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STATUTES OF LIMITATIONS IN RAILS-TO-TRAILS ACT COMPENSATION CLAIMS: THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT BENDS THE RULES OF TAKINGS LAW

Bridget Tomlinson

In 1983, Congress amended the National Trails System Act (NTSA or Act), also known as the Rails-to-Trails Act, to transform the rights-of-way abandoned by America's railroad companies into a nationwide system of recreational trails. This innovative program allows railroad companies that are planning to abandon long stretches of land to transfer that land to organizations or individuals who will convert it into recreational trails for public use. The Act has been successful in creating a nation-
wide system of trails for the public’s benefit, while preserving the government’s ability to reactivate the railroads in the event it later deems them necessary.\footnote{See 16 U.S.C. § 1247(d); see also Caldwell v. United States, 391 F.3d 1226, 1229 (Fed. Cir. 2004) (explaining that “the STB retains jurisdiction for possible future railroad use’’); Hearing 2002, supra note 3, at 1-2 (statement of Rep. Bob Barr, Chairman, H. Subcomm. on Commercial and Administrative Law).}

The NTSA “preserve[s] established railroad rights-of-way” by setting aside (or “railbanking”) the land “for future reactivation of rail service.”\footnote{See 16 U.S.C. § 1247(d); see also Hash, 403 F.3d at 1311; Wright & Hester, supra note 1, at 357 (“Under [the Rails-to-Trails Act], the Surface Transportation Board (STB) oversees the discontinuation of rail services and may preempt the operation of state property laws to preserve the railroad easements for possible future reactivation of rail services. The STB may also permit a recreational trail in the corridor so long as the use is not inconsistent with the preservation of the corridor for possible future reactivation for rail service.” (footnote omitted)).} Through the NTSA, Congress delegated authority to the Surface Transportation Board (STB) to set up a system in which railroad companies announce their intent to abandon lines.\footnote{See 16 U.S.C. § 1247(d); 49 U.S.C. § 10,903; 49 C.F.R. § 1152.20 (2006); see also Caldwell, 391 F.3d at 1228-29. The Surface Transportation Board replaced the Interstate Commerce Commission in 1995. ICC Termination Act of 1995, Pub. L. No. 104-88, §§ 101, 201, 109 Stat. 803, 804, 932 (1995); Statement on Signing the ICC Termination Act of 1995, 2 PUB. PAPERS 1933 (Dec. 29, 1995) [hereinafter 1995 Signing Statement]. President Clinton promoted the elimination of the ICC in his State of the Union Address in 1995; Congress then created the STB as a subsection of the Department of Transportation and shifted many ICC functions to the STB. 1995 Signing Statement, supra, at 1933. This move was an effort to reduce overlap between the ICC and the DOT, and to “produce moderate budget savings.” Id.; see also S. REP. No. 104-176, at 2 (1995) (“Established by the Act to Regulate Commerce in 1887, the ICC is the oldest independent regulatory agency. It originally was created to protect shippers from the monopoly power of the railroad industry. Between 1840 and 1880, the U.S. railroad network grew from 2,800 to 93,000 miles. This boom brought indiscriminate construction, market manipulation, rate abuses, and discriminatory practices against certain types of freight customers and passengers. In some areas, rail monopolies were able to direct the fate of communities, shippers, and entire industries.”).} The STB then issues a Notice of Interim Trail Use or Abandonment (NITU), and potential trail operators respond to the NITU to negotiate possible take-over of management and maintenance of the rights-of-way as recreational trails.\footnote{See 16 U.S.C. § 1247(d); 49 U.S.C. § 10,903; 49 C.F.R. § 1152.20 (2006); see also Caldwell, 391 F.3d at 1228-29. Not-for-profit groups have been created in order to ensure the transfer of railroad easements to trails through the NTSA system. See, e.g., Wright & Hester, supra note 1, at 357 & n.19. These groups, such as the National Rails-to-Trails Conservancy, use their resources to assist local trail operators and to watch for STB announcements of railroad companies seeking to abandon. See id. at 357 (“The National Rails-to-Trails Conservancy was founded in 1986 to take advantage of these administrative opportunities.”); id. at 357 n.19 (“The Rails-to-Trails Conservancy is a non-profit environmental organization that assists in trail conversion by monitoring abandonments, aiding local trail groups in acquiring the corridor, sometimes funding the land purchase and then reselling it to local manag-}
tor and the railroad company reach an agreement, the NTSA allows for the transfer of the land from the railroad company to the trail operator. Once the transfer is complete, the trail operator assumes financial and managerial responsibility for the right-of-way on the land, but the STB retains jurisdiction so that the government will have the option to return the right-of-way to railroad use in the future.

The problem with this system is that in many cases, the railroad does not own the land it is transferring. Often, the railroads only own easements, and not title to the land outright. Therefore, when the railroads originally acquired the easements to create their rights-of-way, the landowners retained fee simple ownership of the land, subject to the railroad companies’ easements. The terms of many of these easements required

8. See 16 U.S.C. § 1247(d); see also Caldwell, 391 F.3d at 1229-30.
9. See 16 U.S.C. § 1247(d); see also Caldwell, 391 F.3d at 1229; H.R. REP. NO. 98-28, at 9 (1983), reprinted in 1983 U.S.C.C.A.N. 112, 120 (“This provision will protect railroad interests by providing that the right-of-way can be maintained for future railroad use even though service is discontinued and tracks removed . . . .”); Mich. Dep’t of Natural Res. v. Carmody-Lahti Real Estate, Inc., 699 N.W.2d 272, 276 n.3 (Mich. 2005) (“Abandonment is to be distinguished from mere discontinuance of service. The former involves relinquishing rail lines and underlying property interests. Discontinuance, on the other hand, ‘allows a railroad to cease operating a line for an indefinite period while preserving the rail corridor for possible reactivation of service in the future.’” (quoting Preseault v. Interstate Commerce Comm’n (Preseault I), 494 U.S. 1, 6 n.3 (1990) (citation omitted))
10. See Hearing 2002, supra note 3, at 13 (statement of Thomas L. Sansonetti, Assistant Att’y Gen., Environment and Natural Resources Division, U.S. Department of Justice) (“The 1983 law that created the railbanking program has . . . had some unforeseen circumstances. Among those consequences, in particular, it has engendered considerable litigation against the United States. The litigation arises out of the fact that many railroads do not own their rights-of-way outright; but instead, hold them under easements or other property interests.”).
11. Id.; see also Preseault I, 494 U.S. at 8; Elizabeth F.R. Gingerich, Abandonment of Railroad Property: A Guide for Attorneys and Landowners, RES GESTAE, Oct. 2003, at 24 (“Railroad companies acquired, and now hold, interests in real property in one of three designations: fee simple absolute, defeasible fee or by easement. . . . Unlike an easement, if the railroad company owns the property in fee simple absolute, the interest will persevere.”). An easement is a property interest lesser than full ownership. 28A C.J.S. Easements § 2 (1996) (“[A]n easement is a right that one has to use another’s land for a specific purpose . . . .”); id. §5 (“An easement is not the complete ownership of land with the right to use it for all lawful purposes perpetually and throughout its entire extent, but is a right only to one or more particular uses.”).
12. See Preseault v. United States (Preseault II), 100 F.3d 1525, 1533 (Fed. Cir. 1996) (explaining that, had “the [r]ailroad obtained fee simple title to the land over which it was to operate,” the landowners “would have no right or interest in those parcels and could have no claim related to those parcels for a taking,” but if “the [r]ailroad acquired only easements for use . . . and if those easements were limited to uses that did not include public recreational hiking and biking trails,” then the landowners would have a claim against the government for a taking). Federal and state governments have granted railroad companies the ability to exercise eminent domain, recognizing that, “[a]lthough . . .
that the land immediately "revert" back to the fee simple owners the moment the railroad stops using the right-of-way for railroad purposes. In easement cases, therefore, the government's interference with the abandonment of railroad easements prevents the land from returning to the underlying landowners, thereby effecting a governmental taking:

railroads are private corporations, they provided great public benefits." Wright & Hester, supra note 1 at 367-68.

13. More accurately, easements do not "revert" but cease to exist. Once the intended use for the easement stops, the land stops being burdened by the easement. However, in rails-to-trails discussions, it is common to use the word "reversion" to describe the underlying fee-simple owner's interest. See ROBERT MELTZ, DWIGHT H. MERRIAM & RICHARD M. FRANK, THE TAKINGS ISSUE 438 n.8 (1999); see also Preseault II, 100 F.3d at 1533 ("Instead of calling the property owner's retained interest a fee simple burdened by the easement, [the] alternative labels the property owner's retained interest following the creation of an easement as a 'reversion' in fee.... [I]t is sometimes loosely said that the estate 'reverts' to the owner."); id. at 1545 ("The usual way in which such an easement ends is by abandonment, which causes the easement to be extinguished by operation of law. Upon an act of abandonment, the then owner of the fee estate, the 'burdened' estate, is relieved of the burden of the easement." (citation omitted)).

14. See, e.g., Preseault II, 100 F.3d at 1543 ("'[W]hen an easement for railway purposes is found, it is generally considered to end when it is no longer used for the stated purposes.'" (citing JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND ¶ 1.06[2][d], at 1-48 (rev. ed. 1995))). The Federal Circuit further explained that "[m]ost state courts that have been faced with the question of whether conversion to a nature trail falls within the scope of an original railroad easement have held that it does not." Id.

15. See, e.g., Toews v. United States, 376 F.3d 1371, 1375 (Fed. Cir. 2004). The transition from railroad to trail can substantially alter the property owners' land. In Toews v. United States, for example, the city, which took over the right-of-way as a trail operator, built a fence on either side of the trail that blocked the landowners' access to the other half of their property and forced their tenants to terminate their lease. Id. Additionally, in all rails-to-trails cases, the property owners must share their land with the general public, rather than exclusively with the railroad company. See, e.g., id. In cases where railways have been effectively abandoned for decades, the introduction of the public to these rights-of-way has had a significant detrimental effect on the owner's beneficial use of his private property. See, e.g., Preseault II, 100 F.3d at 1549-50; see also The Easement Owners Fair Compensation Claims Act: Hearing on H.R. 4581 Before the Subcomm. on National Parks of the H. Comm. on Resources, 109th Cong. (2006) [hereinafter Hearing 2006] (statement of Gale Illig) ("While the railroad had a full 100 foot width easement, they only used a very narrow 12 feet that was occupied by the train tracks and... that was used infrequently. The private trail group transferred this trail easement to the St. Louis County Park Department and they now claim the right to use the full 100 foot width of the original railroad easement, including the right to cut and remove all of the foliage [including a hedge that separated the house from the railroad tracks] on this part of our property. There are now hundreds of people biking and walking through our property where previously we enjoyed a quiet and secluded home."). In determining that NTSA transfers effect takings, the Preseault II court emphasized the vast difference in inconvenience to the landowners between railroad use and recreational trail use:

[T]here are differences in the degree and nature of the burden imposed on the servient estate. It is one thing to have occasional railroad trains crossing one's land. Noisy though they may be, they are limited in location, in number, and in frequency of oc-
a physical appropriation of the property owner’s land by the government.

The Supreme Court has found the NTSA transfers to be constitutional takings under the Fifth Amendment. Therefore, because these takings are permissible and landowners cannot prevent the transfer of their land to trail operators, the landowners’ only remedy is the receipt of just compensation from the government. In two recent cases, the Court of Appeals for the Federal Circuit held that the statute of limitations for NTSA takings claims starts at the very beginning of the transfer process. But the NTSA system is uncertain, making it difficult for landowners to determine the statute of limitations period. For instance, landowners are not entitled to individual notice of the potential transfer. Most importantly, negotiations are not certain to end in a transfer to a trail operator: the limitations period could begin accruing, therefore, before landowners are able to bring a claim for compensation. The decision to interpret the NTSA system as effecting a taking at the beginning of the negotiation process is overly burdensome to the property owners, and creates a system in which the government can avoid paying compensation rightfully owed under the Fifth Amendment.

This Comment describes in detail the National Trails System Act, with particular attention paid to the NTSA’s legislative history, the case law interpreting the NTSA, and the process by which railroad companies apply for and negotiate interim trail usage. This Comment explains tak-
ings generally, and the mechanics behind the judicial decisions regarding just compensation under the Fifth Amendment. Additionally, this Comment discusses the Tucker Act, which the Supreme Court has determined provides adequate remedies to landowners affected by the NTSA.23

This Comment then reviews two recent Federal Circuit decisions, Caldwell v. United States and Barclay v. United States, in which the court held that takings claims under the NTSA begin to accrue for purposes of the Tucker Act’s six-year statute of limitations at the moment the STB authorizes a railroad company to negotiate with possible trail operators.24

Because the negotiation process is uncertain, and the railroad is free to abandon the land at any time before it reaches an agreement with the potential trail operator,25 the taking should not be effective at the beginning of the NTSA process.26

This Comment urges reconsideration of the issue and recommends three solutions. First, the Supreme Court should grant certiorari at the next opportunity to overturn the Federal Circuit’s recent decisions.27 The Court should find that NTSA takings claims actually begin to accrue at the time the right-of-way easements are transferred in “ownership” to the trail operators.

If the Court decides not to grant certiorari, Congress should act to prevent further application of the Barclay and Caldwell decisions. Because the Federal Circuit is the only court that will hear similar cases, and is unlikely to overturn its own decisions, the incorrect ruling regarding the statute of limitations period will remain in place unless Congress adjusts the NTSA or creates an alternative for compensation outside the Tucker Act.

The second and third recommendations, therefore, require Congress to add clarifying language regarding compensation to the NTSA. The second recommendation highlights a recent House of Representatives proposal to change the NTSA statute by setting a specific date for the ac-


24. Barclay, 443 F.3d at 1378; Caldwell, 391 F.3d at 1236.

25. See Barclay, 443 F.3d at 1378 (Newman, J., dissenting) (“If [an agreement for interim trail use] is not reached within 180 days, or an extension thereof, the right-of-way is deemed abandoned and any easements therefore[e] are extinguished in accordance with the applicable state law. . . . Thus, the statute and the NITU do not make trail use mandatory, and if trail use is not achieved, the statute effects abandonment of railway use and reversion of the right-of-way easement.” (citations omitted)).


crual of takings claims. Though the originally proposed bill died in session, a similar bill was recently introduced, and this Comment strongly recommends the adoption of this legislation in the event that the Supreme Court decides not to hear an NTSA case.

Third and finally, this Comment recommends that Congress replace the current NTSA system with a condemnation proceeding similar to those used for various other physical takings of land. This procedure would give landowners actual notice of the potential abandonment of the railroad easement burdening their land, and an opportunity to petition the court for updates on the government's search for a suitable trail operator. The courts would oversee all proceedings, allowing for a clear, fair, and less burdensome system for receiving just compensation.

I. THE CREATION OF THE RAILS-TO-TRAILS ACT AND THE LEGAL FRAMEWORK OF TAKINGS COMPENSATION UNDER THE ACT

A. Congress Creates a National Trails System

1. Congress Creates the NTSA in 1968

In 1968, Congress passed the National Trails System Act.28 As set out in the Statement of Policy, the purpose of the Act was "to provide for the ever-increasing outdoor recreation needs of an expanding population and . . . to promote public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas of the Nation."29 To do this, the


29. National Trails System Act § 2(a); see also H.R. REP. No. 98-28, at 2 (1983), as reprinted in 1983 U.S.C.C.A.N. 112, 113 (explaining that the NTSA system relies upon "[v]olunteer efforts by interested trail users themselves, working in concert with various levels of Government . . . [to] expand[] trail recreation opportunities at low cost"). In addition to the NTSA, Congress passed the Railroad Revitalization and Regulatory Reform Act (also known as the 4-R Act). Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 33 (codified as amended in scattered sections of 15, 45, and 49 U.S.C. and former 31 U.S.C.). This Act sought to remedy the shrinking of the rail system in the United States by attempting to put abandoned rights-of-way to other "public purposes." Preseault v. United States (Preseault II), 100 F.3d 1525, 1538 (1996) (citing 49 U.S.C. § 10,906 (1994)); see also Preseault v. Interstate Commerce Comm'n (Preseault I), 494 U.S. 1, 5-6 (1990). The goal of the 4-R Act was to maintain the railroad rights-of-way "so that this mode of transportation will remain viable." 45 U.S.C. § 801(a) (2000). The 4-R Act promoted "conversion of abandoned rights-of-way to recreational and conservational uses" by offering "assistance to local, state, and federal agencies" to stop trackage losses. Preseault I, 494 U.S. at 5-6 (citing 49 U.S.C. § 10,906 (1982)). It required railroad companies to "first offer [a right-of-way] for sale for 'public purposes'" before they could be allowed to abandon it. Preseault II, 100 F.3d at 1538 (citing 49 U.S.C. § 10,906 (1994)).
Act declared that “trails should be established (i) primarily, near the urban areas of the Nation, and (ii) secondarily, within established scenic areas more remotely located.”

The Act set out guidelines for the addition of new trails to the National Trails System, including the “selection of rights-of-way for National Scenic Trails” and publication in the Federal Register of notice of the intention to include those rights-of-way as part of the system. The Act also permitted the acquisition of private land if necessary for the trails, as long as land acquired “without the consent of the owner” constituted “not more than twenty-five acres in any one mile.”

2. Congress Amends the NTSA in 1983

In 1983, Congress amended the NTSA because the original Act and the subsequent Railroad Revitalization Act had not been successful in establishing a process through which railroad rights-of-way...[could] be utilized for trail purposes.” The Amendments included provisions “authoriz[ing] the [former Interstate Commerce Commission] to preserve [abandoned railroad rights-of-way] for possible future railroad use” and, in the interim, to allow for “use of the land as recreational trails.”

31. See id. § 5(a). This system included what the Act called “the initial National Scenic Trails,” which included the Appalachian Trail and the Pacific Crest Trail. Id. The Act also instructed the Secretary of the Interior and the Secretary of Agriculture to “make such additional studies...for the purpose of determining the feasibility and desirability of designating other trails as national scenic trails.” Id. § 5(b). The Act directed that “such studies shall be the basis of appropriate proposals for additional national scenic trails which shall be submitted from time to time to the President and to the Congress.” Id. The Act mentioned fourteen trails explicitly as being suitable for study. Id. § 7(c).
32. Id. § 7(a); see also Caldwell v. United States, 391 F.3d 1226, 1230 (Fed. Cir. 2004) (“If the STB approves the request for an exemption, it will publish a notice of exemption in the Federal Register.” (citing 49 C.F.R. § 1121.4(b) (2004))).
33. National Trails System Act § 7(d).
34. See generally National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 42. This Comment refers to the entire Act, including the 1983 amendments, as the NTSA or the Rails-to-Trails Act.
37. Preseault v. Interstate Commerce Comm’n (Preseault I), 494 U.S. 1, 6 (1990); see also 16 U.S.C. § 1247(d) (2000). In many cases, railroad companies do not own the rights-of-way on which their tracks are located. Instead, the companies own easements, and the original landowners continue to hold fee simple ownership of the land. Preseault I, 494 U.S. at 8. In addition, many of the easements explicitly state that if the easement ceases to be used for railroad purposes, the easement expires and no longer burdens the fee simple. See id. To avoid this, the NTSA describes the transfer of railroad rights-of-way to recreational trails as temporary, and reserves the right to return them to rights-of-way in the future. 16 U.S.C. § 1247(d). Therefore the Act calls the use of trails “interim use.” Id.
gress envisioned using these rights-of-way as railroads again in the event that national security required it, and also considered potential use of these rights-of-way for local transit systems and other types of public transportation. This process of setting aside rights-of-way for future use has been called "railbanking" or "banking."

3. How the NTSA Transfer Process Works

The system Congress created with the NTSA amendments has been implemented by the STB as follows: First, a railroad company decides to abandon its right-of-way. Because the NTSA restricts railroad companies from simply dismantling their own rights-of-way, the railroad company must apply for abandonment with the STB. The STB then issues a Notice of Interim Trail Use or Abandonment (NITU). The NITU gives the STB jurisdiction over the right-of-way for 180 days, allowing the railroad company to negotiate with an individual or organization willing to convert the land into a trail, and to manage and maintain that

38. See Hearing 2002, supra note 3, at 1 (statement of Rep. Bob Barr, Chairman, H. Subcomm. on Commercial and Administrative Law) ("While this program has obvious environmental and recreational benefits, the legislative history of this act indicates another important consideration by the Congress was . . . [the] preservation of our rail corridors which have important implications for our national defense."); id. at 10 (prepared statement of Danaya C. Wright) ("I believe the railbanking program is terribly important, especially after the devastating September 11 attacks. Protecting railroad corridors and the possibility of alternative transportation needs is a public priority."); id. at 24 (statement of Andrea Ferster, General Counsel, Rails-to-Trails Conservancy) ("The curtailment of national air travel following September 11th tragically demonstrated the importance of rail corridor preservation efforts as a way to achieve needed redundancy in our national transportation network.").

39. See id. at 15 (prepared statement of Thomas L. Sansonetti, Assistant Att'y Gen., Environment and Natural Resources Division, U.S. Department of Justice) ("The amendments allow . . . land . . . [to] be transferred to the trail operator for interim trail use, subject to the right to restore or reactivate rail use, including use as light rail for commuters.").

40. See, e.g., Hash v. United States, 403 F.3d 1308, 1311 (Fed. Cir. 2005); see also Hearing 2002, supra note 3, at 2 (statement of Rep. Bob Barr, Chairman, H. Subcomm. on Commercial and Administrative Law) ("Through the statutory process referred to as 'rail banking,' a railroad wishing to cease operating along a particular route can negotiate with a State, municipality, or private group that is prepared to assume financial and managerial responsibility . . . [and] agrees to transfer ownership of the corridor back to the railroad.").


42. See id. § 10,903(a)(2); see also Caldwell v. United States, 391 F.3d 1226, 1229-30 (Fed. Cir. 2004) ("[T]he typical railbanking process begins when a rail carrier files an abandonment application or . . . a request for an exemption." (citations omitted)).

43. 49 C.F.R. § 1152.29 (2006); see also Caldwell, 391 F.3d at 1230 ("If the STB approves the request for an exemption, it will publish a notice of exemption in the Federal Register." (citing 49 C.F.R. § 1121.4(b) (2004))).
Once the two parties reach an agreement, the trail operator effectively holds the right-of-way easement for the possibility that the government will want to return the trail to railroad use at some point in the future. The STB’s jurisdiction over the right-of-way therefore extends indefinitely. However, if no agreement is reached within the 180-day deadline, the NITU allows the railroad company to abandon the right-of-way, ending the STB’s jurisdiction and relieving the underlying fee simple estate of the burden of the easement.

4. How the NTSA System Differs from Typical Takings

Unlike the NTSA system, many physical takings occur through formal condemnation proceedings. Federal Rule of Civil Procedure 71A governs the procedures for actions in federal district courts to condemn private property.

44. See 49 C.F.R. § 1152.29(d)(1); see also Caldwell, 391 F.3d at 1230 (stating that the “potential trail operator . . . file[s] a railbanking petition” and, if the railroad agrees to negotiate with the potential trail operator, the STB then “issue[s] a Notice of Interim Trail Use or Abandonment.”). It is common for the negotiations between the railroad and the trail operator to start before the actual issuance of the NITU: “In some cases . . . an interim trail use agreement may in fact be reached prior to the issuance of the NITU. In other cases, . . . the NITU is issued . . . prior to the finalization of an agreement.” Caldwell, 391 F.3d at 1230.

45. See 49 C.F.R. § 1152.29(a)(3); see also Caldwell, 391 F.3d at 1229 (explaining that “the STB retains jurisdiction for possible future railroad use,” thereby blocking abandonment of the easement); Hearing 2002, supra note 3, at 2 (statement of Rep. Bob Barr, Chairman, H. Subcomm. on Commercial and Administrative Law) (“[T]he conversion to a trail is completed on a temporary or interim basis, because the law potentially provides for two-way conversions: first, conversion to a trail; and second, the possible reactivation of rail service . . .”).

46. Caldwell, 391 F.3d at 1230 (“If negotiations go as planned and an agreement is reached, the NITU extends indefinitely for the duration of recreational trail use subject to the trail operator’s fulfillment of its agreed-upon obligations.”).

47. See 49 C.F.R. § 1152.29(d)(1); see also Caldwell, 391 F.3d at 1230 (“[I]f no agreement is reached within 180 days, the NITU ‘automatically converts into an effective . . . notice of abandonment’ which permits the rail carrier to ‘abandon the line entirely and liquidate its interest.’” (quoting Preseault v. Interstate Commerce Comm’n (Preseault I), 494 U.S. 1, 7 & n.5 (1990) (citations omitted))).

48. See generally Fed. R. Civ. P. 71A (proscribing procedures for actions in federal district courts to condemn private property). While a condemnation proceeding is the formal way for the government to effect a physical taking, the government performs physical takings through inverse condemnation as well:

Broadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: it can enter into physical possession of the property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings. Under the first method—physical seizure—no condemnation proceedings are instituted, and the property owner is provided a remedy under the Tucker Act to recover just compensation. Under the second procedure the Government may either employ statutes which require it to pay over the judicially determined compensation before it can enter upon the land or proceed under other statutes which enable it to take immediate possession upon order of court before the amount of just compensation has been ascertained. United States v. Dow, 357 U.S. 17, 21 (1958) (citations omitted).
erns these proceedings.\textsuperscript{49} This rule requires that the government file a complaint in district court if it plans to take land using its power of eminent domain.\textsuperscript{50} The complaint must describe the land, the reason for the taking, and the government’s “authority for the taking.”\textsuperscript{51} The government becomes the plaintiff in a civil action, and all persons with an interest in the property, whether known or unknown, become defendants. Under Rule 71A, all defendants are served with process\textsuperscript{52} and may submit an answer to the complaint stating their objections to the taking.\textsuperscript{53} The court then determines an amount for compensation, and gives the government a court order to pay the landowner prior to its occupation of the land.\textsuperscript{54}

\textbf{B. The Supreme Court Finds the NTSA Constitutional}

The Supreme Court issued its only decision regarding the Rails-to-Trails Act with \textit{Preseault v. Interstate Commerce Commission (Preseault I)} in 1990.\textsuperscript{55} In that case, the plaintiffs challenged the taking of a railroad right-of-way on their land for use as a public trail.\textsuperscript{56} The plaintiffs owned the land in fee simple\textsuperscript{57} and argued that the land should have reverted to

\begin{footnotesize}
\begin{enumerate}
\item See generally \textit{FED. R. CIV. P. 71A}; see also \textit{E. Tenn. Natural Gas Co. v. Sage}, 361 F.3d 808, 821 (4th Cir. 2004) (citing \textit{Kirby Forest Indus., Inc. v. United States}, 467 U.S. 1, 3-4 (1984)).
\item \textit{FED. R. CIV. P. 71A(a),(c)}; see also \textit{E. Tenn. Natural Gas Co.}, 361 F.3d at 821.
\item \textit{FED. R. CIV. P. 71A(c)(2)}.
\item \textit{Id.}
\item \textit{Id.}; \textit{FED. R. CIV. P. 71A(e)}. If a property owner has no objections to the taking, he can “serve a notice of appearance”; if he does so within the designated time, he will be entitled to “receive notice of all proceedings affecting” the land. \textit{FED. R. CIV. P. 71A(e)}.
\item \textit{FED. R. CIV. P. 71A(j)} (“The plaintiff shall deposit with the court any money required by law as a condition to the exercise of the power of eminent domain . . . . If the compensation finally awarded to any defendant exceeds the amount which has been paid to that defendant on distribution of the deposit, the court shall enter judgment against the plaintiff and in favor of that defendant for the deficiency. If the compensation finally awarded to any defendant is less than the amount which has been paid to that defendant, the court shall enter judgment against that defendant and in favor of the plaintiff for the overpayment.”).
\item \textit{494 U.S. 1} (1990).
\item \textit{Id.} at 9-10. The land was originally taken as an easement, whereby the land would “cease to be a burden on the underlying fee if railroad use were abandoned.” Brief for Petitioners at 4 n.3, \textit{Preseault v. Interstate Commerce Comm’n (Preseault I)}, 494 U.S. 1 (1990) (No. 88-1076) (citing Tr. of the Diocese of Vt. v. State, 496 A.2d 151, 152 (Vt. 1985)). The railroad company stopped using the right-of-way in the late 1960s or early 1970s, and had removed all tracks by 1975. \textit{Preseault I}, 494 U.S. at 9; Brief for Petitioners, \textit{supra} at 5. The plaintiffs sought to quiet their title in the land in 1981, based on the railroad company’s abandonment of the right-of-way. \textit{Preseault I}, 494 U.S. at 9.
\item \textit{Preseault v. United States (Preseault II)}, 100 F.3d 1525, 1531 (Fed. Cir. 1996). The Federal Circuit described the burden on the Preseaults’ land of the transfer from railroad to trail:
\end{enumerate}
\end{footnotesize}
them once it stopped being used as a railroad. They argued that the government's interference with the reversion was an unconstitutional taking of their land for two reasons. First, it was beyond Congress's commerce power to enact the legislation; and second, the Act did not provide just compensation, which rendered it unconstitutional.

The Court did not find it necessary to reach the issue of whether transfers to trail operators under the NTSA constituted takings. Instead, the Court ruled that the Act was a legitimate use of Congress's commerce power to classify the conversion of the railroad to a pedestrian path as a legitimate commercial activity.

[A]n eight foot wide paved strip was established on the former right-of-way. The path is some 60 feet from the Preseaults' front door. On each side of the Preseaults' driveway, where it crosses the easement, two concrete posts and one metal post were installed to block automobile traffic. The city also erected two stop signs on the path and built a water main under and along the path. The path is used regularly by members of the public for walking, skating, and bicycle riding. On warm weekends up to two hundred people an hour go through the Preseaults' property. People using the path often trespass on the Preseaults' front yard. Id. at 1550.

58. Preseault I, 494 U.S. at 9. When property owners retain a fee simple interest in the land, and the railroad owns only an easement to use the land for railroad purposes, there is actually no "reversion" that should occur because the railroad does not own a defeasible fee. See Preseault II, 100 F.3d at 1533-34. In fact, once the easement ends, the property owners' underlying fee simple owned by the property owners simply stops being burdened by the easement. See id. However, it is common to use the term "reversion" when discussing the issue of railroad right-of-way conversion. Id. at 1533; see also supra note 13.

59. Preseault I, 494 U.S. at 4; see also Preseault v. Interstate Commerce Comm'n, 853 F.2d 145, 147 (2d Cir. 1988), aff'd, 494 U.S. 1 (1990). Because the rights-of-ways had been abandoned without the approval of the ICC, the Superior Court of Chittenden County, Vermont determined that it did not have jurisdiction to quiet title "because the ICC had not authorized abandonment . . . and therefore still exercised exclusive jurisdiction," and the state supreme court affirmed. Preseault I, 494 U.S. at 9 (citing Tr. of the Diocese of Vt., 496 A.2d 151). The state and the railroad subsequently applied for permission to abandon with the ICC, and the ICC dismissed the property owners' claims. Id. at 9-10; see also Preseault, 853 F.2d at 147-48. The Preseaults then brought a claim against the ICC in federal court on the grounds that the NTSA effected an unconstitutional taking against them. Preseault I, 494 U.S. at 4. The Second Circuit determined that the Rails-to-Trails Act could not effect a taking in any circumstance. Preseault, 853 F.2d at 151. The Supreme Court subsequently granted certiorari to determine whether the Rails-to-Trails Act was constitutional. Preseault I, 494 U.S. at 10.

60. Preseault I, 494 U.S. at 10.

61. Id. at 4 ("We find it unnecessary to evaluate the merits of the takings claim because we hold that even if the Rails-to-Trails statute gives rise to a taking, compensation is available to petitioners under the Tucker Act and the requirements of the Fifth Amendment are satisfied." (citation omitted)). But see id. at 22 (O'Connor, J., concurring) (implying that the Court would, in fact, have found NTSA transfers to be takings if it were necessary for the Court to decide the issue because "[t]he [ICC's] actions may delay property owners' enjoyment of their reversionary interests, but that delay burdens and defeats the property interest rather than suspends or defers the vesting of those property rights. Any other conclusion would [be] . . . incompatible with the Fifth Amendment." (citations omitted)).
power, and that, if the Act effected a taking, the taking was constitutional because the Tucker Act provided a remedy for just compensation. The Court explained, "[a]ll that is required by the Fifth Amendment is the existence of a 'reasonable, certain and adequate provision for obtaining compensation.'" The NTSA met the constitutional requirement of just compensation, and the Court found it unnecessary to decide the takings issue since the plaintiffs had failed to seek compensation via the available remedy.

C. The Federal Circuit Finds that the NTSA Effects Takings

The issue of whether an NTSA conversion caused a taking remained undecided after Presault I. But in 1996, the Preseaults’ Tucker Act claim reached the Federal Circuit. In that case, commonly known as Preseault II, the court determined that the Rails-to-Trails Act did effect a taking against the property owners. The court reiterated the Supreme Court’s

62. Id. at 18-19 (majority opinion); see also Jeff Sharp, Rails-to-Trails, Rational Governments, and a Constitutional Shortcut: The Perils of Preseault, 29 REAL EST. L.J. 299, 306-07 (2001) (“Upon Supreme Court review, the Commerce Clause issue was resolved with relatively little discussion. . . . The Court applied the traditional rule of deference, finding a rational basis for the legislation and that the means . . . were ‘reasonably adapted to the end permitted by the Constitution.’” (footnotes omitted)).

63. Preseault I, 494 U.S. at 11-13, 17. Because “taking claims . . . are premature until the property owner has availed itself of the process provided by the Tucker Act,” the plaintiffs could not bring a claim against the federal government until they had exhausted the available Tucker Act remedy. Id. at 11 (quoting Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City, 473 U.S. 172, 195 (1985)). The Tucker Act requires that all constitutionally-based claims against the U.S. government be brought in the Court of Federal Claims. 28 U.S.C. § 1491(a)(1) (2000). But “[t]he Tucker Act . . . ‘merely confers jurisdiction’” on the Court of Federal Claims for claims that already exist; it does not itself “create any substantive right” or new cause of action against the government. Allen v. United States, 46 Fed. Cl. 677, 680 (2000) (quoting Berry v. United States, 27 Fed. Cl. 96, 100 (1992)). In addition, only takings that have been “authorized by Congress, expressly or by implication,” are subject to Tucker Act jurisdiction. NBH Land Co. v. United States, 576 F.2d 317, 319 (Cl. Ct. 1978) (citing Hooe v. United States, 218 U.S. 322, 3335 (1910)); see also Sharp, supra note 62, at 308-09 (“Claims against the federal government for damages founded on the Constitution, a statute, a regulation, or an express or implied-in-fact contract are placed under the jurisdiction of the United States Court of Federal Claims by virtue of the Tucker Act. Takings claims fall within this description.”) (footnotes omitted)).

64. Preseault I, 494 U.S. at 11 (quoting Reg’l Rail Reorganization Act Cases, 419 U.S. 102, 124-25 (1974)); see also Williamson County Reg’l Planning Comm’n, 473 U.S. at 194 (“If the government has provided an adequate process for obtaining compensation, and if resort to that process ‘yield[s] just compensation,’ then the property owner ‘has no claim against the Government’ for a taking.” (alteration in original) (citation omitted)).


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

67. Id. at 1530-31, 1551 (“We have here a straightforward taking of private property for a public use for which just compensation must be paid.”). The court determined that
determination, however, that the government’s constitutional right to exercise eminent domain to convert railroads into trails did not exempt it from paying “just compensation for the state-created rights thus destroyed.” The court determined that the Preseaults had suffered a taking, and that they therefore deserved just compensation from the

the original easement to the railroad company was not sufficiently broad to include recreational trails:

When the easements here were granted to the Preseaults’ predecessors in title at the turn of the century, . . . could it be said that the parties contemplated that a century later the easements would be used for recreational hiking and biking trails . . . ? We think not. . . . In the one case, the grantee is a commercial enterprise using the easement in its business . . . . In the other, the easement belongs to the public, and is open for use for recreational purposes, which happens to involve people engaged in exercise or recreation on foot or on bicycles. It is difficult to imagine that either party to the original transfers had anything remotely in mind that would resemble a public recreational trail.

Id. at 1542-43. This decision was an en banc rehearing of the case, overruling a decision by a three-judge panel. Id. at 1529; see also Hearing 2002, supra note 3, at 28 (prepared statement of Andrea Ferster, General Counsel, Rails-to-Trails Conservancy) (emphasizing that the en banc decision in Preseault II was a plurality, rather than a majority, opinion). Though the Preseault II decision was a plurality, it has been upheld in later Rails-to-Trails cases. See, e.g., Caldwell v. United States, 391 F.3d 1226, 1228 (Fed. Cir. 2004).

68. Preseault II, 100 F.3d at 1537 (citing Preseault I, 494 U.S. at 22 (O’Connor, J., concurring)). The government argued unsuccessfully that a long line of federal railroad laws enacted after the creation of the easements effectively trumped the state easement law in place at the time of the conveyance. See id.

69. Preseault II, 100 F.3d at 1551. The court explained that its holding was limited: for example, “if the railroad owns the right-of-way; a fee simple,” then the landowner does not own an underlying property right and no taking occurs when the railroad converts to a trail. Id. at 1551; see also Hearing 2002, supra note 3, at 7 (prepared statement of Danaya C. Wright) (explaining that “[t]here are only two situations in which the railbanking statute” affects a taking: first, “where the landowner conveyed a defeasible fee simple interest to the railroad and retained a reverter interest,” and second, “where the landowner conveyed only an easement to the railroad for purposes of running trains.”).

In a subsequent unpublished decision, the court further determined that the language of each specific easement can restrict a landowner’s ability to seek compensation. See Chevy Chase Land Co. of Montgomery County, Md. v. United States, No. 97-5079, 1999 WL 1289099, at *2-3 (Fed. Cir. Dec. 17, 1999) (citing Preseault II, 100 F.3d at 1552). Specifically, based on questions certified to the Court of Appeals of Maryland, the Federal Circuit held that an easement written in broad language that can be construed to include trail use will not effect a taking if transferred to a trail operator. Id. As long as trail use is within the parameters of the original easement, the transfer to a trail is a legitimate use of the land and does not effect a taking. Id. (“[I]f the terms of the easement when first granted are broad enough . . . to encompass trail use, the servient estate holder would not be in a position to complain about the use of the easement for a permitted purpose.”) (quoting Preseault II, 100 F.3d at 1552)). Therefore, the court determined that compensation was unnecessary because the landowners had not suffered an additional taking. Id. at *3.

In 2004, the Federal Circuit decided Toews v. United States, which it distinguished from Chevy Chase Land Co. because the “terms of the deed of grant [of the easement] are ex-
government.  

1. Takings Generally

Takings by the government are not prohibited. In fact, the Fifth Amendment allows for the taking of private property upon payment of "just compensation." In addition to the requirement that the property owner receive just compensation, the Supreme Court has also determined that the government may only take property for public use. Further,
thermore, takings can occur without any direct government action at all: if the government "puts into play a series of events which result in a taking of private property," it is enough to constitute government action for the purposes of takings. In other words, it is immaterial that the government effects the taking indirectly through a third party.

2. Physical Versus Regulatory Takings

The government can effect two kinds of takings on a person's property: physical takings and regulatory takings. Physical takings involve an actual physical appropriation of the property owner's land, whereas regulatory takings occur when the government implements legislation that effectively bars the land owner from using the land as he would otherwise prefer.
The Federal Circuit explained in *Preseault II* that NTSA takings cannot be categorized as regulatory.79 Instead, because the NTSA authorizes "physical entry upon . . . private lands . . . under the federal government's authority pursuant to the ICC's Order," these takings are physical.80 The seizure of the Preseaults' land in order to create "a public trail was in effect a taking of a new easement for that new use."81 Further, the court explained that the "new easement for the new use" necessarily "constitut[ed] a physical taking of the right of exclusive possession that belonged to the Preseaults."82

### 3. Timing: When a Taking Occurs

For NTSA takings in particular, it has become important to determine when the actual taking occurs. The Supreme Court has explained that in cases where a taking occurs through a "physical invasion . . . the usual rule is that the time of the invasion constitutes the act of taking."83 All takings, whether physical or regulatory, occur when "all events which fix the government's . . . liability have occurred."84 Therefore, a takings

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79. *See Preseault II*, 100 F.3d at 1538-40. The government attempted to argue that the 1920 Transportation Act, the 4-R Act of 1976, and the 1983 NTSA Amendments effected regulatory takings through the *possibility* of transfers of rights-of-way to trail use. *Id.* at 1537-38. The court rejected this argument, concluding that "enactment of broad general legislation authorizing a federal agency to engage in future regulatory activity is not the type of government action that alone supports a taking claim." *Id.* at 1538 (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981)).

80. *Id.* at 1551; *see also* Appellants' Reply Brief at 4-5, *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004) (No. 03-5152) (arguing that the analysis for regulatory takings is inappropriate for physical takings: "The government's reliance on regulatory takings precedents in a physical takings case violates the Supreme Court's recent admonition that the 'longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for . . . [regulatory takings], and vice versa.'" (citing *Tahoe*, 535 U.S. at 323)).

81. *Preseault II*, 100 F.3d at 1550.

82. *Id.*

83. *United States v. Clarke*, 445 U.S. 253, 258 (1980) (citing *United States v. Dow*, 357 U.S. 17, 22 (1958)). In *Caldwell*, the plaintiffs argued that because takings under the NTSA are physical, and not regulatory, the specific facts of each case are not important to the determination of the time when the taking occurs:

[T]his is a permanent physical taking claim, and straightforward property rules, not complex factual assessments, govern. The question is simply when, as a matter of law, the Appellants' property interest was converted to interim trail use pursuant to 16 U.S.C. § 1247(d). . . . This could not have occurred before [the trail operator] had the right to enter upon the land to manage the trail and was actually responsible for taxes and legal liability, as required by the statute and supporting regulations.

Appellants' Reply Brief, *supra* note 80, at 5.

84. *Boling v. United States*, 220 F.3d 1365, 1370 (Fed. Cir. 2000) (quoting Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1577 (Fed. Cir. 1988)). In *Boling*, the court further recognized that "the key date for accrual purposes is the date on which
claim logically must begin to accrue at the point of the physical invasion or take-over, and the value of the property should be assessed as of that date. 85

In Preseault II, the Federal Circuit described the “Government’s use of the property for a public trail” as a “new, unauthorized, use,” firmly stating that whether or not the land had been previously abandoned, the government’s use was a taking. 86 Though this language suggests that the taking occurs at the point when the new use begins—when the trail operator enters the land—the Federal Circuit determined in 2004, in Caldwell v. United States, that the statute of limitations began, instead, at the moment the STB issued the NITU announcing the railroad company’s intent to abandon its right-of-way. 87

D. Statute of Limitations and NTSA Takings Claims

Even if the Court of Federal Claims has jurisdiction over a claim, “procedural limitations still exist,” including a statute of limitations. 88 The Tucker Act states that “[e]very claim . . . shall be barred unless the petition thereon is filed within six years after such claim first accrues.” 89

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85. See Brief for Plaintiffs-Appellants at 39, Barclay v. United States, 443 F.3d 1368 (Fed. Cir. 2006) (No. 05-1255) (“If a physical intrusion is the hallmark of a per se physical takings claim, it is self-evident that the claim for a per se physical taking can accrue no earlier than the time when the physical intrusion occurs . . . . The Supreme Court’s discussions concerning physical takings cases support no other conclusion . . . .”).
86. Preseault II, 100 F.3d at 1549.
88. Allen v. United States, 46 Fed. Cl. 677, 680 (2000). The statute of limitations imposed on Tucker Act claims is an “express limitation upon the waiver of sovereign immunity contained in the Tucker Act.” Id. Under the doctrine of sovereign immunity, the government is presumptively exempt from liability unless it explicitly consents to it. MICHAEL L. WELLS & THOMAS A. EATON, CONSTITUTIONAL REMEDIES 1 (2002) (“From the beginning of our history as a nation, the central obstacle to an effective system of constitutional remedies has been the doctrine of ‘sovereign immunity’: that is, the principle that the government may not be sued without its consent.”). The tradition of sovereign immunity in the United States originated in the thirteenth century with the immunity of the English monarchy. See id. at 2. When the American colonies won independence, they chose not to abolish the doctrine of sovereign immunity, but instead adopted it as applicable to both the federal government and the governments of each individual state. Id. at 3. Even given the historical assumption that the government is immune from suits against it, the U.S. Congress has gradually given its consent to suits through actions such as the creation of the Court of Claims in 1855, and through legislation such as the Tucker Act in 1887 and the Federal Tort Claims Act in 1946. Id. at 11.
89. 28 U.S.C. § 2501 (2000); see also Allen, 46 Fed. Cl. at 680. In addition to the statute of limitations, Congress placed other conditions on the Tucker Act exemption from sovereign immunity. Specifically, Congress can exempt certain legislation from the Tucker Act: where Congress has explicitly “withdrawn the Tucker Act grant of jurisdiction,” the Court of Federal Claims may not hear claims involving that statute even if such claims are
The issue, then, becomes determining when the claim begins to accrue.\footnote{Barclay v. United States, 443 F.3d at 1368, 1370 (Fed. Cir. 2006), cert. denied, 127 S. Ct. 1328 (2007).}

\section*{1. Caldwell v. United States Sets Date of Accrual}

In 2004, the United States Court of Appeals for the Federal Circuit decided \textit{Caldwell v. United States}.\footnote{Caldwell, 391 F.3d 1226.} In that case, the railroad announced its intent to abandon its right-of-way, and the STB issued a notice in order to promote a railbanking agreement.\footnote{Id. at 1230-31.} The city successfully petitioned for a NITU in August 1994, and before the 180-day time limit had expired, it moved for an extension.\footnote{Id. at 1231.} The STB extended the negotiation period for an additional 180 days to August 1995.\footnote{Id.} The city arranged for a trail group to purchase the right-of-way, but no closing date was set.\footnote{Id.} The city and the group finally signed a railbanking agreement in July 1996, but requested that the NITU "be further extended 'through the time of the actual transfer of the corridor to the interim trail manager.'"\footnote{Id. at 1228.} The railroad company finally transferred the land to the city in October 1996, more than two years after the STB issued the original NITU.\footnote{See id. at 1231-32.}

The plaintiffs brought suit for compensation under the Tucker Act, but the government argued that the statute of limitations had run.\footnote{Id.} The
Caldwells brought their claim on October 7, 2002, just four days shy of six years from the date the transfer from the railroad company to the trail operator was recorded. But the court determined that the Caldwells were barred from receiving compensation because a taking pursuant to the Rails-to-Trails Act actually begins accruing for purposes of the Tucker Act's statute of limitations when the railroad and trail operator announce their "intention to negotiate a trail use agreement" and the STB issues a NITU. In other words, the court determined that the taking in an NTSA transfer occurs when the railroad announces its intent to abandon, and not when the railroad right-of-way is actually transferred for trail use.

2. Barclay v. United States Upholds Caldwell

Similarly, in 2006, the Federal Circuit decided in Barclay v. United States that the plaintiffs' claims for compensation under the Tucker Act were barred because the statute of limitations had run. The reasoning in Barclay was essentially the same as that in Caldwell: the NITU effected the taking, and any claims for compensation should have been brought within six years of the STB's issuance of the NITU. The court further

99. Id. at 1232.
100. Id. at 1228, 1235. Though the lower court had held in favor of the government, it determined that the start-date for the statute of limitations was the transfer of the right-of-way from the railroad upon the signing of an agreement. Caldwell v. United States, 57 Fed. Cl. 193, 203 (2003), aff'd, 391 F.3d 1226 (Fed. Cir. 2004) ("[T]he court holds that the Government taking is fixed upon the signing of the Trail Use Agreement. At that time the provisions of the NITU become permanent, depriving the plaintiffs of their rights in the land in question."). The Federal Circuit affirmed the decision in favor of the government, but determined that the statute of limitations begins instead at the issuance of the NITU. Caldwell, 391 F.3d at 1236.
101. See Caldwell, 391 F.3d at 1233. The court determined that the taking begins at that moment because the NITU acts to prevent abandonment according to section 8(d) of the NTSA. Id.; see also 16 U.S.C. § 1247(d) (2000). The Caldwell plaintiffs had contended that the government's arguments for setting the taking at the time of the NTU were flawed for three reasons:
   First, the Government implies that Trails Act takings are regulatory takings, which are subject to an ad hoc factual analysis, when binding law holds that a taking under the Trails Act is a physical taking, and subject to straightforward property law rules.
   Second, the Government seeks to blur the lines between the issuance of the NITU and the ultimate authorization of conversion to trail use under the NITU; it can only be the conversion that effects a taking. Finally, the Government contends that an act by the United States is necessary to implicate the United States in a taking, even though cases from the Supreme Court and this Court show that is not so.
Appellants' Reply Brief, supra note 80, at 1.
103. Id. at 1378. The facts in Barclay differed from those in Caldwell, however, in that some of the NITUs issued for different portions of the railroad were subsequently substituted with new NITUs, thereby "vacat[ing]" the previous NITUs. Barclay v. United
explained that, because the "issuance of the NITU is the only government action in the railbanking process," the NITU is the only possible trigger for a takings action against the government. Therefore, the statute of limitations must begin to run at the issuance of the first NITU, even if that NITU is ultimately unsuccessful.

3. Judge Newman’s Dissent

Barclay and Caldwell were heard by the same three-judge panel of the Federal Circuit. Judge Pauline Newman dissented in both opinions. In her Caldwell dissent, Judge Newman argued that the majority’s ruling caused the statute of limitations to begin to accrue "from a date before the Caldwell property was ‘taken’ in Fifth Amendment terms." The issuance of the NITU, she explained, did not "vest[] a cause of action in the owner of the fee" because it was not "a ripened taking." She argued that the government’s "liability . . . was not fixed" until the easement actually transferred from the railroad to the trail operator (here, the City of Columbus), and that, in fact, the railroad "continued as owner of the right-of-way, [and] retained all of the benefits and obligations of ownership" until the conveyance of the easement.

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104. Barclay, 443 F.3d at 1373 (quoting Caldwell, 391 F.3d at 1233); see supra notes 74-75 and accompanying text; see also Hearing 2006, supra note 15 (statement of Rep. Todd Akin and Rep. Russ Carnahan) (discussing changing the date the statute of limitations begins to run in response to Caldwell).
105. See Barclay, 443 F.3d at 1378 ("[W]e adhere to Caldwell and hold that the issuance of the original NITU triggers the accrual of the cause of action.").
106. The panel included Circuit Judges Newman, Dyk, and Prost. Barclay, 443 F.3d at 1370; Caldwell, 391 F.3d at 1228.
107. Barclay, 443 F.3d at 1378 (Newman, J., dissenting); Caldwell, 391 F.3d at 1236 (Newman, J., dissenting).
109. Id.
110. Id. These “benefits and obligations of ownership” include such things as “the right to exclude, the obligation to pay taxes, and liability for injury and liens.” Id. at 1236.
In her *Barclay* dissent, Judge Newman again explained that a taking "cannot occur simply upon issuance of a NITU, because the deprivation of the reversion has not yet occurred," and, she emphasized, "may never occur." Because the NITU is "prospective, and requires additional steps by the rail carrier and others" before it can have legal effect and because the railroad is not required to "consummate an agreement for rails-to-trails conversion," it is not certain when the NITU is issued that the railroad will ever be converted to a trail, and, consequently, there cannot yet be a taking.

Judge Newman suggested in the two dissents that a takings claim is not ripe at the time the STB issues the NITU. Further, the plaintiffs do not actually possess the necessary standing to sue until a later point. Judge Newman's *Barclay* dissent was not enough to persuade the Federal Circuit to rehear the case en banc, so the three-judge panel's decision stands. Barclay v. United States, No. 05-1255, 2006 U.S. App. LEXIS 24389 (Fed. Cir. Sept. 12, 2006). En banc rehearing means that "[a] majority of the circuit judges who are in regular active service" agree to hear the case as a full panel. FED. R. APP. P. 35(a). Under Rule 35(a), the court will only hear a case en banc if 

1. en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
2. the proceeding involves a question of exceptional importance." *Id.* Interestingly, the Federal Circuit cannot "overrule a binding precedent" unless it is sitting en banc. FED. CIR. R. 35(a)(1). Therefore, it is possible that the *Barclay* panel could not have ruled any differently if it considered *Caldwell* to be binding precedent, and that only with an en banc hearing of *Barclay* could the result have been any different.

111. *Barclay*, 443 F.3d at 1378 (Newman, J., dissenting). Judge Newman's *Barclay* dissent was not enough to persuade the Federal Circuit to rehear the case en banc, so the three-judge panel's decision stands. Barclay v. United States, No. 05-1255, 2006 U.S. App. LEXIS 24389 (Fed. Cir. Sept. 12, 2006). En banc rehearing means that "[a] majority of the circuit judges who are in regular active service" agree to hear the case as a full panel. FED. R. APP. P. 35(a). Under Rule 35(a), the court will only hear a case en banc if "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." *Id.* Interestingly, the Federal Circuit cannot "overrule a binding precedent" unless it is sitting en banc. FED. CIR. R. 35(a)(1). Therefore, it is possible that the *Barclay* panel could not have ruled any differently if it considered *Caldwell* to be binding precedent, and that only with an en banc hearing of *Barclay* could the result have been any different.


113. *Id.* at 1379.

114. *Id.*

115. *Id.* at 1380.

116. *Id.* at 1378; *Caldwell* v. United States, 391 F.3d 1226, 1236 (Fed. Cir. 2004) (Newman, J., dissenting). Courts determine ripeness based on "whether a dispute has yet matured to a point that warrants decision." 13A CHARLES ALLAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3532 (2d ed. 1984). A claim is not yet ripe if it "involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.* § 3532 (Supp. 2006). The purpose of the ripeness doctrine is to prevent plaintiffs from having "to sue in the face of such uncertainty," so that the courts are not bogged down with suits that are not ready to be heard. Boling v. United States, 220 F.3d 1365, 1370 (Fed. Cir. 2000) (citing United States v. Dickinson, 331 U.S. 745, 749 (1947)). In other words, the ripeness doctrine prevents courts from entertaining "mere hypothetical question[s]." WRIGHT, MILLER & COOPER, supra, §§ 3532.1-2 (2d ed. 1984) ("The central perception is that courts should not render decisions absent a genuine need to resolve a real dispute. Unnecessary decisions dissipate judicial energies . . . . "). Therefore, the ripeness doctrine requires that "accrual of the claim [be] delayed until the situation becomes 'stabilized.'" *Dickinson*, 331 U.S. at 749.

117. *Barclay*, 443 F.3d at 1380 (Newman, J., dissenting) (explaining that "[a] suit for compensation is not ripe until the taking occurs," and that the NITU's "delay" of possible conversion to trail use, while it remains unknown whether trail use will occur at all, is not a *per se* taking"); *Caldwell*, 391 F.3d at 1237 (Newman, J., dissenting) ("Negotiation of a possible future event may state a hope and a plan, but it is not a fixed, ripe, and compensable taking.").
Newman emphasized in *Barclay* that takings claims “do[] not accrue until ‘all events have occurred that fix the alleged liability of the government and entitle the plaintiff to institute an action.’”

**II. THE CALDWELL AND BARCLAY DECISIONS MUST BE REMEDIED IN THE INTEREST OF JUSTICE**

**A. Under Current Law, the Statute of Limitations for Rails-to-Trails Takings Begins to Run Before a Claim Exists**

The current state of the law—that the statute of limitations on Rails-to-Trails takings cases begins to run upon the issuance of a NITU by the STB—provides a remedy before any claim is ripe. The issuance of a NITU does not guarantee the transfer of the railroad right-of-way to a trail operator. As Judge Newman states in her *Caldwell* dissent, “[i]ntentions are rarely actionable; it is the consummation that accrues legal rights.” Therefore, the statute of limitations should begin to run only when the transfer is certain: the moment when the railroad company transfers its interest in the land to the trail operator.

In addition, unlike with other takings, the NITSA takings process does not involve condemnation procedures. Because of this, “there is no

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118. *Barclay*, 443 F.3d at 1380 (Newman, J., dissenting) (quoting Seldovia Native Ass’n v. United States, 144 F.3d 769, 774 (Fed. Cir. 1998)).
119. Id.; see also *Boling*, 220 F.3d at 1370.
120. See 49 C.F.R. § 1152.29(d) (2006); see also *Caldwell* v. United States, 57 Fed. Cl. 193, 195 (2003) (“If the parties do not reach a Trail Use Agreement during the initial negotiating period allowed by the NITU, and the ICC does not extend the negotiating period, the NITU authorizes the railroad to exercise its option to abandon the line . . . .”), aff’d, 391 F.3d 1226 (Fed. Cir. 2004); *Barclay*, 443 F.3d at 1378 (Newman, J., dissenting) (“[T]he NITU do[es] not make trail use mandatory, and if trail use is not achieved, the statute effects abandonment of railway use and reversion of the right-of-way easement.”).
121. *Caldwell*, 391 F.3d at 1238 (Newman, J., dissenting). The *Barclay* plaintiffs contended that not all NITUs result in a transfer: “In 2002 . . . there were approximately 68 different . . . NITU’s . . . pending. Brief for Plaintiffs-Appellants, *supra* note 85, at 52. Of those, 19 resulted in the railroad filing a ‘Consummation Notice’ . . . on part or all of the right-of-way segments.” *Id.* In other words, 19 out of 68 NITUs ended in abandonment of the right-of-way and reversion to the landowners. If more than 25 percent of NITUs fail to ultimately effect a taking, then the taking cannot be said to occur at the time the STB issues the NITU. *See id.* at 53.
122. *See Barclay*, 443 F.3d at 1381 (Newman, J., dissenting) (“[L]iability for a taking is based on the change in use of the easement from railroad use to recreational trail. Until that change is fixed and its occurrence firm, there is no accrual of the right to recover compensation for such taking.”).
123. *Hearing 2002*, *supra* note 3, at 23 (prepared statement of Nels Ackerson, Chairman, The Ackerson Group, Chartered); *see also* Preseault v. Interstate Commerce Comm’n, 494 U.S. 1, 16 n.10 (1990) (“As administered by the ICC, the conversion process begins when a railroad voluntarily seeks a . . . NITU; it then negotiates with a qualified trail operator to establish interim trail use. The ICC does not set up trails on its own and
statutory framework to notify and explain rights or procedures to [the] landowners.\textsuperscript{124} Therefore, the property owner receives no notice of the taking, no explanation of the taking, and no "plain statement of the authority for the taking,"\textsuperscript{125} as he would receive in formal condemnation procedures. The fee simple landowner receives constructive notice only if the deed for the easement is recorded at the end of the NTSA process.\textsuperscript{126} For purposes of the statute of limitations, this means that the claim could accrue for years without the landowner's knowledge.

\section*{B. The Court of Appeals for the Federal Circuit's Decisions in Caldwell and Barclay Disregard That Court's Own Precedent}

The decisions in Caldwell and Barclay defy the Federal Circuit's own precedent in three ways. First, the court rejected the government's expectation argument in Preseault \textsuperscript{II}, but incorporated a similar expectation argument in Caldwell and Barclay.\textsuperscript{127} Second, in Caldwell itself, the court explained that the retention of the STB's jurisdiction over the right-of-way depended on the railroad and trail operator reaching an agreement.\textsuperscript{128} And third, in Preseault \textsuperscript{II}, the court specifically described the taking as occurring at the moment the trail operator took possession of the right-of-way.\textsuperscript{129} The court's holdings in Caldwell and Barclay that the statute of limitations begins to accrue at the issuance of the NITU ignore this significant precedent.

\begin{itemize}
  \item has interpreted [NTSA] § 8(d) to exclude the type of condemnation power vested in the Secretaries of the Interior and Agriculture by 16 U.S.C. § 1246(g)."
  \item 124. \textit{Hearing 2002, supra} note 3, at 23 (prepared statement of Nels Ackerson, Chairman, The Ackerson Group, Chartered).
  \item 125. \textit{FED. R. CIV. P. 71A(c)(2).} In 1998, the District of Columbia Circuit decided that the STB is not required to give notice to the landowners at the time a NITU is issued. Nat'l Ass'n of Reversionary Prop. Owners v. Surface Transp. Bd. (NARPO), 158 F.3d 135, 139 (D.C. Cir. 1998) ("The notice provisions did not (as they do not today) provide for individual notice to holders of reversionary interests of abandonment proceedings . . .").
  The railroad is required, however, to notify other parties besides the property owner when it intends to abandon:

  When a railroad wishes to abandon a corridor it files a Notice of Intent with the STB. The railroad must provide a copy of the Notice to significant users of the railroad, certain state entities including the governor, certain federal entities . . . and relevant railway labor organizations. The Notice must also be posted in relevant railroad stations and published in a newspaper once a week for three weeks in each affected county.

  \textit{Id.} (citing 49 C.F.R. § 1152.20(a)).

  \item 126. \textit{Cf. NARPO}, 158 F.3d at 138-39 (detailing abandonment process).

  \item 128. \textit{Caldwell,} 391 F.3d at 1233.
  \item 129. \textit{Preseault II,} 100 F.3d at 1550-51.
\end{itemize}
In *Preseault II*, the court determined that the parties could not translate a regulatory takings argument of “reasonable expectations” into a physical takings case.\(^{130}\) The court rejected the government’s argument that the landowners should have expected the government to further burden their land, not only because the argument incorrectly defined a property owner’s compensable property rights according to that owner’s subjective expectation of those rights,\(^{131}\) but also because it muddled regulatory takings law with physical takings law.\(^{132}\)

In *Caldwell* and *Barclay*, the court upheld an expectation-based interpretation of the NTSA: though the taking is only potential\(^{133}\) at the time the STB issues the NITU, it is likely to occur and the parties should expect it.\(^{134}\) However, it is clear from the court’s decision in *Preseault II* that a landowner’s expectation of a future transfer of the easement should not be used to measure a physical taking,\(^{135}\) because as the *Barclay* plaintiffs argued, “[a] claim for a physical taking accrues at the time all events have

\(^{130}\) *Id.* at 1539-40. The lower court accepted the government’s expectation argument, explains Professor Jeff Sharp, in granting summary judgment against the Preseaults: “[B]ecause Preseault bought the property subject to a viable railroad right-of-way, Preseault never should have expected the railroad or the government to relinquish such a valuable interest.” *Sharp*, supra note 62, at 310. The lower court essentially determined that because the Preseaults “had no reason to expect that [they] would reacquire the right-of-way, [their] ‘investment backed expectation’ regarding that interest should have been zero.” *Id.* The Federal Circuit, according to Sharp, rejected this reasoning as “the government’s specific authority for this novel approach to takings jurisprudence ‘stood the law on its head.’” *Id.* at 314 (citing *Preseault II*, 100 F.3d at 1540). Instead, the appellate court “determined that the other concept involving property owners’ expectations, regulatory takings jurisprudence, was not relevant here, because [the Preseaults were] making a claim based on a physical invasion by the government . . . .” *Id.* at 315.

\(^{131}\) *Preseault II*, 100 F.3d at 1539-40; *see also* Sharp, supra note 62, at 315.

\(^{132}\) *Preseault II*, 100 F.3d at 1540; *see also* Sharp, supra note 62, at 315. In regulatory takings cases, courts consider the property owner’s “reasonable investment-backed expectations” at the time he acquired the property. Sharp notes, because courts measure regulatory takings by a government regulation’s adverse effects on the property owner’s use of his property. *Sharp*, supra note 62, at 315 n.81 (citing *Preseault II*, 100 F.3d at 1540).


\(^{134}\) *See* Barclay, 443 F.3d at 1373, 1378; *Caldwell*, 391 F.3d at 1233-34. *Caldwell* and *Barclay* both effectively hold that, once the STB has issued a NITU, the parties should reasonably expect the railroad to transfer to a trail. Notably, the government in *Caldwell* did not bring an expectation argument, and even argued in favor of the taking occurring at the time of an agreement between the railroad company and the trail operator: “[T]he NITU provides time for the parties to negotiate, but until they reach an interim trail use agreement the NITU is effectively inchoate.” Brief of Appellee at 18, *Caldwell* v. United States, 391 F.3d 1226 (Fed. Cir. 2004) (No. 03-5152).

\(^{135}\) *Preseault II*, 100 F.3d at 1540.
occurred to fix the government’s liability," not at the time the parties expect they might occur.

In addition, the *Caldwell* court cites precedent stating that "[t]he effect of the notice, if the railroad and the prospective trail operator reach an agreement, is that the STB retains jurisdiction for possible future railroad use and the abandonment of the corridor is blocked." This statement implies that the NITU’s effectiveness depends on the railroad company and the trail operator reaching an agreement. But an official agreement does not occur when the STB issues the NITU; rather, it occurs at the end of the process when the right-of-way is actually transferred to the trail operator. The court’s holdings in *Caldwell* and *Barclay*, therefore, contradict prior cases that conditioned the effect of a taking on the success of an agreement.

Finally, in *Preseault II*, the court held that a taking occurred when the trail operator, "pursuant to federal authorization, took possession of [the rights-of-way] and opened them to public use." The taking did not occur until the trail operator actually took control of the land. This passage refutes the argument made by the government (and adopted by the court) in *Caldwell* and *Barclay* that the only government action in NTSA transfers is the issuance of the NITU. In *Preseault II*, the court described the trail operator's possession of the right-of-way as pursuant to federal authority, indicating that the transfer of title constitutes indirect government action. In NTSA takings cases, therefore, the agreement

138. See id. at 1230; see also *Barclay*, 443 F.3d at 1381 (Newman, J., dissenting) ("[L]iability for a taking is based on the change in use of the easement from railroad use to recreational trail. Until that change is fixed and its occurrence firm, there is no accrual of the right to recover compensation for such taking.").
139. *Preseault II*, 100 F.3d at 1550.
140. Id. at 1550-51.
141. See *Caldwell*, 391 F.3d at 1233-34 ("The issuance of the NITU is the only government action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way."). Because the finalization of the agreement "under the Trails Act" does not involve the STB, but is solely between the railroad company and the trail operator, and because "the regulations do not even require the railroad and the trail operator to notify the STB that an agreement has been finalized," the court in *Caldwell* determined that there was no state action after the issuance of the NITU. *Id.* at 1234; see also *Barclay*, 443 F.3d at 1373.
142. *Preseault II*, 100 F.3d at 1551. Indeed, the argument that the NITU is the only state action is contrary to traditional takings law, which states that, if a third party acts "pursuant to the [or]der" of the government, "its actions [are], for purposes of takings liability, the actions of the United States." *Id.*; see also *supra* notes 74-75 and accompanying text.
between the railroad company and the trail operator constitutes government action and effects the taking.

C. The Federal Circuit's Decision on Accrual is Misplaced and Must Be Overturned

Proponents of *Caldwell* and *Barclay* may argue that the statute of limitations will no longer be a problem for landowners now that the Federal Circuit has decided that the takings accrual date is set at the date of issuance of the NITU. All future landowners will likely take notice of the decisions and will bring their claims as early as possible. 143 Though the decisions may have adversely affected plaintiffs to date, all future landowners will be able to prevent the same outcome by following the holdings of the Court of Appeals. 144

This argument has two problems. First, because the STB can extend the NITU process at its discretion, the time from the first NITU issuance to the completion of an agreement with a trail operator can span several years. 145 This means that the landowner may not have a viable claim until after the statute of limitations has already run. 146 To avoid the lapse of

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143. *See Illig v. United States*, 67 Fed. Cl. 47, 53-54, 56 (2005) (illustrating the significant effect of *Caldwell* and *Barclay* on pending cases). According to Mr. Illig's testimony at the 2006 congressional hearing on H.R. 4581, the government had decided to settle with the Illigs in the amount of $72,000. *Hearing 2006, supra* note 15 (statement of Gale Illig). However, just two days prior to a hearing to approve the settlement, the Federal Circuit decided *Caldwell*. *Id.* Mr. Illig testified that:

The government claimed this case changed the law and meant that now the federal government no longer had to pay us . . . . Understand that this was not because the government did not take our property. Everyone agrees that the government took our property. No, the Justice Department—because of the erroneous *Caldwell* decision—now claimed that they had taken our property nine months earlier and therefore should not have to pay. *Id.*

144. *See Hearing 2006, supra* note 15 (statement of Marianne Wesley Fowler, Senior Vice President of Federal Relations, Rails-to-Trails Conservancy) (“There is no evidence that the *Caldwell* decision will unfairly deprive property owners of their rights to file ‘takings’ claims arising from the Railbanking Law. The only case in which a determination of liability had already been made prior to its dismissal is the Illig case.”).

145. *See Caldwell*, 391 F.3d at 1231-32 (discussing a two year period from the first issuance of the NITU to the final agreement); see also *Brief of Nat'l Ass'n of Reversionary Prop. Owners et al. as Amici Curiae in Support of Petitioners at 7, Caldwell v. United States*, 126 S. Ct. 366 (2005) (No. 04-1728), 2005 WL 1801276 (“A NITU . . . may mark the start of a period lasting six or more years, where no trail use conversion is consummated during that period.”). In particular, the brief cites a case in which “the NITU negotiating period [was extended] . . . more than nine years after the first NITU was served and without consummation of trail use.” *Brief of Nat'l Ass'n of Reversionary Prop. Owners et al. as Amici Curiae in Support of Petitioners*, supra, at 7.

146. *See Hearing 2006, supra* note 15 (statement of Rep. Todd Akin and Rep. Russ Carnahan) (“*Caldwell* found that the statute of limitations for filing a claim begins to run when negotiations begin; not when the trail agreement is finalized. These negotiations can
their rights to compensation, landowners will begin bringing claims before they are ripe, causing unnecessary clogging of the judicial system as courts hear and dismiss claims for lack of ripeness. Now that the Federal Circuit has chosen the beginning of the NITU process as the start of the statute of limitations period, plaintiffs will attempt to follow the court’s guidelines by bringing unripe claims, wasting judicial resources and their own attorney’s fees in the process.

Second, the bright-line rule set out by the Federal Circuit is in clear violation of the law. It is a central tenet of property law that conditional easements—those requiring a certain continuous action or activity for the easement to remain in effect—automatically end when the conditional activity ends. Under the NTSA, the railroad company is prevented from abandoning the right-of-way, and is therefore prevented from ending the conditional activity of its easement. The easement only ends, therefore, at the moment the railroad passes the use of the right-of-way to the trail operator. Additionally, takings law states that “the time of the invasion constitutes the act of taking” for physical occupations. Under the NTSA, any takings claim should therefore be assessed according to the trail operator’s invasion, since the railroad company has already been in possession of the land up to that point.

Finally, the Federal Circuit has previously determined that “a takings claim accrues when ‘all events which fix the government’s alleged liability have occurred’” and that “the key date for accrual purposes is the date on which the plaintiff’s land has been clearly and permanently taken.” Until the railroad company and the trail operator reach an agreement and the interest in the land is transferred, the government’s taking of the

last anywhere from six months up to several years.”). But see id. (statement of Marianne Wesley Fowler, Senior Vice President of Federal Relations, Rails-to-Trails Conservancy) (“The concern that the six-year statute of limitation could expire before the rail corridor is ever transferred . . . is a purely hypothetical concern that has never arisen in any takings case, and that has no experiential basis.”).

147. See Caldwell, 391 F.3d at 1235.
148. See supra note 15.
149. See supra notes 5-16 and accompanying text.
150. See Caldwell, 391 F.3d at 1237 (Newman, J., dissenting). Alternatively, of course, the easement may end due to a lack of any agreement with a trail operator and the subsequent lapse of the NITU. See discussion supra note 121.
152. See Caldwell, 391 F.3d at 1236 (Newman, J., dissenting) (“Until the easement was transferred to the City . . . [the] Railroad not only continued as owner of the right-of-way, but retained all of the benefits and obligations of ownership, including the right to exclude, the obligation to pay taxes, and liability for injury and liens.”).
154. Id. at 1370 (citing Seldovia Native Ass’n, Inc. v. United States, 144 F.3d 769, 774 (Fed. Cir. 1998)).
land under the NTSA cannot be fixed and the land cannot be clearly and permanently taken. If there is still the possibility of railroad right-of-way abandonment, the government has not completed the taking of the land.

Because the Federal Circuit's decisions in *Caldwell* and *Barclay* determine that the taking occurs at the issuance of the NITU, instead of at the time of agreement or transfer of the deed, the decisions are contrary to the law. The rule of these decisions must be modified in the interest of justice.

III. LEGISLATIVE OR JUDICIAL ACTION IS REQUIRED TO REMEDY THE FEDERAL CIRCUIT'S INCORRECT INTERPRETATION OF THE NTSA

When Congress first enacted the NTSA in 1968, it aimed to minimize opposition by directing that, "in selecting the rights-of-way" to be added to the national system of trails, "full consideration [was to] be given to minimizing the adverse effects upon the adjacent landowner or user and his operation." The original Act also called for "the advice and assistance" not only of the state and local governments, but also of the "landowners and land users concerned."

The current system of adversity, in which the government provides

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156. Id. § 7(a), 82 Stat. at 922-23. *But see* Preseault v. United States (*Preseault I*), 100 F.3d 1525, 1538 (Fed. Cir. 1996) (explaining that Congress likely did not foresee the takings issue when drafting the original NTSA because "[i]f Congress intended the 1920 Act to have such an effect . . . with the result of directly obligating the government to a potentially enormous liability of unknown dimensions for takings throughout the United States, there surely would have been some indication of that intent in the legislative history, if not in the legislation itself.").

157. *See* Rails-to-Trails Conservancy, Fact Sheet: Working with Trail Opponents, available at http://www.railtrails.org/resources/documents/resource_docs/RTC_FactSheet_WorkingwTrailOpponents.pdf. The Rails-to-Trails debate has become adversarial. The Conservancy website includes a page entitled "Working with Trail Opponents," which suggests that rail-trail proponents "[f]ind allies . . . [w]ithin the group of people who live adjacent to the proposed rail-trail"; "[i]nvite an articulate landowner who was once opposed to a rail-trail to come and speak in your community"; and "[w]ork the media . . . [t]o generate support for your cause." *Id.* Additionally, the cite explains:

While trail opposition is one of the more difficult hurdles to overcome during rail-trail development, it need not stall your project. If you take the initiative from the outset to inform potential opponents about the trail project, listen to their concerns and keep them involved in the planning process, you will have a much easier time building strong support and creating a trail for your community.

*Id.; see also* Hearing 2002, supra note 3, at 9 (prepared statement of Danaya C. Wright) ("The fact that [Rails-to-Trails takings claims] have little merit . . . does not mean they have had little effect. I know personally of instances in which trail groups had obtained federal funding for land acquisition which was thwarted because the land . . . was tied up in a class-action suit that did not even involve, directly, that corridor. . . . Perhaps the most significant effect of this litigation is the chilling effect it has had on communities seeking to
for negotiations between railroad companies and trail operators without the input of, or even notification to, the landowners, violates Congress's express intent in enacting the National Trails System Act. The decisions of the Federal Circuit in *Caldwell* and *Barclay* have created adversity by setting the date for accrual of all Rails-to-Trails takings at the time of the government's issuance of the NITU. Without any notice to the landowners, and without any certainty that the rights-of-way will eventually become trails, the landowners' rights to compensation are taken from them through the early accrual of their claim.

In order to undo the legal errors of *Caldwell* and *Barclay*, one of three remedies must occur: first, the Supreme Court should grant certiorari to an NTSA takings case and hold that the statute of limitations begins at the time the railroad transfers its interest in the right-of-way to the trail operator under the NTSA; second, Congress should amend the NTSA to include language setting the date for accrual of a takings claim at the date the interest in the land is transferred; or, third, Congress should create a new system of compensation so that landowners can receive just compensation without the burden of litigation.

**A. Supreme Court Action**

Because NTSA takings claims are not actionable until the actual physical taking has occurred, claims should begin to accrue when the railroad company transfers the land to the trail operator. A claim cannot begin to accrue for purposes of the statute of limitations while the taking is speculative, as it generally is at the time the STB issues the NITU. Therefore, the Supreme Court should grant certiorari to an NTSA takings case and overrule the Federal Circuit's holding that the statute of

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158. See National Trails System Act §§ 2, 7(a), 82 Stat. at 919, 922-23.
159. See discussion supra Parts III.D.1-2.
162. See *Allen* v. United States, 46 Fed. Cl. 677, 680 (2000). Claims against the government begin accruing "when all the events have occurred which fix the liability of the government and entitle the claimant to institute an action . . . ." *Id.* (quoting *Kinsey* v. United States, 852 F.2d 556, 557 (Fed. Cir. 1988)).
Bending the Rules of Takings Law

limitations for NTSA compensation under the Tucker Act begins to accrue at the issuance of the NITU.\textsuperscript{163}

It is unlikely, however, that the Supreme Court will grant certiorari to an NTSA takings decision by the Federal Circuit. First, the Federal Circuit itself cannot hear claims similar to Caldwell and Barclay now that those decisions have been rendered.\textsuperscript{164} In addition, there is no circuit split on the issue of NTSA statute of limitations accrual.\textsuperscript{165} The Federal Circuit's decisions in Caldwell and Barclay are not in conflict with the decisions of any other court of appeals on the same issue because the Federal Circuit has exclusive jurisdiction over appeals from the Court of Federal Claims, which hears all Tucker Act cases for compensation.\textsuperscript{166}

The same three-judge panel heard both Caldwell and Barclay, further exacerbating the situation.\textsuperscript{167} The only other possibility for review would

\textsuperscript{163} See generally 28 U.S.C. § 1254 (2000) ("Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party . . . before or after rendition of judgment or decree; (2) By certification at any time by a court of appeals of any question of law . . . as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy."); see also Sup. Ct. R. 10 ("A review on a writ of certiorari is not a matter of right, but of judicial discretion.").

\textsuperscript{164} See, e.g., Teva Pharm. USA, Inc. v. Novartis Pharm. Corp., 482 F.3d 1330, 1338 (Fed. Cir. 2007) ("This court respects the principle of stare decisis and follows its own precedential decisions unless the decisions are 'overruled by the court en banc, or by other controlling authority such as an intervening . . . Supreme Court decision.'" (quoting Tex. Am. Oil Co. v. U.S. Dep't of Energy, 44 F.3d 1557, 1561 (Fed. Cir. 1995) (alteration in original))).

\textsuperscript{165} See Sup. Ct. R. 10(a). One of the possible reasons for Supreme Court consideration arises when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Id. However, the list of potential reasons for Supreme Court consideration is "neither controlling nor fully measuring [of] the Court's discretion." Sup. Ct. R. 10.

\textsuperscript{166} See 28 U.S.C. § 1295(a)(3) (2000) (making it impossible for Caldwell and Barclay to be in conflict with decisions from other Courts of Appeals because "[i]n the United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . of an appeal from a final decision of the United States Court of Federal Claims."); see also ERWIN C. SURRENY, HISTORY OF THE FEDERAL COURTS 100 (2d ed. 2002) ("In 1982, the appellate division of the Court of Claims . . . and the Court of Patent and Customs Appeals were combined as the Court of Appeals for the Federal Circuit, the first Court of Appeals with a subject jurisdiction to hear appeals from the entire Country.").

\textsuperscript{167} Compare Barclay v. United States, 443 F.3d 1368, 1370 (Fed. Cir. 2006) (heard by Judges Newman, Dyk & Prost), cert. denied, 127 S. Ct. 1328 (2007), and Caldwell v. United States, 391 F.3d 1226, 1228 (Fed. Cir. 2004) (same panel), with United States Court of Appeals for the Federal Circuit, About the Court, http://www.fedcir.gov/about.html (last visited Feb. 12, 2007) (explaining that judges are randomly assigned to panels). Federal Circuit judges are assigned to odd-numbered panels for each case, and case assignments are made "so as to provide each judge with a representative cross-section of the fields of law within the jurisdiction of the court." FED. CIR. R. 47.2.
be an en banc rehearing of an NTSA takings case, but the court has already refused en banc rehearing of both Caldwell and Barclay, and it appears unlikely a similar case on the timing of the statute of limitations will reach the court.

B. Legislative Action

Legislative action is necessary if the Supreme Court is unwilling to hear an NTSA takings case. Congress created the Rails-to-Trails Act, and can adjust its legislation if lawmakers feel the courts are interpreting it incorrectly. There would only be a separation of powers problem with a legislative solution if the legislature attempts to undo a final judicial decision. In other words, as long as the legislation does not attempt to retroactively modify the Federal Circuit’s decisions in Caldwell and Barclay, a legislative solution should be permissible.

Representatives W. Todd Akin (R-MO) and Russ Carnahan (D-MO) proposed a bill on this issue in 2005. The proposed bill, entitled The Easement Owners Fair Compensation Claims Act (EOFCCA) was not passed, and in 2007 the bill died. The bill would have changed the starting date for the limitations period from the date of application to the date

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168. See ROBERT A. CARP & RONALD STIDHAM, THE FEDERAL COURTS 23 (4th ed. 2001) (noting that the only possibility for a different opinion on the same case by a court of appeals is by petitioning for an en banc rehearing of the case, “in which all the circuit’s judges sit together on a panel and decide a case”).


171. See, e.g., Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 220 (1995) (noting that the legislature is barred from retroactively changing a decision of the courts to prevent parties to a suit from having their final judgment vacated after expensive litigation).

172. Cf. id. at 220-21 (discussing problems with retroactive legislative adjustments). In Plaut, the Supreme Court determined that a bill passed by Congress retroactively changed decisions made by the judicial branch, in violation of the separation of powers. Id. at 225. According to the Court’s decision, there are three kinds of legislative actions that violate the “text, structure, and traditions of Article III”: first, statutes that “‘prescribe rules of decision to the Judicial Department . . . in cases pending before it’”; second, legislative action that “‘vest[s] review of the decisions of Article III courts in officials of the Executive Branch’”; and third, actions that reopen cases that have been decided by the Judiciary because these decisions “‘conclusively resolve[] the case,’” and because the Judiciary has the power “‘to say what the law is’ in particular cases and controversies.” Id. at 218-19 (citations omitted).

173. H.R. 4581, 109th Cong. (2005); see also S. 3478, 109th Cong. (2006) (companion bill in Senate, sponsored by Senators Christopher S. Bond (R-MO) and Jim Talent (R-MO)).

174. The EOFCCA was introduced during the 109th session of Congress, and because the session ended without a vote on the bill, it died.
of transfer.  

In their introduction of the bill, Representatives Akin and Carnahan explained that the EOFCCA "[would] not change or frustrate the purpose of the Trails Act in any way." To the contrary, the bill "[would have] assure[d] that the administration of the Trails Act [wa]s consistent with Congress' intention and [would have made] the Trails Act a more cost-effective program." The EOFCCA would not have retroactively reversed any final judicial decision. Therefore, though the legislation Representatives Akin and Carnahan presented to Congress was constitutional, it would not have reversed Caldwell or Barclay, and those decisions would stand. The effect of the legislation, instead, would have been to adjust the statute of limitations accrual date on any pending cases, and on all future cases brought to the U.S. Court of Federal Claims for compensation related to the NTSA.

Congress did not adopt the EOFCCA, but on July 24, 2007, Representative Carnahan introduced a similar bill. This bill, entitled the Trails Act Technical Corrections Act (TATCA), similarly seeks to amend the NTSA by setting the statute of limitations accrual date at the end of the transfer process. But the TATCA does something that the EOFCCA did not: it includes a provision requiring courts to reconsider past cases in which plaintiffs were negatively affected by the Barclay and Caldwell decisions.

175. H.R. 4581, § 2(a)(2). The EOFCCA proposes that the National Trail Systems Act be amended to include the following language:

In any action brought against the United States, by the owner of property that is sub-
ject to a railroad right-of-way... for damages... the claim for damages shall not be
deemed to first accrue for purposes of the limitations period prescribed by [The
Tucker Act] before the date on which—(A) the State, political subdivision, or quali-
fied private organization has, by written agreement, assumed full responsibility for
such right-of-way and interim use...; and (B) the railroad has in writing conveyed an
interest in such right of way [sic] to such State, political subdivision, or qualified pri-
vate organization, by donation, transfer, lease, sale, or otherwise.

Id.

Carnahan).

177. Id.

178. See supra note 172.

Carnahan).

180. H.R. 3157, 110th Cong. (2007); see also S. 2073, 110th Cong. (2007) (companion
bill in Senate, sponsored by Senators Claire McCaskill (D-MO) and Christopher S. Bond
(R-MO)).

181. Id.

182. Id. § 2(c) ("Notwithstanding any other provision of law, the court in which the
claim was originally filed shall review on the merits, without regard to the defense of res
judicata or collateral estoppel, any claim that—(A) was brought against the United States,
by the owner of property that is subject to a railroad right-of-way and to interim use...;
This provision leaves the TATCA vulnerable to a constitutional challenge based on separation of powers concerns, because Congress cannot retroactively modify judicial decisions. Though this Comment supports the passage of the TATCA, the bill must first be revised to prevent such a constitutional challenge. The implementation of a fairer NTSA takings system requires alteration of the bill to exclude the requirement that the judiciary review past decisions such as Caldwell and Barclay.

The EOFCCA was a simple solution to an unsettling problem, and, though it would not have corrected the rulings in Caldwell and Barclay, it would have ensured that future landowners receive just compensation for the taking of their rights-of-way under the NTSA. TATCA should be amended similarly to adjust the NTSA compensation system for future takings claims without attempting to alter past decisions.

C. New Condemnation System

If the Supreme Court continues to deny certiorari to NTSA cases and the TATCA is unsuccessful, a third option is to create a new system of formal condemnation for Rails-to-Trails takings cases. Currently, a landowner must bring litigation under the Tucker Act if he discovers that the STB has issued a NITU for the right-of-way on his land. Instead, Congress could create a new system in which landowners are notified of the possible abandonment, and the court oversees the condemnation and compensation process. This system should be modeled after general condemnation proceedings for non-NTSA takings: the STB would be required to submit a complaint or petition for the taking of the land. All possible property owners would be served with process and notified of the proceedings. Property owners could then serve a notice of appearance and would

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(B) was dismissed, before the date of the enactment of this Act, for not being brought within the time period provided . . .; and (C) would have been considered to have been brought in a timely manner if the amendments . . . had been in effect when the claim was brought . . .

183. See supra notes 171-172 and accompanying text.
184. See Hearing 2002, supra note 3, at 17-18 (statement of Nels Ackerson, Chairman, The Ackerson Group, Chartered). Even were the TATCA to pass, however, certain issues would still remain. For example, under the NTSA there is no system in place to provide for compensation without costly litigation. See id. at 17 ("Unlike other areas of government takings, when land is taken for a trail, there is no established system for compensation to the land owners; no process for the government to make a good-faith offer; no established appraisal or valuation system; no grievance process; and no remedy for the landowner, other than full-scale litigation under the Tucker Act.").
187. Cf. Fed. R. Civ. P. 71A(e). If the STB, or any other federal agency, is unable to carry out condemnation-like proceedings, an alternative to the condemnation proceedings
receive notice of all subsequent STB action on the transfer of their land to a trail operator. Rather than determining the compensation amount through Tucker Act litigation, the STB would include in its complaint an approximation of the compensation to be paid.

The STB would submit the complaint when the railroad company and the trail operator are ready to come to an agreement. No complaint could be issued prior to this point, because the complaint (just as under regular condemnation proceedings) would have to specify the reasons for the taking and the STB’s authority to take the land under eminent domain. The statute of limitations would no longer cause conflict because most, if not all, property owners would be aware of the taking upon service of process, and compensation would be paid prior to the trail operator’s taking possession of the land.

IV. CONCLUSION

Congress set out to create a system in which all affected parties would work together to create a nationwide procedure for establishing trails for public use. In order to return to the original vision of the National Trails System Act, the system of takings must be adjusted. Though the Federal Circuit decided Caldwell and Barclay with the intention of creat-

188. Cf. Fed. R. Civ. P. 71A(e). Because the Supreme Court has already held in Preseault I that the NTSA is constitutional, the system would likely not include the opportunity to answer the complaint with objections to the taking itself. Compare id. (providing that a defendant property owner may challenge the government’s decision to exercise its power of eminent domain), with Preseault v. Interstate Commerce Comm’n (Preseault I), 494 U.S. 1, 17 (1990) (holding that the 1983 Amendments to the NTSA are valid under the Commerce Clause).

189. Cf. Fed. R. Civ. P. 71A(c)(2). Before a trail operator has come forward and agreed to take over the deed from the railroad company, the STB would not have sufficient reason to take the land in condemnation-like proceedings, thus eliminating the issue argued in Caldwell and Barclay, by setting the date for statute of limitations accrual purposes at the date of filing of the complaint with the court. Cf. Barclay v. United States, 443 F.3d 1368, 1372 (Fed. Cir. 2006), cert. denied, 127 S. Ct. 1328 (2007); Caldwell v. United States, 391 F.3d 1226, 1228 (Fed. Cir. 2004).

190. Cf. E. Tenn. Natural Gas Co. v. Sage, 361 F.3d 808, 821 (4th Cir. 2004) (citing Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 3-4 (1984)) (explaining that under traditional condemnation procedures, the government must pay just compensation prior to taking possession of the property).

191. See Preseault I, 494 U.S. at 5.
ing a bright-line rule for determining the start-date of the statute of limitations, it has instead built a system of adversity that must be changed.

As Judge Newman noted in her Barclay dissent, "some twenty-two pending cases arising from the National Trails System Act" currently exist.\textsuperscript{192} The large number of cases currently pending demonstrates the unfortunate impact Caldwell and Barclay will have on future cases involving NTSA takings. Additionally, the current interpretation of the NTSA creates wasteful government spending because it promotes unnecessary or premature litigation.

Because the current interpretation of the NTSA creates a confusing segment of time in which landowners have not yet been harmed but the clock has started ticking on their claim for compensation, landowners will be forced to choose between costly litigation on unripe claims or risking the expiration of their claim. This system begs for frivolous litigation at government and landowner expense.

The Rails-to-Trails Act is an innovative program that allows for public enjoyment of unused land. This Comment does not advocate for a change that would prevent or deter the transfer of railroad rights-of-way to trails. Rather, this Comment advocates for the strengthening of the program through adherence to the basic tenets of traditional property and takings law. By working with the landowners to ensure their receipt of just compensation, the system will become one of cooperation rather than adversity. Without a fair system, litigation and dispute will continue.

\textsuperscript{192} Barclay, 443 F.3d at 1381 (Newman, J., dissenting); see also Hearing 2002, supra note 3, at 16 (prepared statement of Thomas L. Sansonetti, Assistant Att'y Gen., Environment and Natural Resources Division, U.S. Department of Justice) ("The number of rails-to-trails cases that the Environment Division handles has increased dramatically in the last few years. In 1990, we had one case with one claimant. Now, we have seventeen cases scattered across the nation with approximately 4,550 claimants.").