2016-1663

United States Court of Appeals for the Federal Circuit

NORMA E. CAQUELIN, KENNETH CAQUELIN, For Themselves and as Representatives of a Class of Similarly Situated Persons,

Plaintiffs – Appellees,

v.

UNITED STATES,

Defendant – Appellant.

On Appeal from the United States Court of Federal Claims in No. 1:14-CV-0037-CFL, Judge Charles F. Lettow

BRIEF FOR NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, AND PUBLIC LANDS COUNCIL AS *AMICI CURIAE* IN SUPPORT OF APPELLEES URGING AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Norma E. Caquelin & Kenneth Caquelin **v.** United States

Case No. 2016-1663

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ☒ (amicus) ☐ (name of party)

National Association of Reversionary Property Owners, National Cattlemen's Beef Association, and Public Lands Council

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held Companies that own 10 % or more of stock in the party
Nat'l Assoc. of Reversionary Prop. Own	Same	None
National Cattlemen's Beef Assoc.	Same	None
Public Lands Council	Same	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 (**and who have not or will not enter an appearance in this case**) are:

n/a

December 28, 2016
Date

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

Please Note: All questions must be answered

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

cc:

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INTRODUCTION

To avoid paying the Caquelin family $900, the government wants this Court to sit *en banc* and overturn four of its prior decisions representing the collective wisdom of more than ten members of this Court and adopt a new rule that is contrary to the Supreme Court's and this Court's Takings Clause jurisprudence. What the government asks this Court to do would throw this Court's Trails Act jurisprudence into a thicket.

This Court should deny the government's request for rehearing *en banc* and summarily affirm the Court of Federal Claims (CFC) decision that faithfully followed this Court's controlling precedent.

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Reversionary Property Owners is a non-profit foundation dedicated to defending the Fifth Amendment right to compensation when the government takes an owner's property under the federal Trails Act.[2] See, *e.g.*, *National Ass'n of Reversionary Property Owners* v. *Surface Transp. Bd.,* 158 F.3d 135 (DC Cir. 1998) (*NARPO*), and *amicus curiae* in *Preseault* v. *I.C.C.*, 494 U.S. 1 (1990) (*Preseault I*), and *Marvin M. Brandt Rev. Tr.* v. *United States*, 134 S.Ct. 1257 (2014).

The National Cattlemen's Beef Association represents the entire cattle industry. The Association represents nearly 139,000 cattle producers and forty-five affiliated state associations throughout the United States.

The Public Lands Council represents ranchers using public lands and preserving the natural resources and heritage of the American West. The Council's members are cattle, sheep, and grasslands associations throughout the western United States.

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[1] This brief is not authored, in whole or part, by any party's counsel nor has any party or party's counsel contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

[2] The National Trails System Act of 1968, as amended in 1983, 16 U.S.C. 1241, *et seq.*

This case is important because, should this Court overturn four of this Court's prior decisions as the government asks, the certainty of title to tens of thousands of acres of land would be unsettled.

STATEMENT OF THE ISSUES

1. Should this Court sit *en banc* to overturn *Caldwell* v. *United States*, 391 F.3d 1226 (Fed. Cir. 2004), *Barclay* v. *United States*, 443 F.3d 1368 (Fed. Cir. 2006), *Illig* v. *United States*, 274 Fed. App'x 883 (Fed. Cir. 2008), and *Ladd* v. *United States*, 630 F.3d 1015 (Fed. Cir. 2010) (*Ladd I*)?

2. Assuming this Court is inclined to overturn this precedent, can this Court do so given the Supreme Court's contrary Takings Clause jurisprudence, including *Preseault I*, *Brandt*, *Arkansas Game & Fish Comm'n* v. *United States*, 133 S.Ct. 511 (2012), and *Leo Sheep Co.* v. *United States*, 440 U.S. 668 (1979), and this Court's decisions in *Preseault* v. *United States*, 100 F.3d 1525 (Fed. Cir. 1996) (*en banc*) (*Preseault II*), *Hash* v. *United States*, 403 F.3d 1308 (Fed. Cir. 2005), *Toews* v. *United States*, 376 F.3d 1371 (Fed. Cir. 2004), and *Ellamae Phillips Co.* v. *United States*, 564 F.3d 1367, 1372 (Fed. Cir. 2009)?

STATEMENT OF THE CASE

I. Congress amended the Trails Act to pre-empt owners' state-law "reversionary" rights.[3]

Railroads had more than 220,000 miles of right-of-way in 1920. *Preseault I*, 494 U.S. at 5. With the advent of the Interstate Highway System and airlines, railroads no longer needed this much right-of-way and began abandoning unused lines. *Id.* at 3. Railroad rights-of-way are common law easements granted for the limited purpose of operating a railroad across a strip of land. See *Brandt*, 134 S.Ct. at 1265.

> The essential features of easements – including, most important here, what happens when they cease to be used – are well settled as a matter of property law. *** [E]asements *** may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude." In other words, if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land.[4]

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[3] "Reversionary" is a shorthand term for the fee owner's interest. "Instead of calling the property owner's retained interest a fee simple burdened by the easement, this alternative labels the property owner's retained interest … a 'reversion' in fee." *Preseault II*, 100 F.3d at 1533. See also *Brandt*, 134 S.Ct. at 1266, n.4.

[4] Quoting *Restatement (Third) of Property: Servitudes* §1.2(1) (1998), comment d, §7.4, comments a and f. See also *Samuel C. Johnson 1988 Trust* v. *Bayfield County, Wis.*, 649 F.3d 799, 803 (7th Cir. 2011)
("the termination of an easement restores to the owner of the fee simple full rights over the part of his land formerly occupied by the right of way created by the easement").

A railroad with an unneeded railway line has two options. The railroad may petition the STB to *discontinue* operations over the line. A discontinuance allows the petitioning railroad to retain ownership of the right-of-way and resume railroad operations in the future. But the petitioning railroad remains subject to the STB's authority to compel that specific railroad to restore service over the line. This is a possible liability for the railroad because a shipper on the line could force the railroad to restore service when doing so is unprofitable for the railroad.

Alternatively, the railroad may petition to *abandon* the railroad line. Abandonment allows the railroad to discontinue service and salvage the track. When the STB grants a petition to abandon a railroad right-of-way, the railroad has no further obligation to preserve the right-of-way and the STB's jurisdiction terminates. For railway lines with no prospect of future use, abandonment is a much more attractive option than discontinuance.

Congress wanted to preserve otherwise abandoned railroad corridors by delaying the railroad's authority to abandon the corridor for six-months, to allow the railroad to possibly sell the right-of-way to a non-railroad for a public recreational trail. See *National Wildlife Federation* v. *I.C.C.*, 850 F.2d 694, 697 (DC Cir. 1988). But this didn't work. The Supreme Court observed, "[B]y 1983, Congress recognized that these measures [the public use provision delaying disposition for six-months] 'ha[d] not been successful in establishing a process

through which railroad rights-of-way which are not immediately necessary for active service can be utilized for trail purposes.'" *Preseault I*, 494 U.S. at 6. Delaying abandonment for six months didn't succeed because, under state law, the railroad had nothing to sell. *Nemo dat quod non habet* – one cannot convey what he does not own.

The Supreme Court explained, "many railroads do not own their rights-of-way outright but rather hold them under easements [and] … the property reverts to the abutting landowner upon abandonment of rail operations." *Preseault I*, 494 U.S. at 7. Congress adopted section 8(d)[5] to fix this problem by pre-empting state law and allowing a railroad to sell the otherwise abandoned right-of-way to a non-railroad trail-user notwithstanding the fee owner's state law reversionary interests.[6]

The Supreme Court explained section 8(d) "pre-empt[s] the operation and effect of certain state laws that 'conflict with or interfere with federal authority over the same activity.'" *Preseault I*, 494 U.S. at 21 (O'Connor, J., concurring).[7] State courts "cannot enforce or give effect to asserted reversionary interests…."

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[5] Codified as 16 U.S.C. 1247(d).

[6] Section 8(d) states "such interim use [for public recreation or railbanking] 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."

[7] Quoting *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 319 (1981). See also *Grantwood Village* v. *Missouri Pacific RR Co.*, 95 F.3d 654 (8th Cir. 1996).

Id. at 22.[8] When the STB invokes section 8(d) it denies an owner his reversionary right to possess his land and perpetually forestalls termination of the railroad easement. See *National Wildlife*, 850 F.2d at 705; *Citizens Against Rails-to-Trails* v. *Surface Trans. Bd.*, 267 F.3d 1144, 1149 (DC Cir. 2001) (*CART*); *NARPO*, 158 F.3d at 139.

Section 8(d) can only be invoked *after* a railroad first petitions the STB for authority to abandon the right-of-way and *after* the STB grants this petition. 49 U.S.C. 10903(a). The STB may only grant a railroad's petition to abandon a right-of-way if the STB first finds abandoning the railroad line is in the public interest and there is no current or future need for railroad service. 49 U.S.C. 10905; 49 C.F.R. 1152.28.

If the railroad and trail-user agree, the railroad transfers the right-of-way to the trail-user. The agreement between the railroad and trail-user is a private agreement not filed with the STB, and owners are never told of the agreement between the railroad and trail-user.[9] As a further consequence of invoking section

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[8] A non-railroad cannot succeed to a railroad's interest in a railroad right-of-way easement. *East Alabama Ry. Co. v. Doe*, 114 U.S. 340, 354 (1885) ("The grant to the 'assigns' of the [railroad] corporation cannot be construed as extending to any assigns except one who should be the assignee of its franchise to establish and run a railroad.").

[9] See *Twenty-Five Years of Railbanking: A Review and Look Ahead, Hearing Before the Surface Trans. Bd.*, Ex Parte No. 690 (July 8, 2009).

8(d), the STB retains jurisdiction of the corridor, perpetually pre-empting state law, and may authorize *any* railroad (not just the original railroad) to build a new railroad line across the owner's land. The STB can indefinitely extend the period for the railroad to reach a trail-use agreement. See *Birt* v. *Surface Trans. Bd.*, 90 F.3d 580, 589 (DC Cir. 1996); and *Rail Abandonments – Supplemental Trails Act Procedures*, 4 I.C.C.2d 152 (1987). The STB will also freely issue "replacement NITUs" substituting new and different trail-users even after the trail-use negotiating period has expired. See *Barclay*, 443 F.3d at 1376 (despite expiration of the original NITU, replacement NITU precluded consummation of abandonment and reversion of landowners' interest).

The duration between when the government originally invokes section 8(d) and when trail-use is established or negotiations with trail-users end without any agreement frequently last a decade or longer – far longer than the six-year statute of limitations. See, *e.g.*, *Wisconsin Cent. Ltd.*, No. AB-303 (Sub-No. 18X) (Surface Trans. Bd. July 28, 2009) (NITU issued March 1998 and extended until January 2010).[10] Thus, if a reversionary owner is required to wait until the outcome of the original invocation of section 8(d) is known – with either

[10] The Rails-to-Trails Conservancy says the government invoked section 8(d) eighty-two times in the last six years. Of those eighty-two orders, trail-use agreements were reached in thirty-two cases and the remaining fifty remain in effect or expired without agreement. Amicus Brief, p. 19.

construction of a public recreational trail or the government surrendering jurisdiction of the corridor without a public trail – the statute of limitations will have expired. During this time the owner's reversionary interest has been forestalled.

II. Trails Act jurisprudence.

Three themes animate past Trails Act litigation. (1) Is section 8(d) a compensable taking, and if so, is section 8(d) constitutional? (2) Did the original railroad acquire title to the fee estate or only an easement to operate a railway across the fee owner's land? And, (3) when does the reversionary owner's claim for compensation accrue?

A. The government's invocation of section 8(d) is a compensable taking.

Early Trails Act litigation challenged the constitutional legitimacy of section 8(d). See the *Preseault* series of cases culminating in *Preseault I* and *Preseault II*. See also *National Wildlife*, *CART*, *NARPO*, and *Grantwood Village* v. *Missouri Pacific RR Co.*, 95 F.3d 654 (8th Cir. 1996).

The Preseaults argued section 8(d) was unconstitutional because the Trails Act made no specific appropriation of compensation for owners. *Preseault I*, 494 U.S. at 13. The government said compensation was unnecessary because invoking section 8(d) is nothing more than an exercise of the federal government's authority to regulate railroads. The government argued that, even if the Preseaults owned

"the reversionary interest they claim, no taking occurred because 'no reversionary interest can or would vest' until the ICC determines that abandonment is appropriate." *Id.* at 23 (quoting *Preseault* v. *I.C.C.*, 853 F.2d 145, 151 (2nd Cir. 1988)).

Justice O'Connor explained the government's error:

> This view conflates the scope of the ICC's power with the existence of a compensable taking and threatens to read the Just Compensation Clause out of the Constitution. The ICC 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.
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> *Preseault I*, 494 U.S. at 23.

The Supreme Court held, "by deeming interim trail use to be like discontinuance rather than abandonment, Congress prevented property interests from reverting under state law." *Preseault I*, 494 U.S. at 8. The Supreme Court's analysis of section 8(d) turned upon "Congress prevent[ing] property interests from reverting under state law." *Id.* at 22. The Court found that when the government invokes section 8(d) it redefines an owner's existing state-law property interest by *ipse dixit* and is a categorical taking. *Preseault I*, 494 U.S. at 23 (quoting *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980), and *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1012 (1984)). The Supreme Court,

nonetheless, found section 8(d) constitutional because an owner could obtain compensation under the Tucker Act.

In *Toews*, 376 F.3d at 1376, this Court explained, "It is elementary law that if the Government uses … an existing railroad easement for purposes and in a manner not allowed by the terms of the grant of the easement, the Government has taken the landowner's property for the new use." In *Ladd I*, this Court held that, when invoked, section 8(d) "destroys" and "effectively eliminates" the fee owner's right to their property. See *Ladd I*, 630 F.3d at 1019. This Court's holding in *Ladd I* is in accord with the DC Circuit's decision in *NARPO*, 158 F.3d at 139, holding, "When [a landowner's] easement reversion is blocked, the interim trail use has been deemed a taking … and the holder of a reversionary interest that does not vest because of a trail use may seek compensation."

B. "Railbanking" and recreation are not the same as operating a railroad.

After losing its regulatory taking theory the government adopted a new argument claiming the easements originally granted railroads in the 1880s and early 1900s gave the railroad title to the fee simple estate in the land under the railroad's right-of-way or granted an essentially unlimited "easement for anything" allowing the railroad to sell the easement to a non-railroad for uses (like public recreation) that have nothing to do with operating a railroad. The government

argued so-called "railbanking" (intentionally not operating a railroad across the land) is equivalent to operating a railroad.

This Court rejected the government's argument. See *Toews*, 376 F.3d at 1376 ("it appears beyond cavil that use of these easements for a recreational trail – for walking, hiking, biking, picnicking, frisbee playing, with newly-added tarmac pavement, park benches, occasional billboards, and fences to enclose the trailway – is not the same use made by a railroad, involving tracks, depots, and the running of trains."). See also *Preseault II*, 100 F.3d at 1554 ("Realistically, nature trails are for recreation, not transportation.") (Rader, J., concurring). Judge Rader explained, "[t]he vague notion that the State may at some time in the future return the property to the use for which it was originally granted, does not override its present use of that property inconsistent with the easement. That conversion demands compensation. Moreover, the United States facilitated that conversion with its laws and regulatory approval." *Id.* at 1552.

"Railbanking" and public recreation are uses of the owner's land the railroad was not granted in the original right-of-way easement. See *Preseault II*, 100 F.3d at 1547-48, 1550 (citing *Lawson* v. *State*, 730 P.2d 1308 (Wash. 1986), and *Pollnow* v. *State Dept. of Natural Res.*, 276 N.W.2d 738 (Wis. 1979); see also

Michigan Dept. of Natural Res. v. *Carmody-Lahti Real Estate*, 699 N.W.2d 272 (Mich. 2005).

Sitting *en banc* in *Presault II*, 100 F.3d at 1533, this Court adopted a three-part test to determine when an owner is entitled to compensation. (1) whether the railroad acquired only an easement or obtained a fee simple estate; (2) if the railroad acquired only an easement, were the terms of the easement limited to use for railroad purposes, and; (3) even if the original railroad easement encompassed public recreation, had the original easement otherwise terminated. *Ellamae Phillips*, 564 F.3d at 1373. Judge Lettow correctly summarized this Court's holding: "in rails-to-trails cases, a taking by the government is established if the railroad acquired only an easement, the easement was limited to railroad purposes, and the scope of the [original] easement does not include recreational trail use." Opinion, p. 7.

C. An owner's claim for compensation arises when the owner first has notice of the STB's decision invoking section 8(d).

The government spawned an additional line of Trails Act litigation when it argued owners' claims were time-barred. The government said the six-year limitation period in 28 U.S.C. 2501 begins to run when the government first invokes section 8(d). See *Caldwell*, *Barclay*, and *Illig*. This Court announced a "bright-line rule" that a Trails Act taking occurs, and an owner's claim for

compensation accrues, when the STB first invokes section 8(d) because that is the only *government action* that blocks an owner's state-law reversionary right from vesting. *Barclay*, 443 F.3d at 1378.

1. *Caldwell*

In July 1994 Norfolk Southern Railroad petitioned the ICC to abandon a railway line near Columbus, Georgia. *Caldwell*, 57 Fed. Cl. at 194. The ICC granted the railroad's petition but delayed abandonment for six months by imposing a public use condition under 49 C.F.R. 1152.29(d)(1). *Id.* at 195. In June 1995 a potential trail-user, the Public Trust for Land, asked the ICC to invoke section 8(d) allowing the railroad to sell the abandoned right-of-way to Public Trust. *Id.* The ICC invoked section 8(d) granting the railroad and Public Trust 180-days to negotiate the sale of the right-of-way. The railroad and Public Trust couldn't agree but asked the ICC to extend the negotiating period. *Id.* In August 1995 the railroad and Public Trust reached a tentative agreement containing numerous contingencies. The agreement was amended in July 1996 and then assigned to a new trail-user, the City of Columbus. Columbus asked the ICC to further extended the negotiating period through November 1996 to allow Columbus to consummate its purchase of the abandoned right-of-way for $1 million.

The purchase closed in early October 1996 and, shortly thereafter, the railroad quit-claimed its interest in the abandoned right-of-way to Columbus. *Id.* The owners sued for compensation in October 2002 – more than six years after the

ICC first invoked section 8(d) but less than six years after the railroad conveyed the right-of-way to Columbus.

The government argued the Caldwells' right to compensation was time-barred because their claims accrued when the railroad agreed to sell the right-of-way to the trail-user. *Caldwell*, 57 Fed. Cl. at 197. The government never said exactly when it believed the Caldwells' claim accrued – when the initial trail-use-agreement was signed, when the trail-use-agreement was amended, when the contingencies were satisfied, or when the original trail-use-agreement was ultimately assigned to the subsequent trail-user. The Caldwells argued their claim couldn't accrue until the railroad actually conveyed the right-of-way to the ultimate trail-user. *Id.*

The CFC accepted the government's argument and dismissed the Caldwells' claim as time-barred. *Caldwell*, 57 Fed. Cl. at 203-04. The Caldwells appealed. Judges Dyk and Prost ruled for the government. Judge Dyk wrote the decision and Judge Newman dissented. The majority held:

> The taking, if any, when a railroad right-of-way is converted to interim trail use under the Trails Act occurs when state-law reversionary property interest that would otherwise vest in the adjacent landowners are blocked from so vesting. The question, then, is in the context of an exemption proceeding, when are state-law reversionary interests forestalled by operation of section 8(d) of the Trails Act? We conclude that this occurs when the railroad and trail operator communicate to the STB their intention to negotiate a trail

> use agreement and the agency issues an NITU that operates to preclude abandonment under section 8(d).
>
> *Caldwell*, 391 F.3d at 1233.

This Court explained, "The issuance of the NITU is the only *government* action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way." *Caldwell*, 391 F.3d at 1233-34 (emphasis in original).

The owners sought, and the government opposed, rehearing. The government argued:

> Unlike the usual physical occupation case, the landowner in a Trails Act taking case is already deprived of possession. Thus, the question is not when the owner loses the right to possess the property (since he is already not in possession), but rather when he would otherwise have recovered ownership of the easement were it not for the operation of the Trails Act. The dissent's focus on when the [trail-user] acquired the right to possess and occupy the property is misplaced in this unique context, because Caldwell was not in possession of the corridor in the first place and his alleged reversionary rights were interrupted (if at all) long before title transferred to the [trail-user].
>
> Government Opposition to Rehearing, p. 5.[11]

The government said "the argument that the NITU works a regulatory taking and that a single Government action under the Trails Act might work two separate takings is clearly incorrect." *Id.* at 7. The government explained:

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[11] 2005 WL 4146730, at *5 (Fed. Cir. No. 03-5152, filed March 10, 2005).

> This Court has long held that a single Government action might cause a single taking, which might turn out to be temporary; if the taking later becomes permanent, it is merely the continuation of the initial taking, not a separate taking. Under the Trails Act, the STB takes only one action – it issues the NITU – that might cause one taking. The taking might turn out to be temporary if, for example, the interim trail use agreement is terminated and the rail carrier subsequently abandons the line. But the temporary taking that might be caused when the NITU and interim trail use agreement prevent reversion under state-law does not end when (or if) interim trail use ensues. Rather, that same potential taking continues and becomes permanent.
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> *Id.* at 8-9.

This Court denied rehearing. The owners petitioned for certiorari, which was denied. 547 U.S. 826 (2005).

2. *Barclay* and *Renewal Body Works*

This Court revisited this same argument a year later in *Barclay* v. *United States*, 351 F. Supp.2d 1169 (D. Kan. 2004), and *Renewal Body Works, Inc.* v. *United States*, 64 Fed. Cl. 609 (2005). The same panel from *Caldwell* heard this appeal. Judge Dyk wrote the majority decision over Judge Newman's dissent.

Renewal involved the same railroad right-of-way as *Toews*. *Barclay* involved three abandoned railroad rights-of-way in Kansas. In *Barclay* the STB issued an order invoking section 8(d) and, when the original negotiation period lapsed, the STB issued a series of new NITUs extending the negotiating period allowing the railroad to negotiate with a series of different trail-users.

The owners argued their claim didn't accrue until the railroad transferred its interest to the trail-user. The owners said *Caldwell* was wrongly-decided.[12] This Court rejected the owners' arguments and affirmed its decision in *Caldwell*:

> We explained in *Caldwell* that "[t]he taking, if any, when a railroad right-of-way is converted to interim trail use under the Trails Act occurs when state law reversionary property interests that would otherwise vest in the adjacent landowners are blocked from so vesting." Abandonment is suspended and the reversionary interest is blocked "when the railroad and trail operator communicate to the STB their intention to negotiate a trail use agreement and the agency issues an NITU that operates to preclude abandonment under section 8(d)" of the Trails Act.
>
> We concluded that "[t]he issuance of the NITU is the only *Government* action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right of way." Thus, a Trails Act taking begins and a takings claim accrues, if at all, on issuance of the NITU.
>
> We explicitly held in *Caldwell* that "[w]hile the taking may be abandoned ... by the termination of the NITU[,] the accrual date of a single taking remains fixed." The issuance of the NITU is the only event that must occur to "entitle the plaintiff to institute an action." Accrual is not delayed until a trail use agreement is executed or the trail operator takes physical possession of the right-of-way.
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> *Barclay*, 443 F.3d at 1373.[13]

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[12] See Owners' Brief, 2005 WL 1563752.

[13] Quoting *Caldwell*, 391 F.3d at 1233-34, and *Creppel* v. *United States*, 41 F.3d 627, 631 (Fed. Cir. 1994)
; citations omitted; emphasis in original; paragraph breaks added.

The owners sought rehearing *en banc*. The government opposed rehearing, arguing "The NITU is the only federal Government action that might allegedly constitute a taking by preventing the reversion of property rights under state law."[14] The government noted the STB's "regulations do not even require the railroad and the trail operator to notify the STB in the event that title is transferred." And, "preemption of the landowners' alleged reversionary rights occurred, if at all, well before title was transferred to the trail operators." *Id.* at 6. The government said, "this Court explained in *Preseault II* [that] the landowners' taking claim is not premised on the conversion of the right-of-way to a trail, but rather the Government's action which blocks the landowner's state-law reversionary interests from vesting, as they otherwise would when the right-of-way is abandoned." *Id.* at 7.

Then, quoting *Caldwell*, the government argued, "'a taking occurs when the owner is deprived of use of the property,' which in the Trails Act context occurs 'by blocking the easement reversion.'" *Id.* at 9. And, the government said, "the question is not when the owner loses the right to physically occupy the property, but rather, when the owner would otherwise have recovered full possession of the easement, were it not for operation of the Trails Act." *Id.* Finally, the government

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[14] Government's Opposition to Petition for Rehearing *en banc*, 2006 WL 2351228, at *11 (Fed. Cir. No. 05-5109, filed July 21, 2006).

noted, "arguments about the potential for a temporary regulatory takings claim is inapposite in the context of a rails-to-trails conversion, which this Court's precedent seems to have characterized as a physical takings claim." *Id.* at 11.

This Court denied rehearing. The owners sought certiorari, which was denied. 549 U.S. 1209 (2007).

3. *Illig*

The Illigs and more than sixty of their neighbors own homes on the same abandoned railroad corridor that was the subject of *Grantwood Village* v. *MoPac*, *Grantwood Village* v. *United States*, 45 Fed. Cl. 771 (2005), and *Miller* v. *United States*, 67 Fed. Cl. 542 (1998). In *Illig* the CFC held the government owed these owners compensation as in *Grantwood Village* and *Miller*. *Illig* v. *United States*, No. 98-934L (Fed. Cl. Oct. 22, 2001). The Justice Department agreed to pay these Missouri owners a total of more than $6 million. The settlement was to be approved in December 2004. Two days before the hearing to approve settlement and enter final judgment, this Court issued its decision in *Caldwell*. On the basis of *Caldwell* the government withdrew from the settlement because, under *Caldwell*, the *Illig* owners' claims were now time-barred. The CFC followed *Caldwell* and *Barclay* and dismissed the *Illig* owners' claims. *Illig* v. *United States*, 67 Fed. Cl. 47, 56 (2005).

The owners appealed. In a unanimous decision Judges Dyk, Mayer, and Linn affirmed *Caldwell* and *Barclay* to be controlling and summarily affirmed the CFC's dismissal of the owners' claims as time-barred. *Illig* v. *United States*, 274 Fed. App'x 883, 884 (2008). Rehearing *en banc* was sought and denied without dissent. The owners petitioned the Supreme Court for a writ of certiorari. The Supreme Court directed then-Solicitor General, now-Justice Kagan to reply. See Brief for the United States in Opposition to Petition for Writ of Certiorari, 2009 WL 1526939.

Solicitor General Kagan wrote, "[i]ssuance of the NITU thus marked the moment at which federal law (1) at least temporarily forestalled the vesting of state-law reversionary interests, and (2) authorized indefinite preclusion of such reversionary interests, contingent on the finalization of an interim trail use agreement." *Id.* at 10. Solicitor General Kagan continued, "by the time a trail use agreement is signed, federal law has already forestalled any such reversion. As the Federal Circuit has explained, a NITU stands as a 'barrier to reversion' so long as it is in effect." *Id.* at 12 (quoting *Barclay*, 443 F.3d at 1374). Solicitor General Kagan continued, "[p]etitioners contend that any taking that commences upon issuance of the NITU 'is temporary at the outset,' and that their taking claim should not accrue until the taking is 'transformed into a permanent interference.' The court of appeals has correctly rejected that contention." *Id.*

Solicitor General Kagan noted, "[t]he issuance of the NITU thus marks the 'finite start' to either temporary or permanent takings claims.' When the NITU is issued, all the events have occurred that entitle the claimant to institute an action based on federal-law interference with reversionary interests, and any takings claim premised on such interference therefore accrues on that date." 2009 WL 1526939, at *12-13 (quoting *Caldwell*, 391 F.3d at 1235). Solicitor General Kagan said this Court's "bright-line rule [in *Caldwell* and *Barclay*] has the singular virtue of providing certainty to prospective claimants of when their claims accrue and when the limitations period expires." *Id.* at 15.

After Solicitor General Kagan filed the government's reply, the Supreme Court denied certiorari. 557 U.S. 935 (2009).

4. *Ladd*

The Ladds and their neighbors own ranches on the US-Mexican border in Arizona. The San Pedro Railroad petitioned the STB to abandon an eighty-two-mile-long railway line. In July 2006 the railroad and a potential trail-user requested the STB invoke section 8(d). *Ladd I*, 630 F.3d at 1017. The STB invoked section 8(d). After the STB issued the 2006 NITU, the railroad removed the tracks from the right-of-way. When the Ladds and their neighbors learned of the STB's order taking their reversionary right to their property, they sued for compensation.

The period for the railroad and trail-user to negotiate a trail-use agreement expired without any agreement. *Ladd I*, 630 F.3d at 1018. The STB issued new NITUs extending the negotiating period for a portion of the right-of-way and substituted different trail-users. But, alas, the railroad didn't reach any agreement with any trail-user. *Id.* For one sixteen-mile-long segment of the right-of-way the railroad consummated abandonment and the owners regained unencumbered title to their land. But, for the remaining seventy miles, the STB's jurisdiction continues and the owners' state-law reversionary rights remain, in Solicitor General Kagan's words, "indefinitely precluded." No public trail has been built across the corridor but, because the owners cannot fence the corridor or exclude others from the land, illegal immigrants and drug smugglers now use this abandoned railroad corridor to enter the country from Mexico. *Id.* at 1018.

Under *Caldwell*, *Barclay*, and *Illig* the government's categorical obligation to compensate these Arizona ranchers arose when the STB invoked section 8(d) blocking their state-law reversionary right to possess their property. But the government argued the opposite and claimed the original order invoking section 8(d) is, at most, a temporary regulatory taking.[15] Judge Hodges bought the government's argument. *Ladd* v. *United States*, 90 Fed. Cl. 221, 227-28 (2009).

[15] See oral argument, available at: <http://www.cafc.uscourts.gov/oral-argument-recordings?title=&field_case_number_value=2010-5010&field_date_value2%5Bvalue%5D%5Bdate%5D=> (last visited 12-26-16).

The Arizona ranchers appealed and this Court reversed and unanimously affirmed *Caldwell*, *Barclay*, and *Illig*. 630 F.3d 1015 (2010).

During oral argument Judge Moore noted the government's regulatory taking argument was the same argument the government made in *Preseault I* which the Supreme Court mocked: "That's the argument you made unsuccessfully to the Supreme Court where Justice Scalia … actually made fun of you. I mean, I don't think that's going to work on us at this point. You can't say, 'Oh yeah, well they didn't lose anything because they didn't [have] anything the day before.'"[16] See Appellees' Brief, p. 2, quoting Chief Justice Rehnquist and Justice Scalia.

Judge Moore, joined by Judges Rader and Linn, unanimously rejected the government's argument. "In light of *Caldwell* and *Barclay*, we reject the Government's present suggestion that the NITU is nothing more than a temporary regulatory hold on the railroad's authority to abandon its railway." *Ladd I*, 630 F.3d at 1025.

The government sought, and this Court denied, rehearing. 646 F.3d 910 (2011). Judges Rader, Newman, Lourie, Bryson, Linn, Dyk, Prost, O'Malley, and Reyna voted to deny rehearing *en banc* and Judges Moore and Gajarsa dissented. In their dissent Judges Gajarsa and Moore noted, "[o]ur precedent, however,

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[16] See *Ladd I* oral argument transcript, note 15, *supra*.

assumes that the issuance of an NITU is a physical taking." *Id*. The government did not seek certiorari.

After this Court remanded *Ladd* to determine compensation, the government uncovered an earlier order the ICC issued in 1998 invoking section 8(d). *Ladd II*, 713 F.3d at 651. This earlier NITU was not a public record and, despite almost a half-decade of litigation, even the government's lawyers didn't know this earlier NITU existed. *Id.* But the government now reverted back to its earlier position that a Trails Act taking occurs when the original order invoking section 8(d) is issued and, thus, the government argued, these owners' claims were time-barred. *Id.* at 652; *Ladd* v. *United States*, 108 Fed. Cl. 609, 612 (2012).

Judge Hodges again accepted the government's argument. 108 Fed. Cl. at 616. The owners appealed and Judges Rader, Moore, and Lourie unanimously reversed. This Court held the issuance of the earlier NITU was inherently unknowable and the claim accrual suspension rule applied. *Ladd II*, 713 F.3d at 652-53.[17] The government did not seek rehearing or certiorari.

In sum, the argument the government makes today has been considered and rejected by five panels of this Court and this Court has rejected rehearing this

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[17] *Ladd II* oral argument, available at: <http://www.cafc.uscourts.gov/oral-argument-recordings?title=&field_case_number_value=2012-5086&field_date_value2%5Bvalue%5D%5Bdate%5D=> (last visited 12-26-16).

argument *en banc* four times. More than ten members of this Court (Judges Prost, Dyk, Rader, Linn, Lourie, Bryson, O'Malley, Reyna, Newman, and Michel) voted to reject rehearing this argument *en banc*. While Judge Newman originally dissented in *Caldwell* and *Barclay*, Judge Newman did not dissent from the denial of rehearing in *Ladd I*. And, while Judges Moore and Gajarsa voted to rehear this argument, they recognized this Court's holding in *Caldwell*, *Barclay*, and *Illig* is settled law. Furthermore, more than four times the Supreme Court denied certiorari and refused to hear this argument.

III. This lawsuit.

In 1866 the Eldora Railroad and Coal Company acquired an easement upon which it built a railway line to transport coal. Opinion, pp. 2-3. By 2013 Eldora Railroad's successor, North Central Railroad, no longer needed or used this railway line and petitioned the STB for authority to abandon this line. The STB granted the railroad's petition to abandon the line in July 2013.

The City of Ackley and the Iowa National Heritage Foundation asked the STB to invoke section 8(d) of the Trails Act. In July 2013 the STB granted this request, invoked section 8(d), and issued a NITU pre-empting the Caquelins' state-law reversionary right to possess their land.

The original July 2013 NITU provided a 180-day period for the railroad to negotiate with the Iowa Trails Council. Two months later, the Iowa National

Heritage Foundation asked the STB to extend the negotiating period six-months so it could negotiate a trail-use agreement with the railroad. Ultimately the railroad didn't reach a trail-use agreement with either trail-group and, in April 2014, the railroad notified the STB that it consummated abandonment of the railroad line. Upon the railroad consummating abandonment, section 8(d) no longer forestalled the Caquelins' reversionary interest in their land.

The Caquelins sued for compensation, and the CFC awarded the Caquelins $900 for the nine-month taking of their property. The government "acknowledged that the easements granted the North Central Railroad were limited to railroad purposes and did not include recreational trail use." Opinion, p. 7. However, the government argued, because the Caquelins' land was not physically used for public recreation, the government didn't need to pay the Caquelins the $900 the CFC awarded. The government said the invocation of section 8(d) gave rise to, at most, a temporary regulatory taking for which the Caquelins are due nothing. The government admits the CFC rightly rejected the government's argument under this Court's controlling precedent in *Caldwell* and *Ladd I.* See Gov. Brief, pp. 1-2. But, the government says this Court "should overrule *Ladd I*'s holding that a Trails Act taking claim based on a NITU that lapses without a trail-use agreement must be treated as a physical takings claim." *Id.* at 31. And, the government says this Court "should overrule *Caldwell* and hold that a physical taking claim under the

Trails Act can accrue only when an interim trail-use agreement is reached." *Id.* at 32.

ARGUMENT

Overturning this Court's "bright-line rule" in *Caldwell* (affirmed in *Barclay*, *Illig*, and *Ladd I*) would unsettle land title and throw this Court's Trails Act jurisprudence into a thicket. The government asks this Court to hold invocation of section 8(d) gives rise to multiple different takings occurring at different times. Accepting the government's argument will cast Trails Act takings adrift without any clear rule establishing when an owner's Trails Act claim accrues and when the statute of limitations begins to run. The government offers no coherent answer to either question.

Does the owner's claim for compensation arise when the railroad agrees to sell the abandoned right-of-way to a trail-user? If so, what happens if (as in *Caldwell*) the railroad and trail-user amend the agreement, make the agreement contingent upon future events, or assign the agreement to a different trail-user? Does the owner's claim accrue when the railroad conveys title to the trail-user? Or does the owner's claim accrue when the trail-user physically constructs a trail across the owner's land? And, if claim accrual is tied to the trail-use-agreement, how is the owner to know his claim accrued? A trail-use agreement is not a public record.

In *Leo Sheep*, the Supreme Court held, "this Court has traditionally recognized the special need for certainty and predictability where land titles are

concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation." 440 U.S. at 687-88. The Court reaffirmed this principle in *Brandt*, 134 S.Ct. at 1268 ("We decline to endorse [the government's] stark change in position, especially given 'the special need for certainty and predictability where land titles are concerned.'") (quoting *Leo Sheep*, 440 U.S. at 687). The Court held, "[t]he Government loses that argument today, in large part because it won when it argued the opposite before this Court…." *Brandt*, 134 S.Ct. at 1264.[18]

So too here. In *Caldwell*, *Barclay*, and *Illig* the government argued section 8(d) gives rise to a single taking when the government first invokes this provision pre-empting an owner's state-law reversionary interest. The government won and the landowners lost. Because the statute of limitations had run the government didn't pay hundreds of owners whose property the government took in *Caldwell*, *Barclay*, and *Illig* and, by reason of this precedent, the government avoided paying thousands of other owners whose property the government took because, under this precedent, these owner's right to compensation is now time-barred.

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[18] In *Great Northern Railway Co.* v. *United States*, 315 U.S. 363 (1942) , the government argued rights-of-way granted railroads under the 1875 Act were only common-law easements and the railroad did not acquire title to the land and minerals under the rights-of-way. The government won. The government later decided it would benefit if the railroad acquired title to the fee estate allowing the railroad and the railroad's successor to use the land for any purpose.

Now the government wants to run with the fox and hunt with the hounds. The government wants this Court to overturn *Caldwell*, *Barclay*, *Illig*, and *Ladd* and adopt a new rule holding the opposite. But the government should be careful about what it asks for. If the new rule is that a Trails Act taking claim does not accrue until the owner learns of the trail-use agreement, there are thousands of miles of abandoned railroad rights-of-way where more than six years have passed since the STB first issued an order invoking section 8(d) but there is not yet a trail-use agreement or a public trail. Under this Court's current rule these owners' claims are time-barred, but under the government's new rule, many of these owners could now bring a claim for compensation.[19]

[19] Under the claim accrual rule and Due Process Clause the statute of limitations does not begin running "until the claimant 'knew or should have known' that the claim existed." *Ladd II*, 713 F.3d at 653.

CONCLUSION

This Court should not overturn *Caldwell*, *Barclay*, *Illig*, and *Ladd I.* These decisions are rightly-decided. But, even if one believed this Court wrongly-decided these cases, for more than a decade the government and landowners have lived under this settled jurisprudence. Overturning these decisions to announce a new and contrary rule will unsettle established land title.

In *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008), Justice Breyer said, "Justice Brandeis once observed that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.' To overturn a decision settling one such matter simply because we might believe that decision is no longer 'right' would inevitably reflect a willingness to reconsider others. And that willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability."[20]

This Court should deny the government's request that it sit *en banc* to overturn this Court's decisions in *Caldwell*, *Barclay*, *Illig*, and *Ladd I.* This Court should instead summarily affirm the CFC's decision correctly applying this Court's controlling precedent.

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[20] Quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932)
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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
Caquelin v. US, 2016-1663

CERTIFICATE OF SERVICE

I, Robyn Cocho, 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, counsel for Amici Curiae to print this document. I am an employee of Counsel Press.

On **December 28, 2016** counsel has authorized me to electronically file the foregoing **Brief for National Association of Reversionary Property Owners, National Cattlemen's Beef Association, and Public Lands Council as Amici Curiae in Support of Appellees Caquelins Urging Affirmance** with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users, including any of the following:

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December 28, 2016

/s/ Robyn Cocho
Counsel Press

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