No. 2022-1277

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DAVID H. BEHRENS, ARLINE M. BEHRENS, et al.
Plaintiffs,

MARK W. HEINTZ, HELEN M. HEINTZ, et al.,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendants-Appellees.

Appeal from the United States Court of Federal Claims
No. 1:15-cv-00421-PEC (Hon. Patricia E. Campbell-Smith)

ANSWERING BRIEF FOR THE UNITED STATES

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

CFC .... United States Court of Federal Claims

NITU .... notice of interim trail use

STB .... Surface Transportation Board

STATEMENT OF RELATED CASES

The present civil action has not previously been before this Court or any other court of appeals. Counsel for the United States are aware of additional cases pending in the Court of Federal Claims that could be directly affected by the court's decision in the pending appeal. Those cases involve alleged takings relating to the same Notice of Interim Trail Use ("NITU") that is at issue in this case (which pertains to a 144.3-mile rail corridor in Missouri), and (as to some claims) the same or similar deeds that established the railroad property rights in the corridor. Those cases are: *Abbott et. al. v. United States*, 1:15-cv-211 (Fed. Cl); *Alexander et al. v. United States*, 1:15-cv-2111 (Fed. Cl.); *Schell & Kampeter, Inc., et al. v. United States*, 1:21-cv-776 (Fed. Cl.); *Mazelin, et al. v. United States*, 1:21-cv-989 (Fed. Cl.).

INTRODUCTION

This case concerns a Notice of Interim Trail Use ("NITU") issued by the Surface Transportation Board ("STB") under the National Trails System Act, 16 U.S.C. § 1247(d) ("Trails Act") for possible interim trail use and "rail banking" on a 144.3-mile railroad corridor in Missouri (hereinafter, "the Corridor"). In accordance with the NITU, the Missouri Central Railroad ("Missouri Central") negotiated and ultimately entered an interim use agreement with the State of Missouri, under which the State will assume liability for use and maintenance of the Corridor as a recreational trail, until such time as the Corridor is again needed for rail service. Plaintiffs are persons who own land abutting or subject to rights of use in the Corridor. Plaintiffs filed this suit in the Court of Federal Claims ("CFC") seeking just compensation under the Fifth Amendment for the alleged taking of public trail easements. Plaintiffs argued that Missouri Central's property interests in the Corridor do not allow interim trail use. Plaintiffs also argued (in an untimely alternative motion) that Missouri Central abandoned the Corridor for all uses before STB issued the NITU.

This appeal is from a Rule 54(b) judgment entered on 35 of the Plaintiffs' claims. Because the relevant source deeds granted Missouri Central (through its predecessor) specific "strips of land" to have and hold forever without limitation, and because the 1853 Missouri statute governing "voluntary grants" to railroads

does not limit those interests to railroad purposes only, the CFC held that the easements in this appeal are sufficiently broad to allow interim trail use and rail banking. The CFC declined to consider Plaintiffs' alternative abandonment claim, citing Plaintiffs' failure to timely assert this claim during summary judgment briefing. On appeal, Plaintiffs argue (1) that the CFC misconstrued Missouri law in interpreting the deeds, and (2) that the CFC abused its discretion in declining to consider their alternative abandonment theory. For the reasons stated herein, Plaintiffs' arguments lack merit and the CFC's judgment should be affirmed.

STATEMENT OF JURISDICTION

(a) Plaintiffs invoked the CFC's jurisdiction under the Tucker Act, 28 U.S.C. § 1491, by stating a claim against the United States founded on the Fifth Amendment of the U.S. Constitution. Appx221, Appx237.

(b) The CFC entered final judgment, per Court of Federal Claims Rule 54(b), on a subset of claims on December 9, 2021. Appx42-45. Plaintiffs appeal from that final judgment. Appx2574-2575. This Court has appellate jurisdiction under 28 U.S.C. § 1295(a)(3).

(c) Plaintiffs filed their notice of appeal on December 16, 2021. Appx2574-2575. The appeal is timely under 28 U.S.C. § 2107(b)(1) and Federal Rule of Appellate Procedure 4(a)(1)(B)(i).

STATEMENT OF THE ISSUES

1. Whether the CFC properly granted summary judgment for the United States on 35 takings claims on the grounds that the interim trail use authorized by STB's order is within the scope of the relevant voluntary grants to the railroad and the 1853 statute governing such grants, and thus does not constitute a taking of any property from the Plaintiffs, and

2. Whether the CFC acted within its discretion in declining to consider Plaintiffs' alternative summary judgment motion (asserting that the NITU authorized a new public trail easement *after* the railroad easement had been abandoned under state law), which Plaintiffs filed months after the specified deadline and ultimately only after the court granted judgment in favor of the United States.

STATEMENT OF THE CASE

A. Legal and Factual Background

1. The Corridor

The St. Louis, Kansas City, and Chicago Railroad Company acquired the 144.3-mile Corridor in the early 1900s, through a mix of condemnations and grants from property owners. *See* Appx256-260. The Corridor became part of the "Rock Island Line," which was owned and operated by the Chicago, Rock Island, and Pacific Railroad Company, from the early 1900s through the 1970s, when Rock Island entered bankruptcy. Appx459. The Southern Pacific Transportation Company purchased the line from the bankruptcy trustee. Appx459. Southern Pacific then merged with Union Pacific, which conveyed the line to Missouri Central in 1999. Appx460. In 2004, Missouri Central leased specified operating rights to the Central Midland Railway Company ("Central Midland"). *Id.*

In 2014, Missouri Central (as owner) and Central Midland (as lessee/operator) sought authority from STB to discontinue service on and abandon two rail segments constituting the 144.3-mile Corridor. Appx528. The main segment extends (east to west) from milepost 71.6 near Beaufort to milepost 215.325 near Windsor. Appx528. The second segment extends from milepost 262.906 to milepost 263.5 near Pleasant Hill. *Id.*; *see also* Appx541 (map).

2. *Verified Notice of Exemption*

Under the Transportation Act of 1920, a railroad carrier may discontinue service or abandon a rail line, in whole or in part, only if STB finds that "public convenience and necessity require or permit the abandonment or discontinuance." 49 U.S.C. § 10903(d); *see also Caquelin v. United States*, 959 F.3d 1360, 1363 (Fed. Cir. 2020). Under STB regulations, a rail carrier may qualify for an "exemption" from the requirements of § 10903 by filing a verified notice that more streamlined regulatory criteria and procedures have been met. 49 C.F.R. § 1152.50(a); *see also* 49 U.S.C. § 10502 (authorizing exemptions). Among other requirements, the carrier must verify that no local traffic has moved on the line for at least two years, that overhead traffic on the line can be rerouted, and that no lack-of-service complaints were decided against the railroad in the past two years or remain pending. 49 C.F.R. § 1152.50(b).

Missouri Central and Central Midland filed a verified notice of exemption for the 144.3-mile Corridor on November 18, 2014. Appx528-532. On December 8, 2014, STB published notice in the Federal Register of the exemption filing. 79 Fed. Reg. 72,757 (Dec. 8, 2014). STB announced that the exemption—which would provide the railroads authority to consummate abandonment—would take effect on January 7, 2015, subject to offers of financial assistance to enable

continued rail operations, or requests for trail use and rail banking under the Trails Act, 16 U.S.C. § 1247(d). *Id.* at 72,758.

3. Trails Act

Congress created the federal rail banking program through a 1983 amendment to the Trails Act. *See Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 7 (1990) ("*Preseault I*") (describing history). Citing a "national policy to preserve established railroad rights of way for future reactivation of rail service" and "to protect rail transportation corridors," the Trails Act encourages state and local governments and qualified private interests to establish recreational trails on railroad rights-of-way that otherwise might be abandoned. 16 U.S.C. § 1247(d). The Trails Act declares that:

> if such interim use is subject to restoration or reconstruction for railroad purposes, such use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.

Id.; *see also Caquelin*, 959 F.3d at 1364.

Under STB regulations, any state, political subdivision, or qualified private organization interested in acquiring or using a rail corridor proposed for abandonment may file a request with STB for interim trail use. 49 C.F.R. § 1152.29(a). In the case of an exemption proceeding, the request must be filed within 10 days of the publication of the notice of exemption in the Federal Register. *Id.* § 1152.29(b)(2). The request must state the trail sponsor's

"willingness to assume full responsibility" for "managing the right-of-way," for "[a]ny legal liability arising out of the transfer or use of the right-of-way," and for the "payment of any and all taxes" that may be assessed on the right-of-way. *Id.* § 1152.29(a)(2). The trail sponsor must also acknowledge that the rail line will remain "subject to possible future reconstruction and reactivation of the right-of-way for rail service." *Id.* § 1152.29(a)(3).

If the railroad "agrees to negotiate an interim trail use/rail banking agreement," STB will issue a notice of interim trail use ("NITU") providing the railroad and trail sponsor a period of time within which to negotiate a transfer of the right-of-way and terms of interim use. *Id.* § 1152.29(d)(1)(i). If the trail sponsor and railroad reach agreement within the specified period (or any extension of that period), they must promptly notify STB of the agreement and STB retains jurisdiction over the line. *Id.* §§ 1152.29(d)(1)(ii), (d)(2), (h); *see also Caquelin*, 959 F.3d at 1364. If no interim use agreement is reached, the railroad may abandon the line by filing a "notice of consummation" of abandonment within one year from the service date of STB's decision authorizing abandonment, or within 60 days after the expiration of the NITU, whichever is later. 49 C.F.R. § 1152.29(e)(2); *Caquelin*, 959 F.3d at 1364.

4. NITU for the Corridor

In the present case, after STB published a notice of exemption, the Missouri Department of Natural Resources ("Missouri"), timely filed a request for interim trail use on the entire 144.3-mile Corridor. Appx577-579. Missouri expressed its willingness to assume liability for the Corridor during interim use. Appx578. And Missouri acknowledged that such use, in accordance with the Trails Act, would be "subject to possible future reconstruction and reactivation of the right-of-way for rail service." Appx578. The Missouri Farm Bureau Federation submitted comments opposing interim trail use and advocating for the Corridor to remain "in active rail use." *See* Appx583 (NITU). Missouri Central agreed to negotiate with Missouri over possible trail use, observing that the proposed interim use would be the "ideal way to preserve this corridor for potential future rail use that could support future growth in agriculture and the local economy." *See* Appx584.

On February 26, 2015, after determining that all statutory and regulatory conditions had been met, STB issued a NITU for the Corridor. Appx582-588. The NITU authorized Missouri Central to "discontinue service and salvage track and related materials," but directed the railroad to otherwise "keep" the Corridor "intact"—including all bridges, trestles, culverts, and tunnels, and other potential "trail-related" structures—during negotiations over a potential trail use agreement.

Appx587.[1] In accordance with the Trails Act and implementing regulations, the NITU provided that any trail use agreement must require Missouri (or other trail sponsor) to assume responsibility and liability for the Corridor, and that any interim use would be subject to the possible future restoration of rail service. Appx587; *see also* 16 U.S.C. § 1247(d); 49 C.F.R. §§ 1152.29(a), (d)(2).

STB extended the NITU negotiating period on several occasions. On December 20, 2019, Missouri Central and Missouri jointly notified STB that they had executed a trail use agreement in accordance with the NITU and STB regulations. Appx1904-1906. The notification advised that Missouri Central would transfer its property interests to Missouri "once certain conditions precedent," including specified fundraising, were completed. Appx1905.

5. *Takings Under the Trails Act*

As noted supra, the "interim use" of a railroad corridor under the Trails Act—i.e., a use "subject to restoration or reconstruction for railroad purposes"—"shall not be treated, for purposes of any law or rule of law, as an abandonment . . . of the . . . right[]-of-way for railroad purposes." 16 U.S.C. § 1247(d). If the railroad owns the right-of-way in fee simple or as an easement broad enough to

[1] The NITU provided an initial negotiation period of 180 days. Appx587. As amended in 2019, STB regulations now provides an initial negotiating period of one year. *See* 49 C.F.R. § 1152.29(d)(1)(i).

encompass trail use, an STB order enabling interim trail use takes nothing from abutting landowners. *See Preseault I*, 494 U.S. at 1; *Preseault v. United States*, 100 F.3d 1525, 1552 (Fed. Cir. 1996) ("*Preseault II*"); *see also Anderson v. United States*, 23 F.4th 1347, 1361 (Fed. Cir. 2022); *Chicago Coating Company v. United States*, 892 F.3d 1164, 1174 (Fed. Cir. 2018); *Romanoff Equities, Inc. v. United States*, 815 F.3d 809, 812-16 (Fed. Cir. 2016).

Conversely, in *Preseault II*, this Court held that the Trails Act effects a taking of private property: (1) if trail use pursuant to a NITU is not within the scope of the railroad's property rights; or (2) if the railroad's property rights would have expired via abandonment before the authorization of interim trail use. *Id.* at 1550-51. This Court has also held that a taking might occur upon the issuance of a NITU—whether or not an interim use agreement is reached and trail use established—if the NITU forestalls the expiration of an easement that otherwise would have occurred (i.e., if an easement would have been abandoned at an earlier time but for the NITU). *Caquelin*, 959 F.3d at 1371-73.

6. Property Grants at Issue

As noted, the St. Louis, Kansas City, and Colorado Railroad acquired the 144.3-mile Corridor through judgments in condemnation and various deeds. *See* Appx256-260. The present appeal involves 35 properties along the Corridor that are held subject to rights granted to the railroad in 19 source deeds, all executed

between January 1901 and April 1902. *See* Appx2316-2318 (list); Appx2381-2438 (handwritten copies); Appx2319-2380 (transcribed copies).[2] With minor variations, 18 of the deeds share the following language:

- *first*, the deeds "grant bargain and sell, convey and confirm," to the railroad, certain "real estate," generally described as a "strip of land one hundred (100) feet wide" with a "uniform width of fifty (50) feet on each side of the center line of the railroad . . . as the same is now or shall be located" on specified quarter-quarter sections of land,
- *second*, the deeds all recite "consideration of one dollar" to the grantors, with "receipt" of payment "acknowledged," and
- *third*, the deeds all grant the specified land to the railroad "and its successors and assigns" "to have and to hold . . . together with all the rights, immunities, privileges and appurtenances . . . forever."

See Appx2320-2321 (Schoening); Appx2323-2324 (Bowles); Appx2326-2327 (Groff); Appx2332-2333 (Drysse); Appx2338-2339 (Backues); Appx2341-2342, 2342-2343, 2351-2352 (Thompson); Appx2345-2346 (Yargar); Appx2348-2349 (Lackland); Appx2354-2355 (Linke); Appx2357-2358 (Vaughn); Appx2360-2361 (Ridenhour); Appx2363-2364 (Wilcoxson); Appx2366-2367 (Lacy); Appx2369-

[2] There are 20 transcribed deeds; one was refiled and re-recorded to correct an error in township designation. *See* Appx2341-2343, Appx2351-2352 (Thompson).

2370 (Marriott); Appx2372-2373 (Yaws); Appx2375-2376 (Crewson); Appx2378-2379 (Hatler).

In addition to the above grants for the primary rail corridor, which contained no qualifying terms, some of the above deeds included secondary or tertiary grants for specified purposes. In particular, nine of the deeds provided "additional strips or parcels" "for the purpose of cuttings and embankments necessary outside of the right of way for the proper construction and security of [the] railroad across the [described] tracts of land." *See* Appx2320 (Schoening); Appx2323 (Bowles); Appx2326 (Stuhlmacher); Appx2326 (Groff); Appx2332 (Drysse); Appx2338 (Backues); Appx2348-2349 (Lackland); Appx2357-2358 (Vaughn); Appx2360-2361 (Ridenhour). And twelve of the deeds provided "the right of entry across adjacent land . . . for the purposes of construction" of the railroad. *See* Appx2320 (Schoening); Appx2323 (Bowles); Appx2326 (Groff); Appx2332 (Drysse); Appx2338 (Backues); Appx2345 (Yargar); Appx2348 (Lackland); Appx2354 (Linke); Appx2357 (Vaughn); Appx2360 (Ridenhour); Appx2363 (Wilcoxson); Appx2372 (Yaws).

Finally, Grantors Isaac Backues and his wife executed two deeds on March 20, 1901. *See* Appx2335-2339. The first of those deeds—among the 18 just described—granted the railroad a 100-foot strip of land without limitation. *See*

Appx2338.[3] The other deed (the 19th at issue) granted the railroad "additional strips of land" for a specified 1,000 feet "for the purpose of side tracks, station house, ware houses, stock yards and for such uses as are necessary in the operation of said Railroad." Appx2335.

B. Proceedings Below

1. Complaint

Plaintiffs filed their takings claim on April 27, 2015, shortly after the issuance of the NITU. Appx57-64. Plaintiffs' fourth amended complaint (filed on September 8, 2016), asserted a single takings "count" on behalf of sixty individuals or groups, each alleging to own or co-own one or more parcels subject to rights of use in the Corridor. Appx221-237. In a subsequent filing, Plaintiffs enumerated 71 claims in relation to 71 identified parcels. *See* Appx256-260 (list).[4] Plaintiffs asserted that the railroad's interests in the Corridor, however acquired, were easements limited to railroad operations. Appx237. Plaintiffs asserted that they would enjoy "exclusive right to physical ownership, possession and use" of the rail

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[3] The phrase "strip of land" is missing from the copy of this first deed (which was recorded in Maries County Book 4, page 198). *See* Appx2338. The second Backues grant (Book 4, page 199), however, makes it clear that the first grant "conveyed" a "strip of land fifty (50) feet wide on each side of the centerline" of the located rail corridor. *See* Appx2335.

[4] Plaintiffs initially identified 74 claims, but stipulated to the voluntary dismissal of three of these claims. See Appx267.

corridor, free and clear from any railroad or trail use, but for the operation of the Trails Act. Appx237. As remedy, Plaintiffs sought compensation for the value of the new easements allegedly taken by the NITU, and severance damages for an alleged diminution in the value of their remaining parcels. *Id.*

2. Initial Summary Judgment Briefing and 2017 Opinion

In November 2016, Plaintiffs moved for partial summary judgment as to federal takings liability on all 71 claims. Appx277-313. The United States did not dispute "standing" and "title" as to 25 of these claims. The United States stipulated that the associated parcels were burdened by easements acquired via Missouri's law of eminent domain, that such easements are limited by the Missouri constitution and case law to railroad operations only, and that interim trail use would thus exceed the scope of these easements.[5] *See* Appx261-263, Appx394; *see also Boyles v. Missouri Friends of the Wabash Trace Nature Trail, Inc.*, 981 S.W.2d 644, 648-650 (Mo. App. 1998) (citing Missouri Const. Art. I, § 26). For the remaining 46 claims, however, the United States moved for summary judgment

[5] The United States did not concede takings liability. At the time of the summary judgment briefing, Missouri Central and the State had not executed an interim use agreement and the prospect of interim use remained uncertain. *See Caquelin*, 959 F.3d at 1371-73 (holding that a NITU does not cause a taking where there is no resulting interim use and no demonstrated delay in abandonment).

(and dismissal), either on the grounds that the subject parcels were held in fee or pursuant to easements broad enough to allow interim trail use and rail banking.

On June 23, 2017, the CFC issued an opinion and order denying the Plaintiffs' motion for summary judgment and granting the United States' cross-motion. Appx1-16. The CFC agreed with the United States on the following claims. *First*, the CFC held Plaintiffs lacked viable claims as to four parcels where the railroad held the rights-of-way in fee simple. Appx6-10. *Second*, the CFC held that Plaintiffs lacked a cause of action for another eight parcels, due to a failure to prove the ownership of property within or abutting the rail corridor. Appx10-12. *Third*, as to 35 parcels at issue in this appeal (including one of the just described eight), the CFC held that the source deeds—the 18 deeds discussed above—granted easements that allow interim trail use. Appx13-15. Addressing the 1853 statute, the CFC acknowledged that the statute limited "voluntary grants" to easements, but determined that the statute "does not support a presumption that [such] easements . . . are limited to railroad purposes only." Appx5-6.

3. *Motion for Reconsideration of 2017 Judgment*

Plaintiffs promptly moved for reconsideration of the CFC's judgment as to the 35 claims, arguing that the CFC misconstrued Missouri law. Appx1064-1097. On the same day (July 25, 2017), Plaintiffs also filed a new motion for summary judgment asserting a different theory of liability on the same 35 claims, namely:

that Missouri Central and Central Midland had abandoned the relevant rights-of-way (under Missouri law) before STB issued the NITU. Appx1098-1114. Plaintiffs describe this claim as a claim under "prong 3" of this Court's decision in *Preseault II*, 100 F.3d 1525.[6]

On October 17, 2017, the CFC granted Plaintiffs' motion for reconsideration in part. Appx19-25. The CFC reaffirmed its "central conclusion" that the 1853 statute did not limit "voluntary grants" to "[P]laintiffs' definition of 'railroad purposes.' " Appx21. But the CFC acknowledged that certain language from its June 2017 opinion was "imprecise," possibly implying that the subject easements were "unlimited," whereas an easement "by its nature" must have a definable scope. Appx22 (citing *Maasen v. Shaw*, 133 S.W.3d 514, 518 (Mo. Ct. App. 2004)). Because the CFC had not specifically addressed the scope of the subject easements, the CFC withdrew its opinion to enable the parties to further brief the issue, including with reference to extrinsic evidence as warranted. *Id.* The CFC denied Plaintiffs' "alternative" motion (alleging state-law abandonment of easements in the Corridor) as "premature." Appx25.

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[6] In Plaintiffs' telling (Brief at 1-2), *Preseault II* established a "three-prong test" for Trails Act takings liability: (1) that the corridor is held as an easement and not in fee, *and* (2) that trail use exceeds the scope of the easement, *or* (3) that the easement expired under state law before the issuance of a NITU.

4. *Supplemental Briefing on Summary Judgment and Order Excluding Professor Ely's Report*

In February 2019, Plaintiffs again moved for partial summary judgment as to federal takings liability on the 35 claims. Appx1402-1437. Plaintiffs principally relied on an "expert report" authored by Professor James W. Ely, Jr., whom Plaintiffs retained to provide a legal opinion on the scope of the property rights conveyed in the 35 deeds. Appx1414. Plaintiffs also briefly argued their alternative "abandonment" theory. Appx1431-1435. On September 27, 2019, the CFC granted the United States' motion to strike Professor Ely's report on the ground that it was not extrinsic evidence on the scope of the easements, but instead an opinion on legal issues belonging to the court. Appx28. Because Plaintiffs' summary judgment motion relied heavily on such "impermissible testimony" and because the United States' cross motion for summary judgment was largely a "response to [P]laintiffs' improperly supported argument," the CFC denied both motions in their entirety as "moot." Appx29.

On October 28, 2019, the CFC issued a new scheduling order calling for renewed summary judgment briefing without reference to Professor Ely's report. Appx1896. The order directed that "Plaintiffs shall **FILE** any further **motion for summary judgment** on the remaining 35 parcels for which title and standing remain in dispute" by January 10, 2020. Appx1896 (emphasis in original).

5. *Further Supplemental Briefing on Scope of Easements and June 2021 Opinion*

Plaintiffs timely filed a renewed motion for summary judgment on January 10, 2020. Appx1909-1950. But Plaintiffs limited their motion to their primary argument concerning the scope of the easements. *Id.* Plaintiffs expressly declined to reassert their alternative claim that the easements had been abandoned under state law. *See* Appx1918 n.6. A few weeks earlier, on December 20, 2019, Missouri Central and the State of Missouri had filed a notice with STB announcing the execution of an interim trail use agreement. Appx1904-1905. In their January 2020 motion, Plaintiffs advised the CFC that the "issue [of] state law abandonment under prong 3 of *Preseault II* . . . *is now moot* because a Trail Use Agreement has been signed." Appx1918 n.6.

On October 26, 2020—while their summary judgment motion remained pending, but months after briefing had been completed—Plaintiffs reversed course and moved for summary judgment on their alternative abandonment claim. Appx2165-2184. Because Plaintiffs did not seek leave to file this motion out of time or explain their change in litigation strategy, the CFC granted the United States' request to strike the alternative motion as untimely. Appx32. The court advised Plaintiffs, however, that if they chose to "file a motion for leave to file an additional motion for summary judgment," the court would "consider all properly briefed arguments in that context." Appx32.

Plaintiffs did not take the court's invitation. Seven months later, on June 16, 2021, the CFC issued an opinion denying Plaintiffs' motion for summary judgment and granting the United States' motion for summary judgment on the 35 claims. Appx33-41. Consistent with its 2017 opinion, the CFC determined that the broad language of the source deeds demonstrated the grantors' intent to convey unrestricted rights-of-way. Appx39.

6. *Belated Motion for Leave to File Alternative Summary Judgment Motion and October 2021 Order*

One month later, on July 16, 2021 (after the CFC granted judgment for the United States on the 35 claims), Plaintiffs moved for leave to file their alternative summary judgment motion regarding abandonment. Appx2492-2501. By order dated October 12, 2021, the CFC declined to reopen the summary judgment proceedings on those claims. Appx2543-2547. The CFC observed: (1) that its October 28, 2019 order plainly required Plaintiffs to file "any" motion for summary judgment concerning the 35 claims by January 10, 2020, (2) that Plaintiffs filed their alternative motion ten months late without any explanation for the change in litigation strategy, and (3) that Plaintiffs failed to respond to the court's invitation to seek leave to belatedly file the alternative motion. Appx2544-2547. In their July 2021 motion, Plaintiffs' only explanation for not timely filing their alternative motion was the observation that such filing would have been unnecessary had they prevailed on their primary argument. *See* Appx2546. The

CFC held that Planitiffs' regret over pursuing the "wrong" claim was not "good cause" for excusing a missed litigation deadline, where the scheduling order was specifically designed to avoid piecemeal litigation. *Id.* The CFC also observed that Plaintiffs' litigation strategy belied their assertion that the alternative claim was "important." Appx2547.

7. Rule 54(b) Judgment

On December 8, 2021, Plaintiffs and the United States jointly moved for the issuance of a final judgment under Rule 54(b) on 45 claims as to which the court had granted summary judgment to the United States in its June 23, 2017 and June 16, 2021 opinions. Appx2555-2556.[7] The CFC entered judgment on December 9, 2021. Appx42-45. Plaintiffs' appeal is limited to the 35 claims, identified above, addressed in the CFC's June 16, 2021 opinion (Appx33-41), and in part "III.E" of the June 23, 2017 opinion (Appx13-15). *See* Plaintiffs' Brief at 1-2 & n.2.

SUMMARY OF ARGUMENT

A. Scope of Easements

The 35 claims on appeal concern grants of property interests comprising portions of the Corridor subject to the NITU. The particular grants at issue—

[7] The June 21, 2017 opinion granted judgment for the United States on Plaintiffs' claims as to 46 parcels. Appx6-15. The parties subsequently stipulated that issues remain to be resolved as to parcel 17. Appx1304.

grants of rights to the primary 100-foot wide right-of-way—are unlimited. They provide strips of land for the railroad and its successors and assigns to have and to hold forever. The source deeds do not specify that these grants are for "railroad purposes only." Nor do they provide for an extinguishment or reverter in the event rail service is discontinued. Under Missouri law, these grants would convey estates in fee simple, but for a longstanding Missouri statute, first enacted in 1853, governing "voluntary grants." Under that statue, railroad interests acquired by voluntary grant are limited to rights of use, even when the language of the grant demonstrates an intention to convey interests in fee. The Missouri Supreme Court has construed the term "voluntary grant" to means grants for nominal consideration like the grants in the source deeds at issue here.

Significantly, however, the 1853 statute does not restrict property acquired by voluntary grant to use for railroad construction, maintenance, and operations only. Rather, the statute broadly allows railroads to take and hold any real estate voluntarily granted to them to "aid in the . . . accommodation of . . . railroads." While interim trail use serves public recreational interests in addition to railroad purposes, the interim use "aid[s] in the . . . accommodation of railroads" by preserving rail corridors for future railroad use. Interim trail use is also within the scope and footprint of the railroad's absolute and exclusive rights of possession in the corridor, which are subject only to limited rights that fee owners retain in the

corridor under Missouri law, such as mineral rights, rights of crossing, and any other rights of use that would not interfere with rail operations. Accordingly, interim trail use is both within the unrestricted terms of the grants and within the limitations imposed by statute.

In arguing otherwise, Plaintiffs mistakenly rely on Missouri cases and precedent from this Court involving easements (unlike those here) that are expressly limited by their terms or by the provisions of a statute to railroad construction and operations. Plaintiffs argue that the Court must infer that the subject easements were granted for "railroad purposes" alone because all easements (unlike estates in fee) are limited rights of use that must have a limiting purpose. This rule, however, is for construing grants that undisputedly convey easements without specifying the scope of the rights of use. In such cases, courts must look to the circumstances of the grant to infer the intended limitations. Here, the grantors intended no limitations. The grants are limited to easements solely by operation of the 1853 statue. Accordingly, the only relevant limits are those imposed by the Missouri statute, which do not preclude interim use and trail banking. In so holding, the CFC did not create a new form of easement unknown to the law. The CFC properly construed a property interest unique to Missouri's "voluntary grant" statute.

B. Alternative Abandonment Claim

The CFC did not abuse its discretion in declining to consider Plaintiffs' alternative takings theory that the relevant easements expired (for all purposes) via abandonment before STB issued the NITU. The CFC's scheduling order required Plaintiffs to assert "any" supplemental motion for summary judgment relating to the United States' alleged takings liability by January 20, 2020. Plaintiffs deliberately chose not to pursue their alternative theory in their motion filed on this date, on the view that the alternative theory had become "moot" (or unnecessary).

Nine months later, in an act of apparent regret, Plaintiffs belatedly asserted their alternative theory in a stand-alone motion for summary judgment. But Plaintiffs failed to seek leave to file the motion out of time. Accordingly, the CFC struck it, inviting Plaintiffs to refile the motion along with a motion for leave. Instead of doing so, Plaintiffs waited another eight months—until after the CFC denied their primary summary judgment motion and granted summary judgment for the United—to refile their alternative motion. As "cause" for this additional delay, Plaintiff argued only that the motion was "important" (i.e., allegedly meritorious) and became relevant upon the court's denial of their primary argument and grant of summary judgment to the United States.

Moreover, the only evidence proffered by Plaintiffs to show abandonment prior to the NITU is evidence of nonuser, which is legally insufficient under

Missouri law. The other acts cited by Plaintiffs—the railroads' decision to pursue rail banking and the removal of track in accordance with the terms of the NITU—can only be construed as an intention to retain the easements, given the CFC's ruling that the interim use for rail banking is within the scope of the easements. Plaintiffs' "alternative" argument arises only in this context and thus necessarily fails. In any event, as the CFC observed, Plaintiffs' litigation strategy by itself belies the "importance" of the alternative claim. The CFC did not abuse its discretion in finding that Plaintiffs' regret over their litigation strategy was not "good cause" for excusing the missed deadline.

STANDARD OF REVIEW

This CFC's determination regarding the scope of the relevant easements, as well as the CFC's grant of summary judgment for the United States, are matters of law that this Court reviews de novo. *Anderson*, 23 F.4th at 1361. The CFC's decision not to consider the summary judgment motion that Plaintiffs belatedly submitted in noncompliance with the court's scheduling order and ultimately after the court granted summary judgment for the United States is reviewed for an abuse of discretion. *See Bot M8 LLC v. Sony Corporation of America,* 4 F.4th 1342, 1357 (Fed. Cir. 2021) (denial of motion to modify schedule); *Indivior Inc. v. Dr. Reddy's Laboratories, S.A.*, 930 F.3d 1325, 1340-41 (Fed. Cir. 2019) (denial of motion to reconsider).

ARGUMENT

I. Plaintiffs' properties are held subject to easements that encompass interim trail use.

To interpret the scope of the easements at issue in this appeal, this Court must construe the relevant source deeds and an 1853 Missouri statute that restricts "voluntary grants" to railroads. As explained in the following sections, neither the grants themselves nor the statute limits the easements to railroad purposes alone.

A. But for the 1853 Statute, Missouri courts would construe the deeds as conveying estates in fee.

1. The primary grants contain all the markers of conveyances in fee simple.

As Plaintiffs acknowledge (Brief at 31-32), under Missouri law, the "cardinal rule" for the interpretation of deeds is that "the intention of the grantor governs." *Lloyd v. Garren*, 366 S.W.2d 341, 345 (Mo. 1963). Accordingly, subject to statutory restrictions (*see infra*, pp. 32-37), when construing a Missouri deed, this court must "ascertain the intention" of the grantor and "give that intention effect." *Hinshaw v. M-C-M Properties, LLC*, 450 S.W.3d 823, 827 (Mo. Ct. App. 2014). To ascertain intent, Missouri courts look "within the four corners of the instrument, the surrounding circumstances and conditions," giving "consideration . . . to what the deed . . . actually says and not what the grantor intended secretly or without stating or what he might have said if he had decided to further explain his intention." *Kansas City Southern Railway. Co. v. St. Louis-San*

Francisco Railway. Co., 509 S.W.2d 457, 460 (Mo. 1974) (quoting *Kerrick v. Schoenberg*, 328 S.W.2d 595, 599 (Mo.1959); *see also Utter v. Sidman*. 70 S.W. 702, 705 (Mo. 1902) ("The intention of the grantor, as gathered from the four corners of the instrument, is . . . the pole star of construction.")

Here, construed as a whole, the relevant source deeds plainly demonstrate an intent to grant estates in fee simple. *First*, all of the deeds utilize the terms "grant, bargain, and sell." *See*, *e.g.*, Appx2320 (Schoening deed); *see also* pp. 11-12, *supra* (listing other deeds). Under longstanding Missouri law, this phrase signifies a warranty of fee simple ownership. *See Alexander v. Schreiber*, 10 Mo. 460, 461 (Mo. 1847) (citing 1845 Mo. Rev. Stat. § 24); *see also* Mo. Stat. Ann. § 442.420 (present codification). When this phrase is not "expressly restrained by other language" in a deed, Missouri courts will find a "conveyance in fee simple." *University City v. Chicago, Rock Island, & Pacific Railway Co.,* 149 S.W.2d 321, 325 (Mo. 1941); *see also Nixon v. Franklin*, 289 S.W.2d 82, 88 (Mo. 1956) (grantors using the phrase "grant, bargain, and sell" without limitation "cannot be heard to say that they did not promise to convey a fee simple title").

Second, all of the deeds convey a specifically described "strip of land." *See*, *e.g.*, Appx2320 (Schoening deed); see also pp. 11-12, supra. Missouri courts recognize that this term—as opposed to "road" or "right-of-way"—demonstrates an intent to convey the land itself and not merely the right of passage across land.

Bockelman v. MCI Worldcom, Inc,. 403 F.3d 528, 532 (8th Cir. 2005) (applying Missouri law); *Powell v. St. Louis County*, 446 S.W.2d 819, 822 (Mo. 1969); *see also Homan v. Hutchison*, 817 S.W.2d 944, 950 (Mo. App. 1991); *City of Columbia v. Baurichter*, 729 S.W.2d 475, 479 (Mo. App. 1987); *accord Anderson*, 23 F.4th at 1362 (applying Texas law).

Third, all of the deeds contain broad habendum clauses, granting to the railroad and its successors and assigns the specified strips of land "to have and to hold . . . together with all the rights, immunities, privileges and appurtenances . . . forever." *See*, *e.g.*, Appx2320 (Schoening deed); *see also* pp. 11-12, *supra*. None of the deeds—as to the primary grant of the 100-foot right-of-way at issue for purposes of interim trail use—contain any language qualifying the use to "railroad purposes only" or reserving an interest in the event of a discontinuance in rail use.[8]

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[8] In this regard, the source deeds stand in marked contrast to other deeds addressed by Missouri courts. *See*, *e.g.*, *Bray v. St. Louis-San Francisco Railway Co.*, 310 S.W.2d 822 (Mo. 1958) (1896 deed granting strip of land "to be used for railroad purposes only"); *University City*, 149 S.W.2d at 323 (addressing 1871 deed granting "right of way" for the "location, construction and maintenance" of a railroad "and for that use and purpose only," said "license" to operate "in perpetuity" as long as the railroad "shall continue to maintain and operate," and to "cease" upon "non use . . . for such purpose"); *Moore v. Missouri Friends of the Wabash Trace Nature Trail, Inc.*, 991 S.W.2d 681 (Mo. App. 1999) (addressing 1878 deed granting right of way "so long as tis used for Rail Road purposes," and 1879 deeds containing express "revert[er]" in the event the railroad "shall be abandoned or not pass over" the described land).

Deeds containing all of the above markers are generally recognized by Missouri courts as conveying estates in fee. *See Powell*, 446 S.W.2d at 820-23; *Fuchs v. Reorganized School Dist. No. 2, Gasconade County*, 251 S.W.2d 677, 678-80 (1952); *Bayless v. Gonz*, 684 S.W.2d 512, 513 (Mo. App. 1984); *Bockelman*, 403 F.3d at 531-33; *see also Brandt v. Manson*, 207 S.W.2d 846, 852 (Mo. App. 1948) ("The law presumes a warranty deed to be an absolute conveyance in fee simple").

2. The grantors' decision to convey land for nominal consideration does not limit the grant.

The relevant source deeds all also recite "consideration of one dollar." *See*, *e.g.*, Appx2320 (Schoening deed); see also pp. 11-12, *supra*. As explained *infra* (pp. 32-33), under a Missouri statute first enacted in 1853, "voluntary grants" to railroads (grants for nominal consideration) are limited to easements. *See Schuermann Enterprises, Inc. v. St. Louis County*, 436 S.W.2d 666, 668 (Mo. 1969). But this *statutory* restriction is not an indication of the *grantor's* intent. *See Brown v. Weare*, 152 S.W.2d 649, 654 (Mo. 1941). Moreover, under Missouri law, when all the markers of a fee simple conveyance are present, a recitation of nominal consideration "standing alone, is not sufficient from which to find an intention to convey other than an unlimited fee." *Fuchs*, 251 S.W.2d at 678-80.

Fuchs involved an 1892 deed granting land for a public school, "in consideration for the sum of One and no/100 Dollars." *Id.* at 678. Like the source deeds in this case, the *Fuchs* deed contained the terms "grant, bargain, and sell,"

conveyed specifically-defined "land," and conveyed such land to the grantee "and its assigns" "to "have and to hold . . . forever." *Id.* at 678-79. Because the deed contained "no express exception or reservation, no express limitation upon the duration of the estate conveyed, no express condition upon which the estate was conveyed, and no express provision for forfeiture, for re-entry, or for reverter," the Missouri Supreme Court held that the "deed conveyed a fee simple title without limitation or condition." *Id.*

In so holding, the Court acknowledged that the payment of nominal consideration "might . . . be an important aid" in finding an intent to limit a conveyance, but only "in connection" with other language or circumstances demonstrating such intent. *Id.* at 679-80. Significantly, unlike the source deeds here (as to the relevant primary grants), the granting and habendum clauses of the *Fuchs* deed stated a purpose for the conveyance: "to Keep and Maintain a Public School-House." *Id.* Nonetheless, the Court held that this language was insufficient (along with nominal consideration) to suggest a limitation on property right conveyed, but instead was "nothing more than an expression or declaration of the purpose for which the grantors *expected* the land to be used." *Id.* (emphasis added). Under *Fuchs*, the source deeds here plainly demonstrate an intention to convey fee simple title.

3. The terms of the secondary and tertiary grants do not limit the scope of the primary grant.

Some of the source deeds in this case also contained secondary and tertiary grants with qualifying language. *See* p. 12, *supra*. Specifically, some of the deeds provide strips of land in addition to the primary 100-foot right-of-way for the express "purpose of cuttings and embankments necessary for the proper construction and security of [the] railroad." *See*, *e.g.*, Appx2320 (Schoening deed). And some of the deeds provide "the right of entry across adjacent land . . . for purposes of construction of said railroad." *Id.* Quoting language from these ancillary grants, Plaintiffs repeatedly represent that all of the deeds specify railroad "construction" to be the "purpose" of the *primary* grants. *See* Brief at 3, 11-12, 16, 21-22, 25, 41-42.

Plaintiffs are mistaken. *First*, as just explained, the mere reference to a "purpose" in a deed is not necessarily a limitation on the grant. *Fuchs*, 251 S.W.2d at 679. Rather, such language may only reflect an anticipated use. *Id.* *Second*, several of the source deeds in this case only contain grants for the primary 100-foot right-of-way. *See See* Appx2341-2342, 2342-2343, 2351-2352 (Thompson); Appx2345-2356 (Yargar); Appx2366-2367 (Lacy); Appx2369-2370 (Marriott); Appx2375-2376 (Crewson); Appx2378-2379 (Hatler). None of these deeds contains the language quoted by Plaintiffs referring to railroad "construction." *Id.* *Third* and most importantly, as to the deeds containing secondary or tertiary grants

(including the second Backues deed), the language regarding railroad "construction" on which Plaintiffs rely is plainly associated with the secondary and tertiary grants only. *See*, *e.g.*, Appx2320 (Schoening deed); Appx2335-3239 (Backues deeds).

Significantly, Missouri law is clear that when a deed to a railroad includes multiple grants, each grant must be construed on its own terms. *See Clevenger v. Chicago, Minneapolis, & St. Paul Railway Co.*, 210 S.W. 867 (Mo.1919); *see also Hinshaw*. 450 S.W.2d at 827-29 (deed granting easement for sewer line and a "right of ingress and egress" created two separate easements). *Clevenger* concerned an 1886 deed to a railway company that granted a 100-foot right of way, fifty feet on each side of a center line, along with an additional 100-foot width for "excavations, embankments, depositing waste earth and borrowing pits." *Id.* at 867. The Missouri Supreme Court held that the deed "vested a fee" in the railroad for the primary right-of-way, and an "easement . . . only" in the "extraneous strip" "for the purposes specified in the deed." *Id.* at 868.

The source deeds here must be interpreted in the same way. The primary grants contain no limitations on use and all the indicators of a conveyance in fee. The terms of the source deeds that limit the secondary and tertiary grants do not apply to the primary grants. *See Clevenger*, 210 S.W.2d at 868; *see also Fuchs*, 251 S.W.2d at 679.

As for the secondary and tertiary grants, they are not at issue on appeal. In their summary judgment briefing, Plaintiffs explained that they were "not claiming a taking for the 100 'additional' feet" associated with the secondary grants, but were "merely claiming a taking for the 100-foot wide corridor" associated with the primary grants. Appx972. As to the 35 claims on appeal, the United States sought summary judgment on the grounds that the "primary conveyances" in the relevant deeds "are unambiguously broad enough to encompass trail use." Appx2046; *see also* Appx2027-2030. The CFC granted summary judgment for the United States on these claims, on the grounds that the "primary conveyances do not contain language limited their scope." Appx15 (2017 decision); *see also* Appx40 (2021 decision) (granting judgment on "easements at issue in the parties' motions"). In this appeal, Plaintiffs challenge the CFC's ruling on the "scope of the primary conveyance included in the deeds." *See* Brief at 15 (quoting Appx14).

B. Missouri's "voluntary grant" statute does not preclude interim trail use and rail banking.

As just explained, the rights-of-way at issue—in the100-foot wide corridor conveyed through the primary grants—were granted without limitation and under terms expressing the intent to convey interests in fee. At the time of the grants, however, there was a statutory limitation on "voluntary grants," *see* 1889 Mo. Rev. Stat., § 2543, that remains in effect today, see Mo. Ann. Stat. § 388.210(2) (2021). That limitation was first enacted in 1853, as part of legislation for the authorization

and regulation of railroads. *See* 1853 Mo. Laws at 121-144. In relevant part, the 1853 statute provides that railroad companies "shall have power"

> To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroads; but the real estate received by voluntary grant shall be held and used for the purpose of such grant only.

Id. at 134, § 28 (¶ 2); *see also Quinn v. St. Louis-San Francisco Railway Co.*, 439 S.W.2d 533, 534 (Mo. 1969) (en banc) (describing statute).

Construing this statute, the Missouri Supreme Court has held that "voluntary grant" means a conveyance for "one dollar" or other "nominal" consideration. *Brown*, 152 S.W.2d at 653; *see also Coates & Hopkins Realty Company v. Kansas City Terminal Railway Co.*, 43 S.W.2d 817, 821 (Mo. 1931). In addition, the Court has held that the phrase "held and used for purposes of such grant only" means that "voluntary grants" are limited to "easements" and that the property interest conveyed in such grants expire upon abandonment. *Brown*, 152 S.W.2d at 654-55; *see also Allen v. Beasley*, 249 S.W. 387, 388-90 (Mo. 1923). Because the relevant grants in this case were "one dollar" deeds subject to the 1853 statute as interpreted by Missouri courts, there is no dispute that the interests conveyed in these grants are treated as easements.

As already noted, however, this result is not an expression of the intention of the parties to the deeds. To the contrary, as Missouri courts have explained, the

1853 statute was "intended to interfere in the dealings" of the parties, *Brown*, 152 S.W.2d at 654, and to limit the interest conveyed to an easement, "even if" a deed expressly recites an intention "to convey the fee," *G. M. Morris Boat Co., Inc. v. Bishop*, 631 S.W.2d 84, 87 (1982). The relevant question, then, is what limitations are imposed by the statute.

The 1853 statute authorizes railroads to receive and hold any real estate granted for the purpose of "aid[ing] in the construction, maintenance, and *accommodation*" of railroads, *see* Mo. Ann. Stat. § 388.210(2) (emphasis added), and limits use to the "purpose of such grant[s]." *Id.* Because the source deeds themselves impose no limitations on use, they are properly construed as granting the greatest possible rights of use under the statute, which directs only that the use must "aid in the . . . accommodation" of railroads. *Id.*

"The primary goal of statutory interpretation is to give effect to legislative intent, which is most clearly evidenced by the plain text of the statute." *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 585 (Mo. 2018). Words not defined in a statute are given their "ordinary meaning pursuant to the dictionary." *Gross v. Parson*, 624 S.W.3d 877, 885 (Mo. 2021) (quoting *Business Aviation, LLC v. Director of Revenue*, 579 S.W.3d 212, 218 (Mo. 2019)). Around the time of the grants in this case, "accommodation" was defined in legal dictionaries as a "convenience, favor, or benefit," *see Overland Auto Co. v. Winters*, 210 S.W. 1, 4

(Mo. 1919) (quoting Anderson's law dictionary), or "an arrangement or engagement made as a favor to another, not upon a consideration received." *Id.* (quoting Black's Law Dictionary). Because interim trail use under the Trails Act as a matter of law preserves the corridor for future railroad use, such use "aid[s] in the . . . accommodation" of railroads, within the ordinary meaning of those terms.

Such interpretation is consistent with the purpose of the statute. As explained by the Missouri Supreme Court, the statute was enacted to encourage voluntary grants to facilitate the growth of railroads in the state and to "protect" grantors in the event a grantee railroad failed to construct a railroad or abandoned the "land acquired for its use." *Brown*, 152 S.W.2d at 654. By limiting railroad rights-of-way to easements, the 1853 statute enables abutting owners to recover the fee interest upon abandonment, thus protecting against the "evils resulting from the retention in remote dedicators of the fee in gores and strips." *Id.* at 656 (quoting *Paine v. Consumers' Forwarding & Storage Co.*, 71 F. 626, 632 (6th Cir. 1895)); *see also Kimberling North, Inc. v. Pope*, 100 S.W.3d 863, 874 (Mo. App. 2003).

Here, the railroad was constructed and operated for nearly a century. Although changed circumstances have rendered rail operations presently infeasible, the State's interest in promoting railroads remains. Missouri has always regulated railroads as public utilities and treated voluntary grants to railroads as dedications of land to public use. See *Venable v. Wabash Western Ry. Co.*, 20

S.W. 493, 496-98 (1892). Indeed, since 1875, the Missouri Constitution has declared all railroads of the state to be "public highways." 1875 Mo. Const. art. XII, § 12; *see also* Mo. Const. Art. II, § 9. In addition, Missouri law on voluntary grants has long reflected the policy of "refraining from interference with freedom of contract." *See Brown*, 152 S.W.2d at 653 (quoting *Forbes v. St. Louis, Iron Mountain & Southern Railway Co.*, 82 S.W. 562, 565 (Mo. App. 1904)). In this context, although the 1853 statute was undeniably designed to limit freedom of contract by precluding grants in fee simple, there is no basis for construing the statute narrowly as limiting voluntary grants to railroads to railroad purposes alone. Although interim use under the Trails Act is for purposes in addition to rail banking, the interim use plainly "aid[s] in the . . . accommodation" of railroads under the ordinary meaning of these terms, by preserving corridors for future railroad use.

Moreover, as long as interim trail use or reactivated rail use continue, there is no concern about strips and gores. If interim trail use is terminated without reactivated rail use, or if reactivated rail use is terminated without interim use and rail banking, the easement will be extinguished and all rights of occupancy and use will revert to the underlying fee owner. *See* 49 C.F.R. § 1152.29(d)(2); Appx587.

In sum, while recognizing that the 1853 statute limits conveyances to railroads via voluntary grant to easements, the CFC correctly determined that the

statute does not include a "presumption" that such easements are limited to "railroad purposes" only—as defined by Plaintiffs to mean railroad construction, maintenance, and operation only—and that the unrestricted grants in this case are broad enough to allow interim trail use and rail banking. *See* Appx5-8; Appx15, Appx20-22, Appx34; *accord Burnett v. United States*, 139 Fed. Cl. 797, 811 (2018) (holding that 1853 statute does not "limit . . . voluntary grants to use for railroad purposes").

C. The arguments of Plaintiffs and supporting amici are misguided.

1. Plaintiffs Misconstrue the Deeds

Plaintiffs argue (Brief at 14, 25) that interim trail use and rail banking are not within the scope of the easements in this case because the deeds strictly limited the easements, as a "matter of fact," to "railroad purposes." But Plaintiffs fail to identify any language in the source deeds to support this claim.

As already noted (pp. 30-31, *supra*), Plaintiffs rely—mistakenly—on language in some of the deeds addressing railroad "construction." *See* Brief at 21-25. Those terms express the purpose of secondary grants (for "cuttings and embankments") and tertiary grants (for access), which are not at issue in this case and which do not appear in all of the deeds. *See* pp. 30-32, *supra.* Plaintiffs also observe (Brief at 25) that the secondary grants for "cuttings and embankments" refer to the primary grants as "right[s] of way." *See* Appx2320 (Schoening deed).

But as the Missouri Supreme Court has noted, the term "right of way" in "railroad parlance" can mean either the "right to use" land or the "strip of land on which the track is laid." *Schuermann Enterprises, Inc. v. St. Louis County*, 436 S.W.2d 666, 669 (Mo. 1969). The deeds here use "right of way" solely as a reference to the primary grants, which otherwise specifically convey "strip[s] of land" and not mere rights of use. This usage of "right of way" is not properly construed as a limitation on the primary grant.

In any event, given the 1853 statute, there is no dispute that the primary grants in the relevant deeds are limited to rights of use. The relevant question as to deed construction is whether the grantors intended to impose limits on their grants in addition to the limitations imposed by the statute. Plaintiffs argue (Brief at 25, 32) that there "can be no doubt" that the grantors intended their grants to be limited to active railroad operations only, because grantors "in the early 1900's" could not have "dreamed the strips of land might be used for bicycling, ATV excursions, jogging, or any other recreational purpose." But this observation is beside the point. Under Missouri law, the grantors' intent is determined from what the deeds "actually say[]," not from speculation as to what the grantors "might have said . . . to further explain [their] intention" in relation to future circumstances not specifically addressed. *See Kerrick*, 328 S.W.2d at 599.

Here, the deeds grant the strips of land in the language of fee simple for the railroad and its successors and assigns to have and to hold "forever." *See*, *e.g.*, Appx2320-2321 (Schoening deed). The deeds express no intention on the grantors' part to recover full use of the granted lands at any point in the future. Accordingly, the grantors plainly intended that the railroad and its successors and assigns would make any use of the easements permitted by law.

2. Plaintiffs misconstrue the "voluntary grant" statute.

Plaintiffs also contend (Brief at 25) that the "voluntary grant" statute, "as a matter of law," strictly limits the grants in the source deeds to "railroad purposes." But Plaintiffs make little effort to actually interpret the statute. Based on the erroneous view that the primary grants are limited by their terms to railroad "construction," Plaintiffs simply observe (*id.*) that this alleged limited purpose "falls directly in line" with the statutory language permitting voluntary grants that "aid in . . . [railroad] construction." Brief at 25. In so doing, Plaintiffs presuppose (erroneously) a limitation predicated on the language of the *grant*; Plaintiffs do not demonstrate any limitation compelled by the terms of the *statute*.

Plaintiffs imply (Brief at 14-15) that all "voluntary grants" under the 1853 statute should be construed in the same manner as rights of way acquired by

condemnation.[9] But Plaintiffs fail to appreciate that Missouri law treats voluntary grants and condemnations differently. *First*, as explained (pp. 34-35, *supra*), the voluntary grant statute permits railroads to take and hold voluntary grants of real estate to "*aid in* the construction, maintenance, and *accommodation* of . . . railroads." *See* 1866 Mo. Laws at 27, ch. 70, § 2; Mo. Ann. Stat. § 388.210(2) (emphasis added). In contrast, Missouri's eminent domain statute limited acquisitions via condemnation to those needed for the "establishment, erection, and maintenance" of railroads. *See* 1866 Mo. Laws at 47, ch. 73, § 1; *see also* Mo. Ann. Stat. 523.010 (present codification).

Second, under longstanding Missouri law, because actions in condemnation are in "derogation" of the property rights of citizens, condemnation statutes are "strictly construed." *State ex rel. Missouri Cities Water Co. v. Hodge*, 878 S.W.2d 819, 821 (Mo. 1994) (quoting *Southwestern Bell Telephone Co. v. Newingham*, 386 S.W.2d 663, 665 (Mo. App.1965)); *Fore v. Hoke*, 48 Mo.App. 254, 259 (Mo. App. 1892). This means interests acquired by condemnation are no greater than necessary to achieve the purpose of the acquisition. *See Preseault II*, 100 F.3d at 1535. No such rule of interpretation applies to voluntary grants, which instead are

[9] The "voluntary grant" statute (now codified at Mo. Ann. Stat. § 388.210(2)) and the condemnation authority (now codified at Mo. Ann. Stat. § 523.010) were both part of an 1866 statute authorizing and regulating corporations, including railroad corporations. *See generally* 1866 Mo. Laws at 20-49, ch. 69-73.

to be construed in light of the policy of freedom of contract. *See Brown*, 152 S.W.2d at 653.

Third, the Missouri Constitution includes, as part of its bill of rights (and prohibition on takings without just compensation), a provision that the "fee of land taken for railroad purposes without consent of the owner thereof, shall remain in such owner, subject to the use for which it is taken." *See* Mo. Const. Art. I, § 26; *see also* 1875 Mo. Const. Art. II, § 21. The Missouri Constitution does not likewise restrict voluntary grants to railroads. *Id.*

To be sure, under Missouri law, both voluntary grants and condemnations for railroad rights-of-way are limited to easements. But the limitations come from different sources of law and are differently described. Under the plain terms of the 1853 statute, voluntary grants to railroads may be more generous in scope than rights-of-way acquired by condemnation.

3. *The cases cited by Plaintiffs are distinguishable.*

Plaintiffs cite no Missouri case contrary to the above proposition or that interprets the scope of an unrestricted (fee-like) grant of real estate under the voluntary grant statute. The two cases that Plaintiffs cite as "leading"—*Boyles v. Missouri Friends of the Wabash Trace Nature Trail, Inc.*, 981 S.W.2d 644 (Mo. App. 1998), and *Moore v. Missouri Friends of the Wabash Trace Nature Trail, Inc.*, 991 S.W.2d 681 (Mo. App. 1999)—are distinguishable. Similar to the present

case, both involved railroad rights-of-way that a railroad conveyed to a trail association for the purpose of creating a recreational trail. *See Boyles*, 981 S.W. 2d at 647; *Moore*, 991 S.W.2d at 684. But the similarities end there.

Boyles involved rights of way acquired in 1879 under Missouri's eminent domain law for the "establishment, erection, and maintenance" of a railroad. *See* 981 S.W.2d at 646; *see also* 1866 Mo. Laws at 47, ch. 73, § 1 (presently codified at Mo. Ann. Stat. § 523.010). After the railroad sold the corridor to the trail association, several abutting landowners—from whose predecessors the rights-of-way were taken—sued to quiet title to the land on the grounds that the right-of-way had been abandoned. *Boyles*, 981 S.W.2d at 647. The trails group argued, among other things, that the easement had not been abandoned because trail use would "keep the existing corridor intact" for future transportation needs, including "reactivated rail service." *Id.* at 649. In rejecting this argument, the Missouri Court of Appeals reasoned that the easements were limited by Missouri's constitution to "railroad purposes" and that use of the right-of-way for a recreational trail was "completely unrelated to the *operation* of a railway." *Id.* at 650 (emphasis added); *see also* Mo. Const. Art. I, § 26.

This holding does not control the present case for two reasons. *First*, as already explained (pp. 39-40, *supra*), because the case here involves unrestricted voluntary grants to a railroad as opposed to rights acquired in condemnation, the

constitutional and statutory limitations on rights acquired by condemnation do not apply. *Second*, while *Boyles* involved the attempt to establish a recreational trail on a railroad right-of-way, it did not involve rail banking under the Trails Act. *See* 981 S.W.2d at 647. To the contrary, the railroad in *Boyles* obtained abandonment authority from the Interstate Commerce Commission (predecessor to STB) and *consummated* abandonment under federal law, *before* conveying any property rights, via quitclaim deed, to the trail group. *Id.* Accordingly, if the railroad somehow retained property rights to convey following consummation of abandonment, the trail group did not hold those rights "subject to restoration or reconstruction for railroad purposes." *See* 16 U.S.C. § 1247(d); 49 C.F.R. § 1152.29(d)(2). It is only in this context that the *Boyles* court determined the proposed trail use to be "consistent only with an intent to wholly and permanently cease rail operations." *See Boyles*, 981 S.W.2d at 647, 650.

Moore is similarly distinguishable. The facts of *Moore* are essentially identical to those of *Boyles* except that Moore involved property rights conveyed via three source deeds. *See Moore*, 991 S.W.2d at 683-84. Unlike the source deeds in the present case, all three deeds in *Moore* expressly limited the grants to active railroad operations. *Id.* One deed conveyed an interest in a 100-foot strip for "consideration" of one dollar, for "the building, maintaining, and operating of a railroad" and only for "so long as tis used for Rail Road purposes." *Id.* at 683.

The other two conveyed a 100-foot strip for "consideration of Five Dollars" and the "building of a . . . wire fence . . . on each side of the rail road track," expressly stated that the grant was "for purposes of a railroad," and provided an express reverter "in case the construction of said road shall be abandoned or not pass of said land." *Id.* at 684.

The Missouri Court of Appeals found that all three deeds recited "nominal" consideration and thus were controlled by the "voluntary grant" statute. *Id.* at 685-87. But the court did not rely on that statute alone. *Moore* held that the railroad possessed easements that were extinguished by the railroad's abandonment—i.e., by the discontinuance of service, track removal and the consummation of abandonment under federal law—both because the statute restricted the grants to easements and because the relevant deeds expressly made the grants subject to continuing railroad operations. *Id.* at 685-88. In contrast, the easements here are *not* restricted by deed and the railroad *never consummated abandonmen*t of its interests in the right-of-way, but instead conveyed those interests for rail banking under the Trails Act.

4. *Plaintiffs misconstrue the purpose of the grants.*

Plaintiffs also erroneously rely on *Maasen v. Shaw*, 133 S.W.3d 514 (Mo. App. 2004). *See* Brief at 26-35. In that case, the Missouri court of appeals construed a "non-exclusive" right-of-way granted to a private landowner. *See* 133

S.W.3d at 516-17. Because an "easement's use is limited to the purposes for which it was created," and because the granting document "did not specify the purpose of the easement," the court was compelled to look to extrinsic evidence to determine the parties' intention as to the scope of use. *Id.* at 519. Finding that the parties granted the easement to provide access to a "landlocked" parcel and that the easement had been used for that purpose only in the years immediately after its grant, the court held that the grantor's purpose was to provide "ingress and egress" and that the easement could not be put to broader uses, such as parking or recreational use by ATVs. *Id.* at 519-521.

Plaintiffs now cite *Maasen* for the propositions (Brief at 28-29) that every easement must have a limiting purpose and that the unrestricted grants to the railroads in the present case must be restricted to the "railroad purposes" to which they were first put. But *Maasen* does not speak to the circumstances of this case. By their terms, the source deeds here did not grant easements; they granted estates in fee. There is no need for extrinsic evidence to determine the grantors' intent; the grantors unambiguously conveyed the greatest estate they could convey. Accordingly, the only relevant limitation is the limitation imposed by the 1853 statute. Under the statute, unrestricted grants may be used for any purpose that "aid[s] in the . . . accommodation" of railroads. *See* Mo. Ann. Stat. § 388.210(2).

5. Interim trail use does not exceed the scope of the grants.

While Plaintiffs argue that the easements in this case are limited to "railroad purposes" only, they do not argue that the grants were contingent upon the continuation of rail service, such that the discontinuance of rail service itself caused a reverter. Rather, Plaintiffs acknowledge (Brief at 50) that the ordinary rules of abandonment apply: nonuse alone will not cause an extinguishment of the easement; there must be an express disclaimer or "unequivocal act" evidencing an intent to abandon. *Hatton v. Kansas City, Clinton & Springfield Railway Co.*, 162 S.W. 227, 236 (Mo. 1913). While that intent may be inferred, it must be shown by "clear and convincing" evidence. *Hennick v. Kansas City Southern Ry. Co.*, 269 S.W.2d 646, 650 (Mo. 1954). Here, the transfer to the State of Missouri for the express purpose of preserving the right-of-way for the possible restoration of rail service is the opposite of an intention to abandon the right-of-way for railroad use.

Accordingly, Plaintiffs disregard rail banking and predicate their argument on the claim that the recreational use exceeds the scope of the easement. Specifically, because trail use is "completely different" from railroad use, Plaintiffs and their amici insist that it is necessarily beyond the scope of the grants. That is not the law. As already explained, *Boyles* held that when a railroad's right-of-way is limited by its terms to railroad operations *and* the railroad disclaims all interests in a corridor in favor of recreational trail use (without rail banking under the Trails

Act), the intent to establish recreational use does not defeat (and instead confirms) an inference of abandonment. *Boyles*, 981 S.W.2d at 649-50; *see also Moore*, 991 S.W.2d at 688. But no Missouri court has held that interim trail use is beyond the scope of a railroad easement that has been properly preserved, under the Trails Act, for potential future railroad use.

Nor has this Court so held. In *Preseault II*, this Court held (applying Vermont law) that a change to recreational use was outside the scope of easements specifically limited "by their terms and as a matter of law" to "railroad purposes." 100 F.3d at 1544. Similarly, in *Toews v. United States*, this Court held (applying California law) that a change to recreational use was outside the scope of a right-of-way that was granted on condition that "if said Railroad Company shall permanently discontinue the use of said railroad the land and Rights of Way shall at once revert to the [grantor]." *See* 376 F.3d 1371, 1373, 1376-81 (Fed. Cir. 2004). But in both cases, this Court emphasized the limitations imposed by the grants. *See Toews*, 376 F.3d at 1379 (change in use must be "consistent with the grantor's purpose"); *Preseault II*, 100 F.3d at 1542-43 (easement to be construed in accordance with the "bargain" made by the parties). And in *Preseault II*, this Court recognized that a different rule might apply under a "special statute" and depending on the terms of the easement at issue. *See* 100 F.3d at 1544.

Here, there are no restrictions on the grants except for those imposed by the 1853 statute. Nor is there any basis in Missouri law for concluding that interim trail use and rail banking under the Trails Act exceeds the scope of the grants. As the Missouri Supreme Court has explained, railroad rights-of-way are not easements in a "technical and limited sense," but instead are "special, peculiar instrument[s] subject to [their] own rules." *Brown*, 152 S.W.2d at 654. While subject to extinguishment upon abandonment, they otherwise "partake[] in the nature of a corporeal estate." *Id.* In particular, except for the fee owner's statutory right of crossing, a railroad easement generally provides "*absolute* and *exclusive* possession and control" of the subject land "as against the private rights of the owner of the fee . . . and all others." *Chicago, S.F. & C. Ry. Co. v. McGrew,* 15 S.W. 931, 935 (Mo. 1891) (emphasis added); *accord St. Louis, Keokuk & Northwestern Railway Company v. Clark*, 25 S.W. 192, 195 (Mo. 1893). In light of the absolute and exclusive right of possession held by the railroads, recreational trail use takes nothing from the fee owner that was not granted to the railroad.

As Plaintiffs observe, there are some Missouri cases indicating that the right of possession under a railroad easement might not be absolute, depending on the terms of the grant. *See* Plaintiffs' Brief at 29-30. Specifically, in *St. Louis, Iron Mountain & Southern Railway Co. v. Cape Girardeau Bell Telephone Co.*, 114 S.W. 586 (Mo. App. 1908), the Missouri Court of Appeals opined that a railroad

had impinged upon a fee owners' rights by allowing a telephone line to be constructed within a rail corridor, to the extent that line served the general public and not simply the railroad. *Id.* at 589.[10] In *Eureka Real Estate & Investment Co. v. Southern Real Estate & Financial Co.*, 200 S.W.2d 328 (Mo. 1947), the Missouri Supreme Court followed *Cape Girardeau Bell* to hold that that an electric power line (unrelated to railway operations) constructed within the corridor of a street railway likewise exceeded the scope of the railway easement. *Id.* at 332.

But these decisions do not control here. In *Cape Girardeau Bell*, the court reasoned that the right to use the corridor for a telephone line remained with the fee owner because the railroad's interest was limited to railroad purposes and because the telephone use did not "interfere" with railroad use. 114 S.W.2d at 588. If and when a fee owner retains a right of use within a rail corridor—under the general rule that fee owners retain reasonable rights of use that do not interfere with the purposes for which an easement is granted—the railroad cannot exercise or convey such right without taking a property interest belonging to the fee owner. *Id.*;

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[10] The fee owners' rights were not before the court. *Id.* The defendant telephone company had installed its line under contract with a railroad that had acquired its easement by condemning part of a prior railroad's easement. *Id*. at 586-87. The court held that he telephone company's use did not interfere with the plaintiff railroad's easement and thus rejected that railroad's takings claim. *Id.* at 590.

accord Eureka Real Estate, 200 S.W.2d at 332 (holding that owner of railroad easement cannot "create a right in excess of the title held by it").

Here, there is no claim that the fee owners retained the right to use the rail corridor *as a recreational trail*. As Professor Ely observes (Amicus Brief at 23-24), any such use by the fee owner would be incompatible with the railroad easement (right to exclude all others from corridor to ensure safe and unfettered rail operations) and could constitute a trespass under Missouri law. *See* Mo. Ann. Stat. §§ 389.650, 389.653. Professor Ely fails to note, however, that any such trespass would be a trespass *against the railroad*, not against the fee owner. *See* Mo. Stat. Ann. § 389.650(6) (walking on railroad track by person "not connected with . . . or employed upon the railroad" shall be deemed a "trespass" in any personal injury suit *against* the railroad "but not otherwise"). Nothing in Missouri law precludes a railroad from allowing pedestrian or other public access to a rail corridor, where the railroad determines that it is consistent with its operations.

For example, in *Rombauer v. St. Louis-San Francisco Railway Co.*, 34 S.W.2d 155 (Mo. App. 1931), a Missouri court of appeals held that a railroad could use its 50 to 100-foot wide right-of-way to permanently house railway workers and their families in boxcars used as bunkhouses, notwithstanding objections from neighboring property owners. *Id.* at 156-58. The court observed that railroad easements are limited in scope where the terms of a grant "contain words of

restriction and limitation to the clear effect" that the right-of-way "shall be used only for certain specific railroad purposes." *Id.* at 157. But the grant at issue was "broad and general," containing "no limitation upon the company's use of the land except that it must be for purposes incidental to, or connected with, the maintenance and operation of a railroad." *Id.* at 157-58.

Plaintiffs' reliance on *Barfield v. Sho-Me Power Electric Cooperative*, 852 F.3d 795 (8th Cir. 2017), is misplaced. That case involved *non-exclusive* easements limited to electric-power transmission. *Id.* at 799-803. For those reasons, the Eight Circuit held that the fee owners (and not the power company) held the right to use the land for the different and additional purpose of cable television wires. *Id.*

Here, the grants to the railroad were *unlimited* and for a statutory purpose—to "aid in the . . . accommodation of . . . railroads," Mo. Ann. Stat. § 388.210(2)—that generally connotes "absolute" and "exclusive" possession and control of the right-of-way. Interim trail use for the purpose of rail banking is within the terms of the grants and the 1853 statute. Such use does not take any rights of use that the grantors retained with their fee title, including any rights of crossing, mineral rights, and (to the extent they exist under Missouri law) rights to permit others uses of the corridor that do not interfere with railroad operations, e.g., for electric or

telecommunication lines. Accordingly, the CFC correctly determined that the NITU did not take anything from the fee owners.

II. The CFC did not abuse its discretion in declining to consider Plaintiffs' alternative takings theory.

Plaintiffs argue that, even if the CFC correctly construed the scope of the easements (as encompassing interim trail use and rail banking), the CFC abused its discretion in declining to consider their belated argument that the rights-of-way expired, for all purposes, before the NITU was issued. Brief at 44-52. To the contrary, the CFC is (and was) required under its rules to establish scheduling orders with deadlines for motions, *see* R.C.F.C. 16(b)(3)(A), including, as appropriate, motions for summary judgment, *see* R.C.F.C. 16(c)(2)(E). Such deadlines "may be modified but only for good cause and with the judge's consent." R.C.F.C. 16(b)(4). Plaintiffs acknowledge that three factors are relevant to a consideration of their alleged "good cause" for failing to file their alternative summary judgment motion by the courts' January 20, 2020 deadline: (1) "counsel's diligence" (2) "counsel's explanation for [the] delay," and (3) "potential prejudice." Brief at 47-48 (citing *Simio LLC v. FlexSlim Products Inc.*, 983 F.3d 1343, 1365-66 (Fed. Cir. 2020); *Advanced Software Design Corp. v. Fiserv, Inc.*, 641 F.3d 1368, 1381 (Fed Cir. 2011)). A consideration of those factors here shows that Plaintiffs did not have good cause for belatedly raising their

alternative motion, and that the CFC did not abuse its discretion in declining to consider that motion.

A. Plaintiffs did not act diligently or provide a reasonable explanation for their delay.

Plaintiffs argue (Brief at 48-49) that they acted diligently because they raised their alternative theory of takings liability in summary judgment motions before January 20, 2020. But those earlier filings are beside the point. As explained (*supra* pp. 15-16), Plaintiffs first asserted their alternative theory simultaneously with a motion for *reconsideration* of the CFC's 2017 summary judgment ruling rejecting their primary claims. Appx1098-1114. Because the alternative theory could have been asserted from the outset, Plaintiffs were not diligent in waiting to assert it until after they received an adverse ruling on the 35 claims. Regardless, the CFC gave Plaintiffs a pass. In granting their motion for reconsideration (on other grounds), the court gave Plaintiffs leave to reassert the alternative claim in future filings. *See* Appx25 (calling Plaintiffs' alternative motion "premature").

In their subsequent supplemental motion for summary judgment, Plaintiffs duly asserted both of their theories. But because Plaintiffs' primary argument was founded on an improper expert report (Professor Ely's legal opinion submitted as extrinsic evidence), the CFC rejected Plaintiffs' motion in its entirety. Appx29. The court then gave Plaintiffs another pass, giving them leave to refile a corrected motion—on any theory—by January 20, 2020. Appx1896.

Plaintiffs' counsel now assert (Brief at 48-49) that they "did not believe" the January 20, 2020 deadline applied both to their primary claims regarding the scope of the easements and their alternative claims under "prong 3 of *Preseault*." But this contention is belied by the terms of the scheduling order and by counsel's own statements. The scheduling order provided that Plaintiffs "shall" file "*any* further motion for summary judgment" by January 10, 2020. Appx1896 (emphasis added). Nothing in this order or the CFC's summary judgment decision suggested that Plaintiffs were free to reserve arguments or that the court considered the *Preseault* "prong 3" argument (as previously briefed) still pending.

Nor did Plaintiffs themselves so believe at the time. Rather, in a footnote in their January 20, 2020 motion, Plaintiffs specifically advised the CFC that they were no longer arguing their *Preseault* "prong 3" argument because it had become "moot" due to the signing of a trail use agreement. Appx1918 n.6. That event was a condition precedent to the establishment of an interim trail on the 144.3-mile Corridor, which is the use that Plaintiffs contend exceeds the scope of the easements at issue in this appeal. Although the meaning of footnote 4 is somewhat unclear, Plaintiffs evidently decided that their alternative "prong 3" theory was no

longer necessary, once trail use allegedly beyond the scope of the easements became more certain.[11]

Nine months later, in October 2020, Plaintiffs changed their litigation strategy and belatedly filed a stand-alone motion asserting their "prong 3" argument. Appx2165-2184. But Plaintiffs did not seek leave to file this motion out of time; nor did they provide an explanation for their delay. *Id.* Accordingly, the CFC struck the filing, again without prejudice, inviting Plaintiffs to refile it with "a motion for leave." Appx32. The CFC advised Plaintiffs that it would then "consider all properly briefed arguments." *Id*. But Plaintiffs failed to file a timely motion for leave. Instead they waited eight more months—until after the CFC denied their primary motion—to renew their alternative motion. Appx2492-2501. In so doing, they failed to acknowledge the reason they gave the CFC for not filing their alternative motion by the court's January 20, 2020 deadline, and failed to explain why they did not immediately file a motion for leave when the CFC invited them to do so in connection with the first belated filing. *Id.*; Appx2545-2546.

[11] This Court subsequently held that a NITU might cause a temporary taking even if it does not lead to trail use. *See Caquelin*, 959 F.3d at 1371-73. In the present case, the trail use agreement was contingent on financing, raising further questions about the scope of any taking based on the NITU alone. *See* p. 9, *supra.*

B. Plaintiffs' alternative theory is lacking in merit.

Instead of proffering good cause for their delay, Plaintiffs argue only that their alternative argument is "important," by which they mean that they believe the argument is meritorious and that they will suffer "extreme prejudice" if it is not reached. *See* Brief at 49-50. This assertion cannot be sufficient. To allow Plaintiffs to assert the purported merits of their claim as an excuse for failing to timely assert it (or for deliberately choosing not to assert it) is to eviscerate the "good cause" requirement.

Moreover, Plaintiffs' alternative claim is patently unsupported. Even if there has been no service on the tracks since the early 1980s (when the Rock Island Railroad entered bankruptcy), this nonuse alone is not sufficient to show abandonment. *See Hatton*, 162 S.W. at 236.[12] Plaintiffs have not identified any express disclaimer or other action from which an intent to abandon can be implied. The rail line was purchased out of bankruptcy and sold in 1999 to Missouri Central, which leased operating rights to Central Midland in 2004. These two railroads did not decide to pursue a potential relinquishment of their rights in the

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[12] The Transportation Act of 1920 governs the abandonment of rail lines used in interstate commerce and preempts any contrary state law. *See Chicago and North Western Transportation Company v. Kalo Brick & Tile Company*, 450 U.S. 309, 312-323 (1981). But even if Missouri law controls the question for purposes of the takings inquiry, the railroads' actions here cannot be construed as an abandonment, for the reasons stated.

144.3-mile Corridor, until filing the November 2014 notice of exemption. *See* Appx528-532. There is no evidence of track removal until after the NITU. That track removal obviously cannot constitute evidence of intent to abandon *before* the NITU. And the NITU and subsequent trail use agreement cannot be deemed evidence of intent to abandon in light of the CFC's correct determination that interim trail use and rail banking are within the scope of the subject easements. Rather, the implementation of interim trail use and rail banking can only be construed as intent to continue the easements.

To be sure, Plaintiffs contend—in their primary argument—that the interim trail use and rail banking is not allowed by the easements. But Plaintiffs' "alternative" argument matters only in the context of a failure of their primary argument. In that context, the only evidence proffered by Plaintiffs that suggests abandonment is the extended period of nonuse, which by itself is insufficient. *See Hatton*, 162 S.W. at 236.

As the CFC observed, Plaintiffs' failure to prioritize and timely file their alternative motion itself belies the alleged "importance" of the theory. Appx2547. At bottom, the CFC is afforded broad discretion in setting and enforcing deadlines for motions. *See Shipp v. Murphy*, 9 F.4th 694, 702 (8th Cir. 2021) (applying Fed. R. Civ. P. 16(b)(4)). The CFC did not abuse its discretion in determining that Plaintiffs' regret over their failed litigation strategy was not "good cause" for

excusing the missed filing deadline and reopening the proceedings on summary judgment. *See* Appx2544-2547.

CONCLUSION

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

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FORM 19. Certificate of Compliance with Type-Volume Limitations

Form 19
July 2020

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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