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.

PLAINTIFFS-APPELLANTS REPLY

MARK F. HEARNE, II
LINDSAY S.C. BRINTON
MEGHAN S. LARGENT
ARENT FOX LLP
112 South Hanley Road, Suite 200
Clayton MO 63105-3418
(314) 721-0219

DEBRA J. ALBIN-RILEY
JOSEPH L. CAVINATO, III
ARENT FOX LLP
555 W. 5th Street
48th Floor
Los Angeles, CA 90013

Attorneys for Plaintiffs-Appellants

October 5, 2012

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

THE FACTUAL RECORD 5

ARGUMENT 9

I. The limitations period in 28 U.S.C. §2501 could not begin running before the landowners had notice of the 1998 NITU 9

1. The §2501 limitations period cannot begin running until the government has provided (or made a reasonable effort to provide) the owner actual notice it has taken the owners' property 9

A. Due process requires notice reasonably calculated to inform these landowners the government had taken their property, but, these owners never received any notice of the 1998 NITU 9

B. The government's claim that these landowners' right to their property is not protected by the Due Process Clause is not just wrong, it is bizarre 10

C. Publication does not satisfy the constitutional requirement of due process 14

2. Even supposing constructive notice commences the §2501 limitations period, these landowners never even had constructive notice of the 1998 NITU 16

3. The government admits the §2501 limitations period does not begin running under this Court's "accrual suspension" rule until these landowners "should have known" of their claim 19

4. The government's claim that this Court "lack[s] jurisdiction" to consider whether the CFC's holding is constitutional is entirely baseless 22

5. The landowners raised their lack of notice before the CFC 27

II. This Court's mandate is more "than a single sentence" which the CFC could ignore on reman 28

III. The railroad only had an easement "over, through, across and upon" the Lindsey family's property 30

CONCLUSION 33

CERTIFICATE OF SERVICE 36

CERTIFICATE OF COMPLIANCE 37

TABLE OF AUTHORITIES

Page(s)

Cases

Amado v. Microsoft Corp.,
517 F.3d 1353 (Fed. Cir. 2008) 28

Barclay v. United States,
443 F.3d 1368 (Fed. Cir. 2006) 2, 25

Bath Junkie Branson, L.L.C. v. Bath Junkie, Inc.,
528 F.3d 556 (8th Cir. 2008) 17

Boyd v. Atchison, T. & S.F. R. Co.,
4 P.3d 670 (1931) 31

Caldwell v. United States,
391 F.3d 1226 (Fed. Cir. 2004) 2, 25

Catellus Develop. Corp. v. United States,
31 Fed. Cl. 399 (1994)..... 20, 21

City of New York v. New York, N.H & H.R. Co.
344 U.S. 293 (1953)..... 9, 10

Coastal Petroleum Co. v. United States,
228 Ct. Ct. 864 (1981) 20, 21

Goos v. Interstate Commerce Comm'n,
911 F.2d 1283 (8th Cir. 1990) 13, 17

Grantwood Village v. Missouri Pacific R. Co.,
95 F.3d 654 (8th Cir. 1996) 6

Ingrum v. United States,
560 F.3d 1311 (Fed. Cir. 2009) 20, 21

Jacobs v. United States,
290 U.S. 13 (1933).....24

Jones v. Flowers,
547 U.S. 220 (2006).....10

Jost v. STB,
194 F.3d 79 (D.C. Cir. 1999).....13

Kaiser Aetna v. United States,
444 U.S. 164 (1979)..... 2, 11

Ladd v. United States,
630 F.3d 1015 (Fed. Cir. 2010) ..... *passim*

Ladd v. United States,
646 F.3d 910 (Fed. Cir. 2011) 7, 25, 29

Ladd v. United States,
90 Fed. Cl. 221 (2009).....6

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982).....11

Marbury v. Madison,
5 U.S. 137 (1803).....15

Mennonite Bd. of Missions v. Adams,
462 U.S. 791 (1983)..... 10, 12

Mullane v. Cent. Hanover Bank & Trust Co.,
339 U.S. 306 (1950)..... 9, 10, 13

Nat'l Ass'n of Reversionary Prop. Owners v. STB,
158 F.3d 135 (D.C. Cir. 1998)..... 5, 13

Navajo Nation v. United States,
631 F.3d 1268 (Fed. Cir. 2011) 1

Pass v. Stephens,
22 Ariz. 461 (Ariz. 1921) 30

Penn. Cent. Corp. v. U.S. R. R. Vest Corp.,
955 F.2d 1158 (7th Cir. 1992) 31

Pitts v. Shinseki,
461 Fed. Appx. 935 (Fed. Cir. 2012) 17

Portsmouth Harbor Land & Hotel, Co. v. United States,
260 U.S. 327 (1922).....11

Preseault v. I.C.C.,
494 U.S. 1 (1990)..... *passim*

Preseault v. United States,
100 F.3d 1525 (Fed. Cir. 1996) 1, 5, 30, 31

Pumpelly v. Green Bay Company,
80 U.S. 166 (1871).....12

Sackett v. EPA,
566 U.S. 1367 (2012) 33

Shulansky v. Michaels,
484 Ariz. App. 402 (Ariz. Ct. App. 1971).....30

Spurlock v. Santa Fe Pac. R.R. Co.,
143 Ariz. 469 (Ariz. Ct. App. 1984).....30

Toews v. United States,
376 F.3d 1371 (Fed. Cir. 2004) 5

United States v. Causby,
328 U.S. 256 (1946).....11

United States v. General Motors Corp.,
323 U.S. 373 (1945).....2

United States v. Rivera,
844 F.2d 916 (2d Cir. 1988) 28

Constitutional Provisions

U.S. Const. Amend V..... *passim*

Statutes

16 U.S.C.A. §1241 *et seq.* (2006) ..... *passim*

16 U.S.C. §1247(d) ..... *passim*

28 U.S.C. §1346 ..... 3, 14

28 U.S.C. §1346(a)(2) 3, 12, 22

28 U.S.C. §1491(a) 3

28 U.S.C. §2501 ..... *passim*

Fed. R. App. P. 10(a) 17

49 CFR 1105.12 16

Other Authorities

62 Fed. Reg. 7086 (Feb. 14, 1997) 16, 17

Government's Petition for Rehearing, 2011 WL 1054242 ..... 7, 16, 28

Rail Abandonments—Use of Rights-of-Way as Trails, Supplemental Trails Act Procedures, ICC EP No. 274 (Sub-No. 13) (ICC served July 28, 1994) 5, 8

Rail Abandonments-Use of Rights-of-Way as Trails-Supplemental Trails Act Procedures, 4 I.C.C.2d 152, 156 (1987) 13

INTRODUCTION

When the Surface Transportation Board (STB) invokes §1247(d) of the National Trails System Act,[1] it takes the landowners' state-law right to unencumbered title and possession of their property. *See Preseault v. United States*, 100 F.3d 1525, 1533-34 (Fed. Cir. 1996) (*en banc*) (*Preseault II*); *Ladd v. United States*, 630 F.3d 1015, 1025 (Fed. Cir. 2010) (*Ladd II*) ("the NITU forestalls or forecloses the landowners' right to unencumbered possession of the property"); *and 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") (internal quotation marks omitted).

Usurping an owner's state-law right to their property is a taking for which the Fifth Amendment requires the federal government to justly compensate the owner. *See Preseault v. I.C.C.*, 494 U.S. 1 (1990) (*Preseault I*), *Preseault II*, 100

[1] 16 U.S.C.A. §1241 *et seq*. (2006) (Trails Act).

F.3d at 1552.[2] This taking occurs, and the owner's claim for compensation accrues, when the STB issues an order invoking §1247(d).[3] *Caldwell v. United States*, 391 F.3d 1226, 1228 (Fed. Cir. 2004); *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") *and Ladd II*, 630 F.3d at 1019.[4]

---

[2] Justice O'Connor explained:

> Although the [STB's] actions may pre-empt the operation and effect of certain state laws, those actions do not displace state law as the traditional source of the real property interests. The [STB's] actions may delay property owners' enjoyment of their reversionary interests, but that delay burdens and defeats the property interest rather than suspends or defers the vesting of those property rights. Any other conclusion would convert the [STB's] power to pre-empt conflicting state regulation of interstate commerce into the power to pre-empt the rights guaranteed by state property law, a result incompatible with the Fifth Amendment. … The [STB] may possess the power to postpone enjoyment of reversionary interests, but the Fifth Amendment and well-established doctrine indicate that in certain circumstances the Government must compensate owners of those property interests when it exercises that power.

Preseault I, 494 U.S. at 23.

[3] The STB invokes §1247(d) by issuing a "Notice of Interim Trail Use or Abandonment" (NITU).

[4] "Property" is the collection of rights an individual holds in land or chattels. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Among these are the right to possess, use, exclude others, and dispose of the property. *Id.* A government act that interferes with or destroys these rights is a taking for which just compensation is due. Compensation is due whether the government appropriates a fee simple or an easement for a term of years. *See General Motors, supra; and Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

When the STB invokes §1247(d), the landowner's only recourse is to bring an inverse condemnation case in the Court of Federal Claims (CFC)[5] seeking just compensation.

A problem arises however when - as here - the STB issues a NITU taking a landowner's property but provides the owner no notice of the NITU and the owner does not learn of the NITU for six years.

The government now seeks to exploit its failure to provide these landowners notice of the NITU by claiming they forfeited their right to compensation because the limitations period in 28 U.S.C. §2501 expired before they learned of a 1998 NITU. The government makes this argument even though the government's lawyers and STB officials did not learn of this 1998 NITU until 2010.

The CFC erred by accepting the government's contention that the §2501 limitations period began to run even before a landowner had notice of a NITU. The CFC was wrong to apply §2501 in this manner because doing so violates the constitutional guarantee of due process. The CFC also ignored this Court's mandate in *Ladd II* when it allowed the government to re-argue liability after remand and wrongly construed a 1911 deed granting the railroad an easement

[5] *See Preseault I*, 494 U.S. 1 and 28 U.S.C. §1491(a). An owner may pursue a claim less than $10,000 in federal district court under the "Little Tucker Act" (28 U.S.C. §1346(a)(2)).

"over, through, across and upon" a strip of land as an outright conveyance of the owner's entire fee estate.

The government defends the CFC's dismissal by asking this Court to embrace the amazing proposition that a federal agency may issue an edict taking an owner's property and, by not telling the owner of its order until after the limitations period has expired, escape the government's constitutional obligation to justly compensate the owner.

The government's position is repugnant to the fundamental principles embodied in The Fifth Amendment.

The CFC should be reversed and this case remanded to determine the compensation these landowners are due.

THE FACTUAL RECORD

The STB invoked §1247(d) in 2006 by issuing a NITU, which created an 80-mile long rail-trail corridor in Cochise County, Arizona. (A56). A portion of this corridor encumbers land owned by these Arizona ranchers. The NITU was issued in an administrative proceeding to which the owners were not a party and of which they were never provided any notice. Neither the STB, nor anyone else, provided these owners any notice of the 2006 NITU. The NITU was never published in the *Federal Register*. *See Rail Abandonments—Use of Rights-of-Way as Trails, Supplemental Trails Act Procedures*, ICC EP No. 274 (Sub-No. 13) (ICC served July 28, 1994) ("*Rail Abandonments*"); *Nat'l Ass'n of Reversionary Prop. Owners v. STB*, 158 F.3d 135, 139 (D.C. Cir. 1998).

The 2006 NITU authorized the railroad to abandon railroad service over the line and remove the tracks from the land. (A58). After the railroad began removing the tracks in 2007, the owners learned of the 2006 NITU. (A1780-1810).

When the STB invokes section 1247(d) of the Trails Act, it takes the landowners' right to unencumbered title and possession of land subject to the NITU. *Preseault I*, 494 U.S. 1; *Preseault II*, 100 F.3d at 1554; *Toews v. United States*, 376 F.3d 1371 (Fed. Cir. 2004); *and Ladd II*, 630 F.3d at 1023. The STB's order "burdens and defeats" landowners' state-law title and right to their land.

Preseault I, 494 U.S. at 23. After the STB invokes §1247(d), owners cannot bring even a quiet title action to define the extent of their state-law interest in the property. *Grantwood Village v. Missouri Pacific R. Co.*, 95 F.3d 654, 659 (8th Cir. 1996) ("[the NITU] precludes a finding of abandonment of the right-of-way under state law . . . . State claims [to the land] can only be brought *after* the [STB] has authorized an abandonment and after the railroad has consummated that abandonment") (emphasis in original).

The landowners promptly commenced this action after learning of the 2006 NITU. And, the government agreed their claims were timely, "Plaintiffs' claims accrued on July 26, 2006. The statute of limitations for Plaintiffs' takings claims . . . will not run in this case until July 26, 2012." (A1201).

But, the government claimed, the STB's order "railbanking" this corridor for possible use as a public recreational trail or a future new railroad line was only a "temporary regulatory taking" for which no compensation was due. The CFC agreed and dismissed the owners' claims. *Ladd v. United States*, 90 Fed. Cl. 221, 227-28 (2009) (*Ladd I*).

The owners appealed and this Court reversed. "The NITU is the government action that prevents the landowners from possession of their property unencumbered by the easement." *Ladd II*, 630 F.3d at 1023. This Court then instructed, "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." *Id.* at 1025.

The government sought rehearing and, *inter alia*, asked this Court to "delete from the panel's opinion the sentence that remands the case for a determination of the compensation owed to appellants . . . [because] this sentence appears to assume that liability has been established against the United States and that the only determination left to be made is just compensation." Government's Petition for Rehearing, 2011 WL 1054242 at *11.

This Court denied rehearing and did not rewrite its mandate. *Ladd v. United States*, 646 F.3d 910 (Fed. Cir. 2011) (*Ladd III*).

Contrary to this Court's mandate, on remand the CFC allowed the government to re-argue liability. And, post-remand, the government found a never-before-seen 1998 NITU issued in a different proceeding.[6] This earlier NITU was unknown to even the government lawyers until 2010. In 2008, the Director of the STB Office of Proceedings provided a sworn declaration saying the NITU affecting these owners' property was "first issued on July 26, 2006." (A1025-1026).

The landowners were not parties to the 1998 administrative proceeding in which the earlier NITU was issued and neither the STB nor anyone else ever

[6] STB Docket No. AB-441 (Sub-No. 2x) (A1592-1594).

provided notice of the 1998 NITU to any landowner. The STB does not provide notice of a NITU to any owner whose property is subject to the NITU. (*Rail Abandonments* at *1) and the 1998 NITU was not published in the *Federal Register*.

Each landowner swore they had no notice or knowledge of any NITU until they learned of the 2006 NITU after the railroad began removing the tracks from their land. (A1695-1723).

In its post-remand motion, the government now argued seven of these owners' claims were time-barred under 28 U.S.C. §2501 on the basis of the 1998 NITU. The CFC embraced the government's argument and dismissed these landowners a second time.

ARGUMENT

I. The limitations period in 28 U.S.C. §2501 could not begin running before the landowners had notice of the 1998 NITU.

1. The §2501 limitations period cannot begin running until the government has provided (or made a reasonable effort to provide) the owner actual notice it has taken the owners' property.

A. Due process requires notice reasonably calculated to inform these landowners the government had taken their property, but, these owners never received any notice of the 1998 NITU.

The government does not dispute that neither the STB nor anyone else ever attempted to provide these landowners any notice of the 1998 NITU. Nor, for that matter, did the government provide these landowners notice of *any* NITU. And, each landowner has affirmatively sworn they "had no notice or knowledge of any NITU or other order of the STB issued at any time prior to [the 2006 NITU]." (A1695-1723).

In *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (citations omitted), the Supreme 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 apprise 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.

The Supreme Court has affirmed *Mullane* in an unbroken series of decisions. *See, e.g., City of New York v. New York, N.H & H.R. Co.* 344 U.S. 293, 301 (1953), ("notice by publication is a poor and sometimes a hopeless substitute for actual

service of notice"); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983) (the government must provide an owner whose identity and location are reasonably ascertainable notice by a means reasonably certain to ensure the owner receives actual notice)*; and Jones v. Flowers*, 547 U.S. 220 (2006) (the government must take reasonable additional steps - in addition to sending the owner notice by certified mail - to make sure the owner received actual notice of a proceeding that would take their property).

B. The government's claim that these landowners' right to their property is not protected by the Due Process Clause is not just wrong, it is bizarre.

The government first attempts to distinguish *Mullane* and its progeny by making the odd contention that constitutional due process applies only to "proceedings by which property is *altogether* deprived [from the owner]." Govt.'s Opening Br. 41, Sep. 18, 2012, Dkt. No. 28(emphasis added).

Citing *Mullane, City of New York, Mennonite* and *Flowers*, the government argues:

> [T]he Supreme Court has held that the government may not hold a proceeding to *completely* deprive a person of their property without making reasonable attempts to notify the person of the proceeding and giving them an opportunity to object. But the Plaintiffs do not claim that they have been *completely* deprived of their property, but instead seek just compensation for a taking for a public use.

Govt.'s Br. at 20-21 (emphases added).

The government thus proposes an entirely novel concept of constitutional law. To wit: constitutional due process is only required when the government "completely deprives" the owner of their property.

The government provides no authority for this absurd notion. The government's attempt to cabin due process to only those circumstances when the government "altogether deprive[s]" an owner of their property is simply not a basis by which to distinguish the Supreme Court's due process jurisprudence.

The Supreme Court has always held due process applies to any taking of any part of an owner's property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982) ("occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land"); s*ee also, Kaiser*, 444 U.S. 164; *United States v. Causby* 328 U.S. 256 (1946); *and Portsmouth Harbor Land & Hotel, Co. v. United States,* 260 U.S. 327 (1922).

The Supreme Court has never provided so much as a syllable of support for the government's strange notion that due process only applies when the government "altogether deprives" an owner of their property.

The government is wrong, again, when it says constitutional due process only protects an owner's right to "object before that agency proceeding concludes"

and does not protect the owner's Fifth Amendment right to "just compensation." Govt.'s Br. at 41.

The Fifth Amendment guarantees "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." The Fifth Amendment looks to the person's protected interest – in this case their property – to define the nature of the constitutional protection afforded by this clause.

The Fifth Amendment protects an individual's "life, liberty and property" and is broadly defined to achieve this end. *Mennonite Bd.*, 462 U.S. at 803. The Supreme Court has held this "provision of constitutional law [has] always [been] understood to have been adopted for protection and security to the rights of the individual." *Pumpelly v. Green Bay Company*, 80 U.S. 166, 177 (1871).

When the STB invokes §1247(d), the "procedure" to vindicate the constitutional right of compensation for landowners whose property is taken is to bring an inverse condemnation action under the Tucker Act. *Preseault I*, 494 U.S. at 4-5 ("even if the rails-to-trails statute gives rise to a taking, compensation is available to petitioners under the Tucker Act and the requirements of the Fifth Amendment are satisfied").

Thus, for notice to be constitutionally sufficient it must "apprise interested parties of the pendency of the action and afford them an opportunity to present

their objections" and be "reasonably [calculated] to convey the required information" necessary for the owner to protect their interest. *Mullane*, 339 U.S. at 314.

The STB affords a landowner no "opportunity to object" to a NITU. The STB's role in issuing a NITU is ministerial. *Rail Abandonments-Use of Rights-of-Way as Trails-Supplemental Trails Act Procedures*, 4 I.C.C.2d 152, 156 (1987) ("We lack any discretion to decide whether rail banking and use of the right-of-way as a trail is desirable . . . we need only be assured that the Trails Act has been properly invoked and that its requirements will be met"); *Goos v. Interstate Commerce Comm'n*, 911 F.2d 1283, 1295 (8th Cir. 1990) ("The role of the [STB] in conversion proceedings, then, is essentially ministerial").

The STB will not hear objections from landowners whose property is subject to a NITU. *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") (quotation marks omitted). The owner is, therefore, entirely shut out of any Trails Act proceeding before the STB. *See National Ass'n of Reversionary Property Owners v. Surface Transp. Bd.*, 158 F.3d 135 (D.C. Cir. 1998).

Also, the STB has no authority to award the owner "just compensation." The owner's only recourse is to file an action in the CFC. *Preseault I*, 494 U.S. at 11.

The only "proceeding" by which any landowner has opportunity to vindicate their constitutional right of compensation is an action in the CFC.[7] Whether an owner has constitutionally sufficient notice depends on whether the government made a reasonable effort to notify the landowner it has taken the owner's state-law right to their property and whether the owner may bring an action for compensation.

It is undisputed that these owners never received such notice. And, yet, the CFC dismissed their claims.

C. Publication does not satisfy the constitutional requirement of due process.

The government says, "the [Trails Act] does not require actual notice and the STB's longstanding regulations implementing that statute provide that no actual notice is given to potential landowners when the agency issues a NITU." Govt.'s Br. at 34. Those statements are true. But, so what?

[7] Or federal district court under 28 U.S.C. §1346.

The failure of the government to tell an owner it has taken the owner's land does not overcome the constitution's due process requirement.[8] That a subordinate statute or regulation may fail to comport with the constitutional requirement of due process is of no moment. *Marbury v. Madison*, 5 U.S. 137 (1803) ("It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it").

We are not asking this Court to require the STB to provide property owners notice of a NITU. Rather, because these owners had no notice of the NITU, we are asking this Court to reverse the CFC's holding that these owners forfeited their constitutional right of compensation by supposing the §2501 limitations period begins to run before these owners knew of the government's order.

This case is the ideal demonstration of why "notice by publication is a poor and sometimes a hopeless substitute for actual service of notice."[9] Indeed, here, the supposed "notice" by publication did not even occur.

---

[8] The STB could have provided affected landowners notice of a NITU when it issues the order, but it did not. However, the STB's decision to not notify owners cannot forfeit these owners' constitutional right to compensation.

[9] *New York*, 344 U.S. at 301.

2. Even supposing constructive notice commences the §2501 limitations period, these landowners never even had constructive notice of the 1998 NITU.

In 1997, the *Federal Register* included a statement saying the SWKR had petitioned for authority to "abandon the relevant portion of the rail line." Govt.'s Br. at 31, *citing* 62 Fed. Reg. 7086 (Feb. 14, 1997). Page 7086 of the *Federal Register* is not in the record and was not considered by the CFC nor mentioned by the government.

The government also cites 49 CFR 1105.12 requiring a railroad to "provide" notice to a "local newspaper" when the railroad seeks to abandon a railway line. But there is no evidence the railroad provided any "notice of abandonment" to any "local newspaper." And, even if the railroad "provided" notice of the 1997 abandonment petition to some newspaper, there is no record of what such "notice" said or whether it was ever published. These landowners swore they never received notice of any STB proceeding until after 2006. (A1695-1723).

The government nonetheless claims, "[a]fter publication in the Federal Register and a local newspaper, landowners along the affected rail corridor were therefore on notice that a NITU was one possible outcome of the abandonment proceeding." Govt.'s Br. at 32.

The CFC, however, did not premise its dismissal of these owners on the basis of this supposed notice by publication. And, the CFC's decision cannot be

sustained on the basis of evidence not in the record. *Pitts v. Shinseki*, 461 Fed. Appx. 935, 942 (Fed. Cir. 2012) ("As this document does not appear in the record before us, it cannot be considered"); *see also Bath Junkie Branson, L.L.C. v. Bath Junkie, Inc.*, 528 F.3d 556 (8th Cir. 2008); *and* Fed. R. App. P. 10(a).

Yet, the government claims, the railroad's filing of a petition to abandon the railroad line somehow notified these landowners the STB would take their property. This is ridiculous. Even if these owners happened to read page 7086 of the *Federal Register* on Valentine's Day 1997, there is nothing in the *Federal Register* that advises landowners the STB would issue a separate order a year later taking their property. *See Goos*, 911 F.3d at 1294 (abandonment and conversion are "separate proceedings").

To the extent page 7086 of the *Federal Register* suggests anything, it suggests the railroad is abandoning the railroad line, not that the STB is invoking §1247(d) to take a perpetual rail-trail corridor easement across their land. Nothing on page 7086 of the *Federal Register* can be reasonably read to notify these owners the federal government is taking their property.

The government also claims these Arizona landowners (many elderly) were "on notice . . . a NITU was one possible outcome" of the railroad's petition to abandon this railway line. Therefore, the government claims, these landowners "should have known" they had a claim for compensation. And, the government

contends, these owners "should have known" to file their claim in 1998. The government is entirely wrong.

Even if these landowners read page 7086 of the *Federal Register* and continued reading every page of the *Federal Register* every day for five years, they would have never learned of the 1998 NITU. The 1998 NITU was never published in the *Federal Register*.

The 1998 NITU existed only as a docket entry in an obscure administrative proceeding. The only parties to this administrative action were SWKR Operating Company and San Pedro Trails, Inc. (A1592-1594).

The absurdity of the government's contention that the railroad's 1997 petition to abandon the corridor somehow "notified" these Arizona ranchers of the 1998 NITU is demonstrated by the fact that the government's own lawyers and STB officials did not know of the 1998 NITU until 2010. *See, supra*. The government never explains why this Court should hold these elderly Arizona ranchers to a higher standard of knowledge than the government's own lawyers and STB officials.

3. The government admits the §2501 limitations period does not begin running under this Court's "accrual suspension" rule until these landowners "should have known" of their claim.

The government acknowledges, "this Court has time and again stated that the rule of accrual in takings' cases includes a 'should have known' element." Govt.'s Br. at 40.

While the government acknowledges the §2501 limitations period does not begin running until these landowners "should have known" of the 1998 NITU (Govt.'s Br. at 34), the government fails to provide *any* reason to conclude these landowners "should have known" of the 1998 NITU before the government's own lawyers learned of this NITU in 2010.

At least ten government lawyers, including two STB general counsel and two Assistant Attorneys General, have represented the government in this case. STB Director Konschnik also filed a sworn declaration saying the 2006 NITU was the "first" NITU affecting these owners' property. (A1026).

If there was anyone on the face of the earth who "should have known" of the 1998 NITU, it would have been this group of government lawyers and STB officials. But none of them knew of the 1998 NITU until 2010.

But the government asks this Court to conclude these rural Arizona ranchers "should have known" of the 1998 NITU and "should have known" the 1998 NITU took their property giving rise to a claim for compensation in 1998.

It boggles the mind. The government offers no reason to believe these landowners "should have known" this. The government asks this Court to hold these landowners to a standard of absolute omniscience, presuming they not only knew of an order the government itself did not know existed, but they knew this order took their property at a time when the government itself said the NITU did not give rise to any takings claim.

Ingrum v. United States, 560 F.3d 1311 (Fed. Cir. 2009) provides the government no succor. The government took fill material from Ingrum's land. Ingrum "signed the Right of Entry permit explicitly authorizing the government task force to enter his property . . . . Because Mr. Ingrum knew of the construction activity, he was on inquiry that he had a potential takings claim." *Id.* at 1316. This is so because "a landowner is on inquiry as to open and notorious activities conducted on his property." *Id.* at 1317 (emphasis added). *See also Coastal Petroleum Co. v. United States*, 228 Ct. Ct. 864, 867 (1981) (holding no accrual suspension where the owner "admitted that it was aware of the [government] project"); and *Catellus Develop. Corp. v. United States*, 31 Fed. Cl. 399 (1994) (holding government "bombing exercises were open and notorious acts").

This case is in no way analogous. These owners never signed *any* documents authorizing the government to enter their property and the first discernable activity on their land was the railroad's removal of the tracks in 2006.

The 1998 NITU did not give rise to any "open and notorious" activity placing any owner on "inquiry" that the STB had issued the 1998 NITU.

Unlike *Ingrum*, *Coastal Petroleum*, and *Calellus*, these owners did not admit they knew of the government's action and there was no "open and notorious" action like the government dropping bombs on these owners' land. The government fails to identify *any* "open and notorious activities conducted on" these owners' property that put them on notice of the 1998 NITU.

4. The government's claim that this Court "lack[s] jurisdiction" to consider whether the CFC's holding is constitutional is entirely baseless.

The government next says a "jurisdictional bar" forbids this Court from considering whether the §2501 limitations period does not begin running until after the landowners had notice of the NITU.

According to the government, an "owner is free to either sue in district court for asserted improprieties committed in the course of the challenged action or to sue for an uncompensated taking in the [CFC]." And therefore, the government claims, this Court lacks jurisdiction to review the CFC's conclusion that §2501 began running before these landowners received any notice of a NITU. Govt.'s Br. at 39.

The government is wrong.

These landowners do not challenge the "propriety" of the STB's authority to issue a NITU §1247(d). The Supreme Court already addressed this issue and held Trails Act §1247(d) is a constitutional exercise of Congress' power of eminent domain. *Preseault I*, 494 U.S. at 17. But the Supreme Court held the Trails Act was constitutional only because owners could obtain compensation in the CFC as provided by the Tucker Act. *Id.* at 13 ('we find that rail-to-trail conversions giving rise to just compensation claims are clearly authorized [under the Tucker Act]").

The STB has chosen to not provide affected owners notice of a NITU. This case does not challenge the propriety of the STB's decision to not provide owners notice of a NITU. What we do challenge, however, is the government's contention that it can fail to notify an owner of a NITU and then claim §2501 allows the government to escape its constitutional obligation to justly compensate owners because the owner did not know of the government's order in time to file a claim.

The issue today is whether the CFC erred when it held the §2501 limitations period could begin running and expire – and thereby cause owners to forfeit their right to compensation – when the owner has no notice of this NITU.

The Supreme Court has held such a result violates constitutional due process.

The government is also entirely incorrect to claim these landowners "cannot avoid application of the statute of limitations by making a due process argument . . . in the context of a just compensation suit." Govt.'s Br. at 39.

The government's statement is wrong because: (1) these landowners do not seek to "avoid application of the statute of limitations." Rather, they want to have the limitations period in §2501 applied in a manner comporting with due process; namely, that the limitations period cannot begin running until an owner knows their property has been taken; and (2) these landowners are not claiming "their

property was unlawfully taken." This case does not challenge the "propriety" of the NITU, nor does it seek to re-litigate *Preseault I.*[10]

Rather, this appeal asks this Court to decide if the CFC was correct to hold that 28 U.S.C. §2501 bars an owner's constitutional right to compensation by commencing the limitations period running before the owner has notice of the STB's order.

It is the CFC's error applying §2501 that violates these owners' right to due process and which gives rise to this appeal.

This suit arises directly under the Constitution and both the CFC and this Court have jurisdiction over this claim and any arguments related to these owners' right to maintain such an action.

In *Jacobs v. United States*, 290 U.S. 13, 16 (1933), the Supreme Court declared:

> [An action,] based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain . . . [is] guaranteed by the Constitution. 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. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was

[10] The government goes even further afield when it claims the Hobbs Act is a jurisdictional bar to this Court hearing this case. *See* Govt.'s Br. at 39, n.2. This inverse condemnation action is not a "challenge to the STB's regulations." The STB's issuance of a NITU is not even a "regulation."

> implied because of the duty to pay imposed by the amendment. The suits were thus founded upon the Constitution of the United States.

This appeal concerns whether the CFC was correct to hold these owners' constitutional right to maintain such an action was barred because the limitations period in §2501 began running before the owners had notice of the government's order.

The government next claims, "[t]he Plaintiff's only argument that the statute of limitations has not run is that, despite this Court's insistence 'that takings law supplies a single bright-line rule for accrual,' the bright line is not so bright, and the court must examine what each individual plaintiff knew or did not know about the issuance of the NITU." Govt.'s Br. at 30.

The government confuses the issue of (a) when a Trails Act taking occurs - by the STB issuing a NITU invoking 16 U.S.C. §1247(d), with the separate issue (b) whether the limitations period in 28 U.S.C. §2501 begins running before the owner has reason to know of the NITU.

No one questions the "bright-line" rule announced in *Caldwell* and followed in *Barclay*, 443 F.3d 136, *Illig v. United States*, 274 Fed. Appx. 883 (Fed. Cir. 2008), and *Ladd II*. Any doubt the *Caldwell* rule applies to Trails Act takings was laid to rest in this Court's denial of rehearing. *Ladd III*, 646 F.3d at 911 (J.

Gajarsa, dissenting) ("our precedent in *Caldwell* . . . [will] stand as the law of this circuit"). But *Caldwell* does not answer the question on appeal today.

5. The landowners raised their lack of notice before the CFC.

The government claims, "[these landowners] did not raise the argument [about lack of notice] in the CFC and have therefore waived it," and "[the landowner's argument they had no notice of the 1998 NITU is] "an argument made for the first time in their opening brief in this Court." Govt.'s Br. at 20, 36.

The government's statement is entirely false. Not only did these landowners raise this point in the CFC, they devoted an entire section of their brief to precisely this point. Pl.'s Mem. Opp. Summ. J. 35-37 (A1774-1776) (under the heading, "The Plaintiffs had no notice of the 1998 NITU so it could not have triggered the statute of limitations").

Not only did these landowners devote an entire section of their brief to this point, each of these Arizona landowners also filed a declaration in the CFC swearing they had no knowledge of this 1998 NITU. (A1695-1723).

Having explicitly raised their lack of notice of the 1998 NITU in the CFC, the landowners absolutely preserved this issue for appellate review by this Court.

II. This Court's mandate is more "than a single sentence" which the CFC could ignore on remand.

This Court issued a mandate to the CFC which provided, "[w]e 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." (A1464).

The government says the CFC should have ignored this Court's mandate because "[t]he Plaintiffs build their argument from a single sentence in the conclusion to this Court's opinion." Govt.'s Br. at 37.

The government is wrong.

This Court's mandate is not a "single sentence" drawn from this Court's opinion. This Court's mandate, issued to a lower court, defines the lower court's jurisdiction on remand. *See Amado v. Microsoft Corp.*, 517 F.3d 1353, 1360 (Fed. Cir. 2008); *United States v. Rivera*, 844 F.2d 916, 921 (2d Cir. 1988); *and* Pl.'s Opening Br. Aug. 20, 2012, Dkt. No. 23, at 31.

This Court has already rejected the government's prior challenge to this mandate. After this Court issued its mandate, the government sought rehearing by the panel and this Court *en banc*. The government asked this Court to rewrite the mandate because "this sentence appears to assume that liability has been established against the United States and that the only determination left to be made is compensation." United States' Petition for Rehearing, 2011 WL 1054242

at *11. This Court denied rehearing and refused to rewrite the mandate. *Ladd III*, 646 F.3d at 910.

So, when the government says the CFC was free to ignore this Court's mandate because it was just "a single sentence in the conclusion to this Court's opinion," the government fails to note this Court's prior refusal to rewrite this mandate as the government earlier requested.

III. The railroad only had an easement "over, through, across and upon" the Lindsey family's property.

In 1911, C.L. Cummings granted the El Paso & Southwestern Railroad an easement across his land. Cummings described the interest he granted the railroad as being "over, through, across and upon" his property. (A790). Cummings granted this interest in his land to a railroad that possessed the power to take his property by eminent domain, a point this Court considered in *Preseault II* when it described a deed as retaining "its eminent domain flavor" because the railroad, like the El Paso here, "had obtained a survey and location of its right-of-way, after which the . . . deed was executed confirming and memorializing the Railroad's action." 100 F.3d at 1537. In *Preseault II*, it was "the act of survey and location . . . and not the particular form of transfer" that was the "operative determinant." *Id.*

"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 work, should when possible, have assigned to it some meaning." *Pass v. Stephens*, 22 Ariz. 461, 466 (Ariz. 1921); *Shulansky v. Michaels*, 484 Ariz. App. 402 (Ariz. Ct. App. 1971) ("[w]hen construing the language of a deed, the purpose and conditions at the time when the deed was made should be taken into account"); and *Spurlock v. Santa Fe Pac. R.R. Co.*, 143 Ariz. 469, 474 (Ariz. Ct. App. 1984)

("in construing deeds, the court's role is to give effect to the intent of the contracting parties").

The government asks this Court to ignore both the express words used in the instrument and also the context in which Cummings granted the railroad this interest. The government claims Arizona law compels all conveyances to be construed as a conveyance of the owners' absolute title to the entire fee simple interest in the owner's land. But this is not an accurate statement of Arizona law. *See Boyd v. Atchison, T. & S.F. R. Co.*, 4 P.3d 670 (1931) ("since the railroad has in all events the right to secure possession by eminent domain . . . the title acquired [by the railroad] is similar to that which would have been acquired by proceedings in eminent domain"); *see also* Pl.'s Br. at 49-59.

As this Court has observed, the presumption in favor of fee title is not applicable to conveyances of a strip of land to a railroad. *Preseault II*, 100 F.3d at 1537 ("a railroad that proceeds to acquire a right-of-way for its road acquires only that estate, typically an easement, necessary for its limited purposes"); *and Penn. Cent. Corp. v. U.S. R. R. Vest Corp.*, 955 F.2d 1158, 1160 (7th Cir. 1992) ("[t]he presumption is that a deed to a railroad or other right of way company . . . conveys a right of way, that is, an easement, terminable when the acquirer's use terminates, rather than a fee simple").

Thus, the CFC's conclusion that Cumming's 1911 grant of an interest "over, across, through, and upon" his land to a railroad was a conveyance of Cumming's entire fee simple estate in the land is contrary to all those principles applicable to the construction of this instrument.

Cummings used the words "over, through, across and upon" to describe that interest he granted to the railroad. These words have specific meaning. "Over the river and through the woods, to grandmother's house we go" would be a very different journey if we went "through the river and over the woods."

Arizona law says we must interpret Cumming's deed to accomplish his intent. We cannot do so by ignoring the words he used.

The CFC's dismissal of the Lindsey family's claim should be reversed.

CONCLUSION

The CFC erred when it did not follow this Court's mandate to "determin[e] the compensation owed to the appellants for the taking." The CFC erred when it dismissed these landowners' claims because the CFC incorrectly believed the §2501 limitation period could begin running before a landowner had any knowledge or notice of the government's order taking their property. And, the CFC erred when it held that a 1911 deed granting a railroad the right to use a strip of land "over, through, across and upon" the grantor's property actually gave the railroad the owner's entire fee estate in the land.

For all these reasons, the CFC's decision should be reversed and these landowners' claims should be remanded to finally determine the "just compensation" they are due.

In *Sackett v. EPA*, 566 U.S. 1367 (2012) (concurring opinion of J. Alito), Justice Alito observed, "[t]he position taken in this case by the Federal Government—a position that the Court now squarely rejects—would have put the property rights of ordinary Americans entirely at the mercy of [government] employees. … In a nation that values due process, not to mention private property, such treatment is unthinkable."

So too here. The government argues it may take an owner's property and, by failing to provide the owner any notice of the government's order, the owners'

right to compensation is extinguished because the limitations period will have run before the owner learns of the government order.

The government's claim to the contrary is nothing more than an appeal to the days when *rex non potest peccare* governed a subjects' claim against the sovereign.[11] The government's contention that it may take an owner's property without notice to the owner and thereby avoid its constitutional obligation to pay the owner is repugnant to the most fundamental principles upon which our Republic is established.

Date: October 5, 2012

Respectfully submitted,

ARENT FOX, LLP

/s/ Mark F. ("Thor") Hearne, II
Mark F. ("Thor") Hearne, II
Lindsay S.C. Brinton
Meghan S. Largent
112 South Hanley Road, Suite 200
Clayton, MO 63105
Phone: (314) 721-0219
Fax: (202) 857-6395
thornet@ix.netcom.com
brinton.lindsay@arentfox.com
largent.meghan@arentfox.com

1050 Connecticut Avenue, NW
Washington, DC 20036-5339
Phone: (202) 857-6000

[11] "The King can do no wrong."

Debra J. Albin-Riley
Joseph L. Cavinato, III
Arent Fox, LLP
555 West Fifth Street, 48th Floor
Los Angeles, CA 90013
Phone: (213) 629-7400
Fax: (213) 629-7401
riley.debra@arentfox.com
cavinato.joseph@arentfox.com

Attorneys for Plaintiff

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 **October 5, 2012**, Counsel for Appellant has authorized me to electronically file the foregoing **Reply 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:

Michael T. Gray
michael.gray2@usdoj.gov
US Army Corps of Engineers
Office of Counsel
701 San Marco Boulevard
Jacksonville, FL 32207
(202) 532-3147

William J. Shapiro
william.shapiro@usdoj.gov
Department of Justice
Appellate Section, Environment and Natural Resources Division
501 I Street
Sacramento, Ca 95814
(916) 932-2207

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

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B).

_x_ The brief contains 6,882 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii),or

____ The brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

_x_ The brief has been prepared in a proportionally spaced typeface using MS Word 2007 in a 14 point Times New Roman font or

____ The brief has been prepared in a monospaced typeface using MS Word 2002 in a ___ characters per inch_____ font.

Date: October 5, 2012

/s/ Mark F. ("Thor") Hearne, II
Mark F. ("Thor") Hearne, II
Attorneys for Plaintiffs-Appellants