLUSION 29

TABLE OF AUTHORITIES

Barclay v. United States, 443 F.3d 1368 (Fed. Cir. 2006),
cert. denied, 549 U.S. 1209 (2007) 1, 6, 7, 8, 9

Caldwell v. United States, 391 F.3d 1229 (Fed. Cir. 2004),
cert. denied, 547 U.S. 826 (2005) .....*passim*

Caquelin v. United States,
140 Fed. Cl. 564 (Fed. Cl. 2018).....8, 19

Caquelin v. United States,
959 F.3d 1360 (Fed. Cir. 2020) ("*Caquelin II*") .....*passim*

Cedar Point Nursery v. Hassid,
141 S. Ct. 2063 (2021) 5

Chi. & M.W. Transp. Co. v. Kalo Brick & Tile Co.,
450 U.S. 311 (1981) 20

Ellamae Phillips Co. v. United States,
564 F.3d 1367 (Fed. Cir. 2009).....23

Flying S. v. United States,
Case No. 1:15-cv-01253.....19

Hash v. United States,
403 F.3d 1308 (Fed. Cir. 2005).....23

Illig v. United States, 274 Fed. Appx. 883 (Fed. Cir. 2008),
cert. denied, 129 S. Ct. 2860 (2009) 1, 7

Ladd v. United States,
630 F.3d 1015 (Fed. Cir. 2010).....*passim*

Lowery v. United States,
Case No. 1:19-cv-00756.....19

Memmer v. United States,
150 Fed. Cl. 706 (Fed. Cl. 2020).....13, 17, 26

Preseault v. Interstate Commerce Comm'n,
494 U.S. 1 (1990) ("*Preseault I*") 5, 20, 28

Preseault v. United States,
100 F.3d 1525 (Fed. Cir. 1996) ("*Preseault II*") .....*passim*

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984) 20

Sauer West v. United States,
Case No. 1:12-cv-00340.....19

STATUTES

49 C.F.R. § 1152.29(e)(2) 24, 26

49 U.S.C. § 10501(b) 20

INTRODUCTION

The three-prong liability test in rails-to-trails cases was established by this Court in 1996 in *Preseault II*.[1] The liability test was then further developed over the ensuing 25 years in *Caldwell*, *Barclay*, *Illig*, and *Ladd*.[2] This longstanding precedent established that the issuance of a Notice of Interim Trail Use ("NITU") triggers a taking when state law reversionary interests that would otherwise take effect pursuant to normal abandonment proceedings are forestalled[3] and that events arising after the NITU date cannot be necessary elements of the claim.[4]

In *Caquelin II*,[5] this Court held that causation is a necessary element in rails-to-trails takings cases and reasoned that causation was an implied element of this Court's precedents in *Caldwell*, *Barclay*, and *Ladd* because causation is a "fundamental principle of takings law."[6] The pronouncement concerning the causation standard in rails-to-trails takings cases is binding as precedent in this

[1] *See Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) ("*Preseault II*").
[2] *See Caldwell v. United States*, 391 F.3d 1229 (Fed. Cir. 2004), *cert. denied*, 547 U.S. 826 (2005); *Barclay v. United States*, 443 F.3d 1368 (Fed. Cir. 2006), *cert. denied*, 549 U.S. 1209 (2007); *Illig v. United States*, 274 Fed. Appx. 883 (Fed. Cir. 2008), *cert. denied*, 129 S. Ct. 2860 (2009); *Ladd v. United States*, 630 F.3d 1015 (Fed. Cir. 2010).
[3] *See Caldwell*, 391 F.3d at 1236; *Barclay*, 443 F.3d at 1373.
[4] *See Ladd*, 630 F.3d at 1024.
[5] *See Caquelin v. United States*, 959 F.3d 1360 (Fed. Cir. 2020) ("*Caquelin II*").
[6] *Id.* at 1371-72.

appeal despite that fact that both parties have addressed the appropriateness of that standard at length.

Caquelin II considered the evidence that was available in the record and found, given the absence of evidence indicating that the railroad did not intend to abandon the line, that there was sufficient evidence to support the CFC's ruling.[7] This Court looked at the railroad's actions before the NITU, during the NITU, and after the NITU in order to assess the railroad's intent to abandon at the time the NITU was issued. The evidence of causation in this case is overwhelming and unrefuted because the railroad intended to consummate abandonment when the NITU was issued, removed the rails and ties during the pendency of the NITU, which established state law abandonment, still intended to either consummate abandonment or enter into a trail use agreement when the NITU expired, and ultimately did formally consummate abandonment under federal law in 2021.

Although the facts of this case are somewhat unique, it is clear that causation existed and the duration of the taking lasted until the railroad finally consummated abandonment in 2021. The issuance of the NITU caused the taking for the first 30 months, until it expired, and then the taking continued because the railroad failed to consummate abandonment under federal law when state law abandonment had already occurred. The Plaintiffs' reversionary state law property rights were blocked

[7] *Id.* at 1372-73.

from the time the NITU was issued until the railroad finally consummated abandonment under federal law because the federal government had no continuing justifiable interest in maintaining jurisdiction over the right-of-way after state law abandonment occurred and the Plaintiffs were blocked from utilizing their land for 10 years.

SUMMARY OF ARGUMENT

The CFC concluded that the Plaintiffs met their burden on causation and that the duration of the taking was approximately 30 months, from the time the NITU was issued until the railroad's authority to abandon expired. The CFC's conclusion with respect to causation should be affirmed but the CFC's holding with respect to the duration of the taking should be reversed because, under these unique facts, the duration of the taking was approximately 10 years and 3 months.

First, Plaintiffs readily acknowledge that the causation standard enunciated in *Caquelin II* is a necessary element for a Trails Act takings case. Although Plaintiffs must establish causation in order to prevail based on *Caquelin II*, the evidence of causation in this case is substantial, overwhelming, and unrefuted and far exceeds the nature of the evidence that established causation in *Caquelin II*.

Second, the government repeatedly misstates the law related to state law abandonment by mischaracterizing the distinction between state law abandonment and the consummation of abandonment under federal law. State law abandonment

has been relevant with respect to liability since *Preseault II* was decided by this Court in 1996 and state law abandonment is relevant on the issue of causation since this Court specifically said that it was in *Caquelin II.*

Third, the duration of the taking under these unique facts is 10 years and 3 months. The taking began when the NITU was issued and initially lasted for 30 months because causation was easily established. After the NITU expired, the taking continued because the issue of abandonment is preempted under federal law. Since the railroad failed to consummate federal abandonment even though state law abandonment had already occurred, Plaintiffs' state law reversionary rights were forestalled until the railroad finally consummated abandonment under federal law in 2021.

ARGUMENT

I. CAUSATION IS A NECESSARY ELEMENT FOR A TRAILS ACT TAKING UNDER *CAQUELIN II* AND IT IS EASILY ESTABLISHED UNDER THESE FACTS

Plaintiffs' position has always been that a causation requirement in a rails-to-trails taking case is contrary to existing precedent because *Preseault II* and all of its progeny establishes that a taking occurs when the NITU is issued, which is a *per se* categorical physical taking at that time, and that it is irrelevant that no trail use

agreement was reached.[8] Plaintiffs believe that the principle of causation can be and often is an issue in a flooding case or in any regulatory takings case but is not an element in a *per se* categorical physical takings case under the Trails Act. Despite Plaintiffs' beliefs as to what the law should be, there is no question of what the law actually is at this point because the pronouncement of a causation standard in a rails-to-trails takings case in *Caquelin II* is binding in this appeal.

A. Causation Is a Necessary Element in a Trails Act Taking Because *Caquelin II* is Binding in This Appeal

The Trails Act "preserve[s] shrinking rail trackage by converting unused rights-of-way to recreational trails" and is subject to the Fifth Amendment Takings Clause. *See Preseault v. Interstate Commerce Comm'n,* 494 U.S. 1, 5 (1990) ("*Preseault I*"). In *Preseault I,* the Supreme Court held, under state law, where the

[8] Although it is a premature discussion at this point, both parties analyzed and discussed whether the Supreme Court's ruling in *Cedar Point Nursery v. Hassid,* 141 S. Ct. 2063 (2021) was intervening authority related to the causation issue. Plaintiffs argued that the "appropriation" of a right to construct a hiking and biking trail creates a *per se* categorical physical taking when the NITU is issued just like the access regulation "appropriated" a right to invade the growers' property in *Cedar Point Nursery. See Cedar Point Nursery,* 141 S. Ct. at 2070, 2073, 2074, 2075-76, and 2077. The government argued that *Cedar Point Nursery* is not a rails-to-trails case, does not discuss causation to any extent, and does not overrule or abrogate *Caquelin II. See* Gov't Br. at 28-29. Although Plaintiffs concede that *Caquelin II* is binding absent further review, Plaintiffs expressly preserve their objections to the causation standard enunciated in *Caquelin II* in the event of further review, whether *en banc* or in the Supreme Court (just like the United States expressly preserves its objections to *Ladd* and *Caldwell* in the event of further review, whether *en banc* or in the Supreme Court). *Id.* at 31.

non-use of a track for railroad purposes would constitute abandonment, the Trails Act takes a new interest in property by superimposing a different easement in place of the old. *Id.* at 8.

In 1996, this Court recognized that a Fifth Amendment Taking occurs when state law reversionary property interests are blocked with its decision in *Preseault II*. *See Preseault II,* 100 F.3d at 1543. Eight years later, this Court held in *Caldwell* that a taking occurs "when a NITU is issued and state law reversionary interests that would otherwise take effect pursuant to normal abandonment proceedings are forestalled." *See Caldwell,* 391 F.3d at 1236. This Court then reaffirmed the *Caldwell* holding in *Barclay* in 2006 and again in *Ladd* in 2010. *See Barclay,* 443 F.3d at 1373; *Ladd,* 630 F.3d at 1023. Most recently, in *Caquelin II,* this Court explained that causation is a necessary element in rails-to-trails taking cases. *See Caquelin II,* 959 F.3d at 1372. In *Caquelin II,* this Court characterized its discussion of a causation element in Trails Act cases as a "clarification of the legal standard." *Id.* at 1370.

While the government argued that prior holdings in *Caldwell* and *Ladd* should be overruled, Plaintiffs argued that the causation standard set forth in *Caquelin II* was inconsistent with *Preseault II* and all of its progeny, especially *Ladd.* Since *Ladd* held that a taking occurs even when no trail use agreement is reached and the

NITU expires, any events that occur after the NITU is issued, like the signing of a trail use agreement, cannot be relevant to the fact that a taking has already occurred.

This Court explained that the causation element that was clarified in *Caquelin II* actually grew out of this Court's previous holdings in *Caldwell, Barclay,* and *Ladd,* which held that "the Fifth Amendment taking, if any, under the Trails Act is accomplished when a NITU is issued and state law reversionary interests that would otherwise have taken affect pursuant to normal abandonment proceedings are forestalled." *See Caquelin II,* 959 F.3d at 1372 (quoting *Caldwell,* 391 F.3d at 1236). As this Court explained, the Federal Circuit's line of precedents set forth in *Caldwell, Barclay, Illig,* and *Ladd* each incorporate the causation inquiry that was later clarified in *Caquelin II.*

Although *Caquelin II* acknowledged that prior precedent and language within *Caldwell, Barclay,* and *Ladd* includes language referring to the NITU date as the date of the taking, Judge Taranto clarified that the "language is better read so as not to run counter both to the fuller formulation and to basic causation principles. It can be read as a shorthand that applies where no party has pointed to any legally material difference between the NITU date of issuance (or expiration) and a date of abandonment in the 'but for' world in which there was no NITU." *See Caquelin II,* 959 F.3d at 1372.

Plaintiffs contended that the causation requirement enunciated in *Caquelin II* was irreconcilable with the *Caldwell, Barclay,* and *Ladd* line of precedents because the taking was a *per se* categorical physical taking when the NITU was issued. If the issuance of a NITU triggers a *per se* categorical physical taking, as argued by the Plaintiffs, they would not be required to demonstrate causation and all of the government-induced flooding cases cited by the government, the nature of which requires Courts to distinguish between isolated instances of flooding and sustained or periodic flooding, which requires a distinction between a trespass and a tort, would be irrelevant.[9]

This Court in *Caquelin II* concluded that any distinction between flooding cases and Trails Act cases is immaterial because causation is a "fundamental principle of takings law." *See Caquelin II,* 959 F.3d at 1371. The Court reasoned that as with tort law, from which the law of takings originated, all takings, whether

[9] The government's brief goes to great length to confirm that they sought *en banc* review in both *Caquelin I* and *Caquelin II* and, since the Plaintiffs did not seek *en banc* review in this case pertaining to causation, "binding precedent requires Plaintiffs to establish causation" and Plaintiffs are "plainly foreclosed" (*see* Govt's Br. at 26) from arguing about whether a causation standard applies or whether the issuance of a NITU results in a *per se* categorical physical taking. Although Plaintiffs readily acknowledge that the pronouncement concerning causation in *Caquelin II* is currently the law of the Federal Circuit and binding at this point, the government merely attempts to utilize *Caquelin II* as both a sword and a shield because Plaintiffs prevailed on the causation issue in *Caquelin II,* just like they prevailed on the causation issue in this case, and could not properly seek *en banc* review of a case or on an issue that they won.

physical or regulatory, require causation to be a necessary element in every takings case because Plaintiffs must demonstrate that the alleged government act caused the property owner's loss.

The bottom line is that *Caquelin II* clarifies that causation was always an implied element of this Court's precedents in *Caldwell, Barclay,* and *Ladd. Caquelin II* applied the holding in *Caldwell*, and confirmed *Barclay*, where this Court held a NITU triggers accrual of a Trails Act claim because "the easement continued in existence beyond the time when it otherwise would have been abandoned." *See Barclay,* 443 F.3d at 1374. Then, in *Ladd,* this Court found that a taking under the Fifth Amendment occurred despite the fact that no trail use agreement was ever reached because "a takings claim accrues on the date that a NITU issues, events arising after that date… cannot be necessary elements of the claim." *See Ladd*, 630 F.3d at 1024. As a result, the causation standard enunciated in *Caquelin II* is currently the law in the Federal Circuit.

B. The Evidence of Causation in This Case is Overwhelming and Unrefuted

This Court in *Caquelin II* observed that a NITU is a necessary requirement to establish a taking but is not sufficient in and of itself. Under the standards articulated in *Caquelin II*, there would be no liability for the STB's issuance of a NITU if there was no causation because the "NITU would not have altered the continuation of the easement during the NITU period—*i.e.*, would not have caused the only alleged

taking of property—if the railroad would not have abandoned the rail line during that period even in the absence of a NITU." *See Caquelin II*, 959 F.3d at 1371. After declaring the causation standard in *Caquelin II*, the Court went no further on the "doctrinal issue"[10] because it recognized that other questions could arise in the future pertinent to "what the railroad would have done if there had been no NITU."[11]

Ultimately, after setting forth the causation standard in Trails Act takings cases, this Court in *Caquelin II* considered the evidence in the record and found, in the absence of evidence affirmatively indicating that the railroad did not intend to abandon the line, that there was sufficient evidence to support the CFC's ruling which granted summary judgment in favor of Ms. Caquelin. *See Caquelin II*, 959 F.3d at 1372-73. The Court considered the railroad's actions before the NITU (the railroad's application to abandon, indicating an affirmative intent to abandon), during the NITU (the railroad refused to consent to an extension of the NITU), and after the NITU (the railroad completed abandonment just three months later), to determine that Ms. Caquelin had met her burden on the issue of causation.

Caquelin II concluded that the evidence was sufficient to establish causation because Plaintiffs provided evidence indicating the railroad's affirmative intent to abandon the corridor, thus meeting their burden, and the government did not produce

[10] *See Caquelin II*, 959 F.3d at 1372.
[11] *Id.*

any evidence indicating that the railroad would have delayed abandonment beyond the NITU period. *See Caquelin II*, 959 F.3d at 1373 (holding, in the absence of contrary evidence, no clear error existed in granting summary judgment in favor of Plaintiffs when evidence indicates the railroad affirmatively intended to abandon the line). Under the causation standard, events that occur before, during, and after the NITU issued are relevant when assessing the railroad's intent to abandon at the time of the NITU, but it is the railroad's intent at the time of the NITU that matters. *See Ladd*, 630 F.3d at 1023-24 (holding a takings claim under the Trails Act accrues with the issuance of a NITU, at which point "all events which fixed the government's alleged liability have occurred" and events arising after the NITU issues cannot be necessary elements of the claim).

Caquelin II considered the railroad's actions before the NITU ("the railroad filed an application to abandon, indicating an affirmative intent to abandon"), during the NITU ("[I]t refused… [to consent to an extension of the NITU], confirming an interest in abandoning sooner rather than later" and removed track during the NITU), and after the NITU ("it completed abandonment just three months after… the date… it became legally authorized to abandon the line):

> **The railroad filed an application to abandon, indicating an affirmative intent to abandon. When it was asked for consent to an extension of the December 30 expiration date, it refused, confirming an interest in abandoning sooner rather than later** (in the absence of a promising negotiation for a trail agreement). **It completed the abandonment just three months after December 31,**

> **2013,** the date on which it became legally authorized to abandon the line, suggesting a comparable time period had authority been granted as of July 5, 2013. **The statute itself provides generally for authorization to remove track during the NITU**, an authorization that was included in the NITU here, **suggesting an expectation of comparatively prompt completion of abandonment. And there was evidence that the railroad in this case did remove track in 2012 or 2013**, see J.A. 282, **a precondition to abandonment-based easement termination under Iowa law, Iowa Code § 327G.76.** In the absence of contrary evidence, this evidence suffices to support an inference that, had there been no NITU, the railroad would have completed abandonment during the period in which the NITU was in effect.

See Caquelin II, 959 F.3d at 1373 (emphasis added).

Caquelin II reviewed the evidence in the record and identified five pieces of evidence that supported the CFC's determination that causation was established: (1) the railroad's application to abandon, which indicated an affirmative intent to abandon; (2) the railroad's refusal to consent to a further extension of the negotiation period; (3) the railroad consummated abandonment under federal law three months after the NITU expired; (4) the Trails Act authorizes the removal of the track during the pendency of the NITU, which suggests an expectation of comparatively prompt completion of abandonment; and (5) the railroad met the standard of abandonment under state law (Iowa law). Since each of these five pieces of evidence were in the record and the government cited no evidence indicating that the railroad would have delayed abandonment, the evidence was sufficient to establish causation.

The undisputed facts of this case are that the railroad verified its intent to abandon the line in their Notice of Exemption (Appx258-261) and, even after the

NITU expired 30 months later, the railroad still had the intent to either negotiate a trail use agreement or consummate abandonment.[12] Although the railroad did not seek or consent to a further extension of the formal negotiating period after the NITU expired in 2013, it continued negotiations up through the time of trial six years later and then ultimately consummated abandonment in 2021. Not only does the Trails Act authorize the removal of the track during the pendency of the NITU, but the railroad actually removed the rails and ties during the pendency of the NITU, which obviously evidences its intent to abandon, and the railroad clearly met the standard of abandonment under state law during the pendency of the NITU as well.[13]

The undisputed facts of this case actually demonstrate that the railroad had the intent to abandon when the NITU was issued, during the pendency of the NITU when the trail use negotiations were being conducted, after the NITU expired when the railroad continued their negotiations with a potential trail operator, and ultimately ten years after the NITU was issued when the railroad finally followed through and consummated abandonment. The testimony of the railroad itself

[12] Dan LaKemper, ISW's General Counsel, testified that ISW intended to abandon when the Notice of Exemption was filed (Appx1216, Appx1221), that the NITU actually lapsed by accident (Appx1228), that the railroad still intended to either enter into a trail use agreement or consummate abandonment after the NITU expired (Appx1228-1229), and that the rails and ties were removed because there were no shippers and there was no need to use it in interstate commerce (Appx1229). *See Memmer v. United States*, 150 Fed. Cl. 706, 751 (Fed. Cl. 2020).

[13] *See Memmer,* 150 Fed. Cl. at 750-51.

demonstrates that it not only had the intent to abandon its easement the entire time but it also had no present or future intention to ever utilize the easement for railroad purposes again.[14]

In other words, even though the corridor had been abandoned under state law, and even though the railroad had not consummated abandonment under federal law, it was still the railroad's intention to either enter into a trail use agreement, which would make the taking permanent, or to formally consummate abandonment under federal law, which would mean that the Plaintiffs could finally get their land back. As a result, ever since the rails and ties were removed in 2011 and 2012, and even though the railroad never consummated abandonment under federal law until 2021, it is clear that the Plaintiffs' reversionary rights were still being blocked. In this case, the governmental actions that created the continuing blockage of the Plaintiffs' reversionary rights were the issuance of the NITU in combination with the STB's regulation requiring formal consummation of abandonment under federal law.

The removal of the rails and ties during the pendency of the NITU is critical for two reasons.[15] First, the removal of the rails and ties evidences the railroad's intent to abandon when the NITU was issued (the railroad clearly acted on their stated intent). Second, the removal of the rails and ties also establishes the

[14] *Id.* at 751.
[15] *Id.* at 748-51.

foundation for a continuing duration of the taking after the NITU expired (discussed in Section III *infra*). Similarly, the ultimate consummation of abandonment by the railroad ten years after the NITU was issued, a fact the government almost completely ignores, also evidences and confirms the railroad's intent to abandon during the entire time period.

Caquelin II concluded that Ms. Caquelin met her burden to establish causation because there was ample evidence in the record to establish the railroad's intent to abandon at the time the NITU was issued and also because the government did not meet their burden to produce evidence indicating the railroad would have delayed abandonment beyond the NITU period. *See Caquelin II*, 959 F.3d at 1373. Here, the government attempts to make two arguments to establish that there was no causation: (1) the railroad "voluntarily participated in lengthy trail-use negotiations and did not seek to consummate abandonment during the NITU period;"[16] and (2) the railroad did not immediately consummate abandonment after the NITU expired.[17] Neither of these arguments are legally relevant.

First, the extensions to negotiate a possible trail use agreement merely follow the regulatory procedure under the Trails Act and have no impact on the railroad's intent to abandon at the time of the NITU, especially because the railroad removed

[16] *See* Govt's Br. at 36-39.
[17] *Id.* at 39-42.

the rails and ties during the pendency of the NITU and the railroad testified that it still intended to either find a trail operator or consummate abandonment at the time the NITU expired. Second, the fact that the railroad did not immediately consummate abandonment has no bearing on the railroad's intent to consummate abandonment at the time the NITU was issued and ignores the railroad's testimony on that subject, including the fact that the railroad did conclude state law abandonment during the pendency of the NITU by removing the rails and ties, and the railroad did, in fact, consummate abandonment later.

The government's theme is repeated throughout its brief—there can only be a taking if a trail use agreement is signed or if abandonment is delayed and the railroad ultimately consummates abandonment.[18] The government's "head in the sand" attitude is illogical, contrary to law, and ignores *Caquelin II's* statement that "other questions could well arise in the future, such as questions about whether the plaintiff or the government has the burden of production or persuasion on what the railroad would have done if there had been no NITU."[19]

Although these facts may not neatly fit into a category of "normal abandonment proceedings"[20] as described by the government, basic legal principles applicable to takings can easily be applied because the regulatory scheme relative to

[18] *Id.* at 2, 20, 25, and 32.
[19] *See Caquelin II*, 959 F.3d at 1372.
[20] *See* Govt.'s Br. at 25.

the Trails Act resulted in the blocking of Plaintiffs' reversionary rights for ten years. Although these facts do not present a normal result as anticipated by the Trails Act, both because neither typical scenario resulted after the NITU was issued and because the railroad abandoned its common carrier function and removed the rails and ties during the pendency of the NITU, this abuse by the railroad at the expense of the Plaintiffs' state law property rights is actually far too common.

The government argues that there is no causation because the railroad declined to consummate abandonment when the NITU expired[21] and that the CFC must have "simply assumed that Indiana Southwestern inexplicably changed its mind about abandonment after the NITU issued."[22] First, the railroad obviously made no conscious decision not to abandon at the time the NITU expired based on its own testimony.[23] Second, the CFC was aware of all of the testimony and did not even have to reach a conclusion that the railroad inexplicably changed its mind concerning abandonment because it was clearly their intent to abandon at the time the NITU was issued.[24]

Under these facts, however, it is important to inquire as to why the railroad did not consummate abandonment when the NITU expired. The government

[21] *Id.* at 40.
[22] *Id.* at 41.
[23] *See Memmer,* 150 Fed. Cl. at 751; *see also* Appx1228-1232.
[24] *See* Notice of Exemption, Appx258-261.

espouses that "this novel conceptualizing [of causation] ignores the fact that the railroad must agree to the issuance of a NITU and any subsequent extensions" and that "it rests on the counter-intuitive premise that a railroad dead set on imminent abandonment would inexplicably agree to issuance of a NITU, which would temporarily prevent abandonment, but would change its mind about abandonment after the NITU's expiration."[25] Unfortunately, the railroad's abuse of the regulatory system is not novel and is not based on any counter-intuitive premise whatsoever.

These facts merely demonstrate what small Class III railroads do all of the time. Although there is no need for continued rail traffic, and the railroads are willing to readily abandon the rights-of-ways for state law purposes, they do not readily agree to consummate abandonment under federal law simply and solely because they believe they possess an asset and because they do not have to consummate abandonment under federal law without forcing somebody to pay them something (Appx1214).

This scenario is unfortunately obvious under these facts because the railroad merely abandoned the right-of-way under state law and refused to consummate abandonment under federal law for ten years. The same scenario actually occurred in *Caquelin II* when Ms. Caquelin was the lone landowner who refused to submit to the railroad's scheme to force adjacent farmers to buy their own land back in

[25] *See* Govt's Br. at 36.

exchange for an agreement to consummate abandonment under federal law[26] and actually occurs frequently.[27] In all of these cases, the railroad merely wants somebody to pay them something because they perceive that they possess an asset under federal law.

The Trails Act is being abused because the fundamental property rights of adjacent landowners are being ignored and trampled on because small railroads around the country are allowed to relinquish all of their common carrier obligations, abandon the right-of-way under state law, and fail to consummate abandonment under federal law. That is what happened in this case until the landowners joined together and said "enough is enough" and pursued an adverse abandonment application before the STB, which ultimately forced the railroad to consummate

[26] *See Caquelin v. United States*, 140 Fed. Cl. 564, 571, fn. 15 (Fed. Cl. 2018).

[27] *See Flying S. v. United States*, Case No. 1:15-cv-01253 (the railroad forced the landowners to buy their own land back before they agreed to consummate federal abandonment under federal law (the case ultimately settled on a temporary taking basis)); *Sauer West v. United States,* Case No. 1:12-cv-00340 (the railroad actually abandoned the right-of-way under state law in the 1980's, sought and received permission to abandon under federal law when the NITU was issued in 2008, sought extensions for six years to consummate abandonment, and then ultimately and purportedly "reactivated" service in order to avoid consummation of abandonment under federal law, even though continued train traffic is impossible); *Lowery v. United States,* Case No. 1:19-cv-00756 (the railroad petitioned for abandonment, received permission to abandon, a NITU was issued, the NITU lapsed, the railroad transferred the right-of-way to a sham railroad who is "available" to contract out train traffic if it ever developed in the future, and then transferred the "asset" to a non-railroad to generate revenue for underground utilities).

abandonment under federal law even though it was actually the railroad's intention by its own admission since the NITU was issued in 2011.

II. THE GOVERNMENT REPEATEDLY MISCHARACTERIZES THE INTERPLAY BETWEEN STATE LAW PROPERTY RIGHTS AND ABANDONMENT UNDER FEDERAL LAW AND STATE LAW

The government's brief contains a myriad of misstatements pertaining to the interplay between state law abandonment and federal law abandonment. First, the government repeatedly states that state law abandonment is irrelevant to a determination that a taking occurred if the railroad does not consummate abandonment under federal law. Second, the government attempts to downplay the significance of state law abandonment under a causation analysis when this Court specifically said it was relevant in *Caquelin II.*

A. The Government Completely Discounts the Significance and Relevance of State Law Abandonment in the Takings Analysis

There should be no dispute that property rights involving railroads are defined by state law.[28] It is also undisputed that the STB has exclusive and plenary jurisdiction over rail lines and that the issue of abandonment of rail lines is preempted by federal law.[29] But, the issue of state law abandonment is relevant to the takings analysis even if federal law preempts the issue of abandonment. The

[28] *See Preseault I,* 494 U.S. at 20; *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1001 (1984).

[29] *See Chi. & M.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981); *see also* 49 U.S.C. § 10501(b).

government fails to recognize that it is federal preemption over abandonments that actually creates a taking when federal regulations allow the continuing jurisdiction by the federal government when the railroad fails to consummate abandonment under federal law after state law abandonment has already occurred.

The government first fails to recognize any distinction between state law abandonment and federal law abandonment: "Indiana Southwestern's easements would not have terminated absent consummation of abandonment."[30] Although it is true that the railroad's easements would not have terminated under federal law absent the consummation of abandonment required by federal law, this entire argument is misguided because it completely ignores the concept of state law abandonment as a means to establish liability for a taking under prong 3 of *Preseault II.* Under prong 3 of *Preseault II,* liability exists if state law abandonment occurs prior to the issuance of the NITU even if federal law abandonment has not been consummated.

The fundamental flaw in the government's argument is accentuated when the government focuses on the continuation of the easements under federal law (when consummation of abandonment does not occur) while completely ignoring the issue of state law abandonment. Although the government recognizes that "consummation of abandonment is what matters under federal law for determining whether the

[30] *See* Govt's Br. at 42.

Board's jurisdiction has concluded—the necessary precondition for termination of an easement,"[31] the consummation of abandonment under federal law has nothing to do with whether state law abandonment has occurred. Similarly, the government's statement that "Indiana Southwestern's easements could not be terminated until after the railroad filed a timely notice of consummation with the Board"[32] is true as it relates to federal law, but it has nothing to do with whether state law abandonment has occurred.

The government's analysis then becomes fatally flawed when it argues that the issue of state law abandonment is irrelevant[33] and "beside the point."[34] Simply put, the issue of state law abandonment is not related to the issue of the consummation of abandonment under federal law and is not "beside the point" to whether a taking has occurred—it is exactly the point.

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[31] *Id.* at 44.

[32] *Id.* at 42.

[33] *Id.* at 46. ("[I]n any event, the Court need not wade into this issue because Indiana state-law requirements are irrelevant to federal abandonment").

[34] *Id.* at 43. ("The status of the easements under state law is thus beside the point because federal law controls whether the line has been abandoned, and Indiana Southwestern did not file a notice of consummation of abandonment during the period in question").

B. State Law Abandonment Has Been Relevant on Liability Since *Preseault II* Was Decided in 1996 and is Relevant on the Issue of Causation Since this Court Said So in *Caquelin II*

The relevance of state law abandonment was first promulgated by this Court in *Preseault II* in 1996. The three-prong test for liability addressed ownership (fee versus easement) in prong 1, the scope of the easements in prong 2, and state law abandonment prior to the NITU in prong 3.[35] Now, the government attempts to obliterate state law abandonment as an issue when it also argues that state law abandonment should not be considered on the issue of causation: "the CFC therefore erred by addressing state law on easements and its discussion of causation."[36]

When considering the evidence on the issue of causation in *Caquelin II*, this Court specifically referenced the removal of the track material as a precondition to an abandonment-based easement termination under Iowa law.[37] As a result, state law abandonment is an independent path to liability under *Preseault II* and is a specific point of reference on the issue of causation under *Caquelin II*.

Under prong 3 of *Preseault II*, liability can be established based on state law abandonment prior to the issuance of a NITU and, obviously, there is no federal consummation of abandonment under that scenario. Similarly, there was no

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[35] *See Preseault II*, 100 F.3d at 1533. This standard was then repeated on several occasions. *See Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009); *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005).

[36] *See* Govt's Br. at 43.

[37] *See Caquelin II*, 959 F.3d at 1373.

consummation of abandonment in *Ladd* and this Court confirmed that a taking occurred. Although the facts of this case are somewhat unique because state law abandonment occurred after the NITU was issued instead of before, these facts do not present a "novel and extraordinary claim"[38] but rather a logical extension of this Court's analysis in *Caquelin II*.

III. UNDER THESE UNIQUE FACTS, THE TAKING BEGAN WHEN THE NITU WAS ISSUED AND LASTED UNTIL THE RAILROAD FINALLY CONSUMMATED ABANDONMENT

The facts of this case are unique: (1) the NITU was issued on May 23, 2011; (2) the NITU expired on November 8, 2013, after multiple extensions; (3) the rails and ties were pulled up from the right-of-way during the pendency of the NITU such that state law abandonment occurred no later than early 2012; (4) the railroad failed to consummate abandonment under 49 C.F.R. § 1152.29(e)(2) even though state law abandonment had already occurred; and (5) the railroad ultimately consummated abandonment under federal law in 2021 after the adjacent landowners forced their hand. Under these unique facts, the governmental actions which blocked the Plaintiffs' reversionary interests were the issuance of the NITU, which originally triggered the taking, in combination with the regulatory scheme that required the railroad to consummate abandonment under 49 C.F.R. § 1152.29(e)(2) when state law abandonment had already occurred.

[38] *See* Govt's Br. at 1.

A. The Taking Began When the NITU Was Issued and the Duration Lasted as Long as the Federal Intervention With State Law Property Rights Existed

The Trails Act was designed to preserve existing railroad corridors while they were utilized for a hiking and biking trail on an interim basis. The Trails Act simply imposes the federal government's right to impose federal supremacy over state law property rights and the landowners have no ability to stop it. Ordinarily, when the federal government intervenes to interfere with state law property rights, the end result is that the Trails Act either works as it is intended to work and a trail use agreement is signed, making the taking permanent, or the railroad ultimately consummates abandonment and the taking is temporary because state law property rights are no longer blocked.

The NITU authorizes railroads to remove the rails and ties during the pendency of the NITU. The removal of the rails and ties is allowed because it is expected that a trail use agreement will be reached. On the other hand, if no trail use agreement is reached, the removal of the rails and ties can occur to facilitate the consummation of abandonment, which the railroad has to previously request in every case before a NITU is issued.

Under these facts, the taking began when the NITU was issued and continued after the NITU expired because state law abandonment occurred in 2012 when the rails and ties were removed and the railroad failed to consummate abandonment

under federal law. State law abandonment occurred during the pendency of the NITU when the railroad's desire and ability to continue to use the right-of-way for rail transportation had ceased and the right-of-way was "unusable" for rail traffic.[39] At that point, the Plaintiffs' reversionary rights were blocked solely because the federal regulatory scheme allowed the railroad to do so at the expense of the Plaintiffs' state law property rights.

The government repeatedly argues that the United States cannot be liable for a taking because it is the railroad's permissive choice to not consummate abandonment when state law abandonment has already occurred. Although it is true as a matter of fact that the railroad has choices to make, the choice the railroad ultimately makes has no impact on whether a taking has occurred or not. Here, the evidence is that the railroad made the choice to not consummate federal law abandonment after state law abandonment had occurred simply because the federal regulatory scheme allows them to do so. Simply put, after the Trails Act and the federal regulatory scheme interferes with state property rights, it is always the railroad's choice that ultimately impacts the duration of the taking.

Although the railroad has the permissive choice to consummate abandonment under federal law when the NITU expires under 49 C.F.R. § 1152.29(e)(2), it is the regulation itself that allows the railroad to block the adjacent landowners' state law

[39] *See Memmer,* 150 Fed. Cl. at 750.

reversionary rights from coming to fruition after state law abandonment has already occurred. When the state law abandonment occurred under these facts, the railroad could no longer perform any common carrier obligation and the only governmental interest at that point was to maintain federal jurisdiction at the expense of the Plaintiffs' state law property rights. As a result, the federal regulation allows the railroad to fail to consummate abandonment after state law abandonment has already occurred, which means the duration of the taking continued until the railroad did actually consummate federal law abandonment in 2021.

B. The Government Misstates the Obvious Point That the Existence of Federal Law Preemption Applied to State Law Abandonment is Why the Taking Continued After the NITU Expired

The fact that federal law preempts state law on the issue of abandonment is irrelevant on the issue of whether a taking has occurred. In addition, the fact that consummation of abandonment under federal law did not immediately occur when the NITU expired is also irrelevant on the issue of whether a taking occurred when the NITU was issued and whether it continued after the NITU expired. The government is obviously trying to conflate the issue of actual abandonment under federal law with the issue of a takings under the Trails Act.

The government argues that there can be no taking without the consummation of abandonment under federal law because the issue of abandonments are preempted by federal law: "to the extent state law might purport to permit termination of

easements without consummation of abandonment, it would be preempted by federal law."[40] So, now, after denying that state law abandonment can even exist without the consummation of federal law abandonment, and after denying the relevance of state law abandonment in the equation, the government states that, even if state law abandonment might exist, it would be preempted by federal law. The government's argument is completely misguided.

The fact of federal preemption over abandonment is precisely why prong 3 of *Preseault II* was originally adopted by this Court. Since property rights are determined by state law, the continuing authority to regulate abandonments by the federal government after landowners' state property rights are blocked or destroyed is exactly why a taking occurs. There is no question that the federal government has the power and authority to regulate abandonments of rail lines, but it is the exercise of that authority when state law abandonment has occurred that results in a taking. As Justice O'Connor stated in *Preseault I,* the fact of preemption does not mean there is no taking because it is the exercise of the federal government's power over individual landowners' property rights under state law that amounts to a taking.[41]

[40] *Id.* at 43.

[41] *See Preseault I,* 494 U.S. at 22 ("the scope of the Commission's authority to regulate abandonments, thereby delimiting the ambit of federal power, is an issue quite distinct from whether the Commission's exercise of power over matters within its jurisdiction effected a taking of Petitioner's property").

A taking occurs under prong 3 of *Preseault II* because the issue of abandonment is preempted by federal law and Plaintiffs' reversionary rights are blocked by the application of federal law. It should make no difference that the state law abandonment occurred in this case during the pendency of the NITU rather than before the NITU as set forth in prong 3 of *Preseault II.* Under these facts, consummation of abandonment did not occur initially after the NITU expired as in *Caquelin II,* but the federal government still preempted the issue of abandonment and all of the Plaintiffs' reversionary rights were blocked after state law abandonment occurred simply and solely because the railroad initially failed to consummate abandonment.

CONCLUSION

The Court should affirm the CFC's conclusion that causation exists based on all of the evidence in this record and should also conclude that the duration of the taking is over ten years and three months, from May 23, 2011 when the NITU was issued, until the right-of-way was formally abandoned under federal law by the railroad on August 31, 2021.

Dated: February 22, 2022

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July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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