

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 777

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**JOINT PETITION FOR RULEMAKING TO CONSIDER AMENDMENTS
TO REGULATIONS GOVERNING INTERIM USE OF RIGHTS-OF-WAY AS
TRAILS (49 C.F.R. PART 1152)**

**NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS’
REPLY AND COMMENT CONCERNING JOINT PETITION FOR
RULEMAKING TO AMENDMENT 49 C.F.R. PART 1152**

INTRODUCTION

The Department of Interior (DOI) and the Environmental Natural Resources Division of the Department of Justice (ENRD) purportedly filed a Joint Petition for Rulemaking proposing amendments to 49 CFR Part 1152 (the Joint Petition). We say “purportedly” because the Joint Petition was filed in the name of the Department of Interior and the Environmental Natural Resources Division of the Department of Justice but there is no representation that the Secretary of Interior or the Attorney General authorized the filing of this Joint Petition.

This Joint Petition was filed with the Surface Transportation Board (the Board) on Friday, December 20, 2024, immediately before the Christmas and Hanukkah holiday break. On January 13, the Board granted requests to extend the time for organizations, including the National Association of Reversionary Property Owners (NARPO), to file a reply to this Joint Petition. The individuals signing this document were career lawyers with the Biden-Harris Administration. The Secretary of Interior, Deb Haaland, Attorney General Merrick Garland, and Assistant Attorney General Todd Kim of the ENRD, have since resigned. All of the Biden-Harris Administration

political appointees have resigned. Many members of the senior staff and senior lawyers in the Department of Interior and Department of Justice, including many of those career lawyers responsible for this Joint Petition have since resigned or been reassigned.

The rulemaking these departing Biden-Harris bureaucrats asked this Board to adopt would frustrate or deny more than one hundred thousand American landowners' compensation for property the federal government has taken from them. The rulemaking these departed Biden-Harris bureaucrats asked this Board to adopt would cost taxpayers more than \$100 million. And the rulemaking these departing Biden-Harris bureaucrats ask this Board to adopt would affect every railroad line in our Nation and confuse and unsettle established procedures by which railroads can abandon unprofitable and unnecessary railway lines. This is why the Association of American Railroads has opposed the Joint Petition and proposed amendment.

The proposed amendment to 49 CFR Part 1152, is contrary to the text of Section 8(d) of the *National Trails System Act of 1968*, as amended in 1983. The proposed amendment is contrary to the purpose for which Congress adopted Section 8(d) of the Trails Act. The proposed amendment is contrary to more than thirty years of Trails Act jurisprudence and all controlling authority.¹ Finally, and most importantly, the proposed amendment is contrary to fundamental principles of constitutional law and principles of property law as declared by the Supreme Court.²

¹ *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990) (*Preseault I*), *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996 (*en banc*)) (*Preseault II*), *Toews v. United States*, 376 F.3d 1371 (Fed. Cir. 2004), *Citizens Against Rails-to-Trails v. Surface Transportation Bd.*, 267 F.3d 1144 (D.C. Cir. 2001), *National Wildlife Federation v. Interstate Commerce Comm'n.*, 850 F.2d 694 (D.C. Cir. 1988), *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) cert. denied, (557 U.S. 935 (2009)), *Caquelin v. United States*, 697 Fed. App'x 1016 (Fed. Cir. 2017) (*Caquelin I*), *Caquelin v. United States*, 959 F.3d 1360 (Fed. Cir. 2020) (*Caquelin II*), *Ladd v. United States*, 630 F.3d 1015 (Fed. Cir. 2010) reh'g and reh'g *en banc* denied, (646 F.3d 910 (Fed. Cir. 2011)) (*Ladd I*), and *Ladd v. United States*, 713 F.3d 648 (Fed. Cir. 2013) (*Ladd II*).

² *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942), *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979), *Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93 (2014), and *Arkansas Game & Fish Comm'n*

In short, everyone other than the Marxists advocating for the federal government taking owner's private property without paying the owner and the departing Biden-Harris bureaucrats oppose the Joint Petition. To put it bluntly, the Joint Petition and the proposed amendment is a really stupid idea. We explain why in the fifty pages that follow.

On their way out the door a cabal of career bureaucrats departing the Biden-Harris Administration devised this Joint Petition to get this Board to embrace an amendment to the Code of Federal Regulations that would enshrine a failed and rejected legal theory these zombie bureaucrats unsuccessfully tried to promote for almost thirty years. The Supreme Court, the Court of Federal Claims, the Federal Circuit, and all legal authorities have repeatedly rejected these bureaucrats' novel legal theory. Even if this Board adopted these Biden-Harris bureaucrats' legal theory, the proposed amendment would be a nullity because, after *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), and the Supreme Court's repeal of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), no court will defer to a rulemaking by this Board that purports to interpret Section 8(d) of the Trails Act in a manner contrary to the text of the law as written by Congress.

But the most important reason to reject the Joint Petition is that the proposed amendment seeks to supplant the United States Constitution and allow the federal government to take private property from American families, farmers, and small businesses without the government paying the landowner. Career bureaucrats in the federal government have been unsuccessfully trying to promote this twisted legal theory since Congress amended the Trails Act in 1983.

v. United States, 568 U.S. 23 (2012), among many other decisions some of which we reference in this reply and comment.

These departing bureaucrats suppose that taking an owner's land for a public recreational trail and a future railroad line is only a "temporary regulatory taking" for which the federal government needn't pay the owner. By redefining the railroad's abandonment of an abandoned right-of-way originally granted for operation of a railway line to be a "temporary regulatory discontinuance" these departing bureaucrats wrongly claim the government's taking of these owner's property must be analyzed under the *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1971) regulatory paradigm under which an owner is almost never compensated.

This legal theory these departing bureaucrats propose this Board adopt by agency fiat is entirely wrong. Every time a court has meaningfully considered these bureaucrats' theory, the courts have rightly rejected this theory.

During oral argument in *Preseault I*, the lawyers for the government argued that, because the railroad was granted a perpetual easement to operate a railway line across the owner's land, the owner was "not deprived of a property interest by [the Trails Act]. . . [it] takes nothing and changes nothing. [The Trails Act] leaves the landowners where they would be if the ICC had ordered the railroad to keep running."³ The courtroom broke into laughter when, in response to this argument, Chief Justice Rehnquist said, "That is like saying, if my aunt were a man she would be my uncle."⁴ Justice Scalia similarly responded:

The ICC didn't order the railroad to keep running. Saying the railroad could have continued using [the land] for rail purposes so you really haven't lost anything. In fact, they didn't, but they might have. Even though you have a deed that says if we stop using it for rail purposes it's yours, you say, well you haven't lost anything

³ Oral Argument, *Preseault II*, 494 U.S. 1 (No. 88-1076) (statements of John Dunleavy), *available at* http://www.oyez.org/cases/1980-1989/1989/1989_88_1076/argument.

⁴ *Id.* (statements of Chief Justice William Rehnquist).

because, yeah, they have stopped using it for rail purposes, but they might not have... that's not very appealing to me.⁵

Yet, the government lawyers hoping to take owners' private property without paying the owner continue to make variations of this same failed and discredited argument. The Joint Petition is these bureaucrats most recent attempt to implement a scheme whereby the federal government can take owners' private property without paying the owner.

In *Hughes v. Washington*, 389 U.S. 290 (1967), Justice Stewart emphasized the Supreme Court's holdings that a property owner must be justly compensated when the government (whether a court, the legislature, or an administrative agency) redefines established property interests.

[T]o the extent that [the Washington Supreme Court's decision] constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.⁶

Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155 (1980) is also instructive. In *Webb*, the Supreme Court's analysis focused more on the Florida Supreme Court's opinion than on the action of the Florida legislature. The Court held "[n]either the Florida [l]egislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal [private funds paid into court pending settlement of litigation] as 'public money' because it is held temporarily by the court."⁷ The Supreme Court held the rule

⁵ *Id.* (statements of Justice Antonin Scalia).

⁶ *Id.* at 296–97.

⁷ *Id.* at 164.

(affirmed in *Preseault II* in the context of the Trails Act) that “a State, by *ipse dixit*, may not transform private property into public property without compensation.”

Despite decades of losing this argument, the government lawyers continued to make this same foolish argument claiming this Board’s invocation of the Trails Act and imposition of a public rail-trail corridor across an owner’s land is nothing more than a “regulation” of property. Federal Circuit Judge Moore told the government lawyer arguing *Ladd* that the Supreme Court actually mocked the argument in *Preseault I* and that argument wouldn’t work in the Federal Circuit.

The bureaucrats that devised this failed strategy now want to relitigate this failed legal theory in an administrative rulemaking proceeding with this Board. One need only listen to the argument before the Federal Circuit in *Ladd v. United States*, 630 F.3d 1015 (Fed. Cir. 2010) reh’g and reh’g *en banc* denied, (646 F.3d 910 (Fed. Cir. 2011)) (*Ladd I*), and *Ladd v. United States*, 713 F.3d 648 (Fed. Cir. 2013) (*Ladd II*) to appreciate the stupidity of this argument.⁸ When listening to the government lawyer’s argument in *Ladd I* and *Ladd II* one is also struck by the tone and attitude of the lawyers arguing for the Justice Department and the remarkable contempt they showed the Court and the landowners whose property the federal government had taken. The Federal Circuit was extremely critical of the Justice Department’s theory.

The most troubling aspect of the departing bureaucrat’s proposed amendment and the legal theory upon which it is premised is the outcome this effort seeks to achieve. Those filing this Joint

⁸ *Ladd I*, Case No. 10-5010, was argued September 7, 2010, and *Ladd II*, Case No. 1258, was argued January 7, 2013. Recordings of the arguments are available on the Federal Circuit’s website, <https://www.cafc.uscourts.gov/home/oral-argument/listen-to-oral-arguments/>. The Justice Department lawyers in *Ladd I* were Jim Gette (the Section Chief for ENRD’s Natural Resources Section who was recently reassigned) and Ignacia Moreno. The Rails-to-Trails Conservancy filed an amicus brief supporting the federal government. *Ladd II* was argued by Michael Bray and Bill Shapiro and Ignacia Moreno, were on the briefs

Petition want to take private property from landowners without paying for what the government has taken. This is a wicked effort to make an end run around one of the foundational principles upon which our nation was founded and our Constitution was adopted – the protection of private property.

This Board should summarily deny the Joint Petition. At the very least, this Board should stay consideration of the Joint Petition until the incoming Attorney General, Pam Bondi, and Secretary of Interior, Doug Burgum, and President Trump’s other nominees and appointees to the Department of Interior and Department of Justice have opportunity to review the Joint Petition and provide this Board with the position of the Department of Justice and Department of Interior.

THE NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS

The National Association of Reversionary Property Owners is a Washington State non-profit 501(c)(3) educational foundation, whose primary purpose is to assist property owners in the education and defense of their property rights, particularly their ownership of property subject to railroad right-of-way easements.⁹ Since its founding in 1989, the Association has assisted over ten thousand property owners and has been extensively involved in litigation concerning landowners’ interest in the land subject to active and abandoned railroad rights-of-way easements. See *Nat’l Ass’n of Reversionary Property Owners v. Surface Transportation Board*, 158 F.3d 135

⁹ We use the term “reversionary” as shorthand reference to a landowner’s fee estate in land encumbered by an easement granting (in this case) a railroad a right-of-way to operate a railway line across a strip of the owner’s land. “We note in passing that as a matter of traditional property law terminology, a termination of the [railroad] easements would not cause anything to ‘revert’ to the landowner. Rather, the burden of the easement would simply be extinguished, and the landowner’s property would be held free and clear of any such burden.” *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004). See also *Preseault v. United States*, 100 F.3d 1525, 1533-34 (Fed. Cir. 1996) (*en banc*) (*Preseault II*) (“Instead of calling the property owner’s retained interest a fee simple burdened by an easement, this alternative labels property owner’s retained interest following the creation of an easement as a ‘reversion’ in fee. Upon the termination, however achieved, of the easement, the ‘reversion’ is said to become fully possessory; it is sometimes loosely said that the estate ‘reverts’ to the owner.”).

(D.C. Cir. 1998) and 517 U.S. 1106 (1996), *Nat'l Ass'n. of Property Owners v. I.C.C.*, 70 F.3d 638 (1995), *Nat'l Ass'n. of Reversionary Property Owners v. Surface Transportation Board*, 158 F.3d 135 (DC Cir. 1998), *Land Conservancy of Seattle v. Surface Transportation Board*, 238 F.3d 429 (9th Cir. 2000), and amicus curiae briefs in, *Preseault I*, *Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93 (2014), *Glosemeyer v. Missouri-Kansas-Texas RR*, 493 U.S. 1016 (1990), and *Behrens v. United States*, 59 F.4th 1339 (Fed. Cir. 2023) (reversing the Court of Federal Claims).

**THE JOINT PETITION IS NOT A PROCEEDING
UPON WHICH THIS BOARD MAY ACT.**

Before addressing the substance of the Joint Petition, we begin with a very troubling question. Who submitted this Joint Petition asking this Board to engage in a rulemaking? And did those government lawyers signing this Joint Petition have the authority to file this Joint Petition on behalf of the United States Department of Interior and the Attorney General?

The Department of Interior (DOI) and the Environmental Natural Resources Division of the Department of Justice (ENRD) purportedly filed a Joint Petition for Rulemaking proposing this Board amend 49 CFR Part 1152. This Joint Petition was filed with this Board on Friday, December 20, 2024, immediately before the Christmas and Hanukkah holiday break. Interested parties including the Rails to Trails Conservancy (RTC), the Lassen Land and Trail Trust (LLTT), and the National Association of Reversionary Property Owners (NARPO) entered and requested an extension of time in which to file a reply to the Joint Petition. On January 13, the Board granted these organizations, including the National Association of Reversionary Property Owners (NARPO), an extension of time to file a reply to this Joint Petition.

On January 13 this Board held, “[t]he requests from RTC, LLTT, and NARPO are reasonable and will be granted. To ensure that all interested persons have an equivalent opportunity to respond to the joint petition, the reply deadline will be extended to January 29, 2025, for all interested persons.” NARPO requested this Board stay consideration of the Joint Petition until President Trump’s incoming Attorney General Bondi and Secretary of Interior Burgum could review this matter and decide whether the Joint Petition reflected the views of President Trump’s Administration. On Friday, January 31, this Board denied NARPO’s request for a stay and allowed NARPO the weekend to file any reply or comment to the Joint Petition. What follows is NARPO’s reply and comment.

Title 49 to the Code of Federal Regulations, Section 1104.4 provides: “(a) If a party is represented by a practitioner or an attorney ... [t]he signature of a practitioner or attorney constitutes a certification that the representative: (1) Has read the pleading, document or paper; (2) *Is authorized to file it*; (3) Believes that there is good ground for the document.” (emphasis added.)

The Joint Petition states it is filed on behalf of the “U.S. Department of the Interior and the U.S. Department of Justice’s Environmental and Natural Resources Division”. The Joint Petition is filed under 49 C.F.R. §1110.2(b) requesting the Board to open a rulemaking proceeding. The signatories to the document are Dondrae N. Maiden “Associate Solicitor in the Division of Parks and Wildlife” of the Office of the Solicitor of the U.S. Department of the Interior and Aaron G. Moody, and Associate Solicitor in the Division of Land Resources in the Office of Solicitor of the U.S. Department of Interior. Todd Kim signed by facsimile as Assistant Attorney General and Peter McVeigh signed electronically as “counsel for the Environmental and Natural Resources Division. Judy Harvey is also listed in the signature block.

On November 5, 2024, American voters elected Donald J. Trump to a second non-consecutive term as the United States' Forty-Seventh President. President Trump won the 2024 presidential election with a massive landslide in both the Electoral College and the popular vote and on January 20th Donald J. Trump was inaugurated as our Nation's Forty-Seventh President. Former Attorney General, Merrick Garland, and former Secretary of Interior, Deb Haaland, who served during the Biden-Harris administration resigned as Attorney General and Secretary of Interior and Todd Kim resigned as Assistant Attorney General of ENRD. President Trump nominated Pam Bondi to be the nation's new Attorney General and North Dakota Governor Doug Burgum is now Secretary of Interior. In the three weeks since taking office, President Trump has issued more than three hundred orders including Executive Orders rescinding the Biden Harris Administration policies.

In light of this dramatic change in political leadership and President Trump's repudiation of the Biden-Harris Administration's policies, NARPO asked this Board to stay consideration of the Joint Petition until the Attorney General and Secretary of Interior had opportunity to provide their views on the proposed rulemaking and proposed amendment. This Board denied this request to stay consideration of the Joint Petition? But why? What is the rush? Why is it necessary to proceed with the consideration of the Joint Petition request for a rulemaking and amendment to a federal regulation that could potentially affect hundreds of thousands of American landowners and every existing railway line in the nation without first hearing the views of the Attorney General and Secretary of Interior? This Board should deny the "Joint Petition" the departing Biden-Harris bureaucrats filed on the eve of the Christmas Holiday or, at least, stay any consideration of this matter until the current Attorney General and Secretary of Interior can provide their views on the proposed rulemaking.

BACKGROUND

I. Section 8(d) of the Trails Act Amendments of 1983.

The operative language of Section 8(d) of the Trails Act provides, “if such interim use [of an abandoned railway line] is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.”

The Trails Act is not, in reality, about preserving railroad corridors. This ostensible purpose is a fiction. The Trails Act is, in practice, about converting abandoned railroad right-of-way easements to a new and different use as a public recreational trail. And, as the Federal Circuit and other courts have held, public recreational trails and so-called “railbanking” are quite different from operating a railroad.¹⁰ So-called “railbanking” is, by definition, *not* using an otherwise abandoned railway line for the operation of a railroad.

In *National Wildlife Federation v. Interstate Commerce Comm’n*, 850 F.2d 694 (DC Cir. 1988), the D.C. Circuit described the history and purpose of the 1983 Amendments to the Trails

¹⁰ In *Toews*, the Federal Circuit noted:

And 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. The different uses create different burdens. In the one case there was an occasional train passing through (no depots or turntables or other appurtenances are involved on these rights of way). In the other, individuals or groups use the property, some passing along the trail, others pausing to engage in activities for short or long periods of time. In the one case, the landowner could make such uses of the property as were not inconsistent with the railroad’s use, crossing over the tracks, putting a fruit stand on one edge of the property, or whatever. In the other, the government fenced the trail in such a way as to deny access.

Some might think it better to have people strolling on one’s property than to have a freight train rumbling through. But that is not the point. The landowner’s grant authorized one set of uses, not the other. Under the law, it is the landowner’s intention as expressed in the grant that defines the burden to which the land will be subject.

376 F.3d at 1376–77.

Act:¹¹ “As originally enacted, the Trails Act made no specific provision for the conversion of abandoned railroad rights-of-way to trails. Congress’s first effort to encourage this type of adaptive re-use appeared in section 809 of the Railroad Revitalization and Regulatory Reform [(4-R)] Act of 1976.”¹² Section 809 of the 4-R Act authorized the Interstate Commerce Commission (ICC) to delay disposition of abandoned railroad corridors for up to 180 days after an effective abandonment order “unless the property at issue had been first offered on reasonable terms for sale for public purposes.”¹³ This section is referred to as a “Public Use Condition.”¹⁴

The Public Use Condition did not, however, achieve Congress’s desired result. As the D.C. Circuit noted, “Section [10905] has no railbanking provision that would preempt state laws that could otherwise result in reversion of rights- of-way to abutting landowners upon a cessation of rail service.”¹⁵

The lack of a railbanking provision preempting state property law created a problem in that the railroad would lose its rights-of-way under state law when the railroad abandoned the line. As Chief Justice Roberts later explained in *Brandt Trust*, the right-of-way granted the railroad terminated when the railroad stopped using the strip of land for operation of a railroad. For this reason, “Congress renewed its effort to promote the conversion of railroad rights-of-way to trail

¹¹ See *NATIONAL TRAILS SYSTEM ACT AMENDMENTS OF 1983*, Pub. L. No. 98-11, 97 Stat. 42 (codified as amended at 16 U.S.C. §§ 1241 to 1247, 1249 (2009)).

¹² *Id.* at 697; see also Railroad Revitalization and Regulatory Reform act of 1976, Pub. L. No. 94-210, tit. VIII, 90 Stat. 144 (current version at 49 U.S.C. § 10905 (2009)).

¹³ *Nat’l Wildlife Fed’n*, 850 F.2d at 697.

¹⁴ Section 809 was originally codified as 49 U.S.C. section 10906, but was subsequently renumbered, and is now at 49 U.S.C. section 10905. See *I.C.C. TERMINATION ACT OF 1995*, P.L. No. 104-88, 109 Stat. 803.

¹⁵ *Nat’l Wildlife Fed’n*, 850 F.2d at 701. For an explanation of the term “railbanking,” see *infra* note 119 and accompanying text.

use when it enacted the current [section] 8(d) as part of the 1983 Trails Act Amendments.”¹⁶

Section 8(d) was.... added to:

reflect[] the concern that previous congressional efforts have 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... [This provision] should eliminate many of the problems with this program. The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use.¹⁷

The Eighth Circuit noted:

One of the major impediments to preserving these rights-of-way existed in state property laws which prescribed that once rail service is discontinued after the ICC’s approval of abandonment, such easements would automatically expire and the rights-of-way would revert to adjacent property owners. In response to this problem, Congress enacted the Trails Act Amendments of 1983.¹⁸

The D.C. Circuit explained, “By deeming interim trail use to be like discontinuance rather than abandonment, Congress sought to prevent property interests from reverting to the landowners under state law.”¹⁹

The Trails Act is codified at Title 16.²⁰ This section of the United States Code concerns “conservation.” The provisions before and after the Trails Act concern estuaries and rivers.²¹ By

¹⁶ *Id.*

¹⁷ H.R. Rep. No. 98-28, at 8-9 (1983), as preprinted in 1983 U.S.C.C.A.N. 112, 119-20. Congress adopted the Trails Act and the 4-R Act to address the loss of railroad rights of way. Congress was not alone in noting the decline of railroads in the 1970s. See Steve Goodman, *THE CITY OF NEW ORLEANS* (1970) (“And the steel rails still ain’t heard the news. The conductor sings his song again. The passengers will please refrain. This train’s got the disappearing railroad blues.” (Sung most famously by Arlo Guthrie on the album *HOBOS’ LULLABY* (Rising Son 1972))).

¹⁸ *Town of Grantwood Vill. V. Mo. Pac. R.R. Co.*, 95 F.3d 654,658 (8th Cir. 1996) (citation omitted).

¹⁹ *Citizens against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1149 (D.C. Cir. 2001) (citing *Preseault v. Interstate Commerce Comm’n*, 494 U.S. 1, 8 (1990)); See also *National Wildlife Fed’n*, 850 F.2d at 702.

²⁰ 16 U.S.C § 1247 (2006) (codifying the *NATIONAL TRAILS SYSTEM ACT AMENDMENTS OF 1983*, Pub. L. No. 97-11, 97 Stat. 42).

²¹ See *Id.* §§ 1221, 1271.

contrast, regulation of railroads and the Board's authority and procedures are codified under Title 49, which concerns "transportation."²²

The Trails Act does not even come into play until the railroad and this Board first agree the existing railroad right-of-way has no current or foreseeable future use for a rail line.²³ After a railroad requests authority to abandon a rail line and this Board has determined that no current or foreseeable future use of the land for a rail line exists, a private or public group may request authority to negotiate with the railroad to acquire the easement pursuant to the Trails Act.²⁴ If such a trail group requests the opportunity to negotiate a Trail Use Agreement with the railroad and if the railroad agrees to these negotiations, this Board will issue a Notice of Interim Trail Use or Abandonment (NITU).²⁵ This Board has disclaimed any discretion over whether or not to issue a NITU.²⁶ If the railroad agrees to negotiate with a trail sponsor, this Board has held that this Board must invoke Section 8(a) of the Trails Act.

Thus, while the Trails Act preserves the *hypothetical* possibility that the Board at some future time may grant some, as-yet unidentified, railroad authority to build a new rail line across the land,

²² See 49 U.S.C. §§ 10101, 10502 (2006).

²³ Before the Trails Act can be invoked, section 10905 of the 4-R Act requires that the STB find there is no public interest in the current or future use of the rail line for transportation.

²⁴ See 49 C.F.R. 1152, 29.

²⁵ See *Id.* The typical Trails Act arises in the course of an exempt abandonment under 49 U.S.C. Section 10502. A parallel provision for non-exempt abandonments is found under 49 U.S.C. section 10903. The order of the STB authorizing Trails Use in a non-exempt abandonment is called a Certificate of Interim Trail Use or Abandonment (CITU). See 49 C.F.R. § 1011.7(a). We refer throughout to a NITU; however, the terms CITU and NITU can be used interchangeably.

²⁶ See *Jost v. Surface Transp. Bd.*, 194 F.3d 79 (D.C. Cir. 1999) (stating that the STB "'shall' impose a trail condition, and not permit abandonment of a line, whenever a railroad is prepared to convey the right-of-way" to a trail sponsor, and that the statute gives the STB "little, if any, discretion to forestall a voluntary agreement to effect a conversion to trail use."); see also *Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1152 (D.C. Cir. 2001) (STB's issuance of NITU is ministerial and is not subject to National Environmental Policy Act (NEPA)); *Goos v. Interstate Commerce Comm'n*, 911 F.2d 1283, 1295–96 (8th Cir. 1990) (STB's issuance of NITU is ministerial and is not subject to NEPA.).

the reality is that this rarely happens. In the vast majority of cases, the land has been converted permanently to public recreational use and never has or will be used for a future railroad.

According to testimony submitted to this Board by the Rails-to-Trails Conservancy, out of 5,079 miles of track subject to a NITU, only 2,764 have been converted to trail use.²⁷ Of these 2,764 miles of trails, a rail line has been rebuilt on the land only nine times.²⁸ And, often only a small segment of the former rail line has been reactivated.²⁹ Many of the abandoned rail lines converted to public recreational use are spur lines or dead-end lines³⁰ that do not run anywhere any railroad will ever be needed again.³¹ Most of these abandoned rail lines are not of significant value as a rail corridor. That is why the railroad wants to abandon these railway lines.

Notably, this Board's order (a NITU or CITU) invoking the Trails Act *does not* guarantee there will be a public recreational trail built on the abandoned railroad right-of-way or that a Trail Use Agreement will be reached within the six-month initial negotiating period. The Board's invocation of Section 8(d) authorizes the railroad and trail group to negotiate for a possible Trail

²⁷ See *Twenty-Five Years of Railbanking*, *supra* note 10, (written statement of Marianne Wesley Fowler, Senior V.P. of Fed. Relations, Rails-to-Trails Conservancy).

²⁸ See *Id.*

²⁹ See *e.g.*, *Glosemeyer v. United States*, 45 Fed. Cl. 771, 774 (2000) (reactivation of 1,100 feet of 6.2 miles of abandoned line).

³⁰ See *Burlington N. & Santa Fe Ry. Co.*, No. AB-6 (Sub-No. 406X) (Surface Transp. Bd. Apr. 5, 2004) (notice of interim trail use or abandonment in Reno County, Kan.); see also *Butler County, Kan.*, No. AB-870X (Surface Transp. Bd. July 2, 2004) (notice of interim trail use or abandonment).

³¹ See *Seminole Gulf Ry., L.P.*, No. AB-870X (Surface Transp. Bd. Apr. 1, 2004) (notice of interim trail use or abandonment in Sarasota County, Fla.).

Use Agreement. The initial negotiating period is for six months, but this period often is extended repeatedly. In some cases the negotiating period has been extended for more than eleven years.³²

Solicitor General Kagen explained,

The 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. The fact that any taking resulting from the interference may later prove to have been temporary is irrelevant; as the court of appeals has explained, "[i]t is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues.

Illig v. United States, 552 U.S. 935 (2009)
United States brief in opposition to Certiorari
2009 WL 1526939 * 19-20³³

Congressional staff slipped Section 8(d) into the final bill on the false supposition that the phrase "such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment" would allow the federal government to create public rail-trail corridors across owner's land without the federal government having to pay the landowners whose property was taken for these public rail-trail corridors. There is no record of any congressional hearings or testimony about the implications of including Section 8(d) in the amendments to the Trails Act. The writers of this provision wrongly believed the federal government could by *ipse dixit* transform established state law property interests to a new and different public use without the federal government having to honor the constitutional requirement to pay the owner of the property "just compensation". See U.S. Const. Amend V. The drafters of Section 8(d) wrongly believed

³² See, e.g., *Wisconsin Cent. Ltd.*, No. AB-303 (Sub-No. 18X) (Surface Transp. Bd. July 28, 2009) (final extension of negotiation for abandonment exemption in Polk County, Wis.; NITU issued Mar. 1998 ultimately extended until Jan. 2010).

³³ Citing and quoting, *Caldwell*, 391 F.3d at 1234, 1235. And *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1355-1356 (Fed. Cir. 2006), *aff'd*, 128 S. Ct. 750 (2008)

that the federal government's authority to regulate the operation of railroads under the Transportation Act of 1920 meant the federal government could also define, and redefine, the nature and extent of private property used by railroads for railway lines.

II. This Board's invocation of Section 8(a) of the Trails Act is a *per se* taking of an owner's private property for which the federal government must promptly pay the owner "just compensation".

Shortly after Congress adopted Section 8(d) of the Trails Act, landowners across the nation challenged the constitutionality of Section 8(d) as taking their property in violation of the Fifth Amendment. See, *Glosemeyer v. Missouri-Kansas-Texas Railroad*, 879 F.2d 316 (8th Cir. 1989), *National Wildlife Fed. V. I.C.C.*, 850 F.2d 692 (D.C. Cir. 1988). The constitutionality of the Trails Act came before the Supreme Court in *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990). The Supreme Court unanimously held the Board's predecessor agency, the Interstate Commerce Commission (ICC)'s invocation of Section 8(d) of the Trails Act gives rise to an unconstitutional taking of private property in violation of the Fifth Amendment.

[The] language [of § 1247(d)] gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way out-right but rather hold them under easements or similar property interests. While the terms of these easements and applicable state law vary, frequently the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations. State law generally governs the disposition of reversionary interests By deeming interim trail use to be like discontinuance rather than abandonment, Congress prevented property interests from reverting under state law[.]

494 U.S. at 8

Justices O'Connor, Scalia and Kennedy concurred to emphasis, "state law creates and defines the scope of the reversionary or other real property interests affected by the ICC's actions pursuant to ... § 1247(d). In determining whether a taking has occurred, 'we are mindful of the basic axiom that '[p]roperty interests ... are not created by the Constitution. Rather, they are

created, and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.” *Id* at 21. (Citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001, (1984), quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980).

The Supreme Court went on to hold Section 8(d) was constitutional only because landowners whose property was taken for public rail-trail corridors could sue for “just compensation” under the Tucker Act. [cite.] The Vermont landowners that had challenged the constitutionality of Section 8(d) were remanded to the Court of Federal Claims to pursue their claim for compensation.

When the federal government takes private property without paying the owner, the government has violated the Fifth Amendment.³⁴ The Tucker Act, 28 U.S.C. § 1491(a), requires owners whose property the government takes without paying the owner to sue the United States.³⁵ The federal government must pay the owner the full measure of “just compensation” for the value of the property the government has taken.³⁶ The United States must also pay interest for the government’s delay in paying the owner. Interest is calculated at the Moody’s Aaa rate

³⁴ The Fifth Amendment provides, “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.” U.S. Const. Amend. V. The government has a *categorical* duty to pay these owners just compensation. *Horne v. Department of Agriculture*, 576 U.S. 350, 358 (2015) (when the government “depriv[es] the owner of the right to possess, use and dispose of the property,” and denies the owner’s right to exclude others from his or her property, the government has a “categorical” duty to compensate the owner).

³⁵ The Tucker Act, 28 U.S.C. § 1491(a), grants the Court of Federal Claims exclusive jurisdiction to hear cases against the United States for private property taken in violation of the Fifth Amendment. “The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded upon the Constitution.”

³⁶ In *Seaboard Air Line Ry. v. United States*, the Supreme Court, citing *Monongahela*, held a landowner is “entitled [to] the full and perfect equivalent of the property taken,” and the owner must be put “in as good position pecuniarily as he would have been if his property had not been taken.” 261 U.S. 299, 304 (1923). The Fifth Amendment requires that “when [an owner] surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.” *Monongahela*, 148 U.S. at 325.

compounded quarterly.³⁷ The government must also reimburse the owner's attorney fees and litigation costs including appraisal expenses the owner incurs bringing a lawsuit for compensation in the Court of Federal Claims.³⁸

The Fifth Amendment is a self-executing right our Constitution guarantees property owners. When this Board issues an order invoking Section 8(d) of the Trails Act it is a *per se* physical taking of an owner's private property. See, *Preseault I*, *Preseault II*, *Toews*, and *Behrens v. United States*, 59 F.4th 1339 (Fed. Cir. 2023). Because the Board does not pay an owner when the Board issues the order, the federal government has violated an owner's constitutional and civil rights the moment this Board issues an order invoking Section 8(d) of the Trails Act. This violation of these owners' civil rights is ongoing until such time as the government honors the federal government's constitutional obligation to pay these owners "just compensation" for that property the government took. The government's payment of "just compensation" must be prompt. An almost decade-long delay in paying these owners just compensation is *not prompt*. The government's delay in paying these owners is a further violation of these owners' civil rights.

³⁷ *United States v. Thayer-W. Point Hotel Co.*, 329 U.S. 585, 588, (1947), "[W]here the United States takes property under its power of eminent domain ... it has consistently been held that the Fifth Amendment's reference to 'just compensation' entitles the property owner to receive interest from the date of the taking to the date of payment as a part of his just compensation." *Collective Edge, LLC v. United States*, 171 Fed. Cl. 736, 775 (2024), and *Hardy v. United States*, 138 Fed. Cl. 344, 356 (2018) "the court concludes that the Moody's rate is the appropriate measure of delay damages in the instant case. It will not depart from the consensus that has emerged since 2009 in the Court of Federal Claims that the Moody's rate is the appropriate benchmark by which to award delay damages in the Rails-to-Trails context. ... the court concludes that interest shall be compounded quarterly in accordance with the Prudent Investor Rule." See also, *Hearne et. al., THE FIFTH AMENDMENT REQUIRES THE GOVERNMENT TO PAY AND OWNER INTEREST EQUAL TO WHAT THE OWNER COULD HAVE EARNED HAD THE GOVERNMENT PAID THE OWNER THE FAIR MARKET VALUE OF THEIR PROPERTY ON THE DATE THE GOVERNMENT TOOK THE OWNER'S PROPERTY*, Brigham-Kammer Property Rights Conference Journal, September 2012, Vol. 1.

³⁸ The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4654(c) (URA), which provides, "[t]he court rendering a judgment for the plaintiff...awarding compensation for the taking of property by a Federal agency, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees...."

The government has a categorical duty to pay these owners of land subject to this Board's orders invoking Section 8(d) of the Trails Act just compensation. See, e.g., *Tyler v. Hennepin County*, 598 U.S. 631, 637 (2023) ("The Takings Clause, applicable to the States through the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation."); *Horne v. Department of Agriculture*, 576 U.S. 350, 358 (2015) (when the government "depriv[es] the owner of the right to possess, use and dispose of the property," and denies the owner's right to exclude others from his or her property, the government has a "categorical" duty to compensate the owner).

Every day that passes after this Board issues an order invoking the Trails Act without the owners being paid is a further violation of these citizens' civil rights. See *Knick v. Township of Scott*, 588 U.S. 180 (2019) ("a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it"); *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). I amplify both these two points below.

In *Folsom v. City of New Orleans*, 109 U.S. 285 (1883), the Fifth Circuit relegated private landowners to a "Folsom Prison" in which the government sought to perpetually delay its obligation to pay plaintiffs. In *Folsom*, Justice Harlan wrote, "[t]o withhold from the citizen who has a judgment for money the judicial means of enforcing its collection...is to destroy the value of the judgment as property." *Folsom*, 109 U.S. at 294, 297 (Harlan, J., dissenting). Justice Harlan explained that "[s]ince the value of the judgment, as property, depends necessarily upon the remedies given for its enforcement, the withdrawal of all remedies for its enforcement, and compelling the owner to rely exclusively upon the generosity of the judgment debtor, is, I submit, to deprive the owner of his property. *Id.* at 295.

Justice Harlan continued, “it is said that the plaintiffs are not deprived of their judgments, so long as they continue to be existing liabilities against the city. My answer is, that such liability upon the part of the city is of no consequence, unless, when payment is refused, it can be enforced by legal proceedings.” *Id.* (citing *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 177 (1871)).

Justice Brennan followed Justice Harlan’s example. Dissenting in *San Diego Gas & Electric v. San Diego*, 450 U.S. 621, 654 (1981), Justice Brennan explained the Fifth Amendment guarantee of just compensation is self-executing. In other words, the owner whose land is encumbered with a public rail-trail corridor due to this Board issuing an order invoking the Trails Act need not wait for Congress or this Board to adopt legislation or an administrative regulation directing the owner to be paid. The owner whose property is subject to a NITU or CITU may immediately go to court seeking compensation and judgment may be entered against the United States requiring the federal government to pay the owner. An owner is not dependent upon the whim or good grace of Congress or this Board to be paid.

As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has already suffered a constitutional violation, and the self-executing character of the constitutional provision with respect to compensation is triggered. The Supreme Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a “taking” compensation must be awarded.

Although Justice Brennan’s view in *San Diego Gas* was stated in dissent, the Supreme Court later recognized its wisdom, and expressly adopted Justice Brennan’s analysis as the Court’s holding in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987). As the Supreme Court explained in *Knick*,

In holding that a property owner acquires an irrevocable right to just compensation immediately upon a taking, *First English* adopted a position Justice Brennan had taken in an earlier dissent. In that opinion, Justice Brennan explained that “once there is a ‘taking,’ compensation must be awarded” because “[a]s soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has already suffered a constitutional violation.”

588 U.S. at 192-193 (emphasis in original).

The Fifth Amendment’s self-executing guarantee of “just compensation” is a principle recognized before the founding of the Republic. The Fifth Amendment’s self-executing guarantee of “just compensation,” is rooted in Magna Carta and mandates that the determination of the compensation due an owner is an “inherently judicial” responsibility that cannot be assumed or barred by the legislature or the executive branch.

Blackstone instructed, “The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisition, without any control or diminution, save only by the laws of the land.” Kent similarly observed the constitutional protection of property is a “principle in American constitutional jurisprudence, [that] is founded in natural equity and is laid down by jurists as an acknowledged principle of universal law.” “As Chancellor Kent explained when granting a property owner equitable relief, the Takings Clause and its analogs in state constitutions required that ‘a fair compensation must, in all cases, be previously made to the individuals affected.’” *Knick*, 588 U.S. at 200.

Thus, the Supreme Court continued, at the founding,

[i]f a government took property without payment, a court would set aside the taking because it violated the Constitution and order the property restored to its owner. The Framers meant to prohibit the Federal Government from taking property without paying for it. Allowing the government to keep the property pending

subsequent compensation to the owner, in proceedings that hardly existed in 1787, was not what they envisioned.

Id.

A landowner's right to be secure in his or her property is one of the primary objects for which the national government was formed. In *United States v. Jones*, 565 U.S. 400, 405 (2012), the Supreme Court recalled Lord Camden's famous holding in *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765), a "case we have described as a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted...." Quoting Lord Camden, the Supreme Court wrote, "[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave...if he will tread upon his neighbor's ground, he must justify it by law. *Jones*, 565 U.S. at 405. Evoking John Locke, Lord Camden further declared, "The great end, for which men entered into society, was to secure their property."

The Framers drafted our Constitution embracing this Lockean view that "preservation of property [is] the end of government, and that for which men enter into society...." John Locke, *Second Treatise on Civil Government*, Ch. XI §138. Madison declared, "Government is instituted to protect property of every sort.... This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own." In *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972), the Supreme Court rightly observed, "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights.... That rights in property are basic civil rights has long been recognized."

The Supreme Court has long held the Fifth Amendment guarantee of compensation does not depend on the good graces of Congress, explaining landowners are "entitled to bring an action

in inverse condemnation as a result of the ‘self-executing character of the constitutional provision with respect to compensation’....” *First English*, 482 U.S. at 315. The Supreme Court has “frequently repeated...that, in the event of a taking, the compensation remedy is required by the Constitution.” *Id.* at 316. More recently Chief Justice Roberts declared, “a property owner has a Fifth Amendment entitlement to compensation *as soon as* the government takes his property without paying for it.” *Knick*, 588 U.S. at 189, (emphasis added).

In *Monongahela*, the federal government took a privately-owned lock and dam. The parties disputed the value of that property the government took. The government argued that Congress determined the amount of compensation the owner was entitled to be paid when Congress passed the legislation authorizing the taking and appropriated a specific sum for compensation. The Supreme Court rejected the government’s argument and held the determination of “just compensation” is an exclusively judicial inquiry. The Supreme Court further held that private property may not be taken “unless a full and exact equivalent for it be returned to the owner.” 148 U.S. at 326. Only after the owner has been compensated for the “true value” of his property can “it be said that just compensation for the property has been made.” *Id.* at 337. In *Monongahela*, the Supreme Court further explained,

The right of the legislature of a state by law to apply the property of the citizen to a public use, and then to constitute itself the judge of its own case, to determine what is the “just compensation” it ought to pay therefore...cannot for a moment be admitted or tolerated under our constitution.

148 U.S. at 327-28 (emphasis added).

In *Seaboard Air Line Ry. v. United States*, the Supreme Court, citing *Monongahela*, held a landowner is “entitled [to] the full and perfect equivalent of the property taken,” and the owner must be put “in as good position pecuniarily as he would have been if his property had not been

taken.” 261 U.S. 299, 304 (1923). The determination of “just compensation” is exclusively a function of the judicial branch. *Monongahela*, 148 U.S. at 327.

In *Cedar Point Nursery*, the Supreme Court, quoting John Adams, reaffirmed the foundational tenet that “[p]roperty must be secured, or liberty cannot exist.” 141 S.Ct. at 2071. The Court “noted that protection of private property rights is ‘necessary to preserve freedom’ and ‘empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.’” *Id.* Put simply, “[t]he government must pay for what it takes.” *Id.* And the government’s payment of an owner must be prompt.

This Board’s taking of landowners’ private property when the Board invokes Section 8(d) of the Trails Act and the Justice Department’s efforts to delay the government’s obligation to pay landowners evokes the long-established legal principle, *ubi jus, ibi remedium*, elucidated by Blackstone, applied by John Marshall in *Marbury v. Madison*, and repeated by John Marshall Harlan in *Folsom*. By delaying landowners’ right to compensation guaranteed by the Fifth Amendment, the Justice Department has essentially nullified these landowners’ fundamental constitutional right to “just compensation.” As the Supreme Court explained, “[t]he word ‘just’ in the Fifth Amendment evokes ideas of ‘fairness’ and ‘equity.’” *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950). Just compensation indefinitely delayed is just compensation denied.

In *First English* and *Armstrong v. United States*, 364 U.S. 40 (1960), the Supreme Court reaffirmed its “frequently repeated” view that “in the event of a taking, the compensation remedy is required by the Constitution.” 482 U.S. at 316 (emphasis added). Chief Justice Marshall explained in *Marbury*:

The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

5 U.S. at 176-77.

The right to just compensation under the Fifth Amendment demands a remedy. As Chief Justice Marshall further declared in *Marbury*,

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. ... [W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

5 U.S. at 163, 166.

The Supreme Court later applied Chief Justice Marshall's declaration specifically in the context of the Fifth Amendment, stating, "In any society the fullness and sufficiency of the securities which surround the individual in use and enjoyment of his property constitute one of the most certain tests of the character and value of government." *Monongahela*, 148 U.S. at 324.

While the government's power of eminent domain allows it to take private property without paying the owner "up front," the payment must be certain and prompt. When he spoke of the legislation establishing the Court of Federal Claims, President Lincoln told Congress, "It is as much the duty of government to render prompt justice against itself, in favor of its citizens, as it is to administer the same, between private individuals." *Abraham Lincoln, First Annual Message to Congress*, December 3, 1861, Cong. Globe, 37th Cong., 2d Sess., app. 2 (1862). This declaration

is, literally, lapidary as President Lincoln's words are now displayed at the doors of the Court of Federal Claims.

In *Bragg v. Weaver*, the Supreme Court stated, “where adequate provision is made for the certain payment of the compensation without unreasonable delay the taking does not contravene due process of law in the sense of the Fourteenth Amendment merely because it precedes the ascertainment of what compensation is just.” 251 U.S. 57, 62 (1919). Likewise, in *Joslin Mfg. Co. v. City of Providence*, the Court explained, “the taking of property for public use...need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably *prompt ascertainment and payment*, and there is adequate provision for enforcing the pledge.” 262 U.S. 668, 677 (1923) (citing *Sweet v. Rechel*, 159 U.S. 380, 400, 404, 407 (1895) (emphasis added)).

Sweet v. Rechel involved a Massachusetts statute enabling a city to condemn properties lacking adequate drainage as a nuisance in order to protect public health. 159 U.S. at 393. The owner of a condemned lot argued the statute violated the state constitution because “it did not provide for compensation to be made to the owners of the property in advance of its actual appropriation by the commonwealth.” *Id.* at 396 (emphasis added). The Supreme Court held, “it is a condition precedent to the exercise of [the government's eminent domain] power that the statute make provision for reasonable compensation to the owner.” 159 U.S. at 399 (Harlan, J.).

The Massachusetts statute at issue in *Sweet* complied with the Fifth Amendment, the Court held, because it provided that “the owner became, from the moment the property was taken, absolutely entitled to reasonable compensation, the amount to be ascertained without undue delay, in the mode prescribed, and its payment to be assured, if necessary, by decree against the city,

which could be effectively enforced.” Id. at 407 (emphasis added). In so holding, Justice Harlan analyzed and followed, inter alia, a New York state court decision, where that court explained,

It certainly was not the intention of the framers of the constitution to authorize the property of a citizen to be taken and actually appropriated to the use of the public, and thus to compel him to trust to the future justice of the legislature to provide him a compensation therefor. The compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided, and upon an adequate fund, whereby he may obtain such compensation through the medium of the courts of justice....

Sweet, 159 U.S. at 405-06.

The Supreme Court reviewed the constitutionality of a Massachusetts condemnation statute, which limited the height of buildings in a certain part of Boston, in *Williams v. Parker*, 188 U.S. 491, 503 (1903). In *Williams* the Court found the Massachusetts statute supplied an “adequate provision for the payment of the damages sustained by the taking” because the statute provided “a direct and appropriate means of ascertaining and enforcing the amount of all such damage.” 188 U.S. at 504 (emphasis added). See also *Crozier v. Fried. Krupp Aktiengesellschaft*, 224 U.S. 290, 306 (1912) (payment of compensation need not be paid in advance, but it is “sufficient...that adequate means be provided for a reasonably just and prompt ascertainment and payment of the compensation”) (emphasis added). Thus, the Supreme Court has allowed the government to take private property without first paying compensation only so long as the government provides the means to enforce and compel prompt payment of the “just compensation.”

Forcing landowners to sue the federal government in a non-Article III court without a jury to be compensated is constitutionally suspect. Justice Thomas concurred in *Knick v. Township of Scott*, 588 U.S. 180 (2019), to emphasize that the government’s “‘sue me’ approach to the Takings Clause is untenable.” Justice Thomas continued, “[t]he Fifth Amendment does not merely provide

a damages remedy to a property owner willing to ‘shoulder the burden of securing compensation’ after the government takes property without paying for it. Instead, it makes just compensation a ‘prerequisite’ to the government’s authority to ‘tak[e] property for public use.’ A ‘purported exercise of the eminent-domain power’ is therefore ‘invalid’ unless the government “pays just compensation before or at the time of its taking.” *Knick*, 588 U.S. at 206-207 (quoting dissent from the Court’s denial of cert. in *Arrigoni Enterprises v. Durham*, 578 U.S. ___, 136 S.Ct. 1409, 1409 (2016)). But the constitutionality of the Tucker Act scheme is a topic for another day.

The federal government has failed to satisfy this constitutional obligation owed the owner whose property is taken by the Trails Act. In most Trails Act cases it is almost a decade-long delay in payment. This delay is caused by Justice Department opposing the landowners in costly litigation. A decade-long delay between when this Board issues an order taking an owner’s property and when the owner is finally paid defies any notion of promptness. This delay between this Board’s order taking an owner’s property and when the Treasury Department finally pays the owner utterly fails to satisfy any notion of a “reasonably prompt” or “without unreasonable delay” standard.

III. The compensation the federal government must pay each owner is the difference between the market value of the owner’s *entire* property before the taking and the market value of the *remainder* of the property after the land is encumbered with the public rail-trail easement.

The standard for determining the compensation the Government must pay an owner is the fair market value of what the owner lost, not what the Government gained. See *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923); *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 635 (1961); *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910) (“the question is, What has the owner lost? Not, what has the taker gained?”) (Holmes, J.).

In *Seaboard Air Line Railway v. United States*, 261 U.S. 299 (1923), *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), *United States v. Miller*, 317 U.S. 369 (1943), and other cases, the Supreme Court held the Takings Clause of the Constitution requires the federal government to pay an owner “a full and perfect equivalent” of compensation for that property the owner lost. In *Monongahela* the Supreme Court held, “the compensation must be a *full and perfect equivalent* for the property taken.” 148 U.S. at 326 (emphasis added). A “full and perfect equivalent” is compensation sufficient to “put [the owner] in as good position pecuniarily as he would have been if his property had not been taken.” *Seaboard*, 261 U.S. at 304. The government must pay the owner whose property is taken for trail corridor “the full and perfect equivalent in money of the property taken.” *Miller*, 317 U.S. at 373. “Just compensation means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.” *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973) (internal quotations and citation omitted).

In *McCann Holdings*, 111 Fed. Cl. at 614, Judge Williams explained, “[w]here the property interest permanently taken is an easement, the conventional method of valuation is the before-and-after method, *i.e.*, the difference between the value of the property before and after the Government’s easement was imposed.”³⁹ Similarly in *Childers v. United States*, 116 Fed. Cl. 486 (2013), Judge Williams held, “In addition to the value of the property actually taken, just compensation includes severance damages – the diminution in value of the owner’s remaining

³⁹ Internal quotations omitted.

property resulting from the taking.” 116 Fed. Cl. at 497 (citing *United States v. Grizzard*, 219 U.S. 180, 185 (1911), and *Miller*, 317 U.S. at 376).⁴⁰ In *Grizzard*, the Supreme Court explained,

The “just compensation” thus guaranteed obviously requires that the recompense to the owner for the loss caused to him by the taking of a part of a parcel, or single tract of land, shall be measured by the loss resulting to him from the appropriation. If, as the court below found, the flooding and taking of a part of the plaintiffs farm has depreciated the usefulness and value of the remainder, *the owner is not justly compensated by paying for only that actually appropriated, and leaving him uncompensated for the depreciation over benefits to that which remains.*

219 U.S. at 184 (emphasis added).

Even earlier, in *Bauman v. Ross*, 167 U. S. 548, 574 (1897), the Supreme Court explained,

Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened.

Grizzard described the Government’s obligation to pay the owner compensation for the “incidental injury” or damages to the part of the property not taken as “severance damages.” The Government’s obligation to pay the owner for the loss in value to the remaining property in addition to the value of the land physically taken is “settled law.” *Grizzard*, 219 U.S. at 184 (citing *Sharp v. United States*, 191 U.S. 341, 354 (1903)). In *United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 632 (1961), the Supreme Court held, “the (trial) court adopted an acceptable method of appraisal, indeed the conventional method, in valuing what was acquired by the Government by taking the difference between the value of the property before and after the Government’s easement

⁴⁰ See also the Court of Federal Claims’ unpublished decisions in *Glosemeyer v. United States*, No. 93-126L, *Dorothy Moore v. United States*, No. 93-134L, *Grantwood Village v. United States*, No. 98-176L, *Robert Miller v. United States*, and *Illig v. United States*.

was imposed.”).⁴¹ In *Miller*, the Supreme Court explained, “If only a portion of a single tract is taken, the owner’s compensation for that taking includes *any element of value arising out of the relation of the part taken to the entire tract*. Such damage is often, though somewhat loosely, spoken of as severance damage.” 317 U.S. at 376.⁴² In the *Childers* Trails Act case, 116 Fed. Cl. at 497, the court held the same and added, “[i]n addition to the value of the property actually taken, just compensation includes severance damages – the diminution in value of the owner’s remaining property resulting from the taking.”⁴³

The before-and-after method to determine the compensation due an owner applies to Trails Act cases. “In a rails-to-trails case, the imposition of a recreational trail creates a new easement for a new purpose across the landowner’s property, which constitutes a taking entitling the landowners to just compensation.” *Childers*, 116 Fed. Cl. at 496-97. See also *Preseault II*, 494 U.S. at 1542-43; *Trevarton v. South Dakota*, 817 F.3d 1081, 1087 (8th Cir. 2016) (the Board’s invocation of section 8(d) encumbers the owners’ land with “a *new easement* for the *new use*”) (citing *Preseault II*, 100 F.3d at 1550) (emphasis added). In *Childers*, Judge Williams emphasized, “Where the property interest permanently taken is an easement, the ‘conventional’ method of valuation is the ‘before-and-after’ method, *i.e.*, ‘the difference between the value of the property before and after the Government’s easement was imposed.’” 116 Fed. Cl. at 497 (quoting *Otay Mesa Property, LP v. United States*, 670 F.3d 1358, 1364 (Fed. Cir. 2012)).

⁴¹ Citing *Olson v. United States*, 292 U.S. 246, 253 (1934).

⁴² Emphasis added; citing LEWIS EMINENT DOMAIN (3rd ed.), p. 686; NICHOLS EMINENT DOMAIN (2nd ed.) §236; *Bauman v. Ross*, 167 U.S. 548, 574 (1897); *Sharp*, 191 U.S. at 351, 352, 354; *cf. United States v. Welch*, 217 U.S. 333 (1910); *Campbell v. United States*, 266 U.S. 368 (1924).

⁴³ Citing *Grizzard*, 219 U.S. at 185, and *Miller*, 317 U.S. at 376.

An owner's land taken by the federal government when this Board invokes Section 8(d) of the Trails Act, must also be valued considering the highest and best use of the *entire* properties (or tracts of land) in both the before-taken and after-taken condition, recognizing that taking a part of the larger parcel may change the highest and best use of the remaining property.⁴⁴ The highest and best use is that use which is physically possible, legally permissible, financially feasible and which results in the most profitable use of the land. The Appraisal Institute provides, "Highest and Best Use" is defined as a use that is (a) "*physically possible* (or it is reasonably probable to render it so); *legally permissible* (or it is reasonably probable to render it so); [and] ... *financially feasible*." Appraisal Institute, THE APPRAISAL OF REAL ESTATE, (15th ed.), p. 305. In the before- and after-taken condition, the market value of the entire property must be determined in light of "zoning, building codes, private restrictions, historic district controls, and environmental regulations." *Id.* at 308. As the Appraisal Institute explains, "[t]he use that produces the highest land value on the effective date of the appraisal is the highest and best use." *Id.*

In both the before-taken and after-taken condition, the property is to be valued considering what a reasonable, prudent, and knowledgeable buyer would pay for the property on the date of the taking:

The most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently,

⁴⁴ *United States v. 760.807 Acres of Land, More or Less, Situated in City and County of Honolulu*, 731 F.2d 1443, 1446 (9th Cir. 1984) ("courts appropriately consider evidence regarding the highest and best use to which the land is put or reasonably may be adapted in the future...as well as any facts which would naturally influence a person of ordinary prudence desiring to purchase") (citing 4 NICHOLS, THE LAW OF EMINENT DOMAIN (rev. 3rd ed. 1981) §12.2[3], pp. 12-96). The Ninth Circuit stated, "We hold . . . that if fear of a hazard would affect the price a knowledgeable and prudent buyer would pay to a similarly well-informed seller, diminution in value caused by that fear may be recoverable as part of just compensation." *Id.* at 1447.

knowledgeably, and for self-interest, and assuming that neither is under undue duress.

THE APPRAISAL OF REAL ESTATE, p. 23.

A knowledgeable buyer would not pay the same amount for a property encumbered with an easement for a public rail-trail corridor as the buyer would pay for the same property unencumbered by a public rail-trail corridor. In the after-taken condition, a knowledgeable buyer would pay significantly less for the Plaintiffs' property because the buyer does not have the ability to exclude others from the property. Furthermore, and importantly, the existence of a public corridor and future railway across the property impairs (indeed entirely prevents) a developer's ability to develop the encumbered land and requires the owner to incur substantial development costs to berm, buffer, or fence the remaining property from the public corridor. See *McCann and Childers*. The existence of the Trails Act easement impairs the owner's ability to develop the remaining land under the relevant land use and zoning regulations.

The Board's jurisdiction over an owner's property subject to the Trails Act is perpetual. The trail operator must preserve the corridor allowing a future railroad to build a new railway across the land in the indefinite future.⁴⁵ Thus, a prudent and knowledgeable buyer would also consider the property in the after-taken easement as subject to a railroad line. It is presumed that the prudent and knowledgeable buyer would assume the use of the easement for all purposes

⁴⁵ See 16 U.S.C. §1247(d) ("Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use...such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes."). See also 49 U.S.C. 10501(b) ("The jurisdiction of the [STB] over [rail transportation, construction, operation, and abandonment] is exclusive" and "the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.")

allowed, including a railroad, and not just a public recreational trail. In other words, the value of an owner's property in the after-taken condition must consider the land as now encumbered with an easement for *both* a public recreational corridor *and* railroad line in the future.

What is left of the owner's property after imposition of the Trails Act easement? The remainder parcel is smaller because the Trails Act easement encumbers the property. The Trails Act easement denies the owner the right to use the land under the corridor and prevents the owner from excluding the public from the land. There is no productive or profitable development the owner can make of the strip of land subject to the Trails Act easement. Furthermore, the encumbrance of the owner's remaining property with this rail-trail corridor means the remaining property is less able to be developed under relevant land use regulation, zoning code, and private land use restrictions (see the testimony and decisions in *McCann Holdings*, *Childers*, and *Rogers* holding that residential properties encumbered with a public rail-trail corridor are between twenty and thirty percent less valuable than essentially identical residential properties that are not encumbered by an easement for a public rail-trail corridor).

In *McCann Holdings*, *Childers*, and *Jackson* the Justice Department's appraiser, John Underwood, testified that a Trails Act easement takes ninety-nine percent of the market value in the strip of land across which the corridor is physically located. Judge Williams agreed and held the imposition of a Trails Act easement takes ninety-nine percent of the value of the fee simple interest in the land. *McCann*, 111 Fed. Cl. at 626 ("the parties agree that the Government took 99% of the value of the land underlying the corridor"); *Childers*, 116 Fed. Cl. at 551 ("The parties agree that the conversion of the rail corridor to a recreational trail was a taking of 99% of the fee interest."). See also *Childers*, 116 Fed. Cl. at 524, 541, 580, 582, 588 (plaintiffs entitled to recover compensation of 99% of the fee interest value); *Jackson v. United States*, 155 Fed. Cl. 689, 702

(2021) (“In Rails-to-Trails cases, the Court has consistently held that the owners of land subject to a trail easement retain virtually no rights in the encumbered land and awarded the plaintiffs the fee simple value of the encumbered parcel.”) (citing and quoting *Moore v. United States*, 54 Fed. Cl. 747, 751 (2002) (“the right of way parcel should be diminished 100% in the ‘after’ analysis because the landowners had no effective remaining use of the property”), and *Howard v. United States*, 106 Fed. Cl. 343, 367 (2012) (stating that properties subject to a trail easement “would appear to be lost to the fee holder for all intents and purposes in perpetuity.”)).

The new rail-trail corridor that now encumbers an owner’s land is a substantial taking of property. In *Western Union Tel. Co. v. Pennsylvania R. Co.*, 195 U.S. 540, 569-70 (1904), the Supreme Court explained,

A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement. We discussed its character in *New Mexico v. United States Trust Co.* 172 U. S. 171. We there said that if a railroad’s right of way was an easement it was “one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property.”

The imposition of a Trails Act easement across an owner’s private property means the owner has lost his right to exclude the public or a railroad from the owner’s land. The “right to exclude” is “universally held to be a fundamental element of the property right....” *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979)). The Supreme Court recently stated, “[t]he right to exclude is ‘one of the most treasured’ rights of property ownership.” *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)).

In the *Moore* Trails Act case, Judge Bruggink followed this jurisprudence and held, “fair market value of the entire affected parcel (is determined) as if the easement did not exist and then

another determination in light of the taking.” 54 Fed. Cl. at 749. In a related case, Judge Bruggink explained,

A landowner who is able to show a physical, partial taking of property is entitled to the difference in value before and after the taking. See *Moore v. United States*, 54 Fed. Cl. 747, 749 (2002). The “before and after” calculation requires “a determination of the fair market value of the entire affected parcel as if the easement did not exist and then another determination in light of the taking.” *Id.* The “affected parcel” may include land not directly the subject of the easement, but which is impacted by severance damages.

Illig v. United States, 58 Fed. Cl. 619, 624 (2003).⁴⁶

J.D. Eaton was the Justice Department’s Assistant Chief Appraiser. Eaton wrote *REAL ESTATE VALUATION IN LITIGATION* (2nd ed. 1995). In this widely respected and quoted treatise Eaton wrote, “[t]he property owner is entitled to consideration for the damage the condemnor has the power to inflict. The appraiser should assume that the condemnor will utilize the rights acquired to their fullest extent.” *Id.* at 291. Applied in the context of Trails Act takings, this principle requires the appraiser to value the property in the after-taken condition as encumbered by *both* a public recreational trail and an easement for a future new railroad right-of-way to be built across the owner’s land.

The important point is that the “just compensation” the Constitution guarantees an owner whose property is taken by this Board’s invocation of the Trails Act, is the full market value of

⁴⁶ The Court rejected the Justice Department’s contrary approach in *Raulerson v. United States*, 99 Fed. Cl. 9, 12 (2011). (“Contrary to defendant’s position, the extent of the taking depends not on plaintiff’s property interests at the time of the NITU, but rather upon the nature of the state-created property interest that petitioners *would have enjoyed* absent the federal action and upon the extent that the federal action burdened that interest.”) (emphasis in original; internal quotation omitted), and *Ybanez v. United States*, 102 Fed. Cl. 82, 87 (2011) (“The determination of what was taken from plaintiffs turns not on the status of the land at the time of the NITU but what interest plaintiffs would have had in the absence of the NITU.”).

what the property owner lost which includes the value of the land physically encumbered by the new Trails Act corridor easement and also includes severance damages for the diminution in the market value of the owner's remaining property resulting from the imposition of the public rail-trail corridor easement across the owner's land. In almost every Trails Act case experts have found this to be very substantial.

In addition to what the federal government must pay the owner in compensation, interest, and reimbursement of attorney fees and litigation expenses, the Justice Department itself incurs substantial expenses and costs defending the federal government in Fifth Amendment takings cases. And the courts also incur significant expense hearing these cases. All this expense (The compensation for the property, interest, and the owners', Justice Department's and the court's litigation expenses) are paid by American taxpayers.

The compensation the United States must pay owners is from the Judgment Fund, which is a permanent, indefinite appropriation to pay judgments against the United States. 31 U.S.C. 1304. The amount varies by year, but the Judgment Fund typically pays more than \$14 billion annually. The funds paid from the Judgment Fund are not taken from the budget of the federal agency responsible for the government's liability but are paid directly from the United States Treasury.

IV. The Justice Department's war against property owners.

A. The Justice Department has waged an unrelenting crusade against landowners and private property.

The Justice Department lawyers opposing property owners have lost sight of their mission and purpose. Especially during the Biden-Harris Administration, these career lawyers have come to suppose that their task is to deny landowners "just compensation" for property the government

has taken and to make a landowner seeking to vindicate the landowner's right to "just compensation" endure years of litigation that is so costly, so complicated and so painful that other landowners will choose to forfeit their right to be compensated and that lawyers and law firms will not represent landowners in such litigation because the cost of doing so is too great. This is not the mission or purpose of the Department of Justice. The ENRD lawyers' opposition is precisely the opposite of the Justice Department's *raison d'être*. The Supreme Court noted this point in *Brady v. Maryland*, 373 U.S. 83, 88 (1963):

An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.'. Judge Simon E. Sobeloff when Solicitor General put the idea as follows in an address before the Judicial Conference of the Fourth Circuit on June 29, 1954: 'The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice. We are constantly reminded of the now classic words penned by one of my illustrious predecessors, Frederick William Lehmann, that the Government wins its point when justice is done in its courts.'

Notwithstanding the Supreme Court's unanimous opinion holding the federal government must justly compensate landowners when their land is taken for a public rail-trail corridor, the Justice Department's lawyers continued to oppose property owners' right to be compensated. The government lost again when the Federal Circuit sat *en banc* and held that "[t]he taking of possession of ... lands ... for use as a public trail [is] in effect a taking of a new easement for that new use, for which ... landowners are entitled to compensation." 100 F.3d 1525, 1550 (Fed. Cir. 1996) ("*Preseault II*") (*en banc*). The Federal Circuit explained, "[i]t is now well-settled that the issuance of a NITU under the Trails Act may result in a taking of property owned by the original grantor of the easement." *Behrens v. United States*, 59 F.4th 1339, 1342 (Fed. Cir. 2023). But the government lawyers with the Justice Department refused to accept this reality.

Despite all authority to the contrary, government lawyers have refused to accept the government's constitutional obligation to justly compensate property owners for that property the federal government took for these rail-trail corridors. The government lawyers continued opposing landowners seeking compensation for property the federal government took for public rail-trail corridors.

Over the past thirty years Justice Department lawyers wasted close to a hundred million of taxpayer resources paid for legal fees, interest, and litigation expenses trying to avoid the government's constitutional obligation to pay property owners. The government's lawyers invented a new legal theory claiming that the Board's order imposing a public rail-trail corridor across owner's land was only a "temporary" regulatory taking because the government could possibly rescind the order in the indefinite future. The government lawyers argued so-called "railbanking" (which is by definition *not* using an abandoned right-of-way for operation of a railway line) is really the same as operating trains across the strip of land. The government lawyers argued, the original railroad easement did not terminate so the government needn't pay owners for the land taken for the public rail-trail corridor. This is the same argument Justices Rehnquist and Scalia mocked during the oral arguments in *Preseault I*. The government lost these arguments. Government lawyers then tried to escape the federal government's constitutional obligation to pay landowners by claimed the Board's order taking a new public rail-trail corridor across an owner's land was only a "temporary regulatory" taking for which the owner was due no compensation. See for example *Ladd I*, *Ladd II*, *Caquelin v. United States*, 697 Fed. App'x 1016 (Fed. Cir. 2017) (*Caquelin I*), and *Caquelin v. United States*, 959 F.3d 1360 (Fed. Cir. 2020) (*Caquelin II*). The Justice Department lost all of these arguments.

The Justice Department lawyers also tried to avoid paying property owners by claiming the six-year statute of limitations had expired before the owner filed his or her claim for compensation. The government actually won this statute of limitations argument in three cases. See, *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004), *Barclay v. United States*, 443 F.3d 1368 (Fed. Cir. 2006), and *Illig v. United States*, 274 Fed. App'x 883 (Fed. Cir. 2008) cert. denied, (557 U.S. 935 (2009)). In *Illig* then Solicitor General Kagen (now Supreme Court Justice Kagen) opposed the owners' petition for certiorari and wrote the brief quoted above that argued this Board's issuance of the NITU is the event giving rise to a taking of the owner's property and the owner's claim for compensation.

The problem with the Trails Act and this Board's failure to administer the Trails Act is that, when the Board issues an order taking an owner's property for a public rail-trail corridor, the Board does not tell the owner the federal government has taken the owner's property. So the owner has no notice that his or her property has been taken. The Board's failure to notify owners means the six-year statute does not begin running until the owner has actual notice of the governments. See *Ladd II* and denial of petition for rehearing *en banc*. The Board's failure to provide landowners actual or even constructive notice of a Trails Act "taking" of the owner's private property has engendered decades of costly litigation and costs taxpayers tens of millions of dollars.

B. The Justice Department's strategy of seeking to frustrate and deny landowners' constitutional right to be justly compensated has been a profligate waste of taxpayer funds.

Since 1983 the federal government has taken thousands of miles of private land for public rail-trail corridors. Only a small fraction of these abandoned railway rights-of-way have actually been used for public recreation. But the federal government must still pay the landowner because this Board has taken these owners' land. The Board and Justice Department do not account for the

land taken or the cost the compensation the government has paid owners, nor the legal fees, litigation expense, and other costs the Trails Act has caused taxpayers to pay. Part of the waste, fraud, and abuse wrought by the Trails Act is due to the thoughtless way in which the Trails Act amendment was drafted in 1983. But a very substantial part of the waste and abuse the Trails Act visits upon landowners and taxpayers is due to the government bureaucrats' incompetence managing the resulting litigation and the Justice Department's progressive-left ideology that is overtly hostile to private property and property owners. The ENRD's mismanagement of the federal government's liability in Trails Act litigation is a case study in the waste and abuse caused by institutionalized bureaucratic incompetence and malfeasance.

Almost twenty-five years ago Congress raised significant concerns about the federal government's Trails Act liability. The Justice Department's mismanagement of Trails Act litigation has been a significant concern to Congress.⁴⁷ The ENRD's failure to responsibly resolve takings claims against the United States has been a longstanding problem spanning both Republican and Democratic administrations. But this malfeasance reached its apogee over the past four years

⁴⁷ See *LITIGATION AND ITS EFFECT ON THE RAILS-TO-TRAILS PROGRAM: HEARING BEFORE THE SUBCOMM. ON COMMERCIAL AND ADMINISTRATIVE LAW OF THE H. SUBCOMM. ON THE JUDICIARY*, 107th Cong. 2 (2002) (Bob Barr, Chairman, H. Subcomm. On Commercial and Administrative Law of the H. Comm. on the Judiciary).

Then Assistant Attorney General, Thomas Sansonetti, testified before Congress that the cost of litigation Trails Act cases is a significant expense for the federal government. Assistant Attorney General Sansonetti told Congress,

The defense of the rails-to-trails cases poses special challenges for the Environmental Division...

These cases require a deed-by-deed liability analysis and a parcel-by-parcel valuation analysis. Therefore, while a class action of 1,000 individuals may technically constitute just one case, they in reality must be defended as if they were 1,000 separate cases.

See, *LITIGATION AND ITS EFFECT ON THE RAILS-TO-TRAILS PROGRAM*, *supra* (prepared statement of Thomas L. Sansonetti, Asst. Att'y General, Environmental and Natural Resources Division, U.S. Dept. of Justice).

under the Biden-Harris Administration, presided over by Attorney General Merrick Garland and Assistant Attorney General Todd Kim.

The Federal Circuit and the Court of Federal Claims have been highly critical of the Justice Department's frivolous and foolish litigation strategy in Trails Act cases. In *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010) and *Evans v. United States*, 694 F.3d 1377, 1380 - 79 (Fed. Cir. 2012) the Federal Circuit wrote:

One might have supposed that the Government, having found itself mired in this messy litigation in three different courts, would readily accede to plaintiffs' proposal for a voluntary dismissal of the district court cases. This would get those cases laid to rest and permit the Government to concentrate its efforts on the merits of the Court of Federal Claims case. To so suppose would be a mistake. ...

The Government, however, foregoing the opportunity to minimize the waste both of its own and plaintiffs' litigation resources, not to mention that of scarce judicial resources, opposed plaintiffs' motions to stay, insisting that the district court suits proceed despite the pending appeal. ...

And even more puzzling is why the Government, after *Bright* was decided, pursued the course it chose in the district courts and in this appeal, seeking with every possible argument—even if so thin as to border on the frivolous—to avoid acquiescing in plaintiffs' effort to have the district court judgments put aside and to proceed on the merits in the Court of Federal Claims.

Evans 694 at 1379-138.

Recently in *Hippely v. United States*, 173 Fed. Cl. 389 (2024), Judge Holte held:

[I]t is incumbent upon the Court and government counsel before it—who work for the American taxpayer—to exercise sound prudence in that administration, especially when government liability may result in the additional payment of plaintiffs' attorneys' fees. In the words of President Thomas Jefferson five decades before Lincoln's address: "The same prudence which in private life would forbid our paying our own money for unexplained projects, forbids it in the dispensation of the public monies." Letter from President Thomas Jefferson to Skelton Gilliam (Jun. 19, 1808) (on file with The United States National Archives and Records Administration). In sum, the Court must not pay public money except as necessary to "render prompt justice" against the United States, and—relatedly—government

counsel, like private attorneys accountable to clients, must balance the benefits of winning each case or issue with the eventual public taxpayer costs associated therewith. (emphasis added.)

Judge Holte continued:

Here, plaintiffs’ counsel requests reimbursement in the amount of \$396,312 in fees and \$22,643.47 in costs for their work recovering \$1,869.09 for their clients. Although this fee-to-client recovery ratio (~\$212 to \$1) may seem staggering, the government has recently paid more than \$1,000,000 in fees in cases with similarly low recoveries. See *Caquelin v. United States*, 959 F.3d 1360, 1362 (Fed. Cir. 2020) (noting the “parties stipulated to compensation of \$900”); (explaining “[t]he government paid \$1,000,000 in legal fees in *Caquelin* when \$900 of damages were at issue”); *Memmer v. United States*, 50 F.4th 136 (Fed. Cir. 2022); (“[T]he government has agreed to a settlement of \$1.7 million in fees and costs in *Memmer* [] when \$29,000 in damages were at issue.”). ...

[T]he Court reminds government counsel once more that it—in working for the American people and their tax dollars—must practice similar restraint when it comes to litigation decisions in these cases.

Government counsel should always factor in the cost of fees when litigating, much as would a private litigator representing a private client—weighing the costs of each pyrrhic victory with the benefits of quickly and efficiently resolving each case.

173 Fed. Cl.at 399.

As Judge Holte noted, it is shocking that the ENRD responded to an admitted liability of \$900 by turning this nominal liability into a more than a \$5 million expense for taxpayers. This exorbitant expense to taxpayers is due almost entirely to the Justice Department’s failure to responsibly respond to and manage Trails Act litigation.⁴⁸

⁴⁸ Rails-to-Trails Conservancy (RTC) filed a comment supporting the Joint Petition. The Rails-to-Trails Conservancy has been living on the wrong side of history since the Trails Act was amended in 1983. RTC appears more interested in opposing landowners than in creating public recreational trails. The RTC devotes significant resources to briefs supporting government bureaucrats taking private property from landowners. The RTC – unsuccessfully - opposed the Arizona ranchers in *Ladd I*. The RTC unsuccessfully opposed the Brandt Family and allied itself with the government bureaucrats in *Brandt Trust*. The RTC is not satisfied when the government – state or federal – takes private property for a public corridor. The. RTC wants to make sure the owners whose

The ENRD's *attaque à outrance* litigation strategy against landowners whose property the government has taken is responsible for the cost the Trails Act imposes on taxpayers. Especially during the Biden-Harris Administration the ENRD has deployed a costly and aggressive opposition to landowners weaponizing the discovery process to impose burdens and cost on landowners. The examples are numerous. Here are a few.

property is taken don't get paid for their land. Toward this goal of denying landowners compensation for property taken under the Trails act, the RTC sidles up to government bureaucrats offering aid in the government's attempt to take private property in violation of the Constitution. See, *Brandt Trust* and *Ladd I*, supra. But the question remains, Why does the RTC devote such effort to opposing landowners right to be justly compensated?

In the RTC's comments the RTC blames attorneys and law firms that defend individuals, families, farmers and small businesses and defend landowners' constitutional right to private property for the immense cost the Trails Act has visited upon American taxpayers. The RTC complains in essence, "if only we could get rid of those pesty lawyers that represent property owners, the government could then take private property without paying the owner and we could create public rail-trail corridors on the cheap."

This is the "first thing we do is kill all the lawyers" attitude. Supreme Court Justice Stevens commended the important role that attorneys play in holding the government accountable and defending citizens liberty and civil rights. Justice Stevens described the important "function of the independent lawyer as a guardian of our freedom." The attorneys and law firms that RTC disparages are the paladins of freedom and individual liberty. Justice Stevens continued to explain:

That function [of independent attorneys defending individual freedom and liberty] was, however, well understood by Jack Cade and his followers, characters who are often forgotten and whose most famous line is often misunderstood.

Dick's statement ("The first thing we do, let's kill all the lawyers") was spoken by a rebel, not a friend of liberty. See W. Shakespeare, *KING HENRY VI*, pt. II, Act IV, scene 2, line 72. As a careful reading of that text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government.

Walters v. Nat'l Ass'n of Radiation Survivors,
473 U.S. 305, 371, 1985)

Perhaps RTC's counsel should spend more time reading the United States Constitution and Shakespeare and less time reading Karl Marx's *DAS KAPITAL*

In *Jackson v. United States* (Case No. 14-397L), the Justice Department argued that appraisers should not rely upon official government records concerning sales of property but that the appraisers personally track down and interview all the parties to any transaction the appraiser used as a comparable sale. The Government lost this argument. Individually interviewing all the parties to a comparable sale transaction is not required by established appraisal practice. The official government records relied upon for the comparable sales transaction were validated with a sworn statement by the party made under criminal penalty for any misstatement is a sufficient basis to rely upon the official records. But, if what the Government argued (the appraiser must personally interview the parties to all comparable sales transactions) was actually required to validate a comparable property value, the cost would be immense.

Judge Williams rightly rejected the government's argument and in doing so she noted the larger point,

[T]o the extent that the Plaintiff prevails, [the government] is liable for attorney fees, and costs, right? So how far are you going to make these experts go in terms of verifying every detail in terms of the costs associated with that? At some point, isn't there a cost-benefit analysis in what these experts are supposed to be doing? I mean, how many hours was [the landowners' appraiser] supposed to spend going through every deed of every comparable when you've got a Public document, you've got a tax assessor that he spoke with, saying it's right, and you've got people inputting the data under penalty of criminal action, if they're wrong[?]

Jackson, trial transcript (July 23, 2019), p. 891 (lines 4-16).

In *Jackson* the ENRD hired an appraiser to make the absurd argument that an owner's home was actually \$5,000 more valuable because the federal government had taken a strip of land for a public railroad and recreational rail-trail corridor ten feet from the landowner's bedroom window. *Jackson v. United States*, 135 Fed. Cl. 436 (2017). When the ENRD Assistant Section Chief and the Justice Department's appraiser tried to explain that landowners should actually pay

the government for taking the landowners property because (in the government's opinion) the owner's home was more valuable. Judge Williams and those in the courtroom literally broke out in laughter.

In *Bratcher v. United States*, 136 Fed. Cl. 786 (2018), the Government wanted to personally depose every landowner including a number of elderly and infirm owners in rural Kansas. The cost of doing so would be substantial and the depositions would have little or no relevance to the amount of compensation the Government owed these owners. Judge Bruggink denied the Government's request and held that the Government's discovery in Trails Act cases must have some sense of proportionality. See *Bratcher*, Case No. 15-986, ECF No. 59, pp. 17-18 ("the rules do contemplate that there has to be some recognition of proportionality, and I think the Government's pursuit of these two depositions under the circumstances is inappropriate and wildly disproportionate to the likelihood that it would have an impact meaningfully in excess of that it would leave room for any – that the cost of the depositions wouldn't automatically exceed any potential recovery by the Plaintiffs. So, I'm going to require you to put your questions in writing to these two individuals"). See also ECF No. 55 ("Defendant's request to depose the two plaintiffs is unduly burdensome and expensive in light of the 'needs of the case and the 'amount in controversy' regarding these two plaintiffs' land. ... Defendant is not permitted to take the depositions of [the two elderly landowners].").

The discovery the government lawyers demand landowners provide in Trails Act cases must be proportional to the matters at issue. *Penland v. United States*, Case No. 22-62, a currently pending Trails Act case involving North Carolina landowners, demonstrates how government lawyers in ENRD use discovery rules to harass landowners.

Charles Penland is in his 90s and legally blind. Mr. Penland must have a relative read him the Justice Department's discovery requests and then help him find documents. The Justice Department's discovery requests are unlimited in time and scope and cause landowners like Mr. Penland to go to completely unnecessary trouble, are not proportional to the Government's modest document/information needs. The ENRD's interrogatories and document requests go far beyond seeking the information relevant and necessary to determining what an owner's property was worth before and after this Board imposed a public rail-trail easement across the land. Mr. Penland and his neighboring landowners are rural North Carolina farmers and families, some of whom have owned their land since the 1970s. These North Carolina landowners are still suffering from the devastation of Hurricane Helene this past Fall.

And yet, the ENRD lawyers demand each of these North Carolina landowners "describe everything [the landowner] knew about the Railroad Corridor at the time they acquired the Subject Properties." And "state all facts that formed the basis of that knowledge" and that each landowner "detail all investments, including improvements and renovations, [each landowner] made in the Subject Properties from the date [each landowner] acquired their ownership interests in the Subject Properties to the present time." And demand that the landowner's "response must include details relating to the amount, nature, and timeframe of the investment." The ENRD lawyers further demand each landowner "identify every Person who had any legal, equitable, or beneficial interest in the Subject Properties, including in the subsurface or any timber resources, from the date [each landowner] acquired the Subject Properties to the present." In its "instructions" and "definitions" the government lawyers demand that when a landowner "identifies" a Person or entity the landowner must provide: a) The Person's full name; b) The Person's address (business or residential); c) The Person's telephone number (business or residential); d) The Person's present

employer and occupation or business; and e) The Person's employer and occupation or business on the date on which the facts or transactions referred to occurred and the capacity in which he or she was then serving."

The landowners whose property the federal government took in *Penland v. United States* are rural North Carolina farmers and families, some of whom have owned their land since 1975 (the Stone family), and 1986 (the Penland family) and all of whom are still recovering from the devastation of Hurricane Helene. The only relevant issue in this litigation is what was the value of that property the federal government took from these owners on June 28, 2021.

If the Stone Family granted someone a right to cut timber on their farm in 1976 or granted someone a license to hunt on their farm in 1980 that has absolutely no relevance to the limited issue of the value of these owners' property in June 2021. And yet, the government lawyers demand the Stone Family locate and produce such documents dating back almost fifty years. What the government lawyers are demanding these North Carolina landowners produce has absolutely nothing to do with any legitimate issue.

If the Scott family added a deck or built a garden shed on their land in 2011 or renovated a guest bathroom a decade ago in 2015, the government's lawyers demand the Scott family to "describe in detail" the improvement or renovation and "identify" an Person (such as a house painter or contractor) with knowledge of the improvement or renovation including the contractor's or house painter's "present employer and occupation" and the contractor's or house painter's employer and occupation when the deck was built or the bathroom was renovated. The government lawyers' discovery demands are absurd and abusive, and these North Carolina

landowners have objected to the government's demands. But responding to the government's lawyers' demands is expensive and costly.

The ENRD lawyers demand these North Carolina landowners produce every picture, image, or aerial photograph of their property. The Stone family has owned their home since August 13, 1975. And the government demands the Stone family produce these documents "as full color .JPG image files at their original resolution with Bates numbers branded onto them."

And it gets worse. The government demands not only those documents these rural North Carolina landowners have in their possession but demands these North Carolina landowners produce all "writings, recordings, photographs, or any other material) known or available to [these owners], including all information in the possession of [these owners]attorneys, consultants, experts, investigators, or any other person acting on behalf or under the direction or control of [these owners]or [these owners'] attorneys." In the case of the Scott family, the government lawyers are demanding the Scott family go through any documents they or "any other person acting on behalf or under the direction or control of" the Scott family *since the Gerald Ford Administration* and locate and produce every "writings, recordings, photographs, or any other material" related to the Stone family's home.

The Board invoked the Trails Act to take a public rail-trail corridor across the land owned by nineteen families in rural Northern California. The families are not large corporations. These families do not have an IT or electronic data department responsible for keeping decades of their personal records and documents. Reviewing decades of documents is extremely burdensome for these owners given their limited resources. The government lawyers also demand these owners produce information and documents that are equally accessible to the government lawyers or even

(as with the Valuation Maps the government itself created) *more* accessible to the government. The Valuation Maps the ENRD lawyers demand these Northern California landowners produce are created by the federal government and are in the National Archives *across the street from the Justice Department*. Why should these Northern California landowners have to research the federal government's archives and produce documents the federal government created?

The government lawyers with ENRD are more concerned about denying landowners compensation for private property the government has taken than fairly, promptly, and justly resolving the federal government's constitutional obligation the United States owes owners whose land the government took under the Trails Act. The ENRD's litigation strategy massively increases the cost to taxpayers and delays by many years owners' being paid that compensation the government owes them. As Judge Holte noted in *Hippley*, the Justice Department's litigation strategy results in taxpayers paying 200-times, or more, than the government's underlying obligation.

In the thirty years since Congress adopted Section 8(d) American taxpayers have paid hundreds of millions in compensation, legal fees and the litigation costs. Section 8(d) of the Trails Act has been a profligate waste of taxpayer funds, a profound violation of the constitutional protection of private property. See Hearne *et al.*, *THE TRAILS ACT: RAILROADING PROPERTY OWNERS AND TAXPAYERS FOR MORE THAN A QUARTER CENTURY*, Real Prop. Tr. & Est. L.J., Vol. 43 Number 1 (Spring 2010). See also, S. Mike Gentine, 47 Real Prop. Tr. & Est., L.J. 173 (Spring 2012), *RIDING THE TRAILS TO BAD LAW: THE INEVITABLE UNJUST RESULTS OF THE NATIONAL TRAILS SYSTEM ACT AND CURRENT TAKINGS JURISPRUDENCE*.

The rulemaking the departing Biden-Harris bureaucrats proposed this Board adopt less than a month before the Biden-Harris Administration left office asks this Board to engage in a fool's errand. It is a fool's errand because the proposed amendment would be void *ab initio* since the amended regulation would contravene the text of Section 8(d) of the Trails Act and is contrary to thirty years of Trails Act and Fifth Amendment jurisprudence of the United States Supreme Court and the lower courts including the Federal Circuit sitting *en banc*.

CONCLUSION

Only federal bureaucrats can take a bucolic notion and wonderful idea – happy citizens hiking and biking across our nation's broad sunlit uplands on nature trails – and turn it into a hellscape for American taxpayers and landowners. Section 8(d) to the 1983 Amendments to the National Trails System Act is a poorly written amendment slipped into the 1983 Amendments to the National Trails System Act without any analysis and without any hearings.

It does not take much imagination to suspect that following President Trump's election the soon to depart bureaucrats of the Biden-Harris Administration hold a Zoom call where they assembled virtually in Brady Bunch boxes on a Zoom screed to discuss a strategy to prevent landowners being paid for land taken by the Trails Act. Were Dr. Seuss to imagine these departing bureaucrats conference call he might do so as follows:

A student quite bashful, a young legal mind,
Spoke up on a call, feeling thoughtful, yet kind.
"If we take what's not ours, well then, wouldn't you say,
The Court and the Constitution demand that we pay?"

"At least, that's the rule—so they taught me in school,
Where the law is quite strict and not just a tool."
The University of Chicago, so wise and so grand,
Had told him the law is a law, as it stands.

But a bureaucrat scoffed with a confident grin,
And said with a smirk, "We won't let owners win!"

A new Trump Administration? Oh, we'll find a way,
For we, the true rulers, still have our say!

The farmers, the teachers, the herders of goats,
The folks who wear flannel and cast simple votes,
They think they have power? Oh no, not a chance!
We steer this great ship, we lead this great dance!

So Trump is now president? What's that to me?
The Deep State's still here, just wait—you will see!
We'll dodge, we'll weave, we'll twist and we'll turn,
We'll rewrite the rules, no lessons to learn!

The Fifth Amendment? Oh, such a bore!
We'll simply make language mean less than before!
A taking's not taking if we say it's not!
And railways are railways, abandoned or not!

Discontinued? Oh no, it's just on a break!
We'll twist it and turn it for politics' sake!
For Orwell once warned of this sneaky old game,
Where words lose their meaning to serve someone's aim.

And Lewis Carroll as well, with his nonsense so grand,
Showed words can be twisted at one's own command.
So let us not pause, let us not delay,
We rule this great land, come what may!"

These departing Biden-Harris bureaucrats seek, by a desperate last minute Deep State ukase, to get this Board to redefine language by *ipsi dixit* and decree that “*railbanking*” (which means not using an abandoned railway right-of-way) now means “operating a railroad across the land”, “*abandonment*” of a railroad line would now mean “temporary discontinuance”, and “*temporary*” will now mean indefinitely – to infinity and beyond. The departing bureaucrats believe that by this Administrative State *ledger de main*, the government can then take millions of owners’ private property for public rail-trail corridors without having to pay the owners.

George Orwell observed that the corruption of language is a hallmark of those seeking to achieve a political end “in a consciously dishonest way. That is, the person who uses [words] has his own private definition [of the words he uses].” See George Orwell’s essay “*POLITICS AND THE ENGLISH LANGUAGE*.” Lewis Carroll likewise captured the mendacious tactic these left-over

bureaucrats from the Biden-Harris Administration seek to achieve with this eleventh-hour effort to have this Board redefine “abandon” to mean “temporarily discontinue”.

“When *I* use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean— neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”⁴⁹

The wicked result the Biden-Harris bureaucrats sought to achieve when these departing bureaucrats filed this Christmas Eve “Joint Petition” asking this Board to engage in this rulemaking will only further inflate the exorbitant cost the Trails Act already imposes on American taxpayers.

The amendment these departing bureaucrats propose this Board adopt is precisely what President Trump’s initiative to eliminate government waste fraud and abuse was established to prevent. President Trump established the Department of Government Efficiency to identify and root out wasteful federal programs. The Trails Act, as currently written and especially as administered under the Biden-Harris Administration is exactly such a federal program that should be targeted for elimination or reform.

Section 8(d) of the Trails Act has confiscated private property from American families, farmers and small businesses for thirty years. Some of these property owners have successfully defended their constitutional right to be justly compensated. But those owners who have actually endured almost a decade of litigation against the federal government to finally receive that compensation are only a small minority of the property owners whose property the federal government has taken in violation of the constitution. And those owners who have been paid had to first run the gauntlet of litigation ENRD lawyers visit upon landowners who seek to vindicate their constitutional right to be justly compensated for private property the federal government has taken from them.

⁴⁹ LEWIS CARROLL, *THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE* 66 (Selwyn H. Goodcare ed., Univ. of Cal. Press 1983 (1871)).

This Board should dismiss or deny the Joint Petition. Or, if not, this Board should at least stay consideration of the Joint Petition until after Attorney General Bondi and Secretary of Interior Burgum have had opportunity to consider the Joint Petition.

Respectfully submitted,

National Association for Reversionary Property Owners

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CERTIFICATE OF SERVICE

I do hereby certify that on this 3rd day of February 2025, I have served a copy of national association of reversionary property owners' request for a stay in the deadline to reply to joint petition for rulemaking to amendment 49 C.F.R. PART 1152 by electronic delivery upon:

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