United States Court of Appeals

for the

Federal Circuit

JACK LADD, JOBETH LADD, JOHN LADD, MARIE LADD, GAIL A. LANHAM, JAMES A. LINDSEY, MICHAEL A. LINDSEY WILLIAM LINDSEY, CHARLIE MILLER, PAULINE MILLER, RAYMOND MILLER, VALENTIN CASTRO, III, DEBORAH ANN CASTRO REVOCABLE TRUST, (Valentin and Deborah Ann Castro, trustees), JOSEPH LAWRENCE HEINZL, and TAMMY WINDSOR-BROWN

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in Case No. 07-CV-271, Senior Judge Robert H. Hodges, Jr.

BRIEF FOR PLAINTIFFS-APPELLANTS

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FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Jack Ladd, et al. v. United States

No. 2012-5086, -5087

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) Appellant, Jack Ladd, et al. certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:
Jack Ladd, John Ladd, Jobeth Ladd, Marie Ladd, Valentin Castro, III, Deborah Ann Castro Revocable Trust, Joseph L. Heinzl, Tammy Windsor-Brown,Charlie Miller, Raymond and Pauline Miller, James A. Lindsey, Michael A. Lindsey, William Lindsey, and Gail A. Lanham

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

See above.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None.

4. ☑ The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:
Lathrop and Gage, LLP, Arent Fox, LLP - including myself, Mark F. ("Thor") Hearne, II (partner), Lindsay S.C. Brinton (associate), and Meghan S. Largent (associate). All counsel represented Plaintiffs/Appellants in the trial court and have filed their entries of appearance in the Court.

June 8, 2012
Date

/s/ Mark F. ("Thor") Hearne, II
Signature of counsel

Mark F. ("Thor") Hearne, II
Printed name of counsel

Please Note: All questions must be answered
cc: _____

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Constitutional Provisions

Other Authorities

STATEMENT OF RELATED CASES

Pursuant to Fed. Cir. R. 47.5(a), Appellants note this is the second appeal in United States Court of Federal Claims ("CFC") Case No. 07-721. The earlier appeal to this Court was *Ladd v. United States*, No. 2010-5010. On December 14, 2010, this Court reversed and remanded the CFC in *Ladd v. United States*, 630 F.3d 1015 (Fed. Cir. 2010). The panel in this decision was comprised of Chief Judge Rader, Judge Linn, and Judge Moore. An *en banc* review was denied by this Court in *Ladd v. United States*, 646 F.3d 910 (Fed. Cir. 2011).

Pursuant to Fed. Cir. R. 47(b), there are no known cases "that will directly affect or be directly affected by this court's decision in the pending appeal."

JURISDICTIONAL STATEMENT

This appeal is from the CFC decision *Ladd v. United States,* _____ Fed. Cl. ____, No. 07-271 (2011) (Joint Appendix A1-10).[1] The CFC entered summary judgment in favor of the government and dismissed the Fifth Amendment[2] taking claims brought by six Arizona families.

The Tucker Act, 28 U.S.C. §1491, grants the CFC jurisdiction to hear claims arising under the United States Constitution.

The CFC entered its decision on April 12, 2012. On April 25, 2012 the CFC entered a final appealable order dismissing these six landowners' claims. (A1-10, A1990). These landowners timely filed notice of this appeal fourteen days later. (A1993-1998). This Court has appellate jurisdiction pursuant to 28 U.S.C. §1295(a)(3).

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[1] Joint Appendix is referenced as "(A__)."

[2] "[N]or shall private property be taken for public use, without just compensation." U.S. Const., Amend. V.

STATEMENT OF THE ISSUES

(1) When this Court issues a mandate remanding a case to the CFC and instructing the CFC to make a "determination of the compensation owed to the appellants," may the CFC ignore this Court's mandate and revisit the issue of the government's liability?

(2) Can the government issue an order taking an owner's property commence the running of the six-year limitations period under 28 U.S.C. §2501 when the owner whose property is taken pursuant to this order has no notice or knowledge of this order?

(3) When a landowner grants a railroad an interest "for the relocation of the [railroad]" "over, through, across, and upon" the owner's land, is it proper as a matter of Arizona law to construe this to be a conveyance of the entire fee estate to the railroad, as opposed to an easement granted to operate a railroad across the land?

STATEMENT OF THE CASE

This is a Fifth Amendment taking case. On July 26, 2006, the Surface Transportation Board ("STB") issued a Notice of Interim Trail Use or Abandonment ("NITU") pursuant to §1247(d) of the National Trails System Act.[3] Less than a year later, in April 2007, eight Arizona landowners whose land was subject to this order commenced this action seeking "just compensation" for property the government had taken pursuant to the Trails Act.

After extensive discovery, the parties filed cross-motions for summary judgment on the issue of the government's liability. In October 2009, the CFC granted the government's motion dismissing all claims and finding 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." *Ladd v. United States*, 90 Fed. Cl. 221, 226 (2009) ("*Ladd I*"). The landowners appealed. In December 2010, this Court reversed the CFC and issued the mandate stating, "we remand for a determination of the compensation owed to the appellants for the taking of the Southern Stretch and the Northern Stretch of railway line." *Ladd v. United States*, 630 F.3d 1015, 1025 (Fed. Cir. 2010) ("*Ladd II*"). The government

[3] National Trails System Act, Pub. L. No. 98-11, 97 Stat. 42, *National Trails System Act of 1968*, Pub. L. No. 98-11, Title II §201, 97 Stat. 42 (codified, as amended) at 16 U.S.C.A. §1241 *et seq.* (2006).

sought *en banc* rehearing, which this Court rejected. *Ladd v. United States*, 646 F.3d 910, 910 (Fed. Cir. 2011) ("*Ladd III*").

On remand, the CFC failed to follow this Court's mandate to determine compensation. Rather, it allowed the government to re-argue its liability. It then granted the government's summary judgment motion as to six landowners. (A1995). For five of these six, the CFC dismissed their claim as untimely because it concluded their taking claims arose in 1998 under a NITU the government did not discover until after the case was remanded by this Court. *Id.* For one landowner (the Lindsey family), the CFC dismissed their claim because it concluded that the 1911 indenture of the right-of-way gave the railroad title to the fee estate in the land, not just an easement "over, through, across and upon" the land. *Id.* For two landowners, the CFC ordered the property taken by the government to be appraised. *Id.* Those two owners have not appealed.

STATEMENT OF FACTS

I. Factual Background

A. The federal government took these owners' land pursuant to the federal Trails Act.

These six Arizona ranch families own the fee estate to land in Cochise County, Arizona near the United States-Mexican border. (A67-92 and A466-503). In 1911, their predecessors granted the El Paso & Southwestern Railroad Company ("El Paso") an easement to operate a railroad across their land. The deeds by which these landowners acquired title to their land are in the record at A67-92 and A466-503 and the conveyances by which the El Paso was originally granted a right-of-way easement are in the record at A428-463.

A portion of this former railroad right-of-way was originally established by a federal grant to the railroad under the 1875 Act. The 1875 Act only conveyed an easement to the railroad, and ownership of the fee estate in the land under the railroad line was held by the federal government – and thereafter by those individuals who acquired title from the federal government. *See Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005) and *Ellamae Phillips Co. v. United States*, 564 F.3d 1367 (Fed. Cir. 2009).

For all these landowners, when the railroad no longer operated across their land, the right-of-way easement terminated and these owners of the fee estate regained their "reversionary" [4] right to unencumbered possession of their land.

B. Railroad operations over the right-of-way ended in 2005 and the tracks were removed in 2006.

In 2003, the San Pedro Railroad Operating Company, LLC ("San Pedro") became successor-in-interest to El Paso. (A504-A505). By then the railroad served only one shipper — Chemical Lime Company. (A505). San Pedro acquired this railway line intending to restore trans-border rail service to Mexico at Naco. (A504). San Pedro's desire was not realized. (A516). Other efforts to generate new business along the line also failed. *Id.*

In June 2005, San Pedro filed a petition with the STB seeking to abandon the seventy-six mile rail line. (A505, A509). While this petition was pending, a segment of the still-active railway washed out and the land, track, and structures were damaged to such extent trains could not operate. (A505). The line was too expensive to repair. (A510).

The abandoned rail line is described as the Bisbee and Douglas Branches and is identified in STB filings as four segments defined by mileposts. (A56). For

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[4] We use "reversionary" as a short-hand reference to the owner's right to regain unencumbered title to and possession of their land. *See Preseault v. United States*, 100 F.3d 1525, 1533-34 (Fed. Cir. 1996) (*en banc*), and *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004).

purposes of this case, the rail line is most easily considered as two segments. The first segment – the "Northern Stretch" – begins in Curtiss Flats and runs south along the San Pedro River, under Highway 92 to the border town Naco.

The Trust for Public Land, a public charity supporting conversion of abandoned rail lines to public recreational trails, requested the STB issue both a Public Use Condition and a NITU. *Id.* The Bureau of Land Management ("BLM") told the STB it desired "to acquire or railbank the railroad corridor." *Id.*, Statement of Dept. of Interior, BLM, March 23, 2006.

Chemical Lime — the only remaining shipper — opposed San Pedro abandoning the line. (A511). In February 2006, the STB denied Chemical's objection to abandonment. (A514). In 2006 the tracks and ties were removed from the land. (*See* landowner affidavits, A1781-A1810).

C. The STB invoked §1247(d) of the Trails Act and took these landowners' right to unencumbered possession of their property.

San Pedro told the STB it agreed "to enter[] into negotiations with the Trust to sell the portions of the subject right of way it owns for trail use under...Trails Act and [STB's] ... regulations." (A56-58). In response, the STB issued a NITU for the entire 76.2-mile railway line. (A56). This NITU allowed San Pedro to remove the rails and ties and eliminated any obligation to provide rail service. *Id.* Shortly thereafter, San Pedro removed the rails and ties. (A972-A981).

In January 2007, the trail sponsor asked the STB to extend the negotiating period thirty days for that portion of the Northern Stretch from Highway 92 to Curtiss Flats. (A60). The STB agreed. That same month, San Pedro advised the STB it had consummated abandonment of the Southern Stretch east of Naco. (A60).

Since 2008, San Pedro has requested, and the STB has granted, more than four years of extensions to file a Notice of Consummation. *See, e.g.,* STB Docket AB 1081X, Order (July 26, 2011). The STB's latest extension continues the STB's jurisdiction until September 24, 2012.

The Northern Stretch remains "railbanked" such that, even though the San Pedro Railroad has removed the rails and ties, San Pedro retains the right (granted it under authority of the Trails Act) to sell this right-of-way corridor to a non-railroad for public recreation. And, the STB retains jurisdiction to grant any railroad the right to build a new railway line across this land.

This abandoned "railbanked" corridor bisects and encumbers these owners' ranches and residences and provides a heavily-used route to enter the United States from Mexico. (A815). Border Patrol supervisor said "an open corridor like the trail could be a highway for illegals. ... we would need to patrol the route regularly.

I have concerns about the close proximity of the border and the possibility of encounters between civilians and illegals."[5]

National Public Radio reported the Ladd's neighbor was "shot and killed along with his dog – presumably by a drug smuggler." NPR described how trails are used by drug smugglers and illegal immigrants. "A century and a half ago, the Apache warrior Geronimo used the area's trails to elude the U.S. Cavalry for decades. Now, the same trails are corridors for drug cartels using illegal immigrants who can't afford to pay for a guide."[6] NPR reported, "Ladd says he has counted 47 groups crossing onto his land in just the past three weeks – more than 300 people." *Id.*

Last month, the Supreme Court noted, "there is an 'epidemic of crime, safety risks, serious property damage, and environmental problems' associated with the influx of illegal migration across private land near the Mexican border." *Ariz. v. United State*s, __ U.S. __, 132 S.Ct. 2492, 2500 (2012).

The Trails Act's preemption of these owners' right to excusive possession of their land means they cannot exclude others from their property. They have tried

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[5] *Rails-to-Trails Idea Debated*, Sierra Vista Herald, March 4, 2007. *(See* A302).

[6] *NPR: Ariz. Ranchers Caught Up in Mexican Drug Violence* (Apr. 12, 2010), Transcript and audio recording available at: http:www.npr.org/templates/story/story.php?storyID=125844450&ps=cprs) (last visited July 18, 2012).

to fence and build barriers across the abandoned rail line but the Border Patrol and trespassers continue to cut the fence and remove the barriers. (A972-A981). And, these ranchers desire to grade the abandoned roadbed to prevent further erosion damage to their land. (A972-A981).

The government acknowledged, "Plaintiff has made some compelling factual assertions to the Court regarding the status of the property and its impact on his clients regarding erosion and other actions." (A1392).

II. The statutory and regulatory framework

A. The procedure to abandon a railway line under 49 U.S.C. 10903.

A railroad with an unprofitable railrway corridor has two choices. It may petition the STB for authority to "discontinue" service over this corridor or the railroad may petition the STB for authority to "abandon" the rail corridor. Before abandoning a railway line the railroad must first obtain authorization from the STB. *See* 49 U.S.C. §10903 and 49 U.S.C. §10502. The railroad initiates abandonment by filing a petition to abandon a railroad line. This is an administrative proceeding before the STB and it may be opposed by, among others, shippers served by the railroad. *See* STB Decision in Docket No. EP 702, "National Trails System Act and Railroad Rights-of-Way," decided Feb. 10, 2011 ("STB Trails Act Decision").

The STB may exempt rail lines from the normal abandonment procedures. *See* 49 U.S.C. 10502. As a class, the STB has exempted the abandonment of lines over which no local traffic has moved for at least two years from the normal abandonment procedure. *See* 49 C.F.R. 1152.50(b).

The abandonment proceedings involving this railway line were exempt from the STB's normal abandonment procedure. (NITU, p. 1 (A56)).

B. How a non-railroad causes the STB to invoke Trails Act preemption of landowners' "reversionary" right to their property under 16 U.S.C. 1247(d).

Section 1247(d) of the Trails Act cannot be invoked until after the railroad first seeks to abandon the rail line and the STB determines, "present or future public convenience and necessity require or permit the abandonment or discontinuance" of the rail line. 49 U.S.C. §10903 (d); *Goos v. I.C.C.*, 911 F.2d 1283, 1293 (8th Cir. 1990). The STB "views abandonment and trail conversion as two separate proceedings." 911 F.2d at 1293.

After a railroad files an abandonment petition, a trail sponsor may request the STB to invoke §1247(d) of the Trails Act. *See* STB Trails Act Decision, p. 3.

Unlike an abandonment proceeding, the STB has no discretion under 16 U.S.C. §1247(d) over whether or not to issue a NITU.[7]

The NITU grants the railroad 180 days to negotiate an agreement with a trail group, and the STB will freely grant extensions to this deadline. *See Birt v. STB*, 90 F. 3d 580, 588-90 (D.C. Cir. 1996); *Grantwood Vill. v. Mo. Pac. R.R. Co.*, 95 F.3d 654, 659 (8th Cir. 1996). Many NITUs are repeatedly extended for years, some for more than a decade. *See* STB Docket No. AB-303 (Sub-No. 18X),

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[7] *Jost v. STB* 194 F. 3d 79, 89 (D.C. Cir. 1999) ("[The] statute gives [the STB] 'little, if any, discretion to forestall a voluntary agreement to effect a conversion to trail use.") *See also Citizens Against Rails-to-Trails v. STB*, 267 F. 3d 1144, 1153 (D.C. Cir. 2011).

Wisconsin Central Ltd., Decision and Notice of Interim Trail Use or Abandonment (NITU issued in 1998 and extended eleven years into 2009).

"The [NITU also] precludes a finding of abandonment of the right-of-way under state law... State law claims can only be brought *after* the ICC has authorized an abandonment and after the railroad has consummated that abandonment authorization." *Grantwood Vill.*, 95 F.3d at 659 (citations omitted) (emphasis added).

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." *Caldwell v. United States*, 391 F.3d 1226, 1233-34 (Fed. Cir. 2004) (emphasis in original). *See also Barclay v. United States*, 443 F.3d 1368, 1374 (Fed Cir. 2006) ("[T]he NITU precludes abandonment and the reversion that would follow if abandonment were consummated.").

A NITU "is itself not a guarantee of eventual trail use. The NITU or CITU serves only 'to provide an opportunity for the railroad and prospective trail users to negotiate an agreement.'" *Goos*, 911 F.2d at 1293 (citing *Iowa S. R.R.—Exemption—Abandonment in Pottawattamie, Mills, Freemont and Page Counties, IA*, 5 I.C.C. 2d 496, 502 (1989)).

> The STB retains jurisdiction over a rail line throughout the CITU/NITU negotiating period, any period of railbanking/interim trail

> use, and any period during which rail service is restored. It is only upon a railroad's lawful consummation of abandonment authority that the Board's jurisdiction ends. At that point, the right-of-way may revert to reversionary landowner interests, if any, pursuant to state law.

STB Trails Act Decision, p. 5 (STB Feb . 10, 2011) (internal citations omitted).

Once the original NITU is issued, "the STB retain[s] jurisdiction over the right-of-way [even after the original NITU expired], and thus had authority to issue the [retroactive] extension, because the railroad did not consummate abandonment while the [N]ITU was expired." *Barclay*, 443 F.3d. at 1376.

The railroad must file a "Notice of Consummation" with the STB within one year of the NITU. *See* 49 C.F.R. §1152(e)(2). The STB will grant one-year extensions to "hold open the possibility...the right-of-way could be used [as a trail]" and may grant any number of successive one-year extensions. *See* STB Ex Parte No. 537, 2 STB 311, 315-18, Abandonment & Discontinuance of R. Lines & R. Transp. Under 49 U.S.C. 10903 (June 18, 1997); 1 S.T.B. 894 (Dec. 9, 1996). The STB adopted this requirement "to provide certainty in identifying the time when the Board's jurisdiction over the line ceases." 2 STB at 316.

If a Trail Use Agreement is reached, the NITU authorizes the trail sponsor to assume control of the former railroad easement and the trail sponsor may use the land for "interim trail use … subject to future reconstruction and reactivation for rail service." (A58). The land under the former railroad right-of-way may be used

for any purpose which does not prevent building a new rail line. *See* 49 C.F.R. §1152.29. Land subject to a NITU can be used for concession stands,[8] utility easements,[9] and even heliports.[10]

C. Section 1247(d) of the Trails Act "destroys" and "effectively eliminates" an owners' "reversionary" right to "unencumbered" title and possession of their land.

"As originally enacted, the Trails Act made no specific provision for the conversion of abandoned railroad rights-of-way to trails. Congress's first effort to encourage this type of adaptive re-use appeared in §809 of the [4-R] Act of 1976."[11] The 4-R Act authorized the ICC (now STB) to delay a railroad's disposition of rail lines subject to abandonment for up to 180 days to allow for the sale of the rail line for public purposes. 49 U.S.C. §10905.

This Public Use Condition did not achieve Congress's hoped-for result. "Section 10906 has no rail banking provision that would preempt state laws that

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[8] *See Pankratz/Biery v. United States*, 07-675L, 07-693L, Tr. p. 91 (Dec. 18, 2008). Government counsel stated a NITU allowed a concession stand to be built on the property. When asked whether there was any use not allowed on land subject to a NITU, government counsel replied she could not think of any. *Id.*

[9] According to STB filings, the trail sponsor acquired the easement not to build a trail, but to install fiber optic cable. *See Pankratz v. United States,* CFC Docket No. 07-675L.

[10] *See* STB Ex Parte Docket No. 690, *Twenty-Five Years of Railbanking: A Review and Look Ahead,* (June 2, 2009), Testimony of Marianne Wesley Fowler, p. 54-55 (citing a Texas case where a heliport was built on land under authority of the Trails Act).

[11] *Nat'l Wildlife Fed'n v. I.C.C.*, F.2d 694, 697 (D.C. Cir. 1988). *See* 49 U.S.C. §10906 (1982).

could otherwise result in reversion of rights-of-way to abutting landowners upon a cessation of rail service." *Nat'l Wildlife*, 850 F.2d at 701."[12]

The lack of a so-called "railbanking" provision created a problem because railroad right-of-way easements would be extinguished as a matter of state law when the railroad ceased railroad operations.

"Congress renewed its effort to promote the conversion of railroad rights-of-way to trail use when it enacted the current §8(d) as part of the 1983 Trails Act Amendments."[13] Section 8(d) was added to "eliminate many of the problems with this program. The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use."[14] *Id*. at 701.

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[12] *See also Fritsch v. I.C.C.*, 59 F.3d 248, 252 (D.C. Cir. 1995) "[O]nce a railroad consummates abandonment of a bare easement, the railroad no longer possesses *any* property interests to transfer.").

[13] *National Wildlife*, 850 F.2d at 697.

[14] H.R. Rep. No. 28, 98th Cong., 1st Sess. 8-9 (1983), *reprinted in* 1983 U.S.C.C.A.N. 119-20. *See also Preseault I*, 494 U.S. at 8.

By deeming public recreation to be like "discontinuance" rather than "abandonment,"[15] Congress sought to prevent railroad easements from "reverting" to landowners under state law.[16] Section 1247(d) provides: "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."

When the STB invokes the Trails Act it "destroys"[17] and "effectively eliminates"[18] the owners' "reversionary" rights denying them unencumbered title and possession of their land. *See Caldwell*, 391 F.3d 1226, 1228; *Barclay*, 443 F.3d 1368, 1371; *Renewal Body Works v. United States*, 443 F.3d 1368, 1371 (Fed. Cir. 2006); *Toews*, 376 F.3d at 1376; *Hash*, 403 F.3d at 1311; *Bright v. United States*, 603 F.3d 1273, 1275 (Fed. Cir. 2010); *Ellamae Philips Co.*, 564 F.3d at 1367; and *Ladd II*, 630 F.3d at 1020.

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15 "'Abandon' and 'discontinue' have distinct meanings in this context. In general, to 'abandon' a line involves ceasing to operate a line, with no intention of resuming operation of that line. Once a line is abandoned, the [STB] loses jurisdiction over that line. To 'discontinue' service over a line involves ceasing to operate a line for an indefinite period of time, with the option of resuming operation of that line in the future. When service over a line has been discontinued, the [STB] retains jurisdiction over that line." *Mfrs. Ry. Co.v. Surface Transp. Bd.*, 676 F.3d 1094, 1095 (D.C. Cir. 2012).

16 *Citizens Against Rails-to-Trails v. STB*, 267 F. 3d 1144, 1149 (D.C. Cir. 2001), *citing Preseault I*, 494 U.S. at 8. *See also Nat'l Wildlife*, 850 F.2d at 703.

17 *Preseault II*, 100 F.3d at 1552.

18 *Id.* at 1533-34.

As such, invoking Section 1247(d) of the Trails Act is a compensable *per se* taking for which the Fifth Amendment requires payment of "just compensation." *See Preseault I* and *Preseault II*. The constitutional obligation to justly compensate a landowner whose property is taken pursuant to the Trails Act is "properly laid at the doorstep of the Federal Government." *Preseault II*, 100 F.3d at 1531.

This Court has established the "bright line" rule that "a Trails Act taking begins and a takings claim accrues, if at all, on issuance of the NITU … [which] is the only event that must occur to entitle the plaintiff to institute an action." *Barclay*, 443 F.3d at 1373 (quotations and citations omitted). "We stated that 'a taking occurs when the owner is deprived of use of the property … by blocking the easement reversion. While the taking may be abandoned … by termination of the NITU [,] the accrual date for a single taking remains fixed." *Ladd II*, 630 F.3d at 1025 (quoting *Caldwell*, 391 F.3d at 1235).

An owner's property is taken when the NITU is issued because that is when "state law reversionary property interests that would otherwise vest in the adjacent landowners are blocked" by the government. *Caldwell*, 391 F.3d at 1233; *Ladd II*, 630 F.3d at 1023 ("The NITU is the government action that prevents the landowners from possession of their property unencumbered by the easement."); *Navajo Nation v. United States*, 631 F.3d 1268, 1275 (Fed. Cir. 2011) ("[A]

takings claim accrues when the government takes action which deprives landowners of 'possession of their property unencumbered by [an] easement,' regardless of whether third parties ever take physical possession of that easement") (citing *Ladd II*).

D. Landowners are given no notice of a NITU taking their land.

Congress did not include any provision for notice to landowners whose property is subject to an order invoking §1247(d). And, the STB does not provide any notice to landowners that a NITU has been issued, nor does the STB require anyone else to notify an that owner their property is subject to an NITU taking their land under §1247(d) of the Trails Act.

Shortly after §1247(d) was adopted, landowners began petitioning the STB (and its predecessor agency, the ICC) for a requirement that landowners be notified when the STB issues a NITU. But, the STB has persistently refused to adopt any rule providing any notice to affected landowners.

"In 1986 the ICC adopted rules to implement the Trails Act. The notice provisions did not (as they do not today) provide for individual notice to holders of reversionary interests of abandonment proceedings, or of the subset of abandonment proceedings involving interim trail use proposals." *Nat'l Ass'n of Reversionary Prop. Owners v. STB*, 158 F.3d 135, 139 (D.C. Cir. 1998) (citation omitted).

The STB recently reiterated its opposition to providing landowners any notice it has issued a NITU had been issued.

> The [STB] previously declined to adopt an actual notice rule, finding that actual notice would be time-consuming, burdensome, and unnecessary. The agency has explained that interested parties may contact either the railroad or trail sponsor to find out whether the railroad has consummated abandonment or obtain information on the status of any interim trail use negotiations.

STB Trails Act Decision, p. 7 (internal citations omitted).

The STB provides no notice when the railroad and trail sponsor reach a trail use agreement. The STB does not even require that it be told if or when a trail use agreement has been reached. "The [STB] has never required that trail use agreements, or notice that the parties have even reached an agreement, be submitted to the Board." Trails Act Decision, p. 4.

III. Procedural history of this case

A. The landowners promptly filed this case after learning the STB had issued a NITU.

The STB issued the NITU affecting this seventy-six mile-long corridor on July 26, 2006. Neither the STB nor any other party provided these landowners any notice of this NITU. The STB did not hold any hearings (local or in Washington, D.C.) related to the NITU's issuance. Shortly after it was issued, the railroad removed the tracks from the corridor, which was how landowners learned of the change in the nature of the use of their land. (*See* landowner affidavits, A1695-1723). Upon learning of the NITU, the landowners promptly filed this action. *Id.* (*See also* CFC Case No. 271, Dkt. No. 1, filed April 30, 2007 (A12.1-A25)).

B. The issue of liability was fully briefed before the CFC in the original proceeding.

After initial disclosures and generous opportunity for additional discovery, the parties filed cross-motions for partial summary judgment. These motions addressed whether the government was liable for a compensable taking. The motions were supported by a full record, including proposed findings of uncontroverted facts offered by both parties. The record included all of the historic title documents by which the railroad right-of-way easement was originally created and the deeds by which each landowner acquired title. The CFC heard oral

argument on the cross-motions for summary judgment in 2008 and 2009, each time for more than four hours.[19]

The CFC granted the government's motion for summary judgment and denied the Arizona ranchers' cross-motion, ruling there was no compensable taking because a trail had not yet been built. *See Ladd I.* The landowners appealed. (A1442).

C. This Court had the full record before it on appeal when it reversed the CFC.

After reviewing the record and hearing oral argument, this Court reversed holding that the federal government was indeed liable for a compensable per se taking. *Ladd II,* 630 F.3d at 1025. This Court rejected the government's argument that the issuance of the NITU was only a "temporary regulatory taking." This Court remanded the case for the limited purpose of making "a determination of the compensation owed to the appellants for the taking of the Southern Stretch and the Northern Stretch of railway line." *Id.*

D. This Court rejected the government's request that it amend its mandate.

The government sought both a panel and *en banc* rehearing. United States' Petition for Panel Rehearing and Rehearing En Banc, *Ladd III*, 2011 WL 1054242, at *11 (Fed. Cir. Mar. 1, 2011). It argued that the mandate "appear[ed] to assume

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[19] A1036; A1258.

that liability has been established against the United States," and requested the Court to reconsider its holding and rewrite and broaden its mandate to allow the government to re-litigate the issue of liability. *See id.* at *11-14.

This Court issued a published decision denying the government's motion for rehearing and declined the government's request to rewrite the mandate. *Ladd III*, 646 F.3d at 910.

E. On remand, the CFC did not follow this Court's mandate but allowed the government to re-litigate the issue of liability.

Over the landowners' objections, the CFC allowed the government to re-litigate liability and directed the parties to reargue the issue. (A1517).

1. In its post-mandate argument, the government introduced a never-before-seen NITU from 1998.

The CFC also allowed the government to introduce**,** for the first time following remand**,** a different NITU issued July 7, 1998 in a different proceeding. STB Docket No. AB-441 (Sub-No. 2x) (A1592-1594). On the basis of this newly-discovered NITU, the government now argued five of the landowners' claims were time-barred under 28 U.S.C. §2501 because those claims actually arose on the date the 1998 NITU was issued. (A1545-1546).

The CFC noted this 1998 NITU was first introduced following remand. "Neither party raised a question about [the 1998 NITU's] possible impact on plaintiffs' claims until after the Circuit issued its remand order." (A1989, n. 6).

No notice of this 1998 NITU (or any related proceedings) was ever provided to any of the landowners. The STB did not hold any "local hearings" related to the issuance of this 1998 NITU and the 1998 NITU was never published in the Federal Register or any other publication.

Each property owner declared they had no knowledge of the 1998 NITU. For example, Jack Ladd said, "I had no notice, actual or constructive, of any NITU or other order of the STB which purported to be issued at any time prior to July 25, 2006." (A1798, ¶9). *See also* A1780-1810 where each of the landowners submitted an affidavit affirming they had no knowledge of the 1998 NITU. Nor did the government ever claim otherwise.[20]

The 2006 NITU made no mention of the 1998 NITU.[21] The STB and the Justice Department were unaware of the 1998 NITU until the government raised its existence in its post-mandate briefing. At no point did the government refer to the 1998 NITU in any pleading, communication, or document prior to the post-remand briefing.

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[20] The government later claimed the 1998 NITU was provided to the Plaintiffs "as part of the United States' initial disclosures." (A1831). But this is unavailing because, at most, this would mean the landowners learned of the 1998 NITU only after they commenced this litigation in 2007.

[21] Dkt. No. 127 at 4, n.4 ("The 2006 NITU does not reference the earlier NITU's").

To the contrary, the government affirmatively represented that "Plaintiffs' claims accrued on July 26, 2006. The statute of limitations for Plaintiffs' takings claims and for putative class members to join any certified class will not run in this case until July 26, 2012 – over three and a half years from now." (A1201, A632).

The government also produced a letter from David M. Konschnik, Director of the STB Office of Proceedings. In this letter Konschnik declared, "under penalty of perjury" that "[t]he NITU, as first issued on July 26, 2006, covered the entire 76.2 mile line, and, by its terms was to extend until January 22, 2007." Konschnik never mentioned the 1998 NITU nor did he reference any proceedings referencing the 1998 NITU. (A1025-1026).

2. Following remand, the CFC did not follow this Court's mandate but instead dismissed five landowners' claims because of the 1998 NITU.

The CFC "interpreted" this Court's mandate to allow it to reconsider the government's liability.

> The appeals court issued a remand order that directs [the CFC] to assess damages for takings … . Such an implicit direction could be reasonable only if the Federal Circuit had made sufficient findings of fact and law to direct entry of judgment for the property owners. We interpret the remand as a direction to consider plaintiffs' rights in the subject property, including the impact of limitations, if any.

(A1989).

The landowners demonstrated they never had any notice or knowledge of the 1998 NITU. (A1780-1810). The government never alleged the landowners had

actual notice of the 1998 NITU. Rather, the government claimed their taking claim accrued with the 1998 NITU because these Arizona ranchers "should have known" of the 1998 NITU. (A1833).

But, the most obvious demonstration these Arizona ranchers could not be charged with constructive notice of the 1998 NITU is that the Director of the STB and the Justice Department lawyers litigating this case did not know of the existence of the 1998 NITU until 2011 following this Court's remand. If the government itself did not know of the 1998 NITU, how can these Arizona ranchers, many elderly, be charged with this knowledge? Therefore, the 1998 NITU could not have triggered the running of the 28 U.S.C. 2501 limitation period.

Yet, the CFC dismissed these five owners' claims as untimely on the basis of the 1998 NITU. The CFC held, "[b]y the time the five plaintiffs had filed taking claims in 2007, at least seven years had passed since they were legally on notice." (A1989). The CFC then dismissed the claims of the Heinzl, Castro, Windsor-Brown, Ladd, and Miller families as time-barred under 28 U.S.C. §2501. *Id.*

3. The CFC also granted summary judgment for the government on the Lindsey family's claim.

The CFC also granted summary judgment for the government on the Lindsey family's claim. (A1991). The CFC dismissed the Lindsey's claim because the CFC interpreted the original 1911 indenture as a fee simple estate to the railroad, not granting the railroad an easement. The CFC reached this

conclusion despite language saying the conveyance was for a relocated railway line "over, through, across and upon" the Cumming's property. *Id.*

SUMMARY OF THE ARGUMENT

This Court's remand directed the CFC to make "a determination of the compensation owed to the appellants for the taking of the Southern Stretch and the Northern Stretch of railway line." The government filed a motion for rehearing asking this Court to rewrite this mandate because it "implied the government was liable." This Court rejected that request. Yet, on remand, the CFC ignored this Court's mandate and, for all but two of the landowners did not determine the compensation they are owed, but rather dismissed six of these owners' claims. The CFC was wrong to not follow this Court's mandate.

Even if the mandate did allow reconsideration of the government's liability after remand, the CFC erred when it dismissed the landowner's claims as time-barred on the basis of the 1998 NITU. This is so because the landowners had no notice of the 1998 NITU. Indeed, even the STB Director and the Justice Department did not discover the 1998 NITU until after remand. As such, the six-year limitations period of 28 U.S.C. §2501 must be read consistent with the "claim suspension rule" providing that the limitations period does not commence running until the claimant "knew or should have known of the claim."

Additionally, dismissing these owners' claims as time-barred violates constitutional guarantees of due process. The Supreme Court has declared "An elementary and fundamental requirement of due process in any proceeding which

is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Court firmly declared that notice by publication is constitutionally inadequate when by "reasonably diligent efforts" the owners could have been provided actual notice by personal service or mail." On the facts of his case, these owners did not receive constitutionally adequate notice of the 1998 NITU. Thus, the CFC erred by dismissing their claims as time-barred on the basis of the 1998 NITU.

Finally, the CFC wrongly construed the 1911 "Indenture" from E.L. Cummings as conveying title to the entire fee estate when, under the language used in the indenture, Arizona law and settled principles of property law applicable to railroad conveyances granted the railroad an easement to operate a railroad "over, across, through and upon" the land, not title to the fee estate. Thus, the CFC erred in dismissing the Lindsey family's claim.

STANDARD OF REVIEW

Summary judgment is appropriate where evidence demonstrates "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(c)(1); RCFC 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). When passing on a jurisdictional challenge, the "allegations of the complaint should be construed favorably to the pleader" and should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (citation omitted).

When considering a motion for summary judgment a court does not weigh each side's evidence, but resolves all inferences from the agreed facts in favor of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

An order granting summary judgment is reviewed *de novo* "in all respects." *Cienega Gardens v. United States* 331 F.3d 1319, 1328 (Fed. Cir. 2003). The CFC's decision to grant the government's motion for summary judgment is a conclusion of law to which this Court owes no deference. *Barclay*, 443 F.3d at 1372-73.

ARGUMENT

I. The CFC erred when it failed to follow this Court's mandate.

"The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate; they can examine it for no other purpose than execution; nor give any other or further relief; nor review it upon any matter decided on appeal, for error apparent; nor intermeddle with it, further than to settle so much as has been remanded."

Sibbald v. United States, 37 U.S. 488, 488 (1838)

The CFC erred when it ignored this Court's mandate and reconsidered the issue of the government's liability after remand.

This Court—like every other Circuit and the Supreme Court—follows the mandate rule. *See Amado v. Microsoft Corp.*, 517 F.3d 1353, 1360 (Fed. Cir. 2008) ("The mandate rule provides that 'issues actually decided on appeal—those within the scope of the judgment appealed from, minus those explicitly reserved or remanded by the court—are foreclosed from further consideration'") (citing *Engel Indus. v. Lockformer Co.*, 166 F.3d 1379, 1383 (Fed. Cir. 1999)).[22]

The mandate rule is jurisdictional, because jurisdiction follows the mandate. *See United States v. Rivera*, 844 F.2d 916, 921 (2d Cir. 1988) ("Simply put, jurisdiction follows the mandate").

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[22] *See also Jewelers Vigilance Comm., Inc. v. Ullenberg Corp.*, 853 F.2d 888, 892 n.3 (Fed. Cir. 1988) (citing *Briggs v. Pa. R.R. Co.*, 334 U.S. 304 (1948)); *N. Helex Co. v. United States*, 634 F.2d 557, 560 (Ct. Cl. 1980) (quoting *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 140 (1940)) ("[A] lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid to rest").

Because of the mandate rule, appellate courts have the power to bind trial courts. *See Sibbald*, 37 U.S. 488 (1838) ("Appellate power is exercised over the proceedings of inferior courts"). A mandate issued by this Court must be "scrupulously and fully carried out" by the trial court. *S. Atl. Ltd. P'ship of Tenn. v. Riese*, 356 F.3d 576, 583 (4th Cir. 2004) (quoting 2A Fed. Proc., L.Ed. §3:1016).

In *Doe v. Chao*, for example, the Fourth Circuit explained that "[t]he mandate rule is a 'more powerful version of the law of the case doctrine.'" 511 F.3d at 464-65 (citing *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 414 (4th Cir. 2005)). The mandate rule restricts the district court's authority on remand, operating with two main effects: first, "'any issue conclusively decided by [the appellate] court on the first appeal is not remanded,' and second, 'any issue that could have been raised but was not raised on appeal is waived and thus not remanded.'" *Id.* at 465 (citing *United States v. Husband*, 312 F.3d 247, 250-51 (7th Cir. 2002) and *S. Atl. Ltd.*, 356 F.3d at 584).

This Court's mandate cannot be examined by the CFC for "any other purpose than execution . . . <u>even for apparent error</u> . . . ." *N. Helex*, 634 F.2d at 560 (emphasis added) (citing *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895); *Briggs*, 334 U.S. at 306 (holding that where the trial court awarded an amount of judgment contrary to mandate, the award was properly stricken by the appeals court as enlargement that could only be done pursuant to "amendment of the

mandate").[23] Instead, because this Court has passed judgment, "the decision of the appellate court determines the law of the case, and the trial court cannot depart from it on remand." *Exxon Corp. v. United States*, 931 F.2d 874, 877 (Fed. Cir. 1991).[24]

This case was filed in 2007. The parties were obligated to make extensive initial factual disclosures of all documents and factual records related to the government's liability. The government requested additional time to conduct further discovery into the factual and legal record related to these landowners' claims. During this time, the parties researched and filed with the court all of the relevant land title records including the original 1903 grants to the railroad. (A428-503; A770-799).

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[23] *See also United States v. Bell*, 5 F.3d 64 (4th Cir. 1993) ("Few legal precepts are as firmly established as the doctrine that the mandate of a higher court is 'controlling as to the matters within its compass'") (quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939)); *Morris v. SEC*, 116 F.2d 896, 898 (2d Cir. 1941) (holding that the "meaning of the mandate . . . should be determined by the court that issued it").

[24] *See also Gindes v. United States*, 740 F.2d 947, 949 (Fed. Cir. 1984) (doctrine "rests upon the important public policy that '[n]o litigant deserves an opportunity to go over the same ground twice'") (quoting *United States v. Turtle Mtn. Band of Chippewa Indians*, 612 F.2d 517, 520 (Ct. Cl. 1979)); *Bastian v. Erickson*, 114 F.2d 338, 340-41 (10th Cir. 1940) (citing cases explaining that when appellate courts issue judgments, the lower court must obey and "no modification of such judgment can be made by the lower court").

On this record, the parties disputed all aspects of the government's liability in their summary judgment cross-motions. The CFC issued its final appealable order in October 2009 on the basis of the uncontested factual record developed by the parties over nearly three years of litigation. (There was no substantive dispute over the factual record, only the legal conclusions to be drawn from these historical title documents.)

On appeal, the landowners raised the issue of their state-law "reversionary property interests" being taken by the government. These landowners challenged the CFC's conclusion that the STB's order and Trails Act preemption of state-law did not interfere with or change their state-law right to unencumbered possession of their land.

This Court overturned the CFC's ruling and remanded their claims to the CFC for the limited (and express) purpose of making a "determination of the compensation owed to the appellants for the taking of the Southern Stretch and the Northern Stretch of railway line." *Ladd II*, 630 F.3d at 1025.

As this Court noted, "The NITU is the government action that prevents the landowners from possession of their property unencumbered by the easement." *Id.* at 1023. This Court reaffirmed this principle in *Navajo Nation v. United States*, 631 F.3d 1268, 1275 (Fed. Cir. 2011) (reaffirming the holdings in *Ladd* and *Caldwell* "that a takings claim accrues when the government takes action which

deprives landowners of 'possession of their property unencumbered by [an] easement.'").

The deeds and grants describing the landowners' and the railroad's property interests were before this Court on appeal. Interpretation of written legal instruments is a matter of law. *See Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 997 (Fed. Cir. 1995) ("The interpretation of a contract or a deed, like a patent, is ultimately a question of law").[25]

The plain language of these instruments demonstrated that the conveyances to the railroad were easements limited in scope to railroad use. This Court needed nothing else to conclude that, upon the NITU's issuance, the named Plaintiffs owned the fee estate, and the STB's order thus "destroyed" and "effectively eliminated" their right to unencumbered title and possession.[26]

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[25] *See also William & James Brown & Co. v. McGran,* 39 U.S. (14 Pet.) 479, 493 (1840) ("[T]he interpretation of written documents properly belongs to the Court, and not to the jury."); *Goddard v. Foster,* 84 U.S. (17 Wall.) 123, 142, (1872) ("[I]t is well-settled law that written instruments are always to be construed by the court....").

[26] This Court has instructed the CFC to apply a three-part test to Trails Act takings cases. *Preseault II,* 100 F.3d at 1533 and *Ellamae Phillips Co*., 564 F.3d at 1373. (1) Did the railroad originally acquire ownership of the fee estate in the land or was the railroad granted only an easement? (2) If an easement, was the easement limited to using the land for operation of a railroad or did the easement grant the railroad the right to sell the property to a non-railroad for public recreation? Finally, (3) if the original easement did include public recreation, had it otherwise terminated?

Thus, when it reviewed the CFC's 2009 decision, this Court had everything it needed to decide the legal issue of liability. *See Pfizer, Inc. v. Teva Pharm. USA, Inc.*, 518 F.3d 1353, 1359 n.5 (Fed. Cir. 2008) (holding that appellate court can reach "a predicate legal issue necessary to a resolution of the issues" before it); Appellants' Opening Brief, *Ladd II*, 2010 WL 464245 at *49 (Fed. Cir. Jan. 20, 2010) (citing record to establish that "easement was limited to use of the land for operation of a railroad").

For these reasons, this Court was well within its authority to hold the government liable for a compensable *per se* taking. *See UMC Elecs. Co. v. United States*, 816 F.2d 647, 657 (Fed. Cir. 1987) (when facts are undisputed and the issue is solely one of law, appellate court need not remand but may resolve issue); *Jewelers Vigilance*, 853 F.2d at 890 n.2 (reversing dismissal and mandating that plaintiff's summary judgment motion be granted); *see also Union Elec. Co. v. Sw. Bell Tel. L.P.*, 378 F.3d 781, 786 (8th Cir. 2004) ("An appellate court has the authority … to reverse summary judgment in favor of one party and to grant summary judgment on the issue of liability in favor of another party if no relevant factual dispute exists.").

In its rehearing petition, the government argued this Court's mandate was "improper," and asked this Court to rewrite the mandate to allow the CFC to conduct "further proceedings." *See* Pet. Panel Rehearing and Rehearing *en banc*,

Ladd, 2011 WL 1054242, at *11. The government fretted that the panel's limited mandate "appear[ed] to assume that liability has been established against the United States." *Id.* at *11.

This Court rejected the government's request. "The petition for panel rehearing was considered by the panel that heard the appeal, and thereafter the petition for rehearing en banc, response, and brief amicus curiae were referred to the circuit judges who are authorized to request a poll of whether to rehear the appeal en banc. A poll was requested, taken, and failed." *Ladd III*, 646 F.3d at 910.

The CFC was obligated to "scrupulously and fully carr[y] out" this Court's instruction to determine "the compensation owed to" these Arizona ranch owners. Its failure to do so was reversible error.

II. The CFC erred dismissing the five landowners' claims because, under the "claim suspension rule," the limitations period could not begin running until the landowners knew of the STB's order.

"According to the accrual suspension rule, 'the accrual of a claim against the United States is suspended, for purposes of 28 U.S.C. §2501, until the claimant knew or should have known that the claim existed.'"

Young v. United States, 529 F.3d 1380, 1384 (Fed. Cir. 2008) (citing *Martinez v. United States*, 333 F.3d 1295, 1319 (Fed. Cir. 2003) (en banc))

The CFC erred when it concluded "[t]he statute of limitations began to run against the five plaintiffs when defendant issued the 1998 NITU, not the NITU filed in 2006." (A1989). And, on this basis, it dismissed five landowners' claims as time-barred.

No one disputes that under, *Caldwell*, *Barclay* and *Ladd*, this Court has adopted the "bright-line rule" that "a Trails Act taking begins and a takings claim accrues, if at all, on issuance of the NITU . . . [which] is the only event that must occur to entitle the plaintiff to institute an action." *Barclay*, 443 F.3d at 1373. Further, no one disputes that Congress established a six-year limitation period in

28 U.S.C. §2501. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134-39 (2008) affirming the jurisdictional nature of §2501.[27]

But, the matter does not end there.

In *TRW v. Andrews*, 534 U.S. 19, 27 (2001), the Court wrote, "[w]e have also observed that lower federal courts 'generally apply a discovery accrual rule when a statute is silent on the issue.'"[28] This Court has held, "[a]ccording to the accrual suspension rule, 'the accrual of a claim against the United States is suspended, for purposes of 28 U.S.C. §2501, until the claimant knew or should

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[27] *See READING LAW* 286-287 (West 2012). ("[S]tatutes of limitation applicable to suits against the government could not be accorded the sorts of equitable tolling that would be allowed in private suits. This rigidity made sense when suits against the government were disfavored, but not in modern times. … The Supreme Court began to make exceptions to this approach in the 1960's, and finally signaled complete departure in [*Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 – 96 (1990)]." Scalia and Garner proceed to note, "The Court has declined to apply the *Irwin* principle to the question of whether the statute-of-limitations provision of the Court of Claims Act is jurisdictional and hence must be raised by a court *sue sponte*. But, that holding was explicitly grounded in stare decisis." Scalia's limited reading of *John R. Sand* is informative given that Scalia was in the majority in the Court's split decision.

[28] Citing *Rotella v. Wood*, 528 U.S. 549, 555 (2000), and *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 191 (1997). The Court in *TRW* went on to find that it was "Congress' intent to preclude judicial implication of a discovery rule" given the "text and structure" of the Fair Credit Reporting Act which was the statute at issue in *TRW*. It must be presumed Congress intended the accrual suspension rule to apply to §2501 in the situation this case presents. Because, if §2501 is applied without regard to the claim suspension rule, as the CFC wrongly did, than this limitations statute, as applied to these landowners, gives rise to a flagrant violation of constitutional due process. See our discussion at Section III below.

have known that the claim existed.'" *Young*, 529 F.3d at 1384 (citing *Martinez*, 333 F.3d at 1319); *Ingrum v. United States*, 560 F.3d 1311, 1314 (Fed. Cir. 2009) ("Under [the 'claim suspension'] rule, the accrual of a claim against the United States will in some situations be suspended when an accrual date has been ascertained, but the plaintiff does not know of the claim.").

This Court in *Young* explained that the "accrual suspension rule" is not the type of "equitable tolling" foreclosed after *John R. Sand*. "This Court in *Martinez* also discussed the 'accrual suspension rule,' which is 'distinct from the question whether equitable tolling is available under [28 U.S.C. §2501] although the term 'tolling' is sometimes used in describing the rule." *Young*, 529 F.3d at 1384 (citing *Martinez*, 333 F.3d at 1319).

Thus, for the six-year limitations period to begin running, the landowners must have "known or should have known the claim existed." And, on the record in this case, it is undisputed they did not actually know of the 1998 NITU.

The record is undisputed that these landowners had no actual notice of the 1998 NITU. The record is clear that neither the STB, nor anyone else, mailed them the 1998 NITU. The 1998 NITU was not published in the newspaper or Federal Register. The railroad did not change its use of the right-of-way because of the 1998 NITU. Prior to 2006 the tracks and ties were still on the land and, prior to 2005 when a portion of the railroad line washed out, trains still

occasionally operated across the right-of-way. (A505). And, while the STB says it does not believe landowners should be provided notice "[b]ecause local public hearings on trail proposals are 'the norm rather than the exception,'"there is no record of any "local public hearings" related to the 1998 NITU. The STB's Director did not know of the 1998 NITU nor did any of the Justice Department lawyers representing the government in this litigation.

This Court in *Young* said, "[t]o achieve [claim] suspension the plaintiff 'must either show that the defendant has concealed its acts with the result that plaintiff was unaware of their existence or it must show that its injury was 'inherently unknowable' at the accrual date.'" 529 F.3d at 1384 (quoting *Welcker v. United States*, 752 F.2d 1577, 1580 (Fed. Cir. 1985)).

Concealment under the claim suspension rule does not require a showing of malice or fraud, and we do not imply that any exists here. The operative language is, "the defendant has concealed its acts with the result that plaintiff was unaware of their existence." *Id.* (quoting *Welcker*, 752 at 1580).

The STB did not provide the landowners notice of the 1998 NITU when it was issued. And, it has steadfastly opposed any requirement that the STB, the railroad, the trail sponsor or anyone else provide notice of an NITU to landowners.

During the course of this litigation (from 2007 until remand in 2011) the government never mentioned the 1998 NITU. Instead, it agreed the landowners'

claims were timely filed and arose upon issuance of the 2006 NITU. For example, see the declaration of Director Konschnik and the government's representations that these owners' claims accrued with the 2006 NITU. (A1201, A632). We do not contend this was done maliciously, but, Director Konschnik's letter and the representations made by the government in the course of this litigation clearly had the effect of concealing the 1998 NITU from these Arizona ranchers with the result they were unaware of the 1998 NITU until the government raised it in the post-remand briefing.

The 1998 NITU was also inherently "unknowable" to these Arizona ranchers. The most compelling demonstration of this is that the STB's Director and the government's lawyers with the Justice Department, well-versed in the Trails Act and familiar with STB proceedings, did not know the 1998 NITU existed despite three years of trial preparation and an appeal to this Court. If the Director of the STB and the Justice Department trial lawyers did not know of the 1998 NITU until 2011, it is absurd to suggest these Arizona ranchers, many elderly, are chargeable with knowledge of this 1998 NITU.

III. The CFC's dismissal of these landowner's Fifth Amendment claims on the basis of the 1998 NITU violates the Constitution's guarantee of Due Process.

"[B]efore the State conducts any *proceeding that will affect the legally protected property interests of* any *party, the State must provide notice to that party by means certain to ensure actual notice as long as the party's identity and location are 'reasonably ascertainable.'"*

Mennonite Bd. of Missions v Adams, 462 U.S. 791, 800-01 (1983) (dissenting opinion of Justice O'Connor summarizing the Court's holding) (emphasis in original)

The Fifth Amendment declares: "[No person shall be] deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[29] The Fifth Amendment guarantees both a right to "due process" and "just compensation." The Fifth Amendment's guarantee that the government will justly compensate a property owner for property the government takes does not exist by legislative grace. Rather, an owner's right to "just compensation" for what was taken from the owner (and the corollary obligation of the government to justly compensate the owner for what it

[29] U.S. CONST. Amend. V.

has taken) is a self-executing constitutional principle and does not depend upon any waiver of sovereign immunity.[30]

As the Court recently observed, "in *Palko* [*v. Conn.*, 302 U.S. 319 (1937)], the Court famously said that due process protects those rights that are 'the very essence of a scheme of ordered liberty' and essential to 'a fair and enlightened system of justice.'" *McDonald v. City of Chicago, Ill.*, __ U.S. __, 130 S. Ct. 3020, 3032 (2010).

Because these landowners' claims are "grounded in the Constitution itself," Congress cannot limit the landowners' right to bring these claims in the manner

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[30] *Jacobs v. United States*, 290 U.S. 13, 16 (1933) ("The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment.").

In *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304 (1987), the Court held:

> [A] landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation' . . . . As noted in Justice Brennan's dissent in *San Diego Gas & Electric Co.*, [450 U.S. 621, 654-55 (1981)], it has been established at least since *Jacobs* that claims for just compensation are grounded in the Constitution itself . . . . *Jacobs v. United States*, moreover, does not stand alone, for the Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution.

Id. at 315-16 (numerous citations omitted).

See also Hendler v. United States, 952 F.2d 1364, 1371 (Fed. Cir. 1991) (citing *Jacobs*, 290 U.S. 13) ("Since the suit was based upon the constitutional provision protecting property rights, and the provision was considered to be self-executing with respect to compensation, it escaped the problems of sovereign immunity.").

Congress may limit a right of action Congress itself created by statute. Thus, even if it were possible to conclude that Congress intended §2501 to begin running in a circumstance such as this where the owner had no notice of the claim, or were it possible to conclude these Arizona ranchers had some constructive notice of the 1998 NITU, the CFC was wrong to dismiss these owners' claims on the basis of the 1998 NITU because to do so without these owners having been provided actual notice of this order taking their property is a flagrant violation of Due Process.

In *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), the Court held, "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information." (Citations omitted).

The Court went on to state, "when notice is a person's due, process which is a mere gesture is not due process." *Id*. at 315. The Court held notice by publication to be constitutionally deficient. Following *Mullane* the Court held, "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice." *City of New York v. New York, N.H & H.R. Co.*, 344 U.S. 293, 301 (1953). In *Mullane*, it was recognized that prior to an action which will affect

an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment,[31] a State must provide [notice by a means described in *Mullane*.]" *Mennonite Bd.*, 462 U.S. at 795. The Court held that published notice was constitutionally deficient when the names and addresses of the party to whom notice was due were available. In such a circumstance, notice was required by "more effective means such as personal service or mailed notice." *Id.* The Court declared, "Neither notice by publication and posting, nor mailed notice to the property owner [when the notice is due the mortgagee], are means 'such as one desirous of actually informing the [mortgagee] might reasonably adopt to accomplish it.'" *Id*. at 799. Finally, the Court held, "Personal service or mailed notice is required even though sophisticated creditors have means at their disposal to discover [the proceeding affecting their property interest]." *Id.*

The Court has continued to affirm the principle that when the government seeks to take "life, liberty or property" it must provide the person actual notice by mail or personal service.[32] The Court recently held that, "[When] the State is exerting extraordinary power against a property owner-taking and selling a house

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[31] The Fifth Amendment established the Due Process Clause as against the federal government. By the Fourteenth Amendment the Due Process Clause was applied to the states. *Benton v. Maryland*, 395 U.S. 784 (1969).

[32] Specific actual personal notice is required before the government may suspend a driver's license *Bell v. Burson*, 402 U.S. 535 (1971), before an owner's property is seized after an accident for failure to post bond, *Fuentes v. Shevin*, 407 U.S. 67 (1972), and before public utility service is terminated for failure to pay the bill, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978).

he owns. It is not too much to insist that the State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed." *Jones v. Flower*s, 547 U.S. 220, 239 (2006). *Jones* involved a notice of tax sale to an owner for delinquent property taxes. Arkansas sent the landowner notice by certified mail but it was returned by the post office. The Supreme Court held "we conclude the State should have taken additional reasonable steps to notify Jones [to satisfy the notice required by the Due Process Clause.]." *Id.* at 234.

Following remand, the government essentially argued "we actually took your property in 1998, we did not tell you, but you 'should have known' and sued us then – even though the government officials and lawyers didn't know (or tell you) the government had taken your property until 2010."

It is impossible to consider the Supreme Court's due process jurisprudence and conclude the STB's 1998 NITU comports with the constitutional requirement that the government provide an owner actual notice before taking their property.

These eight Arizona landowners' identities and addresses are easily obtained. They are listed in the Cochise County Arizona land records and property tax records. The STB could have easily ascertained these owners' identity and

provided them actual notice of the 1998 NITU.[33] The government does this every day when they initiate a taking of property under the Declaration of Takings Act. 40 U.S.C. §3111, *et seq*.

Simply put, the government cannot issue an order taking an owners' property, fail to provide the constitutionally-mandated notice to owner, and then deny the owner their constitutional right to compensation by commencing the running of the limitations period before the owner ever had notice of the government's order. And the CFC's decision dismissing these owners' claims on this basis is a blatant violation of the Due Process Clause of the Fifth Amendment.

[33] The failure of the limitations period to begin running when the STB issued the 1998 NITU is entirely a situation of the government's creation. Congress could have provided owners whose land is taken under the Trails Act are to be compensated under the Declaration of Takings Act. Or, Congress could have provided a statutory requirement that owners are notified when §1247(d) is invoked to take their property. And, the STB could adopt a procedure to provide landowners with actual notice when it issues a NITU taking their property.

IV. The CFC erred when it concluded the railroad acquired title to the fee estate in the land owned by the Lindsey family.

In October 1911 C.L. Cummings executed an "Indenture" granting the El Paso an interest in a "strip of land on the east side of the San Pedro River two hundred feet (200 ft.) in width being one hundred feet in width on each side of the centerline survey as now staked out upon the ground for the relocation of the [Railroad] between the stations of Lewis Springs and Fairbanks, over, through across and upon the [land described by township and range]." (A789-790). This indenture to the railroad contains no warranties of title but only the customary quit claim recitals that the grantor "does bargain, sell, grant, convey, alien, remise, release and confirm unto [the Railroad] in fee simple" the described interest in the land.

The CFC dismissed the Lindsey family's claim because, "[t]he grantor's deed uses language that creates a fee simple estate in nearly every jurisdiction. It does not use the terms 'easement' or 'right-of-way.'" (A6). The CFC provides only three paragraphs explaining how it came to this conclusion. The CFC says it relied upon Ariz. Rev. Stat. §33-432(A), which the CFC reads as "stat[ing] that a conveyance is presumed to be in fee simple unless it is limited to a lesser interest expressly in the granting clause or elsewhere in the deed." (A5). And the term "fee simple" was in the granting clause. *Id.*

The CFC's interpretation of the Cummings indenture is wrong for a number of reasons.

First, when the El Paso and Cummings drafted this deed in 1911, Arizona was not a state (the deed itself says "Territory of Arizona") and "Ariz. Rev. Stat. §33-432(A)" had not been adopted so it cannot be presumed the parties to this indenture drafted it in light of a statute that would not be adopted for generations.

Second, even were this modern statute to control interpretation of this instrument drafted more than a century ago, the statute does not compel the conclusion the CFC gave it. The Arizona Supreme Court held that notwithstanding §33.432, "[a] grantor has the right to make a reservation of an interest in real property." *Phoenix Title & Trust Co. v. Smith*, 416 P.2d 425, 430 (1966). And that, despite this statute, "The courts have recognized many types of reservations [of an interest in land by a grantor]." *Id*. at 431.

Third, the CFC wrongly concluded, "[s]ome states provide that any real property conveyance to a railroad is presumed to be an easement and not a fee title. … Arizona law does not include such a presumption." (A1990, n. 7). The CFC provides no authority for this statement.

The CFC is half-right. The CFC correctly noted, some states provide that any conveyance of a strip of land to a railroad is presumed to be an easement. *See, e.g., Brown v. Weare*, 152 S.W. 2d 649, 655-56 (Mo. 1941) and *Harvest Queen*

Mill & Elevator Co. v. Sanders, 370 P.2d 419, 420 (Kan. 1962). Indeed, almost every state embraces this presumption when interpreting conveyances of a strip of land to a railroad.[34] Judge Posner described the policy for this presumption in *Penn. Cent. Corp. v. U.S.RR. Vest Corp*. 955 F.2d 1158, 1160 (7th Cir. 1992) (citations omitted).

But the CFC was wrong to conclude "Arizona law does not include such a presumption." *Ladd*, No. 07-271, slip op. at 5 (Fed. Cl. Apr. 12, 2012).

The CFC overlooked the Arizona Supreme Court's decision in *Atlantic & P.R. Co. v. Lesueur*, 19 P. 157, 160 (Ariz. Terr. 1888), in which the Court was asked to determine what interest a railroad held in land granted for a right-of-way. The Court ruled:

> It is said [by the railroad] that the term "right of way" is used to describe the land granted,-that is, that these are words of description, rather than of tenure. We cannot concur with this view, and no authority can be found which so holds. We must conclude that the words are used in their common, well-known, and universally accepted legal meaning, and that it was a grant of an easement as defined by the law. It was not a grant of the fee.

Id.

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[34] *See* The Law of Easements & Licenses in Land §1:22 (quoting *Hartman v. J & A Development Co*., 672 S.W. 2d 364, 365 (Mo. Ct. App. E.D. 1984)).

Lesueur was expressly reaffirmed by the Arizona Supreme Court in *Boyd v. Atchison, T. & S.F. Ry. Co.*, 4 P.2d 670, 672 (1931). In *Boyd*, the Court quoted the above language from the *Lesueur* decision and wrote further:

> The precise point passed on in the Lesueur Case, to wit, whether the title acquired by the railroad company to its right of way was in fee simple or merely an easement … The ruling in the Lesueur Case, above set forth [that a conveyance of a "right of way" conveys only an easement], was, and still is, the law of Arizona. For this reason we think [the property owners] were entitled to have their reversionary interest in the premises in controversy quieted…

Id. at 671.

The court then went on to direct that the property owners held fee title to the land underlying the disputed railroad right-of-way and the railroad held only an easement.

Fourth, the language of the deed says the grantor conveyed the railroad an interest "over, through across and upon the" the land. The CFC was wrong to ignore these words when it interpreted this conveyance. "The fundamental rule in the construction of both wills and deeds is to give effect to the intention of the party executing the instrument, and this is to be arrived at by the language used, as found in the entire writing. Every clause, and even every word, should when possible, have assigned to it some meaning." *Blossom Pass v. Kelly*, 22 Ariz. 461, 466 (Ariz. 1921). *See also Spurlock v. Santa Fe Pac. R.R. Co.*, 143 Ariz. 469, 474 (Ariz. Ct. App. 1984) ("[I]n construing deeds, the court's role is to give effect to the intent of the contracting parties").

The words "over, though, across and upon" cannot be ignored[35] and they suggest the grant of an easement not the outright conveyance of Cumming's entire fee estate. *See Mich. Dept. of Natural Resources v. Carmody-Lahti Real Estate*, 699 N.W. 2d 272, 281 (Mich. 2005) ("Indeed, one need only examine the language describing the right-of-way as consisting of a 'strip of land ... *across*' the described parcels to confirm this fact. That the parties described the interest as going 'across' the land reveals that they understood the right-of-way as being distinct from the land itself"); and *Rogers v. United States*, 90 Fed. Cl. 418, 429 (2009) (The conveyance "does not refer to the outright transfer of land; it refers to a 'right of way for railroad purposes *over and across* the … parcels of land,' thereby indicating the grantor retained an interest in the land referenced in the conveyance and granted an easement to [the railroad]" (citation omitted) (emphasis in original)).

Fifth, the CFC was wrong when it adopted a "magic words" formulistic approach to interpreting the Cummings indenture and seized on the words "fee simple" as conclusively establishing Cummings intended to convey his absolute

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[35] *See* READING LAW, p. 167, "[p]erhaps no interpretative fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts."[35] Scalia and Garner continued, "Context is the primary determinant of meaning. A legal instrument typically contains many interrelated parts that make up the whole. The entirety of the document thus provides the context for each of its parts."

entire title and interest in the strip of land to the El Paso. The CFC gave no effect to the stated purpose[36] of establishing a railway line "over, through, across and upon" the designated land.

Use of the word "fee" does not mean Cummings intended to convey his entire fee simple absolute estate in the land. The term "fee simple" can also be used (and is often used) when granting an easement to indicate the easement is perpetual. Thus, appearance of the term "fee simple" does not compel the conclusion that Cummings intended to convey his entire estate in the land to the El Paso.

In THE LAW OF EASEMENTS & LICENSES IN LAND §1:21, professors Ely and Bruce note, "Some courts, however, use estate terminology when seeking to describe the duration of an easement. Hence, cases occasionally contain the assertion that easements may be held in fee or as a defeasible fee. Such statements are unnecessarily confusing." They cite three cases as examples of courts referring to "easements in fee simple." *See Johnson v. Ocean Shore Railroad Co*., 94 Cal. Rptr. 68, 71 (1st Dist. 1971) ("The interest in land which an easement constitutes is

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[36] The CFC wrongly relied upon *Lacer v. Navajo County*, 687 P.2d 404, 408-10 (Ariz. Ct. App. 1983) for its conclusion "[a] description of the purpose for which a grant of property is made does not diminish a fee simple estate in Arizona." (A1991, n. 8). *Lacer* did not involve a conveyance to a railroad or other right-of-way. *Lacer* involved a deed conveying land to a county upon which to build a courthouse. The deed conveyed a fee simple determinable estate was created by words of limitation (e.g., "until," "so long as," or "during"). *Lacer*, 687 P.2d at 408. *Lacer* has no application to this grant to a railroad for a railway line.

real property and itself may be held in fee simple."); *Metro. Dade County v. Potamkin Chevrolet*, 832 So. 2d 815, 817 (Fla. Dist. Ct. App. 3d Dist. 2002) ("[T]he County has held continuous uninterrupted fee simple easements to the canal. The original grantors gave the County the warranty deeds conveying rights of way and canal maintenance easements"); and *Erie-Haven, Inc. v. First Church of Christ*, 292 N.E. 2d 837, 841 (1973) ("An easement is an interest in land and may be held in fee. A fee simple or lesser estate in land may be created so as to be defeasible. While an easement is normally held in fee, it is well established that an easement, like any other estate in land, may be held as a determinable fee."). Many other examples of "fee simple easements" can be found, especially in older decisions and – as here – conveyances from the last century.

Professors Ely and Bruce conclude:

> Unfortunately, the *American Law of Property* encourages this inaccurate and misleading use of estate terminology in easement cases. … The terms "fee," "estate," and "lease" should not be used with respect to easements—not even to describe their duration. Nonetheless, some courts continue to do so. The reader must be alert to such usage in order to recognize that it does not relate to the issue discussed in this section, that is, whether the interest is an easement or a fee. When a court states that an easement is held in fee, it means only that it has concluded that a particular easement is of perpetual duration.

THE LAW OF EASEMENTS & LICENSES IN LAND §1:21

Sixth, and finally, the CFC erred by failing to interpret the Cummings Indenture in the context in which it was made; namely, a grant by a landowner to a

railroad for the location of an already surveyed railway line. This context is expressly stated in the indenture.

In *Preseault II*, this Court noted that the nature of the interest in land conveyed to a railroad must be determined in light of the railroad having the power of eminent domain. And, for this reason, a "voluntary conveyance to a railroad" will not be construed as conveying a greater interest in the land than the railroad needed: an easement to operate a railway across the land. *Preseault III*, 100 F.3d at 1537.

Arizona interprets a railroad's interest in land in light of this principle. In *Boyd*, the Arizona Supreme Court considered what interest a railroad acquired when it built a rail line across privately-owned land with the previous owner's knowledge but without a deed. The Court held the railroad could not obtain title to the fee estate.

> [S]ince the railroad has in all events the right to secure possession by eminent domain of the property for its right of way, regardless of the owner's consent . . . we are of the opinion that in reason the title acquired [by the railroad] is similar to that which would have been acquired by proceedings in eminent domain.

4 P.2d at 672.

The court concluded the railroad obtained only an easement, not title to the fee estate. "[W]e think appellants were entitled to have their reversionary interest in the premises in controversy quieted…" *Id.*

In *Boyd*, the court looked to the Arizona statute identical to one adopted in 1887, which allowed railroads to acquire "[a] fee simple, when [the property is] taken for public buildings or grounds or for permanent buildings, for use in connection with a right-of-way," but limited the interest to "[a]n easement, when taken for any other purpose."[37] *Id.*

This statute also confirms the presumption that, under Arizona law, the interest a railroad obtains in a strip of land for a right-of-way is an easement. The statute distinguished between land acquired for "permanent building for use in connection with a right-of-way" in which the railroad can acquire the fee estate and land acquired "other purposes" which includes the right-of-way itself. The railroad obtains only an easement to use this latter category of land.

The manner in which this Court interpreted the railroad conveyance in *Preseault II* is consistent with general principles governing interpretation of conveyances affecting land used for railway lines. "[Railroads] are public service corporations, vested with the power of eminent domain, they should not be allowed to take any greater property interest in their right of way than is absolutely necessary." Philip A. Danielson, *The Real Property Interest Created In a Railroad Upon Acquisition of Its "Right of Way,"* 27 ROCKY MT. L. REV. 73, 74 (1954).

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[37] The court quoted Paragraph 3076, Rev. St. Ariz. 1913 (Civil Code) and cited Section 1763, Rev. St. Ariz. 1887, Civil Code. The statute remains on the books, essentially unchanged, as Ariz. Rev. Stat. §12-1113.

"[T]he courts … have often favored easements over any kind of fee interest in the railroad." *Id.* This is no less true where a transaction with the railroad has the appearance of arms-length negotiation, because "even in the case of the private grant ... courts see the pistol of condemnation held against the head of the railroad's grantor." *Id.* Professor Ely describes the presumption against conveyance of the fee estate developed.

> Prominent experts took the position that, absent statutory provisions expressly authorizing the taking of a fee simple, railroads should receive just an easement in land condemned for their use. 'It is certain, in this country, upon general principles,' Redfield declared, 'that a railway company, by virtue of their compulsory powers, in taking lands, could acquire no absolute fee-simple, but only the right to use the land for their purposes.' Judicial decisions tended to adopt this line of analysis …. The court then readily concluded that the railroad obtained only an easement, and that the original landowner retained the rights to trees and minerals on the land. This trend to construe strictly the authority of railroads to acquire land through eminent domain accelerated in the decades following the Civil War.

JAMES W. ELY, JR., RAILROADS & AMERICAN LAW 197-98 (2001).

> Another treatise similarly provided:
>
> > The legislature may confer the power to appropriate the fee in the soil, and occasionally does; but this can rarely be necessary. The ordinary purposes of the railroad are sufficiently served by obtaining a perpetual easement….

SIMEON BALDWIN, AMERICAN RAILROAD LAW 77 (1904).

Another commentator has described the policy considerations underlying the preference for interpreting conveyances to a railroad as easements:

> There seems to be no real reason why one rule should apply to land taken by condemnation and another to land deeded as a result of negotiations for a right of way, under threat of compulsory taking. If the statutes have not the force to vest the petitioner in condemnation with an absolute fee in the land, why should the deed of the land-owner made to avoid a proceeding in condemnation have a greater effect?

Railroads, 24 MICH. L. REV. at 513.

The Arizona Supreme Court in *Boyd* applied precisely this reasoning when it determined what interest a railroad obtained in land used for a railway line. Because "the proceedings [by which the railroad obtained title] are analogous to eminent domain," the court said, "it will be presumed that the right of way acquired by the railroad company was of that [same scope]." *Boyd*, 4 P.2d at 672.

The CFC erred when it interpreted the Cummings conveyance contrary to these principles of law.

CONCLUSION

The CFC erred when it failed to follow this Court's mandate. The CFC further erred when it dismissed five landowners' claims on the basis of the 1998 NITU. It is a flagrant violation of due process for the limitations period on a landowner's Fifth Amendment right to seek "just compensation" to begin running before the government has even provided the owner notice of the government's order taking the owners' property.

Further, the CFC was wrong to dismiss the Lindsey's claim because, under Arizona law and the language of the Cummings indenture, the railroad obtained only an easement to operate a railroad across the land now owned by the Lindsey family. The Cummings indenture was not a conveyance of the entire fee estate to the railroad.

Accordingly, this Court should reverse the CFC's decision and remand this case to the CFC with instruction to determine the "just compensation" each of these Arizona landowners is due.

Date: July 20, 2012

Respectfully submitted,

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ADDENDUM

TABLE OF CONTENTS

Page

In the United States Court of Federal Claims

No. 07-271L
Filed: April 12, 2012

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JACK LADD et al.,	*	Rails-to-Trails Act; Fifth Amendment Takings; Notice of Interim Trail Use (NITU); Surface Transportation Board; Application of State Property Law; Notice of Exemption; Notice of Consummation; Statute of Limitations; Continuous Government Action; NITU Extension; Renegotiation for Trail Use; Renegotiation for Railway; Statutory Construction
Plaintiffs,	*	
v.	*	
UNITED STATES OF AMERICA,	*	
Defendant.	*	
	*	

* * * * * * *

Mark Fernlund Hearne, II, Arent Fox, LLP, Clayton, MO, for plaintiffs.

William James Shapiro, Environment and Natural Resources Division, United States Department of Justice, Sacramento, CA, for defendant.

ORDER AND OPINION

HODGES, Judge.

This rails-to-trails case is on remand from the Court of Appeals for the Federal Circuit with instructions to decide Fifth Amendment compensation for a temporary taking. *Ladd v. United States*, 630 F.3d 1015, 1025 (Fed. Cir. 2010), *reh'g denied*, 646 F.3d 910 (2011). We ruled in *Ladd I* that defendant did not effect a Fifth Amendment physical taking of plaintiffs' rights of reverter because the Government had no physical presence on plaintiffs' property. *Ladd v. United States*, 90 Fed. Cl. 221, 227 (2009), *rev'd*, 630 F.3d 1015.

The Federal Circuit stated that applicable precedent is clear where the Surface Transportation Board issues a Notice of Interim Trail Use: a taking arises immediately upon issuance of the NITU. If the parties do not agree on a trail, this affects damages only and not liability; the taking is a

temporary estate for years.[1]

Defendant contends that we lack jurisdiction over several plaintiffs because the statute has run on their claims. It seeks summary judgment as to the remaining plaintiffs because they have no property interests in the railroad corridor abutting their lands. In response, plaintiffs cite the Federal Circuit's remand order stating that the trial court should calculate just compensation. The mandate leaves no room for us to consider legal issues, according to plaintiffs, as it assumes a temporary taking.

Appeals court precedent is clear that we lack jurisdiction to consider the claims of plaintiffs Heinzl, Castro, Windsor-Brown, Ladd, and Miller; the statute of limitations has run against their claims. Plaintiff Lindsey has no property interest in the railroad corridor because the railroad owns the land at that point in fee simple. The claims of plaintiffs Singletree Ranch and Miller Ranch Trust arose separately from the other plaintiffs, and they are not barred by the statute of limitations. Those claims state valid temporary takings entitled to just compensation under the Fifth Amendment, according to the remand order.

BACKGROUND

We ruled that a physical takings did not occur in this rails-to-trails case, where the Government did not have a physical presence on plaintiffs' land. *Ladd I*, 90 Fed. Cl. at 227. The appeals court remanded "for a determination of the compensation owed to the appellants for the taking of the Southern Stretch and the Northern Stretch of railway line." *Ladd*, 630 F.3d at 1025. Upon remand, defendant moved to dismiss for lack of jurisdiction and for summary judgment on the issue of liability.

Defendant contends that some property owners have no underlying property interest in the railroad corridor. Plaintiffs argue that the Federal Circuit's remand order states only that we should calculate damages for takings; this does not permit us to consider property interests at this juncture. However, the appeals court would not have ordered an assessment of the lands' value for Fifth Amendment purposes without sufficient trial court findings concerning plaintiffs' interest in the land taken.[2]

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[1] As this case is reconsidered on remand, trail negotiations are no longer contemplated. We detect practically no likelihood that the issue will recur in the foreseeable future. Defendant advises the court that negotiations are underway among rail companies to establish a new rail line across the easement currently owned by the San Pedro Railroad Operating Company. This could mean that the right-of-way or easement for railroad purposes could remain valid, or again become valid. In that event, even a temporary taking argument for plaintiffs would sound highly theoretical.

[2] The first Opinion did not address property interests of individual plaintiffs because we ruled that a physical taking by the Government could not occur without the Government's

DISCUSSION

Defendant argues for the first time in this proceeding that the statute of limitations bars five plaintiffs' claims.[3] Plaintiffs respond that the Government cannot make such an argument now, having waived the statute of limitations by not raising it before.

The statute of limitations is jurisdictional in this court. A claim against the Government must be filed within six years after accrual. 28 U.S.C. § 2501 ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."); *see also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-37 (2008) (holding that the six-year statute of limitations is jurisdictional). Challenges to a court's subject matter jurisdiction can be brought and must be decided whenever they arise. RCFC 12(h)(3) ("If the court determines *at any time* that it lacks subject-matter jurisdiction, the court must dismiss the action.") (emphasis added).

The Court of Appeals for the Federal Circuit holds that takings in rails-to-trails cases occur, if at all, when the Government issues the first Notice of Interim Trail Use. *Barclay v. United States*, 443 F.3d 1368, 1375 (Fed. Cir. 2006); *see also Caldwell v. United States*, 391 F.3d 1226, 1234 (Fed. Cir. 2004). Moreover, a taking claim ripens when the first NITU is issued, regardless when or whether the Government issues additional NITU's in the same case. *Ladd*, 630 F.3d at 1020-21 ("[T]akings law supplies a single bright-line rule for accrual." (quoting *Barclay*, 443 F.3d at 1378)).

Plaintiffs base their claims on a Notice of Interim Trail Use issued in 2006, which would give them until 2012 to file their Complaint. However, a NITU affecting five of the plaintiffs' lands was issued in 1998, more than six years before they filed in 2007. The 1998 NITU covered a 41.5-mile stretch of railroad corridor between Paul Spur and Charleston, Arizona. Defendant issued the 1998 NITU in response to an application from San Pedro Trails, which intended to develop trails in the area. San Pedro agreed with the railroad that the trail company would assume responsibility for management of the right-of-way, pay taxes on the land, and hold the railroad harmless from any liability arising from use of the trail by the public.

A NITU issued November 21, 2003, designated Cochise Trails as the new interim trail user and trail manager, and vacated the 1998 NITU. The 2003 NITU also authorized the San Pedro Railroad Operating Company to acquire and operate the railroad lines from San Pedro and Southwestern Railway Operating Company. San Pedro Railroad requested abandonment authority

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physical presence on the land taken. *See Ladd I*, 90 Fed. Cl. at 227. Plaintiffs did not argue the case as a regulatory taking. The appeals court stated, "[t]he government disputes the character of the property rights in this case. For purposes of summary judgment, however, we must assume facts in favor of the appellants." *Ladd*, 630 F.3d at 1024, n.4.

[3] Plaintiffs subject to this argument are Heinzl, Castro, Windsor-Brown, the Ladd claimants, and Miller.

from the Surface Transportation Board in 2005 after its plans to restore a connection with the Mexican rail system did not materialize. The Board issued an Environmental Assessment[4] in 2006, followed by another new NITU.[5] The 2006 NITU authorizes negotiation of a trail use agreement with an organization called Trust for Public Land.[6]

The statute of limitations began to run against the five plaintiffs when defendant issued the 1998 NITU, not the NITU filed in 2006. By the time the five plaintiffs had filed taking claims in 2007, at least seven years had passed since they were legally on notice. Even if one NITU expires before the next is issued, the first NITU remains the starting date for purposes of the statute of limitations. *See Ladd*, 630 F.3d at 1020-21 ([A] series of NITU orders must be viewed as a single and continuous government action . . . any extensions or modifications of the original NITU are not separate compensable takings." (citing *Barclay*, 443 F.3d at 1375-76)). Here, there was no gap between NITU's. The claims of plaintiffs Heinzl, Castro, Windsor-Brown, Ladd, and Miller, are barred by the statute of limitations.

Plaintiffs' response is essentially that none of this matters because the Federal Circuit decided "implicitly" that the landowners have property interests in the corridor. The appeals court issued a remand order that directs this court to assess damages for takings, plaintiffs note. Such an implicit direction could be reasonable only if the Federal Circuit had made sufficient findings of fact and law to direct entry of judgment for the property owners. We interpret the remand as a direction to consider plaintiffs' rights in the subject property, including the impact of limitations, if any. As noted earlier, the statute of limitations may be raised at any time during the proceedings.

PLAINTIFFS' PROPERTY INTERESTS

This court's Order and Opinion will dismiss five plaintiffs whose time for filing claims expired before 2007. The three property owners remaining are plaintiffs Lindsey, Singletree Ranch, and Miller Ranch Trust. Defendant moved for summary judgment on liability as to these plaintiffs. The Government contends that we can consider plaintiffs' allegations of fact to be true and still rule as a matter of law that they have no cognizable cause of action against the United States. A party is entitled to summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a).

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[4] This form, filed during the NITU process, included the following statement in reference to the corridor containing the five plaintiffs' property, "[s]ince August 17, 1998, this segment has been operated under an agreement for trail use/rail banking."

[5] This was the NITU that plaintiffs relied on as the trigger for their takings claims. *See, e.g., Caldwell*, 391 F.3d at 1234 (holding that the taking occurs upon issuance of a NITU).

[6] The 2006 NITU does not reference the earlier NITU's. Neither party raised a question about their possible impact on plaintiffs' claims until after the Circuit issued its remand order.

Settled law in this Circuit provides, "a Fifth Amendment taking occurs in Rails-to-Trails 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." *Ladd*, 630 F.3d at 1019. The Court of Appeals for the Federal Circuit provided this framework for analyzing liability in rails-to-trails cases:

> (1) [W]ho 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.

Preseault v. United States, 100 F.3d 1525, 1533 (Fed. Cir. 1996).

We apply state real property laws to make such decisions, including those governing the interpretation of deeds and other interests in land. Controlling state law in this case is Arizona's.

The nature of a plaintiff's property interest is the first issue for a court to resolve in deciding whether just compensation is appropriate. In rails-to-trails takings cases, property underlying the railroad corridor becomes important. If a railroad has a fee simple interest in the land underlying its corridor, abutting landowners have no basis for claiming takings – the railroad can use its corridor for any conforming or non-conforming use it pleases, as any other fee title owner might. In the language of takings jurisprudence, claimants cannot show that they possess a compensable ownership interest in the land alleged to have been taken. *See id.*

Arizona law states that a conveyance is presumed to be in fee simple unless it is limited to a lesser interest expressly in the granting clause or elsewhere in the deed.[7] Ariz. Rev. Stat. § 33-432(A) ("Every estate in lands granted, conveyed or devised, although other words necessary at common law to transfer an estate in fee simple are not added, shall be deemed a fee simple if a lesser estate is not limited by express words . . . ."). We construe a deed in Arizona by "giv[ing] effect to the intent of the contracting parties. If the instrument is unambiguous, the intent of the parties must be discerned from the four corners of the document." *Spurlock v. Santa Fe Pac. R.R. Co.*, 694 P.2d 299, 304 (Ariz. Ct. App. 1984).

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[7] Some states provide that any real property conveyance to a railroad is presumed to be an easement and not a fee title. The wording of an instrument transferring an interest in land to a railroad therefore may not be so important as here. Arizona law does not include such a presumption.

Lindsey Property

The Lindsey family obtained its property rights by deed from the owners of a single tract that included the Lindsey lot and the property under the railroad corridor. The Lindseys' predecessor-in-title conveyed the corridor to the El Paso & Southwestern Railroad Company in fee simple. The relevant portion of the El Paso deed states consideration of $250 and this granting language: "[Grantor] does bargain, sell, grant, [and] convey . . . *in fee simple*, all that certain lot, piece or parcel of land . . . [to the railroad]." (emphasis added). The property granted is described as "[a] strip of land on the east side of the San Pedro River . . . for the relocation of the El Paso & Southwestern Railroad Company[8] . . . ."

The grantor's deed uses language that creates a fee simple estate in nearly every jurisdiction. It does not use the terms 'easement' or 'right-of-way.' The Lindseys own the land abutting the railroad corridor in fee, but they have no interest in the railroad corridor that the Government could have taken by forestalling state law abandonment.

Ranch Properties

The remaining plaintiffs are Singletree Ranch and Miller Ranch Trust. The railroad obtained its interest in the corridor abutting their lands pursuant to an 1875 Act of Congress. That Act conveyed easements to railroad companies while allowing ownership of the land under the railroad bed to remain in the hands of abutting landowners. *See Hash v. United States*, 403 F.3d 1308, 1313-18 (Fed. Cir. 2005) (holding that the patent holder, not the United States, held the reversionary interest[9] in land obtained by a railroad under the 1875 Act).

Plaintiffs Singletree Ranch and Miller Ranch Trust have neither of the problems that caused their fellow plaintiffs' claims to fail. They have undisputed fee simple interests in the land under the railroad corridor abutting their parcels. The NITU that caused a taking of their reversionary rights in the corridor was filed in 2006; so the statute of limitations is not an issue in their cases. Therefore, Singletree Ranch and Miller Ranch Trust own the land under the railroad corridor in fee simple, and they are entitled to just compensation according to the Federal Circuit's mandate, so long as the remaining *Preseault* factors are satisfied.

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[8] A description of the purpose for which a grant of property is made does not diminish a fee simple estate in Arizona. *See Lacer v. Navajo County*, 687 P.2d 404, 408-10 (Ariz. Ct. App. 1983) (holding that a description of purpose did not transform a fee simple grant into a fee subject to condition subsequent or a fee simple determinable).

[9] We use "reversionary interest," for convenience, and because the term has been adopted by most courts to describe the rights of a landowner who holds fee simple title to land subject to a railroad's easement. *See Hash*, 403 F.3d at 1313.

Scope of Easements and Abandonment

The second prong of the *Preseault* test requires a determination whether the easement obtained by the railroad was broad enough to allow for recreational trail use. *Preseault*, 100 F.3d at 1533. The Railroad obtained an easement for railroad purposes pursuant to the 1875 Act. Defendant argues that the NITU does not authorize a new use on the corridor and that no activity has occurred in this instance that could have exceeded the scope of a railroad purposes easement. By its argument that the NITU does not authorize a new use, defendant must mean no such new use has come to pass. Certainly, the Government's policy is to support and encourage such non-conforming uses.

Courts have found repeatedly in applying property laws of other states that railroad operations are different from the recreational trail use contemplated by 16 U.S.C. § 1247(d), "Interim use of railroad rights-of-way." The trail use authorized by the NITU exceeds the scope of the Railroad's 1875 Act easements.

The third question under the *Preseault* test is, if trail use is within the scope of the relevant easements, did the railroad abandon its easements prior to the NITU. *Preseault*, 100 F.3d at 1533. If the railroad had already abandoned its easement under Arizona law, the actions of the STB would be a taking because the land otherwise would have reverted to plaintiffs then.

Abandonment under Arizona law requires a showing of "an intention to abandon, together with an act or an omission to act by which such intention is apparently carried into effect." *City of Tuscon v. Koerber*, 313 P.2d 411, 418 (Ariz. 1957). Filing a request for a NITU is sufficient in many states to establish intent to abandon. The matter is not often reached in these cases because abandonment becomes important only if a court can find that trail use by the general public was an acceptable purpose according to the terms of the easement or right of way. The scope of easements analysis is determinative in this case.

DURATION OF TEMPORARY TAKINGS

The railroad in this case has not filed a Notice of Consummation of Abandonment or otherwise taken steps to complete abandonment under federal law. Defendant has raised the possibility that the railroad wants to reinstitute service along the line, or sell the easement to someone who will. The Surface Transportation Board extended the 180-day, July 2006 NITU applicable to the Ranches for thirty days, then allowed it to expire on February 21, 2007.[10] Since then, the STB has granted several extensions to the railroad to complete abandonment of the line by filing a Notice of Consummation. The routine extensions have assigned the lands of Singletree and Miller on the "Northern Stretch" a limbo status. The Rails-to-Trails Act provides that abandonment

[10] The period for negotiation was 210 days.

of the corridor is not complete until the Notice of Consummation is filed.[11] The current extension for filing a Notice of Consummation of Abandonment expires on July 26, 2012.[12]

Filing a NITU results in a physical taking irrespective of whether a trail has been built on the property. *Ladd*, 630 F.3d at 1025. However, the Court of Appeals for the Federal Circuit ruled that a physical taking without a trail could be a temporary taking in this case, an estate for years. *See id.* The NITU signals the beginning of a taking by the Government, but so far we do not have the taking's end. Where no trail is in place when the court calculates just compensation, and the railroad has not filed a Notice of Consummation, we must have some means to assume an end for appraisal purposes.

The railroad has not reached agreement with a trail operator qualified under the statute to build a trail. No trail exists and none is proposed. The last NITU expired years ago, but the Government has granted a number of extensions for the Railroad to consummate abandonment. The rails-to-trails statute gives the railroad an option to consummate abandonment upon expiration of a NITU, but otherwise does not make clear what happens with no trail and no consummation. 49 C.F.R. § 1152.29. The process begun by issuing a NITU can end only when the railroad files a Notice of Consummation of Abandonment. *See id.* The railroad has not done so.

Abandonment of the railroad easement by the federal regulatory process and expiration of the NITU do not always occur on the same date, as is evident from the situation here. Because abandonment has not occurred, and the STB still retains jurisdiction of plaintiffs' property, the temporary taking has not ended.[13]

The Government contends that a temporary taking lasts only so long as the period of negotiation provided by the NITU is in force, including any extensions. Plaintiffs respond that they are being kept off of their land in perpetuity, and that a permanent taking has occurred.[14] They point

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[11] Defendant has argued that the railroad alone can file a Notice of Consummation, and therefore the matter is out of the Government's hands.

[12] *See* 49 C.F.R. § 1152.29(e)(2) ("A railroad that receives authority from the Board to abandon a line . . . shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line.").

[13] If the statute provided that expiration of the NITU and abandonment were one and the same, the process of calculating just compensation would be relatively straightforward. For example, if expiration of the final NITU without an extension were a statutory alternative to Consummation of Abandonment, just compensation for a temporary taking would be calculated for the time between the first NITU and expiration of the final NITU.

[14] Persuasive arguments can be made either that a permanent taking has occurred, assuming that issuance of a NITU marks the beginning of the taking, or that plaintiffs have not

out that the statute of limitations continues to run through a series of NITU's, even where some have expired and left gaps. Because of this precedent, we have barred five Constitutional claims in this case. Meanwhile, defendant argues that the taking stops when the negotiation period for a NITU expires – even though the Government maintains jurisdiction until the Notice of Consummation is filed. A series of NITU's is one continuing government action. *See Barclay*, 443 F.3d at 1375 ("[A] series of STB NITU orders must be viewed as part of a single and continuous government action rather than as new takings.").[15] The Surface Transportation Board retains jurisdiction over the land, and plaintiffs continue to be prevented from enjoying their reversionary interests. The Court of Appeals for the Federal Circuit has not ruled that the Government is entitled to the best of both worlds by naming the expiration date of a NITU as the end of a temporary taking, but not for interrupting the running of a statute of limitations.

Defendant remains in control of the railroad corridor abutting plaintiffs' lands as this Opinion and Order is issued. *See Barclay*, 443 F.3d at 1374 ("Until the [STB] issues a certificate of abandonment, the railway property remains subject to the [STB's] jurisdiction, and state law may not cause a reverter of the property." (quoting *Preseault v. ICC*, 853 F.2d 145, 150 (2d Cir. 1988))).[16] The estate of years taken by defendant does not end so long as the Government remains in control of the subject property. *Id.* at 1376 ("So long as abandonment was not consummated, the STB retained jurisdiction over the right-of-way.").

CONCLUSION

Plaintiffs Singletree Ranch and Miller Ranch Trust are entitled to compensation for a temporary taking. Counsel will agree on an appraiser who will calculate the value of a temporary taking given a beginning date of July 26, 2006. The appraisal will include a total value ending on the date of this Order and a daily factor for determining value at a later date if necessary. If or when the

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suffered a taking at all. If a trail is built ultimately, the land remains subject to STB jurisdiction in that termination of the trail requires filing with the STB and starting again with the abandonment process. If a trail is not built during the STB's jurisdiction, and a Notice of Consummation is not filed, the corridor may be sold to another railroad or reestablished by the same railroad. In that circumstance, it is not clear what the landowners will have lost or had taken.

[15] The Court reasoned that "the new NITU in substance merely extended the original NITU," despite a gap between the expiration of one 180-day NITU negotiation period and the issuance of a second NITU. *Barclay*, 443 F.3d at 1376.

[16] *But see Farmers Cooperative Co. v. United States*, 98 Fed. Cl. 797 (2011), *reconsideration denied*, 100 Fed. Cl. 579 (2011), where the court ruled that a temporary taking ended at the expiration of the most recent NITU.

Railroad files a Notice of Consummation of Abandonment, the value will be recalculated by applying that date. This court will retain jurisdiction to enter judgment on that basis.

The Government's motion to dismiss the claims of plaintiffs Heinzl, Castro, Windsor-Brown, Ladd, and Miller, for lack of subject matter jurisdiction is GRANTED. The Clerk of Court will dismiss those plaintiffs from the Complaint. The Government's motion for summary judgment as to the Lindsey family for lack of a compensable property interest is GRANTED. The Clerk of Court will dismiss the Lindseys from the Complaint.

The Government's motion for summary judgment as to plaintiffs Singletree Ranch and Miller Ranch Trust is DENIED. The parties will agree to a schedule for obtaining an appraiser to determine value according to the terms of this Order. If they cannot agree on an appraiser, they will contact the court to schedule a hearing to decide on alternative means of appraisal jointly acceptable to the parties. Counsel will advise the court of the schedule by status report no later than April 26, 2012.

IT IS SO ORDERED.

s/Robert H. Hodges, Jr.
Robert H. Hodges, Jr.
Judge

United States Court of Appeals
for the Federal Circuit

CERTIFICATE OF SERVICE

JACK LADD v US, No. 2012-5086, -5087

I, Elissa Matias, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by ARENT FOX LLP, Attorneys for Plaintiffs-Appellants to print this document. I am an employee of Counsel Press.

On **July 20, 2012**, Counsel for Appellant has authorized me to electronically file the foregoing **Brief for Plaintiffs-Appellants** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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A courtesy copy has also been mailed to the above counsel.

Upon acceptance by the Court of the e-filed document, six paper copies will filed with the Court, via Federal Express, within the time provided in the Court's rules.

/s/ Elissa Matias
Counsel Press

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Date: July 20, 2012

/s/ Mark F. ("Thor") Hearne, II
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