No. 16-1663

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NORMA E. CAQUELIN AND KENNETH CAQUELIN

Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

Appeal from the United States Court of Federal Claims
No. 1:14-cv-00037 (Hon. Charles F. Lettow)

CORRECTED OPENING BRIEF AND FEDERAL CIRCUIT RULE 35(a) REQUEST FOR EN BANC REVIEW OF APPELLANT UNITED STATES

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INTRODUCTION

In 1870, a predecessor of the North Central Railway Association ("North Central") acquired an easement to allow its rail line to cross property in rural Iowa. By the time Plaintiffs Norma and Kenneth Caquelin acquired the land subject to this easement, the easement had been in place for some 137 years and the railroad's operations, including abandonment of the rail line, had been subject to federal regulatory jurisdiction and approval for more than a century. Six years after Plaintiffs took title to their property, the railroad sought permission from the Surface Transportation Board ("STB") to formally abandon its rail line. The abandonment process took approximately 11 months, which included a 180-day period requested by the railroad to negotiate with potential recreational trail operators for transfer of the corridor. No agreement for trail use was reached, and the railroad with the STB's approval abandoned the rail line.

Despite Supreme Court direction that regulatory action that does not compel a new occupation of private property cannot constitute a physical taking and that most takings claims are subject to an ad hoc, fact-specific analysis, the Court of Federal Claims ("CFC") held that the 180-day trail-use negotiation period constituted a physical taking per se. Basing its decisions on this Court's rulings in *Ladd v. United States*, 630 F.3d 1015 (2010) ("*Ladd I*")

and *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004), the CFC is poised to reach this same result—of per se liability—each time this legal question is presented, regardless of the particular facts of individual cases.[1]

Ladd I, particularly when read against the backdrop of *Caldwell*, not only has resulted in unjust and incorrect judgments against the government, but has encouraged an onslaught of takings litigation, in which attorneys' fees are guaranteed regardless of the size of the compensation awarded to plaintiffs. *See* Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4654(c). In turn, the CFC has compounded this problem by treating compensation for such claims as automatic, regardless of whether the rail line at issue is in fact converted to trail use under the National Trails System Act Amendments, Pub. L. No. 98-11, § 208(2), 97 Stat. 42, 48 (1983), *codified as amended at* 16 U.S.C. § 1247(d) ("Trails Act"), is abandoned (as in this case), or

[1] The CFC *has* properly recognized that there is no taking when plaintiffs have no property interest in the corridor because the railroad owns the fee or if the railroad owns an interest in its corridor that is broad enough to encompass interim trail use under relevant state law. There is no dispute in this case about the scope of the railroad easements at issue.

For the sake of simplicity, because the scope-of-easement issue is not raised in this case, we do not discuss it in this brief although this Court and the CFC properly understand it as a limit on takings liability. *See*, *e.g.*, *Preseault v. United States*, 100 F.3d 1525, 1533 (Fed. Cir. 1996). Indeed, the scope-of-easement issue is a critical part of a Trails Act takings analysis and our argument herein should in no way be read as suggesting that this factor is irrelevant.

is maintained in rail use due to the railroad's decision *not* to abandon rail service after all (as in *Memmer v. United States*, 122 Fed. Cl. 350 (2015)[2]). The stipulated $900 in compensation due to the landowners in this case may not be large, but the burden imposed on the public fisc by this and similar cases is substantial. Attorneys' fees may amount to many times the compensation award in any case, and the United States is required to expend significant resources defending against claims that should, under traditional takings jurisprudence, not be compensable.

STATEMENT OF RELATED CASES

No appeals from the same civil action were previously before this Court or any other appellate court. Undersigned counsel is not aware of any pending related cases within the meaning of Federal Circuit Rule 47.5.

STATEMENT OF JURISDICTION

Plaintiffs invoked the jurisdiction of the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491, to hear their Fifth Amendment takings claim. The CFC entered judgment under Rule 54(b) of the Rules of the Court of Federal Claims in favor of Plaintiffs on January 6, 2016, following a published opinion, *Caquelin v. United States*, 121 Fed. Cl. 658 (2015). The

[2] After the CFC ruled in *Memmer* that the United States took certain plaintiffs' property, the court scheduled a trial regarding just compensation for early 2017.

United States filed a timely notice of appeal on March 4, 2016. *See* 28 U.S.C. § 2522; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction to review the CFC's judgment under 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUES

Plaintiffs contend that the STB's issuance of the Notice of Interim Trail Use ("NITU")—which provided the railroad a period to attempt to negotiate an agreement for recreational trail use of the rail corridor and which lapsed after 180 days without an agreement being reached or trail use being implemented—constituted a taking of their reversionary interest in the railroad easement. The CFC held that, because such takings claims are analyzed as physical takings under this Court's precedent, issuance of the NITU here constituted a taking per se.

The United States presents the following issues for en banc review pursuant to Federal Circuit Rule 35(a):

1. Whether a takings claim based on issuance of a NITU where no trail-use agreement is reached, no interim trail is created, the time for negotiating a trail-use agreement has lapsed, and the railroad has abandoned its rail line should be analyzed using a regulatory takings, rather than physical takings, framework.
2. Whether a physical takings claim accrues upon issuance of the NITU.

The United States further presents the following issue for panel review:

3. If a NITU-only claim must be analyzed as a physical taking, whether the NITU is a per se taking or whether such a claim is subject to a multi-factor analysis appropriate for temporary physical takings claims.

STATEMENT OF THE CASE

A. Legal Background

1. Rail Regulation and Railbanking

Congress conferred exclusive and plenary authority on the Interstate Commerce Commission (now the STB) to regulate abandonment of nearly all the nation's rail lines in the Transportation Act of 1920, Pub. L. No. 66-152, § 402, 41 Stat. 477–78. *See* 49 U.S.C. §§ 10501(b), 10903; *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). Under this longstanding authority, rail carriers under the STB's purview must "provide . . . transportation or service on reasonable request," 49 U.S.C. § 11101(a), unless the STB agrees to a temporary discontinuance or permanent abandonment of the rail line, *id.* § 10903. A discontinuance allows a rail carrier to "cease operating a line for an indefinite period while preserving the rail corridor for possible reactivation of service," while abandonment, once consummated, removes a line from the national transportation system, terminating the

railroad's financial and managerial responsibilities for the line. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 5 n.3 (1990) ("*Preseault I*"). A grant of abandonment authority to a rail carrier by the STB is permissive: the carrier typically has one year to affirmatively decide to consummate the abandonment, although an extension may be approved if the railroad requests it. 49 C.F.R. §1152.29(e)(2). The STB may exempt a rail line from formal abandonment proceedings under 49 U.S.C. § 10903, providing a streamlined and expedited process for its review, and does so as a matter of course if a line has been dormant for at least two years. *See* 49 U.S.C. §10502(a); 49 C.F.R. § 1152.50.

In 1983, Congress passed the Trails Act, creating an additional option for railroads wishing to terminate rail service, commonly known as railbanking. When a rail corridor is railbanked, the STB retains jurisdiction over the corridor so that it may be returned to active railroad use in the future, but the rail carrier transfers financial and managerial responsibility to a government or private entity, allowing its use in the interim as a recreational trail. *See Preseault I*, 494 U.S. at 6–7. Section 8(d) of the Trails Act ensures that corridors remain available for future rail use by preventing such corridors from being abandoned under state law: "if such interim [trail] use is subject to restoration or reconstruction for railroad purposes, such interim use shall not

be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d).

The railbanking process works as follows. When a rail carrier applies to abandon a rail line, a "state, political subdivision, or qualified private organization" may file a comment indicating an interest "in acquiring or using a right-of-way of a rail line . . . for interim trail use and rail banking." 49 C.F.R. §1152.29(a). If the prospective trail sponsor "is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use," 16 U.S.C. §1247(d), and the rail carrier "agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a [NITU] to the railroad and to the interim trail sponsor for the portion of the right-of-way as to which both parties are willing to negotiate," 49 C.F.R. §1152.29(d)(1). The NITU provides a 180-day period for negotiation (which can be extended upon request), during which time the rail carrier may "discontinue service, cancel any applicable tariffs, and salvage track and materials" after 30 days. 49 C.F.R. § 1152.29(d)(1). If, at the end of this negotiation period, the railroad and prospective trail group reach an agreement, the parties notify the STB and the corridor is railbanked, remaining under STB jurisdiction. If the parties do not reach an agreement, the railroad has one year to decide whether to consummate abandonment of the line

(which can be extended), just as it would have if no NITU had been issued.[3] *Id.* §§ 1152.29(d)(1), (e)(2); *see also Citizens Against Rails-to-Trails v. STB*, 267 F.3d 1144, 1150-53 (D.C. Cir. 2001).

2. Trails Act Takings Litigation

After enactment of the Trails Act, property owners whose land is crossed by railroad easements soon began claiming that railbanking constituted a taking of their property. The Supreme Court confirmed that application of the Trails Act could result in a taking in *Preseault I*, 494 U.S. at 12–17. The subsequent two decades of this Court's case law has at times clarified, and other times obscured, the basis for compensation for these claims. Early cases focused on "use as a public trail" that constitutes a "new use"—and the preclusion of easement abandonment that occurs only when an agreement to allow such use is reached—as the basis for a valid physical takings claim. *See Preseault v. United States*, 100 F.3d 1525, 1550 (Fed. Cir. 1996) ("*Preseault II*"). But recently this Court has held that, simply by triggering the regulatory process that *might* but does not *necessarily* lead to any trail use, the government may have effected a physical taking. Relying on this precedent, the CFC here

[3] To be clear, the STB regulates rail *line* abandonment, not *easement* abandonment. But once the STB's regulatory jurisdiction comes to an end, easement abandonment may occur under state law. *See Preseault I*, 494 U.S. at 920.

has interpreted a mere six-month delay in expiration of a more than 140-year-old-easement to be a physical taking per se, even though no actual trail use ever occurred and the railroad line was promptly abandoned and released from the STB's jurisdiction.

a. *Caldwell* tied physical takings claim accrual to issuance of the NITU for statute of limitations purposes.

This result stems, fundamentally, from how this Court's decision in *Caldwell* has been interpreted. There, the Court was presented with a statute of limitations question: when does a takings claim based on trail use and prevention of easement abandonment accrue? The United States argued to this Court, as the CFC had held, that such claims accrue when a trail use agreement is reached, rather than earlier (such as when the NITU is issued) or later (such as when the corridor is transferred to a trail group). *Caldwell*, 391 F.3d at 1233–34. This Court, however, held that such a takings claim accrued with the issuance of the NITU. This Court reasoned that the STB's "issuance of the NITU is the only *government* action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way" and thus provides the proper takings claim accrual date. *Id.* (emphasis in original). This Court further explained that:

> the NITU operates as a single trigger to several possible outcomes. It may, as in this case, trigger a process that results in a permanent taking in the event that a trail use agreement is reached and abandonment of the right-of-way is effectively blocked. . . . Alternatively, negotiations may fail, and the NITU would then convert into a notice of abandonment. In these circumstances, a temporary taking may have occurred. It is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues.

Id. at 1234; *see also id.* n.8 (citing regulatory takings cases). The Court specifically noted that the case did not present, and the Court did not decide, whether issuance of the NITU in fact constitutes a temporary taking when no trail-use agreement is reached (and thus no railbanking or trail use occurs). *Id.* at 1234 n.7. Instead, *Caldwell* held only that a takings claim based on trail use and prevention of easement reversion accrues for statute of limitations purposes upon issuance of the NITU.[4]

The *Caldwell* plaintiffs sought rehearing en banc, arguing that their claim accrued at the latest of the dates under consideration—when the corridor was physically converted into a trail. Pls.' Pet. for Reh'g En Banc, *Caldwell v. United States,* 391 F.3d 1226 (Fed. Cir. 2004) (No. 03-5152), 2005 WL 3968483, at *7. The United States opposed their petition, stating that "although the majority's conclusion differed from the reading that the United States presented in its

[4] Judge Newman dissented, explaining that in her view a takings claim based on railbanking accrues only when the railroad transfers its easement to a trail operator. *Caldwell*, 391 F.3d at 1237.

brief on appeal, the Court's opinion reflects a permissible construction of the statutory scheme, is consistent with applicable precedent, and does not qualify for rehearing en banc under Rule 35." United States' Opp'n to Pet. for Reh'g En Banc, *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004) (No. 03-5152), 2005 WL 4146730, at *4.

Because the *Caldwell* plaintiffs did not raise the argument that issuance of the NITU itself constituted a regulatory taking, this Court did not address how a court should analyze NITU-only claims, and that important question seemed to remain open. *Caldwell*'s claim-accrual ruling thus appeared defensible and limited, and indeed, the United States defended *Caldwell*'s claim-accrual holding in its opposition to a petition for certiorari in another Trails Act statute-of-limitations case. U.S. Opp'n to Pet. for Writ of Cert., *Illig v. United States*, 557 U.S. 935 (2009) (No. 08-852), 2009 WL 1526939. In doing so, the United States was careful to note its position—not foreclosed by *Caldwell*—that not every delay in an owner's full use of property (the NITU's only true effect where no trail use agreement is reached) constitutes a taking under Supreme Court regulatory takings precedent. *Id.* at *16–17 (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 334–35 (2002)).

b. *Ladd I* held that a taking claim based on a NITU where no trail use agreement is reached should be analyzed as a physical taking.

This Court first faced the question of whether a NITU-only Trails Act takings claim (*i.e.*, where no trail use agreement is reached and no trail use occurs) should be analyzed using a regulatory or physical takings framework in *Ladd I*.[5] The issue on appeal was whether plaintiffs could state a physical takings claim in the absence of a trail use agreement or trail use. The United States contended, consistent with the CFC's ruling, that any such claim should be analyzed using a regulatory takings framework. But this Court held that, under *Caldwell*, even if trail use does not actually later occur, a plaintiff may state a physical takings claim stemming from issuance of the NITU alone, as of the date when that government act occurs. *Ladd I*, 630 F.3d at 1023–24.

The United States petitioned for rehearing en banc of the Court's ruling that the *Ladd* plaintiffs had stated a claim for a physical taking. In a dissent from denial of that petition, Judge Gajarsa, joined by Judge Moore, who

[5] *Ladd* involved two right-of-way segments presenting different facts. The NITU covering the southern portion of the rail line lapsed after 180 days, and the railroad proceeded to abandon that segment. The railroad obtained a 30-day extension of the negotiation period for the northern portion of the line, but those trail use discussions failed as well, and the NITU lapsed for that segment after 210 days. The railroad, however, repeatedly sought one-year extensions for its abandonment of the northern portion of the rail line (per the STB's general regulatory authority over abandonment), and it had not abandoned the line at the time *Ladd* was decided. *Ladd I*, 630 F.3d at 1018.

authored the panel's decision, explained that he believed that *Ladd*'s ruling was compelled by *Caldwell*, but that *Caldwell* was wrong. *Ladd v. United States*, 646 F.3d 910, 911 (Fed. Cir. 2011) (Gajarsa, J. and Moore, J., dissenting). Judge Gajarsa also posited that "some members of this court may have been reluctant to consider this issue en banc" because the United States had not directly challenged *Caldwell*. *Id.*

To date, this Court has not been presented with the question, and has not decided, how to analyze whether a plaintiff actually has a valid physical takings claim based on the issuance of a NITU alone. This case presents both that narrow question, but also the important broader question of whether such a claim should be analyzed in a physical takings framework at all.

B. Factual Background

Apart from *Ladd I*, every previous Trails Act case this Court has considered has involved a trail use agreement and resulting trail use. This case lacks those classic hallmarks of Trails Act takings.

The Caquelins own land near Ackley, Iowa that was traversed by a rail line owned by North Central and its predecessors for more than 140 years. The rail line crossed Plaintiffs' parcels on an easement acquired by the railroad's predecessor in 1870. (Appx003; Appx101–04.) By the time Plaintiffs purchased

their land in 2007 (Appx003; Appx015; Appx094–95), the railroad easement had been in place for 137 years.

North Central filed a notice of exemption under 49 C.F.R. § 1152.50 with the STB on May 13, 2013, indicating its intent to abandon a 10.46-mile segment of its rail line and certifying that no local traffic had moved over the line for more than five years. (Appx003; Appx024–28.) The City of Ackley and the Iowa Natural Heritage Foundation expressed interest and the railroad indicated willingness to negotiate a trail-use agreement, (Appx004; Appx077–79; Appx086.) Accordingly, on July 3, 2015, the STB issued a decision imposing several conditions on the railroad's abandonment of the rail line, including a NITU that provided 180 days for negotiation of an interim trail-use agreement. The NITU provided that during the negotiation period, the railroad could take steps toward abandonment—*i.e.*, removing rails and other fixtures from the corridor—but could not formally abandon the rail line. (Appx004; Appx080–84.) If the parties reached an acceptable trail use/railbanking agreement, railbanking would occur. (Appx083.) If no trail use agreement was reached, the railroad had STB approval to consummate abandonment of the rail line, if it wished to do so. (Appx004; Appx082, 084.)

The NITU expired by its own terms on December 30, 2013. The railroad notified the STB on April 24, 2014, that "as of March 31, 2014, [North

Central] exercised the authority . . . [to] fully abandon [] the subject rail line" between Ackley and Geneva, Iowa. (Appx085; *see also* Appx005.) On May 9, 2014, the STB issued a decision confirming receipt of this notice and stating that the railroad's "[c]onsummation of the abandonment ended the Board's jurisdiction over the line." (Appx108–09.) Accordingly, because no trail use agreement was reached, neither railbanking nor trail use ever occurred, and the NITU's effect—if any at all—was at most a 180-delay in the railroad's abandonment of the rail line at issue. Indeed, the railroad consummated abandonment within the year it would have had to decide whether to actually abandon the line pursuant to STB's authorization.

C. The CFC's Decision and Judgment

The Caquelins filed suit in the CFC on January 16, 2014, after the NITU expired with no trail use agreement having been reached, but before the railroad consummated abandonment of its line. Plaintiffs alleged that the Trails Act resulted in a delay in the railroad's abandonment of its easement, and thus was a taking of Plaintiffs' property for which compensation is due. (ECF No. 1 ¶¶7–10 (Appx015–16).)

The parties cross-moved for summary judgment. The United States agreed that the railroad possessed only an easement crossing the Caquelins' property, rather than a fee simple interest, and that the easement was limited to

railroad purposes. (*See* Appx006–07.) However, the United States contended that because no trail use agreement was reached, issuance of the NITU was not a per se taking under Circuit precedent. (*See* Appx010.) Instead, the United States argued that the court should consider the extent of the burden imposed on Plaintiffs' property interest, which amounted to, at most, a 6-month delay in the railroad's abandonment of its rail line and easement. (*Id.*)

The CFC granted Plaintiffs' motion for summary judgment, opining that *Ladd I* was dispositive of the question whether a taking occurs when the STB issues a NITU but no agreement is reached and no trail use occurs. (Appx009.) The CFC held that a physical taking automatically occurs upon NITU issuance, even when any effect on the easement, like the alleged taking here, is temporary rather than permanent. (Appx010–11.) Accordingly, the CFC declined to consider the extent of the burden on Plaintiffs' property or other factors the government had urged were relevant to whether a taking had in fact occurred. (Appx010.) The parties then reached an agreement regarding appropriate compensation, based on the CFC's decision finding a taking. (ECF Nos. 30, 31.) The CFC entered judgment, reserving the issue of statutory attorneys' fees, and the United States appealed. (Appx011.)

STANDARD OF REVIEW

When reviewing a decision of the Court of Federal Claims, this Court reviews legal conclusions *de novo* and factual findings for clear error. *Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1266 (Fed. Cir. 2009). Whether the United States has taken property is a legal question based on underlying facts. *Maritrans Inc. v. United States*, 342 F.3d 1344, 1350–51 (Fed. Cir. 2003). The burden of proof for establishing required elements of a takings claim lies on the plaintiff; to succeed in a regulatory takings claim, that "heavy" burden includes establishing that the elements of the *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978), balancing test weigh in favor of a finding of taking. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493 (1987); *CCA Assocs. v. United States*, 667 F.3d 1239, 1253 (Fed. Cir. 2011); *Cienega Gardens v. United States*, 503 F.3d 1266, 1288 (Fed. Cir. 2007).

SUMMARY OF ARGUMENT

The finding of a per se taking in this and similar cases is of exceptional importance not only because of the burden on the United States, but also because the finding of per se physical takings liability in NITU-only cases (*i.e.*, where no trail-use agreement is reached or trail use is imposed on plaintiffs' land) is demonstrably wrong under established takings law, which holds that regulatory acts, specifically those that merely delay a property owner's full use

of her property, must be analyzed under a regulatory—not physical—takings framework. *See Tahoe-Sierra*, 535 U.S. 302. The combined effect of two decisions out of this Court runs afoul of this jurisprudence. Most recently, in *Ladd I*, this Court incorrectly rejected the proposition that a NITU-only claim should be analyzed using a regulatory, rather than physical, takings framework. As explained in both the panel's decision and in a dissent to the denial of the United States' petition for rehearing en banc in that case, the Court concluded that the result in *Ladd I* followed from the Court's holding in *Caldwell*, that a physical takings claim accrues upon NITU issuance. Before *Ladd I*, *Caldwell*'s claim-accrual holding—which arose in the statute of limitations context—had not been interpreted to require that *all* Trails Act claims must be analyzed under a physical takings framework.[6] *Ladd I* interpreted *Caldwell* broadly to require that result, a result that is demonstrably inconsistent with Supreme Court takings precedent. The CFC has now taken this error one step further, interpreting *Ladd I* as requiring a finding of a per se physical taking based solely on the issuance of a NITU.

[6] Indeed, still believing that *Caldwell* left open the question whether NITU-only claims would be analyzed using a regulatory takings framework, the United States supported application of *Caldwell*'s claim accrual rule in *Illig*. U.S. Opp'n to Pet. for Writ of Cert., *Illig v. United States*, 557 U.S. 935 (2009) (No. 08-852), 2009 WL 1526939, at *16–17 (citing *Tahoe-Sierra*, 535 U.S. at 334–35 and noting that not every delay in use of property constitutes a taking).

The time has come for this Court to overrule *Ladd I* and, if necessary, *Caldwell* and correct its Trails Act takings law. The case most immediately leading to the incorrect ruling in this case is *Ladd I*. The Court should overturn *Ladd I*'s Trails Act-specific holding that a physical taking claim can be based on a NITU alone, even in the absence of later events that actually trigger trail use and railbanking under Section 8(d) of that Act. The Court should instead recognize that where a NITU does not in fact result in railbanking and trail use, it is simply a regulatory action that at most delays the underlying landowner's full use of her property, and is thus subject to a regulatory takings analysis under *Penn Central*.

If the Court continues to interpret *Caldwell* as requiring the result in *Ladd I*, *Caldwell* should be overruled as well. The Court should hold instead that a physical takings claim stemming from railbanking can accrue only when a trail-use agreement is reached, which is a necessary condition for Section 8(d) of the Trails Act to prevent easement expiration under state law.

Finally, if the Court declines to correct its Trails Act precedent and direct application of a regulatory—not physical—takings analysis to Plaintiffs' claim, it should still reverse the CFC's ruling. That ruling is premised on an incorrect theory that temporary physical impacts are takings per se, and remand this case to the CFC for a proper multifactor fact-specific analysis appropriate for

temporary physical takings claims. Even if a NITU-only Trails Act takings claim is properly conceived of as a physical takings claim, the CFC has incorrectly interpreted *Ladd I* as requiring that all NITUs effect per se takings. Instead, as the Supreme Court recently made explicit in *Arkansas Game and Fish Commission v. United States*, 133 S.Ct. 511 (2012), temporary physical takings claims, as here, are part of the broad majority of takings claims that are subject to fact-specific analysis. The CFC erred in declining to apply such a multi-factor analysis to this (at most) temporary physical takings claim, which this Court should require it to do on remand.

ARGUMENT

I. The issuance of a NITU where no trail use agreement is reached and no trail use occurs should be analyzed as a regulatory taking, and holdings underlying this Court's contrary precedent, in *Ladd I* and, if necessary, *Caldwell*, should be overturned.[7]

This Court's Trails Act precedent holding that the mere regulatory delay caused by the issuance of a NITU allowing for interim trail use negotiations gives rise to a physical taking claim is inconsistent with the Supreme Court's, and this Court's, takings jurisprudence.

[7] We raise these arguments pursuant to Federal Circuit Rule 35(a), which permits parties to present arguments to merits panels on issues foreclosed by circuit precedent but for which hearing en banc is requested. Fed. Cir. R. 35(a). The rule allows arguments "to overrule a binding precedent without petitioning for hearing en banc. The panel will decide whether to ask the regular active judges to consider the case en banc." *Id.*

This inconsistency is apparent in *Ladd I*'s ruling that *all* Trails Act taking claims based on a NITU are physical in nature and that the proper analytical framework for analyzing such claims does not depend on events occurring after the NITU issues. The Court in *Ladd I* believed *Caldwell* compelled that result. The United States does not agree with this reading of *Caldwell*, and the time is ripe for this Court to conform its takings analysis in Trails Act cases to Supreme Court precedent and to the operation of the Trails Act itself. The United States thus respectfully requests this Court to overrule *Ladd I* and, to the extent necessary, *Caldwell* and hold instead that where a NITU *may be* but is not *necessarily* followed by a physical taking, and where no railbanking or trail use results from a NITU, any such Trails Act claims are properly analyzed under a regulatory takings framework.

A. A takings claim based on a NITU that lapses without a trail-use agreement should be evaluated under a regulatory takings framework.

A core principle underlying takings law is the "fundamental distinction" between physical and regulatory takings. *Tahoe-Sierra*, 535 U.S. at 325. Physical takings occur by means of "a direct government appropriation or [a] physical invasion of private property," *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005), whereas regulatory takings involve "regulations prohibiting private uses" that go "too far," *Tahoe-Sierra*, 535 U.S. at 323, 326. In contrast

to regulatory takings, physical takings are "relatively rare, easily identified, and usually represent a greater affront to individual property rights." *Tahoe-Sierra*, 535 U.S. at 324. If there has been a physical seizure or permanent physical occupation, a taking has occurred. *See id*. at 322–23; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). But weighing a claim of regulatory taking "necessarily entails complex factual assessments of the purposes and economic effects of government actions." *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992).

Consistent with these fundamental principles, a delay in the culmination of a railroad's abandonment of its rail line is properly evaluated using a *regulatory*, not *physical*, takings analysis. Under the STB's regulatory process for abandonment, as mandated by statute, a railroad under the jurisdiction of the STB may abandon a rail line only if the STB determines—after balancing the need for continued service against the financial burden of continued service on the railroad—that public convenience and necessity require or permit the abandonment. 49 U.S.C. § 10903. The petition-for-abandonment process, from the first notice of potential abandonment to the STB's decision, may last 180 days.[8] *See* Office of Public Services, STB, *Overview: Abandonments and*

[8] Streamlined "exempt" abandonment proceedings have fewer steps and take less time. *See* 49 C.F.R. § 1152.50.

Alternatives to Abandonments, Appx. I (April 1997).[9] Additional time may be required to allow a financially responsible party to attempt to acquire or undertake subsidized operations of the line, see 49 U.S.C. § 10904; 49 C.F.R. § 1152.27, and even after the STB has finally approved abandonment of the line, the railroad still has one year to decide whether, in fact, it actually *will* abandon the line, a time period subject to annual extensions, *see* 49 C.F.R. § 1152.29(e)(2).

The 180-day period provided by a NITU to allow a railroad and prospective trail sponsor to negotiate a possible trail-use agreement is just one additional aspect of the long-standing regulatory abandonment process. A NITU, issued only at a trail sponsor's and/or railroad's request,[10] provides the railroad an alternative mechanism for relieving itself of responsibility for the corridor through sale or other transfer. And the 180-day period is a modest overlay on a process that already may extend for approximately a year-and-a-half—even absent additional time required for considering financial assistance offers or extensions of the railroad's one-year period for effectuating abandonment. Indeed, here, the entire abandonment process, including the

[9] Available at http://go.usa.gov/x27T4.

[10] At the very least, the railroad must consent to a trail sponsor's request. *See* 49 C.F.R. § 1152.29(d)(1).

NITU's 180-day negotiation period, took approximately 10 1/2 months, less time than the railroad alone could have taken to decide whether to finalize abandonment in the absence of a NITU. The NITU's provision of a 180-day delay in the effectiveness of the STB's approval of abandonment, therefore, is a run-of-the-mill regulatory action that, at most, gives rise to a regulatory takings claim.

It is immaterial that the NITU may temporarily forestall the reversion of a railroad right-of-way to the owner of the burdened land. The Supreme Court's decision in *Tahoe-Sierra* establishes that where a government action temporarily "preserve[s] the status quo" to allow for completion of government decision-making pertaining to the property's future use, that action must be analyzed as a potential regulatory taking under *Penn Central*, taking into consideration the duration of the restriction and the extent of the interference with the property owner's reasonable investment-backed expectations. 535 U.S. at 337, 341–42 (considering a development moratorium preventing development of affected property for 32 months). The Court distinguished a moratorium's regulatory hold on property use from the "classic [physical] taking in which the government directly appropriates private property for its own use." *Id.* at 306, 324 (internal quotation marks omitted).

This case bears the same indicia of regulatory, not physical, government action as did *Tahoe-Sierra*. Where, as here, no trail-use agreement is reached, a NITU (like other potential STB actions) merely imposes a temporary regulatory hold on the progress of the railroad's abandonment of a pre-existing easement that "preserve[s] the status quo." *See id.* at 337. The NITU, at most, may have caused a temporary diminution in the value of Plaintiffs' interest in the land at issue. As *Tahoe-Sierra* explained, such a "temporary restriction that merely causes a diminution in value" is not evaluated as a per se taking, *id.* at 332, because the delay is not tantamount to a physical invasion or appropriation; instead it is an application of a "public program adjusting the benefits and burdens of economic life to promote the common good," *id.* at 324–25 (quoting *Penn Central*, 438 U.S. at 124), and accordingly is properly analyzed under *Penn Central*'s well-recognized regulatory takings framework.

The fact that a NITU may be seen as temporarily maintaining the railroad's easement (if in fact relevant state law bases easement expiration in part on the end of STB jurisdiction) does not subject the NITU's impact to a different analysis. It is well established that a takings claim challenging government action that affect an existing, "voluntarily entered into relationship," should be analyzed as a potential regulatory, rather than physical, taking "'under the multifactor inquiry generally applicable to

nonpossessory governmental activity.'" *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987) (quoting *Loretto*, 458 U.S. at 440). Indeed, before the Court had articulated the concept of a regulatory taking, it weighed the impact of a government regulation that allowed a tenant to continue occupying an apartment after the expiration of its lease, rather than subjecting the regulation to a per se taking test. *See Block v. Hirsh*, 2565 U.S. 135, 156 (1921) (regulation was not taking because it did not go "too far"). More recently, the Court determined that even if an ordinance regulating the relationship between a mobile home park owner and its tenants "amount[ed] to compelled physical occupation because it deprive[d] petitioners of the ability to choose their incoming tenants," this did "not convert regulation into the unwanted physical occupation of land," because having "voluntarily open[ed] their property to occupation by others, petitioners [could not] assert a *per se* right to compensation based on their inability to exclude particular individuals." *Yee*, 503 U.S. at 530–31. *Cf. Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 828–29 (1987) (physical takings analysis applies to *new* public use easement).

Indeed, the category of cases involving true physical occupation are "relatively rare," *Tahoe-Sierra*, 535 U.S. at 324, making the application of physical takings analysis "quite narrow," *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1354 (Fed. Cir. 2002). *See also Loretto*, 458 U.S. at 440 ("So

long as . . . regulations do not require the [property owner] to suffer the physical occupation of a portion of his [property] by a third party, they will be analyzed under the [*Penn Central*] inquiry generally applicable to nonpossessory government activity."); *Horne v. Dep't of Agric.*, 135 S.Ct. 2419, 2425–28 (2015) (discussing distinction between physical and regulatory takings). Here, the government action merely resulted, at most, in a relatively short delay in the abandonment of the rail line and the expiration of an already-existing easement. No third-party occupation occurred because no trail use agreement was reached under which trail use might have occurred. Instead, the government action at most imposed a regulatory condition on an already-existing, voluntarily-created relationship between the underlying property owners and the railroad, as in *Block*, *Yee*, or *Florida Power Corp.*, the result of which preserved the status quo, just like the development moratorium in *Tahoe-Sierra*. Accordingly, Plaintiffs' takings claim should be analyzed using a regulatory—not physical—takings analysis.

Applying a proper evaluation framework here is important because doing so reveals that mere issuance of the NITU did not constitute a taking: the economic impact of the delay in the railroad's abandonment of an easement it held for over 140 years was, at most, minimal; the government action served only to preserve the status quo for a limited period of time; and

Plaintiffs had no reasonable and distinct investment-backed expectations for use of their reversionary property interest that were thwarted by the temporary delay resulting from the NITU. *See Penn Cent.*, 438 U.S. at 124. A remand for application of such an analysis is essential here.

B. This Court should overturn *Ladd I*'s holding that a NITU alone can constitute a physical taking.

As set forth above, only Trails Act claims that involve actual trail use and preclusion of underlying landowners' reversionary rights through railbanking should be analyzed using a physical takings framework. Trails Act claims that involve only NITU issuance or *delay* of reversion—but no trail use agreement, actual trail use, railbanking, or resulting *preclusion* of reversion—should instead be analyzed under a regulatory takings framework. *Ladd I* must be overturned to reconcile Trails Act precedent with other takings law and allow proper analysis of claims like the one here.

Ladd I held that because a takings claim accrues on the date a NITU issues, events after that date "cannot be necessary elements of the claim." 630 F.3d at 1024. In reaching that holding, the *Ladd I* Court quoted a statement from *Caldwell* explaining that, although "the taking [by the NITU] may be abandoned" by the NITU's termination, "'the accrual date of a single taking remains fixed.'" *Id.* at 1025 (quoting *Caldwell*, 391 F.3d at 1235). But it does not follow from this observation that only one type of takings claim may arise

in this context. Separate events may trigger separate types of takings claims. As demonstrated in Part I.A, a NITU (or subsequent grants of extensions for negotiation time by the STB) may create an occasion for a *regulatory* takings claim. But as established in Part I.C, it is only the operation of Section 8(d) of the Trails Act resulting from the railroad's and trail operator's entry into a trail-use agreement that may trigger a *physical* takings claim. While a NITU provides an opportunity for negotiation that *may* in turn result in an agreement and the triggering of Section 8(d), the NITU is not itself the trigger for a physical takings claim under the Trails Act.

But even if these distinct takings claims were merged together, it does not follow that events occurring after the date of the NITU are irrelevant to how a taking claim should be analyzed. *Caldwell* itself plainly contemplated that post-NITU events may affect the nature of that taking claim: *Caldwell* stated that "the NITU operates as a single trigger to several possible outcomes," including that "a trail use agreement is reached and abandonment of the right-of-way is effectively blocked," or that, if negotiations fail, "the NITU would then convert into a notice of abandonment," in which case "a temporary taking may have occurred." *Caldwell*, 391 F.3d at 1234.

In noting these divergent possible outcomes, this Court reasoned that "[i]t is not unusual that the precise nature of the takings claim . . . will not be

clear at the time it accrues." *Id.* Indeed, analyzing a takings claim frequently involves considering the "economic impact" of a government action, *Penn Central*, 438 U.S. at 124, the "severity" of a physical imposition, *Arkansas Game and Fish*, 133 S.Ct. at 522–23 (*see infra* Part II), or the "duration" of a regulatory restriction, *Tahoe-Sierra*, 535 U.S. at 342, and the extent of that impact, severity, or duration may be unclear at the time a claim accrues. Thus, analysis of a takings claim may necessitate consideration of facts that develop well after claim accrual. *Caldwell* does not bar this aspect of a takings liability analysis.

Most significantly, *Caldwell* expressly declined to address "whether the issuance of the NITU in fact involves a compensable temporary taking when no agreement is reached."[11] *Caldwell*, 391 F.3d at 1234 n.7. In doing so, the Court tacitly recognized that NITU-only claims necessarily involve a nuanced analysis of the sort applied to regulatory takings claims—no question concerning the existence of a temporary taking would otherwise exist. This understanding in *Caldwell*—that the NITU triggers several possible courses that may give rise to a takings claim based on *either* a physical or regulatory takings theory (or both)—is consistent with the principle recognized by the Supreme

[11] This could also be understood as acknowledging that not all physical takings claims are compensable per se. *See infra* Part II.

Court in *Yee*, in which the Court held that petitioners did not waive a regulatory takings "claim" when they raised only a physical takings theory in state court. 503 U.S. at 534–35. *Yee* explained that petitioners' arguments there, that the same action constituted a taking "in two different ways, by physical occupation and by regulation, are not separate *claims.* They are, rather, separate *arguments* in support of a single claim—that the ordinance effects an unconstitutional taking." *Id.* Thus, although a takings "claim" may accrue at a date certain, the facts directing the proper analytical framework for evaluating any such claim may develop over time and should not be ignored.[12] While a court might conclude that these facts are not critical for claim accrual, they are certainly relevant to claim analysis.

For all these reasons, the Court should overrule *Ladd I*'s holding that a Trails Act takings claim based on a NITU that lapses without a trail-use agreement must be treated as a physical takings claim. Instead, this Court should hold, consistent with *Tahoe-Sierra*, that under such circumstances, as in this case, the taking claim should be analyzed under a regulatory takings analysis.

[12] The premise of *Yee* was that the *same action* could give rise to different takings theories in support of a single takings claim. As explained above and *infra* Part II.C, here *different actions* could give rise to regulatory or physical takings claims.

C. If necessary, this Court should also overrule *Caldwell* and its progeny regarding the accrual date for a physical taking claim under the Trails Act.

If this Court deems *Ladd*'s reliance on *Caldwell* is correct, it should overrule *Caldwell* and hold that a physical taking claim under the Trails Act can accrue only when an interim trail-use agreement is reached. Although the *Caldwell* rule was not facially unreasonable at the time, time has shown that it fails to account for the full complexity of the Trails Act's interplay with the STB's regulatory abandonment regime and, as interpreted by *Ladd I*, it has led to the untenable result that a mere regulatory delay caused by the NITU gives rise to a physical taking. While the NITU *authorizes* the parties to enter into a trail use agreement, it is only when a trail use agreement is *actually reached* that the preclusive effect of Section 8(d) of the Trails Act is triggered, indefinitely blocking the final abandonment of the rail line and the termination of the easement that would otherwise occur if the railroad's easements were deemed abandoned and extinguished under state law.

A takings claim accrues "when all events have occurred that fix the alleged liability of the Government and entitle the plaintiff to institute an action." *Creppel v. United States*, 41 F.3d 627, 631 (Fed. Cir. 1994). "A claimant under the Fifth Amendment must show that the United States, by some specific action, took a private property interest for a public use without just

compensation. Therefore, a claim under the Fifth Amendment accrues when that taking action occurs." *All. of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994). The United States argued to this Court in *Caldwell* that "the government's liability (if a taking occurred) was fixed" when a trail use agreement was reached, "not when the [STB] issued the NITU." United States' Br. as Appellee, *Caldwell v. United States,* 391 F.3d 1226 (Fed. Cir. 2004) (No-03-5152), 2004 WL 3763407, at *16. We explained that "the NITU authorizes railbanking and interim trail use, contingent upon the parties reaching a trail use agreement." *Id.* at *18. We noted that the NITU "provides time for the parties to negotiate, but until they reach an interim trail use agreement the NITU is effectively inchoate." *Id.* We thus urged that "the CFC held correctly that it is when the parties reach a trail use agreement that the underlying landowner's reversionary rights are preempted, if ever." *Id.* at *18–19.

The *Caldwell* Court repeatedly recognized, consistent with the United States' reasoning, that a taking, if any, does not occur under the Trails Act until an interim trail-use agreement is reached. *Caldwell* explained that, under this Court's precedent, "a Fifth Amendment taking occurs *when*, pursuant to the Trails Act, state law reversionary interests are effectively eliminated *in connection with a conversion of a railroad right-of-way to trail use*." 391 F.3d at 1228

(emphasis added) (citing *Preseault II*, 100 F.3d at 1543; *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004)). The Court acknowledged that such blocking of reversionary rights results from the operation of Section 8(d) of the Trails Act, which provides that "'*interim use [for trails]* shall not be treated . . . as an abandonment of the use of such rights-of-way for railroad purposes.'" *Id.* at 1229 (quoting 16 U.S.C. § 1247(d)) (emphasis added). The Court explained that it is, therefore, Section 8(d)—that "prevents the operation of state laws . . . that would result in extinguishment of easements for railroad purposes and reversion of rights of way to abutting landowners." *Id.* (internal quotation marks and citation omitted); *see also id.* at 1233 (a Trails Act taking, if any, based on interim trail use "occurs when state law reversionary property interests that would otherwise vest in the adjacent landowners are blocked from so vesting").

Caldwell also recognized that the NITU may give rise to a taking claim based on trail use only if a trail-use agreement is reached. The Court explained that the "effect of the [NITU], *if the railroad and prospective trail operator reach an agreement*, is that the STB retains jurisdiction for possible future railroad use and the abandonment of the corridor is blocked." *Id.* at 1229 (emphasis added); *see also id.* at 1230 ("*If . . . an agreement is reached*, the NITU extends indefinitely for the duration of recreation trail use," the "STB retains jurisdiction for

possible future railroad use," and "state law reversionary interests that would normally vest upon abandonment are blocked" (emphasis added)).

Despite acknowledging that any taking based on interim trail use and railbanking occurs only when a trail-use agreement triggers Section 8(d)'s blocking of the corridor's abandonment, the Court ultimately held that such a takings claim accrues with the issuance of the NITU because that is when "state law reversion interests [are] *forestalled* by operation of section 8(d)." *Id.* at 1233 (emphasis added).[13] It is now clear, however, that viewing the NITU as "forestalling" reversionary interests, led the Court down the wrong path. The United States agrees that, when a NITU is later followed by a trail-use

[13] Judge Newman, dissenting, opined that a taking could not have occurred merely upon NITU issuance, because "[n]egotiation of a possible future event may state a hope and a plan, but it is not a fixed, ripe, and compensable taking." *Caldwell*, 391 F.3d at 1237. Judge Newman would have tied claim accrual to transfer of the easement from the railroad to the trail operator, rather than trail use agreement consummation, but rejected NITU issuance as a proper accrual date for the same reasons we argue herein.

Judge Newman elaborated on her reasoning in a later dissent in *Barclay v. United States*, 443 F.3d 1368 (Fed. Cir. 2006), explaining, "[T]he statute and the NITU do not make trail use mandatory, and if trail use is not achieved, the statute effects abandonment of railway use and reversion of the right-of-way easement." 443 F.3d at 1378 (Newman, J., dissenting); *see also id.* at 1380 ("If the ensuing negotiations had failed, such that the trail did not come into being, there could be no taking based on trail use."). The uncertainty regarding an agreement and resulting trail use that is inherent in NITU issuance cannot give rise to a taking on its own because "liability for a taking is based on the change in use of the easement from railroad use to recreational trail. Until that change is fixed and its occurrence firm, there is no accrual of the right to recover compensation for such taking." *Id.* at 1381.

agreement and the blocking of reversionary interests, the regulatory negotiating period authorized by the NITU that led to the agreement may be seen as *temporarily* forestalling an occasion for the vesting of any state-law reversionary interests, which would occur if the carrier ultimately decided to abandon the rail line.[14] But the railroad always has the option of not following through with the abandonment it has requested, and indeed in some circumstances does not consummate abandonment. *See Memmer*, 122 Fed. Cl. 350. The issuance of the NITU alone, absent a trail-use agreement, merely provides a regulatory negotiating period, never implicates Section 8(d) of the Trails Act, and does not "fix the government's liability" for a physical taking.[15]

That is true because, as *Caldwell* recognized, "the NITU operates as a single trigger to several possible outcomes," 391 F.3d at 1234, and the *only* one of these outcomes that effects the blocking of reversionary interests under Section 8(d) is interim trail use. When a NITU lapses, for example, the railroad may decide *not* to abandon the line, in which case no question of vesting of reversionary interests in the corridor is presented. Or, if the railroad

[14] *See* United States' Opp'n to Pet. for Writ of Cert., *Illig v. United States*, 557 U.S. 935 (2009) (No. 08-852), 2009 WL 1526939.

[15] Indeed, The STB's role in the entire conversion proceeding has been described as "ministerial." *Goos v. Interstate Commerce Comm'n*, 911 F.2d 1283, 1295 (8th Cir. 1990).

does abandon the rail line, any reversionary interests in the right-of-way *may* vest under state law at that time.[16] In neither case is the NITU properly seen as triggering Section 8(d) of the Trails Act, which by its terms preempts abandonment only in the event of "such interim use." *See* 16 U.S.C. § 1247(d). Nor is the NITU in those circumstances correctly viewed as temporarily forestalling the vesting of reversionary interests, any more than other of the many aspects of STB abandonment proceedings that may "delay" a railroad's abandonment of a rail line. Such temporary maintenance of the status quo is simply part and parcel of regulatory programs that require agency permission for various actions. *See Tahoe-Sierra*, 535 U.S. at 323–25.

Caldwell also relied on the Court's view that the NITU "is the only *government* action in the railbanking process that operates to prevent abandonment of the corridor." 391 F.3d at 1233–34 (emphasis in original). To be sure, under the current procedures utilized by the STB, no further *agency*

[16] Even if a railroad abandons rail service on a rail corridor, it may use the right-of-way for purposes still within the scope of the easement under relevant state law, potentially including uses like storage of railroad equipment, so that the right-of-way may not be deemed abandoned under state law. *See*, *e.g.*, *Farmers Co-op. Co. v. United States*, 98 Fed. Cl. 797, 803 (2011) (recognizing that railroad may continue to hold easement even if not in "active" service); *Capreal, Inc. v. United States*, 99 Fed. Cl. 133, 144 (2011) (railroad uses could encompass other uses consistent with rail service).

In that way, an end to STB's jurisdiction over a rail line may not even necessarily lead to the expiration of a rail easement under applicable state law.

action takes place when an interim trail-use agreement is reached, although the railroad and future trail operator must now notify the STB if they reach an agreement.[17] But the operation of Section 8(d) itself *does* constitute a government action, albeit an automatic one, that effects a Trails Act taking, if any. Thus, holding that a Trails Act physical takings claim accrues when an interim trail-use agreement triggers Section 8(d) is consistent with this Court's rule that "[w]hat a plaintiff 'may challenge under the Fifth Amendment is what the government has done, not what [third parties] have done.'" *Navajo Nation v. United States*, 631 F.3d 1268, 1274 (Fed. Cir. 2011) (quoting *Fallini v. United States*, 56 F.3d 1378, 1380–83 (Fed. Cir. 1995)). Although the trail-use agreement is reached by third parties, the true basis for a takings claim here is Congress's mandate that Section 8(d) preempts reversionary interests *if* the carrier and trail sponsor reach an agreement. It is not, therefore, third parties that are *causing* the taking, it is the operation of the Trails Act itself, albeit triggered by those parties' actions.

Moreover, the absence of formal agency action when a trail-use agreement is reached is a merely a product of the current structure of the STB's

[17] *Caldwell* noted that STB regulations at that time did not require the railroad and trail operator to notify the STB that an agreement had been finalized. 391 F.3d at 1234. But current STB regulations do require such notice. *See* 49 C.F.R. § 1152.29(h). (*See also* Appx084.)

regulatory process, in which the STB authorizes abandonment before issuing a NITU. Presumably, the STB could change this regulatory process so that a final abandonment decision came only after a NITU expired, thereby more formally marking the start (or absence) of railbanking. But altering the regulatory process would not alter the legal fact that it is Section 8(d) that blocks any reversionary interests, and the accrual date for a taking claim based on Section 8(d) should not hinge on how the STB has *procedurally* structured its regulations. To predicate a ruling on a Trails Act taking claim on the particular form of the STB regulatory process, which is currently streamlined for administrative efficiency, would elevate form over function.

For these reasons, if this Court determines that *Ladd I*'s holding is compelled by *Caldwell*, *Caldwell*'s holding that a physical takings claim accrues when the NITU has issue should be overturned.

II. Even if the Court declines to overrule *Caldwell* or *Ladd I*, a remand is still required for a proper temporary physical takings claim multi-factor balancing analysis.

Should this Court decline our request for en banc review of our argument to overturn *Ladd I* and, if necessary, *Caldwell*, the Court must nonetheless remand this matter to the CFC, because the CFC improperly concluded that there had been a per se temporary physical taking based only on the issuance of the NITU. A proper analysis under *Arkansas Game and Fish*

requires fact-specific consideration rather than application of a per se test. A proper analysis would result in a finding of no taking here.

A. The CFC incorrectly interpreted *Ladd I* as holding that issuance of a NITU constitutes a per se taking.

When determining that Plaintiffs' taking claim here—understood by the CFC as a temporary physical takings claim—was valid, the CFC concluded that *Ladd I* required a finding that issuance of a NITU is necessarily a taking. The CFC concluded that factors such as duration of the impact and degree of interference were "unavailing because they address the issue of damages, rather than liability." (Appx010.) In doing so, the CFC erred, first, by overstating *Ladd I*'s holding and, second, by interpreting *Ladd I* in a manner inconsistent with the Supreme Court's direction that temporary physical takings claims involve consideration of just the type of factors that the United States identified.

Ladd I did not hold that the issuance of a NITU effects a physical taking. In the ruling on appeal in that case, the CFC, on cross-motions for summary judgment, had dismissed plaintiffs' takings claim on the ground that they could not state a claim for a physical taking where no interim trail use agreement was reached and no trail was created on the right-of-way. *Ladd v. United States*, 90 Fed. Cl. 221, 222 (2009) ("Plaintiffs cannot argue a physical taking as the record stands."). The CFC reasoned that in the absence of a trail-use

agreement and trail use, no physical invasion of plaintiffs' property had occurred, and thus there could be no physical taking (plaintiffs had not alleged a regulatory taking). *Id.* at 226–27. This Court reversed and remanded for further proceedings, thus holding that plaintiffs *could* allege a physical taking. The question of whether a physical taking had in fact occurred, or how a physical taking claim should be analyzed, was not before this Court. Nevertheless, the CFC has since taken *Ladd I* to mean that issuance of a NITU actually constitutes a taking per se. The CFC has reached this conclusion both here—where the NITU effected at most a 180-day delay in abandonment—and in an interlocutory decision in *Memmer,* 122 Fed. Cl. 350—where the NITU cannot be said to have effected any delay whatsoever.[18]

To be sure, the panel's decision in *Ladd I* uses strong language suggesting that it understood the accrual of a physical takings claim to be synonymous with the compensability of a physical takings claim, including the opinion's specific statement that it was "remand[ing] for a determination of the compensation owed to the appellants for the taking" of specified right-of-way

[18] In *Memmer*, the railroad submitted a notice of exemption to abandon its rail lines; a potential trail sponsor requested and the STB issued a NITU. 122 Fed. Cl. at 356–57. After several extensions, the NITU expired by its own terms. *Id.* The railroad then had one year to consummate abandonment of the rail lines, but neither did so nor sought an extension of time to do so. *Id.* Nevertheless, the CFC determined that, under *Ladd I*, the NITU effected a taking. *Id.* at 365–66

segments. *Ladd I*, 630 F.3d at 1025. But in a later appeal in *Ladd* regarding various threshold issues, this Court clarified that *Ladd I* "did not decide the government's liability," because it merely reversed the CFC's dismissal of plaintiffs' claims when that court concluded mere "issuance of the 2006 NITU *could not constitute a compensable taking*." *Ladd v. United States*, 713 F.3d 648, 652 (Fed. Cir. 2013) ("*Ladd II*") (emphasis added). This Court accordingly upheld the CFC's consideration on remand of other factors going to liability. *Id.* In other words, *Ladd II* recognized that *Ladd I*'s language regarding compensability of a temporary takings claim language went beyond the limited question before the Court, and is thus dicta that this Court "is free to reject." *See In re McGrew*, 120 F.3d 1236, 1239 (Fed. Cir. 1997) (internal quotation marks omitted).

Moreover, reading *Ladd I* as requiring that the mere issuance of a NITU constitutes a per se physical taking is inconsistent with Supreme Court case law regarding temporary takings, as summarized and confirmed in the Supreme Court's recent decision in *Arkansas Game and Fish.* As demonstrated below, that decision makes plain that temporary physical takings claims, unlike claims stemming from permanent physical invasions, are subject to a multi-factor analysis involving consideration of, *inter alia*, the government action's severity, duration, and interference. *Ark. Game & Fish*, 133 S.Ct. at

522–23. One of the critical factors for "determining the existence *vel non* of a compensable taking" is "time." *Id.* at 522.

For these reasons, the CFC improperly relied on *Ladd I* for the proposition that all temporary physical takings claims stemming from issuance of a NITU where no trail use agreement is reached are compensable. *Ladd I* is instead properly understood as allowing plaintiffs to *allege a physical takings* based on issuance of the NITU, but not to reach the question whether the issuance of NITUs automatically constitute takings. Resolution of that question requires a more nuanced analysis, and the CFC erred by refusing to consider key factors going to the validity of Plaintiffs' claim here.

B. To the extent this claim is properly analyzed as a physical taking, Plaintiffs present only a temporary physical takings claim, which is subject to a fact-specific, balancing analysis.

1. Supreme Court case law compels the application of a fact-specific balancing analysis to Plaintiffs' temporary takings claim.

Because the CFC interpreted *Ladd I* as requiring a per se finding of a taking here, it incorrectly failed to engage in the fact-specific analysis required for temporary physical takings claims. (*See* Appx010.) At the very least, this case must be reversed and remanded to allow the CFC to correct this legal error, which is potentially dispositive of the case.

In *Arkansas Game and Fish*, the Supreme Court explained that "most takings claims turn on situation-specific factual inquiries." 133 S.Ct. at 518 (citing *Penn Cent.*, 438 U.S. at 124); *see also Tahoe-Sierra*, 535 U.S. at 337 (declining to adopt a bright-line rule that a temporary development moratorium was a taking per se). Bright-line situations in which there is a per se taking, by contrast, are "narrow" and "few." *Lingle*, 544 U.S. at 538; *Ark. Game & Fish*, 133 S.Ct. at 518. Temporary physical takings claims, the Court held, fall into this broad category of cases that "should be assessed with reference to the 'particular circumstances of each case.'" *Ark. Game & Fish*, 133 S.Ct. at 521 (quoting *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958)).

The Supreme Court's reasoning was based on well-established case law distinguishing temporary physical takings claims as different from permanent physical takings claims. In *Loretto*, for example, the Court identified three categories of takings—temporary physical takings, permanent physical takings, and regulatory takings, *see Loretto* 458 U.S. at 430—and explained that the mere fact that an "invasion" was "physical" in nature "cannot be viewed as determinative" where it was "temporary and limited in nature." *Id.* at 435 (quoting *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980)) (internal quotation marks omitted); *see also Lingle*, 544 U.S. at 539 (*Penn Central* applies

except where government action is tantamount to permanent physical invasion). The Supreme Court further explained that "temporary limitations are subject to a more complex balancing process [than permanent physical occupations] to determine whether they are a taking." *Ark. Game & Fish*, 133 S.Ct. at 521 (quoting *Loretto*, 458 U.S. at 435 n.12).

While *Arkansas Game and Fish*'s temporary physical takings claim arose in the context of government-induced flooding, the Supreme Court expressly rejected the proposition that cases involving government-induced flooding of a temporary nature should enjoy an automatic exclusion from physical takings analysis. *Id.* at 519–21. The Court recognized that it "ha[s] drawn some bright lines, notably, the rule that a permanent physical occupation of property authorized by government is a taking," *id.* at 518 (citing *Loretto*, 458 U.S. at 426), as is "a regulation that permanently requires a property owner to sacrifice all economically beneficial uses of his or her land," *id.* (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1009 (1992)). But "most takings claims turn on situation-specific factual inquiries." *Id.* (citing *Penn Central*, 438 U.S. at 124). In rejecting the government's argument that a temporary takings claim will never lie based on flooding resulting from the government's operation of a dam, the Court explained instead that the temporary nature of the government action is one factor among many warranting consideration, but does not itself

answer the question of compensability. *Id.* at 519; *see also Tahoe-Sierra*, 535 U.S. at 337. Explaining its interpretation in *Loretto* of *Sanguinetti v. United States*, 264 U.S. 146 (1924), a flooding case where the Court declined to the find a taking, the Court pointed to *Loretto*'s inclusion of temporary flooding cases in the broad category of temporary invasions of property that are "'subject to a more complex balancing process to determine whether they are a taking.'" *Ark. Game & Fish*, 133 S.Ct. at 521 (quoting *Loretto*, 458 U.S. at 435 n.12). And the Court emphasized that it is "incumbent on courts to weigh carefully the relevant facts and circumstances in each case, as instructed by our decisions." *Id.*

The Court's emphasis that temporary takings claims are not subject to per se takings rules is underscored by its reliance on a wide array of takings cases, including temporary physical occupation of private property under exigent circumstances, *see National Board of YMCA v. United States*, 395 U.S. 85 (1969), claims involving repeated action potentially constituting a taking, *see Portsmouth Harbor Land and Hotel Co. v. United States*, 260 U.S. 327 (1922); *Ridge Line, Inc. v. United States*, 346 F.3d 1346 (Fed. Cir. 2003), and cases involving a single action limiting use of private property for a duration of several years, *see Central Eureka Mining Co.*, 357 U.S. 155. These diverse cases indicate the broad application of the principle that physical takings that are less than permanent

are subject to a complex multi-factor, fact-specific analysis. As such, *Arkansas Game and Fish*'s holding that courts must balance all relevant factors clearly applies to physical takings claims of limited duration more generally—including temporary Trails Act takings claim based on the issuance of a NITU that does not result in an interim trail-use agreement—regardless of the type of government action those claims arise from.

2. An appropriate fact-specific analysis here includes weighing the short duration of the government action, the minimal burden imposed, and the absence of interference with reasonable investment-backed expectations for Plaintiffs' property.

Arkansas Game and Fish compiled from a variety of takings cases factors potentially relevant to a temporary physical takings claim analysis. These include: (1) duration of the physical invasion or interference, (2) "the degree to which the invasion is intended or is the foreseeable result of authorized government action," (3) "the character of the land at issue and the owner's reasonable investment-backed expectations regarding the land's use," and (4) "[s]everity of the interference." *Ark. Game & Fish*, 133 S.Ct. at 522 (internal quotation marks omitted).[19] These factors, which the Court did not treat as

[19] On remand, the Federal Circuit included "duration," "causation," "foreseeability," "severity," and "reasonable investment-backed expectations." *Ark. Game & Fish Comm'n v. United States*, 736 F.3d 1364, 1369–75 (Fed. Cir. 2013).

exclusive or necessarily relevant to all factual circumstances, are akin to the "complex of factors" enunciated in *Penn Central*, which include the character of the government action, interference with investment-backed expectations, and economic impact. *See Tahoe-Sierra*, 535 U.S. at 315 n.10.

Application of factors similar to those set forth in *Arkansas Game and Fish* further accords with Justice O'Connor's concurrence in *Preseault I*, which recognizes that "the existence of a taking" depends in part "upon the extent that the federal action burdened that [landowner's reversionary] interest." *Preseault I*, 494 U.S. at 24. Indeed, the extent or severity of the burden on Plaintiffs' reversionary interest is one of the "essentially ad hoc" or "situation-specific factual inquiries" appropriate for a Trails Act temporary physical takings claim. *See Penn Central*, 438 U.S. at 124; *Ark. Game & Fish*, 133 S.Ct. at 518. Other appropriate factors include the duration of the government action (as distinct from the rail carrier's action) and whether the government interfered with an underlying landowner's reasonable and distinct investment-backed expectations. These factors appropriately get at the key inquiry of any takings analysis—whether, considering "fairness and justice," a taking has occurred. *Tahoe-Sierra*, 535 U.S. at 333.

Because the CFC here declined to consider such factors, this Court should at a minimum reverse and remand this matter for the CFC to undertake

an appropriate multi-factor analysis to consider whether a taking occurred here. The United States submits that no taking did occur.

First, as to the duration of the interference, the 180-day duration of any delay in abandonment in this case is exceptionally short, especially given that the railroad easement across Plaintiffs' property has been in existence for over 140 years, and that the carrier chose to abandon the line less than three months after expiration of the 180-day negotiation period. The *total* time consumed between NITU issuance and consummation of abandonment was therefore less than the one-year period (subject to extensions) that a carrier ordinarily has to actually abandon the line after the STB grants permission to do so. *See* 49 C.F.R. § 1152.29(e)(2); *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1350 (Fed. Cir. 2004) (federal regulations at time of the activity in question established the absence of reasonable expectations). The procedures adopted by the STB to provide an opportunity for Section 8(d) of the Trails Act to be triggered thus had *no incremental impact* on the overall regulatory scheme as applied here. By contrast, even years-long delays restricting use of property have been deemed to not constitute takings in other contexts. *See*, *e.g.*, *Tahoe-Sierra*, 535 U.S. at 338 n.34 (rejecting notion that even 6-year delay would constitute categorical taking); *Wyatt v. United States*, 271 F.3d 1090, 1097–98 (Fed. Cir. 2001) (ten-year delay in permitting process not a taking).

Second, the severity of the government's interference here is minimal. Only a small portion of Plaintiffs' property is affected: the land subject to the railroad's easement is only a narrow strip adjacent to the eastern edge of Plaintiffs' rural property. (*See* Appx100.) Any diminution in the economic value of Plaintiffs' property from the at-most 6-month continuance of the easement is speculative at best, and minimal in any event, as evidenced by Plaintiffs' agreement to settle for just compensation of $900. (*See* ECF Nos. 30, 31.) Furthermore, during the 180-day NITU, Plaintiffs retained whatever rights they previously had within the easement-encumbered area: the NITU merely preserved the status quo, imposed no new access or use restrictions or other limitations on the right-of-way, and allowed no public access or other new use of the easement.

Third, there is no indication that Plaintiffs had any investment-backed expectation of regaining an unencumbered interest in the property at issue at *any point*. Any such expectation would not be reasonable, given that the railroad was never required to abandon the rail line (or thereafter allow the easement to expire), even after the STB approved (but did not require) rail line abandonment. *See* 49 C.F.R. § 1152.29(e)(2). There is likewise no evidence that Plaintiffs assigned any value to the land underlying the long-existing railroad easement when they acquired it. And, given that at the time Plaintiffs acquired

the property in 2007, the railroad's easement had been in place for nearly 140 years, it is highly doubtful that Plaintiffs formed any subjective expectation about the prospect of railroad easement abandonment, nor would any expectation be objectively reasonable, particularly given the STB's long history of regulating railroad abandonment. *See Hayfield N. R.R. Co. v. Chicago & N. W. Transp. Co.*, 467 U.S. 622, 628 (1984) (describing history of Interstate Commerce Commission railroad abandonment regulation, beginning in 1920). Nor could Plaintiffs have any reasonable investment-backed expectations that they would regain an unencumbered interest *immediately* upon the rail carrier's expression of an intent to abandon the line, without regard for the federal regulatory process that allows a year (or more) for the carrier to consummate abandonment if it so chooses.

Had the CFC properly considered these factors, as it explicitly declined to do (*see* Appx010), the court should have concluded that no taking occurred here. Accordingly, to the extent this Court determines that Plaintiffs' claim must be analyzed as a physical—rather than regulatory—takings claim, this case must nevertheless be remanded to the CFC for an appropriate multi-factor evaluation.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Federal Claims and remand this case for an appropriate takings analysis.

Respectfully submitted,

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August 2016

90-1-23-14122

DECISION OF COURT OF FEDERAL CLAIMS

In the United States Court of Federal Claims

No. 14-37L

(Filed: June 17, 2015)

****

KENNETH AND NORMA CAQUELIN,	Rails-to-trails takings case; liability for a taking arising upon issuance of a NITU by the STB
Plaintiffs,	
v.	
UNITED STATES,	
Defendant.	

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OPINION AND ORDER

LETTOW, Judge.

In this takings case, a Notice of Interim Trail Use ("NITU") issued by the federal Surface Transportation Board ("STB") authorized conversion of a portion of a railroad line located in Hardin and Franklin Counties, Iowa and its attendant right-of-way into a public recreational trail under Section 208 of the National Trails System Act Amendments of 1983, Pub. L. No. 98-11, § 208, 97 Stat. 42 ("Trails Act") (codified at 16 U.S.C. § 1247(d)).[1] Plaintiffs, Kenneth and

[1]The original purpose of the Trails Act "was to preserve unused railroad rights-of-way by converting them into recreational trails." *Barclay v. United States*, 443 F.3d 1368, 1371 (Fed. Cir. 2006) (citing *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990) ("*Preseault I*")). The Trails Act Amendments in 1983 included new provisions that created a "railbanking"

Norma Caquelin, owned two parcels of land adjacent to the railroad right-of-way on the date of the STB's action. For one parcel, the predecessor railroad had acquired its interest by a right of way deed, and for the other parcel, the railroad had acquired its rights by condemnation. Plaintiffs allege that the successor railroad held easements limited to railroad purposes that were exceeded by issuance of the NITU, rendering the government liable for taking plaintiffs' property without just compensation under the Fifth Amendment. *See, e.g.*, *Preseault I*, 494 U.S. at 12 (holding that the Tucker Act, 28 U.S.C. § 1491(a), provided a remedy for an alleged taking of a property interest in land previously used as a railroad right-of-way that had been transferred to a public entity for use as a public trail).[2] Before the court are plaintiffs' motion for partial summary judgment and defendant's corresponding cross-motion on the issue of liability.

For the reasons stated, the court concludes that the government is liable to the plaintiffs for the taking of their property upon the issuance of the NITU that exceeded the scope of the former easement.

BACKGROUND[3]

The parties' dispute concerns a 10.46-mile strip of land extending from milepost 201.46 near Ackley, Iowa, to milepost 191.0, outside Geneva, Iowa, upon which North Central Railway Association, Inc. ("North Central Railway") previously acquired easements for railway purposes through a series of mesne conveyances. Compl. ¶ 3. A railroad had been constructed by the Eldora Railroad and Coal Company in 1866 from approximately one mile north of Eldora, Iowa, to Ackley, Iowa, for the purpose of transporting coal from the Coal Bank Hill area in the Iowa River valley near Eldora[4] to a connection at Ackley with an east-west railroad, then known as the Dubuque & Sioux City Railroad, which later became part of the Illinois Central Railroad. *See* Pls.' Mem. in Support of Mot. for Partial Summary Judgment on Liability ("Pls.' Mot.") at 12-13, ECF No. 12. Between 1868 and 1870, the line was extended north to Northwood, Iowa, and south to Marshalltown, Iowa, where it connected with the Chicago & North Western Railroad.

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system that allowed rail carriers to transfer management of rail corridors to private or public entities for interim management as public recreational trails while preserving the ability to reactivate the abandoned rail corridors for potential future railroad use. *See* 16 U.S.C. § 1247(d). A NITU serves as the mechanism that bars railroad abandonment during the pendency of trail-use negotiations. *See Preseault I*, 494 U.S. 1.

[2]The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.

[3]The recitation of factual circumstances that follows is taken from the parties' pleadings, their cross-motions for partial summary judgment, and the documentary materials submitted with the parties' motions.

[4]Mining was discontinued many years ago. The locality of the mine now is preserved in name by the Coal Bank Hill Bridge, which traverses the Iowa River between Fallen Rock State Preserve to the north and Pine Lake State Park to the south. The bridge is listed on the National Register of Historic Places.

Id. at 13 & Ex. F (Historic Report (May 9, 2013)). A predecessor extending the rail line, the Central Railroad of Iowa,[5] acquired rights in one of the parcels at issue by a right of way deed, *see id*. at Exs. A-2 (Maps of the Line) & J (Right of Way Deed by Henry and Maria Ihde to Central Railroad of Iowa (filed Apr. 30, 1870)), and rights to the second parcel by a condemnation, *see id*. at Ex. K (Latham Condemnation, Franklin County, Iowa (witnessed Aug. 31, 1870)). North Central Railway acquired property rights in the rail corridor in 1989. *See* United States' Cross-Mot. for Summary Judgment and Mem. in Support, and Opp'n to Pls.' Mot. for Partial Summary Judgment on Liability ("Def.'s Cross-Mot.") at 2-3, ECF No. 18. The rail corridor traverses a rural area of fertile agricultural land. *See id*. at 2; *see also* Pls.' Mot. Ex. I (Map of Parcels). Plaintiffs are residents and citizens of Cedar Falls, Iowa, who acquired the two parcels, numbered 1219200016 and 1219200001, in Franklin County, Iowa, on May 17, 2007, adjacent to the rail corridor. Compl. ¶ 4. Plaintiffs allege that under Iowa law, they gained fee title up to the centerline of the rail corridor in question. Compl. ¶ 4; *see also* Pls.' Mot. at 1-2 & Exs. G (Warranty Deed (May 11, 2007)), H (Summary of Parcels (Jan. 15, 2015)), & I (Map of Parcels); Hr'g Tr. 5:21-25 (May 14, 2015).[6]

On May 13, 2013, North Central Railway filed a Proposed Abandonment with the STB,[7] including a verified notice of exemption pursuant to 49 C.F.R. § 1152.50, seeking to abandon the railroad line on the grounds that "no local traffic has moved over the [l]ine for at least two years" and that "no local or overhead traffic has moved over or on the [l]ine for over five . . . years." Def.'s Cross-Mot. at 3 (citing Pls.' Mot. Ex. F, at 4); *see also* Pls.' Mot. Ex. A-1 (Notice of Exemption (May 9, 2013)).[8] Under STB regulations, the abandonment exception for the railroad

[5]The Central Railroad of Iowa was succeeded by the Central Iowa Railway and eventually became part of the Minneapolis and St. Louis Railway system.

[6]Further citations to the transcript of the hearing held on May 14, 2015 will omit reference to the date.

[7]The STB has authority "to regulate the construction, operation, and abandonment of most railroad lines in the United States." *Caldwell v. United States*, 391 F.3d 1226, 1228 (Fed. Cir. 2004).

[8]49 C.F.R. § 1152.50 addresses abandonments and discontinuances of service and trackage rights that are exempt from the generally applicable procedures outlined under 49 U.S.C. § 10903 and provides, in pertinent part:

> An abandonment or discontinuance of service or trackage rights is exempt if the carrier certifies that *no local traffic has moved over the line for at least 2 years* and any overhead traffic on the line can be rerouted over other lines and that no formal complaint filed by a user of rail service on the line (or a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or any U.S. District Court or has been decided in favor of the complainant within the 2-year period. The complaint must allege (if pending), or prove (if decided) that the carrier has imposed an illegal embargo or other unlawful impediment to service.

line was scheduled to become effective July 5, 2013. *See* Pls.' Mot. at 11-12 (citing Ex. C, at 1 (STB Decision and Notice of Interim Trail Use or Abandonment (July 3, 2013))).

Shortly before the abandonment exception became effective, on June 25, 2013, the City of Ackley and the Iowa National Heritage Foundation (collectively "the City") filed a request for the issuance of a Public Use Condition under 49 U.S.C. § 10905 and a NITU under the Trails Act. *See* Pls.' Mot. Ex. B, at 1 (Pet. for Recons. (dated June 25, 2013 and entered June 26, 2013)); Hr'g Tr. 6:4-11 (noting that "the railroad initially applied purely for abandonment").[9] Two days later, on June 27, 2013, a letter from North Central Railway was entered with the STB indicating North Central Railway's agreement with the requested public use condition and related restrictions and its willingness to negotiate with the Iowa Trails Council regarding acquisition of the railroad line. *See* Def.'s Cross-Mot. at 3-4; *see also* Pls.' Mot. Ex. E (Letter to Chief, Section of Administration, Office of Proceedings, STB from counsel for North Central Railway (dated June 24, 2013 and entered June 27, 2013)). On July 3, 2013, STB accordingly issued a NITU for the railroad line. Pls.' Mot. Ex. C (STB Decision and Notice of Interim Trail Use or Abandonment (July 3, 2013)); *see also* Def.'s Cross-Mot. at 4; Compl. ¶ 5.[10] The NITU provided a 180-day period during which the railroad could negotiate with the potential trail group regarding "railbanking and interim trail use" of the corridor. Def.'s Cross-Mot. at 1 (citing Pls.' Mot. Ex. C, at 4). After the 180-day period, absent an extension, the NITU would expire by its own terms, at which point the railroad would be authorized to abandon the line. *See* Pls.' Mot. Ex. C, at 5.

On October 15, 2013, the Iowa Trails Council filed a Trail Use Request with the STB, and negotiations over a Trail Use Agreement ensued, contemplating that the rail corridor would be used as a public recreational trail with railbanking for possible future activation as a railroad. Compl. ¶ 6.[11] However, no agreement was reached. *See* Def.'s Cross-Mot. at 4. On December

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49 C.F.R. § 1152.50(b) (emphasis added).

[9] 49 U.S.C. § 10905 provides, in relevant part:

> When the [STB] approves an application to abandon or discontinue . . . , the [STB] shall find whether the rail properties that are involved in the proposed abandonment or discontinuance are appropriate for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the [STB] finds that the rail properties proposed to be abandoned are appropriate for public purposes and not required for continued rail operations, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the [STB].

49 U.S.C. § 10905.

[10] Plaintiffs maintained ownership over the two parcels in question on that date. Compl. ¶ 4.

6, 2013, the Iowa National Heritage Foundation requested a 180-day extension to continue negotiations, *see id*. Ex. 1 (Letter to Cynthia T. Brown, STB, from President, Iowa Natural Heritage Foundation (Dec. 6, 2013)), but North Central Railway did not file a letter indicating its consent. On December 30, 2013, the NITU expired. *See id.*, *see also* Hr'g Tr. 29:22 to 30:4. On March 31, 2014, the railroad consummated abandonment of its line, and the STB's regulatory jurisdiction ended. Def.'s Cross-Mot. at 2, 4 & Ex. 3 (STB Decision (May 9, 2014)). On April 24, 2014, North Central Railway notified the STB that it had exercised the authority to fully abandon the line. Pls.' Mot. Ex. D (Notice of Consummation (Apr. 24, 2014)).

On January 16, 2014, plaintiffs filed suit in this court. In their complaint, they allege an uncompensated taking of their property in contravention of the Fifth Amendment. Specifically, plaintiffs argue that cessation of railroad activities across the burdened property effected an abandonment under Iowa law of the railroad-purposes easement, leading to a taking when the STB prevented plaintiffs from regaining use and possession of their property. Compl. ¶¶ 7-9. Plaintiffs aver that the government's action "diminish[ed] the value of the remaining property[] and [engendered] delay damages based upon the delayed payment of compensation." Compl. ¶ 10. Plaintiffs request damages equal to the "full fair market value of the property . . . on the date it was [allegedly] taken, including severance damages and delay damages, and costs and attorneys' fees" in addition to "such further relief as [the] [c]ourt may deem just and proper." Compl. at 3.

On January 16, 2015, plaintiffs filed their motion for partial summary judgment on the issue of liability. *See* Pls.' Mot. On March 6, 2015, the government responded with a cross-motion for partial summary judgment on the same issue. *See* Def.'s Cross-Mot. These cross-motions have now been thoroughly briefed and were argued at a hearing held on May 14, 2015.

STANDARD FOR DECISION

A grant of summary judgment is appropriate if the pleadings, affidavits, and evidentiary materials filed in a case reveal that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a) of the Rules of the Court of Federal Claims ("RCFC"). A material fact is one "that might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute exists when the finder of fact may reasonably resolve the dispute in favor of either party. *Id.* at 250.

The moving party bears the burden of demonstrating the absence of any genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Accordingly, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (alteration in original) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). To establish "that a fact cannot be or is genuinely disputed," a party must "cite[] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials." RCFC 56(c)(1)(A). If the record taken as a whole "could not lead a rational

[11]The complaint incorrectly lists the date as October 15, 2001. Compl. ¶ 6.

trier of fact to find for the non-moving party, there is no 'genuine issue for trial'" and summary judgment is appropriate. *Matsushita*, 475 U.S. at 587 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968)).

The same standard applies when the parties have cross-moved for summary judgment. *See Marriott Int'l Resorts, L.P. v. United States*, 586 F.3d 962, 968 (Fed. Cir. 2009). "The fact that both parties have moved for summary judgment does not mean that the court must grant judgment as a matter of law for one side or the other." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). Rather, the court must evaluate each motion on its own merits, "taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Id.*

ANALYSIS

To find a taking giving rise to liability under the Fifth Amendment in a rails-to-trails case, the court must perform a three-part analysis outlined by the Federal Circuit in *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) ("*Preseault II*"):

> (1) who owned the strips of land involved, specifically did the Railroad . . . acquire only easements, or did it obtain fee simple estates;
>
> (2) if the Railroad acquired only easements, were the terms of the easements limited to use for railroad purposes, or did they include future use as public recreational trails; and
>
> (3) even if the grants of the Railroad's easements were broad enough to encompass recreational trails, had these easements terminated prior to the alleged taking so that the property owners at that time held fee simples unencumbered by the easements.

100 F.3d at 1533; *see also Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009); *Haggart v. United States*, 108 Fed. Cl. 70, 77 (2012); *Geneva Rock Prods., Inc. v. United States*, 107 Fed. Cl. 166, 170 (2012); *Ingram v. United States*, 105 Fed. Cl. 518, 534 (2012); *Longnecker Prop. v. United States*, 105 Fed. Cl. 393, 405 (2012); *Beres v. United States*, 104 Fed. Cl. 408, 423-24 (2012); *Jenkins v. United States*, 102 Fed. Cl. 598, 605 (2011). To prevail, plaintiffs must demonstrate that the railroad held only an easement, rather than a fee simple estate, on their property, and that either the easement did not encompass future use as a public recreational trail or that it terminated prior to the alleged taking.

A. *Easements*

Plaintiffs have satisfied the first element of the *Preseault II* inquiry because it is undisputed by the parties that North Central Railway possessed only an easement for railroad purposes derived from the 1870 Ihde deed and the 1870 Latham Condemnation. *See* Def.'s Cross-Mot. at 3 ("For purposes of summary judgment, the United States does not dispute that under applicable Iowa law and the original deed to the railroad and condemnation proceedings, the railroad acquired an easement for railroad purposes to the segments of the corridor adjacent

to the two parcels of land owned by the [p]laintiffs on the date the NITU was issued."); *see also* Hr'g Tr. 13:23 to 14:1 ("[O]n the first factor [of the *Preseault II* inquiry], there is no dispute for purposes of the summary judgment [motion] that the [p]laintiffs . . . owned fee simple the right-of-way or the rail corridor."). "Under Iowa law, deeds are interpreted according to the ordinary rules of contract construction." *Burgess v. United States*, 109 Fed. Cl. 223, 228 (2013) (citing *Wiegmann v. Baier*, 203 N.W.2d 204, 206 (Iowa 1972); *Maxwell v. McCall*, 145 Iowa 687, 124 N.W. 760 (1910); *Jackson v. Benson*, 54 Iowa 654, 7 N.W. 97 (1880)). Here, the relevant "Right of Way Deed" from Henry and Maria Ihde granted a right of way to the railroad company for "construction of said road," Pls.' Mot. Ex. J, and thus "conveyed to the railroad only an easement for railroad purposes," *Macerich Real Estate Co. v. City of Ames*, 433 N.W.2d 726, 729 (Iowa 1988). Similarly, the Latham Condemnation was "occasioned by the location of the Central Railroad of Iowa, over and across the lands of H. E. Latham," Pls.' Mot. Ex. K, and led to acquisition by the railroad of an easement, *see Hastings v. Burlington & M.R.R.*, 38 Iowa 316 (1874) (holding that with a condemnation for railroad purposes, landowners hold fee title and railroads acquire nothing more than an easement by the condemnation); *see also McKinley v. Waterloo, R.R.*, 368 N.W.2d 131, 133-35 (Iowa 1985) (same). In sum, the Central Railroad of Iowa acquired, and the North Central Railway as successor held, an easement while the plaintiffs retained fee simple title to the parcels. *See McClurg Family Farm, LLC v. United States*, 115 Fed. Cl. 1, 7-11 (2014) (applying Iowa statutory and judicial precedents); *see also Burgess*, 109 Fed. Cl. at 230-31 (same); *Jenkins v. United States*, 102 Fed. Cl. 598, 607 (2011) (same). The court thus must proceed to the other elements of the *Preseault II* analysis.

B. *Limited Use for Railroad Purposes*

In rails-to-trails cases, a taking by the government is established if the railroad acquired only an easement, the easement was limited to railroad purposes, and the scope of the easement does not include recreational trail use upon issuance of a NITU. *See Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010), *reh'g and reh'g en banc denied*, 646 F.3d 910 ("It is settled law that a Fifth Amendment taking occurs in [r]ails-to-[t]rails cases when government action destroys state-defined property rights by converting a railway easement to a recreational trail, *if trail use is outside the scope of the original railway easement*.") (emphasis added). Plaintiffs claim that the STB's issuance of the NITU exceeded the scope of the easement by blocking their reversionary interest and contemplating conversion of the railway into a recreational trail. Pls.' Mot. at 19. Therefore, plaintiffs contend that they are entitled to compensation for a temporary taking of their property. *Id.* at 2.

The government acknowledges that the easements granted to North Central Railway were limited to railroad purposes and did not include recreational trail use. *See, e.g.*, Def.'s Cross-Mot. at 15. However, it contends that the question of whether trail use exceeds the scope of the railroad's easement is "irrelevant" under the circumstances presented because the NITU was in effect for only six months and expired on its own terms, and because no interim trail-use agreement was reached. Def.'s Cross-Mot. at 16; *see also* Hr'g Tr. 14:6-9. The government emphasized that "there was no actual non-railroad use that occurred during the time that the NITU was effective." United States' Reply in Support of Cross-Mot. for Summary Judgment ("Def.'s Reply") at 1, ECF No. 20. Therefore, in the government's view, "[a]lthough the issuance of the NITU may have delayed the railroad's abandonment of an easement . . . , that

delay did not defeat [p]laintiffs' interests nor burden those interests in a manner that rises to the level of a compensable taking." Def.'s Cross-Mot. at 15.

In support of its position, the government largely relies upon, but seeks to distinguish, the Federal Circuit's decisions in *Caldwell*, 391 F.3d 1226, and *Barclay*, 443 F.3d 1368, in which the court of appeals addressed the question of the proper date of accrual in Fifth Amendment rails-to-trails actions. In *Caldwell*, the court held that because the issuance of a NITU is "the only *government* action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way," the proper date of accrual of a takings claim is the date of the NITU issuance. 391 F.3d at 1233-34 (emphasis in original); *see also* Def.'s Cross-Mot. at 11-12. The court explained:

> [T]he NITU operates as a single trigger to several possible outcomes. It may, as in this case, trigger a process that results in a permanent taking in the event that a trail use agreement is reached and abandonment of the right-of-way is effectively blocked. . . . Alternatively, negotiations may fail, and the NITU would then convert into a notice of abandonment. In these circumstances, a temporary taking may have occurred. It is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues.

Caldwell, 391 F.3d at 1234 (citing *Preseault II*, 100 F.3d at 1552; *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004)). In *Barclay*, the court of appeals reaffirmed this resulting "bright-line rule" by holding that the proper date of accrual for several landowners' claims was the date of the NITU issuance. 443 F.3d at 1378.

The government attempts to distinguish *Caldwell* and *Barclay* by observing that while in those cases the STB's issuance of a NITU had led to an interim trail use agreement, no such agreement was reached here. *See* Def.'s Cross-Mot. at 11-12. In addition, the government underscores that in *Caldwell*, the Federal Circuit employed noncommittal language and specifically left open the question of whether issuance of a NITU itself was sufficient to trigger a temporary takings claim, noting that, "[t]his case does not involve, and we do not herein address, whether the issuance of the NITU in fact involves a compensable temporary taking when no agreement is reached." 391 F.3d at 1234 n.7. Correlatively, the government points out that the court's decision in *Barclay* also did not address a temporary takings claim. *See* 443 F.3d 1368. On this basis, the government avers that whether the issuance of a NITU gives rise to a compensable takings claim where no trail agreement is reached and the NITU is not extended is an open question and urges the court to find that the United States is not liable for a taking because "there was no transfer of the railroad's easement" and therefore "no resulting trail use." Def.'s Cross-Mot. at 16; *see also* Hr'g Tr. 22:1-7.

In the Federal Circuit's decision in *Ladd*, 630 F.3d 1015, the government raised, and the court of appeals rejected, virtually identical arguments to those the government is now making. *Ladd* concerned landowners who owned tracts adjacent to a railway in Cochise County, Arizona. The landowners brought a Fifth Amendment takings action against the government after the STB issued a NITU suspending abandonment proceedings by the local railway. *Id*. at 1017-18. After no trail use agreement was reached, the negotiating period was extended. *Id*. At the time that

plaintiffs' claims were first considered on the merits, the NITU was set to expire and trigger the consummation of abandonment of the easement in the following year. The trial court concluded that no taking had occurred, reasoning that "[a] physical taking cannot have occurred in these circumstances, where neither the NITU nor another aspect of the federal abandonment process has resulted in construction of a trail for public use." *Ladd v. United States*, 90 Fed. Cl. 221, 226 (2009), *rev'd and remanded*, 630 F.3d 1015. The court justified its position by explaining that "[i]ssuance of a NITU cannot be a physical taking where the landowners have not suffered a physical invasion of the property in which they claim interests." *Id*.

The Federal Circuit reversed. In doing so, the court stated that it found the government's attempts to distinguish *Caldwell* and *Barclay* to be unpersuasive, reasoning:

> In *Caldwell* and *Barclay*, we indicated that physical occupation is not required. *See, e.g.*, *Barclay*, 443 F.3d at 1374 ("The barrier to reversion is the NITU, not physical ouster from possession."). Indeed, the Barclay appellants' claim accrued while the railroad was still operating. *Id.* "In general, a takings claim accrues when 'all events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence.'" *Boling v. United States*, 220 F.3d 1365, 1370 (Fed. Cir. 2000). Because according to our precedent, a takings claim accrues on the date that a NITU issues, events arising after that date—including entering into a trail use agreement and converting the railway to a recreational trail—cannot be necessary elements of the claim. *Hence it is irrelevant that no trail use agreement has been reached and that no recreational trail has been established*.

Ladd, 630 F.3d at 1024 (emphasis added).[12]

The Federal Circuit's decision in *Ladd* is dispositive here. The court specifically addressed and contemplated the circumstance where a NITU is issued and no trail use agreement is reached. *See Ladd*, 630 F.3d at 1025.[13] As the court of appeals specified, the action by the government that gives rise to a takings claim is the issuance of a NITU by the STB, regardless of the events that follow. *Id.* at 1025. The court stated that "where no trail use agreement is reached, the taking may be temporary. . . . However, physical takings are compensable, even when temporary." *Id.* (citing *Caldwell*, 391 F.3d at 1234; *Barclay*, 443 F.3d at 1348; *Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991) ("A taking can be for a limited term—what

[12]The Federal Circuit in *Ladd* also observed that holding otherwise could potentially deprive landowners of the opportunity to file takings claims entirely if the STB allowed extensions to continue negotiations beyond the six-year statute of limitations period following the issuance of a NITU. *Ladd*, 630 F.3d at 1024 ("[L]andowners whose property is subject to a NITU would be left in the untenable position of having the six-year limitations period running—and even expiring—before they could file suit.").

[13]On remand, the trial court in *Ladd* awarded compensation for a temporary taking. *Ladd v. United States*, 108 Fed. Cl. 609 (2012), *aff'd in relevant part and rev'd in a separate respect*, 713 F.3d 648 (Fed. Cir. 2013).

is 'taken' is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute."); *Yuba Natural Res., Inc. v. United States*, 821 F.2d 638, 641-42 (1987)).[14] In *Ladd*, the court concluded that "the duration of the taking goes to damages, not to whether a compensable taking has occurred." *Id.*[15]

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[14]These statements by the court squarely refute the government's assertion "that the opinions in *Caldwell* and *Barclay* and *Ladd* don't really address or opine on whether an issuance of a NITU involves a compensable temporary taking when no agreement is reached." Hr'g Tr. 28:1-5.

The government's position was also rejected by a judge of this court in *Farmers Cooperative Co. v. United States*, 98 Fed. Cl. 797 (2011), *recons. denied*, 100 Fed. Cl. 579 (2011), which involved the issuance of a NITU where the rail corridor never was converted to use as a recreational trail. The court reasoned that "[b]ecause the issuance of the NITU by the STB . . . forestalled the abandonment process in favor of the potential conversion of the railroad right-of-way to a use outside the scope of the original easement, it blocked the vesting of [p]laintiffs' state law reversionary interests" and therefore constituted a taking. *Id.* at 805 (citing *Ladd*, 630 F.3d at 1023) (in turn citing *Caldwell*, 391 F.3d at 1233-34).

[15]The government argues that unlike the circumstances in *Ladd* and *Farmers Cooperative* in which "the interference with the plaintiffs' 'reversionary' interests was for a period of five to six years," in this case "the NITU was in place for only 180 days" and "the railroad did consummate abandonment . . . shortly after the NITU expired." Def.'s Reply at 5; *see also* Hr'g Tr. 12:7-15. The government suggests that any interference was "minimal" given that the railroads had held the easement "for over 140 years." Def.'s Reply at 5; *see also* Hr'g Tr. 25:4-7 ("[I]f there is a temporary taking, you have to at least go through a balance of factors in establishing whether that taking is compensable."); Hr'g Tr. 27:5-7 ("[A]fter 140-plus years of a railroad track in place, it was probably not prime agricultural land."). The government's arguments are unavailing because they address the issue of damages rather than liability. In that respect also, the government's offhand comment about value may not be accurate as an evidentiary matter because the surrounding land is sufficiently productive that neighboring farmers "ban[d]ed together and bought [the rail easement to] their own land back." Hr'g Tr. 30:2-3.

Applying *Ladd* to the facts at issue is also consistent with Supreme Court precedent on the subject. In *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012), the Supreme Court held that government-induced flooding of temprorary duration may be compensable. The Court specified that "we have rejected the argument that government action must be permanent to qualify as a taking." *Id.* at 519. Similarly, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court observed that an easement of passage of cables, although not a permanent occupation of land, constitutes a physical invasion that "is a government intrusion of an unusually serious character." *Id.* at 433 (citing *Kaiser Aetna v. United States***,** 444 U.S. 164 (1979) (involving the government's imposition of a navigational servitude requiring public access to a landowner's pond)). The Supreme Court has also specified that once the government's actions have "worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during

Accordingly, in light of the termination of the NITU, the court finds that a temporary taking occurred.

C. *Ownership of the Underlying Fee*

A qualifying plaintiff must have owned pertinent property on the date of the taking. The date of the taking is identified as the date "when state law reversionary property interests that would otherwise vest in the adjacent landowners are blocked from so vesting. . . . [T]his occurs when the railroad and trail operator communicate to the STB their intention to negotiate a trail use agreement and the agency issues an NITU that operates to preclude abandonment." *Caldwell*, 391 F.3d at 1233; *see also Ladd*, 630 F.3d at 1025; *Barclay*, 443 F.3d at 1373 ("Thus, a Trails Act taking begins and a takings claim accrues, if at all, on issuance of the NITU."). Therefore, the date of the taking is July 3, 2013, when the NITU was issued. The government has not disputed that plaintiffs then owned the adjacent property and the underlying fee to the centerline of the rail corridor.

CONCLUSION

For the reasons stated, the government is liable for the taking of plaintiffs' property on July 3, 2013, upon issuance of the NITU. Accordingly, plaintiffs' motion for summary judgment on liability is GRANTED. The government's cross-motion for summary judgment on the same issue is DENIED.

The court requests that the parties file a joint status report by July 16, 2015, providing a plan and schedule for addressing damages.

It is so **ORDERED**.

s/ Charles F. Lettow
Charles F. Lettow
Judge

which the taking was effective." *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., Cal.*, 482 U.S. 304, 321 (1987).

STATUTORY AND REGULATORY ADDENDUM

Subsec. (e). Pub. L. 95–625, § 551(17), (19), inserted ''or national historic'' after ''scenic'' in two places and struck out from first proviso ''within two years'' before ''after notice of the selection of the right-of-way''.

Subsec. (g). Pub. L. 95–625, § 551(20), (21), as amended Pub. L. 96–87, § 401(m)(3), struck out second proviso '': *Provided further*, That condemnation is prohibited with respect to all acquisition of lands or interest in lands for the purposes of the Pacific Crest Trail'' after ''connecting trail right-of-way'' and inserted provisions that direct Federal acquisition for trail purposes be limited to high potential route segments or high potential historic sites and that no land or site located along a designated national historic trail or along the Continental Divide Scenic Trail be subject to the provisions of section 1653(f) of title 49 unless that land be deemed to be of historical significance under appropriate historical site criteria such as those for the National Register of Historic Places.

Pub. L. 95–248, § 1(4), substituted ''an average of one hundred and twenty-five acres per mile'' for ''twenty-five acres in any one mile'', and struck out limitation on exercise of authority with respect to a connecting trail right-of-way.

Subsec. (h). Pub. L. 95–625, § 551(17), substituted ''recreation, national scenic, or national historic'' for ''recreation or scenic'' in first sentence, and inserted ''or national historic'' after ''scenic'' in second sentence.

Subsec. (i). Pub. L. 95–625, § 551(17), substituted ''recreation, national scenic, or national historic'' for ''recreation or scenic''.

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of the Interior related to compliance with system activities requiring coordination and approval under this chapter and such functions of Secretary or other official in Department of Agriculture, insofar as they involve lands and programs under jurisdiction of that Department, related to compliance with this chapter with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§ 102(e), (f), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

§ 1247. State and local area recreation and historic trails

(a) Secretary of the Interior to encourage States, political subdivisions, and private interests; financial assistance for State and local projects

The Secretary of the Interior is directed to encourage States to consider, in their comprehensive statewide outdoor recreation plans and proposals for financial assistance for State and local projects submitted pursuant to the Land and Water Conservation Fund Act [16 U.S.C. 460*l*–4 et seq.], needs and opportunities for establishing park, forest, and other recreation and historic trails on lands owned or administered by States, and recreation and historic trails on lands in or near urban areas. The Secretary is also directed to encourage States to consider, in their comprehensive statewide historic preservation plans and proposals for financial assistance for State, local, and private projects submitted pursuant to the Act of October 15, 1966 (80 Stat. 915), as amended [16 U.S.C. 470 et seq.], needs and opportunities for establishing historic trails. He is further directed, in accordance with the authority contained in the Act of May 28, 1963 (77 Stat. 49) [16 U.S.C. 460*l* et seq.], to encourage States, political subdivisions, and private interests, including nonprofit organizations, to establish such trails.

(b) Secretary of Housing and Urban Development to encourage metropolitan and other urban areas; administrative and financial assistance in connection with recreation and transportation planning; administration of urban open-space program

The Secretary of Housing and Urban Development is directed, in administering the program of comprehensive urban planning and assistance under section 701[1] of the Housing Act of 1954, to encourage the planning of recreation trails in connection with the recreation and transportation planning for metropolitan and other urban areas. He is further directed, in administering the urban open-space program under title VII of the Housing Act of 1961 [42 U.S.C. 1500 et seq.], to encourage such recreation trails.

(c) Secretary of Agriculture to encourage States, local agencies, and private interests

The Secretary of Agriculture is directed, in accordance with authority vested in him, to encourage States and local agencies and private interests to establish such trails.

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

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

[1] See References in Text note below.

then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

(e) Designation and marking of trails; approval of Secretary of the Interior

Such trails may be designated and suitably marked as parts of the nationwide system of trails by the States, their political subdivisions, or other appropriate administering agencies with the approval of the Secretary of the Interior.

(Pub. L. 90–543, § 8, Oct. 2, 1968, 82 Stat. 925; Pub. L. 95–625, title V, § 551(22), Nov. 10, 1978, 92 Stat. 3516; Pub. L. 98–11, title II, § 208, Mar. 28, 1983, 97 Stat. 48; Pub. L. 104–88, title III, § 317(1), Dec. 29, 1995, 109 Stat. 949.)

REFERENCES IN TEXT

The Land and Water Conservation Fund Act, referred to in subsec. (a), is Pub. L. 88–578, Sept. 3, 1964, 78 Stat. 897, as amended, which is classified generally to part B (§ 460*l*–4 et seq.) of subchapter LXIX of chapter 1 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 460*l*–4 of this title and Tables.

Act of October 15, 1966, referred to in subsec. (a), is Pub. L. 89–665, as amended, popularly known as the ''National Historic Preservation Act'' which is classified generally to subchapter II (§ 470 et seq.) of chapter 1A of this title. For complete classification of this Act to the Code, see section 470 of this title and Tables.

Act of May 28, 1963, referred to in subsec. (a), is Pub. L. 88–29, May 28, 1963, 77 Stat. 49, as amended, which is classified generally to part A (§ 460*l* et seq.) of subchapter LXIX of chapter 1 of this title. For complete classification of this Act to the Code, see Tables.

Section 701 of the Housing Act of 1954, referred to in subsec. (b), was classified to section 461 of former Title 40, Public Buildings, Property, and Works, prior to repeal by Pub. L. 97–35, title III, § 313(b), Aug. 13, 1981, 95 Stat. 398.

The Housing Act of 1961, referred to in subsec. (b), is Pub. L. 87–70, June 30, 1961, 75 Stat. 149, as amended. Title VII of the Housing Act of 1961 was classified generally to chapter 8C (§ 1500 et seq.) of Title 42, The Public Health and Welfare, and was omitted from the Code pursuant to section 5316 of Title 42 which terminated authority to make grants or loans under such title VII after Jan. 1, 1975. For complete classification of this Act to the Code, see Short Title note set out under section 1701 of Title 12, Banks and Banking, and Tables.

The Railroad Revitalization and Regulatory Reform Act of 1976, referred to in subsec. (d), is Pub. L. 94–210, Feb. 5, 1976, 90 Stat. 31, as amended. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 45, Railroads, and Tables.

AMENDMENTS

1995—Subsec. (d). Pub. L. 104–88 substituted ''Chairman of the Surface Transportation Board'' for ''Chairman of the Interstate Commerce Commission'' and ''the Board'' for ''the Commission''.

1983—Subsecs. (d), (e). Pub. L. 98–11, § 208(2), added subsec. (d) and redesignated former subsec. (d) as (e).

1978—Subsec. (a). Pub. L. 95–625 inserted ''and historic'' after ''establishing park, forest, and other recreation'' and ''administered by States, and recreation'', and directed the Secretary to encourage States to consider in their plans and proposals the needs and opportunities for establishing historic trails.

EFFECTIVE DATE OF 1995 AMENDMENT

Amendment by Pub. L. 104–88 effective Jan. 1, 1996, see section 2 of Pub. L. 104–88, set out as an Effective Date note under section 701 of Title 49, Transportation.

§ 1248. Easements and rights-of-way

(a) Authorization; conditions

The Secretary of the Interior or the Secretary of Agriculture as the case may be, may grant easements and rights-of-way upon, over, under, across, or along any component of the national trails system in accordance with the laws applicable to the national park system and the national forest system, respectively: *Provided*, That any conditions contained in such easements and rights-of-way shall be related to the policy and purposes of this chapter.

(b) Cooperation of Federal agencies with Secretary of the Interior and Secretary of Agriculture

The Department of Defense, the Department of Transportation, the Surface Transportation Board, the Federal Communications Commission, the Secretary of Energy, and other Federal agencies having jurisdiction or control over or information concerning the use, abandonment, or disposition of roadways, utility rights-of-way, or other properties which may be suitable for the purpose of improving or expanding the national trails system shall cooperate with the Secretary of the Interior and the Secretary of Agriculture in order to assure, to the extent practicable, that any such properties having values suitable for trail purposes may be made available for such use.

(c) Abandoned railroad grants; retention of rights

Commencing October 4, 1988, any and all right, title, interest, and estate of the United States in all rights-of-way of the type described in section 912 of title 43, shall remain in the United States upon the abandonment or forfeiture of such rights-of-way, or portions thereof, except to the extent that any such right-of-way, or portion thereof, is embraced within a public highway no later than one year after a determination of abandonment or forfeiture, as provided under such section.

(d) Location, incorporation, and management

(1) All rights-of-way, or portions thereof, retained by the United States pursuant to subsection (c) of this section which are located within the boundaries of a conservation system unit or a National Forest shall be added to and incorporated within such unit or National Forest and managed in accordance with applicable provisions of law, including this chapter.

(2) All such retained rights-of-way, or portions thereof, which are located outside the boundaries of a conservation system unit or a National Forest but adjacent to or contiguous with any portion of the public lands shall be managed pursuant to the Federal Land Policy and Management Act of 1976 [43 U.S.C. 1701 et seq.] and other applicable law, including this section.

(3) All such retained rights-of-way, or portions thereof, which are located outside the boundaries of a conservation system unit or National

isting under prior Acts or portions thereof shall not be affected by the repeal of such prior Act or portions thereof under this section [repealing sections 3071 to 3073 of this title, section 141 of Title 23, Highways, and section 596 of Title 33, Navigation and Navigable Waters].''

§ 4652. Buildings, structures, and improvements

(a) Notwithstanding any other provision of law, if the head of a Federal agency acquires any interest in real property in any State, he shall acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property so acquired and which he requires to be removed from such real property or which he determines will be adversely affected by the use to which such real property will be put.

(b)(1) For the purpose of determining the just compensation to be paid for any building, structure, or other improvement required to be acquired by subsection (a) of this section, such building, structure, or other improvement shall be deemed to be a part of the real property to be acquired notwithstanding the right or obligation of a tenant, as against the owner of any other interest in the real property, to remove such building, structure, or improvement at the expiration of his term, and the fair market value which such building, structure, or improvement contributes to the fair market value of the real property to be acquired, or the fair market value of such building, structure, or improvement for removal from the real property, whichever is the greater, shall be paid to the tenant therefor.

(2) Payment under this subsection shall not result in duplication of any payments otherwise authorized by law. No such payment shall be made unless the owner of the land involved disclaims all interest in the improvements of the tenant. In consideration for any such payment, the tenant shall assign, transfer, and release to the United States all his right, title, and interest in and to such improvements. Nothing in this subsection shall be construed to deprive the tenant of any rights to reject payment under this subsection and to obtain payment for such property interests in accordance with applicable law, other than this subsection.

(Pub. L. 91–646, title III, § 302, Jan. 2, 1971, 84 Stat. 1905.)

§ 4653. Expenses incidental to transfer of title to United States

The head of a Federal agency, as soon as practicable after the date of payment of the purchase price or the date of deposit in court of funds to satisfy the award of compensation in a condemnation proceeding to acquire real property, whichever is the earlier, shall reimburse the owner, to the extent the head of such agency deems fair and reasonable, for expenses he necessarily incurred for—

(1) recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the United States;

(2) penalty costs for prepayment of any preexisting recorded mortgage entered into in good faith encumbering such real property; and

(3) the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the United States, or the effective date of possession of such real property by the United States, whichever is the earlier.

(Pub. L. 91–646, title III, § 303, Jan. 2, 1971, 84 Stat. 1906.)

§ 4654. Litigation expenses

(a) Judgment for owner or abandonment of proceedings

The Federal court having jurisdiction of a proceeding instituted by a Federal agency to acquire real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if—

(1) the final judgment is that the Federal agency cannot acquire the real property by condemnation; or

(2) the proceeding is abandoned by the United States.

(b) Payment

Any award made pursuant to subsection (a) of this section shall be paid by the head of the Federal agency for whose benefit the condemnation proceedings was instituted.

(c) Claims against United States

The court rendering a judgment for the plaintiff in a proceeding brought under section 1346(a)(2) or 1491 of title 28, awarding compensation for the taking of property by a Federal agency, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

(Pub. L. 91–646, title III, § 304, Jan. 2, 1971, 84 Stat. 1906.)

§ 4655. Requirements for uniform land acquisition policies; payments of expenses incidental to transfer of real property to State; payment of litigation expenses in certain cases

(a) Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, an acquiring agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after January 2, 1971, unless he receives satisfactory assurances from such acquiring agency that—

(1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 4651 of this title and the provisions of section 4652 of this title, and

Pub. L. 99–521, §5(a), Oct. 22, 1986, 100 Stat. 2994, related to intervention in Commission proceedings.

Section 10329, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1351; Pub. L. 99–521, §5(b), Oct. 22, 1986, 100 Stat. 2994, related to service of notice in Commission proceedings.

Section 10330, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1352, related to service of process in court proceedings.

Section 10341, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1352, authorized Commission to refer matters to joint boards.

Section 10342, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1353, related to establishment and membership of joint boards.

Section 10343, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1353, related to powers of joint boards.

Section 10344, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1354; Pub. L. 96–296, §36, July 1, 1980, 94 Stat. 826, related to administration and proceedings of joint boards.

Section 10361, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1355, related to Rail Services Planning Office.

Section 10362, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1355; Pub. L. 98–216, §2(5)–(7), Feb. 14, 1984, 98 Stat. 5; Pub. L. 99–509, title IV, §4033(c)(7), Oct. 21, 1986, 100 Stat. 1909; Pub. L. 103–272, §4(j)(13), July 5, 1994, 108 Stat. 1368, related to duties of Rail Services Planning Office.

Section 10363, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1356; Pub. L. 103–272, §4(j)(14), July 5, 1994, 108 Stat. 1369, related to appointment and duties of Director of Rail Services Planning Office.

Section 10364, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1356; Pub. L. 103–272, §5(m)(15), July 5, 1994, 108 Stat. 1377, related to powers of and assistance to Director.

Section 10381, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1357, related to Office of Rail Public Counsel.

Section 10382, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1357; Pub. L. 96–258, §1(3), June 3, 1980, 94 Stat. 425, related to duties and standing of Office of Rail Public Counsel.

Section 10383, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1357; Pub. L. 103–272, §4(j)(14), July 5, 1994, 108 Stat. 1369, related to duties and appointment of Director of Office of Rail Public Counsel.

Section 10384, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1358, related to staff of Office of Rail Public Counsel.

Section 10385, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1358; Pub. L. 103–272, §5(m)(15), July 5, 1994, 108 Stat. 1377, related to powers of Office of Rail Public Counsel.

Section 10386, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1358, related to reports concerning activities of Office of Rail Public Counsel.

Section 10387, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1358, related to budget requests and estimates of Office of Rail Public Counsel.

Section 10388, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1358; Pub. L. 96–73, title III, §301, Sept. 29, 1979, 93 Stat. 557, authorized appropriations for Office of Rail Public Counsel for fiscal year ending Sept. 30, 1980.

CHAPTER 105—JURISDICTION

§ 10501. General jurisdiction

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is—

(A) only by railroad; or

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in—

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country; or

(F) the United States and a place in a foreign country.

(b) The jurisdiction of the Board over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

(c)(1) In this subsection—

(A) the term ''local governmental authority''—

(i) has the same meaning given that term by section 5302(a)[1] of this title; and

(ii) includes a person or entity that contracts with the local governmental authority to provide transportation services; and

(B) the term ''mass transportation'' means transportation services described in section 5302(a)[1] of this title that are provided by rail.

(2) Except as provided in paragraph (3), the Board does not have jurisdiction under this part over—

(A) mass transportation provided by a local government authority; or

(B) a solid waste rail transfer facility as defined in section 10908 of this title, except as provided under sections 10908 and 10909 of this title.

(3)(A) Notwithstanding paragraph (2) of this subsection, a local governmental authority, described in paragraph (2), is subject to applicable laws of the United States related to—

(i) safety;

(ii) the representation of employees for collective bargaining; and

(iii) employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers.

(B) The Board has jurisdiction under sections 11102 and 11103 of this title over transportation

[1] See References in Text note below.

provided by a local governmental authority only if the Board finds that such governmental authority meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission that were in effect immediately before January 1, 1996. The enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act.

(Added Pub. L. 104–88, title I, §102(a), Dec. 29, 1995, 109 Stat. 807; amended Pub. L. 104–287, §5(21), Oct. 11, 1996, 110 Stat. 3390; Pub. L. 110–432, div. A, title VI, §602, Oct. 16, 2008, 122 Stat. 4900.)

REFERENCES IN TEXT

Section 5302 of this title, referred to in subsec. (c)(1)(A)(i), (B), was amended generally by Pub. L. 112–141, div. B, §20004, July 6, 2012, 126 Stat. 623, and, as so amended, no longer contains a subsec. (a) or a definition of ''mass transportation''. However, the term ''local governmental authority'' is defined elsewhere in that section.

The ICC Termination Act of 1995, referred to in subsec. (c)(3)(B), is Pub. L. 104–88, Dec. 29, 1995, 109 Stat. 803. For complete classification of this Act to the Code, see Short Title of 1995 Amendment note set out under section 101 of this title and Tables.

The Railway Labor Act, referred to in subsec. (c)(3)(B), is act May 20, 1926, ch. 347, 44 Stat. 577, as amended, which is classified principally to chapter 8 (§151 et seq.) of Title 45, Railroads. For complete classification of this Act to the Code, see section 151 of Title 45 and Tables.

The Railroad Retirement Act of 1974, referred to in subsec. (c)(3)(B), is act Aug. 29, 1935, ch. 812, as amended generally by Pub. L. 93–445, title I, §101, Oct. 16, 1974, 88 Stat. 1305, which is classified generally to subchapter IV (§231 et seq.) of chapter 9 of Title 45. For further details and complete classification of this Act to the Code, see Codification note set out preceding section 231 of Title 45, section 231t of Title 45, and Tables.

The Railroad Retirement Tax Act, referred to in subsec. (c)(3)(B), is act Aug. 16, 1954, ch. 736, §§3201, 3202, 3211, 3212, 3221, and 3231 to 3233, 68A Stat. 431, as amended, which is classified generally to chapter 22 (§3201 et seq.) of Title 26, Internal Revenue Code. For complete classification of this Act to the Code, see section 3233 of Title 26 and Tables.

The Railroad Unemployment Insurance Act, referred to in subsec. (c)(3)(B), is act June 25, 1938, ch. 680, 52 Stat. 1094, as amended, which is classified principally to chapter 11 (§351 et seq.) of Title 45, Railroads. For complete classification of this Act to the Code, see section 367 of Title 45 and Tables.

PRIOR PROVISIONS

Provisions similar to those in this section were contained in sections 10501 and 10504 of this title prior to the general amendment of this subtitle by Pub. L. 104–88, §102(a).

A prior section 10501, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1359; Pub. L. 96–448, title II, §214(c)(3)–(5), Oct. 14, 1980, 94 Stat. 1915; Pub. L. 103–272, §4(j)(15), July 5, 1994, 108 Stat. 1369, related to jurisdiction of the Interstate Commerce Commission, prior to the general amendment of this subtitle by Pub. L. 104–88, §102(a). See sections 10501 and 15301 of this title.

AMENDMENTS

2008—Subsec. (c)(2). Pub. L. 110–432 amended par. (2) generally. Prior to amendment, text read as follows: ''Except as provided in paragraph (3), the Board does not have jurisdiction under this part over mass transportation provided by a local governmental authority.''

1996—Subsec. (c)(3)(B). Pub. L. 104–287 substituted ''January 1, 1996'' for ''the effective date of the ICC Termination Act of 1995''.

EFFECTIVE DATE

Chapter effective Jan. 1, 1996, except as otherwise provided in Pub. L. 104–88, see section 2 of Pub. L. 104–88, set out as a note under section 701 of this title.

ABOLITION OF INTERSTATE COMMERCE COMMISSION

Interstate Commerce Commission abolished by section 101 of Pub. L. 104–88, set out as a note under section 701 of this title.

§ 10502. Authority to exempt rail carrier transportation

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

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

(2) either—

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

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

(b) The Board may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party. The Board shall, within 90 days after receipt of any such application, determine whether to begin an appropriate proceeding. If the Board decides not to begin a class exemption proceeding, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of an application under this subsection shall be completed within 9 months after it is begun.

(c) The Board may specify the period of time during which an exemption granted under this section is effective.

(d) The Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title. The Board shall, within 90 days after receipt of a request for revocation under this subsection, determine whether to begin an appropriate proceeding. If the Board decides not to begin a proceeding to revoke a class exemption, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of a request under this subsection shall be completed within 9 months after it is begun.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706 of this title. Nothing in this subsection or section 11706 of

AMENDMENTS

2008—Pub. L. 110–432, div. A, title VI, §§ 603(b), 604(b), 605(b), Oct. 16, 2008, 122 Stat. 4903, 4905, added items 10908 to 10910.

§ 10901. Authorizing construction and operation of railroad lines

(a) A person may—

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) provide transportation over, or by means of, an extended or additional railroad line; or

(4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line,

only if the Board issues a certificate authorizing such activity under subsection (c).

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Board shall give reasonable public notice, including notice to the Governor of any affected State, of the beginning of such proceeding.

(c) The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity. Such certificate may approve the application as filed, or with modifications, and may require compliance with conditions (other than labor protection conditions) the Board finds necessary in the public interest.

(d)(1) When a certificate has been issued by the Board under this section authorizing the construction or extension of a railroad line, no other rail carrier may block any construction or extension authorized by such certificate by refusing to permit the carrier to cross its property if—

(A) the construction does not unreasonably interfere with the operation of the crossed line;

(B) the operation does not materially interfere with the operation of the crossed line; and

(C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the parties are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Board for determination. The Board shall make a determination under this paragraph within 120 days after the dispute is submitted for determination.

(Added Pub. L. 104–88, title I, § 102(a), Dec. 29, 1995, 109 Stat. 822.)

PRIOR PROVISIONS

A prior section 10901, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1402; Pub. L. 96–448, title II, § 221, Oct. 14, 1980, 94 Stat. 1928, related to authorizing construction and operation of railroad lines, prior to the general amendment of this subtitle by Pub. L. 104–88, § 102(a).

EFFECTIVE DATE

Chapter effective Jan. 1, 1996, except as otherwise provided in Pub. L. 104–88, see section 2 of Pub. L. 104–88, set out as a note under section 701 of this title.

§ 10902. Short line purchases by Class II and Class III rail carriers

(a) A Class II or Class III rail carrier providing transportation subject to the jurisdiction of the Board under this part may acquire or operate an extended or additional rail line under this section only if the Board issues a certificate authorizing such activity under subsection (c).

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Board shall give reasonable public notice of the beginning of such proceeding.

(c) The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity. Such certificate may approve the application as filed, or with modifications, and may require compliance with conditions (other than labor protection conditions) the Board finds necessary in the public interest.

(d) The Board shall require any Class II rail carrier which receives a certificate under subsection (c) of this section to provide a fair and equitable arrangement for the protection of the interests of employees who may be affected thereby. The arrangement shall consist exclusively of one year of severance pay, which shall not exceed the amount of earnings from railroad employment of the employee during the 12-month period immediately preceding the date on which the application for such certificate is filed with the Board. The amount of such severance pay shall be reduced by the amount of earnings from railroad employment of the employee with the acquiring carrier during the 12-month period immediately following the effective date of the transaction to which the certificate applies. The parties may agree to terms other than as provided in this subsection. The Board shall not require such an arrangement from a Class III rail carrier which receives a certificate under subsection (c) of this section.

(Added Pub. L. 104–88, title I, § 102(a), Dec. 29, 1995, 109 Stat. 823.)

PRIOR PROVISIONS

A prior section 10902, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1403, related to authorizing action by rail carriers to provide adequate, efficient, and safe facilities.

§ 10903. Filing and procedure for application to abandon or discontinue

(a)(1) A rail carrier providing transportation subject to the jurisdiction of the Board under this part who intends to—

(A) abandon any part of its railroad lines; or

(B) discontinue the operation of all rail transportation over any part of its railroad lines,

must file an application relating thereto with the Board. An abandonment or discontinuance may be carried out only as authorized under this chapter.

(2) When a rail carrier providing transportation subject to the jurisdiction of the Board under this part files an application, the application shall include—

(A) an accurate and understandable summary of the rail carrier's reasons for the proposed abandonment or discontinuance;

(B) a statement indicating that each interested person is entitled to make recommendations to the Board on the future of the rail line; and

(C)(i) a statement that the line is available for subsidy or sale in accordance with section 10904 of this title, (ii) a statement that the rail carrier will promptly provide to each interested party an estimate of the annual subsidy and minimum purchase price, calculated in accordance with section 10904 of this title, and (iii) the name and business address of the person who is authorized to discuss the subsidy or sale terms for the rail carrier.

(3) The rail carrier shall—

(A) send by certified mail notice of the application to the chief executive officer of each State that would be directly affected by the proposed abandonment or discontinuance;

(B) post a copy of the notice in each terminal and station on each portion of a railroad line proposed to be abandoned or over which all transportation is to be discontinued;

(C) publish a copy of the notice for 3 consecutive weeks in a newspaper of general circulation in each county in which each such portion is located;

(D) mail a copy of the notice, to the extent practicable, to all shippers that have made significant use (as designated by the Board) of the railroad line during the 12 months preceding the filing of the application; and

(E) attach to the application filed with the Board an affidavit certifying the manner in which subparagraphs (A) through (D) of this paragraph have been satisfied, and certifying that subparagraphs (A) through (D) have been satisfied within the most recent 30 days prior to the date the application is filed.

(b)(1) Except as provided in subsection (d), abandonment and discontinuance may occur as provided in section 10904.

(2) The Board shall require as a condition of any abandonment or discontinuance under this section provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under sections 11326(a) and 24706(c)[1] of this title before May 31, 1998.

(c)(1) In this subsection, the term ''potentially subject to abandonment'' has the meaning given the term in regulations of the Board. The regulations may include standards that vary by region of the United States and by railroad or group of railroads.

(2) Each rail carrier shall maintain a complete diagram of the transportation system operated, directly or indirectly, by the rail carrier. The rail carrier shall submit to the Board and publish amendments to its diagram that are necessary to maintain the accuracy of the diagram. The diagram shall—

(A) include a detailed description of each of its railroad lines potentially subject to abandonment; and

(B) identify each railroad line for which the rail carrier plans to file an application to abandon or discontinue under subsection (a) of this section.

(d) A rail carrier providing transportation subject to the jurisdiction of the Board under this part may—

(1) abandon any part of its railroad lines; or

(2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Board finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Board shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

(e) Subject to this section and sections 10904 and 10905 of this title, if the Board—

(1) finds public convenience and necessity, it shall—

(A) approve the application as filed; or

(B) approve the application with modifications and require compliance with conditions that the Board finds are required by public convenience and necessity; or

(2) fails to find public convenience and necessity, it shall deny the application.

(Added Pub. L. 104–88, title I, §102(a), Dec. 29, 1995, 109 Stat. 823; amended Pub. L. 112–141, div. C, title II, §32932(b), July 6, 2012, 126 Stat. 829.)

REFERENCES IN TEXT

Section 24706(c) of this title, referred to in subsec. (b)(2), was repealed by Pub. L. 105–134, title I, §142(a), Dec. 2, 1997, 111 Stat. 2576, effective 180 days after Dec. 2, 1997.

PRIOR PROVISIONS

A prior section 10903, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1403; Pub. L. 96–448, title IV, §402(a), Oct. 14, 1980, 94 Stat. 1941; Pub. L. 98–216, §2(14), Feb. 14, 1984, 98 Stat. 5; Pub. L. 103–272, §5(m)(24), July 5, 1994, 108 Stat. 1378, related to authorizing abandonment and discontinuance of railroad lines and rail transportation.

AMENDMENTS

2012—Subsec. (b)(2). Pub. L. 112–141 substituted ''24706(c) of this title before May 31, 1998'' for ''24706(c) of this title''.

EFFECTIVE DATE OF 2012 AMENDMENT

Amendment by Pub. L. 112–141 effective Oct. 1, 2012, see section 3(a) of Pub. L. 112–141, set out as an Effective and Termination Dates of 2012 Amendment note under section 101 of Title 23, Highways.

RAILROAD BRANCHLINE ABANDONMENTS BY BURLINGTON NORTHERN RAILROAD IN NORTH DAKOTA

Pub. L. 97–102, title IV, §402, Dec. 23, 1981, 95 Stat. 1465, as amended by Pub. L. 102–143, title III, §343, Oct. 28, 1991, 105 Stat. 948, provided that: ''Notwithstanding any other provision of law or of this Act, none of the funds provided in this or any other Act shall hereafter be used by the Interstate Commerce Commission to approve railroad branchline abandonments in the State of North Dakota by the entity generally known as the Burlington Northern Railroad, or its agents or assignees, in excess of a total of 350 miles, except that exempt abandonments and discontinuances that are effectuated pursuant to section 1152.50 of title 49 of the Code of Federal Regulations after the date of enactment of

[1] See References in Text note below.

the Department of Transportation and Related Agencies Appropriations Act, 1992 [Oct. 28, 1991], shall not apply toward such 350-mile limit: *Provided*, That this section shall be in lieu of section 311 (amendment numbered 93) as set forth in the conference report and the joint explanatory statement of the committee of conference on the Department of Transportation and Related Agencies Appropriations Act, 1982 (H.R. 4209), filed in the House of Representatives on November 13, 1981 (H. Rept. No. 97–331).'' [Section 311 of H.R. 4209 is section 311 of Pub. L. 97–102, title III, Dec. 23, 1981, 95 Stat. 1460, which is not classified to the Code.] Similar provisions were contained in Pub. L. 97–92, title IV, § 115, Dec. 15, 1981, 95 Stat. 1196.

[Interstate Commerce Commission abolished and functions of Commission transferred, except as otherwise provided in Pub. L. 104–88, to Surface Transportation Board effective Jan. 1, 1996, by section 702 of this title, and section 101 of Pub. L. 104–88, set out as a note under section 701 of this title. References to Interstate Commerce Commission deemed to refer to Surface Transportation Board, a member or employee of the Board, or Secretary of Transportation, as appropriate, see section 205 of Pub. L. 104–88, set out as a note under section 701 of this title.]

§ 10904. Offers of financial assistance to avoid abandonment and discontinuance

(a) In this section—

(1) the term ''avoidable cost'' means all expenses that would be incurred by a rail carrier in providing transportation that would not be incurred if the railroad line over which the transportation was provided were abandoned or if the transportation were discontinued. Expenses include cash inflows foregone and cash outflows incurred by the rail carrier as a result of not abandoning or discontinuing the transportation. Cash inflows foregone and cash outflows incurred include—

(A) working capital and required capital expenditure;

(B) expenditures to eliminate deferred maintenance;

(C) the current cost of freight cars, locomotives, and other equipment; and

(D) the foregone tax benefits from not retiring properties from rail service and other effects of applicable Federal and State income taxes; and

(2) the term ''reasonable return'' means—

(A) if a rail carrier is not in reorganization, the cost of capital to the rail carrier, as determined by the Board; and

(B) if a rail carrier is in reorganization, the mean cost of capital of rail carriers not in reorganization, as determined by the Board.

(b) Any rail carrier which has filed an application for abandonment or discontinuance shall provide promptly to a party considering an offer of financial assistance and shall provide concurrently to the Board—

(1) an estimate of the annual subsidy and minimum purchase price required to keep the line or a portion of the line in operation;

(2) its most recent reports on the physical condition of that part of the railroad line involved in the proposed abandonment or discontinuance;

(3) traffic, revenue, and other data necessary to determine the amount of annual financial assistance which would be required to continue rail transportation over that part of the railroad line; and

(4) any other information that the Board considers necessary to allow a potential offeror to calculate an adequate subsidy or purchase offer.

(c) Within 4 months after an application is filed under section 10903, any person may offer to subsidize or purchase the railroad line that is the subject of such application. Such offer shall be filed concurrently with the Board. If the offer to subsidize or purchase is less than the carrier's estimate stated pursuant to subsection (b)(1), the offer shall explain the basis of the disparity, and the manner in which the offer is calculated.

(d)(1) Unless the Board, within 15 days after the expiration of the 4-month period described in subsection (c), finds that one or more financially responsible persons (including a governmental authority) have offered financial assistance regarding that part of the railroad line to be abandoned or over which all rail transportation is to be discontinued, abandonment or discontinuance may be carried out in accordance with section 10903.

(2) If the Board finds that such an offer or offers of financial assistance has been made within such period, abandonment or discontinuance shall be postponed until—

(A) the carrier and a financially responsible person have reached agreement on a transaction for subsidy or sale of the line; or

(B) the conditions and amount of compensation are established under subsection (f).

(e) Except as provided in subsection (f)(3), if the rail carrier and a financially responsible person (including a governmental authority) fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Board establish the conditions and amount of compensation.

(f)(1) Whenever the Board is requested to establish the conditions and amount of compensation under this section—

(A) the Board shall render its decision within 30 days;

(B) for proposed sales, the Board shall determine the price and other terms of sale, except that in no case shall the Board set a price which is below the fair market value of the line (including, unless otherwise mutually agreed, all facilities on the line or portion necessary to provide effective transportation services); and

(C) for proposed subsidies, the Board shall establish the compensation as the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line.

(2) The decision of the Board shall be binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the Board's decision. In such a case, the abandonment or discontinuance may be carried out immediately, unless other offers are being considered pursuant to paragraph (3) of this subsection.

(3) If a rail carrier receives more than one offer to subsidize or purchase, it shall select the

offeror with whom it wishes to transact business, and complete the subsidy or sale agreement, or request that the Board establish the conditions and amount of compensation before the 40th day after the expiration of the 4-month period described in subsection (c). If no agreement on subsidy or sale is reached within such 40-day period and the Board has not been requested to establish the conditions and amount of compensation, any other offeror whose offer was made within the 4-month period described in subsection (c) may request that the Board establish the conditions and amount of compensation. If the Board has established the conditions and amount of compensation, and the original offer has been withdrawn, any other offeror whose offer was made within the 4-month period described in subsection (c) may accept the Board's decision within 20 days after such decision, and the Board shall require the carrier to enter into a subsidy or sale agreement with such offeror, if such subsidy or sale agreement incorporates the Board's decision.

(4)(A) No purchaser of a line or portion of line sold under this section may transfer or discontinue service on such line prior to the end of the second year after consummation of the sale, nor may such purchaser transfer such line, except to the rail carrier from whom it was purchased, prior to the end of the fifth year after consummation of the sale.

(B) No subsidy arrangement approved under this section shall remain in effect for more than one year, unless otherwise mutually agreed by the parties.

(g) Upon abandonment of a railroad line under this chapter, the obligation of the rail carrier abandoning the line to provide transportation on that line, as required by section 11101(a), is extinguished.

(Added Pub. L. 104–88, title I, §102(a), Dec. 29, 1995, 109 Stat. 825.)

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 10905 of this title prior to the general amendment of this subtitle by Pub. L. 104–88, §102(a).

A prior section 10904, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1404; Pub. L. 96–448, title IV, §402(b), Oct. 14, 1980, 94 Stat. 1941; Pub. L. 98–216, §2(4), Feb. 14, 1984, 98 Stat. 5, related to filing and procedure for applications to abandon or discontinue railroad lines or rail transportation, prior to the general amendment of this subtitle by Pub. L. 104–88, §102(a). See section 10903 of this title.

§ 10905. Offering abandoned rail properties for sale for public purposes

When the Board approves an application to abandon or discontinue under section 10903, the Board shall find whether the rail properties that are involved in the proposed abandonment or discontinuance are appropriate for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Board finds that the rail properties proposed to be abandoned are appropriate for public purposes and not required for continued rail operations, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Board. The conditions may include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the order, unless the properties have first been offered, on reasonable terms, for sale for public purposes.

(Added Pub. L. 104–88, title I, §102(a), Dec. 29, 1995, 109 Stat. 827.)

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 10906 of this title prior to the general amendment of this subtitle by Pub. L. 104–88, §102(a).

A prior section 10905, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1405; Pub. L. 96–448, title IV, §402(c), Oct. 14, 1980, 94 Stat. 1942; Pub. L. 103–272, §4(j)(26), July 5, 1994, 108 Stat. 1369, related to offers of financial assistance to avoid abandonment and discontinuance, prior to the general amendment of this subtitle by Pub. L. 104–88, §102(a). See section 10904 of this title.

§ 10906. Exception

Notwithstanding section 10901 and subchapter II of chapter 113 of this title, and without the approval of the Board, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

(Added Pub. L. 104–88, title I, §102(a), Dec. 29, 1995, 109 Stat. 827.)

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 10907 of this title prior to the general amendment of this subtitle by Pub. L. 104–88, §102(a).

A prior section 10906, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1406, related to offering abandoned rail properties for sale for public purposes, prior to the general amendment of this subtitle by Pub. L. 104–88, §102(a). See section 10905 of this title.

§ 10907. Railroad development

(a) In this section, the term ''financially responsible person'' means a person who—

(1) is capable of paying the constitutional minimum value of the railroad line proposed to be acquired; and

(2) is able to assure that adequate transportation will be provided over such line for a period of not less than 3 years.

Such term includes a governmental authority but does not include a Class I or Class II rail carrier.

(b)(1) When the Board finds that—

(A)(i) the public convenience and necessity require or permit the sale of a particular railroad line under this section; or

(ii) a railroad line is on a system diagram map as required under section 10903 of this title, but the rail carrier owning such line has not filed an application to abandon such line under section 10903 of this title before an application to purchase such line, or any required preliminary filing with respect to such application, is filed under this section; and

(B) an application to purchase such line has been filed by a financially responsible person,

(h) FEES.—The Board may charge permit applicants reasonable fees to implement this section, including the costs of third-party consultants.

(i) DEFINITIONS.—In this section the terms ''solid waste'', ''solid waste rail transfer facility'', and ''State requirements'' have the meaning given such terms in section 10908(e).

(Added Pub. L. 110–432, div. A, title VI, § 604(a), Oct. 16, 2008, 122 Stat. 4903.)

REFERENCES IN TEXT

The date of enactment of the Clean Railroads Act of 2008, referred to in subsecs. (a)(2), (b), and (e), is the date of enactment of title VI of div. A of Pub. L. 110–432, which was approved Oct. 16, 2008.

Public Law 108–421, referred to in subsec. (c)(2), is Pub. L. 108–421, Nov. 30, 2004, 118 Stat. 2375, known as the Highlands Conservation Act, which is not classified to the Code.

PRIOR PROVISIONS

For prior section 10909, see note set out under section 10907 of this title.

§ 10910. Effect on other statutes and authorities

Nothing in section 10908 or 10909 is intended to affect the traditional police powers of the State to require a rail carrier to comply with State and local environmental, public health, and public safety standards that are not unreasonably burdensome to interstate commerce and do not discriminate against rail carriers.

(Added Pub. L. 110–432, div. A, title VI, § 605(a), Oct. 16, 2008, 122 Stat. 4905.)

PRIOR PROVISIONS

For prior section 10910, see note set out under section 10907 of this title.

CHAPTER 111—OPERATIONS

SUBCHAPTER I—GENERAL REQUIREMENTS

SUBCHAPTER II—CAR SERVICE

SUBCHAPTER III—REPORTS AND RECORDS

SUBCHAPTER IV—RAILROAD COST ACCOUNTING

SUBCHAPTER I—GENERAL REQUIREMENTS

§ 11101. Common carrier transportation, service, and rates

(a) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request. A rail carrier shall not be found to have violated this section because it fulfills its reasonable commitments under contracts authorized under section 10709 of this title before responding to reasonable requests for service. Commitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable.

(b) A rail carrier shall also provide to any person, on request, the carrier's rates and other service terms. The response by a rail carrier to a request for the carrier's rates and other service terms shall be—

(1) in writing and forwarded to the requesting person promptly after receipt of the request; or

(2) promptly made available in electronic form.

(c) A rail carrier may not increase any common carrier rates or change any common carrier service terms unless 20 days have expired after written or electronic notice is provided to any person who, within the previous 12 months—

(1) has requested such rates or terms under subsection (b); or

(2) has made arrangements with the carrier for a shipment that would be subject to such increased rates or changed terms.

(d) With respect to transportation of agricultural products, in addition to the requirements of subsections (a), (b), and (c), a rail carrier shall publish, make available, and retain for public inspection its common carrier rates, schedules of rates, and other service terms, and any proposed and actual changes to such rates and service terms. For purposes of this subsection, agricultural products shall include grain as defined in section 3 of the United States Grain Standards Act (7 U.S.C. 75) and all products thereof, and fertilizer.

(e) A rail carrier shall provide transportation or service in accordance with the rates and service terms, and any changes thereto, as published or otherwise made available under subsection (b), (c), or (d).

(f) The Board shall, by regulation, establish rules to implement this section. The regulations shall provide for immediate disclosure and dissemination of rates and service terms, including classifications, rules, and practices, and their effective dates. Final regulations shall be adopted by the Board not later than 180 days after January 1, 1996.

(Added Pub. L. 104–88, title I, § 102(a), Dec. 29, 1995, 109 Stat. 830; amended Pub. L. 104–287, § 5(25), Oct. 11, 1996, 110 Stat. 3390.)

PRIOR PROVISIONS

A prior section 11101, Pub. L. 95–473, Oct. 17, 1978, 92 Stat. 1419; Pub. L. 96–258, § 1(10), June 3, 1980, 94 Stat. 426; Pub. L. 96–448, title II, § 222, Oct. 14, 1980, 94 Stat. 1929; Pub. L. 99–521, § 9(a), Oct. 22, 1986, 100 Stat. 2997; Pub. L. 103–180, § 8, Dec. 3, 1993, 107 Stat. 2052, related to duties of carriers to provide transportation and service, prior to the general amendment of this subtitle by Pub. L. 104–88, § 102(a). See sections 11101, 13710, 14101, and 15701 of this title.

applicant to afford the public the requisite notice of its proposed abandonment, etc.), the Board will entertain petitions to vacate the abandonment or discontinuance authorization. An original and 10 copies of these petitions to vacate must be filed with the Board.

(7) *Petitions to stay.* (i) The filing of a petition to reopen shall not stay the effect of a prior action. An original and 10 copies of any petitions to stay must be filed with the Board.

(ii) A petition to reopen an administratively final action may be accompanied by a petition for a stay of the effectiveness of the abandonment or discontinuance. As provided in paragraph (e)(2) of this section, a petition to reopen must be accompanied by a stay request if the party wishes the Board to have the opportunity to consider the petition to reopen before the abandonment or discontinuance authorization becomes final.

(iii) A party may petition for a stay of the effectiveness of abandonment or discontinuance authorization pending a request for judicial review. The reasons for the desired relief shall be stated in the petition, and the petition shall be filed not less than 15 days prior to the effective date of the abandonment authorization. No reply need be filed. If a party elects to file a reply, the reply must reach the Board no later than 5 days after the petition is filed.

[61 FR 67883, Dec. 24, 1996, as amended at 62 FR 34669, June 27, 1997; 74 FR 52909, Oct. 15, 2009]

§ 1152.26 Board determination under 49 U.S.C. 10903.

(a) The following schedule shall govern the process for Board consideration and decisions in abandonment and discontinuance application proceedings from the time the application is filed until the time of the Board's decision on the merits:

Day 0—Application filed, including applicant's case in chief.
Day 10—Due date for oral hearing requests.
Day 15—Due date for Board decision on oral hearing requests.
Day 20—Due date for Notice of Application to be published in the FEDERAL REGISTER.
Day 45—Due date for protests and comments, including opposition case in chief, and for public use and trail use requests.
Day 60—Due date for applicant's reply to opposition case and for applicant's response to trail use requests.
Day 110—Due date for service of decision on the merits.
Day 120—Due date for offers of financial assistance, except that if an application has been granted by decision issued sooner than Day 110, the offer of financial assistance shall be due 10 days after service of the decision granting the application.

(b) If an application for abandonment or discontinuance is filed by a bankrupt railroad, the Board shall base its decision (Report to the Bankruptcy Court) on the application and any responses to the application that are filed. In each such instance, the Board shall establish a reasonable period of time for filing responses to the application so that public input can be included in the Board's decision (Report) and so that the Board will be able to meet a deadline imposed or requested by the Bankruptcy Court. Because Board action on abandonment applications by bankrupt railroads is advisory only, no environmental filings or analysis is necessary. See 49 CFR 1105.5(c).

[61 FR 67883, Dec. 24, 1996, as amended at 62 FR 34670, June 27, 1997]

§ 1152.27 Financial assistance procedures.

(a) *Provision of information.* An applicant must provide promptly upon request to a party considering an offer of financial assistance to continue existing rail service, and concurrently to the Board, the following:

(1)(i) *In an application or petition for exemption proceeding,* an estimate of the annual subsidy and minimum purchase price required to keep the line or a portion of the line in operation;

(ii) *In a class exemption proceeding,* either an estimate of the annual subsidy or the minimum purchase price, depending upon the type of financial assistance indicated in the potential offeror's formal expression of intent submitted under paragraph (c)(2)(i) of this section;

(2) Its most recent reports on the physical condition of the involved line; and

(3) Traffic, revenue, and other data necessary to determine the amount of annual financial assistance that would

be required to continue rail transportation over that part of the railroad line. In an exemption proceeding, the data to be provided must at a minimum include the carrier's estimate of the net liquidation value of the line, with supporting data reflecting available real estate appraisals, assessments of the quality and quantity of track materials in a line, and removal cost estimates (including the cost of transporting removed materials to point of sale or point of storage for relay use), and, if an offer of subsidy is contemplated, an estimate of the cost of rehabilitating the line to Federal Railroad Administration class 1 Safety Standards (49 CFR part 213).

(b) *Federal Register notice*—(1) *Abandonment and discontinuance applications.* The FEDERAL REGISTER publication, which gives notice of the filing of the application 20 days after the application is filed, will serve as notice to persons intending to offer financial assistance to assure continued rail service under 49 U.S.C. 10904 and these regulations as they relate to abandonment and discontinuance applications. Offers of financial assistance will be due 120 days after the application is filed or 10 days after a decision granting the application is served, whichever occurs sooner.

(2) *Exemption proceedings.* (i) If a petition for individual exemption from the prior approval requirements of 49 U.S.C. 10903 is filed with the Board for abandonment or discontinuance of a line of railroad, the Board will publish notice of the petition in the FEDERAL REGISTER within 20 days of the filing of the petition. The FEDERAL REGISTER publication will serve as notice to persons with a potential interest in providing financial assistance to assure continued rail service on the line under 49 U.S.C. 10904 and these regulations as they relate to exempt abandonments and discontinuances. Offers of financial assistance will be due 120 days after the filing of the petition for exemption or 10 days after service of a Board decision granting the exemption, whichever occurs sooner.

(ii) If a notice of exemption is filed under the class exemption, the Board will publish notice of the exemption in the FEDERAL REGISTER within 20 days of filing. The FEDERAL REGISTER publication will serve as notice to persons with a potential interest in providing financial assistance to assure continued rail service on the line under 49 U.S.C. 10904 and these regulations as they relate to exempt abandonments and discontinuances. Offers of financial assistance will be due no later than 30 days after the date of the FEDERAL REGISTER publication giving notice of the exemption.

(c) *Submission of financial assistance offer*—(1) *Abandonment and discontinuance applications and petitions for exemption*—(i) *Service and filing.* An offeror must serve its offer of assistance on the carrier owning and operating the line and all parties to the abandonment or discontinuance application or exemption proceeding. The offer must be filed concurrently with the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, Washington, DC 20423–0001.

(A) An offer may be filed and served at any time after the filing of the abandonment or discontinuance application or petition for exemption. Once a decision is served granting an application or petition for exemption, however, the Board must be notified that an offer has previously been submitted.

(B) An offer, or notification of a previously filed offer, must be filed and served no later than 10 days after service of the Board decision granting the application or petition for exemption. This filing and service is subject to the requirements of 49 CFR 1152.25 (d)(1), (d)(2), and (d)(4).

(C) If, after a *bona fide* request, applicant or petitioner has failed to provide a potential offeror promptly with the information required under paragraph (a) of this section and if that information is not contained in the application or petition, the Board will entertain petitions to toll the 10-day period for submitting offers of financial assistance under paragraph (c)(1) of this section. Petitions must be filed with the Board within 5 days after service of the decision granting the application or petition for exemption. Petitions should include copies of the prior written request for information or an accurate outline of the specific information that was orally requested. Replies to these

petitions must be filed within 10 days after service of the decision granting the application or petition for exemption. These petitions and replies must be filed on or before their actual due date under 49 CFR 1152.25(d)(4). The Board will issue a decision on petitions within 15 days after service of the decision granting the application or petition for exemption.

(ii) *Contents of offer*. The offeror shall set forth its offer in detail. The offer must:

(A) Identify the line, or the portion of the line, in question;

(B) Demonstrate that the offeror is financially responsible; that is, that it has or within a reasonable time will have the financial resources to fulfill proposed contractual obligations; governmental entities will be presumed to be financially responsible; and

(C) Explain the disparity between the offeror's purchase price or subsidy if it is less than the carrier's estimate under paragraph (a)(1) of this section, and explain how the offer of subsidy or purchase is calculated.

(2) *Class exemption proceedings*—(i) *Expression of intent to file offer*. Persons with a potential interest in providing financial assistance must, no later than 10 days after the FEDERAL REGISTER publication described in paragraph (b)(2)(ii) of this section, submit to the carrier and the Board a formal expression of their intent to file an offer of financial assistance, indicating the type of financial assistance they wish to provide (i.e., subsidy or purchase). Such submissions are subject to the filing requirements of §1152.25(d)(1) through (d)(3). Submission of a formal expression of intent under this subsection will automatically stay the effective date of the notice of exemption under the class exemption for 40 days (normally, this will be 10 days beyond the date stated in the FEDERAL REGISTER publication).

(ii) *Service and filing*. An offeror must serve its offer of assistance on the carrier that instituted the exempt filing as well as all other parties to the proceeding. The offer must be filed concurrently with the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, Washington, DC 20423–0001.

(A) An offer may be filed and served at any time after the filing of the notice of exemption. Once a notice of exemption is published in the FEDERAL REGISTER, however, the Board must be notified that an offer has previously been submitted.

(B) An offer, or notification of a previously filed offer, must be filed and served no later than 30 days after the FEDERAL REGISTER publication described in paragraph (b)(2)(ii) of this section. This filing and service is subject to the requirements of 49 CFR 1152.25(d)(1), (d)(2), and (d)(4).

(C) If, after a *bona fide* request, applicant has failed to provide a potential offeror promptly with the information required under paragraph (a) of this section and if that information is not contained in the notice of exemption, the Board will entertain petitions to toll the 30-day period for submitting offers of financial assistance under paragraph (c)(2) of this section. Petitions must be filed with the Board within 25 days after publication in the FEDERAL REGISTER (as described in paragraph (b)(2)(ii) of this section). Petitions should include copies of the prior written request for information or an accurate outline of the specific information that was orally requested. Replies to these petitions must be filed within 30 days after publication. These petitions and replies must be filed on or before their actual due date under 49 CFR 1152.25(d)(4). The Board will issue a decision on petitions to toll the offer period within 35 days after publication.

(D) Upon receipt of a formal expression of intent to file an offer under paragraph (c)(2)(i) of this section, the rail carrier applicant may advise the Board and the potential offeror that additional time is needed to develop the information required under paragraph (a) of this section. Applicant shall expressly indicate the amount of time it considers necessary (not to exceed 60 days) to develop and submit the required information to the potential offeror. For the duration of the time period so indicated by the applicant, the 30-day period for submitting offers of financial assistance under paragraph (c)(2) of this section shall be tolled without formal Board action.

(iii) *Contents of offer*. The offeror shall set forth its offer in detail. The offer must meet the requirements of paragraph (c)(1)(ii) of this section.

(d) *Access to documents*. Upon receipt by the carrier of a written comment under § 1152.25 or a formal expression of intent under paragraph (c)(2)(i) of this section indicating an intent to offer financial assistance, or upon receipt by the carrier of an offer of financial assistance, whichever occurs earlier, the carrier must make available to that party or offeror the records, accounts, appraisals, working papers, and other documents used in preparing Exhibit 1 (§ 1152.36) or, if an exemption proceeding, those documents that would have been used in preparing Exhibit 1 had an abandonment or discontinuance application been filed, or other records, reports, and data in the possession of the carrier seeking the exemption that provide comparable data. These documents shall be made available during regular business hours at a time and place mutually agreeable to the parties.

(e) *Review of offers*—(1) *Abandonment and discontinuance applications*. The Board will review each offer submitted to determine if a financially responsible person has offered assistance. If that criterion is met, the Board will issue a decision postponing the effective date of the authorization for abandonment or discontinuance. This decision will be issued within 15 days of the service of the decision granting the application (or within 5 days after the offer is filed if the time for filing has been tolled under paragraph (c)(1)(i)(C) of this section, or within 5 days after expiration of the 120 day (4 month) period described in 49 U.S.C. 10904, if that occurs first). Under the delegation of authority at § 1011.7(a), the Director of the Office of Proceedings will make the initial determination whether offers of financial assistance satisfy the standards of 49 U.S.C. 10904(d) for purposes of instituting negotiations. Appeals of initial decisions determining whether offers of financial assistance satisfy the standards of 49 U.S.C. 10904(d) for purposes of instituting negotiations will be acted upon by the entire Board pursuant to 49 CFR 1011.2(a)(7).

(2) *Exemption proceedings*. The Board will review each offer submitted to determine if a financially responsible person has offered assistance. If that criterion is met, the Board will postpone the effective date either of the decision granting a petition for individual exemption or the notice of exemption under the class exemption and partially revoke the exemption or (in the case of a class exemption) the notice of exemption to the extent it applies to 49 U.S.C. 10904. The decision to postpone and partially revoke will be issued within 15 days of the service date of a decision granting a petition for exemption, or within 35 days of the FEDERAL REGISTER publication described in paragraph (b)(2)(ii) of this section (or within 5 days after the offer is filed if the time for filing has been tolled under paragraph (c)(1)(i)(C) or (c)(2)(ii) (C) or (D) of this section). Under the delegation of authority at section 1011.7(a), the Director of the Office of Proceedings will make the initial determination whether offers of financial assistance satisfy the standards of 49 U.S.C. 10904(d) for purposes of partial revocation and institution of negotiations. Appeals of initial decisions determining whether offers of financial assistance satisfy the standards of 49 U.S.C. 10904(d) for purposes of partial revocation and institution of negotiations will be acted upon by the entire Board pursuant to 49 CFR 1011.2(a)(7).

(f) *Agreement on financial assistance*. (1) If the carrier and a person offering financial assistance enter into a subsidy agreement designed to provide for continued rail service, the Board will postpone the effective date of the abandonment or discontinuance. If a decision granting a petition for individual exemption, or a notice of exemption, has been issued, the Board will postpone the effective date of the decision or notice of exemption. The postponement will be for as long as the subsidy agreement is in effect.

(2) If the carrier and a person offering to purchase a line enter into a purchase agreement which will result in continued rail service, the Board will approve the transaction and dismiss the application for abandonment or

discontinuance, or the petition for exemption or notice of exemption. Board approval is not required under 49 U.S.C. 10901, 10902, or 11323 for the parties to consummate the transaction or for the purchaser to institute service and operate as a railroad subject to 49 U.S.C. 10501(a).

(g) *Failure to reach agreement on financial assistance.* (1) If the carrier and a financially responsible person fail to agree on the amount or terms of subsidy or purchase, either party may request the Board to establish the conditions and amount of compensation. This request must be filed with the Board within 30 days after the offer is made and served concurrently by overnight mail on all parties to the proceeding. The request must be accompanied by the appropriate fee, codified at 49 CFR 1002.2(f)(26). Replies will be due 5 days later.

(2) If no agreement is reached within 30 days after the offer of purchase or subsidy is made, and no request is made to the Board to set the conditions and amount of compensation under paragraph (g)(1) of this section, the Board will serve a decision vacating the prior decision, which postponed the effective date of the decision granting the application, the decision granting the exemption, or the notice of exemption and, which, if applicable, partially revoked either the decision granting the exemption or (in the case of a class exemption) the notice of exemption. The Board will issue the decision to vacate within 10 days of the due date for requesting the Board to set the conditions and amount of compensation, and the Board will make the decision to vacate effective on its date of service.

(h) *Request to establish conditions and compensation for financial assistance.* (1) If the Board is requested to establish conditions and compensation for financial assistance under paragraph (g)(1) of this section, the Board will issue a decision within 30 days after the request is due.

(2) If the applicant receives multiple offers of financial assistance, requests to establish conditions and compensation will not be permitted before the applicant selects the offeror with whom it wishes to transact business. (See paragraph (l)(1) of this section.)

(3) A party requesting the Board to establish conditions and compensation for financial assistance must, within the time period set forth in paragraph (h)(4) of this section, provide its case in chief, including reasons why its estimates are correct and the other negotiating party's estimates are incorrect, points of agreement and points of disagreement between the negotiating parties, and evidence substantiating these allegations. The offeror has the burden of proof as to all issues in dispute.

(4) The offeror must submit all evidence and information supporting the terms it seeks within 30 days after the offer is made. The carrier's reply to this evidence and support for the terms it seeks are due within 35 days after the offer is made. No rebuttal evidence will be permitted and evidence and information submitted after these dates will be rejected.

(5) If requested, the Board will determine the amount and terms of subsidy based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line. Under 49 U.S.C. 10904(f)(4)(B), no subsidy arrangement approved under section 10904 shall remain in effect for more than one year unless mutually agreed by the parties.

(6) If requested, the Board will determine the price and other terms of sale. The Board will not set a price below the fair market value of the line (including, unless otherwise agreed upon by the parties, all facilities on the line or portion necessary to provide effective transportation services). Fair market value equals constitutional minimum value which is the greater of the net liquidation value of the line or the going concern value of the line. The constitutional minimum value is computed without regard to labor protection costs.

(7) Within 10 days of the service date of the Board's decision, the offeror must accept or reject the Board's terms and conditions with a written notification to the Board and all parties to the proceeding. If the offeror accepts the terms and conditions set by

the Board, the Board's decision is binding on both parties. If the offeror withdraws its offer or does not accept the terms and conditions set by the Board with a timely written notification, the Board will serve, within 20 days after the service date of the Board decision setting the terms and conditions, a decision vacating the prior decision, which postponed the effective date of either the decision granting the application or exemption or the notice of exemption, and which, if applicable, partially revoked the exemption or (in the case of a class exemption) the notice of exemption (unless other offers are being considered under paragraph (l) of this section). The decision to vacate will be effective on its date of service.

(i) *Substitution of purchasers and disposition after sale.* (1) Prior to the consummation of a purchase under this section, an offeror may substitute its corporate affiliate as the purchaser under an agreement, provided the Board has determined either:

(i) The original offeror has guaranteed the financial responsibility of its affiliate; or

(ii) The affiliate has demonstrated financial responsibility in its own right.

(2) Except as provided in paragraph (i)(3) of this section, a purchaser under this section may not:

(i) Transfer the line or discontinue service over the line prior to the end of the second year after consummation of the original sale under these provisions; or

(ii) Transfer the line, except to the carrier from whom the line was purchased, prior to the end of the fifth year after consummation.

(3) Paragraph (i)(2) of this section does not preclude a purchaser under this section from transferring the line to a corporate affiliate following the consummation of the original sale. Prior Board approval of the affiliate's acquisition and operation, however, is required under 49 U.S.C. 10901, 10902, or 11323. A corporate affiliate acquiring a line under this section is prohibited from discontinuing service over the line or transferring the line to a party that is not a corporate affiliate during the time periods prescribed in paragraph (i)(2) of this section.

(j) *Discontinuance of subsidy.* A subsidizer may discontinue a subsidy under this section by giving 60 days notice of the discontinuance to the applicant and all other parties to the proceeding. Unless another financially responsible party enters into a subsidy agreement as beneficial to the carrier as the discontinued subsidy agreement in a situation where the 1-year time limit of 49 U.S.C. 10904(f)(4)(B) has not yet run, the carrier may by filing a request with the Board and serving the request on all parties to the abandonment or exemption proceeding obtain a decision vacating the decision postponing the effective date of either the decision granting the application, or petition for individual exemption, or the notice of exemption. The Board will issue a decision to vacate within 10 days after the filing and service of the request. This decision to vacate will be effective on its service date.

(k) *Default on agreement.* If any party defaults on its obligations under a financial assistance agreement, any other party to the agreement may promptly inform the Board of that default. Upon notification, the Board will take appropriate action.

(l) *Multiple offers of financial assistance.* (1) If an applicant receives more than one offer to purchase or subsidize the line from offerors found to be financially responsible, the applicant must select the offeror from those with whom it wishes to transact business. In abandonment and discontinuance application and petition for exemption proceedings within 25 days after service of the decision granting the application or petition for exemption, and in class exemption proceedings within 45 days after the FEDERAL REGISTER publication described in paragraph (b)(2)(ii) of this section, the railroad must:

(i) File a written notification of its selection with the Board; and

(ii) Serve a copy of the notification on all parties to the proceeding.

(2)(i) *Abandonment and discontinuance applications and petitions for exemption.* If the applicant has received multiple offers of financial assistance from persons found to be financially responsible and has selected the offeror with whom

it wishes to transact business, the negotiating parties shall complete the sale or subsidy agreement or request the Board to establish the conditions and amount of compensation within 40 days after the service date of the decision granting the application or petition for exemption. A request to the Board to set terms and conditions must be served concurrently on all parties to the proceeding. If no agreement on subsidy or sale is reached within the 40-day period and the Board has not been requested to establish the conditions and amount of compensation, any other financially responsible offeror may request the Board to establish the conditions and amount of compensation. This request must be filed at the Board within 50 days of the service date of the decision granting the application or petition for exemption and served concurrently on all parties to the proceeding. If no other request is filed, the Board will issue a decision authorizing abandonment or discontinuance within 60 days of the service date of the decision granting the application or petition for exemption. This decision will be effective on the date of service.

(ii) *Class exemption proceedings.* If the carrier seeking the exemption has received multiple offers of financial assistance from persons found to be financially responsible and has selected the offeror with whom it wishes to transact business, the negotiating parties shall complete the sale or subsidy agreement or request the Board to establish the conditions and amount of compensation within 60 days after the FEDERAL REGISTER publication described in paragraph (b)(2)(ii) of this section. A request to the Board to set terms and conditions must be served concurrently on all parties to the proceeding. If no agreement on subsidy or sale is reached within the 60-day period and the Board has not been requested to establish the conditions and amount of compensation, any other financially responsible offeror may request the Board to establish the conditions and amount of compensation. This request must be filed at the Board within 70 days of the FEDERAL REGISTER publication described in paragraph (b)(2)(ii) of this section and served concurrently on all parties to the proceeding. If no other request is filed, the Board will issue a decision vacating the decision postponing the effective date of the notice of exemption within 80 days of the FEDERAL REGISTER publication described in paragraph (b)(2)(ii) of this section. The decision to vacate will be effective on the date of service.

(3) If the Board has established the conditions and amount of compensation, and the original offer is withdrawn under paragraph (h)(7) of this section, any other offeror found to be financially responsible may accept the Board's decision within 20 days after the service date of the Board's decision setting terms and conditions. If the decision is accepted by another such offeror, the Board will require the applicant to accept the terms incorporated in the Board's decision.

(m) *Additional time for filing.* Notwithstanding the deadlines previously set forth in part 1152 for filing an offer of financial assistance, parties that can show that they would be materially prejudiced by having less than the full 4 months for filing an offer of financial assistance provided in 49 U.S.C. 10904(c) for application proceedings may seek relief under 49 CFR part 1117.

(n) *Special provisions for summary discontinuance and abandonment of lines not part of the Final System Plan.* (1) Board authorization is not needed for the cessation of service on a line of railroad formerly in reorganization that was not included in the Final System Plan (Plan) under the Regional Rail Reorganization Act of 1973, 45 U.S.C. 701 *et seq.*, as amended by the Railroad Revitalization and Regulatory Reform Act of 1976, if the line has been continuously subsidized since the inception of the Plan. To provide an opportunity for rail service continuation through offers of financial assistance, however, the owner of the line must give not less than 60 days' notice of a discontinuance, and beginning 120 days after discontinuance, not less than 30 days' notice of abandonment. Designated operators need only comply with the notice requirements of §1150.11 of this title. In instances of discontinuance by a designated operator, the line owner is not obligated to operate the line. Notice is to be sent by

the line owner to the Board, the governor and transportation agencies and the government of each political subdivision of each state in which such rail properties are located and to each shipper who has used the rail service during the previous 12 months. The Board will generally apply the OFA procedures in this section (49 CFR 1152.27) for class exemptions to summary abandonment and discontinuance notices (except that the Board will not postpone the effective date of a summary discontinuance). For example, notice of summary abandonment or discontinuance will be published by the Board in the FEDERAL REGISTER within 20 days of filing. Paragraph (b)(2)(ii) of this section. Expressions of intent to file an offer must be filed no later than 10 days after the FEDERAL REGISTER publication. Paragraph (c)(2)(i) of this section. An offer must be filed within 30 days of the FEDERAL REGISTER publication. Paragraphs (b)(2)(ii) and (c)(2)(ii)(B) of this section. The Board will review offers to determine if a financially responsible person has offered assistance. If this criterion is met, the Board will postpone the effective date of the summary abandonment (but not the discontinuance) within 35 days of the FEDERAL REGISTER publication. Paragraph (e)(2) of this section. If the carrier and financially responsible person fail to agree on the amount or terms of subsidy or purchase, either party may request the Board to establish the conditions and amount of the compensation. This request must be filed within 30 days after the offer of purchase or subsidy is made, and the Board will issue a decision within 30 days after the request is due. Paragraphs (g)(1) and (h)(1) of this section.

(2) Where a designated operator is being used, it shall be paid a reasonable management fee. If the parties cannot agree on this fee, it shall be four and one-half percent of the total annual revenues attributable to the branch.

[61 FR 67883, Dec. 24, 1996, as amended at 63 FR 28290, May 22, 1998; 74 FR 52909, Oct. 15, 2009; 75 FR 30713, June 2, 2010]

§ 1152.28 Public use procedures.

(a)(1) If the Board finds that the present or future public convenience and necessity require or permit abandonment or discontinuance, the Board will determine if the involved rail properties are appropriate for use for other public purposes.

(2) A request for a public use condition under 49 U.S.C. 10905 must be in writing and set forth:

(i) The condition sought;

(ii) The public importance of the condition;

(iii) The period of time for which the condition would be effective (up to the statutory maximum of 180 days); and

(iv) Justification for the imposition of the time period. A copy of the request shall be mailed to the applicant.

(3) For applications filed under part 1152, subpart C, a request for a public use condition must be filed not more than 45 days after the application is filed. A decision on the public use request will be issued by the Board or the Director of the Office of Proceedings prior to the effective date of the abandonment. For abandonment exemptions under part 1152, subpart F or exemptions granted on the basis of an individual petition for exemption filed under 49 U.S.C. 10502, a request for a public use condition must be filed not more than 20 days from the date of publication of the notice of exemption in the FEDERAL REGISTER in the case of class exemptions under subpart F of this part, or not more than 20 days from the date of publication of notice of the filing of the petition for individual exemption in the FEDERAL REGISTER.

(b) If the Board finds that the rail properties are appropriate for use for other public purposes, the railroad may dispose of the rail properties only under the conditions described in the Board's decision. The conditions imposed by the Board may include a prohibition against the disposal of the rail assets for a period of not more than 180 days from the effective date of the decision authorizing the abandonment or discontinuance, unless the properties have first been offered, on reasonable terms, for sale for public purposes. This period will run concurrently with any other postponements. Jurisdiction to impose such conditions expires after 180 days from the effective date of the decision authorizing the abandonment or discontinuance.

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

(a) If any state, political subdivision, or qualified private organization is interested in acquiring or using a right-of-way of a rail line proposed to be abandoned for interim trail use and rail banking pursuant to 16 U.S.C. 1247(d), it must file a comment or otherwise include a request in its filing (in a regulated abandonment proceeding) or a petition (in an exemption proceeding) indicating that it would like to do so. The comment/request or petition must include:

(1) A map depicting, and an accurate description of, the right-of-way, or portion thereof (including mileposts), proposed to be acquired or used;

(2) A statement indicating the trail sponsor's willingness to assume full responsibility for:

(i) Managing the right-of-way;

(ii) Any legal liability arising out of the transfer or use of the right-of-way (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability); and

(iii) The payment of any and all taxes that may be levied or assessed against the right-of-way; and

(3) An acknowledgment that interim trail use is subject to the sponsor's continuing to meet its responsibilities described in paragraph (a)(2) of this section, and subject to possible future reconstruction and reactivation of the right-of-way for rail service. The statement must be in the following form:

STATEMENT OF WILLINGNESS TO ASSUME FINANCIAL RESPONSIBILITY

In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29 with respect to the right-of-way owned by _____ (Railroad) and operated by _____ (Railroad), _____ (Interim Trail Sponsor) is willing to assume full responsibility for: (1) Managing the right-of-way, (2) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability), and (3) the payment of any and all taxes that may be levied or assessed against the right of way. The property, known as _____ (Name of Branch Line), extends from railroad milepost _____ near _____ (Station Name), to railroad milepost _____, near _____ (Station name), a distance of _____ miles in [County(ies), (State(s)]. The right-of-way is part of a line of railroad proposed for abandonment in Docket No. STB AB _____ (Sub-No. _____). A map of the property depicting the right-of-way is attached.

_____ (Interim Trail Sponsor) acknowledges that use of the right-of-way is subject to the sponsor's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. A copy of this statement is being served on the railroad(s) on the same date it is being served on the Board.

(b)(1) In abandonment application proceedings under 49 U.S.C. 10903, interim trail use statements are due within the 45-day protest and comment period following the date the abandonment application is filed. See §1152.25(c). The applicant carrier's response notifying the Board whether and with whom it intends to negotiate a trail use agreement is due within 15 days after the close of the protest and comment period (i.e., 60 days after the abandonment application is filed).

(i) In every proceeding where a Trails Act request is made, the Board will determine whether the Trails Act is applicable.

(ii) If the Trails Act is not applicable because of failure to comply with §1152.29(a), or is applicable but the carrier either does not intend to negotiate an agreement, or does not timely notify the Board of its intention to negotiate, a decision on the merits will be issued and no Certificate of Interim Trail Use or Abandonment (CITU) will be issued. If the carrier is willing to negotiate an agreement, and the public convenience and necessity permit abandonment, the Board will issue a CITU.

(2) In exemption proceedings, a petition containing an interim trail use statement is due within 10 days after the date the notice of exemption is published in the FEDERAL REGISTER in the case of a class exemption and within 20 days after publication in the FEDERAL REGISTER of the notice of filing of a petition for exemption in the case of

a petition for exemption. When an interim trail use comment(s) or petition(s) is filed in an exemption proceeding, the railroad's reply to the Board (indicating whether and with whom it intends to negotiate an agreement) is due within 10 days after the date a petition requesting interim trail use is filed.

(3) Late-filed trail use statements must be supported by a statement showing good cause for late filing.

(c) *Regular abandonment proceedings.* (1) If continued rail service does not occur pursuant to 49 U.S.C. 10904 and Sec. 1152.27, and a railroad agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue a CITU to the railroad and to the interim trail sponsor for that portion of the right-of-way as to which both parties are willing to negotiate. The CITU will: Permit the railroad to discontinue service, cancel any applicable tariffs, and salvage track and material consistent with interim trail use and rail banking, as long as it is consistent with any other Board order, 30 days after the date the CITU is issued; and permit the railroad to fully abandon the line if no trail use agreement is reached 180 days after the CITU is issued, subject to appropriate conditions, including labor protection and environmental matters.

(2) The CITU will indicate that any interim trail use is subject to future restoration of rail service and to the sponsor's continuing to meet its responsibilities described in paragraph (a)(2) of this section. The CITU will also provide that, if an interim trail use agreement is reached (and thus interim trail use established), the parties shall file the notice described in paragraph (h) of this section. Additionally, the CITU will provide that if the sponsor intends to terminate interim trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of the CITU and request that it be vacated on a specified date. If a party requests that the CITU be vacated for only a portion of the right-of-way, the Board will issue an appropriate replacement CITU covering the remaining portion of the right-of-way subject to the interim trail use agreement. The Board will reopen the abandonment proceeding, vacate the CITU, and issue a decision permitting immediate abandonment for the involved portion of the right-of-way. Copies of the decision will be sent to:

(i) The abandonment applicant;

(ii) The owner of the right-of-way; and

(iii) The current trail sponsor.

(3) If an application to construct and operate a rail line over the right-of-way is authorized under 49 U.S.C. 10901 and 49 CFR part 1150, or exempted under 49 U.S.C. 10502, then the CITU will be vacated accordingly.

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

(2) The NITU will indicate that interim trail use is subject to future restoration of rail service and to the sponsor's continuing to meet its responsibilities described in paragraph (a)(2) of this section. The NITU will also provide that, if an interim trail use agreement is reached (and thus interim trail use established), the parties shall file the notice described in paragraph (h) of this section. Additionally, the NITU will provide that if the sponsor intends to terminate interim trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of the NITU and request that it be vacated on a specific date. If a party requests that the NITU be vacated for only a portion

of the right-of-way, the Board will issue an appropriate replacement NITU covering the remaining portion of the right-of-way subject to the interim trail use agreement. The Board will reopen the exemption proceeding, vacate the NITU, and issue a decision reinstating the exemption for that portion of the right-of-way. Copies of the decision will be sent to:

(i) The abandonment exemption applicant;

(ii) The owner of the right-of-way; and

(iii) The current trail sponsor.

(3) If an application to construct and operate a rail line over the right-of-way is authorized under 49 U.S.C. 10901 and 49 CFR part 1150, or exempted under 49 U.S.C. 10502, then the NITU will be vacated accordingly.

(e)(1) Where late-filed trail use statements are accepted, the Director (or designee) will telephone the railroad to determine whether abandonment has been consummated and, if not, whether the railroad is willing to negotiate an interim trail use agreement. The railroad shall confirm, in writing, its response, within 5 days. If abandonment has been consummated, the trail use request will be dismissed. If abandonment has not been consummated but the railroad refuses to negotiate, then trail use will be denied. If abandonment has not been consummated and the railroad is willing to negotiate, the abandonment proceeding will be reopened, the abandonment decision granting an application, petition for exemption or notice of exemption will be vacated, and an appropriate CITU or NITU will be issued. The effective date of the CITU or NITU will be the same date as the vacated decision or notice.

(2) A railroad that receives authority from the Board to abandon a line (in a regulated abandonment proceeding under 49 U.S.C. 10903, or by individual or class exemption issued under 49 U.S.C. 10502) shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line (e.g., discontinued operations, salvaged the track, canceled tariffs, and intends that the property be removed from the interstate rail network). The notice shall provide the name of the STB proceeding and its docket number, a brief description of the line, and a statement that the railroad has consummated, or fully exercised, the abandonment authority on a certain date. The notice shall be filed within 1 year of the service date of the decision permitting the abandonment (assuming that the railroad intends to consummate the abandonment). Notices will be deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation (such as outstanding conditions, including Trails Act conditions). If, after 1 year from the date of service of a decision permitting abandonment, consummation has not been effected by the railroad's filing of a notice of consummation, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. In that event, a new proceeding would have to be instituted if the railroad wants to abandon the line. Copies of the railroad's notice of consummation shall be filed with the Chief, Section of Administration, Office of Proceedings. In addition, the notice of consummation shall be sent to the State Public Service Commission (or equivalent agency) of every state through which the line passes. If, however, any legal or regulatory barrier to consummation exists at the end of the 1-year time period, the notice of consummation must be filed not later than 60 days after satisfaction, expiration or removal of the legal or regulatory barrier. For good cause shown, a railroad may file a request for an extension of time to file a notice so long as it does so sufficiently in advance of the expiration of the deadline for notifying the Board of consummation to allow for timely processing.

(f)(1) When a trail user intends to terminate trail use and another person intends to become a trail user by assuming financial responsibility for the right-of-way, then the existing and future trail users shall file, jointly:

(i) A copy of the extant CITU or NITU; and

(ii) A Statement of Willingness to Assume Financial Responsibility by the new trail user.

(iii) An acknowledgement that interim trail use is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

(2) The parties shall indicate the date on which responsibility for the right-of-way is to transfer to the new trail user. The Board will reopen the abandonment or exemption proceeding, vacate the existing NITU or CITU; and issue an appropriate replacement NITU or CITU to the new trail user.

(g) In proceedings where a timely trail use statement is filed, but due to either the railroad's indication of its unwillingness to negotiate interim trail use agreement, or its failure to timely notify the Board of its willingness to negotiate, a decision authorizing abandonment or an exemption notice or decision is issued instead of a CITU or NITU, and subsequently the railroad and trail use proponent nevertheless determine to negotiate an interim trail use agreement under the Trails Act, then the railroad and trail use proponent must file a joint pleading requesting that an appropriate CITU or NITU be issued. If the abandonment has not been consummated, the Board will reopen the proceeding, vacate the outstanding decision or notice (or portion thereof), and issue an appropriate CITU or NITU that will permit the parties to negotiate for a period agreed to by the parties in their joint filing, but not to exceed 180 days, at the end of which, the CITU or NITU will convert into a decision or notice permitting abandonment.

(h) When the parties negotiating for rail banking/interim trail use reach an agreement, the trail sponsor and railroad shall jointly notify the Board within 10 days that the agreement has been reached. The notice shall include a map depicting, and an accurate description of, the involved right-of-way or portion thereof (including mileposts) that is subject to the parties' interim trail use agreement and a certification that the interim trail use agreement includes provisions requiring the sponsor to fulfill the responsibilities described in paragraph (a)(2) of this section. Additionally, if the interim trail use agreement establishes interim trail use over less of the right-of-way than is covered by the CITU or NITU, the notice shall also include a request that the Board vacate the CITU or NITU and issue a replacement CITU/NITU for only the portion of the right-of-way covered by the interim trail use agreement. The Board will reopen the abandonment proceeding, vacate the CITU or NITU, issue an appropriate replacement CITU or NITU for only the portion of the right-of-way covered by the interim trail use agreement, and issue a decision permitting immediate abandonment of the portion of the right-of-way not subject to the interim trail use agreement. Copies of the decision will be sent to:

(1) The rail carrier that sought abandonment authorization;

(2) The owner of the right-of-way; and

(3) The current trail sponsor.

[61 FR 67883, Dec. 24, 1996, as amended at 62 FR 34670, June 27, 1997; 64 FR 53268, Oct. 1, 1999; 74 FR 52910, Oct. 15, 2009; 77 FR 25914, May 2, 2012]

Subpart D—Standards for Determining Costs, Revenues, and Return on Value

§ 1152.30 General.

(a) *Contents of subpart.* (1) 49 U.S.C. 10904 directs the Board to determine the extent to which the avoidable costs of providing rail service plus a reasonable return on the value of the line exceed the revenues attributable to the line. This subpart contains the methodology for such determinations and the standards necessary for application of those terms in the context of a particular proceeding. Such data will be used in reaching the Board's findings on the merits of an abandonment or discontinuance proceeding and in making the necessary financial assistance determinations.

(2) This subpart also sets forth a method by which the carrier may establish its Forecast Year estimates and Estimated Subsidy Payment to be included in its application (§ 1152.22(d) of this part). Furthermore, an offeror of financial assistance may use this method to formulate a subsidy offer and/or Proposed Subsidy Payment under 49 U.S.C. 10904 and § 1152.27 of subpart C of this part.

	Base year operations	Forecast year operations	Projected subsidy year operations
17. Avoidable loss from operations (line 4 minus line 7)			
18. Estimated forecast year loss from operations (line 4 minus lines 7 and 16)			
19. Estimated subsidy (line 4 minus lines 7, 11 and 16)			

[1] This projection shall be computed in accordance with § 1152.32(m).
[2] Omit in applications pursuant to §§ 1152.22 and 1152.23.
[3] If the amount in line 12c is a negative for the ''Forecast Year operations'' insert ''0'' in this line.

§ 1152.37 Financial status reports.

Within 30 days after the end of each quarter of the subsidy year, each carrier which is party to the financial assistance agreement shall submit to the subsidizer a Financial Status Report for each line operated under subsidy. Such Financial Status Report shall be in the form prescribed below. Significant deviations from the negotiated estimates must be explained. All data shall be developed in accordance with the methodology set forth in §§ 1152.31 through 1152.35. In the quarterly reports, the actual data for the year to date and a projection to the end of the subsidy year shall be shown for each item.

	Actual	Projected
Revenues for:		
1. Freight originated and/or terminated on branch		
2. Bridge traffic		
3. All other revenue and income		
4. Total revenues (lines 1 through 3)		
Avoidable costs for:		
5. On-branch costs (lines 5a through 5j)		
a. Maintenance of way and structures		
b. Maintenance of equipment		
c. Transportation		
d. General administrative		
e. Deadheading, taxi, and hotel		
f. Overhead movement		
g. Freight car costs		
h. Return on investment—locomotives		
i. Revenue taxes		
j. Property taxes		
6. Off-branch costs		
7. Total avoidable costs (line 5 plus line 6)		
Subsidization costs for:		
8. Rehabilitation		
9. Administrative costs		
10. Casualty		
11. Total subsidization costs (lines 8 through 10)		
Return on value:		
12. Valuation of property (lines 12a through 12c)		
a. Working capital		
b. Income tax consequences		
c. Net liquidation value		
13. Rate of return		
14. Total return on value (line 12 times line 13)		
Subsidy payment:		
15. Subsidy payment (line 4 minus lines 7, 11, and 14)		

Subpart E [Reserved]

Subpart F—Exempt Abandonments and Discontinuances of Service and Trackage Rights

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

(a)(1) A proposed abandonment or discontinuance of service or trackage

rights over a railroad line is exempt from the provisions of 49 U.S.C. 10903 if the criteria in this section are satisfied.

(2) Whenever the Board determines a proposed abandonment to be exempt from the requirements of 49 U.S.C. 10903, whether under this section or on the basis of the merits of an individual petition, the provisions of §§1152.27, 1152.28, and 1152.29 as they relate to exemption proceedings shall be applicable.

(b) An abandonment or discontinuance of service or trackage rights is exempt if the carrier certifies that no local traffic has moved over the line for at least 2 years and any overhead traffic on the line can be rerouted over other lines and that no formal complaint filed by a user of rail service on the line (or a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or any U.S. District Court or has been decided in favor of the complainant within the 2-year period. The complaint must allege (if pending), or prove (if decided) that the carrier has imposed an illegal embargo or other unlawful impediment to service.

(c) The Board has found:

(1) That its prior review and approval of these abandonments and discontinuances is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and

(2) That these transactions are of limited scope and continued regulation is unnecessary to protect shippers from abuse of market power. 49 U.S.C. 10502. A notice must be filed to use this class exemption. The procedures are set out in §1152.50(d). This class exemption does not relieve a carrier of its statutory obligation to protect the interests of employees. 49 U.S.C. 10502(g) and 10903(b)(2). This also does not preclude a carrier from seeking an exemption of a specific abandonment or discontinuance that does not fall within this class.

(d) *Notice of exemption.* (1) At least 10 days prior to filing a notice of exemption with the Board, the railroad seeking the exemption must notify in writing:

(i) The Public Service Commission (or equivalent agency) in the state(s) where the line will be abandoned or the service or trackage rights discontinued;

(ii) Department of Defense (Military Traffic Management Command, Transportation Engineering Agency, Railroads for National Defense Program);

(iii) The National Park Service, Recreation Resources Assistance Division; and

(iv) The U.S. Department of Agriculture, Chief of the Forest Service.

The notice shall name the railroad, describe the line involved, including United States Postal Service ZIP Codes, indicate that the exemption procedure is being used, and include the approximate date that the notice of exemption will be filed with the Board. The notice shall include the following statement ''Based on information in our possession, the line (does) (does not) contain federally granted rights-of-way. Any documentation in the railroad's possession will be made available promptly to those requesting it.''

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

(3) The Board, through the Director of the Office of Proceedings, shall publish a notice in the FEDERAL REGISTER within 20 days after the filing of the notice of exemption. The notice shall include a statement to alert the public that following any abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Petitions to stay the effective date of the notice on other than environmental or historic preservation grounds must be filed within 10 days of the publication. Petitions to stay the effective date of the notice on environmental or historic

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

(4) In out-of-service rail line exemption proceedings under 49 CFR 1152.50, the Board, on its own motion, will stay the effective date of individual notices of exemption when an informed decision on pending environmental and historic preservation issues cannot be made prior to the date that the exemption authority would otherwise become effective.

(5) A notice or decision to all parties will be issued if use of the exemption is made subject to environmental, energy, historic preservation, public use and/or interim trail use and rail banking conditions.

(6) To address whether the standard labor protective conditions set forth in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979), adequately protect affected employees, a petition for partial revocation of the exemption under 49 U.S.C. 10502(d) must be filed.

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

[61 FR 67883, Dec. 24, 1996, as amended at 62 FR 34670, June 27, 1997]

Subpart G—Special Rules Applicable to Petitions for Abandonments or Discontinuances of Service or Trackage Rights Filed Under the 49 U.S.C. 10502 Exemption Procedure

§1152.60 Special rules.

(a) This section contains special rules applicable to any proceeding instituted under the 49 U.S.C. 10502 exemption procedure for either the abandonment of a rail line or the discontinuance of service or trackage rights over a rail line. General rules applicable to any proceeding filed under the 49 U.S.C. 10502 exemption procedure may be found at 49 CFR part 1121, but the rules in part 1152 control in case of any conflict with the general exemption rules. In the case of petitions for exemption for abandonment, notice of the filing of the petition will be published by the Board, through the Director of the Office of Proceedings, in the FEDERAL REGISTER 20 days after the petition is filed. There will be no further FEDERAL REGISTER publication later if and when a petition is granted.

(b) Any petition filed under the 49 U.S.C. 10502 exemption procedure for either the abandonment of a rail line or the discontinuance of service or trackage rights over a rail line must be accompanied by a map that meets the requirements of §1152.22(a)(4) of this part.

(c) A petitioner for an abandonment exemption shall submit, with its petition, a draft FEDERAL REGISTER notice of its petition according to the form prescribed below:

Draft FEDERAL REGISTER Notice. The petitioner shall submit a draft notice of its petition to be published by the Board within 20 days of the petition's filing with the Board. The petitioner must submit a copy of the draft notice as data contained on a computer diskette compatible with the Board's current word processing capabilities. The draft notice shall be in the form set forth below:

STB No. AB–_____ (Sub-No._____)

Notice of Petition for Exemption To Abandon or To Discontinue Service

On (insert date petition was filed with the Board) (name of petitioner) filed with the Surface Transportation Board, Washington, D.C. 20423, a petition for exemption for the

OVERVIEW:

Abandonments
&
Alternatives to Abandonments

Office of Public Services
Surface Transportation Board
Washington, D.C. 20423
(202) 565-1592

April, 1997

Appendix I

SYNOPSIS OF NEW ABANDONMENT REGULATIONS

1. Effective Date: Regulations effective on 1/23/97

2. New Uniform Schedule:

Day -60	Deadline for identifying line as category 1 on SDM.
Day -30 To Day -15	Opportunity to file Notice of Intent.
Day -20	Due date for railroad to file environmental and/or historic reports on required agencies
Day 0	**Application filed, including applicant's case in chief.**
Day +10	Due date for oral hearing requests.
Day +15	Due date for Board decision on oral hearing requests.
Day +20	Due date for Notice of Application to be published in the Federal Register.
Day +45	Due date for protests and comments, including opposition case in chief, and for public use and trail use requests.
Day +60	Due date for applicant's reply to opposition case and for applicant's response to trail use requests.
Day +110	Due date for service of decision on the merits.
Day +120	Due date for offers of financial assistance, except that if an application has been granted by decision issued sooner than Day 110, the offer of financial assistance shall be due 10 days after service of the decision granting the application.

3. Important Changes from the Old Regulations:

a. The Board will publish a notice of an abandonment application or a petition for an individual exemption in the Federal Register 20 days after the application or petition is filed.

The notice will: 1) Describe the proposal; and 2) Advise the public regarding due dates for OFAs and requests for public use and trail use conditions, and explain how to participate in the proceeding.

The railroad must file a draft notice on a disk.

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2016, I electronically filed the foregoing brief with the United States Court of Appeals for Federal Circuit by using the appellate CM/ECF system.

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

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

This brief complies with the type volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting the portions of the brief described in Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b), the brief contains 12,321 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). The brief has been prepared using Microsoft Word 2013 in 14-Point Calisto MT, a proportionally-spaced font.

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