Nos. 21-2133, 21-2220

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JEFFREY MEMMER, GILBERT EFFINGER, LARRY GOEBEL, SUSAN GOEBEL, OWEN HALPENY, MATTHEW HOSTETTLER, JOSEPH JENKINS, MICHAEL MARTIN, RITA MARTIN, MCDONALD FAMILY FARMS OF EVANSVILLE, INC., REIBEL FARMS, INC., JAMES SCHMIDT, ROBIN SCHMIDT,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Cross-Appellant.

Appeal from the United States Court of Federal Claims
No. 1:14-cv-135 (Hon. Margaret M. Sweeney)

UNITED STATES' SECOND CORRECTED PRINCIPAL AND RESPONSE BRIEF AND SUPPLEMENTAL APPENDIX

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STATEMENT OF RELATED CASES

Appeals were taken previously in this action in *Memmer v. United States*, Nos. 17-2150 and 17-2230. The cases were consolidated. On November 16, 2017, the Court granted a joint motion to vacate the judgment below and remand for further proceedings in light of the Court's decision in *Caquelin v. United States*, 697 F. App'x 1016 (Fed. Cir. June 21, 2017). Then-Chief Judge Prost, Judge Moore, and Judge O'Malley comprised the panel, and Judge O'Malley wrote the order. The order was not published in the Federal Reporter but can be found on Westlaw. *See Memmer v. United States*, Nos. 2017-2150, 2017-2230, 2017 WL 6345843 (Fed. Cir. Nov. 16, 2017).

Counsel is unaware of other related cases within the meaning of Circuit Rule 47.5 that will directly affect or be directly affected by the Court's decision in this appeal.

INTRODUCTION

In this rails-to-trails case, Plaintiffs make the novel and extraordinary claim that the United States should compensate them for a private railroad's decision not to relinquish easements. This Court has held that the workings of the National Trails System Act may, under specific circumstances, cause a Fifth Amendment taking by preventing or delaying a railroad's abandonment of rail lines, thereby preventing or delaying the termination of the railroad's easements. But the Court has never held that the United States causes a taking when the railroad makes an independent decision not to abandon the line. That would mark a dramatic expansion of takings liability in rails-to-trails cases, without any support in this Court's precedent, and the Court should not do so for the first time in this case.

Plaintiffs own land subject to railroad easements in a 17.2-mile rail corridor in Indiana. In 2010, the railroad—Indiana Southwestern Railway Company—requested authorization from the Surface Transportation Board to abandon the line. The Board granted the railroad conditional authorization to consummate abandonment, subject to filing a timely notice of consummation with the Board. But during this process, a recreational trail group expressed interest in converting the line to a trail, as contemplated by the National Trails System Act. With the railroad's agreement, the Board issued a Notice of Interim Trail Use or Abandonment ("NITU") to permit trail-use negotiations. After several years of

voluntary negotiations, these talks between the railroad and trail group were fruitless. After the NITU expired, the railroad chose not to file a timely notice of consummation of abandonment with the Board, meaning the rail line remained under federal jurisdiction as part of the interstate rail system.

Plaintiffs brought suit, claiming that the NITU effected a compensable physical taking by preventing termination of easements over their property. This Court has held that a NITU may effect a physical taking if the trail-use negotiations result in the continuation of easements, either permanently (if the rail line is converted to a trail) or temporarily (if the voluntary negotiations compel a delayed abandonment). The Court of Federal Claims, applying a causation standard recently recognized by this Court, concluded that a NITU can also cause a temporary taking even when the railroad chooses *not* to abandon the line. That was error. There can be no physical taking where the NITU ultimately has no effect on easements. The continuation of any railroad easements is the result of the railroad's independent decision not to abandon—and the result is no different than if the railroad had never sought abandonment authority to begin with. The government has not coerced or compelled any delay in the railroad's exercise of its abandonment authority, nor prevented termination of the railroad's easements.

For these reasons, the Court should reverse the CFC's judgment that the United States is liable for a compensable physical taking. In the alternative, the

Court should affirm the CFC's judgment that any taking was temporary, but also make a small modification to the determination as to the taking's duration.

STATEMENT OF THE ISSUES

1. Whether the Board's issuance of a NITU causes a physical taking even when the NITU results in neither a trail use agreement nor a delay in abandonment and the resulting termination of easements in the rail corridor.

2. Whether, in the alternative, any taking is temporary and concludes when the NITU expires.

STATEMENT OF THE CASE

A. Legal background

1. Abandonment of rail lines

Congress vested exclusive and plenary authority in the Surface Transportation Board to regulate rail transportation, including nearly all of the Nation's rail lines. 49 U.S.C. § 10501(b); *see also* Transportation Act of 1920, Pub. L. No. 66-152, § 402, 41 Stat. 477-78; *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). Rail carriers under the Board's purview must "provide . . . transportation or service on reasonable request," 49 U.S.C. § 11101(a), unless the Board agrees to a temporary discontinuance of operations or to the permanent abandonment of the rail line, *id.* § 10903. Abandonment permanently removes a line from the national transportation system and from

federal jurisdiction. *Preseault v. Interstate Com. Comm'n*, 494 U.S. 1, 5 n.3 (1990).

The Board grants railroads authority to abandon lines by application or through a streamlined "exemption" process. 49 U.S.C. §§ 10502 (exemption), 10903 (application). Application proceedings before the Board involve a determination of the public need for service in relation to economic hardship on the railroad. *See generally N.Y. Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177, 1180 (D.C. Cir. 2004). If a railroad satisfies certain criteria—for example, if no local traffic has moved over the line for two years—the railroad can invoke an exemption by simply filing a notice with the Board. 49 C.F.R. § 1152.50(d)(2).[1] If the notice of exemption is complete, the Board will publish a notice in the Federal Register, which confers discretionary authority on the railroad to consummate abandonment of the line 30 days after publication of the notice, absent intervening events that may affect its effective date. *See id.* § 1152.50(d)(3).

Importantly, the Board does not direct or control a railroad's abandonment of a rail line; the Board merely authorizes the railroad to abandon the rail line and discontinue service otherwise required by federal law. The railroad still must make an affirmative decision to exercise the discretion conferred by the Board and

[1] Unless otherwise noted, this brief cites to the regulations as they existed in 2010, when the railroad invoked the abandonment process.

consummate abandonment of the line, which is a distinct process. 49 C.F.R. § 1152.29(e)(2). Consummation of abandonment requires the railroad to take affirmative steps to end its use of the rail line and to fulfill all other conditions of abandonment imposed by the Board. *See id.* If the railroad wishes to go forward with abandonment of the line, the railroad must file a timely "notice of consummation" with the Board. *Id.*; *see also* 49 C.F.R. § 1152.50(e). Only upon receipt of this notification is the rail line abandoned under federal law and thus removed from the Board's jurisdiction. *Id.*; *see also* 49 U.S.C. § 10904(g); *Baros v. Tex. Mex. Ry.*, 400 F.3d 228, 236 (5th Cir. 2005) ("[T]he STB, since 1997, has required rail carriers to file with the agency a letter confirming consummation of abandonment.") (citation omitted); *Honey Creek R.R., Inc. – Pet. for Decl. Order*, STB FD No. 34869, 2008 WL 2271465, at *5 (S.T.B. served June 4, 2008) ("In short, the filing of a notice of consummation now provides the only legally recognizable way to consummate abandonment of a rail line[.]").

Generally, the railroad must consummate abandonment within one year of receiving conditional authorization from the Board. 49 C.F.R. § 1152.29(e)(2). If the railroad does not file a notice of consummation of abandonment within that period, the line remains subject to federal jurisdiction unless and until the railroad seeks authority again and satisfies the conditions for abandonment. *Id.* If there is a "legal or regulatory barrier to consummation" at the end of the one-year period, the

railroad has another sixty days to file a notice of consummation "after the satisfaction, expiration, or removal of the legal or regulatory barrier." *Id.*

Abandonment of a rail line and termination of the Board's jurisdiction may have ramifications for property rights in the rail corridor. In many cases, railroads hold fee title to land in the corridor, but in others, railroads hold only an easement over land owned by a third party. Property rights within the rail corridor are governed by state law, but the Board's plenary jurisdiction over rail lines preempts any state law purporting to interfere with the railroad's common carrier obligation under federal law. 49 U.S.C. §§ 10501(b), 10903(a); *Kalo Brick*, 450 U.S. at 318; *see also Preseault*, 494 U.S. at 8 ("State law generally governs the disposition of reversionary interests, subject of course to the [Surface Transportation Board's] 'exclusive and plenary' jurisdiction to regulate abandonments."). After the Board's plenary jurisdiction is terminated, the railroad may abandon any underlying property interest in the corridor as permitted by state law.

In Indiana, railroads must satisfy two main criteria to abandon a right of way under state law. Ind. Code § 32-23-11-6. *First*, the railroad must be relieved of its obligation under federal law before the right of way may be abandoned. *Id.* § 32-23-11-6(a)(2)(A). If Indiana law purported to terminate easements before the termination of the Board's jurisdiction, the law would be preempted. *Kalo Brick*, 450 U.S. at 318; *Grantwood Village v. Mo. Pac. R.R.*, 95 F.3d 654, 658 (8th Cir.

1996) ("[F]ederal law preempts state law on the question of abandonment[.]"). *Second*, after consummating abandonment under federal law, a railroad in Indiana must still satisfy additional criteria before its rights of way are abandoned, like "making the right-of-way unusable for continued rail traffic" or waiting ten years after the railroad has been relieved of its common carrier obligation by the Board. *See id.* §§ 32-23-1-16(a)(2)(B), (b).

2. Railbanking under the Trails Act

In 1983, Congress enacted legislation to promote "railbanking" through the conversion of rail corridors to recreational trail use as an alternative to abandonment—a policy commonly known as "rails-to-trails." *See* National Trails System Act Amendments, Pub. L. No. 98-11, § 208(2), 97 Stat. 42, 48 (1983) (codified as amended at 16 U.S.C. § 1247(d)) ("Trails Act"). When a rail corridor is banked, the Board retains jurisdiction over the corridor to allow for possible reactivation of the corridor for railroad use in the future, but the rail carrier transfers responsibility over the corridor to a third party for interim use as a recreational trail. *See Preseault*, 494 U.S. at 6-7. Under the Trails Act, "if such interim [trail] use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d).

Under Board regulations, railbanking is entirely voluntary on the part of the railroad. *See* 49 C.F.R. § 1152.29(d)(1). When a rail carrier seeks Board authorization to abandon a rail line through the streamlined "exemption" process, the railbanking process is initiated when a "state, political subdivision, or qualified private organization" files a comment with the Board indicating an interest "in acquiring or using a right-of-way of a rail line . . . for interim trail use and rail banking." 49 C.F.R. § 1152.29(a). If the railroad makes the discretionary decision to explore railbanking and the prospective sponsor meets the necessary requirements, 16 U.S.C. § 1247(d), the "Board will issue a Notice of Interim Trail Use to the railroad and to the interim trail sponsor for the portion of the right-of-way as to which both parties are willing to negotiate," 49 C.F.R. § 1152.29(d)(1).

The NITU effectively grants the railroad and the prospective trail sponsor a period of 180 days to negotiate a trail use agreement.[2] 49 C.F.R. § 1152.29(d)(1); *see also, e.g.*, *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1150-53 (D.C. Cir. 2001); *Goos v. Interstate Com. Comm'n*, 911 F.2d 1283, 1286 (8th Cir. 1990). The NITU does not actually mark the beginning of any use of the corridor as a trail, interim or permanent, nor does it indicate that a railroad

[2] In 2020, new Board regulations changed the NITU period from 180 days to one year. *Limiting Extensions of Trail Use Negotiating Periods; Rails-to-Trails Conservancy—Petition for Rulemaking*, 84 Fed. Reg. 66320, 66321 (Dec. 4, 2019). During the events at issue in this case, the NITU period was 180 days.

and trail group have reached a trail-use agreement. Instead, it simply serves as a notice that although a railroad has been conditionally authorized to abandon a line, voluntary negotiations for trail use are occurring, because a trail group is interested and the railroad has agreed to consider that possibility. Thirty days after the NITU issues, the railroad may "discontinue service, cancel any applicable tariffs, and salvage the track and materials"—steps consistent with both interim trail use and railbanking. 49 C.F.R. § 1152.29(d)(1). But the railroad remains subject to federal jurisdiction and may not abandon the line until after the NITU expires on its own terms or is vacated by the Board. *Id.*

If the railroad and the prospective trail sponsor reach a trail-use agreement, they notify the Board and the line is railbanked, remaining under Board jurisdiction. If an interim trail-use agreement is not reached during the NITU period, the NITU authorizes—but does not require—the railroad to file a timely notice of consummation of abandonment, which would end the Board's jurisdiction. 49 C.F.R. § 1152.29(d)(1). In that way, the NITU is no different than normal Board abandonment authorization—it is always permissive. The carrier may then decide whether to exercise its discretion to abandon the line within whatever remains of the one-year abandonment period. *Id.* §§ 1152.29(d)(1), (e)(2); *see Baros*, 400 F.3d at 236 (explaining that the Board's abandonment authority is permissive, even after expiration of a NITU, and "that the decision

actually to abandon a line rests with the carrier"). Because the Board will grant extensions of the 180-day NITU period upon agreement of both the railroad and the prospective trail sponsor, the NITU may end up extending past the one-year period of abandonment authority. If so, the railroad has another sixty days after the expiration of the extended NITU to consummate abandonment. *See id.* § 1152.29(e)(2) (citing "Trails Act conditions" as a basis for granting an additional sixty days of abandonment authority).

As with rail abandonment, railbanking may have implications for the underlying property rights, even though these issues are beyond the Board's jurisdiction. For example, Indiana law on rail line rights-of-way specifically provides that a "right-of-way is not considered abandoned" if the Board "imposes on the right-of-way a trail use condition" under the Trails Act. Ind. Code § 32-23-11-7.

3. Fifth Amendment takings

Under the Fifth Amendment, private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. The Just Compensation Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987). The Supreme Court "has recognized two kinds of takings: physical takings and regulatory

takings." *Washoe County v. United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003). A physical taking "generally occurs when the government directly appropriates private property or engages in the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992)); *see also, e.g.*, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 323 (2002). Regulatory takings, in contrast, "generally involve the regulation of private property." *Washoe County*, 319 F.3d at 1326; *see also, e.g.*, *Tahoe-Sierra*, 535 U.S. at 323.

B. Factual background

Plaintiffs in this case own property in Indiana comprising part of the 17.2 miles of rail corridor operated by Indiana Southwestern Railway Company ("Indiana Southwestern"). The interconnecting rail lines at issue run between Posey County and Vanderburgh County in southwestern Indiana. The railroad's predecessors obtained easements across Plaintiffs' land.

In 2010, Indiana Southwestern believed that it no longer needed the rail lines and sought abandonment authority from the Board. The railroad submitted a notice of exemption from abandonment proceedings in October 2010, stating that it would consummate abandonment in or after January 2011. Appx48, Appx253-254, Appx1358-1361. The Board then published a notice in the Federal Register. *Indiana Southwestern Railway Co.—Abandonment Exemption—in Posey and*

Vanderburgh Counties, IN, 75 Fed. Reg. 69520 (Nov. 12, 2010). In this notice, the Board stated that the exemption would be effective December 14, 2020, absent third-party intervention. *Id.* at 69520. The deadline for railbanking requests was November 22, 2010. *Id.* And the deadline for Indiana Southwestern to file a notice of consummation of abandonment—if it chose to do so—was about a year later, November 12, 2011. *Id.* The Board did not direct the railroad to do anything; the abandonment process is permissive.

A few days after the notice, the Indiana Trails Fund, Inc. submitted a request for the Board to issue a NITU for the rail corridor to permit negotiations about railbanking if the railroad agreed. Appx254.[3] The Board also received notice from the Town of Poseyville of its intent to file an offer of financial assistance to continue rail service, an alternative means of preventing the abandonment of a rail line. *See generally* 49 U.S.C. § 10904; 49 C.F.R. § 1152.27. On November 18, 2010, Indiana Southwestern advised that it was "willing to negotiate interim trail use/rail banking with . . . Indiana Trails Fund, Inc." SAppx1. But the Town of Poseyville's offer of financial assistance under 49 U.S.C. § 10904 took priority over the railbanking request, and there were several months of proceedings over

[3] Plaintiffs suggest that the NITU authorized trail use. The NITU alone did not authorize the railroad to establish a recreational trail because the NITU, like all NITUs, was subject to the condition of the parties voluntarily entering into a trail use agreement. *See* Appx1070, Appx1362-1369.

the town's offer that are not directly relevant to this appeal. Appx29-31 (discussing this background). Ultimately, the Poseyville offer fell through.

With the railroad's consent, the Board then issued a NITU that became effective May 23, 2011. Appx52, Appx254, Appx1362-1369. The NITU provided an initial six-month period to negotiate an interim trail use agreement, through November 19, 2011. Appx1368-1369. The trail fund obtained five extensions—all with Indiana Southwestern's consent—through November 8, 2013. Appx254-255, 1075. When this deadline passed, the NITU lapsed without an agreement, and thus expired on its own terms. Because the NITU extensions had lasted more than one year, Indiana Southwestern then had sixty days—through January 7, 2014—to file a notice of consummation of abandonment of the rail lines, if it chose to do so. 49 C.F.R. § 1152.29(e)(2). The railroad chose not to file a notice of consummation, *see, e.g.*, Appx1077, Appx1200, Appx1214, Appx1229, and the conditional abandonment authority conferred by the Board expired.

Accordingly, the rail line remained under Board jurisdiction as part of the interstate rail network. The railroad also continued to hold its right-of-way easements under state law. *See* Ind. Code § 32-23-11-6(a)(2). Although almost all of the tracks had been removed except for some crossing roads and Indiana Southwestern still claimed to be interested in potentially finalizing abandonment or executing a trail-use agreement, Appx1228-1229, Appx1231, Indiana

Southwestern could not abandon the line without once again seeking Board authorization and exercising it. 49 C.F.R. § 1152.29(e)(2).

Several years later, during the pendency of this appeal, Indiana Southwestern submitted a new notice of exemption. The Board published a notice in July 2021. *Indiana Southwestern Railway Co.—Abandonment Exemption—in Posey and Vanderburgh Counties, Ind.*, 86 Fed. Reg. 37782 (July 16, 2021). No potential trail sponsors came forward, and no NITU issued. Indiana Southwestern filed a notice of consummation with the Board on August 31, 2021.

C. Procedural history

1. The CFC's 2015 decision

Plaintiffs filed a Fifth Amendment takings lawsuit in the Court of Federal Claims in 2014. Plaintiffs claimed that the NITU effected a physical taking of their property—specifically, their interest in land subject to railroad easements—requiring payment of just compensation. *See* Appx98-104. The parties moved for summary judgment on liability. Appx105-111, Appx154-192.

The CFC ruled in 2015 that the NITU effected a physical taking of Plaintiffs' property interests. Appx219-238. The CFC relied on *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010) ("*Ladd*"), which held that the Board's issuance of a NITU may effect a categorical physical taking of landowners' property interests in circumstances where trail-use negotiations fail and the railroad

abandons the line. (The substance of the Court's decisions in this area are discussed in detail in the argument section below.) The CFC interpreted *Ladd* as requiring the conclusion that the NITU in this case effected a temporary physical taking of Plaintiffs' land. Appx236-238. The CFC entered judgment under U.S. Ct. Fed. Claims R. 54(b) in 2017, Appx244-245, and the parties appealed.

2. *Caquelin v. United States*

The parties' appeals from the CFC's 2017 judgment raised issues similar to another rails-to-trails case then pending in this Court. In *Caquelin v. United States*, 121 Fed Cl. 658 (2015), the CFC, relying on *Ladd*, found physical takings liability where a railroad abandoned its line after a NITU expired. The United States appealed and requested initial en banc consideration under Circuit Rule 35(a) to argue that *Ladd* and one its predecessors, *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004), were wrongly decided. The Court declined to refer the case for initial en banc consideration and instead remanded to the CFC. *Caquelin v. United States*, 697 F. App'x 1016, 1019-20 (Fed. Cir. 2017) (per curiam) ("*Caquelin I*").

In its remand order, the Court directed the CFC to hold further proceedings to develop a record on the United States' alternative argument that any alleged taking effected by the NITU should be evaluated under the multi-factor test of *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012), rather than viewed as a categorical taking. *Caquelin I*, 697 F. App'x at 1020. *Arkansas*

Game prescribed a multi-factor test for deciding whether a particular kind of "temporary physical invasion" of property is a compensable taking. 568 U.S. at 38-39. The *Caquelin I* Court explained that the en banc review sought by the United States might not be necessary if the multi-factor analysis under *Arkansas Game* would yield the same result. 697 F. App'x at 1020.

On remand, the CFC permitted discovery relevant to a multi-factor *Arkansas Game* analysis and in 2018 held a three-day trial. The CFC ultimately decided that the United States was liable for a taking under the *Arkansas Game* factors, *Caquelin v. United States*, 140 Fed. Cl. 564, 579-84 (2018), and the United States appealed.

In the second appeal, the United States once again requested initial en banc hearing under Circuit Rule 35(a) for reconsideration of *Ladd* and *Caldwell*, in addition to arguing that the CFC misapplied *Arkansas Game*. The Court declined to refer the case for en banc hearing and affirmed the CFC's liability determination. *Caquelin v. United States*, 959 F.3d 1360 (Fed. Cir. 2020) ("*Caquelin II*"). Among other things, the Court held that a NITU may effect a categorical taking if the NITU is the cause of a delay in the termination of easements and that an *Arkansas Game* analysis is not appropriate. *Id.* at 1369-70.

3. The CFC's 2020 decision

This Court issued its decision in *Caquelin I* (the remand decision) shortly after the parties appealed from the CFC's 2017 judgment in this case. Given the similarities, the parties jointly requested that this Court vacate the CFC's 2017 judgment and remand for further proceedings in line with *Caquelin I*. The Court granted the motion and ordered the CFC to conduct proceedings on the *Arkansas Game* multi-factor analysis. *Memmer v. United States*, Nos. 17-2150, 17-2330, 2017 WL 6345843 (Fed. Cir. Nov. 16, 2017).

On remand, the parties engaged in discovery on the *Arkansas Game* multi-factor analysis, consistent with *Caquelin I*. The CFC then held a five-day trial in in 2019. Following the submission of post-trial briefing, the CFC heard closing arguments in October 2020—a few months after this Court issued its decision in *Caquelin II* (the merits decision) holding that a NITU may effect a categorical physical taking if causation is satisfied and that the *Arkansas Game* multi-factor analysis does not apply.

The CFC once again concluded that the NITU effected a taking. The CFC explained that "binding Federal Circuit precedent provides that the type of taking involved in Trails Act cases is a categorical physical taking." Appx43. The CFC then analyzed whether, under *Caquelin II*, the NITU caused a taking through the "compelled continuation of Indiana Southwestern's easements that prevented

plaintiffs from acquiring fee simple interests in the underlying land by operation of state law." Appx48. The CFC held that the NITU effected a taking because the railroad would have abandoned the line if the NITU had not issued. Appx48-51.

The CFC also examined the scope and duration of the taking. Appx51-54. Plaintiffs claimed the taking was effectively permanent because the taking continued beyond the expiration of the NITU. *Id.* The CFC rejected this argument, concluding that the United States was responsible for extending the easements only through the expiration of Indiana Southwestern's abandonment authority. Appx54. The CFC determined that the taking was temporary and lasted from 2011 until the deadline for filing the notice of consummation of abandonment in 2014. *Id.* The CFC denied Plaintiffs' motion for reconsideration of its determination of the scope of the taking. Appx66-73.

The CFC then entered a final judgment under U.S. Ct. Fed. Claims R. 54(b), Appx77-78, and the parties once again appealed.

SUMMARY OF ARGUMENT

The United States did not cause a physical taking, and the CFC's liability determination should be reversed. Furthermore, if the United States did cause a physical taking, any taking would be temporary, not permanent, and necessarily concluded at the end of the NITU.

1. The NITU did not cause a physical taking because the NITU did not affect the easements on Plaintiffs' land. This Court has held that a NITU may cause a physical taking where the NITU results in a trail-use agreement or compels a railroad to delay consummation of its abandonment authority. This NITU did neither. The NITU had no effect on the status quo with respect to the easements, and the NITU therefore could not cause a physical taking. The CFC held that the NITU effected a taking because the railroad would have abandoned the line if the NITU had not issued, but this conclusion rests on an erroneous view of the law and a flawed consideration of the facts. Plaintiffs argue that takings liability is even stricter and that the effects of the NITU do not matter, but this view is squarely foreclosed by this Court's recognition in *Caquelin II* that plaintiffs must demonstrate causation.

2. Alternatively, if the NITU caused a physical taking, the taking was temporary and concluded when the NITU expired. This Court has recognized both permanent and temporary takings in Trails Act cases depending on whether the NITU results in an indefinite continuation of easements (through a trail-use agreement) or a temporary continuation during trail-use negotiations (if the railroad was compelled to abandon the line later than it otherwise would have). Plaintiffs contend that the NITU at issue here effected a permanent taking, but this argument rests primarily on their mistaken view of takings liability. Plaintiffs also

suggest that the Board's notice of consummation requirement effected a taking, but that contention is wholly unsupported and wrong. As the CFC held, any taking here must have been temporary because the continuation of the railroad's easements lay within the railroad's discretion and cannot be attributed to the Board. The CFC did, however, erroneously assess the taking's duration.

For these reasons, the judgment of the CFC should be reversed or, in the alternative, remanded for further proceedings on the duration of the taking.

ARGUMENT

I. The United States is not liable because Plaintiffs failed to establish that the NITU delayed or prevented expiration of the railroad's easements.

The NITU did not cause a taking of Plaintiffs' property, and the CFC's judgment that the United States is liable for a Fifth Amendment taking should be reversed. This Court has held that a taking may occur where a NITU results in a trail-use agreement or compels a delay in the railroad's exercise of its abandonment authority. A NITU cannot cause a taking where, as here, there is no trail-use agreement and the railroad chooses not to terminate federal jurisdiction by filing a timely notice of consummation. In this case the railroad simply exercised its discretion—as it always may—to not finish the regulatory process that it began. Even if a taking could theoretically arise under those circumstances, Plaintiffs failed to establish that this NITU caused a taking.

Plaintiffs, for their part, argue that the CFC held them to too high a standard by requiring them to establish causation. Memmer Brief 11-37. But that argument is squarely foreclosed and should be rejected out of hand.

A. Federal Circuit precedent holds that a NITU may effect a taking under only two circumstances.

Plaintiffs seek, and the CFC awarded, compensation for a taking under a novel set of circumstances that does not follow from this Court's precedents. This Court has held that a NITU may effect a taking in only two circumstances: where a NITU results in a trail-use agreement or where the NITU causes a delay in the railroad's abandonment of the line. These decisions control many of the issues in this case, including the contours of the takings analysis in rails-to-trails cases. But the Court's precedent in this area does not provide for takings liability where there is neither a trail-use agreement nor a delayed abandonment. Plaintiffs, for their part, contend that the Court's precedents are wrong. They argue that the Court's recent decision in *Caquelin II* should be reversed, Memmer Brief at 21-37, but that claim is plainly foreclosed and must be rejected.

1. This Court has held that a NITU may effect a taking where it results in a trail-use agreement.

The first type of rails-to-trails case where the Court has recognized takings liability involves trail-use conversions. This case does not involve a trail-use conversion, and those cases thus do not support takings liability here.

This line of cases begins with *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990) ("*Preseault I*"), a case involving a trail-use agreement. The Supreme Court rejected an argument that the Trails Act was unconstitutional on its face because, among other things, trail conversions were takings without just compensation. *Id.* at 10. In resolving this question, the Supreme Court assumed (without deciding) that federal actions under the Trails Act could "create federal liability under the Fifth Amendment" but concluded that there would be a remedy in the CFC for any such "rail-to-trail conversions giving rise to just compensation claims." *Id.* at 13.

Subsequently, in *Preseault v. United States*, 100 F.3d 1525, 1529-30 (Fed. Cir. 1996) (en banc) ("*Preseault II*"), this Court held that a trail conversion could indeed create takings liability. The *Preseault* plaintiffs owned land in Vermont subject to railroad easements and sought certification from the Board's predecessor (the Interstate Commerce Commission) that the line had been abandoned. *Id.* at 1549. Vermont intervened and negotiated a trail-use agreement under the Trails Act. *Id.* at 1549-50. This Court held that the trail-use agreement with Vermont constituted a taking by the United States. The Court explained that "use as a public trail" effected a "physical taking of the [plaintiffs'] right of exclusive possession." *Id.* at 1550. Although not a party to the trail-use agreement, the

United States was liable because the Commission "put[] into play a series of events which result[ed] in a taking of private property." *Id.* at 1551.

Preseault II and other trail-conversion cases thus stand for the proposition that a trail-use agreement can effect a taking, but do not support takings liability in this case where there is no trail-use agreement.

2. A NITU may effect a taking where it compels the railroad to a delay termination of its easements.

Following the *Preseault* cases, a second line of cases arose involving claims that a NITU effected a taking even without a trail-use agreement. This type of case involves delays in abandonment caused by a NITU. This case, however, does not involve a delay in abandonment attributable to a NITU, and these NITU takings cases thus do not support the takings liability found here by the CFC.

This second line of cases begins with *Caldwell*, 391 F.3d at 1233-34. In *Caldwell*, a divided panel held that a trail-conversion claim accrues when the Board issues a NITU. *Id.* The Court reasoned that the "issuance of the NITU is the only *government* action in the railbanking process that operates to prevent abandonment" and the termination of easements. *Id.* If a trail-use agreement is reached, the process "results in a permanent taking" because "abandonment of the right-of-way is effectively blocked." *Id.* But the Court also noted (without deciding) that a temporary taking "may" occur in some circumstances even if the NITU process results in abandonment. *Id.*; *see also id.* at 1234 n.7. Although the

issue is not presently before the Court, the United States' position is that *Caldwell* was wrongly decided. *Caquelin I*, 697 F. App'x at 1019 n.4; *see also Barclay v. United States*, 443 F.3d 1368, 1378 (Newman, J., dissenting); *Caldwell*, 391 F.3d at 1236-39 (Newman, J., dissenting).

The Court addressed the question left open by *Caldwell* in *Ladd*, 630 F.3d at 1018-19. The *Ladd* plaintiffs sought compensation for alleged takings from a NITU that had not resulted in a trail-use agreement. *Id.* The Court held that *Caldwell*, right or wrong, compelled the conclusion that a plaintiff may state a claim for a physical taking when a NITU issues, and a NITU may therefore effect a taking even if there is no trail-use agreement reached and the line is abandoned. *Id.* at 1023-24. The Court denied the United States' petition for rehearing en banc. *Ladd v. United States*, 646 F.3d 910 (Fed. Cir. 2011); *see also id.* at 911 (Gajarsa, J., dissenting, joined by Moore, J.) (describing *Caldwell* as "an egregious legal error").

The Court clarified and further explained *Ladd* in *Caquelin II*. The *Caquelin II* plaintiffs claimed that a NITU effected a physical taking, per se, where no trail-use agreement was reached and the railroad then abandoned the line. 959 F.3d at 1364-65. The Court described the NITU as "a government action that compelled continuation of an easement for a time." *Id.* at 1367. Although there was no permanent taking from a trail-use agreement, the NITU in that action "mandated

continuation of the easement for a shorter period of time," constituting "federal-law maintenance of an easement" and thus a "temporary taking." *Id.* The Court concluded that this "coerced easement" should be subject to "categorical treatment," consistent with *Ladd*. *Id.* at 1367-70. This element of compulsion is significant because the government generally cannot be held liable for the actions of a private party, absent government coercion or agency. *See, e.g.*, *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1153-57 (Fed. Cir. 2014).

The *Caquelin II* Court also recognized that the mere fact of a NITU, standing alone, is not sufficient to establish a taking. Rather, Plaintiffs must establish that the NITU actually *caused* a taking by compelling delay in the termination of a railroad's easement—or in other words, that the railroad was prevented from abandoning the line (and terminating the easement) earlier than it would have otherwise. *Id.* at 1370. To the extent *Caldwell* and *Ladd* used a "shorter formulation" that suggested absolute equivalence between the issuance of the NITU and a physical taking, the *Caquelin II* Court reasoned that this language was simply "shorthand" and did not establish "controlling precedent" because no party had argued that the railroad would not have abandoned the line in the absence of the NITU. *Id.* The Court thus held that "there is no taking until the time as of which, had there been no NITU, the railroad would have abandoned the rail line" under "normal abandonment proceedings." *Id.* at 1370-71. Put another

way, the proper analysis asks (1) whether the railroad would have consummated abandonment but for the NITU (and if so when), and (2) whether the railroad was in fact compelled to delay abandonment beyond that date. *See id.*

Together, *Ladd* and *Caquelin II* stand for the proposition that a NITU may effect a taking where a NITU compels a delay in abandonment. They do not support takings liability in this case, where there was no abandonment following termination of the NITU.

3. Binding precedent requires Plaintiffs to establish causation for their NITU takings claim.

Plaintiffs argue that takings liability is not limited to these two circumstances because a NITU effects a taking immediately upon issuance, full stop, regardless whether or how the NITU affects property rights. *See* Memmer Brief 3, 11-37. In their view, claimants in Trails Act takings cases should not be required to show causation because the takings are per se. *Id.* But under binding decisions from this Court, Plaintiffs must show that a NITU caused some physical invasion or appropriation in order to establish that the United States is liable for just compensation. This requirement is not unique to the rails-to-trails context—it is a cornerstone of takings liability. *See, e.g.*, *St. Bernard Parish Gov't v. United States*, 887 F.3d 1354, 1362 (Fed. Cir. 2018).

Nearly all of Plaintiffs' arguments are complaints about the Court's decision in *Caquelin II* and are plainly foreclosed. The Court's decision in *Caquelin II* is

both controlling and binding on questions of causation in Trails Act takings cases. Stare decisis holds that a "prior precedential decision on a point of law by a panel of this court is binding precedent and cannot be overruled or avoided unless or until the court sits *en banc*." *Preminger v. Sec'y of Veterans Affs.*, 517 F.3d 1299, 1309 (Fed. Cir. 2008). Where a prior decision "squarely confronts and disposes" of an argument, the panel is bound and cannot revisit the issue. *Sacco v. Dep't of Justice*, 317 F.3d 1384, 1386 (Fed. Cir. 2003). Whether or not Plaintiffs agree with it, *Caquelin II* is the law of the Circuit.

Plaintiffs nevertheless argue throughout their brief that the CFC erred in applying *Caquelin II* because *Caquelin II* was wrongly decided and ask the Court to overturn it. *See, e.g.*, Memmer Brief 23 ("The *Caquelin II* panel imposed a causation requirement as an element in all takings cases but that conclusion was in error[.]"); *id.* at 30 ("The 'causation' principle enunciated in *Caquelin II* should not have been applied by the CFC in this case . . . because causation does not apply[.]"); *id.* at 56 (asking the Court to "reverse" *Caquelin II*). A panel of this Court has no power to grant Plaintiffs the relief they seek. This Circuit has a process for seeking initial en banc review to argue that prior precedent was wrongly decided, Circuit Rule 35(a), and Plaintiffs did not use it. The Court therefore need not engage with most of Plaintiffs' litany of criticisms of *Caquelin*

II or their objections to its formulation of causation. *See, e.g.*, *Barclay*, 443 F.3d at 1373 (rejecting landowners' similar argument that *Caldwell* was wrongly decided).

Two points require additional elaboration. *First*, Plaintiffs contend that *Caquelin II* is not consistent with the Court's earlier decisions in *Caldwell*, *Ladd*, and other precedents that Plaintiffs read to adopt their view that a NITU automatically causes a taking "per se." *See, e.g.*, Memmer Brief 22. If there were a conflict in the Court's decisions, some further analysis of *Caquelin II*'s precedential value might be necessary. *See, e.g.*, *Newell Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988) (discussing conflicts). But that is not the case. *Caquelin II* directly addressed the criticisms Plaintiffs make in their brief and explained why the decision could be reconciled with *Caldwell*, *Ladd* and *Barclay*. 959 F.3d at 1371-72. Plaintiffs observe that the *Caquelin II* Court "opined" that its decision was consistent with these precedents, Memmer Brief 22, but the Court did not just opine—it held, as a matter of law, that these decisions were consistent. 959 F.3d at 1371-72.

Second, Plaintiffs contend that the Supreme Court's decision last year in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), calls into question *Caquelin II*. An intervening Supreme Court decision overruling a past precedent can, of course, be cause for departing from that precedent. *Deckers Corp. v. United States*, 752 F.3d 949, 966 (Fed. Cir. 2014). But *Cedar Point* does not

overrule or abrogate *Caquelin II*. *Cedar Point* addressed a claim that a state regulation granting labor organizations a right of access to agricultural property effected a per se physical taking. 141 S. Ct. at 2069-71. The case does not address rails-to-trails takings and discusses causation only in passing while elaborating on the distinction between trespass and takings. *Id.* at 2078.

True, *Cedar Point* discusses broader physical takings principles, but nothing in the decision is inconsistent with *Caquelin II* or could otherwise be construed to abrogate it. Plaintiffs focus on *Cedar Point*'s discussion of categorical takings, but *Caquelin II* expressly identifies NITU takings as categorical while also recognizing a causation requirement. Plaintiffs also contend that *Cedar Point* calls into question the multi-factor *Arkansas Game* analysis considered (and rejected) by the CFC in this case, Memmer Brief 33, but *Caquelin II* already held that *Arkansas Game* does not apply. Plaintiffs' contention that *Cedar Point*'s discussion of *Arkansas Game* "debunked" the use of causation in this case is thus inaccurate. The Supreme Court stated simply that the flooding issues in *Arkansas Game* presented "complex questions of causation." 141 S. Ct. at 2078; *see also, e.g.*, *Hardy v. United States*, No. 14-388, 2021 WL 4839907, at *3-5 (Fed. Cl. Oct. 18, 2021) (explaining in detail why *Cedar Point* is irrelevant in this context).

For similar reasons, Plaintiffs' reliance on *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), also fails. *Knick*, like *Cedar Point*, does not address the Trails

Act, causation, or any other significant issue in this case. Moreover, *Knick* was decided before the Federal Circuit decided *Caquelin II* and cannot be considered an intervening Supreme Court decision.

In any event, Plaintiffs' arguments for a per se rule should be rejected, even if the issue were not controlled by prior decisions from this Court. The Supreme Court has cautioned against per se rules, *Arkansas Game*, 568 U.S. at 32, and no such rule could possibly be appropriate in these circumstances. The United States can be held liable for just compensation only for actions taken by the United States. *See St. Bernard Parish*, 887 F.3d at 1362; *A & D Auto Sales*, 748 F.3d at 1153-57; *Navajo Nation v. United States*, 631 F.3d 1268, 1274 (Fed. Cir. 2011) ("A takings claim must be predicated on actions undertaken by the United States[.]"). In the Trails Act context, where government action is attenuated from the actual effects on a landowner's property interests, demonstrating the relationship between the government action and some form of harm is particularly important. Plaintiffs seek a "per se" rule to avoid the burden of establishing causation and injury—but in a case with no trail-use agreement or delay in abandonment, they must show both.

4. This Court has not held that a NITU can cause a taking without trail use or abandonment.

For these reasons, the Court's decisions on NITU-based takings, including *Caquelin II*, provide the governing framework for this appeal and are controlling

precedent on the issues that fall within their scope. The United States continues to disagree with the Court's central holdings in *Ladd* and *Caldwell* that a NITU can effect a physical taking even without a trail-use agreement, as explained in the United States' requests for en banc review in the *Caquelin* appeals. *See, e.g.*, Corrected Opening Brief, *Caquelin v. United States*, No. 16-1663 (Fed. Cir. Aug. 9, 2016). Unlike Plaintiffs, the United States concedes (as it must) that these decisions cannot be revisited in this case absent further review. But 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.

Moreover, there is no need to revisit the Court's past decisions for the United States to prevail in this matter because, contrary to the CFC's decision, this Court's precedent does not support takings liability in this case. Although the Court has held that a NITU may effect a physical taking when the railroad enters a trail-use agreement (*Preseault II*) and when the NITU causes a delay in the termination of easements (*Caquelin II*), no case has held that a NITU can effect a taking where, as here, the NITU does not result in either a trail-use agreement or delayed abandonment. Under these circumstances, there is only a NITU—which the Board issues only with the consent of the railroad, 49 C.F.R. § 1152.29(d)(1)—and no coercion or compelled delay in abandonment.

B. A NITU does not cause a physical taking where the railroad does not enter a trail-use agreement or consummate abandonment.

A NITU cannot effect a physical taking where trail-use negotiations fail and the railroad chooses not to file a timely notice of consummation of abandonment that would terminate the Board's jurisdiction. Indiana Southwestern's NITU expired without a trail-use agreement on November 8, 2013, and the railroad then had sole discretion to complete the process by filing a notice of consummation of abandonment by January 7, 2014. Appx1077. It chose not to file a notice of consummation of abandonment. *Id.* Indiana Southwestern's decision to not abandon the line after the NITU lapsed was its own, independent of any federal action, and that private decision by the railroad cannot be the basis for federal takings liability. The CFC erred as a matter of law in holding that the NITU resulted in a compensable physical taking.

At the outset, it bears repeating that physical takings require "a direct government appropriation or [a] physical invasion of private property." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005). In contrast to regulatory takings, physical takings are "relatively rare, easily identified, and usually a greater affront to individual property rights" because "the government physically takes possession of an interest in property for some public purpose." *Tahoe-Sierra*, 535 U.S. at

323-34. The analysis of a physical takings claim thus focuses on the physical occupation of the plaintiffs' land, not regulatory burdens on private use.

This Court's decisions in rails-to-trails cases have found physical takings due to the effect of Trails Act processes on the ownership and use of railroad easements or other interests in private property held by a railroad. *See, e.g.*, *Caquelin II*, 959 F.3d at 1367-70; *Ladd*, 630 F.3d at 1024; *Preseault II*, 100 F.3d at 1550. But there is no change to the landowners' property interests when a railroad requests abandonment authority from the Board and then chooses not to exercise that authority. The Court's decisions in Trails Act cases therefore do not compel the conclusion that a NITU effects a taking under these circumstances.

To wit, trail-use cases find takings liability in changes to the scope of easements. *Preseault II*, 100 F.3d at 1550; *see also, e.g.*, *Castillo v. United States*, 952 F.3d 1311, 1315 (Fed. Cir. 2020); *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373-74 (Fed. Cir. 2009); *Caldwell*, 391 F.3d at 1229; *Toews v. United States*, 376 F.3d 1371, 1376-77, 1381-82 (Fed. Cir. 2004); *Ladd*, 630 F.3d at 1019. The Court has held that a trail-use agreement creates a "new" easement by authorizing use of the affected property inconsistent with the existing burdens. *Preseault II*, 100 F.3d at 1550. But when a NITU expires with no change in the use of the rail corridor or in federal jurisdiction over the rail line, the government cannot be said to have caused a change in the nature or effect of any easement.

The cases involving a NITU and subsequent abandonment, meanwhile, ground liability in compelled delays in the termination of easements and not in any change in use of the easements. *Caquelin II*, 959 F.3d at 1367; *see also Hardy v. United States*, 965 F.3d 1338, 1349-50 (Fed. Cir. 2020); *Ladd*, 630 F.3d at 1023-24. If the railroad decides to abandon the line after the NITU has expired, that action suggests that a NITU may have effected a taking by "denying abandonment authority to the railroad." *Caquelin II*, 959 F.3d at 1367. Under *Caquelin II*, if, absent a NITU, the railroad would have abandoned the line during the NITU period, then the easements do not terminate as early as they might have if the NITU had not been issued, and a temporary taking can result. *Id.* at 1372-73; *see also, e.g.*, *Hardy*, 965 F.3d at 1349. But when the railroad does not abandon the line and easements do not terminate after the NITU period, no government action—NITU or otherwise—can be said to have caused a delay. The government cannot delay something that does not happen. The railroad simply made an independent decision, as was its right, to not follow through on the abandonment it previously sought authorization to pursue.

Put simply, a NITU cannot effect a taking when there is no effect on any rail easements in the rail corridor, whether alterations in scope or delays in termination. If the railroad does not abandon the line or enter a trail-use agreement, there is no change whatsoever in the status of the easements. *See, e.g.*, *Caquelin II*, 959 F.3d

at 1367. When the discretionary abandonment authority expires because the railroad decides not to proceed with timely consummation, it is as if the railroad never requested abandonment authority. Appx1045-1046, Appx1077; 49 C.F.R. § 1152.29(e)(2). The Board had jurisdiction over the line before the railroad requested abandonment authority, and the Board has jurisdiction over the line after that authority expires—it remains part of the interstate rail system. The railroad owned easements before requesting abandonment authority, and the railroad owns those same easements after the abandonment authority expires. No government action has had any effect on landowners' property interests; they are in the same position before and after the unconsummated abandonment proceedings. *See, e.g.*, *Caquelin II*, 959 F.3d at 1371; *St. Bernard Parish*, 887 F.3d at 1358-60, 1362.

There cannot be a compensable Fifth Amendment taking attributable to the government where, as here, the outcome of the abandonment proceeding lies within the sole discretion of the railroad. *Navajo Nation*, 631 F.3d at 1274. The railroad voluntarily initiates the process, voluntarily agrees to negotiate a trail-use agreement, and then voluntarily chooses not to consummate. The Board's actions have no real-world effect, and there can be no coercion or compulsion where the entire process is voluntary on the part of the railroad. The CFC thus erred as a matter of law in holding that a NITU may effect a physical taking when there is

neither a trail-use agreement nor a consummation of abandonment by the railroad that could potentially have been delayed by government action.

C. The CFC erred in holding that Indiana Southwestern would have abandoned if the NITU had not issued.

Even if hypothetical circumstances might exist where a NITU could cause a physical taking without any effect on easements, this NITU did not. The CFC reasoned, under *Caquelin II*, that a NITU could cause a taking even without a trail-use agreement or delayed abandonment if, absent the NITU, the railroad would have abandoned the line during the period when the railroad was engaged in trail-use negotiations. Appx43. This novel conceptualization ignores the fact that the railroad must agree to the issuance of a NITU and any subsequent extensions. In other words, it rests on the counterintuitive 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. *See id.* The CFC concluded that Plaintiffs met their burden of establishing a physical taking on that basis, Appx48-51, but in doing so the CFC misconstrued this Court's takings decisions.

1. Indiana Southwestern voluntarily participated in lengthy trail-use negotiations and did not seek to consummate abandonment during the NITU period.

Indiana Southwestern's decision to engage in trail-use negotiations and to consent to repeated extensions of the NITU support the conclusion that the Board

did not cause a taking, and the CFC erred in failing to properly account for these choices. The CFC correctly laid out *Caquelin II*'s basic framework: "there is no taking until the time as of which, had there been no NITU, the railroad would have abandoned the rail line." 959 F.3d at 1372; *see also Hardy*, 965 F.3d at 1349. But the CFC erred in applying this standard by focusing on the railroad's initiation of the abandonment process—common to all rails-to-trails cases—rather than its voluntary agreement to the issuance of the NITU and four extensions.

The CFC determined that Indiana Southwestern would have abandoned the line in the absence of the NITU in part because the railroad pursued abandonment authority from the Board by filing a notice of exemption from abandonment proceedings. Appx48-49; *see also supra* at 4 (discussing the exemption process). As the CFC observed, Indiana Southwestern believed that it no longer needed the rail line when it filed its notice of exemption in October 2010 and stated that it intended to consummate abandonment "on or after January 15, 2011." Appx1254-1257. But the railroad's initiation of the abandonment process is both insufficient to show causation and outweighed by the railroad's voluntary participation in trail-use negotiations.

Filing a notice of exemption with the Board cannot be considered particularly probative of causation under *Caquelin II*. Requests for abandonment authority are ordinarily premised on an interest in consummating abandonment in

the near future. Seeking abandonment authority thus indicates some interest in abandonment, as *Caquelin II* acknowledged, *id.* at 1373, but that cannot be enough to carry Plaintiffs' burden. The *Caquelin II* Court took great pains to make clear that a NITU does not automatically effect a taking, as had been suggested by *Caldwell* and *Ladd*, and that a showing of causation is necessary. 959 F.3d at 1371-72. If an interest in abandonment on its own establishes that a NITU causes a taking, *Caquelin* would not have highlighted the causation requirement.

The timeline for abandonment discussed in Indiana Southwestern's notice also adds little support for the claim that the railroad would have abandoned but for the NITU. The Board's regulations require that the railroad state "the proposed consummation date" in its exemption notice, 49 C.F.R. § 1152.50(d)(2), and Indiana Southwestern accordingly stated that it planned to consummate abandonment "on or after" January 15, 2011. Appx1254-1257. But in November 2010, three months before that date, Indiana Southwestern agreed to negotiate trail-use with a potential trail sponsor. SAppx1. At that point, the railroad voluntarily agreed not to abandon for at least 180 days under the initial NITU. Appx254, Appx1362-1369. This entire process is voluntary on the part of the railroad—there is no coercion or compulsion by the government. The railroad's voluntary agreement to negotiate trail use in November 2010 thus confirms that the railroad was not set on abandoning in early 2011.

Furthermore, Indiana Southwestern consented to four extensions of the NITU, all the way through November 2013. Appx254-255, Appx1370-1373. Every time the NITU was set to expire, Indiana Southwestern could have declined to continue negotiations with the trail sponsor by refusing an extension. *Id.* Indeed, the Board will not extend a NITU without the railroad's consent. Appx1075; *see also* 49 C.F.R. § 1152.29(d)(1). If Indiana Southwestern had wanted to consummate in 2011—or in 2012, or in 2013—it could have done so. In *Caquelin II*, the railroad did not consent to a trail sponsor's request for a NITU extension, and the Court cited that refusal as evidence of causation. 959 F.3d at 1373. The fact that Indiana Southwestern, in contrast, made five independent decisions not to pursue abandonment between 2011 and 2013 shows that the government did not cause a physical taking by preventing consummation.

2. Indiana Southwestern's decision not to abandon supports the conclusion that the railroad would not have abandoned if the NITU had not issued.

Indiana Southwestern's decision not to consummate abandonment after the NITU expired also should weigh heavily against the conclusion that the NITU caused a physical taking solely by preventing the railroad from abandoning the line during its pendency. The CFC disagreed, holding that "what Indiana Southwestern chose to do (or not to do) after the NITU expired is not particularly suggestive of what Indiana Southwestern was planning to do while the NITU was in place

because such action (or inaction) might have been prompted by information learned or circumstances that arose after the NITU expired." Appx49.

The CFC's error fundamentally lies in its application of *Caquelin II* and its causation analysis. The "causation principle focuses on comparing the plaintiff's property interest in the presence of the challenged government action and the property interest the plaintiff would have had in its absence." *Caquelin II*, 959 F.3d at 1371. Although this exercise involves examining a hypothetical, that hypothetical must be compared against what actually happened: here, the railroad repeatedly chose not to abandon by agreeing to the NITU (and its extensions) and deciding not to file a timely notice of consummation of abandonment.

There is no justification for the CFC's decision to arbitrarily exclude from its analysis Indiana Southwestern's decision not to abandon the line. In addition to the railroad's consent to the NITU and multiple extensions, the best evidence of what the railroad might have done if the NITU had not issued is what the railroad actually did once it possessed that abandonment authority after the NITU expired: decline to actually abandon. Indeed, in *Caquelin II*, the Court's analysis of the causation question focused in part on what the railroad in that case did after the NITU expired—it promptly filed a notice of consummation of abandonment. 959 F.3d at 1373. Here, Indiana Southwestern did not.

The CFC brushed aside Indiana Southwestern's decision not to abandon as the result of intervening events after the NITU expired, but that is not enough under *Caquelin II*. The CFC referred to "information learned or circumstances that arose after the NITU expired" but cited no such "information" or "circumstances." Appx49. The CFC simply assumed that Indiana Southwestern inexplicably changed its mind about abandonment after the NITU issued and then determined that had no relevance. But under *Caquelin II*, liability must be based on causation, and Plaintiffs bear the burden of demonstrating causation. *St. Bernard Parish*, 887 F.3d at 1362. Plaintiffs did not meet that burden here, and the CFC cannot rest on assumptions about unidentified intervening events without any evidence.

The CFC's failure to examine the NITU's role in the railroad's decision not to abandon is all the more egregious because that decision lies entirely within the railroad's discretion. The railroad can *always* change its mind after requesting abandonment authority, regardless whether a NITU issues. If no NITU issues, the railroad has two options: consummate abandonment by filing a timely notice of consummation or do nothing and let its abandonment authority expire. If a NITU issues, the railroad has those same two options, plus a third: reach a trail-use agreement. No action taken by the Board, and nothing in federal law, requires the railroad to choose any one of those options over the others. And because the

railroad has the option not to consummate in either case, the NITU itself cannot be said to cause the decision not to abandon.

Thus, when considering the full picture, the railroad's decision to forgo abandonment should, at the very least, support the conclusion that the NITU had no effect on the termination of Plaintiffs' easements. The burden is on Plaintiffs to establish otherwise by putting forth evidence that the railroad would have abandoned during the NITU period, notwithstanding the decision not to abandon.

3. Indiana Southwestern's easements would not have terminated absent consummation of abandonment.

The CFC's causation determination also rested on the erroneous conclusion that, but for the NITU, Indiana Southwestern would have terminated its easements under Indiana state law. Appx49. The CFC reasoned that Indiana Southwestern had taken steps toward satisfying the state-law requirements for terminating easements and that these actions supported a finding that the NITU prevented the railroad from abandoning. *See* Appx49-50. But the CFC's analysis of these state-law issues was incorrect both in its basic premise and in its application of Indiana state law to the facts of the case.

First, Indiana Southwestern's easements could not be terminated until after the railroad filed a timely notice of consummation with the Board. Because the Board's jurisdiction over abandonment is both plenary and exclusive, a timely notice of consummation is necessary to abandon rail lines. 49 U.S.C. §§ 10501(b),

10903(a); *Barclay*, 443 F.3d at 1374 ("Federal law dictates when abandonment occurs."). Railroads thus cannot terminate easements in the rail corridor until they first consummate abandonment under federal law. *See, e.g.*, *Caquelin II*, 959 F.3d at 1363 (noting federal-law abandonment is "a necessary prerequisite for termination of the easement under state law"); *Nat'l Ass'n of Reversionary Prop. Owners v. Surface Transp. Bd.*, 158 F.3d 135, 137 (D.C. Cir. 1998) ("*NARPO*"). To the extent state law might purport to permit termination of easements without consummation of abandonment, it would be preempted by federal law. *See, e.g.*, *Grantwood Village*, 95 F.3d at 658 ("[F]ederal law preempts state law on the question of abandonment[.]"). 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.

The CFC therefore erred by addressing state law on easements in its discussion of causation. The CFC focused on the Indiana statute setting out the requirements for terminating railroad rights-of-way, which provides that the Board must "reliev[e] the railroad of the railroad's common carrier obligation on the right-of-way" before easements may terminate, Ind. Code § 32-23-11-6(a)(2)(A), and discussed whether the NITU met this standard by permitting the discontinuance of service. Appx50. But abandonment and discontinuance of

service are distinct issues, *see, e.g.*, *Preseault*, 494 U.S. at 5 n.3; *NARPO*, 185 F.3d at 137 n.1; *Wisc. Cent. Ltd. v. Surface Transp. Bd.*, 112 F.3d 881, 887 (7th Cir. 1997), and consummation of abandonment is what matters under federal law for determining whether the Board's jurisdiction has concluded—the necessary precondition for termination of an easement. Although federal law governs this issue, Indiana law notably also distinguishes between abandonment of the line and discontinuance of service. *See* Ind. Code § 32-23-11-8(b).

Second, although the Court need not reach this issue, the CFC also erred in its conclusion that Indiana Southwestern would have satisfied the requirements for state-law abandonment absent the NITU. Appx48-51. Indiana law requires that railroads meet two conditions in order to abandon a rail line under state law (and thus terminate easements), Ind. Code § 32-23-11-6, and the CFC concluded that Indiana Southwestern had satisfied both during the pendency of the NITU. It had not.

The first requirement is that the Board issue "a certificate of public convenience and necessity relieving the railroad of the railroad's common carrier obligation on the right-of-way." Ind. Code § 32-23-11-6(a)(2)(A). Because the majority of abandonments proceed (as here) through the exemption process, the Board generally no longer issues "certificates of public convenience and necessity," though it will conduct a public convenience and necessity analysis

when a railroad seeks abandonment authority by application rather than through an exemption. *See* 49 U.S.C. §§ 10502, 10903; *R.R. Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523, 531 (6th Cir. 2002). The CFC concluded that the NITU was functionally equivalent to a certificate of public convenience and necessity because it authorized the railroad to discontinue service. But this provision of Indiana law should be understood as referring to abandonment—not simply discontinuance of service. *See, e.g.*, Ind. Code § 32-23-11-6 ("Requirements for abandonment"). Moreover, the Indiana Supreme Court has referenced abandonment when addressing this provision. *See Consol. Rail Corp., Inc. v. Lewellen*, 682 N.E. 2d 779, 783 (Ind. 1997) (discussing "issuance of a certificate of abandonment").

The second requirement, as relevant here, is that the railroad must also "mak[e] the right-of-way unusable for continued rail traffic" by removing "[r]ails, switches, ties, and other facilities" from the right-of-way. Ind. Code § 32-23-11-6(a)(2)(B)(i). Indiana Southwestern had not satisfied this condition when the NITU issued in 2011. In August 2011, Indiana Southwestern entered into an agreement to sell the rails and other property in the corridor to A&K Railroad Materials Inc. for $1.2 million. Appx1143-1145. But Plaintiffs established at trial only that most of the rails were removed by April 2012, a year after the NITU issued, and it is clear from the record that the buyer left many of the rails in railway crossings intact. Appx1115, Appx1148-1149. Further, the buyer did not

purchase the rail ties, and the purchase agreement specifically provided that railroad ties could not be removed from the right of way. Appx1106, Appx1109-1111. The buyer thus did not remove tens of thousands of ties from the corridor. Appx1111, Appx1114, Appx1120, Appx1130, Appx1132-1136. Despite receiving bids to salvage the ties, valued at about $300,000, the railroad did not remove them. Appx1134-1136, Appx1153-1154, Appx1172, Appx1191.

The CFC viewed the government's argument on this point as "overly precise" and opined that it was "unlikely" that the ties left in the corridor could be used for rail service. Appx50-51. But the Indiana Supreme Court's cases discussing this requirement refer to the removal of rails *and* ties. *Calumet Nat'l Bank v. Am. Tel. & Tel. Co.*, 682 N.E.2d 785, 788 (Ind. 1997); *Lewellen*, 682 N.E.2d at 785. In any event, the Court need not wade into this issue because Indiana state-law requirements are irrelevant to federal abandonment.

* * *

In sum, Plaintiffs failed to establish—as they must—that the Board caused a physical taking of their property by issuing a NITU to permit Indiana Southwestern to voluntarily negotiate a trail-use agreement with a potential trail sponsor. Because the NITU expired without a trail-use agreement and Indiana Southwestern then chose not to abandon the line, the NITU had no effect on the easements that burden Plaintiffs' property. Even if a temporary change in the railroad's

abandonment authority with no real-world effect could somehow cause a physical taking, Plaintiffs did not meet their burden to establish that the Board's issuance of this NITU—extended four times with Indiana Southwestern's consent—caused the railroad not to exercise the abandonment authority conferred by the Board. The decision whether to consummate abandonment of the line and permit the termination of the easements on Plaintiffs' land lay with the railroad, not the Board, and the railroad chose not to do so.

II. Any NITU-based taking necessarily concluded when the NITU expired.

If the Court agrees with the United States' argument that the NITU here did not cause a compensable physical taking, then the other issues in these appeals are moot. Plaintiffs and the United States both appeal the CFC's determination of the scope of the physical taking, Memmer Brief 38-55, which the Court need not address if there is no takings liability. If the Court instead concludes that there was a physical taking, the Court should affirm the CFC's conclusion that any taking was temporary but remand the CFC's judgment as to its duration.

A. Assuming there was a taking, the CFC correctly concluded that the duration of the taking was temporary.

Plaintiffs appeal the CFC's judgment that the NITU effected a temporary rather than permanent taking. In Plaintiffs' view, the taking began with NITU issuance and then continued indefinitely—up until the railroad obtained and

exercised new abandonment authority in 2021. That is not how this Court has explained takings in this context. The CFC's conclusion that any taking was temporary follows from this Court's decisions, and Plaintiffs' arguments are premised on a fundamental rejection of controlling precedent on takings liability rather than an effort to apply the Court's decisions to the facts of this case.

1. This Court's decisions dictate that any taking must be considered temporary.

This Court has explained under what circumstances physical takings should be considered permanent or temporary, and the taking alleged in this case is clearly temporary in nature. In general, courts have drawn distinctions between permanent and temporary takings because just compensation depends on the duration of the taking. *Otay Mesa Prop., L.P. v. United States*, 670 F.3d 1358, 1363 (Fed. Cir. 2012). For a permanent taking, the property owner usually is entitled to the fair market value of the property; for a temporary taking, the usual measure of just compensation is the fair rental value for the duration of the taking. *Id*.

Applying these concepts to rails-to-trails cases, the Court has held that a NITU that results in a trail-use agreement effects a permanent taking because "abandonment of the right-of-way is effectively blocked" by the creation of a right to trail use. *Caldwell*, 391 F.3d at 1234; *see also Caquelin II*, 959 F.3d at 1363, 1367. In contrast, the Court has held that a NITU that does not result in a trail-use agreement can effect a temporary taking where it "compel[s] continuation of an

easement for a time." *Caquelin II*, 959 F.3d at 1367. Unlike a trail-use conversion, a NITU-only taking is temporary where it "mandate[s] continuation of the easement for a shorter period, providing a right of occupation by someone other than the landowner" after the railroad would have consummated abandonment pursuant to "normal abandonment proceedings." *Id.* at 1367, 1372; *see also Ladd*, 630 F.3d at 1025; *Caldwell*, 391 F.3d at 1234, 1236.

Although the Court has not previously addressed the scope of a physical taking effected by a NITU (if any) when the railroad's authority to consummate abandonment expires without abandonment, the lesson of the Court's decisions is clear. The nature of the taking—permanent or temporary—is determined by the duration of the compelled continuation of easements, whether indefinitely or for a limited period of time. On this basis, the CFC correctly determined that the type of taking alleged in this case is temporary (though the CFC incorrectly determined the duration of the temporary taking, as discussed below). Appx53-54.

Under the CFC's theory of liability, Indiana Southwestern would have abandoned the line during the NITU period if the NITU had not issued. From this perspective, the NITU would have effected a temporary taking through "federal-law maintenance of an easement" for the period where the NITU prevented abandonment. *Caquelin II*, 959 F.3d at 1367. But once the NITU expired, the NITU could no longer be said to have any coercive effect or compelled

continuation of easements. From that point, Indiana Southwestern had sole discretion to decide whether to consummate abandonment and terminate its easements. *See Baros*, 400 F.3d at 236. Thus, the government can be held responsible, at most, only for a temporary taking during the pendency of the NITU.

Plaintiffs' argument that the taking is permanent ignores this Court's explanations of the basis for takings liability in rails-to-trails cases. *See* Memmer Brief 38-40, 44-51. In Plaintiffs' view, the NITU effects a per se physical taking upon issuance by authorizing the construction of a trail. *Id.* at 16. That is factually incorrect. The NITU did not authorize the railroad to establish a recreational trail because it was subject to the condition of entering into a trail-use agreement, and no trail-use agreement was ever reached. *See* Appx1070, Appx1362-1369. In any event, as discussed (pp. 26-30), this per se view of takings liability is foreclosed by *Caquelin II* and, more broadly, is inconsistent with the Court's holdings that takings liability arises from the continuation of easements, not a mere grant of abandonment authority. Plaintiffs' arguments that the taking in this case is permanent ultimately rest on this incorrect view of takings liability and fail for the same reasons.

For example, Plaintiffs' principal argument is that the taking is permanent because the taking "continued after the NITU expired because the Plaintiffs' reversionary rights were still being blocked." Memmer Brief 40. This assertion

simply ignores *Caquelin II* and takings precedent more generally. A physical taking must be premised on some affirmative government action. *Navajo Nation*, 631 F.3d at 1274. A physical taking could not continue after the point at which any continuation of easements was attributable only to the railroad's decision not to exercise abandonment authority. Plaintiffs seem to recognize as much when they acknowledge that "it is true as a matter of fact that the railroad's conduct determines the ultimate duration of the taking." *Id.* at 46. That recognition should be enough to resolve the issue. The railroad decided not to enter a trail-use agreement or to abandon the line, so any taking here lasted only as long as the NITU.

2. The federal consummation requirement does not constitute or extend any taking.

Ultimately, Plaintiffs' contention that the taking is permanent rests on the contention that the Board's consummation requirement, not the NITU, is responsible for the easements continuing after the NITU expired and Indiana Southwestern chose not to abandon its line. *See, e.g.*, Memmer Brief 49-52. This argument has no basis in this Court's takings cases or in common sense. No court has ever held that the abandonment consummation requirement effects a taking, and a holding to that effect would transform takings liability in rails-to-trails cases. The Court should refuse this invitation to expand takings liability under the guise of determining the scope of the alleged NITU-based taking in this case.

Plaintiffs contend that the Board regulation requiring the filing of a notice of consummation of abandonment, 49 C.F.R. § 1152.29(e)(2), either triggers or continues a taking whenever a railroad chooses not to consummate abandonment. Memmer Brief 49-52. Plaintiffs raised this contention in their motion for reconsideration of the CFC's judgment, and the CFC thoughtfully explained why the argument failed, including Plaintiffs' extensive reliance on *Preseault II*. Appx71-73. This Court can reject the argument for any of the reasons the CFC identified, as there are multiple problems, but Plaintiffs' argument fails at the most basic level. Plaintiffs are effectively shifting their takings claim from the NITU to the consummation regulation, a different government action related to abandonment regulation, even though this Court has said that the "issuance of the NITU is the only *government* action in the railbanking process that operates to prevent abandonment." *Caldwell*, 391 F.3d at 1233-34.

Plaintiffs' arguments are effectively a challenge to the Board's plenary authority to regulate abandonment, which Congress granted over a hundred years ago in the Transportation Act of 1920, Pub. L. No. 66-162, 41 Stat. 477-78, not the Trails Act. *See* 49 U.S.C. §§ 10501(b), 10903; *Kalo Brick*, 450 U.S. at 318. Consummation has always been necessary to abandonment, *see, e.g.*, *Birt v. Surface Transp. Bd.*, 90 F.3d 580, 585-88 (D.C. Cir. 1996), and the Board adopted the consummation notice requirement in 1996 to provide clarity on the issue of

when a railroad has actually exercised the permissive abandonment authority granted by the Board. 49 C.F.R. § 1152.29(e)(2); *see also Baros*, 400 F.3d at 236; *Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903*, 61 Fed. Reg. 67876, 67895-96 (Dec. 24, 1996).[4] The Board's consummation notice requirement applies to all railroad abandonments—not just those involving NITUs and potential trail use. *See* 49 C.F.R. § 1152.50(e). Imposing a notice of consummation of abandonment requirement on railroads is a straightforward exercise of the Board's regulatory authority under federal statute and does not affect Plaintiffs' property rights.

Plaintiffs' property is subject to the railroad's easements unless and until the railroad chooses to allow its easements to expire, regardless of the regulatory framework for effectuating abandonment. And this regulatory framework expressly preserves the railroad's discretion to determine whether to exercise the abandonment authority it has been granted. Accepting Plaintiffs' argument that a regulation conferring discretion on private parties regarding whether to consummate abandonment, standing alone, constitutes a physical taking would unsettle the Board's longstanding statutory authority over the national rail system, including abandonment, and would raise sweeping new questions about liability,

[4] Because the Board adopted the regulations in 1996, 61 Fed. Reg. at 67895-96, any challenge to the lawfulness of this regulation would be time-barred. *See Love Terminal Partners v. United States*, 889 F.3d 1331, 1341 (Fed. Cir. 2018).

even in areas far removed from the rails-to-trails context. There is no discernable limiting principle to Plaintiffs' contention that compliance with a procedural regulation for abandonment can somehow constitute a physical taking.

The Court should reject Plaintiffs' broad and unsupported arguments that any taking was permanent and affirm the judgment that any taking was temporary.

B. The CFC erroneously determined the duration of any taking.

Although the CFC was correct to recognize that if there was a taking here, it could only be temporary, the CFC erred in determining the duration of the taking was from its commencement when the NITU issued on May 23, 2011, to its alleged conclusion when Indiana Southwestern's authority to consummate abandonment expired on January 7, 2014. Appx54. Assuming arguendo that there was a physical taking, any taking would have ended with the expiration of the NITU on November 8, 2013, and no later. Accordingly, if the Court determines that the NITU constituted a taking here, the Court should hold that the CFC improperly extended the scope of the taking by a term of sixty days and modify the judgment accordingly.

In its discussion of the scope of the taking, the CFC concluded that the Board "forced the continuation of Indiana Southwestern's railroad-purposes easements" from the issuance of the NITU through January 2014. Appx53. The CFC's analysis proceeded in two parts. *First*, the Court reasoned that the NITU

blocked abandonment through its expiration in November 2013, at which point the rail lines would have been considered abandoned under Indiana law. *Id.* *Second*, the Court concluded that from November 2013 to January 2014, the only thing barring termination of the easements on Plaintiffs' property was the provision of federal law that requires the railroad to file a timely notice of consummation in order to fully abandon the rail line. *Id.* (citing 49 C.F.R. § 1152.29(e)(2)). The CFC thus concluded that the United States was liable for mandating the continuation of the easements through the expiration of abandonment authority in January 2014. *Id.* at 54.

As an initial matter, the taking does not begin "until the time as of which, had there been no NITU, the railroad would have abandoned the rail line" in "normal abandonment proceedings." *Caquelin II*, 959 F.3d at 1371-72. The CFC did not make a finding, for purposes of determining just compensation, as to when the railroad would have abandoned the rail line in "normal abandonment proceedings." *Id.* The CFC simply assumed a taking commenced upon issuance of a NITU, contrary to *Caquelin II*. *See id.* Even the CFC's erroneous analysis of easement termination under state law (pp. 42-46) would place the commencement of the taking at a later date—exactly when is unclear.

Further, the United States cannot be said to have caused the continuation of any easements between November 8, 2013, and January 7, 2014. This period after

the expiration of the NITU on November 8, 2013, was simply a consummation notice period, unrelated to the Trails Act, NITU, or any other rails-to-trails considerations. The Board's consummation notice period applies in all abandonment proceedings, not just those involving NITUs and potential trail use, and this Court has never held that the consummation notice period in any way effects a taking. After the NITU expired, the decision whether to abandon the line lay within the discretion of Indiana Southwestern; the Board had no role in preventing abandonment or mandating the continuation of easements. On this point, the CFC correctly explained that the taking could not extend past the expiration of the railroad's abandonment authority because at that point "Indiana Southwestern, not the federal government, was responsible for the continuation of the easement since the decision to fully abandon the lines was solely within its control." Appx54. Yet the CFC held that the taking lasted through January 2014 without accounting for the railroad's sole discretion to decide whether to abandon during the consummation notice period.

The United States cannot be liable for a decision wholly within the discretion of the railroad. *Navajo Nation*, 631 F.3d at 1274. The CFC seemed to recognize as much during the proceedings on Plaintiffs' motion for reconsideration. In its decision denying reconsideration, the CFC noted that its conclusion seemed to be in tension with other CFC decisions concluding that a

taking ends with the termination of a NITU. Appx70 (citing *Farmer's Coop. Co. v. United States*, 98 Fed. Cl. 797, 800-01 (2011), and *Balagna v. United States*, 145 Fed. Cl. 442, 444 (2019)). But the CFC determined that it could not revisit the issue in the course of resolving Plaintiffs' motion. If this Court concludes that the NITU effected a physical taking here—which it should not—this Court should address this defect in the CFC's judgment by remanding for further proceedings on the duration of the taking, including holding that the physical taking lasted no later than November 8, 2013.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Federal Claims should be reversed.

Respectfully submitted,

/s/ Daniel Halainen

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February 10, 2022
DJ 90-1-23-14143

STATUTORY AND REGULATORY ADDENDUM

16 U.S.C. § 1247(d)

§ 1247. State and local area recreation and historic trails

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

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 801 et seq.) and chapter 224 of Title 49, shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

16 U.S.C. § 10502(a)

§ 10502. Authority to exempt rail carrier transportation

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

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

(2) either—

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

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

49 C.F.R. § 1152.29(d)(1), (e)(2) (2010)

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

(d) Exempt abandonment proceedings.

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

. . .

(e)(2) A railroad that receives authority from the Board to abandon a line (in a regulated abandonment proceeding under 49 U.S.C. 10903, or by individual or class exemption issued under 49 U.S.C. 10502) shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line (e.g., discontinued operations, salvaged the track, canceled tariffs, and intends that the property be removed from the interstate rail network). The notice shall provide the name of the STB proceeding and its docket number, a brief description of the line, and a statement that the railroad has consummated, or fully exercised, the abandonment authority on a certain date. The notice shall be

filed within 1 year of the service date of the decision permitting the abandonment (assuming that the railroad intends to consummate the abandonment). Notices will be deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation (such as outstanding conditions, including Trails Act conditions). If, after 1 year from the date of service of a decision permitting abandonment, consummation has not been effected by the railroad's filing of a notice of consummation, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. In that event, a new proceeding would have to be instituted if the railroad wants to abandon the line. Copies of the railroad's notice of consummation shall be filed with the Chief, Section of Administration, Office of Proceedings. In addition, the notice of consummation shall be sent to the State Public Service Commission (or equivalent agency) of every state through which the line passes. If, however, any legal or regulatory barrier to consummation exists at the end of the 1–year time period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier. For good cause shown, a railroad may file a request for an extension of time to file a notice so long as it does so sufficiently in advance of the expiration of the deadline for notifying the Board of consummation to allow for timely processing.

49 C.F.R. § 1152.50(d)(2)-(3), (e)

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

(d) Notice of exemption.

. . .

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

(3) The Board, through the Director of the Office of Proceedings, shall publish a notice in the Federal Register within 20 days after the filing of the notice of

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

. . .

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

SUPPLEMENTAL APPENDIX

228306

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November 23, 2010

VIA E-FILING
Cynthia T. Brown, Chief
Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington DC 20423-0001

Re: *Indiana Southwestern Railway Co. – Abandonment Exemption – In Posey and Vanderburgh Counties, IN*, STB Docket No. AB-1065X

Dear Ms. Brown:

Indiana Southwestern Railway Co. ("ISW"), the party who seeks abandonment authority in the above-captioned abandonment notice of exemption proceeding, has received the request of the Indiana Trails Fund, Inc. seeking issuance of a trail use condition covering all of the approximately 17.2 miles of rail line within Posey and Vanderburgh Counties, IN that is the subject of ISW's abandonment notice of exemption. Board precedent states that the agency will not impose such a condition without the concurrence of the party seeking abandonment authorization. Accordingly, the purpose of this letter is to advise, in accordance with 49 C.F.R. §1152.29(b)(2) and Board precedent, that ISW is willing to negotiate interim trail use/rail banking with the Indiana Trails Fund, Inc.

Please let me know if you have any questions concerning the foregoing consent to negotiate trails use.

Sincerely,

William A. Mullins

cc: Parties of Record
Richard Vonnegut
J. Michael Carr

EXHIBIT
tabbies
JX5

CERTIFICATE OF SERVICE

I certify that I filed the foregoing with the United States Court of Appeals for the Federal Circuit through the CM/ECF system on February 10, 2022. All case participants are registered CM/ECF users, and the Notice of Docketing Activity generated by this filing constitutes service under Fed. Cir. R. 25(e)(1).

/s/ Daniel Halainen
DANIEL HALAINEN

Counsel for the United States

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. Cir. R. 28.1(b)(2). Excluding the items exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b), this brief contains 13,648 words.

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared using Microsoft Word 2013 in 14-point Times New Roman, a proportionally-spaced font.

/s/ Daniel Halainen
DANIEL HALAINEN

Counsel for the United States