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' REPLY BRIEF

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INTRODUCTION

Plaintiffs allege that the Notice of Interim Trail Use or Abandonment ("NITU") in this case effected a physical taking of their property. But under *Caquelin v. United States*, 959 F.3d 1360 (Fed. Cir. 2020) ("*Caquelin II*"), Plaintiffs cannot establish that the United States caused a taking because Indiana Southwestern consented to the NITU, agreed to four extensions, and did not file a timely notice of consummation of abandonment. There can be no taking under this set of facts, and Plaintiffs' reliance on Indiana law and objections to abandonment consummation requirements are irrelevant to that straightforward conclusion.

Consequently, the liability question raised in the United States' cross-appeal is not the complicated doctrinal dispute Plaintiffs make it out to be. Although both parties have preserved their objections to the governing precedents, the Court need only apply *Caquelin II*'s causation standard to the facts of this case in order to rule for the government and reverse the judgment of the Court of Federal Claims ("CFC") that the United States is liable for a taking under the Fifth Amendment. In the alternative, the Court should reverse the CFC's determination of the duration of any taking because the CFC made no finding as to the date the taking began and mistakenly extended the taking past the expiration of the NITU, at which point any delay in the railroad's consummation of abandonment cannot be attributed to the United States. For these reasons, the Court should reverse the judgment below.

SUMMARY OF ARGUMENT

1. There was no taking under *Caquelin II* because Indiana Southwestern voluntarily chose to negotiate a trail-use agreement and decided not to consummate abandonment of the rail line within the consummation notice period. Plaintiffs point to evidence purportedly showing that the railroad "intended" to move forward with abandonment at various points, but this contention is belied by the railroad's actions, which establish that the NITU did not cause the railroad to delay or decline to file a timely notice of consummation of abandonment. Plaintiffs' own arguments illustrate that their quarrel is with the railroad and its independent decisions, not with the NITU or any other action taken by the United States. Although that should end the inquiry under *Caquelin II*, Plaintiffs seek to confuse the issues by asking the Court to consider questions of state-law abandonment and the role of the federal consummation notice requirement. But these issues are irrelevant to the issue on appeal. The Court should hold that there was no taking.

2. In the alternative, if the Court affirms the CFC's judgment that Plaintiffs established a taking, the Court should reverse the CFC's determination of the scope of the taking. First, Plaintiffs contend that the taking began when the NITU issued but the CFC made no such finding. Plaintiffs suggest that the commencement of the taking is tied to considerations of state law, not federal law, but that argument is inconsistent with *Caquelin II*. Second, any taking concluded

when the NITU expired and Indiana Southwestern had sole discretion to decide to consummate abandonment by filing a notice with the Surface Transportation Board. At that point, the NITU cannot be said to have prevented the railroad from abandoning the line. Plaintiffs do not defend the CFC's conclusion that the taking ended on the date when the Board's grant of permissive abandonment authority expired; instead, Plaintiffs suggest that the taking continued indefinitely. But that argument rests on a mistaken understanding of the Board's procedures.

ARGUMENT

I. The United States is not liable for a taking because the NITU did not cause a delay in the railroad's abandonment of the line.

There can be no Fifth Amendment takings liability in this case because Plaintiffs cannot establish the necessary element of causation. In *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010), this Court held that a NITU may sometimes effect a taking even where the NITU does not result in a trail-use agreement and the railroad abandons the line. The Court then held in *Caquelin II* that to prevail on such a claim, a plaintiff must establish that the NITU caused a delay in the railroad's abandonment of the line: "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, by filing a notice of consummation of abandonment in normal Board proceedings. This rule is a "straightforward" application of the general "causation principle" in takings cases "to the NITU situation." *Id.* at 1371.

And in takings cases, it is "well established that a takings plaintiff bears the burden of proof to establish that the government action caused the injury." *St. Bernard Parish Gov't v. United States*, 887 F.3d 1354, 1362 (Fed. Cir. 2018).

As the United States has explained, Plaintiffs cannot meet their burden to establish takings liability in this case (and the CFC erred in holding otherwise) because the facts show that the railroad would not have abandoned the line but for the NITU. U.S. Brief 20-47. Plaintiffs' response is to point to evidence they deem consistent with an intent to pursue abandonment. Memmer Reply 9-20. But Plaintiffs cannot refute the clear evidence that the railroad repeatedly chose not to exercise its independent discretion to file a notice consummating abandonment and thus would not have done so even if the NITU had not issued. Laced throughout Plaintiffs' arguments are also suggestions that the Court should address state-law abandonment or that the mere existence of certain procedural requirements somehow caused a taking, *e.g.*, Memmer Reply 20-24, but these arguments are irrelevant. Plaintiffs bear the burden of proving that the NITU prevented the railroad from consummating abandonment under federal law.

A. Plaintiffs did not establish causation under *Caquelin II*.

The question before the Court in the United States' cross-appeal is whether Plaintiffs established causation under *Caquelin II*. Plaintiffs characterized *Caquelin II* as "in error" in their opening brief, but in their response brief they

concede (as they must) that *Caquelin II* is the governing standard. *Compare* Memmer Brief 21-30 *with* Memmer Reply 5-10.[1] Plaintiffs cannot establish causation under *Caquelin II* because Indiana Southwestern consented to the NITU, agreed to four extensions, and chose not to file a notice of consummation of abandonment after the NITU expired. U.S. Brief 32-42. The Board's grant of abandonment authority to Indiana Southwestern was permissive; it was up to the railroad to decide whether to complete the process. The NITU could not have caused a delay in abandonment because the railroad had sole discretion to proceed with abandonment of the line during and after the NITU—whether by declining to continue negotiating or by filing a timely notice of consummation of abandonment after the NITU expired—but did not. *See id.*

Plaintiffs contend that the CFC correctly found causation under *Caquelin II* primarily by reference to the railroad's "intent" to abandon the line at various points. *See* Memmer Reply 9-20. But their arguments cannot account for the railroad's repeated decisions not to consummate abandonment of the line, and their vision of causation would mean that liability is established every time a NITU issues, inconsistent with the teachings of *Caquelin II*.

[1] Plaintiffs accordingly retreat from their contention that the Supreme Court's decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), unsettled *Caquelin II*. Memmer Reply 5 n.8 (observing that *Caquelin II* "is binding absent further review" and describing discussion of *Cedar Point* as "premature").

1. Plaintiffs cannot dispute evidence establishing the railroad's repeated decisions not to abandon.

Plaintiffs argue that Indiana Southwestern intended to abandon the line "before, during, and after" the NITU issued and that the evidence of causation in this case is "overwhelming," "far exceed[ing]" the evidence in *Caquelin II*. Memmer Reply 3, 11. Unlike in *Caquelin II*, 959 F.3d at 1372, where the Court did not identify "any evidence at all affirmatively indicating that the railroad would have delayed abandonment," there is abundant evidence here—before, during, and after the NITU—that the NITU did not cause a taking. Instead, the railroad independently chose not to exercise its discretion to consummate abandonment.

First, Plaintiffs point to evidence that Indiana Southwestern intended to abandon "before" the NITU issued. They contend that the railroad "verified its intent to abandon the line" by requesting abandonment authority from the Board. Memmer Reply 12. But the request for abandonment authority is not tantamount to a final decision to consummate abandonment; the grant of authority is permissive, subject to the railroad's ultimate decision to subsequently file a timely notice of consummation of abandonment. 49 C.F.R. § 1152.29(e)(2). This grant of authority merely *allows* the railroad the discretion to determine whether and when to abandon during the consummation notice period. *See id.*; *Baros v. Tex. Mex. Ry.*, 400 F.3d 228, 236 (5th Cir. 2005) ("[T]he decision actually to abandon a line rests with the carrier; it is only upon actual consummation of the abandonment

that the STB's jurisdiction ceases."); *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) ("The carrier may carry out the authority but is not compelled to do so."). Plaintiffs do not dispute this basic principle.

Moreover, any probative value in the railroad's request for abandonment authority is significantly diminished—if not refuted entirely—by the railroad's subsequent consent to the NITU. Appx52, Appx254, Appx1362-1369. By consenting to the NITU, the railroad decided not to abandon for at least six months. *See, e.g.*, *Goos v. Interstate Com. Comm'n*, 911 F.2d 1283, 1286 (8th Cir. 1990). In contrast to the railroad's request for abandonment authority from the Board, which is not telling as to whether and when the railroad actually may abandon, *see* 49 C.F.R. § 1152.29(e)(2), the railroad's agreement to a NITU demonstrates that the railroad made a decision not to imminently consummate abandonment. *See* U.S. Brief 8.

It is true that *Caquelin II* discusses events preceding the issuance of the NITU in its discussion of causation. 959 F.3d at 1373. The *Caquelin II* Court noted that the "railroad filed an application to abandon, indicating an affirmative intent to abandon." *Id.* at 1373. But that is also true in every rails-to-trails case. A NITU will issue only after a railroad requests abandonment authority, whether through application or exemption proceedings before the Board. *See* U.S. Brief 8.

Caquelin II does not hold that a mere request for abandonment authority, standing alone, establishes that a NITU caused a taking. Regardless, *Caquelin II* was decided in an unusual procedural posture, where the parties had not developed a record on causation in the CFC, and the Court did not address the railroad's consent to the NITU. 959 F.3d at 1372-73.

For similar reasons, Plaintiffs are also wrong to argue that *Caquelin II* directs the Court to evaluate the causation question in terms of the railroad's intent "at the time of the NITU." Memmer Reply 11. Under *Caquelin II*, the CFC must determine "the time as of which, had there been no NITU, the railroad would have abandoned the rail line." 959 F.3d at 1372. The Court must make an objective determination of when the railroad would have actually exercised its permissive abandonment authority by filing a notice of consummation if the NITU had not issued, not its intent at the time the NITU was issued. *See id.* Railroads necessarily will require some time to satisfy the requirements for abandonment. *See* 49 C.F.R. § 1152.29(e)(2). Plaintiffs' focus on the NITU alone also runs counter to their argument, given that the railroad must consent to the NITU at the time the NITU issues. *Id.* § 1152.29(d)(1) (NITU issues only if "railroad agrees").

Second, Plaintiffs assert that Indiana Southwestern intended to abandon the line "during" the pendency of the NITU and point to actions taken by the railroad in 2011 and 2012 to support that claim—namely, the removal of rails and ties from

the rail corridor. Memmer Reply 14-15. In Plaintiffs' view, Indiana Southwestern was taking these steps to effectuate the termination of its easements under state law. *See id.* As discussed in detail below, *infra* 15-20, Plaintiffs' framing of state-law abandonment and its role in the causation analysis is overstated and largely irrelevant. But to the extent *Caquelin II* contemplated a railroad's progress in taking steps toward eventual "abandonment-based easement termination" (in other words, termination of easements *after* the line is abandoned under federal law), 959 F.3d at 1373, the evidence here is at best inconclusive on that front.

Plaintiffs have not actually shown that the railroad was in a position to terminate its easements under Indiana law, even if federal jurisdiction had terminated. U.S. Brief 44-46. Moreover, Plaintiffs agree that the railroad's actions are consistent with an intent to enter into a trail-use agreement. Memmer Reply 25; *see also* 49 C.F.R. § 1152.29(d)(1)(i) ("The NITU will permit the railroad to . . . salvage track and materials, *consistent with interim trail use and railbanking*[.]" (emphasis added)). Plaintiffs also acknowledge that Indiana Southwestern had a sincere interest in negotiating a trail-use agreement. Memmer Reply 13. Thus, these actions do not necessarily show that the railroad would have consummated abandonment *absent* such an agreement—the relevant inquiry.

On the other side of the ledger, the record of the railroad's actual decisions refutes Plaintiffs' arguments about the railroad's unstated intentions. After

agreeing to the NITU, Indiana Southwestern consented to four extensions. Appx254-255, Appx1370-1373. Together, these four decisions extended the NITU through November 2013. *See id.* The Board will not grant extensions without the railroad's consent, *see* Appx1075, which means the railroad could have declined to continue negotiating at each of these points in order to file a notice consummating abandonment. It did not. Regardless what other actions the railroad took during the pendency of the NITU, the railroad expressly chose not to abandon by agreeing to extensions of the NITU on four separate occasions. In *Caquelin II*, in contrast, the railroad refused a request to extend the NITU. 959 F.3d at 1373. If the railroad's refusal of an extension supported causation in *Caquelin II*, *see id.*, then Indiana Southwestern's four independent decisions to consent to extensions weigh against causation here.

Third, Plaintiffs contend that the railroad's actions "after" the NITU expired also show causation. Memmer Reply 16. Plaintiffs argue that the railroad did not make a "conscious decision not to abandon," *id.* at 17, but do not explain why inaction should be treated any differently from a "conscious" choice. Inaction by the railroad will always prevent consummation of abandonment, even absent a NITU; a railroad's inaction in declining to consummate abandonment is functionally no different from a railroad's inaction in declining to request abandonment authority in the first place. Plaintiffs also contend that Indiana

Southwestern still intended to either negotiate a trail-use agreement or consummate abandonment at the time the NITU expired, *id.* at 16, but that point weighs against causation. By Plaintiffs' own account, Indiana Southwestern continued negotiating a trail-use agreement after the expiration of the NITU, *id.* at 13 & n.12, which means the railroad voluntarily decided to negotiate with or without a NITU.

Given the railroad's decision not to file a notice of consummation of abandonment before the Board's grant of abandonment authority lapsed, the NITU cannot be said to have had a coercive effect on the railroad or compelled any delay in its abandonment of the line. The NITU allowed voluntary negotiations that did not come to fruition; after the NITU expired, what happened next cannot be attributed to the United States. The expiration of the railroad's abandonment authority without a notice of consummation of abandonment was the result of choices made by the railroad.[2] The Court has repeatedly held that the United States cannot be held liable for just compensation for actions that were not taken by the United States. *See, e.g.*, *A & D Auto Sales, Inc. v. United States*, 748 F.3d

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[2] Plaintiffs suggest that the railroad's eventual abandonment in 2021 supports their argument and criticize the United States for "almost completely ignor[ing]" this fact. Memmer Reply 15. But the railroad's abandonment of the line in 2021 is not part of this case; Plaintiffs' claim arises out of the 2011 NITU, which expired in 2014. The railroad's eventual abandonment in 2021 was a separate proceeding that was not before the CFC, which issued its decision in 2020. In any event, the railroad's decision to wait until 2021 to seek abandonment authority only reinforces that the 2011 NITU was not the cause of any delay in abandonment.

1142, 1153-57 (Fed. Cir. 2014); *Navajo Nation v. United States*, 631 F.3d 1268, 1274 (Fed. Cir. 2011). There can be no takings liability when a plaintiff's alleged injury is attributable to a third party like Indiana Southwestern.

For that reason, Plaintiffs' criticisms of railroads and their conduct only bolster the argument that the United States did not cause a taking. Memmer Reply 17-20. In explaining "why the railroad did not consummate abandonment when the NITU expired," Plaintiffs contend that railroads like Indiana Southwestern "do not readily agree to consummate abandonment under federal law" for financial reasons. Memmer Reply 17-18. Railroads, of course, have discretion to dispose of their own property, including easements, as they see fit; that is beyond the purview of the United States. Plaintiffs nonetheless complain that Indiana Southwestern, in particular, "refused to consummate abandonment under federal law for ten years." *Id.* at 18. But if the railroad "refused" to consummate abandonment, how can the NITU be responsible? Similarly, Plaintiffs suggest that they "forced the railroad to consummate abandonment under federal law" in 2021. *See* Memmer Brief 19-20. But if the railroad had to be "forced" to consummate abandonment by the Plaintiffs, why was the expired NITU to blame? Ultimately, all of Plaintiffs' complaints are directed at actions taken by the railroad, not by the United States. Plaintiffs' own arguments demonstrate that the NITU did not cause a taking.

2. Plaintiffs' view of causation would render *Caquelin II* a dead letter.

Beyond the four corners of this case, Plaintiffs' arguments seek to diminish the role of causation generally and are incompatible with *Caquelin II*'s recognition of causation as a "fundamental principle of takings law" that applies in rails-to-trails cases. 959 F.3d at 1371-72. Having reluctantly conceded that *Caquelin II* is controlling, Plaintiffs now seek to vitiate *Caquelin II* by eliciting a causation standard that would be satisfied in practically every case.

Plaintiffs reject the characterization of their arguments as novel or inconsistent with *Caquelin II*, but their fundamental contention in this case is that a NITU effects a taking even when there is no change in the status of the rail corridor in the real world. Without the Court's enforcement of a robust causation principle, rails-to-trails plaintiffs could argue that the mere fact of a NITU's issuance—a procedural step that the Board takes only at the behest of third parties—effects a physical taking regardless whether it results in a "physical invasion of private property." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005). Causation is thus necessary both to ensure that the United States is not held liable for just compensation for actions taken by third parties, *A & D Auto Sales*, 748 F.3d at 1153-57, and to prevent this Court's rails-to-trails takings cases from becoming unmoored from their underlying rationale. As the United States has explained, the Court's rails-to-trails cases have recognized physical takings

only where a NITU has some actual effect on easements in a rail corridor, whether by altering their scope or delaying their termination. U.S. Brief 33-35.

Given the arguments in this case, it is difficult to imagine the circumstances where Plaintiffs' version of causation would not be established. Plaintiffs regard routine actions like a request for permissive abandonment authority to be strong evidence of causation that cannot be overcome even by the railroad's decision not to consummate abandonment. The Court should resist Plaintiffs' effort to reduce *Caquelin II*'s recent and important recognition of a causation principle in rails-to-trails cases (the same causation principle that applies in *all* takings cases) to a meaningless standard with no actual utility.

B. The only question before the Court is whether the CFC erred in its application of *Caquelin II*.

Beyond the question of causation, Plaintiffs make a variety of arguments that confuse the issues in the United States' cross-appeal. The principal question before the Court in the cross-appeal is whether Plaintiffs established that the NITU caused a taking under *Caquelin II*. Although the United States continues to object to the decisions underpinning *Caquelin II* and preserves its arguments that those cases were wrongly decided, U.S. Brief 31, the Court need only reverse the CFC's judgment as to causation in order to resolve the question of liability in this case. Plaintiffs seek to complicate this straightforward inquiry by raising broader doctrinal issues involving the role of state abandonment and vague complaints

about abandonment under federal law, but these issues are irrelevant to the question of causation and the Court need not engage with them.

1. *Preseault II* and Indiana law are largely irrelevant.

Plaintiffs direct the Court's attention to Indiana state law and ask the Court to consider whether Indiana Southwestern satisfied Indiana's requirements for abandoning easements before the NITU expired. *See, e.g.*, Memmer Reply 2-3. To that end, Plaintiffs assert that Indiana Southwestern abandoned its easements under state law at some point in 2011 or 2012, before or during the pendency of the NITU, and that takings liability arises from completion of state-law abandonment before consummation of abandonment under federal law. *See, e.g.*, Memmer Reply 14, 20-21 ("the consummation of abandonment under federal law has nothing to do with whether state law abandonment occurred"). Plaintiffs believe that this conclusion follows from *Preseault v. United States*, 100 F.3d 1525, 1529-30 (Fed. Cir. 1996) (en banc) ("*Preseault II*"). This argument is irrelevant to the causation question before the Court in the United States' cross-appeal.

As an initial matter, Plaintiffs' contention that the railroad abandoned the line in 2011 or 2012 is wrong. The Board has exclusive and plenary jurisdiction over the abandonment of rail lines under federal law, and any state law purporting to provide otherwise would be preempted. 49 U.S.C. §§ 10501(b), 10903(a); *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981); *Caquelin*

II, 959 F.3d at 1363 (federal-law abandonment is "a necessary prerequisite for termination of the easement under state law"); *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[.]"). Under these circumstances, the railroad must terminate federal jurisdiction over the rail line by satisfying the requirements for abandonment under federal law before state law comes into play. *See, e.g.*, *Barclay v. United States*, 443 F.3d 1368, 1374 (Fed. Cir. 2010) ("Federal law dictates when abandonment occurs."); *Burnett v. United States*, 154 Fed. Cl. 539, 548 (2021) ("Until the STB relinquishes jurisdiction over a rail line, state law is irrelevant."). To consummate abandonment under federal law, the railroad must file a timely notice of consummation with the Board. 49 C.F.R. § 1152.29(e)(2); *see also, e.g.*, *Baros*, 400 F.3d at 236; *Honey Creek*, 2008 WL 2271465, at *5.

Indiana Southwestern did not file a timely notice of consummation before the Board's grant of abandonment authority expired in 2014. *See, e.g.*, Appx1077, Appx1200, Appx1214, Appx1229. That is undisputed. The railroad abandoned the line in 2021 only after seeking a new grant of abandonment authority from the Board in a new exemption proceeding and then filing a timely notice of consummation. U.S. Brief 14. Despite focusing on state law, Plaintiffs seem to acknowledge that federal law controls this question. *See, e.g.*, Memmer Reply 21. And notably, Indiana Southwestern could not have abandoned its easements *even*

under Indiana law, which provides both that easements cannot be abandoned while a NITU is pending and that the line must first be removed from federal jurisdiction. Ind. Code §§ 32-23-11-6(a)(2)(A), 32-23-11-7; *see also* U.S. Brief 10, 43-44.

Plaintiffs nonetheless argue that state-law abandonment is relevant to the Court's evaluation of causation in this case under *Preseault II*. *See, e.g.*, Memmer Reply 1, 4, 21, 23-24, 28-29. But *Preseault II* is not implicated in this case. The question before the Court here is whether Plaintiffs met their burden to establish that the NITU caused a taking under *Caquelin II* by temporarily preventing the railroad from abandoning the line under federal law. Regardless how Plaintiffs seek to frame questions of liability, the fundamental issue in this case is the effect of the NITU on the timing of the railroad's consummation of abandonment under federal law. *Preseault II* has nothing to say on that issue.

Indeed, *Preseault II* was a very different case by several measures. For one, *Preseault II* involved a trail-use agreement. *See Preseault v. Interstate Com. Comm'n*, 494 U.S. 1, 9 (1990) ("*Preseault I*"). The United States briefly summarized in its principal brief the long and complicated history of takings liability in rails-to-trails cases and explained how a case involving a trail-use agreement is analytically distinct from a case where (as here) a NITU does not result in a trail-use agreement. U.S. Brief 21-26. *Preseault II* also involved an adverse abandonment proceeding (i.e., an abandonment proceeding initiated by

landowners, not the railroad) and an unusual situation where federal authorization for a trail was issued *after* the trail-use agreement was negotiated, meaning the case did not involve a NITU—the central issue in this case. *Preseault I*, 494 U.S. at 9; *see also Preseault II*, 100 F.3d at 1552 (declining to address railbanking). Plaintiffs repeatedly invoke *Preseault II*, but its analysis reflects particular issues in that unusual trail-use case and not questions of causation where a NITU issues and no trail-use agreement is reached.

Take, for example, *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004), which Plaintiffs characterize as a *Preseault II* case. Memmer Reply 1. *Caldwell* cited *Preseault II* a couple of times, but only to discuss "recreational trails" and conversions to "trail use." *Id.* at 1230, 1233. And the *Caldwell* Court specifically contrasted cases involving trail-use agreements, like *Preseault II*, with cases where "negotiations . . . fail" and no agreement is reached. *Id.* at 1234; *see also, e.g.*, *Ladd*, 630 F.3d at 1018 (citing *Preseault II* only to note the CFC's conclusion that a NITU-only case is different from *Preseault II*). The cases Plaintiffs cite where this Court applied *Preseault II* are cases in which the line actually was converted to trail use. *See, e.g.*, *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373-74 (Fed. Cir. 2009); *Hash v. United States*, 403 F.3d 1308, 1310 (Fed. Cir. 2005). Plaintiffs' suggestion that *Preseault II* announced a universal standard directly applicable here is overstated.

Plaintiffs' repeated invocation of *Preseault II* is thus a confusion of the question before the Court in the United States' cross-appeal. The issue here is causation under *Caquelin II*, not liability under *Preseault II*—no matter how the latter is interpreted. To the extent Plaintiffs' arguments are rooted in a belief that "the causation standard set forth in *Caquelin II* was inconsistent with *Preseault II* and all of its progeny, especially *Ladd*," Memmer Reply 6, that contention would be properly directed only to the Court sitting en banc.

2. Plaintiffs' objections to the federal consummation requirement are unpreserved, unprecedented, and unpersuasive.

Lastly, Plaintiffs suggest at several points that the alleged taking was caused not only by the NITU, but also by the requirement for railroads to file a timely notice of consummation of abandonment to terminate federal jurisdiction. *See, e.g.*, Memmer Reply 14 ("the governmental actions . . . were the issuance of the NITU in combination with the STB's regulation requiring formal consummation"), *id.* at 21 ("it is the federal preemption over abandonments that actually creates a taking when federal regulations allow the continuing jurisdiction by the federal government"), *id.* at 26 ("the federal regulation allows the railroad to fail to consummate abandonment"). Plaintiffs have no good explanation for the railroad's decision not to consummate abandonment and thus contend that takings liability arises from Board procedures that leave to the railroad the determination whether

to abandon. Although subtly presented, this argument, if accepted, could have enormous consequences. U.S. Brief 52-54.

In 1920, Congress granted the Board's predecessor plenary jurisdiction over the interstate rail system, including authority over rail line abandonments. *See* Transportation Act of 1920, Pub. L. No. 66-162, 41 Stat. 477-78; *Kalo Brick*, 450 U.S. at 318. In 1996, the Board adopted a regulation requiring railroads granted permissive abandonment authority to file a timely notice of consummation with the Board to make clear when (and if) the railroad has actually consummated abandonment. 49 C.F.R. § 1152.29(e)(2); *see also Baros*, 400 F.3d at 236; *Honey Creek*, 2008 WL 2271465 at *5. The Board's abandonment procedures, including this consummation notice requirement, apply to all rail lines in the interstate rail system, not just in rails-to-trails cases where a NITU has issued. *See* 49 C.F.R. § 1152.50(e) (referencing § 1152.29(e)(2)). Plaintiffs' argument appears to be that the mere existence of the consummation regulation effects a taking because a railroad that might otherwise abandon its rail line can forestall abandonment by declining to take the necessary steps. *See, e.g.*, Memmer Reply 21. In Plaintiffs' view, this regulation improperly "allow[s]" federal jurisdiction to continue under these circumstances, requiring just compensation. *Id.*

This argument must fail for three reasons.

First, this argument is not properly before the Court. Plaintiffs' claim in this case has always been that the rails-to-trails process effected a taking of their property. *See* Appx48-51. Plaintiffs did not claim in the CFC that the Board's abandonment procedures, including the consummation notice requirement, effected a taking, and any such argument presented to this Court for the first time on appeal is forfeited. *See generally In re Google Tech. Holdings LLC*, 980 F.3d 858, 862-64 (Fed. Cir. 2020). Although Plaintiffs raised similar issues in their motion for reconsideration of the CFC's determination as to the taking's duration, Appx71-73, their claim has never been that takings *liability* arises from the mere existence of a consummation regulation. In any event, the Board has had this authority for 100 years, and the Board adopted the regulation in question more than 25 years ago. *See Abandonment and Discontinuance of Rail Lines and Rail Transportation Under 49 U.S.C. 10903*, 61 Fed. Reg. 67876, 67895-96 (Dec. 24, 1996). The statute of limitations for any challenge to the regulation has long since run.

Second, Plaintiffs' claim fails on its merits. The Court has made clear that a NITU is a precondition for a takings claim in rails-to-trails cases; there can be no claim after the NITU expires. *Caldwell*, 391 F.3d at 1233-34; *see also* Memmer Reply 9 ("*Caquelin II* observed that a NITU is a necessary requirement"). Plaintiffs' argument can be comprehended only as a contention that the mere existence of the Board's abandonment procedures effected a taking of Plaintiffs'

property after the NITU expired. But the consummation notice requirement is procedural and has no effect on property on its own. *Cf. United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-27 (1985) (regulatory jurisdiction is not, on its own, a taking). The easements over Plaintiffs' land failed to terminate because the railroad chose not to file a notice of consummation to abandon the line, not because of the regulation setting out how the railroad has to effectuate that choice. And the United States cannot be held liable for just compensation for actions taken (or not taken) by third parties. *A & D Auto Sales*, 748 F.3d at 1153-57. Otherwise, landowners could raise physical takings claims against the United States solely because railroads are subject to federal regulatory procedures.

Third, the implications for Plaintiffs' argument, if accepted, could be sweeping in scope. Plaintiffs' challenge to the Board's consummation notice requirement rests on the premise that the Board's jurisdiction is preventing the termination of landowners' easements. But rail lines in the interstate rail system are always subject to Board jurisdiction until they are removed through the abandonment process; the only reason the consummation notice requirement comes into play is because a railroad has requested abandonment authority. In other words, Plaintiffs' argument is rooted in the Board's jurisdiction generally, not just its expression in a procedural requirement that comes into play only at the railroad's request. The suggestion that the Board's jurisdiction over abandonment

of rail lines effects a taking of property is untethered from any concept of a physical taking. The Board and its predecessor have had plenary authority over abandonment of rail lines in the interstate rail system for over a hundred years, *Kalo Brick*, 450 U.S. at 318, and Plaintiffs' passing arguments that this jurisdiction effects a taking would upend a hundred years of established law.

II. The CFC erred in determining the duration of any taking.

In the alternative, if this Court upholds the CFC's liability determination (and it should not), the Court should adopt the United States' position on the scope of any taking. The United States has explained how the CFC miscalculated the duration of any taking by failing to make a finding as to when the taking began under *Caquelin II* and by failing to recognize that the taking concluded when the NITU lapsed in November 2013, rather than when the Board's grant of permissive abandonment authority expired in January 2014. *See* U.S. Brief 54-57. Plaintiffs only briefly engage with the former point; otherwise, Plaintiffs reiterate their argument that the taking was permanent and lasted from the issuance of the NITU in 2011 through the railroad's eventual abandonment of the line in 2021. *See* U.S. Brief 14 (discussing 2021 exemption and abandonment).[3]

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[3] Both the appeal and the cross-appeal seek this Court's review of the CFC's determination of the duration of the taking (if any). Memmer Brief 38-55; United States Brief 54-57. Although these issues have significant overlap, this brief addresses only the aspects of Plaintiffs' argument that respond to the United States' cross-appeal, consistent with Federal Circuit Rule 28.1(c)(4).

As to the beginning of the taking, Plaintiffs contend that the taking "began when the NITU was issued." Memmer Reply 25. But as *Caquelin II* explained, "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 1373.[4] Plaintiffs' position seems to be that the taking began when the NITU issued because the railroad intended to abandon at that point, *see, e.g.*, Memmer Reply 11, but they offer no evidence that the railroad would have (or could have) abandoned at that exact date. Plaintiffs also repeat their assertion that "[s]tate law abandonment occurred during the pendency of the NITU," *id.* at 26, even while arguing that the taking began earlier. Regardless, Plaintiffs do not dispute that the CFC made no finding on that issue.

As to the conclusion of the taking, Plaintiffs reiterate their argument that the taking was permanent and concluded only when the railroad filed a timely notice of consummation of abandonment during a new abandonment exemption proceeding in 2021. Memmer Reply 25-29. If the Court affirms the CFC's conclusion that any taking was temporary, Plaintiffs offer no reason why this Court should not reverse the CFC's erroneous conclusion that the taking concluded in

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[4] Although announcing the standard, *Caquelin II* did not determine the precise point at which the taking in that case began. 959 F.3d at 1370-73. The parties had stipulated to compensation, and the Court thus concluded that the exact point at which the taking began was immaterial because there was "no issue of damages." *Id.* at 1362, 1370-71 & n.2.

January 2014. Any temporary taking can have extended no later than November 2013, when the NITU expired, because at that point the railroad had sole discretion to decide whether to file a notice of consummation of abandonment with the Board. The filing of a timely consummation notice would have ended federal jurisdiction and allowed the termination of any easements in the rail corridor as appropriate under state law. 49 C.F.R. §§ 1152.50(e), 1152.29(e)(2); *Baros*, 400 F.3d at 236; *Honey Creek*, 2008 WL 2271465, at *5. The railroad's decision not to file a consummation notice cannot be attributed to the United States under the basic principles of causation discussed above and in the United States' principal brief. *Supra* 6-15; U.S. Brief 56-57.

Plaintiffs make two additional points that bear on the United States' cross-appeal on the duration of the taking. *First*, Plaintiffs accuse the United States of improperly "trying to conflate the issue of actual abandonment under federal law with the issue of a takings under the Trails Act." Memmer Reply 27. This claim simply ignores *Caquelin II*. Under *Caquelin II*, Plaintiffs must establish that the NITU caused a delay in the railroad's consummation of abandonment under federal law—in other words, that the railroad would have consummated abandonment under federal law earlier if the NITU had not issued. 959 F.3d at 1373. The United States has made no improper conflation. Plaintiffs' efforts to tie

the commencement of the taking to abandonment under state law are inconsistent with *Caquelin II*.

Second, Plaintiffs' position on the role of the railroad's decisions in determining the scope of the taking is dubious, if somewhat inscrutable. Memmer Reply 26. On the one hand, Plaintiffs insist that "the choice the railroad ultimately makes has no impact on whether a taking has occurred or not." *Id.* This argument is inconsistent with *Caquelin II*, which focused exclusively on actions taken by the railroad—whether to agree to an extension, how soon to consummate after the NITU expired, and so on—in determining whether there was a taking. 959 F.3d at 1373; *see also* Memmer Reply 11-12 (acknowledging as much). And it follows from *Caquelin II* that any taking caused by the NITU concludes once the NITU expires, at which point the railroad has the discretion whether to exercise the Board's permissive grant of abandonment authority. Plaintiffs seem to agree on this larger point, observing that "it is always the railroad's choice that ultimately impacts the duration of the taking." Memmer Reply 26.

Yet Plaintiffs go on to suggest that only the railroad's choice to consummate abandonment will conclude a taking. *Id.* at 26-27. That cannot be the case. Any taking caused by a NITU must conclude when the NITU expires and the decision whether to consummate abandonment is in the hands of the railroad, not when the railroad makes a particular decision. The United States' liability to pay just

compensation for a taking cannot hinge on actions taken by third parties; if, for example, a railroad that agrees to a NITU was never going to abandon—for whatever reason—the United States has no role in that outcome. *A & D Auto Sales*, 748 F.3d at 1153-57. Once the NITU expired in November 2013, the taking could not continue through the conclusion of the consummation notice period in January 2014 because at that point the United States had no role in preventing abandonment or mandating the continuation of easements. The Court should therefore reverse the CFC's determination of the scope of any taking.

CONCLUSION

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

Respectfully submitted,

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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 March 15, 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).

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. Cir. R. 28.1(b)(3)(a). Excluding the items exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b), this brief contains 6,808 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 2016 in 14-point Times New Roman, a proportionally-spaced font.

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